

**IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)**

**REPORTABLE.
Case No. AC71/2003**

In the matter between:

BOMINFLOT LIMITED

Applicant

And

**KIEN HUNG SHIPPING CO. LTD
CENTRAL LEASING CORPORATION
HAMBURG SÜAMERICKANISCHE DAMPFSCIFFFAHRT
GESELSCHAFT KG**

**Respondent
First Intervening Party
Second Intervening Party**

JUDGMENT: DELIVERED ON 21 OCTOBER 2003

DAVIS J:

Introduction.

Applicant seeks confirmation of a rule nisi granted on 6 June 2003 in terms whereof containers as described in paragraph 1.1 of the order of 6 June 2003 were attached for the purpose of founding or confirming the jurisdiction of this court in an action to be instituted by applicant against respondent for payment of the sum of US \$766 484,52 and US \$1 266 484,52, interest thereon and costs.

It is established law that the requirements for an attachment of this nature are that

1. The respondent is a peregrinus;

2. The property sought to be attached is that of respondent; and
3. **The applicant has a prima facie case in that it must tender evidence which, if accepted, will establish cause of action. See Weissglass NO v Savonnerie Establishment 1992(3) SA 928(A) at 936G.**

It is common cause that respondent is a peregrinus and that applicant has established a prima facie case against it. The present dispute is solely concerned with whether respondent is the owner of all the containers which have been attached.

On 7 August 2003 this Court confirmed the rule nisi in respect of containers listed as 'A' in an annexure which was handed in with the consent of all parties as constituting a complete list of the containers arrested. The list entitled 'B' is that of containers in which the intervening parties have no interest and which again with the consent of the parties, this Court was asked to confirm the rule nisi.

Accordingly, the dispute continued with regard to two intervening parties who have contested applicant's allegations with regard to the ownership of further containers which were the subject of the rule nisi. By the time of the hearing, the Court was informed that applicant does not seek confirmation of the rule in respect of those containers to which the second intervening party lays claim. For this reason, the containers which are the subject of the present dispute are listed under the heading 'C', and 'E' of the annexure to which I have made reference. The only question which remains for determination is whether these containers are owned by respondent or by the first intervening party.

The first intervening party contends that it is the owner of the balance of the containers pursuant to a series of conditional sale agreements in terms whereof ownership of the containers remains vested in it until payment in full of the purchase price.

Applicant contends that the question of the ownership of the containers falls to be determined in accordance with the laws of Taiwan. Briefly stated, Mr Fitzgerald, who appeared together with Mr Manca on behalf of applicant, submitted that, although it was a principle of South African private international law that disputes concerning the ownership of movables are generally to be governed by the lex situs at the time of the transaction, the lex domicilii of the owner might, in particular circumstances, be applied. See *Marcard Stein and Company v Port Marine Contractors (Pty) Ltd* 1995 (3) SA 663(A) at 671 H – J.

According to Mr Fitzgerald, applicant was not able to determine the precise location of each of the containers at the time of the alleged transfer of ownership to the first intervening respondent. In his view, it may well have been that the containers, allegedly transferred, were dispersed around the world on various different vessels and at various different depots at the relevant time. He therefore submitted that in such a case, the application of the lex situs would be unworkable, insofar as the determination of the dispute regarding ownership of the containers pursuant to these transactions were concerned. The only realistic

candidates for ownership of the containers were the respondent and the first intervening party, both of whom were domiciled in Taiwan. In this case therefore the application of the *lex domicilii* would provide legal certainty.

As the papers revealed that there was a dispute between the parties regarding the contents of Taiwanese law and its application to this case, Mr Fitzgerald submitted this dispute was a matter which could only be resolved by oral evidence and he therefore contended that a referral to oral evidence was the appropriate approach for the court to adopt.

Factual Background.

It was common cause that the containers, which formed the basis of the present dispute, were the subject of four installment sale agreements between the first intervening party and respondent. Although these agreements were drafted in Chinese script and there was an incomplete translation of these documents, it did appear that each contract contained a reservation of title clause to the following effect:

‘The title of the subject matter shall remain with party A until the installments are paid in full by party B.’

According to an affidavit deposed to by Ms Pitman on behalf of the intervening parties, these installments have not been fully paid. This contention has not been placed in dispute by applicant. For this reason the first intervening party contends that, as title of the containers remained with it, being the seller until such time as all the installments have been paid in full, attachment of all containers, being the subject of these contracts, falls to be set aside. Simply stated the containers do not belong to respondent but rather to it, the first intervening party.

The Essential Legal Dispute.

Mr Fitzgerald submitted that, notwithstanding the provisions of the contract

entered into between respondent and first intervening party, article 5 of the Chattel Secured Transactions Act of Taiwan ('the Act') provided:

'Chattel-Secured Transactions shall be by contract in writing and shall not be valid against bona fide third parties unless duly registered'.

As it was common cause that the contracts in question had not been registered and as a chattel-secured transaction included a conditional sales contract, Mr Fitzgerald submitted that Taiwanese law in effect provided that, as to applicant, first respondent was deemed to be the owner of the containers.

In support of these contentions, Mr Fitzgerald referred to an affidavit deposed to by Mr CY Huang, a Taiwanese attorney on behalf of applicant, who stated the following:

'Mr Chen correctly points out in paragraphs 14 and 15 of his Declaration that as CAI (first intervening party) had no actual constructive knowledge of any conflicting claims of ownership to certain group B containers, nor the alleged underlying installment sale contracts between the Respondent and CLC, CAI should naturally be deemed a 'good-faith third party' vis-à-vis the said containers as contemplated by the plain language of Article 5, and as further supported by the legislative commentary of the said Article 5.

In relation to this matter, at the time that the Applicant conducted business with and sold fuel to the Respondent during the period February to March 2003, it was not aware that containers in the possession and control of Respondent and marked with the Respondent's insignia were subject to the reservation of ownership clauses in installment sale contracts. The Applicant therefore in my opinion qualifies as a good-faith third party under the Act.'

In a further affidavit on behalf of applicant, Mr Overmeyer contended that at the time applicant contracted with respondent, 'it was not aware of the fact that the containers with prefixes "KHLU" and/or "KHJU" were subject to an installment sale agreement and/or agreement(s) in which ownership was reserved in favour of the party other than the Respondent.'

In the alternative, Mr Fitzgerald submitted that as the court would not be

able on the available evidence, to determine the effect of Article 5 of the Act, the question of whether the applicant was a bona fide third party as contemplated by Article 5 should be referred to oral evidence in terms of Uniform Rule 6(5)(g).

Mr Wallis, who appeared together with Mr Stewart on behalf of the intervening parties referred to Mr Chen's affidavit and in particular to his averment that 'A conditional sales contract refers to a contract whereby the purchaser takes possession of the subject matter of the sale but ownership is only transferred to the purchaser once certain conditions are met. In the case of an installment sales contract, the ownership will not be transferred until all agreed installments of the purchase price are paid on time'.

Mr Wallis also referred to the concluding paragraph of Mr Huang's affidavit in which the latter stated, 'The First Intervening Party's failure to register the installment sale contract(s) in accordance with the Act has the effect that ownership in and to the containers under attachment is deemed to vest in the Respondent rendering the containers susceptible to attachment by the Applicant.' Mr Wallis submitted that this conclusion needed to be evaluated in terms of the key provisions of the Act. Thus, Article 5 of the Act had to be read in conjunction with Articles 26 and 27 (3) of the Act. Article 26 provides, 'A conditional sale is a transaction under which the buyer first takes possession of the chattel object with an agreement that ownership of the object shall vest in him only upon payment of part or all of the price, or upon the performance of the specific condition'. In terms of article 27(c), 'a conditional sale contract shall specify the following particulars: (3) A statement that the seller retains ownership of the object while the buyer may take possession and make use of it'.

According to Mr Wallis, a plain reading of these provisions of the Act suggests that ownership does not pass to respondent. By contrast, Mr Huang's contention that ownership was deemed to vest in the respondent rendering the containers susceptible to attachment by applicant was, at best, questionable and, at worst, not of any assistance to applicant, for, according to Mr Wallis, applicant could not show that respondent was the owner of the containers. In short, Mr Huang's contention supported an argument that the containers might be deemed to vest in respondent.

On whatever construction of Mr Huang's affidavit, Mr Wallis submitted that

the applicant had not shown, on a balance of probabilities, that the containers, at the time of the attachment, were the property of respondent.

See Shipping Corporation of India Limited v Evdomon Corporation 1994(1)

SA 550(a) at 556 F.

Mr Wallis also referred to the passage already quoted from the supplementary affidavit of Mr Overmeyer where the latter confirmed 'At the time the Applicant contracted with the Respondent it was not aware of the fact that the containers with prefixes "KHLU" and/or "KHJU" were subject to an installment sale agreement and/or agreements in which ownership was reserved in favour of a party other than Respondent.' According to Mr Wallis, the crux of applicant's case first emerged in this one, skeletal paragraph in a supplementary affidavit without any further confirmation as to how it had come to pass that when applicant supplied bunkers, it had taken the view that respondent was the owner of these containers. In Mr Wallis' view, this argument had further implications in that, in the affidavit deposed to by Mr Huang, it was claimed that '[T]he group B containers were in control and visibly marked with the insignia of the Respondent and thus CAI was led to believe that those containers in the Respondent's possession were the Respondent's property....and further CAI continued to conduct business with Kien Hung on reliance of Respondent's apparent ownership of the relevant containers.'

Mr Wallis contended that no basis had been laid as to the foundation of these conclusions and hence there was no evidential source which had been provided for a bona fide person to have arrived at the conclusions reached by Mr Huang.

Mr Wallis further submitted that it was settled law that the ownership of a tangible movable was to be governed by a lex situs, that is the law of the place where the object is located. See Standard Bank of South Africa

Limited v Ocean Commodities Inc 1983(1) SA 276(A) at 294 D. As the containers were situated in South Africa, it was clear that South African law must govern this dispute. In terms of South African law, a reservation of ownership clause was valid. Hence the first intervening party owned the containers, subject to the four installment sale agreements and accordingly the attachment of these containers fell to be set aside. Furthermore, there was no basis to have regard to the law of Taiwan in determining the rights of the third party to the contract in terms of which ownership was reserved, particularly where that party is registered in the United Kingdom, does not undertake any business in Taiwan and where the supply of bunkers to vessels was undertaken in Durban.

Evaluation.

The primary issue in the present dispute concerns the determination of the proper law governing the question of ownership and the 'conditional sale agreements' between the first intervening party and respondent. If applicant is correct, the law of Taiwan applies. If so, then the further question arises as to the interpretation of the applicable provisions of the Act

Mr Fitzgerald correctly conceded that there was a principle of South African private law that disputes concerning the ownership of movables

are to be governed generally by the *lex situs* at the time of the transaction. In this connection Corbett CJ said in *Marcard Stein and Company v Port Marine Contractors (Pty) Ltd* 1995(3) SA 663(A) at 671 H-672 B '[a] South African Court, exercising its admiralty jurisdiction, should in general apply the principle of lex situs in determining the passing of ownership in movable property when the case involves a foreign element and there is a potential conflict of laws. I might add that it would seem that a South African Court exercising its ordinary jurisdiction would adopt the same approach.... This general principle would apply also to the passing of ownership in a ship sold while located within the territory, i.e. not on the high seas. In the present case the Gulf Trader was in East London harbour at the time of the sale (and had been there for at least some nine or ten days) and it must be inferred that the parties to the sale were at the time well aware of this fact. It is not necessary to decide what the position would be were a ship to be on the high seas at the relevant time. It follows that the question whether ownership on the Gulf Trader passed from Verena to Alvo must be determined by reference to the *lex situs* at the time of the transaction, viz South African law.'

Given applicant's case, the question arises as to when the *lex domicilii* of the owner might find application in circumstances similar to the present

dispute. C.F. Forsyth Private International Law (3rd ed) at 321-324 contends that the lex situs governs most questions concerning movables. However, in certain circumstances, South African law might apply the maximum *mobilia sequuntur personam*, whereby a person's movables are deemed to be situated in the place of his or her domicile. However, Forsyth states at 322 '[t]he *lex domicilii* of the owner is generally applied in questions affecting movables. However, although the classical sources consider the *lex domicilii* rule as the basic rule, the truth today, it is submitted, is that the *lex situs* is the basic rule with the *lex domicilii* applying exceptionally. The reason for this is in part simply practical – if ownership for the raise is disputed, the *lex domicilii* of the owner may be unknown so the *lex domicilii* rule is unworkable – and in part common sense since the application of the *lex situs* accords with the expectations of the parties'.

Significantly in his discussion with regard to deviations from the *lex situs*, Forsyth refers, in particular, to the position of *res in transitu* and provides an example of goods which may be despatched from Malawi through Zambia, Zimbabwe and Botswana to South Africa. The owner/seller may purport to transfer the goods to the transferee/buyer by mere agreement. Such an agreement is effective to transfer ownership under the law of

Zambia and Malawi but is ineffective under the law of Zimbabwe, Botswana and South Africa. But it is unknown where the goods were at the crucial time. In such circumstances, Forsyth concedes that the *lex situs* is on weak ground because, it is unknown at the crucial time. However he goes on to submit that the *lex domicilii* of the transferor cannot be supported as providing an adequate solution to the difficulty in question. He therefore suggests that the choice lies between the *lex loci expeditionis* (the law of the place of despatch) and the *lex loci destinationis* (the law of the place of destination). See also in this connection J L Neels 1991 TSAR 309 at 310 and 315 where the learned author rejects any recourse to the *lex domicilii* in such a situation. I should add that Dicey and Morris *The Conflict of Laws* (13th ed) at 968 only suggest the replacement of the *lex situs* in exceptional circumstances.

Given the difficulties of finding an appropriate governing law other than *lex situs*, considerable care should be given before extending the concept of goods in transit so as to justify a deviation from the *lex situs*. In the present case, it was common cause that all containers were situated in South Africa. As Mr Overmeyer stated in his founding affidavit, 'I understand that during April 2003 Fairbridge, Arderne and Lawton Inc acting at the instance of their client, Container Applications International

Inc, also effected the arrest of containers bearing the name Kien Hung Line or marked with the aforementioned prefixes at Uniroute Logistics (Pty) Ltd in Johannesburg, Cape Town and South African container depots in Durban'.

In a situation where the containers are to be found in South Africa and the dispute turned on a reservation of ownership clause, there is, in my view, no cogent reason as to why the *lex situs* should not apply. Accordingly, if South African law governs this issue the reservation of ownership clause is effective. Thus the first intervening must be taken to own the containers which are the subject to the four installment sale agreements.

In the event that the *lex domicilii* should be applied, the question arises as to whether the law as contended for by applicant would justify a different finding or as Mr Fitzgerald contended whether there would be a basis for recourse to oral evidence regarding the proper interpretation of Taiwanese law.

Assuming that Mr Overmeyer has made out a sufficient case in his supplementary affidavit to the effect that at the time applicant contracted with respondent, it was justified in holding to the view that respondent was

the owner of the applicable containers, the further question arises as to the implications of the various sections of the Act as set out in the expert affidavits. In short, the question which needs to be determined is whether, on the probabilities, applicant has made out a case that the provisions of this Act support the conclusion that respondent was the owner of the relevant containers. Article 5 provides that a chattel secured transaction shall be concluded by a contract in writing and shall not be valid as against bona fide third parties unless duly registered. Therefore applicant's contention is that, notwithstanding Article 26 which confirms the reservation of ownership clause in a contract, a good faith third party such as applicant must be deemed, as the possessor, to be the owner of the containers.

In seeking to resolve the competing versions of the law placed before the Court, it is significant to note that the dispute turns on an interpretation of one key section of an Act which has been placed before this Court. Where a Court is satisfied that a section of the foreign law is plain and unambiguous it can, in my view, base its approach to the resolution of the dispute on its own reading of such law. See for example, *Continental Illinois Bank v Seamen's Pension Fund* 1989(2) SA 515(d) CLD at 544-545.

In any event, the high water mark of applicant's case is that respondent is deemed to be the owner. As to the concept of 'deeming', Mr Wallis referred to S v Rosenthal 1980(1) SA 65(A) at 75-76 where Trollip JA examined the concept of 'deemed' and concluded that one of the usual meanings is, being merely prima facie or rebuttable'. In the present dispute, the fact that the possessor is deemed to be the owner, absent registration of the contract, would appear to support a conclusion that this meaning of the word 'deemed' has been employed in the Act. The provision does not justify a sufficiently confident assertion of ownership so that, on the probabilities, an attachment would be justified. But even were applicant to show that, in terms of Article 5 of the Act, ownership vested in respondent, it would appear that two further requirements must be met, namely that applicant in the present dispute must have mistakenly believed that the possessor of the goods concerned was the owner of the containers and secondly that the mistaken belief caused applicant to conclude the transaction to the latter's detriment.

It appears from a reading of the affidavits of both Mr Chen and Mr Huang that these requirements are part of Taiwanese law. However, only in the supplementary affidavit of Mr Overmeyer is any attempt made to provide evidence to satisfy these two requirements and then in very generalised terms.

In summary, the lex situs should apply to this dispute in which case it is the first intervening party who continues to own the containers which were

the subject of the four installment sale agreements.

In the event that the lex domicilii applies (I might add against all the authority set out both in Forsyth and Neels, supra) applicant has not demonstrated that respondent was the owner of the containers which are the subject of attachment. At best it has only shown that the containers are 'deemed to vest' in respondent. Furthermore, save for a perfunctory assertion in Overmeyer's supplementary affidavit, no evidence has been placed before the court as to the basis upon which applicant contracted with respondent, and further concerning any basis for a mistaken belief that respondent was the owner of the goods and that the mistaken belief caused the applicant to transact accordingly.

For these reasons, the containers described in B of the annexure to this order are confirmed. The attachment of those containers that are subject to the purchase and sale agreement between respondent and the first intervening party and which are described in C and E of the annexure are set aside as well as the containers which are described in D of the annexure which belong to the second respondent.

As to costs, the question arose as to costs to be awarded to the second intervening party. Since this dispute was never disputed before me no basis for an award of costs was ever set out to justify this decision. Thus costs are awarded in favour of the first intervening party, such costs to include the costs attendant upon the employment of two counsel.

DAVIS J