

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: NO
(2)	OF INTEREST TO OTHER JUDGES: NO
(3)	REVISED:
Date: 11/11/2024 Signature: 	

Case No. 015224-2024

In the matter between:

GROUPAIR (SA) (PTY) LTD

Applicant

and

REXUS TRADING (PTY) LTD

Respondent

JUDGMENT

MAHOMED AJ

1. This application is brought on the grounds of a commercial urgency. The applicant hired a container from Maersk to ship goods to be returned from Saudi Arabia to Durban, on instructions from the respondent and they were to be collected by the respondent. The evidence is that the respondent sent the applicants details of its clearing agent in Durban and set the date

for the shipment to be received. The shipment arrived in June 2022, the respondent has not collected the goods, the costs to date, at a rate of R2000 per day is at R900 000. Advocate Brammer for the applicant submitted that the heavy trial rolls in this division, indicate the matter will only be heard in 2028. She estimated the costs to escalate to over R3,7 million and contends that the applicant cannot sit back and allow the costs to escalate, it must limit its damages. The respondent has ignored all the applicant's emails which requested proof of payment regarding the shipping costs. The applicant on inquiry was advised that the goods can only be released to the consignee, who is the respondent as appears from a waybill annexed to the papers. The applicant has no option but to approach the court for the order sought.

2. Advocate Lavine for the respondent denied that the respondent was liable for any of the transport costs and informed the court that the applicant has not file any evidence that the respondent agreed to pay for any on the costs for transport.
3. Advocate Brammer for the applicant contended that the applicant must be ordered to complete the release process of the container carrying the cargo which is currently in the state warehouse. Action proceedings have been instituted regarding the liability for the transport costs and the issue of liability for transport will be determined by the court at trial, it cannot be determined in motion proceedings.

4. Advocate Lavine submitted that the matter is not urgent because the applicant will obtain substantial redress at a hearing in due course. Counsel submitted that the fact that costs are escalating, it not in and of itself a reason for the matter being urgent. It was further argued that the costs for the container have been accumulating since June/July 2022, the applicants have done nothing for two years and only in February 2024 a summons was issued. The delay is self-created and there is no explanation why the applicant could not act earlier.
5. Ms Brammer reminded the court that the order sought is only regarding the release of the container and that upon inquiry the applicants were advised that the cargo can only be released to the consignee whose name appears on the waybill, which it is not negotiable.

URGENCY

6. Ms Brammer submitted that the applicant served its papers and allowed the respondent a fortnight for a response, it was fair notice, despite it being forced to approach this court for the relief it seeks. An applicant in an urgent matter, must set out clearly why the matter is urgent and why it will not obtain substantial redress at a hearing in due course.¹ A court must exercise its discretion having regard to the facts and the circumstances of

¹ *East Rock Trading 7 (Pty) Ltd v Eagle Valley Granite Pty Ltd Others* (11/33767)[2011] ZAGPJHC 196 (20 September 2011)

the parties. Commercial urgency does not have to be crippling commercial loss for matter to be urgent.² A court though must be circumspect where final relief is sought, the applicant is to set out an even stronger case for urgency.

7. The respondent contended that the applicant should look to Engineering Products Trading Est, with which it had concluded an agreement to sell certain dismantling joints. Although Ms Brammer argued that the consignment can only be released to the consignor, the respondent has not provided a logical explanation as to why Engineering Products would agree to pay for the return of the defective goods.
8. Mr Lavine contended that the contracting party insisted on returning the defective products, despite the respondent having instructed it to dispose of the products and await a replacement of the goods. It was further contended that when the respondents provided a date for arrival and the name of its clearing agent, it did not thereby admit to liability. Counsel submitted that the applicant has other alternate remedies, it can also approach the state's warehouse to empty the container and hold the consignment until the trial of this matter is finalised, it can pay the costs now and reclaim it at trial.

² See note 3

JUDGMENT

9. A court in determining urgency must consider the facts against the indulgence sought to jump the queue for a hearing of a matter. The applicant must demonstrate to the court that it will not obtain substantial redress at a hearing in the normal course. A court is also obliged to consider access to courts.³
10. It is noteworthy that the applicant made repeated requests in various emails for payment and to which no response was received, nor any denial of liability for payment for the transport costs. This issue is before the trial court and will be determined in due course, however I agree with Ms Brammer, the applicant is obliged to limit its damages.⁴ It demonstrated a clear right. The issue of the consignee's authority to release the cargo remains and I am not persuaded that the waybill can be negotiated. In my view the document in dispute is a waybill and not a bill of lading. What was before me was a document that can serve as both, it is clearly stamped as serving as a waybill and it was not disputed on the papers as being anything different.
11. The escalating costs is a grave concern particularly with the long delay in trial dates, the costs can pose the harm or threat to satisfy the requirement

³ *Avis Southern Africa Pty Ltd and Others v Porteous and Another* 2024 (2) SA 386 at para 17-21

⁴ *Hazis v Transvaal and Delagoa Bay Investment Co Ltd* 1939 AD 372 see also 2017 (2) SA 42 SCA

for an interdict. The alternate remedy as proposed by Mr Lavine, is not sustainable unless another action is instituted on a different cause of action. Mr Lavine's contentions that the applicant should look to the respondent's contracting party must be rejected, as it begs the question as to why the respondent itself has not done so, and why it remained silent when it was called to pay up.

12. I am of the view that application must succeed, on the facts before me it is sufficiently urgent. The costs are awarded in the normal course to the successful party.

Accordingly, I grant the following order:

1. The forms and service provided for in the rules is dispensed with and the matter is heard as once of urgency.
2. The respondent is directed to complete the release process of the container (B/L218324065) with the state warehouse and collect its cargo from Grindrod Logistics Denver within 30 days of this order.
3. The respondent is directed to return the empty container to Maersk South Africa (Pty) Ltd within 15 days of collection of the cargo.
4. The respondent is to pay the applicants costs on scale A.



MAHOMED AJ
Acting Judge of the High Court

This judgment was prepared and authored by Acting Judge Mahomed. It is handed down electronically by circulation to the parties or their legal representatives by email and by uploading it to the electronic file of this matter on Caselines. The date for hand-down is deemed to be 11 November 2024.

Date of Hearing: 31 October 2024

Date of Judgement: 11 November 2024

Appearances:

For Applicant: Adv B Brammer

Instructed by: JVK Webb Inc

For Respondent: Advocate Lavine

Instructed by: Penny Griffiths Attorneys