

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between

ALEX CARTAGE (PTY) LIMITED

h/a ALEX CARRIERS

AND

THOMAS CECIL TURNBULL

APPELLANTS

and

THE STATE

RESPONDENTS

CORAM : HEFER, MILNE et EKSTEEN JJA.

HEARD : 12 SEPTEMBER 1988.

DELIVERED : 23 SEPTEMBER 1988.

J U D G M E N T

HEFER JA:

After an unsuccessful appeal to the Transvaal

Provincial Division the appellants have appealed to this court against their conviction in a magistrate's court on a charge of contravening sec 38(1)(b) of the Road Transportation Act 74 of 1977.

First appellant is a company having its head office at Pietermaritzburg where it conducts a haulage business. The conviction arose from the transportation by first appellant (of whom second appellant was a director at the relevant time and thus liable to prosecution in terms of sec 332(5) of the Criminal Procedure Act, 1977) of certain spare parts which the trial court found were not covered by the permit issued in respect of the trailer in which they were conveyed.

In order to understand the argument addressed to us on appellant's behalf it is necessary to refer briefly to the provisions of the permit and to the way in which the evidence was presented to the trial court.

At the commencement of the trial appellant's attorney formally admitted that the goods described in the

charge as "verskeie kratte bevattende swaar voertuig nuwe onderdele vir M.A.N. voertuie" had been conveyed in the trailer. He informed the court that "the accused's defence in brief is that they have got a valid Road Transportation Permit which authorises inter alia the transport of the components which is in issue here-----."

The permit which was later produced, contains an elaborate description of a large variety of goods. Included therein are

"5. -----components required for immediate bona fide repairs of machinery and/or mechanical installation which have become defective and which, due to urgency, require speedy repair."

This is the provision on which the appellants relied in this court. (It is not necessary to refer to another one on which they also sought to rely in the trial court and in the court a quo.)

Pausing for a moment to examine clause 5 it is immediately apparent that spare parts, whether it be for heavy vehicles or otherwise, are not mentioned as such.

The general class of goods to which the clause refers, is components required for the repair of machinery or mechanical installations. This general class has, moreover, been limited to components required for the so-called immediate repair of defective machinery or mechanical installations which, due to urgency, require speedy repair.

In order to prove that the parts conveyed by first appellant were not covered by the permit the prosecution called Mr L J A Roux, the manager of the company to which they were to be delivered in Isando. It emerged from his evidence that his company had ordered the parts in question as a "normale tipe van maandelikse voorraad bestelling" from its supplier in Germany some four months before the date on which first appellant conveyed them from Durban to Isando. Upon delivery they would have been taken into stock "en vandaar weer teen aanvraag vanaf ons takke en ons handelaars word

dit weer versend aan takke en aan handelaars". What happened after he had said this and how his evidence proceeded appear from the following extract from the record:

"Mnr Roux, ek toon aan u wat betref dié 45 kaste wat deur Alex Cartage vervoer is, toon ek aan u paklyste wat hierdie bestelling meegemaak het net om u geheue te verfris. Ek wil hê u moet net vir die Hof vertel wat hierdie vrag behels het, in kort, u hoef nou nie deur die hele te gaan nie, ek wil net hê u moet vir die Hof beskryf wat se onderdele is ontvang as u na hierdie lyste kyk?--- In kort is dit onderdele vir basies regoor u voertuig van voor tot agter, nasien werk en dié tipe van dinge, wat insluit enjin onderdele, ratkas onderdele, en om so 'n woord te gebruik 'chassis' onderdele.

In ander woorde, enige moontlike onderdeel wat nodig kan wees op 'n vragmotor? ---Ja. Ek het so 'n bietjie van 'n probleem met enige moontlike onderdeel, dit is onderdele wat regoor 'n voertuig gebruik word maar in hierdie besending is daar nie spesifiek alle onderdele wat op die voertuig gebruik word nie.

So in kort sal mens dit kan opsom het hierdie vrag neergekom op onderdele vir vragmotors?--- Vragmotors en busse.

Vragmotors en busse?---Dit is korrek.

U het nou gepraat van ratkas onderdele, masjien onderdele, sou dit goedere insluit soos ligte?---Ja, ligte, kajuit

onderdele en so aan sluit dit ook in.

Die waarde van dié onderdele was ongeveer R300 000? Is dit korrek?--- Dit is korrek ja.

Wat sou u doen indien n onderdeel dringend benodig word?--- Normaalweg as dit n dringende onderdeel is wat per lugvrag kan verskeep word dan bring ons dit in per lugvrag maar dit gebeur wel dat dit n item is wat te swaar is vir dié tipe van vervoer en dan kom dit ook in per seevrag wat dan ingesluit word in so n besending soos wat ons hier het.

Was daar van hierdie besending onderdele goedere wat noodsaaklike onderdele was of vir noodsaaklike herstelwerk nodig was?--- Nie op die stadium toe die bestelling geplaas was nie. Maar sedertdien, ten tye van die ontvangs van die goedere was daar wel goedere wat dringend benodig was.

Kan u vir die Hof sê hoeveel?--- Dit was 97 lyn items wat deur takke en handelaars benodig was maar ek weet nie wat was hulle werklike benodigtheid gewees as sulks nie, by my was dit as dringend gewees.

Dié 97 items, watter persentasie van hierdie spesifieke besending maak dit uit? --- Plus-minus 25%.

Ek sien.

KRUISONDERVRAGING DEUR MNR.COETZEE: Mnr. Roux, die dokument wat bloot net aan u getoon is in die getuiebank, waar word dit opgestel?---Die een dokument was deur ons opgestel, in ons kantoor en die ander dokument is in Duitsland opgestel as verpakkingslyste."

Roux's evidence was not contradicted and on his evidence the trial court and the court a quo both found that the consignment was not covered by clause 5 since, as MYBURGH AJ said in the court a quo:

"----on the evidence at the most 97 items could possibly be regarded as urgent and then it is still a moot point whether the component parts qualified by repairs of machinery and/or mechanical installations could refer to a motor vehicle. I will accept that that is a possibility. But that does not help the appellants in any way because the majority of the items in the container were not needed urgently in any way."

In this court appellant's counsel argued -

- (1) that it was for the State to prove that the cargo was not covered by the permit, which entailed
- (2) that it was accordingly for the State to prove that the parts which appellant conveyed were not urgently required for the immediate repair of defective machinery;

- (3) that Roux's evidence relating to the question of urgency was largely inadmissible;
- (4) that the onus resting on the State was accordingly not discharged; and
- (5) that it was in any event established that it was impossible for first appellant to comply with the provisions of its permit.

There is no need to dwell at any length on any part of the argument. (1) and (2) are obviously correct. (3) is also correct but Roux's admissible evidence reveals that the parts would be taken into stock and "vandaar weer teen aanvraag vanaf ons takke en ons handelaars word dit weer versend aan takke en handelaars". On this evidence there was no urgency at all. Later in his evidence (after referring to the waybills) Roux did say that 97 line items were urgently required by his company's branches and dealers but it is an open question whether urgency of this nature is the type of urgency which clause 5 of the permit requires.

And even if the 97 items were indeed covered by the permit it is quite clear, as the court a quo pointed out, that the remaining items (representing about 75% of the cargo) were not urgently required. The State did, therefore, discharge the onus.

Appellant's counsel relied for his fifth submission on another part of Roux's evidence. When asked in cross-examination whether it was physically possible when the goods arrived in Durban to determine "waar is die dringende goed verpak", he said : "Nee, omrede dit binne die houer in kratte is. Want dan moet ons die hele krat verskeep kry anders is dit addisionele kostes en dié tipe van ding daaraan verbonde om dit uit te kry". His evidence in re-examination reads as follows:

"Mnr. Roux, u sê dit is nie moontlik om in die hawe vas te stel in watter krat die noodsaaklike of dan die nodige items is nie? ---Jammer, ek glo nie ek het myself dan reg beskryf nie, dit is wel moontlik om vas te stel in watter krat dit is maar die krat is weer verpak in 'n houer en om dan daardie houer oop te maak, kratte uit te kry, die item uit 'n krat uit te kry is

basies n onmoontlike saak as sulks.

Hoekom sê u dit is basies onmoontlik?

----Omrede ... (kom tussenbeide)

Dit is n groot klomp werk?--- Dit is n groot klomp werk, dit is addisionele koste, dit is, in hierdie geval is dit 400 lyn items wat dan basies moet uitkom of 42 kratte wat uit die houer moes uitkom om dan byvoorbeeld kom ons sê een item uit n krat uit te kry, 97 lyn items wat ons hier gehad het kon in 42 verskillende kratte gewees het. So basies die hele besending sou dan moes uitgepak geword het om daardie items by te kom."

Assuming this to be a case in which the defence of impossibility may be raised, it is plainly not one in which it can be raised successfully. The only reason why the crates could not be unpacked, was an economic one. The law does not recognise this kind of impossibility. (Rex v Canestra 1951(2) S A 317 (A) at 324H)

The appeal is accordingly dismissed.

J J F HEFER JA

MILNE JA)
 EKSTEEN JA) CONCUR.