BORDER TIMBERS LIMITED
versus
ZIMBABWE REVENUE AUTHORITY

HIGH COURT OF ZIMBABWE
MAKARAU JP
HARARE, 30 September, 1 October, 3 November 2008 and 25 February 2009.

CIVIL TRIAL

Advocate *L Uriri* for plaintiff,
Mr *A Chinake* for defendant.

MAKARAU JP: The plaintiff filed a delictual claim against the defendant, seeking damages in the sum of US$709, 948-00. It was specifically alleged in the plaintiff's declaration that the defendant wrongfully and unlawfully sought to levy import duty on certain resin imported by the plaintiff for its manufacturing processes using an incorrect tariff, causing the plaintiff to litigate on the matter. By the time the litigation was resolved in favour of the plaintiff, the imported resin, which remained un-cleared for customs purposes, had become moribund and useless to the importer, thereby causing the total loss that was claimed in the summons, under various heads that I shall detail later.

The claim was defended primarily on the basis that in seeking to levy duty on a higher tariff than previously levied, the defendant was not acting with malice and that its actions were not wrongful and unlawful to ground an action in delict. Further, it was denied that the containers of the imported resin were presented to the defendant for the purposes of customs clearance.

The facts giving rise to the suit between the parties are largely common cause.

The plaintiff is an established public company, specializing in the production and manufacture of timber and timber products. It is listed on the local bourse. As part of its manufacturing processes, it uses a certain resin (hereinafter referred to as "the chemical"), that is imported into the country and import duty paid. Over a period of about ten years, the plaintiff imported this resin at a steady 5% duty payable to the defendant.

In or about February 2005, the plaintiff received four containers of the imported chemical. When it presented the chemicals to the defendant for clearance, duty was levied not

on the usual and expected 5% but at 25%. The plaintiff approached this court for adjudication on the correct level of duty payable and its contentions were upheld. The defendant immediately noted an appeal against the decision of this court. In the meanwhile, the parties reached an agreement that the four containers be released upon the plaintiff paying a deposit against the required duty. Again, in the meanwhile, in May 2005, the plaintiff imported into the country ten other containers of the chemical while the legal wrangle was still on. There is a dispute as to whether these ten containers were presented for customs clearance or not. I shall revert to this dispute in detail later.

On 7 April 2006, the Supreme Court handed down its judgment, upholding the High Court judgment and vindicating the plaintiff's stance. In June 2006, the ten containers of the chemical were cleared by the defendant at 5% duty. It was then discovered that the chemical had become moribund and valueless to the importer. On 27 September 2006, the plaintiff issued summons against the defendant as detailed above.

In the summons, the plaintiff claimed the sum of US$285,123-76 as the replacement value of the chemical that went moribund; US$20 016-44 as the value of orders that were lost as a result of the plaintiff's failure to use the moribund chemical and the sum of US$404,807-80 as damages for lost business.

At the trial of the matter, three issues had to be resolved by evidence. These were firstly, whether the order issued by this court also covered the ten containers, the subject of this dispute and secondly, whether the ten containers were presented to the defendant for duty purposes. Thirdly, in issue was the quantum of damages that the plaintiff would be entitled to in the event that the defendant was found liable.

In support of its case, the plaintiff led evidence firstly from one Joseph Chikwana. He was the plaintiff's purchasing manager at the time the dispute arose. His testimony was largely to reiterate the facts that are common cause in this dispute concerning the first four containers of the chemical. Regarding the ten containers forming the subject of this suit, he testified as follows:

These were imported about six months after the first four and in respect of which the parties were before this court, locked in litigation over the correct tariff to be used for calculating duty. The ten containers came through Beira and when they arrived in Mutare, the plaintiff sought to have them cleared. The plaintiff did not submit any documents to the

defendant as there was a pending case between the parties. The containers were placed in a bonded warehouse.

When the customs clearance agent came back with the news of the stalemate between the parties, the witness personally visited the defendant's office and was attended to by a Mr Chamboko and a lady officer who was assisting Mr Chamboko. The discussions referred to the pending case and the parties felt that they could not move from that position due to the pending litigation. The defendant demanded duty at the higher rate which the plaintiff was not in a position to pay at the time.

The witness was involved in the formulation of the claims that the plaintiff finally brought against the defendant. He explained that the claim for $22 billion was the fees that the plaintiff paid to the agent to have the containers released.

During the period of the dispute the plaintiff had pending orders from its overseas customers. Because of the time it took to resolve the issue, the plaintiff was unable to meet the orders, resulting in the orders being cancelled. The value of the lost orders was captured in a spread sheet that the plaintiff's finance department generated. The spread sheet was adduced into evidence. The value of the lost orders was in the sum of US$74 134-97. Using a profit margin of 27%, the plaintiff claimed damages in the sum of US$20 016,44 under this head.

The chemicals expired whilst they were in the containers and awaiting clearance. The value of replacing the chemical was in the sum of US$285 123-76.

During the time that the parties were locked in the dispute, the plaintiff could not produce most of its products and thus lost business due to the unavailability of its products. It calculated this loss at US$404 807-80. Another spread sheet was adduced into evidence through the witness, showing plaintiff's calculation of the lost business.

The plaintiff tried to mitigate its damages by borrowing glue from other timber processing companies.

When the judgment of the High Court became available in November 2005, the witness took the judgment to the defendant, seeking release of the ten containers. He was informed that the defendant would appeal against the judgment, which they did. Pending determination of the appeal, the plaintiff again approached the defendant for the release of the containers. The approach was not successful leading the plaintiff to approach this court on a certificate of urgency. No judgment was handed down in the matter which was heard on 8 December 2005.

In my view the witness is an articulate and confident man who fared well under cross examination. He was forthright in his answers to questions put to him under cross-examination and readily admitted to some of the shortcomings in the assumptions that had been used in calculating the damages claimed by the plaintiff. While I found the witness unnecessarily verbose in his responses, I have no reason to disbelieve his evidence.

The second witness to testify on plaintiff's behalf was one Prince Nyemba. At the time, he was the plaintiff's Finance Director. He joined the plaintiff's employment in August 2006 and was not yet with the plaintiff in May 2005 when the events forming the subject of this trial were unfolding. The plaintiff naturally keeps records of its transactions and the witness had access to these.

The witness then testified as to what the plaintiff's records revealed its loss to be as a result of the delay in having the glue released to it by the defendant.

Under cross-examination, the witness admitted that the claims by the plaintiff had been calculated without taking into account certain exigencies and variable such as changing exchange rates and fluctuating costs of production.

Due to the fact that the witness was not an employee of the plaintiff at the relevant time and also due to the concessions that he made under cross-examination that the plaintiff's claim was aggressively if not inaccurately calculated, I shall place marginal probative value on his testimony and will only rely on it where it is corroborated by other reliable evidence.

After the testimony of this witness, the plaintiff closed its case.

The defendant opened its case by calling the one Clements Kwenda. He is employed by the defendant as a team Leader at Forbes Border Post, having joined the then Department of Customs and Excise in 1990.

The witness detailed the procedures that an importer of good into the country has to observe before his or her goods can be cleared. Regarding the claim before the court, he testified as follows:

The plaintiff imported two separate lots of chemicals. Firstly, it imported four containers of the chemicals. An entry for the four was submitted to the defendant. A dispute arose as the defendant called for duty at a rate higher than the plaintiff was offering. The matter was then referred to the courts. At a later stage and while the matter was pending before the court, the plaintiff paid a deposit for the release of the four containers.

As at 25 February 2005, the plaintiff was aware that it could have the ten containers released upon payment of a deposit.

In respect of the ten containers, Bills of Entry for the ten were submitted to the defendant on 29 June 2006. The containers were all cleared on the same date. Prior to this, he was unaware of any letter that the plaintiff had written to the defendant seeking the release of the ten containers. He was aware that a letter had been addressed to the defendant's Harare office though he had not seen it.

Under cross examination, the witness could not dispute that for the previous eleven years the plaintiff had imported the chemical at 5% duty. In his opinion, the officer who inspected the goods and asked for duty at a higher rate was simply doing his work and did not err. He did not agree that the departure from the classification that had been used for the past eleven years had been done with an improper motive.

The witness gave his evidence well. I find that most of his testimony was on facts that are common cause. He was clear as to what transpired between the parties although his attempt to draw a distinction between the Harare and the Mutare offices of the defendant was without basis. On the main, I will rely on the testimony of this witness.

The defendant called the testimony of one Clifford Mubaiwa Chamboko next. He is the man in charge of the defendant's offices in Mutare.

On 17 February 2005, a meeting was held in his office pertaining to the clearance of the four containers. The plaintiff's first witness and the clearing agent were in attendance. The tariff dispute between the parties was discussed.

At no stage did the defendant refuse to accept the entry relating to the ten containers. There was no meeting between the parties regarding the ten containers.

Under cross-examination, the witness maintained that the defendant was justified in re-classifying the imported chemicals. He pointed out that the classification of imports is a complex matter and that for that matter, errors would occur.

The witness gave his evidence in a very measured way, so measured was he that at times he appeared slow. Despite this, I have no reason to disbelieve his evidence as in my view, there are few material disputes of facts in this matter.

After the testimony of this witness, the defendant closed its case.

At the pre –trial conference of the matter, eight issues were identified for trial as follows:

1. whether the declarator issued by the Honourable Justice Hungwe under case no HC 838/05 covered the four containers or the ten containers, which are the subject matter of this dispute;
2. whether the containers were declared for duty purposes;
3. what is the procedure to be followed by an importer of goods in circumstances where there is a dispute in relation to a consignment that has been declared for duty purposes;
4. whether, in the absence of compliance with such procedure, any liability attaches to the defendant;
5. whether the defendant is liable to the plaintiff in respect of contents (that) became moribund as well as the customs clearance, storage charges and demurrage charges associated with the containers;
6. whether the defendant is liable to the plaintiff for special damages in respect of canceled orders and lost business;
7. in respect of all damages, the quantum of damages that may be awarded to the plaintiff is any and
8. what order is to be made as regards costs.

In my view, the issue that falls for determination in this trial in the main is whether or not the defendant's conduct was culpable under the *lex Aquilia*. If so, what damages did the plaintiff suffer?

I narrow down the issues in this manner as in my view, resolution of issues one to four as settled at the pre-trial conference, will not resolve the dispute between the parties. Having listened to the evidence of the parties, it appears clear to me that while the declarator by Hungwe J specifically dealt with the four containers in respect of which a dispute had been formally declared, his ruling, and that of the Supreme Court on the matter would bind the parties in the importation of similar chemicals and would thus have a direct bearing on the importation of the ten containers. I also note that while the ten containers may not have been formally presented to the defendant for clearance, the parties were locked in a dispute over the four containers in respect of the duty payable and on a practical note, the defendant was most unlikely to accept duty at the lower tariff pending determination of the litigation that was then unfolding between the parties. The parties are all familiar with the procedures that have to be

observed in relation to the importation of products and an answer to this question will in my view not bring us nearer to the resolution of the matter than we were when we started off. I further form the view that the plaintiff has not approached this court because the defendant allegedly did not clear the ten containers of the chemical. The dispute between the parties relates to defendant's insistence on the incorrect rate of duty after the High Court ruling and the issue that arises is my view is whether such insistence, including the unsuccessful approach to the Supreme Court on the issue is culpable and renders the defendant liable to the plaintiff in delict.

I now return to the issues as I see them.

In my view, the plaintiff's claim could have been pleaded with greater clarity to reveal the plaintiff's cause of action against the defendant. I must confess that I am at a loss as to the cause of action that the plaintiff is raising against the defendant. I had hoped that the cause of action would become clear with the leading of evidence and the final submissions by counsel in the matter. Unfortunately it has not as I shall show below.

The plaintiff has pleaded in its declaration that the defendant acted wrongfully against the plaintiff, leading to the plaintiff incurring certain losses.

Reading through the plaintiff's declaration, I discern three possible actions by the defendant that the plaintiff appears to be terming "wrongful". Firstly, the plaintiff alleges in paragraph 4 of the declaration that the defendant acted wrongfully and unlawfully when it demanded duty for the first four containers at 25%. Secondly, it is alleged in paragraph 6 that the defendant acted wrongfully and unlawfully and with malice when it noted an appeal against the decision of this court. Finally, the plaintiff alleges in paragraph 7 that the defendant acted wrongfully by refusing to clear the ten containers on duty other than the erroneously calculated 25%.

As pleaded above, the plaintiff alleges wrongful action leading to an economic loss without grounding its claim in the *lex Aquilia,* that requires a mental element in the form of negligence or *dolus* before liability can be founded. It is my understanding of our law of delict that actions under the *lex Aquilia* are meant to compensate the plaintiff for the damages occasioned to him or her by the wrongful act attributable to the defendant's fault. Thus, for a successful prosecution of a claim under the action, a plaintiff must prove a wrongful act by the defendant, patrimonial or economic loss and fault on the part of the defendant.

It is common cause that the plaintiff has not pleaded that the defendant acted negligently in the circumstances of this matter. No particulars of the negligence are pleaded. The plaintiff has not specifically pleaded that the defendant acted intentionally and that it intended to cause loss to the plaintiff by its actions.

It is trite in my view that in an action founded on the *lex Aquilia*, the mental element status of the defendant must be specifically pleaded so that the defendant knows the case that it has to meet. Lack of such particularity in my view is fatal to the plaintiff's claim as it does not disclose the plaintiff's cause of action. On this basis alone, I would absolve the defendant from the instance.

However, I am somewhat handicapped by two events that did not occur in this matter. Firstly, the defendant did not except to the plaintiff's pleadings for the cause of action to be crystallized before the defendant pleaded thereto. Secondly, the matter proceeded through a pre-trial conference where the parties appeared to have been agreed that what was being pleaded was the *lex Aquilia* and the real issue for determination was whether the defendant was liable to the plaintiff for the pure economic loss that resulted from the defendant's actions.

It is true in practice that evidence led at the trial to prove culpa under the *lex Aquilia* invariable proves the wrongfulness of the conduct. (See *Van Der Eeecken v Salvation Army Property Co and Another* 2008 (4) SA 28 (T) at 37F-G). However, the correct legal position in my view is that culpa, in the form of negligence or *dolus*, like wrongfulness, is an essential requirement for liability under the *Aquilian* action. While culpable conduct causing harm is not actionable unless it is also wrongful, conduct that is not negligently or intentionally caused but that result in harm is equally not actionable unless there was a duty to prevent the occurrence of harm to the plaintiff. Where the defendant owes the plaintiff no legal duty, there is no wrongfulness. This means that despite the existence of blameworthy conduct on his or her part, the defendant enjoys immunity against liability for damages resulting from such conduct.

I will therefore proceed to examine the evidence that was led at the trial to assess whether the evidence establishes both the culpa and the wrongfulness.

As indicated above, the plaintiff did not plead negligence. Similarly, the tenor of the evidence led at the trial was not suggestive of any negligent conduct on the part of the defendant. The essence of Chikwana's evidence was to the effect that the defendant simply refused to release all the containers of chemicals on duty other than at the wrongly calculated 25 %. He did not proceed to suggest that such conduct by the defendant in this regard was

negligent in any respect. In his evidence in chief, the plaintiff's main witness did not at all testify as to the defendant's state of mind in refusing to release the containers of the chemicals at 5% duty. It was only in answer to a question put to him in cross-examination that the witness was drawn into testifying that the actions by the defendant were malicious and deliberate although the plaintiff had no complaints to make against the employees of the defendant. One clearly discerns a contradiction in the evidence so elicited from the witness. It is common cause that the defendant acts though the agency of its employees and if the plaintiff had no complaints about the manner in which the defendant's employees had handled the matters, it is difficult to envisage in what way the defendant acted maliciously and intentionally against the plaintiff.

On the basis of the above, I would find that the plaintiff did not lead any evidence to show that the defendant's conduct, even if found wrongful, was accompanied by such a mental element as to find liability under the *lex Aquilia*.

In his written submissions, plaintiff's counsel makes a sweeping statement to the effect that the conduct by the defendant was in breach of a clear statutory provision and that such breach was without just cause. Counsel proceeds to submit that at the very least, this constituted gross negligence.

With respect, I find myself unable to agree. Firstly, I am not convinced that setting the tariff using an incorrect classification was breach of the duty imposed upon the defendant by statute. Secondly, I am not persuaded that making an error in calculating duty is per se gross negligence. In any event, as discussed above, the plaintiff did not plead negligence and did not lead any evidence to reveal any negligent behaviour on the part of the defendant. It is therefore idle of counsel to make such a submission in the circumstances.

Again, on the basis that the plaintiff failed to lead any evidence upon which I can find that the defendant behaved towards the plaintiff with the requisite mental element to found liability under the *lex Aquilia*, I would absolve the defendant from the instance on this basis alone.

It appears to me that the plaintiff may have proceeded under the incorrect belief that wrongfulness is similar to and the same as culpa and that pleading wrongfulness on its own suffices to satisfy the requirements of the *Aquilian a*ction. It is not. The two are separate requirements that have to be satisfied in each suit although the evidence led to prove one may be used to prove the other. I can do no better than associate myself with the observations of

Scott JA in *Gouda Boerdery Bk v Transnet Ltd* 2005 (5) SA 490 (SCA) when he had the following to say in paragraph 12 starting on page 499:

"It is now well established that wrongfulness is a requirement for liability under the modern Aquilian action. Negligent conduct giving rise to loss, unless also wrongful, is therefore not actionable. But the issue of wrongfulness is more often than not uncontentious as the plaintiff's action will be founded upon conduct which, if held to be culpable, would be prima facie wrongful. Typically this is so where the negligent conduct takes the form of a positive act which causes physical harm. Where the element of wrongfulness gains importance is in relation to liability for omissions and pure economic loss. The inquiry as to wrongfulness will then involve a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without negligence: in other words to avoid negligently causing the plaintiff harm. This will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. If a legal duty is found to have existed, the next inquiry will be whether the defendant was negligent. The test to be applied will be that formulated in *Kruger v Coetzee*, involving as it does, first, a determination of the issue of foreseeability and, second, a comparison between what steps a reasonable person would have taken and what steps, if any, the defendant actually took. While conceptually the inquiry as to wrongfulness might be anterior to the enquiry as to negligence, it is equally so that without negligence the issue of wrongfulness does not arise for conduct will not be wrongful if there is no negligence. Depending on the circumstances, therefore, it may be convenient to assume the existence of a legal duty and consider first the issue of negligence. It may also be convenient for that matter, when the issue of wrongfulness is considered first, to assume for that purpose the existence of negligence. The courts have in the past sometimes determined the issue of foreseeability as part of the inquiry into wrongfulness and, after finding that there was a legal duty to act reasonably, proceeded to determine the second leg of the negligence inquiry, the first (being foreseeability) having already been decided. If this approach is adopted, **it is important not to overlook the distinction between negligence and wrongfulness**."

(The emphasis is mine).

Assuming that I have erred in finding that the plaintiff fatally failed to plead and prove culpability on the part of the defendant, I now turn to consider whether the conduct by the defendant was wrongful.

In my view, the issue of wrongfulness in this matter takes centre stage as the loss that the plaintiff seeks to be redressed is pure economic loss. There is thus no physical damage to the property of the defendant giving rise to the loss, which historically, would have led to the conclusion that the action of the defendant was prima facie wrongful if it was culpably caused.(See *Gouda Boerdery Bk v Transnet Ltd* (supra).

The inquiry as to wrongfulness in situations where the plaintiff has suffered pure economic loss as occurred in this matter involves a determination of the existence or otherwise of a legal duty owed by the defendant to the plaintiff to act without culpa. It has been held in a number of authorities that the inquiry into whether or not the defendant owed the plaintiff a

legal duty will be a matter for judicial judgment involving criteria of reasonableness, policy and, where appropriate, constitutional norms. This has been a part of our law since the courts in this jurisdiction accepted that the Aquilian action was wide enough to apply to claims for pure economic loss. Thus in *Zimbabwe Banking Corporation v Pyramid Motor Corp* 1985 (4) SA 553 (ZSC) at 562I-J GUBBAY JA (as he then was) had this to say:

> "There is no general principle of delictual liability for economic loss negligently caused. It must have been caused wrongfully as well as culpably. There must have been an infringement of a legally protected right, the determination of which requires the exercise of a judicial value judgment embracing all relevant facts, including matters of policy. See *Administateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) at 833D-H. For whereas physical injury to person or corporeal property is prima facie unlawful, causing economic loss is not."

In *casu*, it is my view that the plaintiff approached this matter without realizing that its claim called for more than evidence of what transpired between the parties. Having approached the court for an order redressing pure economic losses, it fell upon the plaintiff to persuade the court to make a value judgment to the effect that the defendant owed the plaintiff a duty not to cause it loss through the incorrect calculation of duty. This is a novel duty to which the *Aquilian* action has not yet been extended by our courts. As such, great care had to be taken in leading evidence that would persuade the court to hold that the extension of the action to cover such incidences is proper and is in accordance with policy. No evidence was led before me as to what a reasonable collector of revenue would have done in the circumstances and whether to hold the defendant liable in the circumstances of the matter will be promotive of any social or economic norm that is consistent with current policies on revenue collection.

Speaking for my self, I am reluctant to extend the action to hold liable a public body like the defendant for an error that occurs during the discharge of its statutory functions. I am also reluctant to hold liable a defendant for pursuing a constitutional right in unsuccessfully noting an appeal to the Supreme Court as to do so might be to stifle and in some cases completely negate such right. But these are just my views arrived at without the aid of argument from counsel. In reaching this conclusion, I have been influenced by the remarks by GUBBAY JA (as he then was) in the *Zimbabwe Banking Corporation* case at 564B-D when he had this to say: "

> Mr *Chaskalson* is, of course, correct in cautioning that in determining whether any norm of behaviour causing economic loss should be characterised as wrongful, the adoption of a conservative approach is required. (See the *Lillicrap* case supra at 500D - E and the authorities there cited.) Certainly there is need for "care and

circumspection" in the ascertainment of whether a particular type of action is one which will be confined within reasonable and manageable bounds and is not fraught with what aptly has been described as "overwhelming potential liability". Each case must be assessed pragmatically on its own facts and merits, with primary weight being laid upon the policy of the law. The Court must ask itself whether, paying due and proper regard to the notion of justice and the interests of the litigants balanced against the community as a whole, it is socially desirable to impose liability in the particular circumstances. *See Tobacco Finance (Pvt) Ltd v Zimnat Insurance Co Ltd* 1982 (3) SA 55 (ZH) at 61F - H."

On the basis of the above, I would hold that the conduct complained of was not wrongful in the circumstances even if it was committed with the requisite culpability, which I have already found above not to have been proved.

In view of the finding that I make on the liability of the defendant, I do not think it is necessary that I make a finding on the quantum of damages sought by the plaintiff in this matter. However, in keeping with the practice of this court, I shall proceed to do so for the benefit of the Supreme Court in the event that my decision is appealed against.

It has been my finding above that the evidence of the plaintiff's two witnesses in respect of the alleged loss was inconclusive in that under cross-examination, the witnesses admitted that the claims by the plaintiff had been calculated without taking into account certain exigencies and variables such as changing exchange rates and fluctuating costs of production. As such, it is my view that the amounts claimed by the plaintiff in its declaration are somewhat exaggerated and are not a correct reflection of the loss actually suffered by the plaintiff.

In the result, I make the following order:

1. The defendant is absolved from the instance.
2. The plaintiff shall meet the costs of the defendant.

Honey & Blanckenberg, plaintiff's legal practitioners
Kantor & Immerman, defendant's legal practitioners