THE SUPREME COURT OF APPEAL
REPUBLIC OF SOUTH AFRICA

JUDGMENT

NOT REPORTABLE
CASE NO 73/06

In the matter between

ASSURED FREIGHT SERVICES (PTY) LTD
Appellant

and

COMAIR LTD
Respondent

CORAM: **HOWIE P, STREICHER, BRAND, COMBRINCK JJA et SNYDERS AJA**

Date Heard: **6 March 2007**

Delivered: **22 March 2007**

Summary: **Misappropriation by appellant of amount paid to it by respondent which appellant underlook to pay to SARS in settlement of a VAT debt due by respondent to SARS – appellant unsuccessfully raising defence of prescription to respondent's claim for repayment**

Neutral citation: This judgment may be referred to as *Assured Freight Services (Pty) Ltd v Comair Limited* [2007] SCA 20 (RSA)

HOWIE P

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[1] The respondent, Comair Ltd (Comair), paid the appellant, Assured Freight Services (Pty) Ltd (AFS), R6 515 864,85, the bulk of which AFS had, by agreement between them, to pay over to the South African Revenue Service (SARS) on Comair's behalf in settlement of a debt due by Comair to SARS. The balance of the amount was owed by Comair to AFS as a fee for its services as a clearing agent. Payment by Comair to AFS occurred on 20 February 2001. In September 2004 Comair first realised that AFS had not fulfilled its obligation to Comair to pay SARS. In October 2004 Comair itself paid the debt owing to SARS and then brought an application against AFS in the High Court at Johannesburg for an order for repayment of the amount paid to AFS, less the agency fee. AFS resisted the application, one of its defences being prescription. The case came before Goldstein J. The learned Judge ordered repayment. (Other issues unnecessary to mention here were referred to trial.) With the leave of this Court AFS appeals. Due to late filing of the notice of appeal, the appeal is subject to the grant of condonation. For practical reasons the condonation application and the appeal were argued as one.

[2] The only issue for appeal is that of prescription. The relevant facts are briefly as follows. The debt due by Comair to SARS was in respect of Value Added Tax (VAT) owing on the importation of an aircraft from the United States of America into South Africa. Absent the VAT payment, the aircraft could not lawfully have been cleared through customs.

[3] On 19 February 2001, prior to Comair's paying AFS, the latter invoiced Comair in the relevant amounts of VAT and agency fee respectively. With the invoice AFS submitted a pro forma bill of entry relating to the imported aircraft. It was the obligation of AFS to submit a bill of entry to SARS together with the VAT payment once AFS was

informed that the aircraft was ready to be cleared through customs. Such clearance was, of course, the process for which AFS was paid its agency fee. It is not disputed that the aircraft was so cleared but the date of its release from customs is not apparent from the record. Be that is it may, Comair, under the impression that AFS had paid the VAT debt and had submitted the original bill of the entry to SARS, proceeded to claim from SARS the refund of input tax. The claim was made in March 2001 as part of a refund claim in respect of all input tax paid by Comair for the period February 2001. In May 2001 Comair received the refund claimed, including the amount equivalent to the VAT payable on the aircraft in question.

[4] At some stage prior to claiming the refund Comair tried on several occasions to obtain the original bill of entry from AFS, it being its impression that AFS possessed the original. These attempts met with no success. However, when the VAT refund was effected Comair considered it unnecessary to persist in the quest for the original bill and concluded that it had been submitted to SARS by AFS.

[5] Nothing further that was material occurred until 8 September 2004 when Customs officials informed Comair that they were investigating whether VAT had been paid, *inter alia*, in respect of the aircraft involved in the present case. Comair endeavoured to confirm that AFS had paid SARS but AFS failed to give any satisfactory response. The upshot was that on 30 September Customs informed Comair that VAT had not been paid after all and demanded payment. Having complied with that demand, Comair instituted this litigation.

[6] On the record there can be no other conclusion than that AFS wrongfully appropriated the amount which it ought to have paid to SARS on Comair's behalf.

[7] It is plain that proceedings in the case were commenced more than three years after Comair paid AFS.

[8] In terms of s 12(1) of the Prescription Act 68 of 1969, the prescriptive period begins to run as soon as the debt in issue is due but ss (3) says that it is not deemed to be due 'until the creditor has knowledge of the ... facts from which the debt arises'. The subsection goes on – 'Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care.'

[9] As indicated already, Comair did not know the facts from which its claim arose until more than three years after it paid the misappropriated sum. Precisely when misappropriation occurred one need not determine. The basis of the defence is that Comair was in a position to acquire knowledge of the relevant facts, by the exercise of reasonable care, earlier than three years before the commencement of proceedings in the court below.

[10] The case for AFS is essentially based on the provisions of s 16(2)(d) of the Value-Added Tax Act 89 of 1991. Those provisions as applied to Comair, laid down that it was not permitted a deduction of input tax unless it or its importation agent held the bill of entry and a receipt for payment of the VAT, and unless those documents were delivered to SARS in terms of the Customs and Excise Act 91 of 1964.

[11] Relying on those provisions, AFS argued that in order for Comair to seek recovery of input tax as it did, it should have had, or should have ensured that AFS had, the two required documents. Accordingly, so the argument proceeded, had Comair properly complied with its obligations under the VAT Act it would necessarily, and concomitantly by the exercise of reasonable care, have discovered timeously that AFS never had those documents and, consequently, that it had not only failed to pay SARS but had misappropriated the money.

[12] It seems to me that whatever lack of reasonable care one might assume there to have been in Comair's record-keeping (and one cannot find as a fact that there was such shortcoming) the argument for AFS attempts, wrongly, to transpose that absence of reasonable care into the reasonable care required by s 12(3) of the Prescription Act.

[13] The evidence does not justify the conclusion that Comair failed to exercise the latter care. It entrusted the procedures necessary for clearance of the aircraft, and payment of VAT, to AFS as its clearing agent. It may be accepted for present purposes, in favour of AFS, that AFS was not Comair's importation agent and therefore that possession by AFS of the original bill of entry and the tax receipt did not assist Comair to comply with s 16(2)(d) of the VAT Act. But that is beside the point. Comair was justified, having entrusted AFS with the procedures referred to, and having been given the pro forma bill of entry by AFS, to believe that AFS would acquire and present all necessary documentation when paying VAT on Comair's behalf. Then, when Comair sought and achieved a VAT refund in an amount inclusive of the VAT amount payable in respect if the aircraft and the aircraft was released, Comair was, by all reasonable criteria, entitled to think that everything necessary for the

clearance of the aircraft, including payment of VAT by AFS, had all taken place in accordance with the relevant statutory requirements.

[14] That being the state of Comair's knowledge and belief there was nothing which ought reasonably to have alerted it to possible misappropriation by AFS and the need for timeous legal action against AFS. The only factors which should have alerted it – and in any event did alert it – were the intimations and demand by Customs officials in September 2004.

[15] The exercise by Comair of such care as was reasonably required in the proved circumstances prior to September 2004 would not have revealed to it the facts from which AFS's liability to Comair arose. It follows that Comair cannot be deemed to have had knowledge of those facts. The defence of prescription was therefore rightly rejected by the Court below. In the light of this conclusion it is unnecessary to deal with an argument for Comair based on s 12(2) of the Prescription Act.

[16] The application for condonation is dismissed, with costs. The appellant is to pay the costs of appeal.

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CT HOWIE
PRESIDENT
SUPREME COURT OF APPEAL

CONCUR:

STREICHER JA

BRAND JA