38/95

IN THE SUPREME COURT OF SOUTH AFRICA Saak no. 285/93

APPELLATE DIVISION

In the matter between:

ANDERSON SHIPPING (PTY) LTD **Appellant**

and

POLYSIUS (PTY) LTD **Respondent**

CORAM: **JOUBERT, E.M. GROSSKOPF, EKSTEEN JJA et NICHOLAS, OLIVIER AJJA**

Heard: 9 March 1995

Delivered: 30 Maart 1995

JUDGMENT

JOUBERT JA:

During November 1987 the parties to this appeal entered into an oral

agreement with each other in terms of which the appellant company ("Anderson"), which exercised the business of a public carrier, undertook for reward to convey on behalf of the respondent company ("Polysius") two of the latter's cases of machinery parts from Durban Harbour to Leeudoorn Mine. Anderson removed the cases from Durban Harbour but failed to deliver them, or delivered them in a damaged state, to Polysius in consequence of which the latter sued Anderson in the Witwatersrand Local Division for payment of R415 765-38 damages. In its special plea Anderson stated that the claim of Polysius was based on absolute liability regulated by the Praetor's Edictum de nautis, cauponibus et stabulariis ("the Edict"), which referred to public carriers by water and not to public carriers by land. Being a public carrier by land Anderson was accordingly not obliged in law to pay any amount to Polysius. The latter excepted to the special plea on the ground that the Edict formed part of modern South African law and it has been extended to public carriers by land. COETZEE J upheld the exception to the special plea with costs and struck it out. With leave from the Court a quo Anderson now appeals to this

Court.

The issue in this appeal is whether or not the Edict is applicable to public carriers by land in South Africa.

ROMAN LAW

The Praetor framed his Edict in a terse single sentence: Nautae caupones stabularii quod cuiusque salvum fore receperint nisi restituent, in eos iudicium dabo. (I will grant an action against sea carriers, innkeepers and stablekeepers if they fail to restore to any person any property of which they have undertaken the safe-keeping). Since the jurist Marcus Antistius Labeo (born c 48 BC and died 10 AD) was the earliest Roman jurist to comment on the Edict, as appears from D 4.9.1.3, the inference is reasonably acceptable that it was published during the first century BC. As regards the origin of the Edict concerning nautae it is possible that the Praetor may have been influenced by the Sea Laws of Rhodes. See the doctoral thesis of Dönges, The Liability for Safe Carriage of Goods in Roman-Dutch Law, 1928, p 1-10.

The Edict was enforced by the praetorian action, actio de recepto which

was described by later jurists, e.g. Voet (1647-1713) 4.9.2, as the actio de recepto rei persecutoria quasi ex contractu. The formula of the action granted by the Praetor to a plaintiff for the instruction of the Judex against a sea carrier as defendant was as follows:

> Si paret Numerium Negidium, cum navem exerceret, Auli Agerii res quibus de agitur, salvas fore recepisse neque restituisse, quanti ea res erit, tantam pecuniam judex Numerium Negidium Aulo Agerio condemna, si non paret absolve.

(The names Aulus Agerius and Numerius Negidius are the fictitious names of the plaintiff and defendant respectively). A sea carrier who took charge of freight or property belonging to a customer undertook liability for the custodia thereof as if he had concluded an express contract to that effect (quasi ex contractu). Should the freight or property become lost or damaged while in the custodia of the sea carrier the latter will be liable for full damages (in simplum) unless he can prove by an exceptio that the loss or damage was caused by damnum fatale or vis maior, e.g. owing to shipwreck or action by pirates, (without culpa on his part) D 4.9.3.1 .

According to D 4.9.1.1 (Ulpian) the reason for the introduction of absolute liability on the part of nautae, caupones et stabularii was that they had by the exercise of their business the means or opportunity for conspiring with thieves against their customers. According to Pomponius the Praetor wanted to repress dishonesty on the part of "hoc genus hominum" (D 4.9.3.1).

The law as contained in the Edict was praetorian law (ius honorarium) which could not abolish or amend the ius civile. It was a peculiarity of Roman law that these two systems of law existed side by side until they were blended into one system under Diocletian although traces of the praetorian law do feature in the codification of Justinian.

Before the publication of the Edict the liabilities of sea carriers (nautae) were regulated by the ordinary principles of the ius civile. The legal relationship between sea carriers and their customers could vary according to the nature of the contract agreed to e.g. locatio conductio operis faciendi if the conveyance was undertaken for reward, or depositum if there was no reward, or mandate, or even an innominate contract where the quid pro quo for the

conveyance consisted of something other than money. The liability of the sea carrier would be based on dolus or culpa levis in the case of locatio conductio operis faciendi (D 19.2. 13.5 et 25.7), on dolus or culpa lata in the event of depositum (D 16.3.32, D 44.7.1.5, Inst 3.14.3), dolus or culpa levis in the instance of the actio mandati directa under Justinian. It was the existence of these provisions of the ius civile which caused the jurist Pomponius to marvel at the introduction of the Edict in D 4.9.3.1: miratur igitur, cur honoraria actio sit inducta, cum sint civiles. (Watson's translation: "Therefore, he is surprised that the praetorian action has been introduced, since there are civil actions available . . . ")

I may conclude the relevant principles of the Roman law by drawing attention to another actio de recepto introduced by the Praetor. Justinian in his Inst 4.5.3 referred to this remedy as an actio quasi ex maleficio according to which a sea carrier could be held liable in the event of the customer's goods being stolen or wilfully damaged on board of the ship by his employees. Here too the customer could elect rather to avail himself of the ius civile e.g. the

actio furti. See D 47.5.1.3. For purposes of this appeal it is not necessary to investigate this remedy further.

The conclusion is inescapable that the Romans never extended the principles of the Edict to carriers by land.

For a discussion of the Edict by modern authors see: Buckland, A Text-Book of Roman Law, 3rd ed. p 531; Van Oven, Leerboek van Romeinsch Privaatrecht, 3e druk, p 309-310; Thomas, Textbook of Roman Law, 1976, p 319; Zimmermann, The Law of Obligations, 1990, p 514-516.

ROMAN-DUTCH LAW

It is a long leap in time from the collapse of the Western Roman Empire in 476 AD to the reception of Roman law in the Netherlands during the 15th century. It covers a period of almost 1 000 years. I could find nothing in the works of the Medieval Glossators, or of the Commentators, in support of the proposition that the provisions of the Edict should be extended to public carriers by land. Moreover, during the 17th century Italian and Spanish jurists applied the principles of marine insurance to transport by land (Mutual and

Federal Insurance Co Ltd v Oudtshoorn Municipality 1985 (1) S A 419 (A) at p 428 A-C).

In the German States which adopted Roman law there was a diversity of opinion among the German jurists over the question whether or not the provisions of the Edict should be extended to public carriers by land. It would serve no purpose to count heads. Von Glück (1755-1831) in his Ausführliche Erläuterung der Pandecten (1800), vol 6 part 1 book 4 title 9 para 493 furnishes reasons in favour of the extension to "unsere Postmeister und Landkutscher" in view of the peculiar unsafe conditions without security which made the public use of roads unsafe along or through woodland.

In France the jurist Domat (1625-1695) in his work, The Civil Law (1722) book 1 section 2 paras. 3 and 4 (translated by William Strahan) applied the extension of the Edict to carriers by land or fresh water. The extension was adopted in art 1784 of the Code Civil and art 103 of the Code Commercial.

To revert to the Roman-Dutch law that applied in the Graefschap (since 1580 the Province) of Holland and West Friesland. I have made a careful

study of the works of the leading Dutch jurists which compels me to agree with the conclusion reached by Dr Dönges, op.cit., para. 57 (v), viz that the Dutch jurists are silent on the question of the extension of the Edict to carriers by land. The Praelectiones ad Grotium by Van der Keessel (1738-1816) were published and translated into Afrikaans from 1961. It would seem that Dr Dönges did not take cognizance of the unpublished manuscript in the library of the University of Leiden. I studied Van der Keessel's comments on Gr 3.1.32, 3.20.5 and 3.38.9 but they do not shed new light on the enquiry. I also had the additional advantage of consulting the Observationes Tumultuariae by Van Bynkershoek (1673-1743), (published from 1926 onwards i.e. after Dr Dönges presented his doctoral thesis in 1925 to the University of London) as well as the Observationes Tumultuariae Novae by Pauw (1712-1787), (published from 1964 onwards). I was unable to find in them a single instance where the Hooge Raad extended the Edict to carriers by land.

Another legal source that I studied is the Dutch Zee-Rechten as embodied in the Placaet van Keyser Karel V, 19 Juli 1551, in 1 G.P.B. 782-

795, and the Placaet van Coninck Philips, 31 October 1563, in 1 G.P.B. 796-884. Both placaats, which were influenced by the Maritime law of Visby, also contained provisions relating to ships, belonging to private persons, which were employed in commerce and for carrying merchandise. In arts 43, 44 and 50 of the Placaet of 19 July 1551 the liability of a shipmaster (schipper) to a merchant (koopman) for certain types of damage or loss of the freight or goods on board the ship was based on his "schult" or negligentia. The position was exactly the same under the Placaet of 31 October 1563 as appears from arts 8, 9 and 11 thereof. De Groot (1583-1645) significantly heads chapter 20 of his book 3: Van huir tusschen schippers, reders, bevracthers ende bootsgezellen (Lee's translation: Of hire between masters, shipowners, freighters, and crew) which is preceded by chapter 19 headed: Van huir ende verhuring (Lee's translation: Of letting and hiring). This is an indication that he founded a shipmaster's liability to a merchant for loss of or damage to the freight on the Roman actio locati which required dolus or culpa, as indicated supra. In 3.20.7 he repeats the substance of the above-mentioned provisions of the

placaats. In his Koopmans Handboek (1808) book 4 chapter 2 p 452-507 Van der Linden (1756-1835) discusses very fully the Dutch maritime law in accordance with the afore-mentioned two placaats as amended and supplemented by subsequent legislation.

It appears from the aforegoing that legislation in the Province of Holland and West Friesland brought the liability of carriers by sea closer to the Roman actio locati. The tendency therefore was to restrict the Edict, not to extend it.

In the light of the aforegoing I have come to the conclusion that according to Roman-Dutch law the Edict was not applied to carriers by land.

SOUTH AFRICAN LAW

It remains to ascertain what the attitude of the South African case law is in regard to the applicability of the Edict to public carriers by land. It is wise to commence with the judgments of this Court.

In Davis v Lockstone 1921 AD 153 this Court held that the Edict was the basis of the liability for an hotel keeper for the loss of his guests' luggage

brought into the hotel. The correctness of that decision does not arise in the present appeal. In the course of his judgment Solomon JA stated at p 159: "That the Praetor's Edict is in force in South Africa has been recognised by the Courts in many cases chiefly in connection with the liability of shipowners". (My underlining). The underlined words amount to an obiter dictum and are in any event too widely stated. They should with due respect be qualified in order to avoid the creation of a mistaken impression. While it is indisputable that the liability of public carriers by land was considered in a few decisions of the Courts the fact remains that such decisions were not based upon a proper investigation of such liability according to the principles of Roman-Dutch law as applied in the Province of Holland and West Friesland. See also the instructive analysis of the earlier decisions in question by Cilliers AJ in International Combustion Africa Ltd v Billy's Transport 1981(1) SA 599 (WLD) at p 602 F-605 C.

In Essa v Divaris 1947 (1) SA 753 (A) this Court decided that the Edict did not apply to the owners of a parking-garage in the circumstances of that

case. Schreiner JA (p 775) stated the following in his judgment: "We were presented with the argument that the Edict has been held to cover the liability of common carriers by land because their functions were regarded as sufficiently closely analogous to those of mariners. Well, I am prepared to assume that what I have no reason to doubt is the well-established extended liability of common carriers in our law is founded rather upon the enlargement, by analogy, of the scope of the Edict than upon an appreciation of the advantages of assimilating our law in this respect to the English Common Law". (My underlining). That assumption contained in an obiter dictum is with due respect not binding on this Court since the Edict has according to Roman-Dutch law never been extended to carriers by land as I demonstrated supra.

In Histor Boerdery (Edms) Bpk v Barnard 1983 (1) SA 1091 (A) this Court did not decide the question of the applicability of the Edict to public carriers by land. Viljoen JA (at p 1096F-G) left the question undecided because it had not been fully argued. He assumed for purposes of his judgment

that the Edict had been extended to carriers by land (at p 1096F-G). Van Heerden AJA likewise assumed for purposes of his judgment that the Edict applied to carriers by land (p 1106A).

The position is then that this Court is now not bound or fettered by any of its previous decisions to decide whether or not the Edict is applicable to public carriers by land in South Africa. Nor am I persuaded by the decisions of the Courts as to the applicability of the Edict to public carriers by land in the face of the principles of Roman-Dutch law as applied in the Province of Holland and West Friesland. Cilliers AJ in his judgment (supra) correctly pointed out that the earlier decisions of the Courts on the extension of the Edict to carriers by land did not rest upon a thorough investigation of the Roman-Dutch law. This also applies to the judgment in favour of the extension of the Edict by King J Hall-Thermotank Africa Ltd v Prinsloo 1979 (4) SA 91 (T) which Cilliers AJ considered to be binding on him since he sat alone and was unable to conclude that it was wrong in view inter alia of the obiter dictum in Essa v Divaris (supra).

In Cotton Marketing Board of Zimbabwe v Zimbabwe National Railways 1990 (1) SA 582 (ZSC) it was held by the Zimbabwe Supreme Court that having regard to the fact that Zimbabwe was a landlocked country where the principal mode of transport was by land (p 589H) the principles of the Edict had to be applied to public carriers by land. That ratio decidendi does not apply to South Africa with its long coast line and several harbours.

In the light of the aforegoing I have come to the conclusion that in accordance with the principles of Roman-Dutch law as applied in the Province of Holland and West Friesland the Edict is not applicable to public carriers by land. Even in the land of its birth the Edict as jus honorarium existed side by side with the jus civile. We have no need of such a duality. To impose the absolute liability of the Edict on public carriers by land would be an anomaly while the liability of private carriers by land would be based on dolus and culpa levis. The general principles of our law favouring liability based on dolus and culpa levis should be applied to both kinds of carriers by land.

It follows that the appeal must succeed. The Court a quo erred in upholding the exception taken by Polysius to Anderson's special plea and by the striking out of the latter.

The following orders are granted:

1 The appeal succeeds with costs of two counsel

2 The following order is substituted for the order of the Court a quo: "The Plaintiff's exception to the defendant's special plea is dismissed with costs".

C.P. JOUBERT JA

CONCURRED
E M GROSSKOPF JA
EKSTEEN JA
NICHOLAS AJA
OLIVIER AJA