

Beoliere Aqua (Pty) Ltd v Air Seychelles Limited

(2010) SLR 316

Divino SABINO for the plaintiff

Kieran SHAH for the defendant

Judgment delivered on 4 October 2010 by

KARUNAKARAN J: The plaintiff has brought this action against the defendant claiming damages in the sum of R 63,250 for a breach of contract by the defendant. On the other side, the defendant in its statement of defence, having completely denied the plaintiff's claim, not only seeks dismissal of the plaint but also makes a counterclaim against the plaintiff in the sum of R 7,457.92 contending that the plaintiff owes the said sum to the defendant towards freight costs charged in respect of air cargo the defendant transported for the plaintiff.

It is not in dispute that the plaintiff is a company registered in Seychelles and engaged in the business of producing and selling mineral water in plastic bottles; incidental thereto, it also manufactures plastic bottles for the purpose of bottling the water. The defendant - Air Seychelles - is an airline company registered in Seychelles and engaged in the business of airline services of transporting passengers and freight flying to and from domestic and international destinations.

Mr Austin White, the Managing Director of the plaintiff company testified that his company manufactures its own plastic bottles, fills them with spring water and markets them for sale. According to Mr White, the company's own production of bottles is crucial to the day-to-day running of the business. He stated that without bottles they had no business. To manufacture those bottles, they need a raw material - a thermoplastic polymer called Poly-Ethylene Terephthalate commonly known by its acronym PET, which the plaintiff company used to import from overseas. In February 2007, the company was about to face a production crisis as its stock of "PET" had depleted. In order to sustain its daily production the company had to import urgently the said raw material by air cargo from Boxmore in South Africa. For an immediate airlifting of the cargo from South Africa to Seychelles, the plaintiff had retained the services of the defendant airline, which agreed to transport and effect delivery of the cargo consignment to the plaintiff in Seychelles on a particular date. However, according to the plaintiff, the defendant did not deliver the entire consignment of 7 cartons on the agreed date but delivered only 2 cartons and the remaining 5 cartons a couple of days later. Mr White further testified that the defendant subsequently accepted responsibility for the delay in the transportation and agreed to compensate the plaintiff by offering a concessionary rate of freight next time when the plaintiff required such services from the defendant.

A couple of months later - that was in April 2007 - the plaintiff was in urgent need of an air compressor, an essential piece of equipment required for the daily production of the plastic bottles. This equipment had to be imported from South Africa to Seychelles by air cargo. Therefore, the plaintiff immediately contacted its suppliers in

South Africa called "Abac Air Compressors (SA) (Pty) Ltd" for procurement. The suppliers agreed to supply and export the compressor weighing 1600 kg, uplifting the same from Johannesburg to the plaintiff in Seychelles by air cargo. The plaintiff approached the defendant company for freight services to transport the cargo. Following various telephone conversations between the plaintiff company and the defendant's official M Jim Bonnelame on this matter, the defendant through an email dated 7 March 2007 made an offer to the plaintiff in respect of the transportation of the cargo. The email admittedly sent by the defendant to the plaintiff - exhibit PI- reads:

From: Jim Bonnelame [mailto:[jimbonnelame\(ai\)alrsetichelles.com](mailto:jimbonnelame(ai)alrsetichelles.com)]
Sent: 07 March 2007 12:14
To: beolaqua(ontelvision. net)
Subject Cargo Complaint - A WB 061-20813085 T7K2226 JNBISEZ

Dear Sir,

Reference is made to below email regarding the above as well as over various telephone exchanges on the matter.

We wish to extend our apology for the chain of events and misconnections that has caused the above shipment to be excessively delayed. We had good intentions to reroute your shipment over LHT but unfortunately the first carrier did not transfer the shipment to Air Seychelles in good time.

We are extremely embarrassed at the turn of events as it is not Air Seychelles Policy to have such negative levels of customer service.

In view of the above, we will offer as compensation a concessionary freight rate of USD 1.00 on your next shipment from JNB based on 1600 Kilos. Please, advise as when you placed your next order.

Please, accept our assurance that we shall give our utmost attention to your future consignments in order that this unfortunate experience will not repeat itself.

Thanking you
Jim

The plaintiff replied by an email dated 11 April 2007:

Dear Mr. Bonnelame,

We wish to take you up on this free offer of 1600 kg free cargo for USD1 and use part of it on next Wednesday flight 18th April 2007 from J'burg. The cargo will only be approximately 600 Kg leaving 1000 Kg still in credit. Please, confirm this is ok and let me know what steps I need to take to book it officially.

Regards,
Austin White
Beoliere Aqua (Pty) Ltd

In response to the above, the defendant company through Mr Jim Bonnelame sent the following reply:

Dear Mr. White,

Thank you for email with regard to our offer pertaining to the above mentioned. This is to confirm our agreement to proceed with your next order as stated in your email below. Kindly, request your agent to contact our GSA office on the following address for booking purposes of your shipment.

Aviation GSA International Pty Ltd.

... J'burg

Mr White further testified that the defendant, in breach of the said agreement, failed to bring the cargo (the compressor) into Seychelles on 18 April 2007. The cargo arrived in Seychelles a week later on 25 April 2007.

Having thus testified, Mr White admitted in cross-examination that the freight forwarding agent Jonen Freight Pty Ltd was the one involved in the preparation of airway bills and export documentation and forwarding the cargo to the defendant – the airline's agent Aviation GSA International Pty Ltd in Johannesburg, South Africa. According to Mr White, he did not know whether it was the defendant company or Abac Air Compressors (SA) (Pty) Ltd responsible for appointing Jonen Freight Pty Ltd as the cargo forwarding agent. Also he admitted that the freight forwarding agent is the one responsible for signing and completing the airway bill before the cargo is uplifted. He also admitted that the goods cannot be exported by the suppliers in South Africa unless and until the customs formalities are completed. As regards the counterclaim of the plaintiff, Mr White testified that according to his own interpretation and understanding of the email sent by the plaintiff in exhibit P1, the plaintiff had agreed to charge the defendant only US\$1 as freight for air transportation of the entire cargo of 1600 kg from South Africa to Seychelles.

Moreover, according to the plaintiff, the defendant was aware that the cargo was necessary for plaintiff's day-to-day running of the business and was aware that any delay in the delivery of it would result in loss of business for the plaintiff. As a result of the defendant's breach, the plaintiff could not manufacture the plastic bottles for 5 and a half days. This caused loss of earning for 5 and a half days' production time at the rate of R 11,500 per day, the total loss of which amounts to R 63,250.00. Therefore, the plaintiff claims that the defendant is liable to compensate the plaintiff for the said loss and so seeks judgment against the defendant with costs accordingly.

On the other side, DW1, Mr Christopher Samsoodin, an employee of the defendant company, testified in essence that he has been working with the defendant company as Head of Cargo Section for the past 32 years. It is the normal practice in the export trade that when a supplier exports goods to a customer/consignee in a foreign country, it is the consignee or the supplier who contacts the forwarding or shipping agent, which in turn accepts the cargo from the supplier and does all the logistics and prepares documentation with regard to the shipment or transportation of the cargo. It is the responsibility of the forwarding agent to apply for and get customs clearance from the country of origin, complete the airway bills, and book and deliver the cargo to the carrier's agent for uplifting/transportation to the country of destination. In the instant case, although the supplier Abac Air Compressors (SA)

(Pty) Ltd had delivered the cargo containing the compressor to the forwarding agent Jonen Fright Pty Ltd for transportation on the defendant's flight of 18 April 2007 to Seychelles, the forwarding agent did not, rather could not, complete the necessary export documentation since the supplier had failed to provide the required Export-Code Reference Number to the forwarding agent. Consequently, the forwarding agent Jonen Fright Pty Ltd could not complete the export documentation formalities and deliver the cargo to the Air Seychelles' agent Aviation GSA International Pty Ltd in Johannesburg in time, that is, before the departure of its 18 April flight for transportation from Johannesburg to Seychelles. In fact, the forwarding agent did not give any airway bill to the crew or captain of that particular flight for the transportation of the cargo. After the plane left Johannesburg the cargo was still in Johannesburg. When the defendant received a call from the plaintiff enquiring about the cargo, the defendant found out the reason for the delay and took immediate steps to reroute the cargo via Paris using the earliest available flight so as to arrive in Seychelles on the morning of 25 April 2007. Thus, Mr Samsoodin testified that the defendant was not responsible for the delay as it was the responsibility of the shipper/supplier/forwarding agent to comply with the laws South Africa for the cargo to be exported to Seychelles and deliver the cargo to the carrier in good time for transportation. This they failed to do and caused the delay and the defendant is not at all responsible for the loss and damage if any, the plaintiff might have suffered. Hence, the defendant seeks judgment dismissing the plaint with costs.

On the issue of counterclaim, Mr Samsoodin - DW1 - testified that the defendant company never agreed to render freight service free of costs to the plaintiff as compensation for the delayed arrival of 5 cartons of PET cargo on the previous occasion of February 2007. Mr Samsoodin testified in essence that the plaintiff had misread the contents of the email - exhibit P1 - sent by the defendant offering a concessional rate. The plaintiff wrongly assumed that the defendant agreed to transport the entire cargo of 1600 kg for only US\$1 whereas it was only the rate per kg that has been quoted at the rate of US\$1. In the circumstances, the defendant claims the sum of R 7,457.92 towards freight costs in respect of the air cargo the defendant transported for the plaintiff on 25 April 2007.

The plaintiff's action in this matter is obviously based on a breach of contract. It is not in dispute that the parties had entered into a contract of transportation in respect of air cargo, whereby the defendant agreed to bring the cargo from South Africa to Seychelles by its flight scheduled to arrive in Seychelles on 18 April 2007. However, the said cargo did not arrive in Seychelles on the scheduled flight but a week later, which was on 25 April 2007. Now, the plaintiff claims damages for the delayed arrival of the cargo, alleging breach of contract by the defendant. The defendant denies responsibility for the delay, contending that the freight forwarding agent did not deliver the cargo with necessary documents to the defendant in time so as to be loaded onboard the scheduled flight of 18 April 2007. As regards the plaintiff's claim against the defendant the crucial question that arises for determination is this: Was the defendant directly or vicariously responsible for the delayed arrival of the cargo in question?

Indeed, it involves a question of fact and the answer to which can be found only from the evidence on record. I carefully perused the entire evidence including the documents adduced by the parties in this matter. I also had the opportunity to

observe the demeanour and deportment of the witnesses, while they deposed in court. I gave diligent thought to the submissions made by counsel on both sides. Firstly, on the question of credibility, I believe the defendant's witness Mr Samsoodin, the Chief of Air Seychelles Cargo Section in every aspect of his testimony. He appeared to be a truthful witness. Especially, I believe his testimony as to why, how and under what circumstances the delay occurred in transporting the cargo from South Africa to Seychelles. I believe Mr Samsoodin in that, the freight forwarding agent Jonen Freight Pty Ltd, the agent of the supplier was the one responsible and so involved in the act of preparing the airway bill, export documentation and of forwarding or entrusting the cargo to the defendant airline's agent Aviation GSA International Pty Ltd in Johannesburg, South Africa for transportation to Seychelles. His testimony in this respect was very cogent, reliable and consistent. The plaintiff's witness Mr White also admitted in cross-examination that he did not know whether it was the defendant company or Abac Air Compressors (SA) (Pty) Ltd responsible for appointing Jonen Freight Pty Ltd as the cargo forwarding agent. Also he admitted that the freight forwarding agent is the one responsible for signing and completing the airway bill before the cargo can be uplifted. He also admitted the fact that the goods cannot be exported by the suppliers in South Africa unless and until the customs formalities are completed and the cargo is delivered to the carrier's agent by the cargo forwarding agent with proper and necessary documents. In the circumstances, I find on the evidence that the freight forwarding agent Jonen Freight Pty Ltd did not deliver the cargo with the necessary documents to the defendant in time so as to be loaded onboard and transported by the scheduled Air Seychelles flight that left Johannesburg on 18 April 2007 for Seychelles. Therefore, I conclude that the defendant was not directly or vicariously responsible for the delayed arrival of the cargo in question and such delay was caused by the act/s of third parties who were not the agent/servant/préposé of the defendant company. Hence, I find that the defendant is not liable to compensate the plaintiff for any loss or damage, which the plaintiff might have suffered due to delayed arrival of the said cargo. Having said that, I note the defendant company has taken all reasonable and necessary steps as a prudent carrier, to transport the cargo with minimal delay by using the next available flight to Seychelles. Obviously, the plaintiff's claim against the defendant in this matter is devoid of merit. Hence, the plaintiff is liable to be dismissed.

Now, I will proceed to examine the counterclaim made by the defendant against the plaintiff in this matter. The whole issue of counterclaim revolves around the interpretation given to the words used by the defendant in its email exhibit P1 sent to the plaintiff making an offer of a concessional freight rate for the transportation of cargo in question. It is plain and evident from exhibit P1 that the defendant company never agreed to render any freight service free of costs to the plaintiff as compensation for the delayed arrival of 5 cartons of PET cargo in February 2007. The defendant has simply made an offer through exhibit P1, which reads:

We will offer as compensation a concessional freight rate of US D 1.00 on your next shipment from JNB based on 1600 Kilos.

Indeed, the meaning of the words used by the defendant in the given context is plain, clear and simple. Any reasonable reader of exhibit P1 would undoubtedly understand that the defendant has agreed to apply the concessional rate of US\$1 per kilogram only in respect of 1600 kilos of cargo, which the plaintiff had intended to

import from Johannesburg to Seychelles. No reasonable person would construe and equate the above offer of a concessional rate to an offer of transport free of charge. Also it is pertinent to note that the crucial term "rate" used by the defendant in its natural and ordinary sense would mean and means that the concessional rate was offered only per kilogram of cargo. The plaintiff has wrongly assumed that the defendant had agreed to transport the entire cargo of 1600 kg for only US\$1 whereas it was only the rate per kg that has been offered at US\$1. In the circumstances, I find that the defendant is entitled to claim the sum of R 7,457.92 from the plaintiff towards the freight costs in respect of 631 kgs of cargo (vide exhibit D5 - the Airway Bill), which the defendant transported on 25 April 2007 from South Africa to Seychelles.

Having considered the entire evidence in this matter, I find on a preponderance of probabilities that the defendant was not responsible for the delayed arrival of the cargo on 25 April 2007 from South Africa to Seychelles. The defendant cannot be held liable for the delay. In my judgment, the defendant was therefore not in breach of any contract nor committed any act amounting to a breach of contract in the special circumstances in which the prejudice was caused to the plaintiff. Accordingly, I find the defendant not liable in damages. On the contrary, I find that the plaintiff is liable to pay the sum of R 7,457.92 to the defendant for the freight costs in respect of 631 kgs of the cargo the defendant transported for the plaintiff on 25 April 2007 from South Africa to Seychelles. Wherefore, I enter judgment as follows:

- (i) I dismiss the plaint;
- (ii) I allow the counterclaim of the defendant ordering the plaintiff to pay the sum R 7,457.92 to the defendant; and
- (iii) I make no order as to costs.

Record: Civil Side No 214 of 2007