

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CC08/2015

[2018] SCSC 975

EDGARD MOREL

Plaintiff

versus

CONVOY (PTY) LTD

**(A COMPANY INCORPORATED IN SEYCHELLES, HEREIN REPRESENTED BY
MR. DAVID ESSACK)**

Defendant

Heard: 11/01/2018, 20/03/2018, 06/04/2018, 16/05/2018
Counsel: Mr. France Bonte Attorney at Law for the Plaintiff
Mr. Elvis Chetty Attorney at Law for the Defendant
Delivered: 29 October 2018

JUDGMENT

Burhan J

- [1] The plaintiff filed plaintiff seeking judgment in favour of the plaintiff in a sum of SR 838,200/= with interest at the commercial rate of 10%.
- [2] The plaintiff avers in his plaintiff that he entered into an agreement with the defendant Convoy Pty Ltd, represented by Mr. David Essack whereby the defendant would import a

Nissan UD flat-bed truck. It is further averred that as per the pro-forma invoice received from the defendant, the cost of the said pick up truck together with the freight charges amounted to USD 63,500 (equivalent SR 838.200) and the said sum was transferred in two instalments on the defendant's instructions by the plaintiff. It is further averred that that the defendant had failed and neglected to import the said pick up and failed to reimburse the plaintiff of all the money paid for the said purpose.

- [3] The defendant in reply, denied that that he had agreed to import the said vehicle for the plaintiff and provided the invoice for the sole purpose of assisting the defendant to transfer the funds to the supplier of the pick-up truck and it was the plaintiff who had liaised and negotiated with the overseas supplier for the importation and purchase of the pick-up truck.
- [4] In his evidence the plaintiff produced a document P2, a letter issued by Ms Brenda Bastienne Director General (Finance and Trade Department) to the Attorney at Law of the plaintiff Mr. Bonte, informing him that the records of the Ministry of Finance Trade and Blue Economy indicate, that on the application for an import permit by "Clynns Clearings and Forwarding", a licensed clearing agent, a permit was issued. The letter P2 further states that the application contained a copy of an invoice for the vehicle in the name of the plaintiff, Mr. Morel made to Holland Trucks –UAB.
- [5] The plaintiff Mr. Edgard Morel further stated in his testimony that it was the defendant who had showed him a picture of the proposed vehicle and when he stated he was satisfied, the defendant had helped him to apply and had obtained the import permit. This fact is not denied by the defendant. He further stated he had made payment on the instructions of the defendant and after making payments as per invoice P3 (also referred to as pro forma invoice issued by the defendant's Company on their letterhead and signed by its director Mr. David Essacks), he was instructed by the defendant that everything was okay and that the vehicle would arrive within a month and a half but up to date, he had not received the vehicle. He admitted he had not paid the defendant a 15% commission and stated Mr. Essack had never asked for any such commission. It was suggested to the plaintiff that it was not the defendant Company "Convoy Pty Ltd" that

was involved in the importation of the said vehicle. The plaintiff denied the suggestion and stated it was Mr. Essack who had handled the importation of the vehicle.

[6] The director of the defendant Company Mr. David Essack (hereinafter also referred to as the defendant) in his personal answers admits “Clynns Clearing and Forwarding” belongs to a friend of his and he had got him to apply for a permit on behalf of his friend the plaintiff Mr. Morel. The defendant admitted the pro forma invoice was issued by his Company “Convoy Pty Ltd” and admitted his signature on it. The defendant further stated according to the pro forma invoice, payment should have been made to him but it was not done. He admitted it was on his instructions that payment was made but not on his behalf. In his evidence, the defendant admitted he was the director of the defendant Company “Convoy Pty Ltd”. He admitted knowing the plaintiff for a considerable time and admitted he was a good client. He admitted he had previously imported vehicles into Seychelles and admitted assisting the plaintiff in importing the said vehicle. He described the usual procedure was that he would go on internet to find the vehicle and the Company in Japan and the price. This information he would pass on to the client who deposits the money and he would import the vehicle and when it arrived, the client would pay the balance and his commission of 15%. He admitted he had helped the plaintiff get the import permit but when he had informed the plaintiff about his price and his commission, the plaintiff had stated the commission was too much that he will do the importation himself. He had allowed him and even though being refused his commission, given a paper from his Company (P3) to the plaintiff which he needed for bank purposes. He admitted he had used his letterhead to help him.

[7] The defendant further stated document P4a and P4b produced by the plaintiff indicate money was transferred but he had nothing to do with it. He stated he was not an agent of the entity that received the money. He denied receiving any money from the plaintiff. He stated he helped the plaintiff to get the permit and provided details he asked for. He stated he was unaware whether the vehicle arrived in Seychelles. Under cross examination the defendant admitted giving document P6 (copy of P3) to the bank which was signed by him and the document gave instructions to whom the money should be paid to.

- [8] Mr. Steve Ho Peng a witness for the defendant stated he worked closely with the owner of the defendant company. He knew the plaintiff well and the plaintiff had stated the commission of 15% was too much and he would import the vehicle himself. He admitted that they had got the account number and address of the Company to be paid and given it to the plaintiff. He admitted he did not have a copy of the invoice mentioning 15% commission.
- [9] Having thus carefully considered the evidence of both parties, the first issue to decide is whether there was any contractual obligations between the parties. If such contractual obligations did exist, the fact that the failure occurred at the hands of a third party, a foreign supplier would not stand in the way of the defendant's liability, as a person that promises, a third party will perform an obligation under a contract, is liable if the third party does not perform *Aitkinson v Government of Seychelles SCA 20/2002*.
- [10] Another issue to decide is whether in the absence of consideration any contractual obligation exists between the parties. In this instant case, the defendant's case as borne out by the evidence of Mr. Essack and his witness Steve Ho Peng is that the plaintiff was not willing to pay the 15% commission the defendant was asking but yet the defendant continued to help the plaintiff as he was an old friend and a good customer. The plaintiff denies there was any talk about a commission.
- [11] Article 1105 of the Seychelles Civil Code explicitly recognizes the possibility to conclude a "gratuitous contract" and reads as follows:
- "In a gratuitous contract one of the parties procures to the other an advantage entirely free of charge."*
- [12] Therefore when one party obliges itself to procure the other an advantage entirely free of charge, even though no consideration may pass between the parties, a gratuitous contractual agreement exists between the parties as per the said article.
- [13] When one considers the evidence in this case, it is apparent that the defendant Mr. Essack was well aware being an importer of vehicles himself, the economic significance of the transaction as he himself had provided the plaintiff with the details of the vehicle

including its value as per documents P3 and P6, which the defendant admits was signed by him on his own Company letter head, "Convoy Pty Ltd" to assist in the importation of the said vehicle. The defendant further admits the information contained in P3 was provided by him to assist the plaintiff. Therefore Learned Counsel for the defendant's contention that "Convoy Pty Ltd" had nothing to do with the said importation bears no merit. It is also apparent from the evidence of the plaintiff that the plaintiff was relying on the assurance and the information given by the defendant in making his payment to a third party.

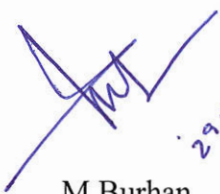
- [14] Being an importer of vehicles, it is clear that Mr. Essacks would have been aware that the plaintiff would suffer financial losses if he transferred the money to a third party and was not able to obtain the vehicle. The plaintiff in his evidence further states that it was the defendant who did everything for him and perusal of the said pro forma invoice given to him by the defendant, shows it contained clear instructions which the plaintiff followed exactly when making the transfer of money to the overseas supplier also named and recommended by the defendant as borne out by documents P4a and P4b. In fact such transfer of money was done in two instalments also on the recommendation and advice of the defendant. Mr. Essacks was well aware that the plaintiff was relying on the details provided for by him, in the importation of the vehicle which the defendant himself admits he provided in order to help the plaintiff, as he was an old friend and customer.

- [15] When one considers the evidence before Court, it is apparent that the initial and subsequent conduct of the defendant from the very outset, in taking all steps to ensure and advice the plaintiff in respect of the importation of the vehicle, by obtaining the import permit, preparing the pro forma invoice on his own letter head and advising the plaintiff to make payments in two instalments to a third party recommended by him, clearly indicate the existence of a contractual obligation to import the said vehicle cf. ***Chetty v Chetty SCA 15/2009***. In fact in document P3, the defendant has signed after the words "Thanking you for your business" on his own Company letterhead. It is apparent that the plaintiff on his part, acted and made the necessary payment as instructed by the defendant as borne out by document P4a and P4b and suffered a loss as he had not received the vehicle. In terms of the *Aitkinson* case (supra), the defendant is liable as he

had assured the plaintiff by his conduct that the third party would perform the obligation under the contract.

[16] For all the aforementioned reasons, I am satisfied that the plaintiff has established his case on a balance of probabilities. I therefore enter judgment in favour of the plaintiff and make order the defendant pay the plaintiff a sum of SR 838,200/= (eight hundred and thirty eight thousand two hundred) with interest at the commercial rate of 10% from the date of filing plaint.

Signed, dated and delivered at Ile du Port on 29 October 2018


29.10.2018

M Burhan

Judge of the Supreme Court

