

**SUPREME COURT OF SEYCHELLES**

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**Reportable**  
[2024] .....  
CS 18/21

**SKYWIRE COMMUNICATIONS INC**  
**(Trading as ‘Skywire Communications’)**  
*(rep. by Audric Govinden)*

**PLAINTIFF**

v/s

**CABLE & WIRELESS (SEYCHELLES) LTD**  
**(Trading as Cable and Wireless)**  
*(rep. by Frank Elizabeth)*

**DEFENDANT**

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**Neutral Citation:** *Skywire Communications Inc v Cable & Wireless* (CS18/21) [2024]  
..... (29<sup>th</sup> November 2024).

**Before:** Pillay J  
**Summary:** Breach of Contract  
**Heard:**  
**Delivered:** 29<sup>th</sup> November 2024

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**ORDER**

- [1] The Plaintiff is dismissed.
- [2] Costs are awarded to the Defendant.

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**JUDGMENT**

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**PILLAY J:**

- [3] By way of a Plaintiff filed on 10<sup>th</sup> March 2021 the Plaintiff seeks a judgment for the payment of \$113, 479.51 and a sum of \$10, 000 with interest and costs.
- [4] The Plaintiff claims as follows:

1. *At all material time, plaintiff, a company registered in Florida, USA, was a global mobile phone supplier and defendant was a telecommunication provider in Seychelles.*
2. *During second half of 2019, plaintiff sold and delivered to defendant mobile phones.*
3. *Upon receipt of the mobile phones, defendant informed plaintiff that they had wanted all the mobile phones to be of EMEA region and not TPA region specification and subsequently listed the mobile phones to be replaced (the 'replacement agreement')*
4. *The parties agreed (the 'replacement agreement') that*
  - a) *defendant could send and deliver to plaintiff the 'replaced mobile phones' and*
  - b) *plaintiff would send and deliver to defendant the corresponding phones substituting for the 'replaced mobile phones'.*
5. *Pursuant to replacement agreement, plaintiff sent and delivered to defendant the corresponding phones substituting for the 'replaced mobile phones'*
6. *In breach of replacement agreement, defendant failed to send and deliver to plaintiff the 'replaced mobile phones'.*
7. *As a result of breach of replacement agreement mentioned in paragraph 6 above, defendant owes plaintiff sum of US \$113, 479.51 which is due and payable and sum of US\$10, 000 for bad faith.*
8. *Plaintiff issued a 'Mise en Demeure' dated 22<sup>nd</sup> January 2021 for payment of a sum of US\$113, 479.51 which remains unsatisfied.*

[5] The Defendant denied all the claims in its Defence as follows:

1. *Except that the Defendant is and was at all material times a telecommunication company trading and carrying on business in Seychelles, the rest of the averments in paragraph 1 of the plaint is not within the personal knowledge of the Defendant.*

2. *Paragraph two is denied and the Plaintiff is put to the strictest proof of all the averments contained therein. The Defendant avers that on the 26<sup>th</sup> and 27<sup>th</sup> August 2019 it ordered the following goods from the Plaintiff, listed in the Purchase Orders provided herewith, namely:-*
  - a) *P0001115-19-1*
  - b) *P0001147-19-1*
3. *The Defendant avers that on the 4<sup>th</sup> September 2019 it received a package from FEDEX and upon opening the said package realised that the Plaintiff has not dispatched the goods ordered by the Defendant but instead had sent the wrong goods to the Defendant. The Defendant avers that it notified the Plaintiff of that fact and was advised by the Plaintiff to send back the goods to the Plaintiff via FEDEX with all shipment costs covered by the Plaintiff. The Defendant avers that on 8<sup>th</sup> November 2019 it sent back the goods to the Plaintiff as instructed by the Plaintiff and on the 6<sup>th</sup> December 2019 the goods again returned back to Seychelles. The Defendant avers that it notified the Plaintiff of this fact and the Plaintiff advised the Defendant that since the Defendant was the Shipper, it has to re-ship the goods back to the Plaintiff again. The Defendant avers that on the 30<sup>th</sup> December 2019 the Defendant liaised with FEDEX to ship the goods back to the Shipper which was done by FEDEX and on the 8<sup>th</sup> January 2020 the Defendant was advised by the Plaintiff that it only took delivery of part of the goods and that the remaining goods had not been received by the Plaintiff. The Defendant avers that upon querying the whereabouts of the goods with FEDEX it was advised that the goods have been lost and that it was too late to make a complaint as the time limit for making such a complaint had lapsed.*
4. *Paragraph 3 is admitted.*
5. *Paragraph 4 is denied and the Plaintiff is put to the strictest proof of all the averments contained therein. The Defendant denies the existence of all the replacement agreement and puts the Plaintiff to the strictest proof of the agreement.*
6. *Paragraph 5 is denied and the Plaintiff is put to the strictest proof of all the averments contained therein. The Defendant denies taking delivery of any phones from the Plaintiff or at all.*

7. *Paragraph 6 is denied and the Plaintiff is put to the strictest proof of all the averments contained therein. The Defendant denies being in breach of any agreement with the Plaintiff and further denies the existence of such an agreement at all. The Defendant repeats paragraph 2 here-above and avers that the phones were shipped back to the Plaintiff as per the Plaintiff's instructions and that the phones got lost whilst in the possession, under the control and care of FEDEX. The Defendant avers that the Plaintiff was under a legal obligation to liaise with FEDEX to organise delivery of the returned phones but failed, refused or neglected to do so until the limitation period had expired. The Defendant avers that the Plaintiff is thus liable for the loss of the goods and that the same cannot be attributable to the Defendant. The Defendant thus denies liability for its loss, abandonment or neglect which was caused or contributed by either the Plaintiff or FEDEX.*
8. *Paragraph 7 is denied and the Plaintiff is put to the strictest proof of all the averments contained therein. The Defendant repeats paragraph 6 here-above and puts the Plaintiff to the strictest proof of all the averments contained therein. The Defendant denies owing the Plaintiff the sum of \$113, 479.51 or any other sum at all and puts the Plaintiff to the strictest proof thereof.*
9. *Except that the Defendant answered the mis-en-demeure and denied liability, paragraph 8 is admitted. The Defendant avers that it has not satisfied the request for payment from the Plaintiff because the Defendant does not owe the Plaintiff the sum claimed or any other sum at all.*

[6] Thereafter, on 7<sup>th</sup> November 2023 the Defendant filed a plea in limine in two parts;

1. *The Defendant has been wrongly suited in law.*
2. *The action discloses no reasonable cause of action against the defendant and is frivolous and vexatious.*

[7] The statement of agreed facts is as follows:

1. *Prior to the facts mentioned below, the parties have shared a business relationship whereby the Defendant, based in Seychelles, ordered from the Plaintiff and the Plaintiff, based in the United States, sent stock of mobile phones ('stock') to the Defendant.*

2. *Except for correspondence between the parties' attorneys, all correspondence between the parties is by way of email.*

*Background facts giving rise to the Material Facts of this Suit*

3. *At or around late August 2019, the Defendant, sent two purchase orders to the Plaintiff:*

- (a) *Purchase Order – 115 - 19 – Annex 1*
- (b) *Purchase Order – 1147 - 19 – Annex 2*

4. *At or around late August 2019, the Plaintiff issued two invoices:*

- (a) *Invoice 106315 (invoice for Annex 3) – Annex 3*
- (b) *Invoice 106439 (invoice for Annex 4) – Annex 4*

5. *At or around September 2019, the Defendant informed the Plaintiff that some of the stock sent to and received by the Defendant has an incorrect model extension that is not compatible with the EMEA region ('defective stock'). The Plaintiff confirms that the wrong stock of mobile phones was sent to the Defendant.*

6. *In order to rectify the mistake, the parties agreed as follows:*

- i. *The Plaintiff on 18<sup>th</sup> September agreed to deliver to the Defendant replacement stock ('replacement stock') of mobile phones.*
- ii. *The Defendant on the 19<sup>th</sup> September agreed to return the defective stock ('defective stock') to the Plaintiff.*

7. *At or around early October 2019, the Plaintiff sends pictures of replacement stock ('replacement stock') to the Defendant. The Defendant approves the replacement stock and the Plaintiff proceeds to ship the same.*

8. *At or around the 29<sup>th</sup> October 2019, the Defendant enquires as to who will be responsible for the shipping costs of the defective stock to the Plaintiff. The Plaintiff confirms that they will be responsible for the shipping costs of the defective stock and will send the Defendant FedEx labels to attach to the same.*

9. *At or around the 29<sup>th</sup> October 2019, the Defendant requests the Plaintiff's FedEx account details to declare the defective stock being shipped back to the Plaintiff.*
10. *At or around 31<sup>st</sup> October 2019, the Plaintiff informs the Defendant that it cannot issue FedEx labels and instructs the Defendant to contact its partner responsible for freight logistics, Jose Pacheco.*
11. *Return of Defective Stock (Tracking no. #129154085313)*
12. *On 6<sup>th</sup> November 2019 the Plaintiff queries to the Defendant on who is the local FedEx agent assisting in shipping back the defective stock.*
13. *On 7<sup>th</sup> November 2019 the Defendant informs the Plaintiff that the local FedEx agent in Seychelles is Nadia Labrosse.*
14. *At around 7<sup>th</sup> November 2019, the Plaintiff informs the Defendant that it has contact Seychelles' FedEx agent, Nadia Labrosse. Further at or around the 7<sup>th</sup> November 2019, the Plaintiff instructs the Defendant to arrange the return of the defective stock.*
15. *At or around 19<sup>th</sup> November 2019, the Defendant provides the Plaintiff the FedEx tracking number, #129154085313.*
16. *At around 6<sup>th</sup> December 2019 a shipment under tracking number #129154085313 was returned to Seychelles under tracking #138916756701. At or around 6<sup>th</sup> December 2019, FedEx delivered a delivery slip to the Defendant for Tracking #138916756701 and the delivery slip was signed off by Ronna, an employee of the Defendant.*
17. *At or around 30<sup>th</sup> December 2019 a shipment was sent to the Plaintiff by FedEx under Tracking #122067504202.*

#### *Material Facts of the Case*

18. *At or around 30<sup>th</sup> December 2019, the Defendant informs the Plaintiff that FedEx has managed to get these boxes and FedEx will re-export these boxes the following day at the latest. Further, the Defendant asks the Plaintiff to advise if the Plaintiff has provided a FedEx account for FedEx to charge for the re-export.*

19. *On 7<sup>th</sup> January the Defendant asks the Plaintiff who is going to bear the cost of their local FedEx charges and on the 8<sup>th</sup> January the Plaintiff confirms that they be responsible for the cost.*
20. *At or around 8<sup>th</sup> January 2020, the Plaintiff informs the Defendant that it received 10 a705, 10 a705 Blue, 10 a705 White and 20 G973 Black. The Plaintiff further asked for a status on the rest of the stock.*
21. *On the 31<sup>st</sup> January 2020 the Defendant informed the Plaintiff that FedEx exported 6 boxes on a pallet weighing 110KG under tracking number 129154085313. The 6 boxes contained 2 Note 10 phones, 20 Apples XS phones, 25 Samsung S10+ phones, 100 Samsung A3 phones, 50 Samsung A7, and 40 Alcatel phones. The Defendant further informed the Plaintiff that as at 31<sup>st</sup> January 2021, the tracking number was still pending in Miami and, the Defendant was investigating the issue with FedEx Seychelles to track the defective stock. The Defendant informed the Plaintiff that Tracking 129154085313 was the shipment for the phones under invoice 106315 and 106439.*
22. *In the same email dated 31<sup>st</sup> January 202 the Defendant informed the Plaintiff that, as per the tracking 1 box weighing 26kg that formed part of the defective stock under tracking number 129154085313 was shipped back to Seychelles. Further the Defendant stated that FedEx re-shipped the box back to the Plaintiff under tracking number 122067504202.*
23. *On 5<sup>th</sup> February the Plaintiff informed the Defendant to include them in the correspondence with Fedex and further informed the Defendant that FedEx has a 60 day policy to finalise an open case.*
24. *On the 5<sup>th</sup> February the Defendant informs the Plaintiff that they are copied into in all correspondence with Fedex and that they are trying to get an answer from Fedex.*
25. *At or around 5<sup>th</sup> February 2020, the Plaintiff asks if the shipment is insured and, the Defendant advises the Plaintiff to sort out their insurance query with FedEx.*
26. *Further on the 6<sup>th</sup> February, the Defendant informs the Plaintiff that the Defendant will not be paying for the handling of the return of the*

*consignment, and the Plaintiff instructed the Defendant to hand the cargo to FedEx as the Plaintiff had contacted Nadia at FedEx office.*

27. *On the 6<sup>th</sup> February 2020, in reply, the Plaintiff admits authorising the Defendant to process the return and to reimburse the Defendant because FedEx did not authorize the Plaintiff to use the Plaintiff's account. The Plaintiff states that it does not have an account with FedEx Seychelles.*
28. *At or around 13<sup>th</sup> February 2020, FedEx representative Dania Labrosse informs the Plaintiff that the defective stock was shipped to the USA wrapped on a pallet weighing 110kg, and when the shipment returned Air Seychelles only received one box. Further Nadia Labrosse asks the Plaintiff where is the rest of the shipment under awb 129154045313.*

*Subject Matter of the Suit*

- (a) *For the purposes of logistics, the Defendant is the 'Shipper' and the Plaintiff is the 'Receiver'.*
- (b) *The Defendant alleges that on the instruction of the Plaintiff it used a logistics firm ('FedEx') to deliver the defective stock from the Defendant to the Plaintiff for the replacement stock (see Annexes 11, 12.4 and 14). The Plaintiff denies that they gave instruction to the defendant to use FedEx but assumed responsibility for the shipping costs and advised the Defendant that it would send FedEx labels.*
- (c) *It was agreed by the parties that the Plaintiff will pay the Defendant the cost of FedEx for the return of the defective stock; however, insurance of the defective stock was not discussed nor agreed upon by the parties (see Annexes 17, 18 and 22).*
- (c) *The Defendant liaised with FedEx and complied with the FedEx's shipping processes to return the defective stock; including being named as the 'Shipper' by FedEx.*
- (d) *The Defendant informed the Plaintiff of the FedEx tracking number for the shipment of the defective stock; #129154085313 (see Annex 13)*
- (e) *The Defendant informed the Plaintiff that the shipment was to be re-exported by FedEx and that this would require the Plaintiff's FedEx account number to bear charges (see Annex 16 and 17).*



- (f) *The Defendant used the same logistics company, FedEx, to return the defective stock and the replacement stock to the Plaintiff (see Annex 13, 17, and 12.1)*
- (g) *The Plaintiff confirms receipt of some of the stock and enquires about remaining stock (see Annex 18).*
- (h) *FedEx advises that one box weighing 26 kg was returned to Seychelles and FedEx re-routed the package back to the Plaintiff (see Annex 23 and 26)*

Facts in Issue

- (i) *The Plaintiff alleges that the Defendant is in breach of its obligations to return the defective stock to the Plaintiff, the defendant did not deliver totally to the Plaintiff. The Plaintiff alleges that the Defendant failed to deliver the defective stock to the Plaintiff resulting in the demand as per Statement of Account.*
- (ii) *The Defendant denies the allegation of the Plaintiff. FedEx was the Plaintiff's chosen courier to both deliver and return the defective stock. The Defendant asserts that it acted on the instruction of the Plaintiff when the Defendant arranged for FedEx Seychelles to return the stock;*

*The Defendant further asserts that it only assisted the Plaintiff because the Plaintiff could not use its own FedEx account and did not have a Seychelles FedEx account to return the stock. The Defendant contends that it fulfilled its obligation when it delivered the defective stock to FedEx to be returned to the Plaintiff. The Defendant alleges that FedEx is in breach of its obligations as it failed or neglected to deliver the entirety of the defective stock to the Plaintiff. The Defendant alleges that FEDEX is liable for the undelivered defective stock.*

[8] Sabrina Leite De Silva a director of the Plaintiff testified that there was an agreement between the Plaintiff and the Defendant for the delivery of products to the Defendant. The Defendant received the products which they claimed to be defective. The Plaintiff accepted to receive the units back and replace the units but the Plaintiff never received the units back. The Plaintiff contacted FEDEX as they have an account with them but

FEDEX did not accept the Plaintiff as shipper so they could not use their account. They contacted their agent who also did not accept so the Defendant had to be the shipper, inspect the goods and deliver and the Plaintiff would pay for the shipment.

[9] She denied sending the labels to the Defendant to attach to the shipment as they were unable to use their account. The only way they could have provided the Defendant with labels was if the Plaintiff was the shipper which they weren't. The Plaintiff attempted to file a claim with FEDEX but FEDEX refused as they were not the shipper.

[10] She testified that the Plaintiff was claiming \$10, 000 because the Defendant was always denying to pay and help. It was her testimony that the Defendant was refusing to find a solution and they were not supportive as a result of the lack of responses. It was her evidence that the Defendant used FEDEX as it was the easiest way to return the goods. She further denied any communication from the Plaintiff that specifically instructed the Defendant to choose FEDEX as a courier.

[11] In cross examination she accepted that she informed the Defendant to send back the goods which were not fit for the local market. She further accepted that the Defendant told the Plaintiff that they would use the same courier the Plaintiff used to send the goods to Seychelles in the first place. She further accepted that the Plaintiff accepted to pay the freight costs no matter what it was. It was her evidence that the Plaintiff never received an invoice from FEDEX for the cost of re-shipment back to the Plaintiff. She accepted telling the Defendant that FEDEX had advised her that only the Defendant could be the shipper and has to be the one to ship the goods back to the Plaintiff as receiver with the Defendant as shipper.

[12] She further accepted that the Defendant was helping out the Plaintiff in reshipping the consignment to the Plaintiff as the Plaintiff did not have an account with FEDEX. She however insisted that there were two shipments. There was an initial shipment of 110kg and a second shipment that was not shipped back at all.

[13] Caroline De Commarmond testified on behalf of the Defendant. She is the Head of Legal Risk Business Continuity and Corporate Compliance. She knows of the Plaintiff being

one of the suppliers the Defendant uses for mobile phones. As far as she was aware there had been no issues with goods ordered from the Plaintiff. She identified PE1 and explained that it was the purchase order sent to the Plaintiff by the Defendant dated 26<sup>th</sup> August 2019. This was followed by an invoice dated 27<sup>th</sup> September 2019. The invoice is processed by the Finance Department and confirmation is sent to the Plaintiff for shipment. The invoiced goods were delivered but upon checks conducted by the Defendant, the goods were found not to be suitable to the purpose and this was communicated to the supplier. The Plaintiff was informed and they agreed to send replacement phones and that the Defendant would return the faulty phones. The Defendant proceeded to return the phones to the supplier using FEDEX as shipping agent. FEDEX was contacted by the Plaintiff and followed their instructions. FEDEX collected the goods from the Defendant on the instructions of the Plaintiff.

[14] It was her evidence that Julio Denousse is in charge of logistics at the Defendant's company. The Defendant did not pay for the consignment. The Defendant requested that the invoice for the shipment be sent to the Plaintiff and she was unaware if the Plaintiff had settled the payment. At no point did FEDEX request payment from the Defendant. She was aware that part of the said consignment was received by the Plaintiff but the Plaintiff stated that they had not received the other part, being one palette containing six boxes. Thereafter, the Plaintiff requested that the Defendant get in touch with FEDEX as the Plaintiff were unable to get feedback from FEDEX.

[15] She denied there being a replacement agreement between the parties but agreed that the Plaintiff did send a replacement stock in substitute of the first defective consignment. It was her evidence that the Defendant is not liable for the consignment not received by the Plaintiff. The Defendant followed all the instructions of the Plaintiff issued to return the faulty items. The Defendant queried from FEDEX as to the whereabouts of the shipment of the defective phones FEDEX informed them that they were looking into the matter. On 4<sup>th</sup> June 2020 Marie-Claire Dupres, the Procurement Officer with the Defendant, wrote to submitting a claim of \$113, 479 being the value of the phones not received by the Plaintiff.

- [16] In cross-examination the witness stated that “Skywire agreed to replace the phone that were unsuitable and Cable and Wireless agreed to send the phones back to Skywire based on their instructions to return.” She insisted that there was an agreement for the Defendant to return the defective phones based on instructions. She further denied that the Defendant had a FEDEX account and was allocated as the shipper by FEDEX being where the goods was processed.
- [17] Marie-Claire Dupres, the Senior Procurement Officer at the Defendant company for 34 years, testified that she was aware of the consignment at issue. At the time she was acting as the Manager and one of her roles was to send back the consignment of faulty phones. The phones were sent from the US to Seychelles where the Defendant took physical possession of them. The phones were inspected and found that some did not meet the requirements. On 4<sup>th</sup> June 2020 on FEDEX’s instructions, she wrote to FEDEX during the time that they were trying to figure out what had happened to the consignment that the supplier had not received. The consignment of phones was given to FEDEX for them to ship it back but the Plaintiff never received it. As the shipper they made a claim to FEDEX but were told that the time limit for making such a claim had expired.
- [18] In cross examination she confirmed that it was the local FEDEX who informed the Defendant that they would have to make a claim because they are the shipper.
- [19] Julio Denousse testified that he is the logistics officer with the Defendant. He recalled dealing with a consignment of goods that was shipped by the Plaintiff to the Defendant and then shipped back to the Plaintiff. It was his role to facilitate the import and export of the consignment. As soon as the consignment was ready to exported as a result of the incident, FEDEX was contacted since the consignment came in through FEDEX in order for the supplier to do the formalities and once that was done for FEDEX to effect collection.
- [20] It was his evidence that the Defendant does not have an account with FEDEX but has a credit facility. Emails were thereafter sent back and forth with the Plaintiff regarding payment to FEDEX for the re-export of the phones.

- [21] Rona Pillay, an accounts officer with the Defendant, denied taking delivery of any consignment from FEDEX in relation to the matter. She was aware that accounts staff signs delivery slips from FEDEX but she could not recall signing one in this case.
- [22] Defence identified the issues for the Court as the Plaintiff's claims that the Defendant failed to deliver the second batch of phones resulting in financial demands, whereas the Defendant denies the allegations stating that they fulfilled their obligations by handing over the batch to FEDEX, which failed to deliver the goods to the Plaintiff.
- [23] The learned counsel for the Defendant submitted that the obligations of the parties in the contract, including the delivery of goods are governed by the Civil Code, particularly principles surrounding "obligation de livrer" (the obligation to deliver) and "transfert de risqué" (transfer of risk).
- [24] Learned counsel submitted that the seller's obligation to deliver the goods as per the contractual agreement is fundamental. He submitted that the Plaintiff acknowledged the mistake and agreed to replace the defective phones, thereby initiating compliance with their obligation to deliver as per the agreement.
- [25] He further submitted that according to Article 1196 of the French Civil Code, the risk is transferred to the buyer once the goods are delivered to the carrier. He submitted that therefore when the Defendant handed the goods over to FEDEX the risk technically should have transferred to the Plaintiff, especially considering that the Defendant was acting on the Plaintiff's instructions and using the Plaintiff's logistics provider.
- [26] Learned counsel submitted that Article 103 of the Commercial Code places liability firmly on the carrier of goods for the loss of the goods entrusted to him. It was his submission that Article 103 supports the Defence's contention that the Plaintiff has wrongly suited the Defendant as a party to the suit and ought to have sued FedEx instead.
- [27] Learned counsel for the Plaintiff for his part submitted that the law on contractual obligations is governed by the Civil Code of Seychelles Act 202. It was his submission that Article 1702 of the Civil Code is applicable the agreement between the parties being a contract of exchange. He added that in accordance with Article 1706 (2) of the Code, all

other rules applicable to contract for sale applies to contracts of exchange therefore all rules of delivery applicable to sales contracts is applicable to the same effect to contract of exchanges.

[28] It was his submission that in contracts of exchange any party who possesses or owns the thing to be exchanged is bound by the same rules as the seller. On that basis he submitted that the Plaintiff was bound by the rules and laws of delivery of the replacement phones and the Defendant was bound by the same rules and laws of delivery of the defective products. He submitted that in accordance with Article 1605 (3) (a) one of the principal obligation of the parties of an exchange is the obligation to deliver which according to Article 1606 is complete when possession and control of the thing is transferred between the exchanger and the exchange.

[29] Learned counsel went on to submit that in accordance with Article 1607 (2) (a) delivery of movables is made upon actual delivery. The agreement between the parties being a contract of exchange which the Defendant breached by not delivering the entirety of the defective phones in the possession and control of the Defendant. He therefore submitted that in accordance with Article 1611 the Defendant is liable to damages in favour of the Plaintiff for the value of the non-delivered defective phones.

[30] Learned counsel went on to submit that on the evidence FedEx was used as a courier of choice for the delivery of the phones. He submitted that such contracts are contracts of hire of which there are two types pursuant to Article 1708; that of hire of things and hire of services. He referenced Article 1179 of relevant paragraph (b) a contract for services is the hire of carriers for passengers or goods. Referencing Article 1782 he submitted that the agreement was “that the Defendant would cause the delivery of the defective products, thereafter the Defendant decided to use FedEx as the courier to cause the delivery and the Plaintiff agree to pay the freight cost for delivery.”

[31] Learned counsel submitted that though carriers bear liability under Article 103 of the Commercial Code for loss of products under their responsibility, he submitted that “such liability is owed to the party to the contract and not to third parties.” He added that the Defendant’s concession that FedEx informed them that they were the ones who could

make the claim because they were the shipper is evidence of the contractual ties between the two parties”.

- [32] Learned counsel for the Plaintiff relied on the case of *Beoliere Aqua (Pty) Ltd v Air Seychelles Ltd Civ 214 of 2007 (SLR 2010)* where Karunakaran J found no liability against the carrier where the delay of the shipment was caused by a third party.
- [33] It was further his submission that on the basis of *Mountain View Investment (Pty) Ltd v Pomeroy* the Court has to assess the continuous change in stance by the Defendant. It was his submission that the Defendant initially denied the existence of an agreement but then went on to agree in the statement of agreed facts that there was an agreement. He pointed out that the Defendant denied ever receiving the replacement phones but then admitted to receiving them in the statement of agreed facts and through the evidence of its witnesses. He submitted that the Defendant had continuously changed its stance in order to avoid liability.
- [34] It terms of the claim for damages he submitted that damages are recoverable under Article 1149. He submitted that foreseeable damages are recoverable under Article 1150. It was his argument that “it was foreseeable that due to the failure of the Defendant to make their claim to the carrier the phones could not be claimed by the Defendant and therefore now owes the loss of the value of the lost consignment.” He added that in terms of moral damages the demand is made as a result of the inconvenience of the non-response from the Defendants and the unwillingness to assist them in trying to find a solution to the lost products.
- [35] He accordingly moved for judgment in favour of the Plaintiff.
- [36] It is not in dispute that the Defendant is in the business of providing telecommunications services. It is also not in dispute that both parties agreed to use the services of a third-party freight carrier for the delivery of the phones in issue to and from the Plaintiff and Defendant. Indeed, there is ample evidence that the phones were shipped back to the Plaintiff by the Defendant but were lost in transit to the Plaintiff.

[37] The Plaintiff's case is that the parties agreed that the Defendant would ship the defective phones back to the Plaintiff whereas the crux of the defence as I understand it is that the Defendant is not liable for the phones that were not delivered but that it is the courier that is liable for the loss.

[38] The Defendant's position is made clear in paragraph 3 of the Defence which I repeat:

*The Defendant avers that on the 4<sup>th</sup> September 2019 it received a package from FEDEX and upon opening the said package realised that the Plaintiff has not dispatched the goods ordered by the Defendant but instead had sent the wrong goods to the Defendant. The Defendant avers that it notified the Plaintiff of that fact and was advised by the Plaintiff to send back the goods to the Plaintiff via FEDEX with all shipment costs covered by the Plaintiff. The Defendant avers that on 8<sup>th</sup> November 2019 it sent back the goods to the Plaintiff as instructed by the Plaintiff and on the 6<sup>th</sup> December 2019 the goods again returned back to Seychelles. The Defendant avers that it notified the Plaintiff of this fact and the Plaintiff advised the Defendant that since the Defendant was the Shipper, it has to re-ship the goods back to the Plaintiff again. The Defendant avers that on the 30<sup>th</sup> December 2019 the Defendant liaised with FEDEX to ship the goods back to the Shipper which was done by FEDEX and on the 8<sup>th</sup> January 2020 the Defendant was advised by the Plaintiff that it only took delivery of part of the goods and that the remaining goods had not been received by the Plaintiff. The Defendant avers that upon querying the whereabouts of the goods with FEDEX it was advised that the goods have been lost and that it was too late to make a complaint as the time limit for making such a complaint had lapsed.*

[39] The Defendant went on deny that there was a "replacement agreement" between the parties but in the statement of agreed facts agreed that:

*In order to rectify the mistake, the parties agreed as follows:*

- i. The Plaintiff on 18<sup>th</sup> September agreed to deliver to the Defendant replacement stock ('replacement stock') of mobile phones.*
- ii. The Defendant on the 19<sup>th</sup> September agreed to return the defective stock ('defective stock') to the Plaintiff.*

[40] As I see it the facts as agreed are as per the admissions in the Defence and the statement of agreed facts. The parties agree that a batch of phones, being part of invoices 106315



and 106439, were sent to the Defendant by the Plaintiff which phones were not compatible for the region. The parties further agreed that the Plaintiff would send new phones that were compatible with the region whereas the Defendant would ship back to the Plaintiff the phones that were not compatible with the region. While the Plaintiff terms this shipment of the compatible phones by the Plaintiff to the Defendant and the return of the incompatible phones to the Plaintiff by the Defendant, a “replacement agreement”, the Defendant disputed that this was in fact a “replacement agreement”. The position of the Defendant on the pleadings is that it sent back the incompatible phones per the instructions of the Plaintiff as such could not be liable to replace the missing phones. Leaving that aside for a minute, it is the finding of this Court that the parties did agree for compatible phones to be sent to the Defendant and for the Defendant to return the incompatible phones to the Plaintiff.

[41] The issue then becomes was the Defendant in breach of the agreement to return the incompatible phones. Of relevance to determine the said issue are the following emails:

(1) On 28<sup>th</sup> October 2019 at 8:17am Dominic Coopoosamy wrote to Sabrina Leite copying Marie-Claire Dupres and Julio Denousse

*“Hi Julio, kindly proceed with shipping the replacement units to Skywire. They have advised that the replacement stock is currently in transit with the expectation of arrival this week.”*

(2) On 29<sup>th</sup> October 2019 at 12:39am Julio Denousse answered:

*“Hi Dominic/Sabrina, Kindly advice way forward for the shipping back of these item. Is it cable & wireless who will bear the shipping cost back or Skywire?”*

(3) At 11:08 am Sabrina Leita answers:

*“Dear Julio, Skywire will be responsible for the shipping costs. We will send you FedEx labels to be attached to the boxes.”*

(4) At 11:39am Julio Denousse replies:

*“Hi Sabrina, Well noted. But as per the Local Fed ex office they will need a Fed ex account from your company for them to handle the shipment. Kindly if you can provide the details cause the new batch has arrive to clear and I really need to declare the ones shipping back so that we don’t have to pay customs again. Waiting for your prompt response.”*

- (5) On 30<sup>th</sup> October 2019 at 8:38am, Julio Denousse emails Sabrina Leite:  
“Hi Sabrina, Any update on the below request as we have a deadline to clear out items at the airport cargo or else we will be paying storage charges which we are trying to avoid.”
- (6) On 31<sup>st</sup> October 2019 at 4:55am Dominic Coopoosamy emails Julio Denousse and Sabrina Leite with Marie-Claire Dupres, Oliver Fock-Tave and Teng Lustre Alvarez in copy:  
“Hi Sabrina, CWS awaits your feedback. Please have this completed by EOD. As communicated charges will be incurred the longer this takes.”
- (7) At 6:13pm Sabrina Leite answers:  
Dear Dominic, Unfortunately we couldn't issue FedEx labels. It looks like we have a restriction in the account and we cant use it to “import” from Seychelles.  
I'm including Jose Pacheco. He is our partner and responsible for all our freight logistics. He will help us with the returning process. If you have a local agent, they can work together. Jose is always very helpful and answers quickly and he was the one that processed all shipments to Seychelles.  
He works with Emirates.  
I'm sorry for this delay. Please let me know if you have any questions.  
Regarding the accessories that were supposed to be returned with Samsung S10. Please keep them. This is the minimum we can do as a token of appreciation for all the years of business we have worked together.”
- (8) On 1<sup>st</sup> November 2019 at 4:27am Jose Pacheco wrote:  
“Hello Dominic/Sabrina, Please advise the exact address of where the cargo is located, when is the last free day, before you are charged? I am checking the options we have and will advise.”
- (9) On 2<sup>nd</sup> November 2019 at 9:18am Dominic Coopoosamy replied:  
“Hi Julio, Please share details requested. Thanks.”
- (10) On 4<sup>th</sup> November 2019 at 6:05am Julio Denousse wrote:  
“Hi Jose, The new replacement cargo is at the airport, the cargo that is needed to be ship out is at our warehouse. Kindly note that tomorrow is the last day for free time at the airport cargo, they will charge Cable & Wireless storage fee as of Wednesday. Kindly advice on this way forward as we are so far behind our schedule.”
- (11) At 4:29pm Sabrina Leite writes:

*“Dear Jose, This is the office address. They will deliver cargo to the airline. Francis Rachel Street, POBox 4, Victoria, Mahe, Seychelles, Airport: SEZ. Please proceed with booking SEZ x MIA asap.”*

*(12) ON 6<sup>th</sup> November 2019 at 8:28am Sabrina Leite writes:*

*“Hello Julio, Can we have your local agent contact? We’ve been getting difficult to reach someone there to assist us on shipping the goods back. Please let us know as soon as you can.”*

*(13) On 7<sup>th</sup> November 2019 at 1:29am Julio Denousse writes:*

*“Hi Sabrina, See below our local fed ex agent contact in Seychelles. Nadia Labrosse...nlabrosse@airseychelles.com....Tel:2484391498”*

*(14) At 16:32 Sabrina Leite writes:*

*“Dear Julio, Already contacted Nadia. Can you please go ahead and arrange return of the item back to us? Thank you.”*

[42] It is clear from the above that the Plaintiff took the responsibility of bearing the cost of the shipment of the incompatible phones back to Miami. The Plaintiff further informed the Defendant that it would send FedEx labels. The Plaintiff came back to say that it could not issue FedEx labels and copied in one Jose Pacheco their shipping partner before the Plaintiff then sought the contact details of the Defendant’s local agent in Seychelles to whom Sabrina reached out and made some form of arrangements, thereafter informing the Defendant to proceed to arrange shipment back to her (the Plaintiff). From the evidence, at all times the Defendant was acting on the instructions of the Plaintiff as regards the shipment of the incompatible phones back to the United States. By the time the Plaintiff instructed the Defendant to file a claim with the courier (shipper) the time had lapsed within which such claim could be made.

[43] It is noted at this point that in examination in chief the Plaintiff’s witness stated that she deals with FEDEX on a daily basis. She added that the shipper is the only one able to file a claim with FEDEX in case anything happens. One has to wonder then why it was that the Plaintiff attempted to file a complaint with FEDEX regarding the lost products then, with the full knowledge that only the shipper, in this case being the Defendant, can make such a claim? Furthermore, wouldn’t the Plaintiff have known that FEDEX has a time

limit for claims? Why didn't the Plaintiff request that the Defendant file a claim within the time limit?

[44] Of relevance at this juncture are the rules applicable to liability for goods in transit.

[45] Article 103 of the Commercial Code provides in part that:

1. *A carrier shall be liable for delay in delivery or the loss of the goods entrusted to him. He shall also be liable for all damage which does not arise from a defect inherent to the goods. However, in respect of the loss or damage of such goods, the carrier shall escape liability if he proves that such loss or damage cannot be imputed to him but it occurred through an inevitable accident or an act of God, as laid down in articles 1147, 1148 and 1784 of the Civil Code.*

[46] In the case of ***Chez Deenu Pty Ltd v State Assurance Corporation of Seychelles (CS 92/2004) [2006] SCSC 90 (20 January 2006)*** Per Perera J considered the case of

***Crows Transport Ltd v Phoenix Assurance Co Ltd [1965] 1 WLR 383***

*Wherein Lord Denning MR, Danckwerts and Salmon LJJ considered this phrase [goods in transit].*

*The Plaintiffs claimed that sum from their insurers under a "good in transit" policy which covered goods against loss or damage (inter alia) "whilst temporarily housed during the course of transit whether on or off the [insured] vehicles." The insurers denied liability. The county Court judge found in favour of the insurers that though the goods were "temporarily housed," they were not covered by the policy since "the course of transit" did not begin while the hauliers had taken some steps towards loading the goods on to one of their vehicles; and he dismissed the claim. On appeal by the Plaintiffs, it was held, allowing the appeal, (Salmon LJ dubitante), that the loss was within the cover provided by the policy, for where goods were housed as an incident of the transit, whether for minutes, hours, or a day, and awaiting loading on to the insured's vehicles, they were "temporarily housed during the course of transit."*

*Per Danckwerts, L.J. These goods were in transit from the moment they left the consignors' premises until they reached their destination in the north.*

[47] His Lordship Perera further relied on the case of *Eurodale Manufacturing Limited v Ecclesiastical Insurance Office Plc*, [2003] EWCA Civ 203. [2003] Lloyd's Rep IR 444. **COURT OF APPEAL** wherein Lord Justice Longmore, held:

*When you take a parcel to the post office or to a railway station and you hand it over and get a receipt, the goods are in transit from the moment the post office or the railway takes them. They are in transit by the post office or the railway's vehicles, as the case may be, because from that moment onwards everything that is done is incidental to that transit. So here it seems to me that from the moment that the Plaintiffs accepted these goods from Decca and took them down the steps, they were there temporarily housed awaiting loading on the Plaintiffs' own vehicles. It was an incident of the transit by those vehicles. That seems to be to be 'in transit per the Plaintiffs' vehicles.*

[48] In the current matter, it is in evidence and accepted by the parties that the incompatible phones were collected by FedEx, who was the courier, for delivery to the Plaintiff. Documentary evidence was supplied to the effect that the incompatible phones were shipped by FedEx. However, part of the consignment did not make it back to the Plaintiff. For the duration that the incompatible phones were taken over by FedEx for shipment they effectively amounted to goods in transit. It is noted at this point that as per the email dated 30<sup>th</sup> January 2020 the original cargo bearing tracking number 129154085313 was still pending in Miami.

[49] Furthermore, Article 18 of the Carriage By Air (Overseas Territories) Order, 1967 (Cap 22) provides that:

(1) *The carrier is liable for damage sustained in the event of the destruction or loss of, or of damage to, any registered baggage or any cargo, if the occurrence which caused the damage so sustained took place during the carriage by air.*

(2) *The carriage by air within the meaning of the preceding paragraph comprises the period during which the baggage or cargo is in charge of The period of the carriage by air does not extend to any carriage by land, by sea or by river performed outside an aerodrome. If, however, such a carriage takes place in the performance of a contract for carriage by air,*

*for the purpose of loading, delivery or transshipment, any damage is presumed, subject to proof to the contrary, to have been the result of an event which took place during the carriage by air.*

[50] There being clear evidence that the incompatible phones were collected by FedEx and shipped out of the jurisdiction to the Plaintiff, the Defendant fulfilled its part of the agreement so it cannot be said that the Defendant is in breach of the agreement between the Plaintiff and the Defendant. The Defendant assisted the Plaintiff by facilitating the collection of the incompatible phones by FedEx, with whom the Plaintiff had made arrangements for the incompatible phones to be shipped back out to the Plaintiff.

[51] In the circumstances, upon consideration of the evidence on record, I find that the Plaintiff has not proved its case against the Defendant. Accordingly, the Plaintiff is dismissed.

[52] In view of the above findings there is no need to consider the pleas in limine.

[53] Costs are awarded to the Defendant.

Signed, dated and delivered at Ile du Port on 29<sup>th</sup> November 2024

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Pillay J