

IN THE SUPREME COURT OF SEYCHELLES

Civil Side: CS 139/2000

[2016] SCSC 728

FALCON ENTERPRISE
(REP. BY MARCO AND CELINE FRANCIS)
Plaintiff

versus

DAVID ESSACK
Defendant

Heard:

Counsel: Mr. K. Shah for plaintiff

Mr. A. Derjacques for defendant

Delivered: 7 October 2016

JUDGMENT

Renaud J

The Parties

- [1] The Plaintiffs, Falcon Enterprise (Pty) Ltd, was at the material time a partnership with Celine Francis (mother) and Marco Francis (Son) as partners.
- [2] The 1st Defendant David Essack is being sued in his personal capacity.

- [3] The Wine Cellar, the 2nd Defendant, was at the material time a Company with the 1st Defendant David Essack as shareholder and director.
- [4] The Intervenor, Eagle Auto Parts (Pty) Ltd, was at the material time a Company with Marco Francis, David Essack and Ronnie Barallon as shareholders and directors. The Intervenor filed a Statement of Demand also claiming ownership of the container and its contents. It also claimed damages pertaining to its detention until determination of this case.

Plaintiffs' Case

- [5] It is the case of the Plaintiff that it imported from Dubai container No. DVRV1212985 loaded with spare parts to the value of SR200,000.00 inclusive cost of freight. The said container of goods was initially consigned in the name of the Plaintiff. That transaction was done through the 1st Defendant who was a businessman and who prior to 1st May, 2000 allegedly sometimes acted on behalf of the Plaintiff.
- [6] The Plaintiff averred that the 1st Defendant was at the material time in possession of the original Bill of Lading and had attempted to have the said container released to him upon its arrival in Seychelles.
- [7] The Plaintiff averred that on 16th May, 2000, 1st Defendant travelled to Dubai and there contrived to have the Bill of Lading altered so that the consignee was falsely and unlawfully altered and changed from the name of the Plaintiff to that of the 2nd Defendant.
- [8] By this suit the Plaintiff has brought action against the 1st and 2nd Defendants on the basis of the unlawful interference with the Plaintiff's proprietary rights.
- [9] The Plaintiff is asking this Court for an order confirming its ownership of the said container and its contents, in addition to losses and damages.

Defendants' Case

- [10] The 1st Defendant averred that he never acted for the Plaintiff and denied any alleged mandate which the Plaintiff purported to have terminated on 1st May, 2000.

- [11] The 1st and 2nd Defendants averred that the said container belonged to the Intervenor. It is the case of those two Defendants that the Plaintiff's name was only used as a facility for importation, shipment and quota purposes. The 1st and 2nd Defendant further averred that the Plaintiff was to receive a wholesale mark-up as a Commission Agent. In addition to these averments, the Intervenor averred that it owns the container and its contents that were imported in Seychelles on 2nd May, 2000.
- [12] The 1st Defendant admitted that he, at the material time, was and is in possession of the original Bill of Lading in his capacity as a Director of the Intervenor.
- [13] Despite various attempts by the Plaintiff to have the 1st Defendant returned the original Bill of Lading in respect of the container and its contents to the Plaintiff, the 1st Defendant had failed and refused to do so.
- [14] The 1st Defendant admitted that on 16th May, 2000, he travelled to Dubai and obtained an alteration to the Bill of Lading without the Plaintiff's consent. The 1st Defendant, however, averred that the said alteration was regularly obtained and that the Intervenor should be entitled to have possession of the goods.

Facts not in dispute

- [15] There is no dispute that the Bill of Lading for the said container which reached Seychelles on 2nd May, 2000 was originally drawn in the name of the Plaintiff as the consignee. There is also no dispute that the alteration of previous name on the Bill of Lading, referred to by the 1st Defendant, was made in or around mid-May 2000 when the said container load had already reached Seychelles. It is not in dispute that on 16th May, 2000, the 1st Defendant travelled to Dubai and obtained the alteration to the name on the Bill of Lading by the carrier. The 1st Defendant was and is in possession of the full set of the original the Bill of Lading ostensibly in his capacity as a Director of the Intervenor.

Matters in dispute

- [16] The Plaintiff is claiming that the said container and its contents belonged to it for having imported these from Dubai. On the other hand the 1st and 2nd Defendants claimed that

the container and its contents belonged to the Intervenor - Eagle Auto Parts (Pty) Ltd. The thrust of the argument of the Plaintiff is that the container was originally shipped and consigned in its name as stated on the first Bill of Lading.

[17] According to the Plaintiff once the original Bill of Lading had been issued, it is only, the shipper and itself as consignee stated therein who can make any alteration thereto..

[18] The 1st Defendant as the consignor contended that he can assign the Bill of Lading to a third party who has been duly endorsed therein by the shipper and himself who all along held the complete set of the Bill of Lading. As the consignor he could legally make any alteration to the name of the consignee in the original set of the Bill of Lading.

[19] The 1st Defendant maintained that the first Bill of Lading, however, has been legally and correctly endorsed by himself being the consignor to another party, the Intervenor, and as such title passed to that party which has the full set of the Bill of Lading, duly endorsed to itself.

The Law

[20] Learned Counsel for the Plaintiff submitted that this suit is neither based on contract nor ownership, but rather on Tort or Delict, since what is in issue is the delictual act of the 1st Defendant which caused damage to the Plaintiff. Article 1382 of the CCsey states:

“Every act whatever of man that causes damage to another obliges him by whose fault it occurs to repair it.”

[21] Learned Counsel for the Plaintiff further submitted that Bill of Lading is like a cheque and a bill of exchange and as such cannot be changed. However, it my considered view that even cheque and/or bill of exchange can always be altered/endorsed and made payable to another party.

[22] Article 101 of the Commercial Code states that:

“A consignment note or receipt for goods delivered shall be evidence of a contract between the consignor and the carrier. When the contract is for the delivery of

goods to a third party such consignment or receipt shall be evidence of the carrier's legal obligation to such third party. The Court may, however, freely determine in respect of such contracts, the extent to which evidence other than the aforementioned consignment note or receipt shall be taken into account."

[23] Article 102 of the Commercial Code states that:

"A consignment note shall not be made to order. Nevertheless, if such a consignment note or other document or receipt treated as such, refers specifically to a named third party as consignee, such reference shall be prima facie evidence that the consignee is entitled to the possession of the goods consigned and the carrier shall be under a duty to deliver the same".

Documentary Evidence

[24] I believed that the surest way to proceed in such a case where the witnesses of all parties tried to impress upon the Court that he/she is more truthful than the other. I will therefore placed more reliance on documentary evidence that have been admitted as exhibits and allow these to "speak louder" than the witnesses of both parties.

[25] Exhibit P1 is a copy of a statement made by Mr. Marco Francis to the Police on 11th May, 2000 in which he stated that Mr. David Essack (1st Defendant) was holding the Bills of Lading for container DVRV121985 illegally. That Mr. Essack was an agent of Falcon Enterprise whose mandate had been terminated and had been requested to return those Bills but had refused. The container and all the items therein belonged to Falcon Enterprise. Mr. Essack gave him the Bill of Lading in the month of March with all the invoices. During the same month the Bill was stolen from his (Marco's) car.

[26] Exhibit P2 is a Memo on the letter head of "Mahe Shipping Company Ltd" in Seychelles dated 19th May, 2000 to Land Marine Ltd states –

"As per instructions received from Agents at Port Of Lading, Original B/Lading has been re-issued and following amendments were made:

Shipper now reads as: Al Zomrah Co. Ltd, Dubai, UAE

Consignee now reads: The Wine Cellar, P.O. Box 2010, Mahe, Tel: 373899

Please update your records and manifest accordingly."

[27] Exhibit P3 is an email dated 25th April, 2000 at 16.19 being a copy of 'Export Freight Manifest' of the vessel 'Ebony' sailing from Dubai, U.A.E. to Seychelles, on 15th March, 2000, with handwritten alterations showing that 'Inchcape Shipping Service, P.O. Box 70, Dubai' has been crossed out and 'Al Zomrah Co. Ltd, Dubai' has been inserted as the shipper, and 'Falcon Enterprise' has been crossed out and 'Wine Cellar' has been inserted as the Consignee. There is a handwritten note on it stating – "as per amendment manifest dated 19.5.00 from Mahe Shipping." That memo was in respect of container ref: DVRV1212985.

[28] Exhibit P4 is a copy of a 3 page email exchanged between 17th to 22nd May, 2000.

[29] On 17th May, 2000 Mr. Gerry Adam of Mahe Shipping emailed Marianna M Sadie of ISS Dubai, as follows:

"There is a dispute between the partners of Falcon Enterprise and as a result there is a police enquiry going on. The local police have requested that I try and find out from ISS Dubai the following –

1. Was the Original B/Lading handed over to the shippers or was it posted to them.
2. If it was handed over, was it handed over to David Essack or to Marco Francis.
3. If it was posted, to what address was this sent and for the attention of whom.

In case it was not you that handled this shipment, could you please pass on to the appropriate person.

Please treat as urgent and your overnight reply would be greatly appreciated."

[30] On 17th May, 2000 Marianna M Saidie responded as follows:

"Many thanks to note that I am leaving the Company next week. Your email has been sent to M. Lawrence Cruz who will answer you."

[31] On 17th May, 2000 John Noronha Shipping replied to Gerry as follows:

"Please note that Mr. David Essack today approached us with amendments for the captioned B/L for which we issued new set of OB/L to him on surrender of full set of earlier B/L No. CN 1962.

Shipper now reads as: Al Zomrah Co. Ltd., Dubai, UAE

Consignee now reads: The Wine Cellar, P.O. Box 2010 Mahe tel 373899

Please update your records and file manifest accordingly. Amendment charges if any to be collected from new consignees prior release of cargo.

Please note that the earlier set of OB/L was picked up by M/s. Al Zomrah Co. Ltd., Sharjah, UAE as they came to our office and paid the Dubai Local charges."

Please be guided accordingly."

[32] On 22nd May, 2000 from John Noronha Shipping to Gerry Adam of Mahe Shipping, stating as follows:

"Further our below mentioned message, we have today received a fax from Falcon Enterprise stating that Mr. David Essack who was working with them was sacked and now is not giving the original B/L to them.

Understand from them that the matter has gone to the CID who is investigating (sic) same. They want to know on what basis the amendment was done for above OB/L No. CN1962.

Please explain to them that Mr. David Essack came to our office and surrendered the full set of B/L showing Falcon Enterprise as consignees to us and requested us to amend consignee to read as The Wine Cellar, Mahe for which was issued him a new set of OB/L.

We request you to please withhold delivery of cargo since above matter is under dispute and keep us posted with further developments.”

- [33] Exhibit P5 is a copy of a Bill of Lading dated 16th April, 2000 in respect of container DVRV1212985, seal No. 104158, shipped on board vessel Ebony from Dubai to Seychelles. The shipper is stated as “Falcon Enterprise” and the consignee is stated as “Falcon Enterprise”. However, Exhibit P6 is a Bill of Lading also dated 16th April, 2000 and is an exact replica of Exhibit P5 except that the shipper is stated as “Al Zomrah Co. Ltd” and the consignee if “The Wine Cellar”.
- [34] Exhibit P7 is the business registration name of Falcon Enterprise showing Marco Francis and Celine Francis as the partners. Exhibit P8 shows that Falcon Enterprise was licensed as an Importer/Wholesaler from 26th March 2000 until 25th March, 2001. Exhibit P9 is a copy of the Export Freight Manifest before it was amended.
- [35] Exhibit P10 is a bundle of 18 receipts, made out in the name of Falcon Enterprise and one receipt for cash, being for the purchase of goods in Dubai during the periods 19th to 20th February 2000 and 10th to 13th April, 2000, in the total amount of Dirhams57,756.75 apparently for goods that were shipped in the container.
- [36] Mr. David Essack testified on behalf of the Defendant.
- [37] Exhibit D1 is a letter dated 26th April, 2000 from Mr. Marco Francis (MF) to Messrs Ronny Barallon and David Essack explaining certain issues regarding their business relationship including the issue of AI Auto Parts and its import quota; the formation of Eagle Auto Parts and offer to sell 33% of shares on the following conditions:
1. The container of tyres will be handed over to me after Eagle Auto Parts pay for duty and freight, as this will be only to the value of SR300,000.00.
 2. The total sum of SR220,000.00 is paid to falcon Enterprise, which comprises of the loan taken plus 30% of the bill of Entry of the container already given to Eagle since March 2000 as per our oral agreement.

3. The second container of spare parts will be given to Eagle on the condition that 30% of the Bill of Entry is paid in advance and duty and freight is paid.
4. Falcon Enterprise borrowed a total sum of SR126,000.00 from David Essack. This sum will be paid.
5. David Essack will have no other claims against Falcon Enterprise or in respect to shares in that company.

I trust that the above agreement will meet to your approval as I feel I am being lenient considering that you would receive over million as your shares.

This proposition is valid only up to the 27th April, 2000.

If you do accept the proposition, kindly call me on my mobile in order to make the necessary documents."

- [38] Exhibit D2 is a letter from Celine Francis to Mr. Ronny Barallon dated 24th April, 2000 inter alia stating that her Company has lent him SR190,000.00 in order to purchase goods. Mr. Barallon has not paid 30% as per bill of entry for goods provided. She requested payment within 5 days.
- [39] Exhibit D3 is an original of Exhibit P6.
- [40] Exhibit D4 is a bundle of 3 Invoices dated 15th in the name of Falcon Enterprise and 2 Invoices 17th February, 2000 for Cash, all totalling Dirhams10,425.00.
- [41] Exhibit D5 is a receipt from Aeroflot dated 5th April, 2000 in the name Eagle Auto Parts for SR5,794.00 being payments of air tickets for Mr. David Essack and Mr. Ronny Barallon Seychelles/Dubai return; a photocopy of Barclays Bank cheque 494203 dated 5th April, 2000 in the sum of SR5,794.00 payable to Ronny Barallon drawn on the account of Eagle Auto Parts; a photocopy of Barclays Bank cheque 494201 dated 4th April, 2000 in the sum of SR5,790.00 payable to Global Connection; and, a photocopy of Barclays Bank cheque 494202 dated 4th April, 2000 in the sum of SR1,000.00 payable to Ronny Barallon drawn on the account of Eagle Auto Parts.

- [42] Exhibit D6 is a Funds Transfer – Debit Advice from Barclays Bank dated 12th April, 2000 advising the debiting the account of of Mr, DS & Mrs AU Essack with the sum of USD4,500.00.
- [43] Exhibit D7 is the registration documents of Eagle Auto Parts (Pty) Ltd registered on 7th February, 2000 with a Nominal capital of SR10,000.00 and Ronny George Barallon holding 50 shares; Mr. Marco Francis holding 33 shares and Mr. David Sunny Essack holding 17 shares.
- [44] Exhibit D8 is a bundle of 7 receipts from Thomas Cook in Dubai the exchange of - USD7470 for Dirhams27,372.50 on 16th February, 2000; French Francs8650.00 on 14th February, 2000 for Dirhams4,740.00; French Francs5,300.00 on 14th February, 2000 for Dirhams2,904.50; USD200 on 14th February, 2000 for Dirhams730.00; USD13,740.00 on 14th February, 2000 for Dirhams50,355.00; Italian Lira900,000.00 on 14th February, 2000 for Dirhams1655.00; and, on 14th February, 2000, USD1,300 for Dirhams4,765.50 totalling to Dirhams92,522.25.
- [45] Exhibit D9 is a receipt dated 15th April, 2000 made out in the name of Al-Zomrah Auto Spare Parts in the sum of Dirhams1,170 as ADV payment – CN1962 – from Inchcape Shipping Services for Maritime & Mercantile International L.L.C. of Dubai. There is also a receipt dated 17th May, 2000 from the same firm in the sum of USD50 being for B/L correction Fee in respect of CN1962.
- [46] Exhibit D10 is a copy of a Supreme Court judgment dated 19th September, 2007 in case CS155/00 between David Essack as Plaintiff and Falcon Enterprise as Defendant, where the Court entered judgment in favour of the Plaintiff as against the Defendant in the sum of SR28,080.00 with interest at the legal and costs.
- [47] Exhibit D11 – the record shows that this number was not allocated to any exhibit.
- [48] Exhibit D12 is a letter dated 29th May, 2000 from Lawyer Mr. France Bonte to Mr. Ronny George Barallon and David Sunny Essack concerning the sale of 33 shares in Eagle Auto Parts – writing on behalf of Mr. Marco Francis informing that his client is prepared to offer

them 33 shares at the price of SR300,000.00. The offer was open for 14 days failing which the shares may be sold to other buyers.

Findings

- [49] Following my meticulous analysis of the evidence adduced I find that the 1st Defendant prior to 1st May, 2000 never acted on behalf of or as agent of the Plaintiff. This allegation is not supported by any evidence.
- [50] Container No DVRV1212985 loaded with automobile spare parts and accessories reached Seychelles on 2nd May, 2000. At all material times it was the 1st Defendant who had in his possession the full set of the original the Bill of Lading pertaining to that container.
- [51] The 1st Defendant was the actual party who purchased the merchandises in the container, inserted the name of the Plaintiff as the consignee on the Bill of Lading and caused the container to be loaded and shipped to Seychelles from Dubai.
- [52] From the time of the shipping of the said container from Dubai up to the time it was due to be cleared from the Port in Seychelles, it was the 1st Defendant who all along had in his personal possession all the original set of the Bill of Lading for the said container.
- [53] After the container arrived in Seychelles, the 1st Defendant went back to Dubai and got the carrier to alter the Bill of Lading by deleting name of the Plaintiff as the shipper and consignee and inserted the name of the Intervenor in its stead.
- [54] According to the 1st Defendant the alteration was regularly obtained as a matter of common practice. The shipper and consignee who holds the complete original set of the Bill of Lading is entitled to possession of the goods and the carrier is under a duty to deliver the same to him.
- [55] Documentary evidence supports the fact that it was the 1st Defendant who actually procured the merchandises in Dubai and placed them in the container and thereafter organized with the carrier to ship the said container to Seychelles. In the process the 1st Defendant obtained and held in his possession the original set of the Bill of Lading. The 1st Defendant had been doing this kind of transactions as part of his usual business over a

considerable period of time. Obviously, he had by then become well known to the carrier who drew up the original set of the Bill of Lading. That explains how and why he easily managed to change the previous Bill of Lading by substituting the name of the Plaintiff with that of the Intervenor.

- [56] Whether or not the Intervenor is now still a legally existing corporate entity, is outside the purview of the pleadings in this suit.
- [57] The Shipping Agent in Seychelles after receiving and exchanging information with shipper in Dubai as revealed by Exhibits P2; P3 and P4, was prepared to release the container in issue to the party who had possession of the original full set of the Bill of Lading issued by the shipper. Such valid Bill of Lading was presented by the 1st Defendant to clear the container on behalf of the Intervenor the name of which appears on that Bill of Lading.
- [58] At no material time was the Plaintiff ever in possession of the original full set of the Bill of Lading and as such was never in a position to be able to clear the container from the Shipping Agent and the Port in Seychelles.
- [59] I believe the 1st Defendant when he averred that there was an arrangement between the parties for the name of the Plaintiff to be used only as a facility for importation, shipment and most importantly to meet the quota purposes. In return the Plaintiff was to earn a commission based on the mark up of the merchandise. However the Plaintiff did not plead such claim.
- [60] The Plaintiff attempted to falsely claim that the 1st Defendant stole documents from the car of its director. I find Exhibit P1 to be a false statement to the Police made in bad faith.
- [61] My analysis of Exhibits P10; D4; D5; D6; D8 and D9 leads me to the conclusion that the Plaintiff did not make any financial contributions at all towards the purchases of the merchandises contained in that container.
- [62] The 1st Defendant was the original party and consignor who shipped the container in the name of the Plaintiff and who held the Bill of Lading throughout. He thereafter caused the shipper to alter that to another party.

[63] For reasons set out above, I find that the 1st Defendant did not commit any fault in law and as such is not liable to the Plaintiff for any loss or damage.

Conclusions

[64] In the final analysis, I conclude and find that the container and its contents were not imported by the Plaintiff from Dubai. It was 1st Defendant who went to Dubai to purchase the goods that were in the container. There is no evidence that the Plaintiff gave him any money to make such purchases. There is also no evidence to support the fact the 1st Defendant was ever an agent of or was acting on behalf of the Plaintiff. The container and its contents were initially consigned in the name of the Plaintiff as directed by 1st Defendant for convenience purposes in order to meet import requirement in Seychelles with respect to import quota.

[65] The 1st Defendant at all material times had possession of the full set of the Bill of Lading in respect of the container in issue because he purchased the goods contained therein and also shipped it to Seychelles. The 1st Defendant thereafter replaced the Plaintiff and substituted that of the Intervenor, as the consignee, again for the same reason regarding import quota.

[66] The alteration of the name of the consignee was not unlawful as the container and its contents belonged to 1st Defendant who put the name of the Plaintiff as the consignee in the first place. If he thereafter changed it and put it onto another name that was his choice provided he did not breach any shipping law. There is no evidence that 1st Defendant acted in breach of any shipping law and practice. I find that the 1st Defendant did not unlawfully interfere with the Plaintiff's proprietary rights in the container and its contents.

[67] When the 1st Defendant was testifying he admitted that the Plaintiff was to receive a wholesale mark-up as commission for allowing him to use its name for the purpose of consigning the container in view of the import quota. The Plaintiff agreed for the 1st Defendant to do so but the 1st Defendant thereafter dispensed with the name of the Plaintiff as consignee. This issue is, however, outside the pleadings since the Plaintiff did not pray for such relief.

[68] In any event, the transaction had not gone through as originally planned and as such the Plaintiff cannot now receive any commission for that purpose.

[69] Both the 1st and 2nd Defendant averred that the container effectively belonged to the Intervenor. The Plaintiff did not raise any issue with this averment in his pleadings obviously because it is claiming that the container and its contents belonged to the Plaintiff. Having found otherwise, I believe that the container do now indeed belong to the Intervenor.

[70] This Court is not oblivious of the fact that the container in issue has been lying at the Port since May 2000 and the merchandisable value of its contents is doubtful. Certain spare parts become obsolete with the passage of time and others may have been deteriorated due to rust and/or by its very nature.

Plaintiffs' Prayers

[71] By an amended Plaint entered on 7th June, 2004 the Plaintiff prayed this Court to:

- (a) make an order that container No. DVRV1212985 together with its content belongs solely to the Plaintiff as consignee and that it should be released to it;
- (b) order the Defendants jointly and severally to pay Plaintiff the sum of SR374,000.00 plus the continuing storage costs;
- (c) make any other order which may seem just and fit in the circumstances of the case;
- (d) all with costs and interests at the commercial rate of ten percent per annum commencing from 2nd May 2000.

Judgment and Orders

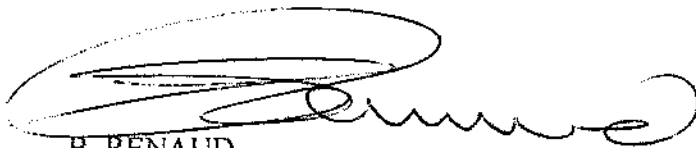
[72] Based on the findings and conclusions set out above, I hereby enter final judgment by making the following orders:

- (a) I dismissed the claim and prayers of the Plaintiff.

- (b) I declare that the that container DVRV1212985 together with its content belong solely to the Intervenor, Eagle Auto Parts (Pty) Ltd;
- (c) I hereby order that the said container be accordingly released to the Intervenor.
- (d) I award costs to the Defendants.

[73] I order accordingly.

Signed, dated and delivered at Ile du Port on 7 October 2016

A handwritten signature in black ink, appearing to read 'B. Renaud', written over a horizontal line. The signature is fluid and cursive.

B. RENAUD
Judge of the Supreme Court