AIR FRANCE *v* MWASE IMPORT & EXPORT COMPANY LIMITED

Supreme Court
Ngulube, CJ, Muzyamba, Chibesakunda, JJS
8th February and 6th April, 2000
(SCZ Judgment No. 10 of 2000.)

Flynote

Contract – Airway bill – contents – effects of.

Headnote

The respondent wished to participate in an international trade exhibition which was to take place in Munich, Germany, from 26th November, to 4th December, 1994. The respondent had handicrafts to exhibit with the view of selling them during or after the show. The respondent claimed that it was made known to the appellant that the cargo was required for the international exhibition. In the event the goods arrived late for the show. The respondent launched proceedings in the High Court claiming damages and loss on an indemnity basis of the entire costs of the cargo and other expenses and loss of profit in respect of the allegedly delayed arrival of the goods.

The learned trial judge entered judgment for the respondent for negligence based on res ipsa loquitur. The appellant appealed.

Held:

(i) It is the untransferrable duty of a consignor to make out the airway bill and it is up to the consignor to enter into the airway bill the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon.

(ii) The airway bill is evidence of the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage.

(iii) Any action for damages, however, founded, can only be brought subject to the conditions and limits set out in the Air Services Act Cap 416 and the carriage by Air Act Cap 447.

(iv) There was in fact no schedule date on the airway bill and the alleged delay was unsupported.

Legislation referred to:

1. Air Services Act Cap 446.
2. Carriage by Air Act Cap 447.

Cases referred to:

1. *Donoghue* v *Stevenson* [1932] AC 562.
2. *Lyons Brooke Bond* v *Zamtan Road Services* (1977) Z.R 317.

C.A.J. Njovu, of Solly Patel Hamir & Lawrence for the appellant.

D. Ng'ambi (Mrs), of Nyankhata Chambers for the respondent.

Judgment

NGULUBE, CJ, delivered the judgment of the court.

For convenience we will refer to the appellant as the carrier and to the respondent as the consignor. The consignor wished to participate in an international trade exhibition which was to take place in Munich, Germany, from 26th November, to 4th December 1994. The consignor had handicrafts or Curios to go and exhibit with a hope of selling them during or after the show.

On behalf of the consignor, PW1 approached Hill and Delamain, Forwarding and Clearing agents and there saw PW2. This was on 23rd November 1994. PW1 claimed that he had informed PW2 that the goods were required to arrive in Germany the very next day or otherwise in time for the exhibition. PW2, who completed the necessary airway bill on behalf of the consignor, denied this and testified that he was not informed about any such urgency nor the actual dates of the exhibition so as to have otherwise booked the cargo on specific flights or on an express basis; instead, he was instructed to send the cargo on a "FIRAV"- "first available flight"- basis which inherently negated the sense of urgency contended for by the consignor. According to PW2, the cargo sent on a FIRAV basis would take seven to ten days. The consignor launched proceedings in the High Court claiming damages and loss on an indemnity basis of the entire cost of the cargo and other expenses and loss of profit in respect of the allegedly delayed arrival of the goods which got to Munich late for the show. The consignor and his agents in Germany – the consignee on the airway bill – refused to take delivery despite the arrival of the cargo within the period of seven to ten days envisaged by the consignor's agents through PW2.

The action was framed as one in negligence. The pleading in the statement of claim was unusual: There was one substantial averment which stated that at the time when the handicrafts were handed over to the carrier it was made known to them that the same were required for an international exhibition which would take place in Munich from 26th November to 4th December 1994, an allegation denied by the carriers who asserted that the consignor's agents – Hill and Delamain – had booked the cargo as ordinary cargo being sent on the basis of FIRAV terms. Of the particulars of negligence pleaded, only one came close to being such a particular, namely, the averment that the goods were by the airway bill to have arrived in Munich on the 26th of November 1994, an averment not borne out by the airway bill itself. The other *"particulars of negligence"* consisted of an averment that the carriers could have sent the goods in time since they had regular flights out of Lusaka; that the plaintiff was to have exhibited and sold the goods at the show; and that the consignor and the organizers of the show made unsuccessful attempts to get the goods to arrive during the period of the show. These were clearly not manifestations of the carrier's negligence. Finally, at the trial, the consignors relied on the doctrine of res ipsa loquitur which arises when a specific negligent cause cannot be assigned and the complainant relies on an inference of negligence to be drawn from the thing speaking for itself because the occurrence complained of would ordinarily not have taken place in the normal course and it cannot be explained on any other hypothesis.

The learned trial judge entered judgment for the consignor for damages for negligence based on res ipsa loquitur, such damages to be assessed by a Deputy Registrar. The Air Services Act, CAP. 446, which has excerpts of the Warsaw Convention in a schedule applicable to the transaction was mentioned but not heeded. Unmentioned altogether was the Carriage by Air Act, CAP. 447 which sets out in even greater detail the terms of the Warsaw Convention and related protocols and later conventions for the international carriage of passengers, baggage and cargo by air, which conventions have the force of statute law in Zambia, having been domesticated inter alia, under the two chapters of the Laws of Zambia mentioned. On the evidence before him, the learned trial judge was of the opinion that the carrier should have appreciated and realized that the consignment which was being sent to Munich was a business deal requiring a sense of urgency. The learned trial judge considered that a sense of urgency had to be inferred in spite of the evidence of PW2 that the airway bill – the sole document which evidenced the contract of carriage – gave no time for performance other than Firav – first available flight. The learned judge reasoned that the carriers had breached their duty of care within the principles discussed in the classic authority of *Donoghue* v *Stevenson* (1) because:-

"the need for business sense required of a transporter to ensure that the goods were expeditiously dispatched despite the shortness of time and that no urgency was indicated."

As Counsel for the carrier was to point out when the case came on appeal before us, no reason was stated for this finding and assumption which flew in the teeth of PW2's evidence that no urgency was expressly stated and this was a last minute shipment of goods to go on the first available flight and which was expected to reach its destination in the normal course in seven to ten days time, which it did by arriving on 2nd December 1994. The learned trial judge went round the evidence of PW2 by finding him to have been an agent of the carrier: This was contrary to the pleadings by both parties and above all contrary to the law. In the latter connection, we draw attention to the law as set out in the Carriage by Air Act, CAP. 447, Article 6 in the First Schedule under which it is the un transferable duty of the consignor to make out the airway bill. The ground of appeal against the finding that Hill and Delamain were agents for the carrier in the preparation of the airway bill had merit given also that the learned trial judge was not at liberty to ignore the pleadings and the evidence which was common cause. The learned trial judge expressed the opinion that the carrier had to apply *"due diligence in a commercial sense to ensure that the items arrived on time"*; that it was the carrier's duty to ensure that the *"cargo arrived as quickly as possible"*; reasoning that FIRAV conditions had *"to conform to what a reasonable business cargo enterprise could do"* so that *"first available flight"*could not mean "any available flight any time". He was satisfied that there was no explanation for the "delay" and as the carriers were presumably aware of the urgency attached and the need for the goods to catch the exhibition, res ipsa loquitur could be invoked so that the carrier was in breach of its duty to take care *"to ensure expeditious, prompt and safe arrival of the consignment"* in Munich. In the volume of Chitty on Contracts *"Specific Contracts"*, 26th edition, the learned authors very correctly observe in para 3041 – in relation to the Warsaw Convention on carriage by air – that …

"the rules of the common law are of minimal importance in the law of carriage by air, whether of passengers, baggage or cargo; for international carriage is regulated by international conventions which have been given statutory force …"

The Warsaw Convention of 1929 was drafted in order to remove inconsistencies between the national laws of the different countries and to strike a fairer balance than might otherwise have been the case between carriers and passengers and owners of cargo in respect of their mutual rights and liabilities". In the case of Zambia, the two Acts already mentioned are

among the local statutes which have decreed that the Warsaw Convention and related later amendments and supplements have the force of statute law. It follows that litigation cannot be conducted in disregard or so as not to take into account the provisions of the Convention. Accordingly, it was not admissible for the court below to speculate whether the consignor might have informed the carrier of the need to deliver the goods to Munich by a certain date since by Article 8 (p) of the Warsaw Convention (see first schedule CAP. 447) it was up to the consignor to enter onto the airway bill

"the time fixed for the completion of the carriage and a brief note of the route to be followed, if these matters have been agreed upon."

The airway bill is evidence of "the conclusion of the contract, of the receipt of the cargo and of the conditions of carriage"- see Article 11. It is clear that the carrier was on firm ground below and here in resisting attempts by the consignor to infer terms into the contract or to suggest what may or may not have been intimated verbally – as suggested by the learned trial judge. By the terms of Article 24 of the Warsaw Convention, "any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention" and this is stipulated in specific reference to cases covered by Article 18 (in the event of destruction or loss) and Article 19 (damage occasioned by delay in the carriage of, among other things, cargo).

Mrs Ng'ambi on behalf of the consignor submitted that the carrier was asked to transport the goods within twenty – four hours and agreed to do so. She was not able to show support for this submission beyond the bold assertion of PW1 who was contradicted by PW2, the very person he had approached when engaging the forwarding agents for the consignor. Mrs Ng'ambi further sought to support the findings and conclusions below on the basis that the consignor had received no explanation from the carrier as to the whereabouts of the goods in the interval between their dispatch and their arrival and further repeated the consignor's bold assertion that the goods did not arrive on the scheduled date. There was in fact no scheduled date on the airway bill and the alleged delay was unsupported. Mrs Ng'ambi cited the case of *Lyons Brooke Bond* v *Zamtan Road Services* (2) to support a finding of liability in favour of the consignor. There can in fact be no support and no joy for the consignor from that case. That case concerned a common carrier of goods by road whose truck overturned, destroying the plaintiff's consignment of tea. The High Court among other things discussed the absolute liability of such a common carrier. The Warsaw Convention had no application in that case; but it has here, both as to questions of liability and the measure of damages which would not have included the cavalier rejection of the curios. There was no suggestion whatsoever in the case at hand that the handicrafts had either been damaged or destroyed during the carriage. The allegation was simply one of delay. learned Counsel for the consignor further indicated that she was relying on Article 7 in the second schedule to the Air Services Act, CAP. 446. Article 7 (1) is self-explanatory and reads in the relevant part:-

"Schedules are subject to change without notice. Subject to special agreement carrier does not undertake to carry the shipment on a particular aircraft or over a particular route or by a particular flight nor to make connections according to a particular schedule …"

There was in this case no *"special agreement"* reflected in the airway bill and accordingly no basis for attaching to the carrier an obligation which was never undertaken and of which the Article relieves them.

The truth is that there was no viable answer to the challenge mounted by the appellants in their grounds of appeal, heads of argument and submissions. The judgment below flew in the teeth of the written contract as reflected in the airway bill; in the teeth of the evidence;

and in the teeth of the law as set out in the conventions which have the force of statutory law. We allow the appeal; reverse the learned judge below; and enter judgment for the carrier, the defendant in the action, with costs both here and below to be taxed if not agreed.

Appeal allowed