

# **FREIGHT AFRICA BVBA v. BONUS ENTERPRISES Ltd**

[Rwanda SUPREME COURT – RCOMA0031/13/CS (Mutashya, P.J., Munyangeri and Gakwaya, J.) July 31, 2015]

*Law determining the jurisdiction of courts – A forum selection clause – It is the courts referred to in forum selection clause which are competent to settle the matters emanating from implementation of that contract – Law N°45/2011 of 25/11/2011 governing contracts, articles 64 and 113 – Law of 19/1/1920 relating to agent in trade and transport, articles 10 and 11 – Law N°42/1988 of 27/10/1988 instituting the preliminary title and the civil code Book I relating to persons and family law, article 14(2).*

*Damages – Procedural and advocate fees – The defendant must be awarded those fees but in the discretion of the court – Law of 30/07/1888 governing contracts or obligations, article 258.*

**Facts:** BONUS ENTERPRISES Ltd filed a case against FREIGHT AFRICA BVBA in the Commercial High Court requesting to order it to pay its damaged goods based on the transport contract concluded between them and requesting for the refund of the transportation fees paid, as well as to award it different damages. ARICA FREIGHT SERVICES Ltd also was forced to intervene into this case. The Court ordered FEIGHT AFRICA BVBA and ARICA FREIGHT SERVICES Ltd to jointly pay BONUS ENTERPRISES Ltd damages equivalent to 29,330,752Frw.

FREIGHT AFRICA BVBA appealed to the Supreme Court stating that the Commercial High Court was not competent to hear the case grounding on the contract concluded between them which provide that it is the Courts in Envers, Belgium, which are competent to settle the matters. AFRICA FREIGHT SERVICES Ltd also appealed submitting that Rwandan Courts are not competent to hear the case based on the principle that civil laws are suppletive to the contract entered into by parties.

BONUS ENTERPRISES Ltd responded that the Commercial High Court was competent because both damage and accident occurred in Rwanda. Additionally, BONUS ENTERPRISE Ltd submitted, the fact that the Commercial High Court is located at the place where the contract was supposed to be executed indicates that the Commercial High Court infringed no law. BONUS ENTERPRISES Ltd filed cross appeal requesting the Court to order AFRICA FREIGHT BVBA to pay damages and procedural and advocate fees.

**Held:** 1. It is Courts agreed upon in the contract which are competent to settle matters emanating from its execution. Thus, the Commercial High Court was not competent to hear this case while the parties to the transport contract had agreed that any prospective matter or dispute would fall in the jurisdiction of Courts in Antwerp (Envers). Therefore, the rendered judgment must be overturned.

2. Procedural and advocate fees should be awarded to the defendant but they are determined in the discretion of the court as those requested are excessive.

**Appeal has merit.  
The judgement is quashed.  
Court fees to the plaintiff.**

**Statutes and statutory instruments referred to:**

Law N°45/2011 of 25/11/2011 governing contracts, articles 64 and 113.

Law of 19/1/1920 relating to mandate in commerce and transporters, articles 10 and 11.

Law N°42/1988 of 27/10/1988 instituting the preliminary title and the civil code Book I relating to persons and family law, article 14(2).

Law of 30/07/1888 Governing Contracts or obligations, article 258.

**No case is referred to.**

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] The case commenced in the commercial High Court, Bonus Enterprise Ltd suing Freight Africa Bvba requesting the Court to order it to pay for the destroyed goods during the transportation, the refund of transportation fees and different damages. Africa Freight Services Ltd was forced to intervene.

[2] In its decision dated 21/01/2013, the Court ordered Freight Africa Bvba and Africa Freight Services Ltd to jointly pay to Bonus Enterprise Ltd 29,330,752Frw and 9,750Frw for the Court fees.

[3] Freight Africa Bvba appealed to the Supreme Court, submitting that consideration made of the contract it entered into with Bonus Enterprise Ltd; the Commercial High Court was not competent to hear the case.

[4] Africa Freight Services Ltd also appealed alleging that according to the principle according to which the private laws are suppletive to contracts concluded by the parties, Rwandan Courts are not competent to hear that case. Africa Freight Services Ltd insisted further that it was brought in a case in which it is not involved while the Court had already decided on this issue on 21/9/2012. It added that the Commercial High Court confused the Managing Director of Africa Freight Services Ltd with company under his management.

[5] Bonus Enterprise Ltd filed a cross appeal requesting the Court to order Freight Africa Bvba and Africa Freight Services Ltd to pay it pecuniary damages, procedural and the advocate fees.

[6] The case was heard in public on 9/6/2015, Freight Africa Bvba represented by Counsel Nzamwita Toy, Africa Freight Services Ltd represented by Idahemuka Tharcise, the counsel while Bonus Enterprise Ltd was represented by Ingabire Joséline, the counsel and Bugingo Jean-Bosco, the counsel.

### **II. ANALYSIS OF LEGAL ISSUES**

#### **a. Whether the Commercial High Court was competent to hear this case.**

[7] Nzamwita Toy, the counsel, states that the Commercial High Court had no competence to hear the case based on the contract signed between Freight Africa Bvba and Bonus Enterprise Ltd because they had agreed that the courts of "Anvers" in Belgium are the ones with this competence. He submits that this position is emphasized by the decision of the

Supreme Court in the case RCOMA0038/09/CS decided on 19/02/2010, where it ruled that “Cases regarding commercial companies and other non-government organizations with legal personality are heard by the court in the jurisdiction of its headquarters or where the object of the claim is located, unless it was provided otherwise in the contract by the parties in a conflict”.

[8] Idahemuka Tharcisse, the counsel, submits that Bonus Enterprises Ltd and Freight Africa Bvba had agreed upon competent court to hear the case for prospective disputes and based on article 64 of the Law N°45/2011 of 25/11/2011 governing contracts, it is clear that they agreed on a clause which stands as a provision of the law that must be respected by either party.

[9] Idahemuka Tharcisse, the counsel, goes on stating that article 121(1) of Organic Law N°51/2008 of 09/09/2008 determining the organisation, functioning and jurisdiction of Courts provides that unless the law provides otherwise, the Court situated where the defendant ordinarily resides shall have jurisdiction and also article 125 of that Law provides that “If there is a place chosen for the execution of a deed, any related action shall be brought before the Court situated in the place”, therefore, to him, the fact that they agreed that in case of a conflict the competent court will be at the headquarters of Freight Africa Bvba, implies that the law must be respected.

[10] Counsel Idahemuka Tharcisse concluded that based on article 89 of Law N°21/2012 of 14/6/2012 relating to the civil, commercial, labour and administrative procedures and several case laws, whereby in their different position they decided that Rwandan courts are not competent to contradict contracts whereby parties elected competent courts; it is the Court of First Instance of Antwerp (Tribunal de Première Instance d’Anvers) which is competent to hear the case.

[11] Ingabire Joséline and Bugingo Jean-Bosco, counsels for Bonus Enterprise Ltd replied that Commercial High Court is competent because the damage or the accident occurred in Rwanda. They continued requesting the court to examine whether the clause of the contract signed by both parties relating forum selection clause “clause de jurisdiction” replaces the Rwandan Laws. They concluded that, the fact that the Commercial High Court is situated in the territorial jurisdiction where the contract was concluded and even was supposed to be executed, and based on article 124 of the Organic Law N°51/2008 of 9/9/2008 mentioned above, they find therefore that the Court which decided the case did not violate any Law.

## **THE VIEW OF THE COURT**

[12] Article 64 of the Law N°45/2011 of 25/11/2011 governing contracts provides that “contracts made in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith”.

[13] Article 113, paragraph 1 of the Law N°45/2011 of 25/11/2011 mentioned above provides that “contracts shall have effect only on contracting parties. They shall not cause any prejudice to a third party and shall only benefit to him/her in case of provisions in favour of a third party”.

[14] Article 10 Law of 19/1/1920 relating to mandate in commerce and transporters provides that “transport contract is proved by all sort of evidence provided for by the law, especially like those relating to the commodities using the bill of lading”.

[15] Article 11, paragraph 2 of the Law of 19/1/1920 mentioned above provides that “the bill of lading is drafted in two copies, one of them for the exporter with the transporter’s signature, while the other is given to the transporter, bearing the signature of the exporter of the commodities”.

[16] Article 14, paragraph 2 of the Law N°42/1988 of 27/10/1988 instituting the preliminary title and Civil Code, Book I relating to persons and family law provides that “unless otherwise agreed by the parties, contracts are governed as to their substance, their effects and their evidence, by the law of the place where they are concluded”.

[17] The Supreme Court finds the transport contract (bill of lading *ou le connaissement*)<sup>1</sup> N°RWA3993 of 5/12/2009 under dispute was concluded between Freight Africa NV, the consignor and Elleci Service & Leuenberger + C & Cartiera Galliera, the carrier and Bonus Entreprise Ltd is also involved as consignee.

[18] The Supreme Court finds that this contract provides that the parties agreed that this transport would be guaranteed by the owner of the commodities, that he is governed by the Belgian Law, and that in case of any conflict or disagreement of any kind, all this will be in the competence of Antwerp (Anvers) courts.

[19] The Supreme Court finds that though the bill lading (le connaissement ou la lettre de chargement) is involved to put in execution the transport contract, it may mislead that this contract was only between the consignor and the carrier while actually, when the consignor concludes a contract with the carrier, it is concluded in the interests (au profit) of the consignee (destinataire) because he/she is the beneficiary<sup>2</sup>.

[20] The Supreme Court finds further that as long as it is clear in the bill of lading that the consignee (destinataire) is the one who requested this contract to be concluded (donneur d’ordre), it should be understood that he/she is a party to it, and that the consignor did it in the name of the consignee. Additionally, the fact that the name of the consignee is identified on the bill of lading; this is sufficient enough to justify that he/she committed to the obligation of respecting the transport contract<sup>3</sup>.

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<sup>1</sup> “Le connaissement (en anglais bill of lading: bon de chargement, de fret, abrégé/L) est le document matérialisant le contrat de transport maritime conclu entre le chargeur et le transporteur maritime”, in le connaissement, <https://fr.wikipedia.org/wiki/connaissement>, consulté le 20/7/2015.

<sup>2</sup> “Le destinataire rentre en ligne de compte (comme partie à un contrat auquel il apparaît qu’il ne lui a pas été donné possibilité de manifester sa volonté) dans le cadre du contrat de transport en vertu de la stipulation pour autrui”, Rwankubito Prudence, Droit du transport, printer Set, Kigali, 1993, p.41. “Les auteurs proposent deux explications pour justifier cette association du destinataire à un contrat à la formation duquel il n’a pas directement pris part. Une partie de la doctrine retient l’opération juridique de la stipulation pour autrui pour expliquer cette association. L’expéditeur, estime-t-on, aurait stipulé du transporteur en faveur du destinataire. D’autres auteurs, au contraire, préfèrent reconnaître que le contrat de transport est un contrat tripartite. **Quelle que soit la théorie juridique à laquelle l’on adhère, il ne fait plus de nos jours de doute que le contrat peut être invoqué par le destinataire aussi bien que par l’expéditeur et opposé par le transporteur, aussi bien à l’un qu’à l’autre**”, Alain COMLAN, Traité de droit commercial congolais, Nouvelles Editions Africaines, Paris, 1972.

<sup>3</sup> “Si le donneur d’ordre n’est pas l’expéditeur réel, celui-ci doit être considéré comme ayant agi au nom de celui-là et avoir pris des engagements vis-à-vis du transporteur par l’indication de son nom sur la lettre de chargement. Mais si le donneur d’ordre s’est indiqué sur la lettre de chargement, le chargeur réel n’est alors que

[21] Regarding article in the contract indicating the competent courts to hear the case with regard to the prospective conflicts in its execution, the Supreme Court finds that, based on the holdings above, it is clear that Bonus Enterprises Ltd (destinataire et donneur d'ordre) is a party to the transport contract because it has the obligation to respect it, and both the carrier and the consignor (Freight Africa NV: expéditeur) also have the obligation to respect it. That article of the contract attributes to courts the competence to hear the case between parties to the contract (clause attributive de compétence). Thus, he/she cannot ignore it because he/she is also responsible and has to respect it.

[22] Based on articles of the Laws mentioned above and the explanations given, the Supreme Court finds that Rwandan courts lack jurisdiction to hear this case, thus as indicated in the bill of lading involved in the transport contract, only the Courts of Antwerp (Anvers) are competent to hear it.

[23] For those reasons, the Supreme Court finds that appeal filed by Freight Africa BVBA (now NV) and that of Africa Freight Services Ltd have merit. Thus, the Commercial High Court had no competence to hear this case, therefore the judgment it rendered should be quashed.

**b. Whether Africa Freight Services Ltd must be awarded damages requested for.**

[24] Idahemuka Tharcisse, counsel, states that Africa Freight Services Ltd requests the court to order Bonus Enterprises Ltd to pay 3,500,000Frw for the procedural and advocate fees.

## **THE VIEW OF THE COURT**

[25] Article 258 of the Civil Code Book III provides that “any act of man, which causes damage to another obliges the person by whose fault it happened to repair it”.

[26] Regarding the procedural and the advocate fees requested by Africa Freight Services Ltd, though Bonus Enterprises Ltd remains silent about it, the Supreme Court finds that it should be awarded, but because the 3,500,000Frw requested is excessive, in its discretion, the Court awards 800,000Frw.

## **III. THE DECISION OF THE COURT**

[27] Decides that the appeal filed by Freight Africa BVBA (now NV) and Africa Freight Services Ltd has merit.

[28] Quashes the judgment RCOM0038/12/HCC decided by the Commercial High Court.

[29] Orders Bonus Enterprises Ltd to pay Africa Freight Services Ltd 800,000Frw for procedural and advocate fees.

[30] Orders Bonus Enterprises Ltd to pay court fees equal to 100,000Frw.

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l'agent d'exécution de l'expédition au nom et pour compte de l'expéditeur qui est en même temps donneur d'ordre, Rwankubito Prudence, op.cit., p.43.