

NDIGELA v. ATA

[Rwanda SUPREME COURT – RCOMA 0054/10/CS (Mugenzi, P.J., Mukamulisa and Rugabirwa, J.) 18 March 2011]

Civil procedure – Security deposits furnished by a foreigner – No East African Community company can be requested to pay security deposits furnished by foreigners because it is considered on the same level as Rwandan companies by the law – Law n° 14/2010 of 07/05/2010 amending and completing Law n° 07/2009 of 27/04/2009 relating to companies, article 12 – Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as amended to date, article 81.

Transport law – Contracts – Difference between carriage contract and lease contract of the vehicle – It is considered as lease contract of vehicle when the owner is not the one who remains in control of the vehicle after lease – If the vehicle was leased with his driver and the latter continues to be under control of the owner of the car, it is considered as carriage contract.

Contracts or obligations Law – Damages – Compensation request for the loss incurred – Applicant for damages may alternate to request the Court to hold civilly liable the employers for the damages resulting from their employees when they were executing the duties they assigned to them instead of requesting them basing on criminal liability – Law of 30/07/1888 relating to contracts or obligations, article 260.

Facts: ATA entered into a carriage contract with NDIGELA & Co related to the transportation of goods from Isaka to Goma (RDC). ATA sued NDIGELA & Co before the Commercial High Court stating that it breached their carriage contract because when the vehicles arrived at Gisenyi, their drivers sold the maize they were transporting. The Commercial High Court decided that the claim of ATA has merit and ordered to NDIGELA & Co to pay the money equivalent to the stolen maize along with the advance payment given to NDIGELA & Co and advocate fees.

NDIGELA & Co appealed to the Supreme Court arguing that ATA's claim would have been inadmissible unless it paid security court fees furnished by foreigners who file a case in Court and states that it should not be liable for the fault committed by drivers who sold the goods they were transporting but rather they are the ones who must pay because they have been convicted and accepted to pay.

On these points, ATA replies that the East African Community companies are considered as Rwandan companies. Thus, no security deposits furnished by foreigner should be paid. In addition, it states that NDIGELA & Co is the one that must pay damages because the drivers who stole the goods were its employees and that it had an obligation to deliver the goods to the convened destination.

Held: 1. The fact that ATA is a company from a member state of the East African Community and that Rwandan laws consider it as the Rwandan company, it must not prior pay security deposits furnished by foreigner to file a claim in Court.

2. When the owner of the leased car is not in its control, it is the lease contract of a vehicle, while in case the businessman gives in rent his car and provides a driver who remains under his supervision; that is carriage contract. Therefore the contract between NDIGELA &CO and ATA is of carriage because it does not show where the contract provides that ATA will seek its own drivers and it does not show that the drivers who stole goods they were transporting were not its employees. For that reason, NDIGELA &CO is liable for the drivers' failure to deliver the carried goods because it was within its duty.

3. Employers are liable for damages caused by their servants in the function they have employed. Nothing can prevent ATA the alternative to request the Court to hold NDIGELA &CO civilly liable as employer of the drivers who caused him prejudice instead of basing on criminal liability.

Appeal lacks merit.

Cross appeal has merit.

NDIGELA&CO ordered to pay to ATA various damages.

Court fees to the appellant.

Statutes and statutory instruments referred to:

Law n° 14/2010 of 07/05/2010 amending and completing Law n°07/2009 of 27/04/2009 relating to companies, article 12.

Law n°18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as amended to date, article 81.

Law of 30/07/1888 relating to contracts or obligations, article 260.

No case referred to.

Authors Cited:

François COLLART DUTILLEUL et Philippe DELEBECQUE, Contrats civils et commerciaux, 7^e édition, Paris, Dalloz, 2004, p. 698.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Company ALLIED TRANSPORT AGENT (ATA) was successful bidder of a tender of "World Food Programme" (WFP) of 65,000.00 USD related to carriage of goods from Tanzania to Goma (RDC). As ATA did not own vehicles, it entered into a carriage contract with a company called NDIGELA & Co to carry maize from Isaka to Goma. It rented two trucks from NDIGELA for 11,000.00 USD, with an advance payment of 5,000.00 USD.

[2] ATA states that when the vehicles had arrived at Gisenyi, the drivers sold the carried maize. This led ATA to file a claim against NDIGELA for breach of their carriage contract which caused a loss.

[3] After deciding that ATA's claim had merit, the Commercial High Court, ordered NDIGELA to pay 32,214.10 USD deducted by WFP equal to 61 tons of maize sold by his drivers, plus 5,000.00 USD of the advance payment NDIGELA was given as well as 1,000.00 for advocate fees.

[4] In appeal before the Supreme Court, Counsel for NDIGELA states that ATA's claim is inadmissible for failure to pay the security deposits furnished by foreigners who file claims. He/She also declares that NDIGELA should not be liable for the fault committed by its drivers who sold the carried goods because they were recruited by ATA pursuant to the carriage contract held between ATA and NDIGELA. In addition, the persons who sold the maize accept that they should pay for the loss themselves because they are found guilty in their criminal case and they signed a document admitting to pay.

[5] The judgment was held in public on February 17, 2011. NDIGELA & Co was represented by the Counsel, Gumisiriza Hilary, and ALLIED TRANSPORT AGENT was represented by the Counsel, Ndutiye Yussuf.

II. ANALYSIS OF LEGAL ISSUES

Regarding NDIGELA's claim that ATA should have deposited security as a foreigner plaintiff

[6] NDIGELA states that the Commercial High Court should not have admitted ATA's claim since it is a foreigner company and did not deposit the security required for foreigners.

[7] As stated by the counsel for ATA and explained by the Commercial High Court, article 81 of law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as amended to date, provides that if the defendant so requires, any foreigner who files a case to Court must deposit an amount of security, unless there are agreements by which foreign States entered with Rwanda exempting their nationals from depositing such a security.

[8] NDIGELA explains that, besides the contract's legal provision, there is the Law n° 14/2010 of 07/05/2010 amending and completing the Law n° 07/2009 of 27/04/2009 relating to companies which provides in article 12 that companies originating from East African Community member States are considered on the same level as Rwandan companies by the Law. Therefore, NDIGELA's appeal is without merit, since it does not contest that ATA, a Tanzanian company falls under this law. Whether the contract between NDIGELA and ATA was a carriage contract or a rent of vehicle contract.

[9] NDIGELA argues that the Commercial High Court disregarded the contract it concluded with ATA to provide it with vehicles for which ATA would personally recruit drivers. Thus NDIGELA confirms it should not be liable for consequences of the carriage contract it did not conclude with it.

[10] On this point, ATA responds that NDIGELA's argument that they agreed ATA would recruit the drivers is false. ATA confirms they made carriage contract that NDIGELA was required to perform with its own vehicles and drivers.

[11] In the contract between NDIGELA and ATA, there is no provision stating that ATA is responsible to recruit drivers itself as claimed by NDIGELA and the latter failed to prove this argument. The Court finds that since NDIGELA failed to prove that the drivers who stole the goods were not its employees, it is confirmed they were. NDIGELA had authority over them since this was a carriage contract rather than a vehicle rent contract.

[12] This explanation is in accord with the confirmation from the law scholars, where they explain that when a businessman has no power over the provided vehicle, he should not be called a carrier but rather a lesser of that vehicle. This is different from the case when the cargo vehicle is leased with its driver under control of the lessor, since it is in this instance that the agreement is considered that of carriage.¹

[13] The fact that the contract concluded by NDIGELA with ATA is of carriage, as explained above, indicates that the carrier NDIGELA shall be liable for failure to deliver the goods to their destination because it was its duty as provided for by article 16 and 18 of the law of January 19, 1920 related to commercial agents and carriers².

Whether or not ATA did not seek of refund from the drivers who diverted the goods and their purchasers who were identified.

[14] NDIGELA says that even if the drivers who stole the goods were its employees, it should not be held liable because the responsible persons are known and the criminal responsibility is personal, and the receiver of stolen goods were criminally punished and accepted to pay.

[15] On that issue, ATA claims that NDIGELA should indemnify it because the drivers who stole the goods were its employees and that it had an obligation to deliver the goods to their destination, while on the issue of seeking the payment of damages basing on the contract rather than on a criminal case, ATA states that it is an option recognised to it by the law.

[16] The Court finds that NDIGELA shall not rely on the principle of personal criminal liability while it was not prosecuted for the offense committed by third parties, rather, the its liability resulting from the acts of its drivers should rely on article 260 of the civil code Book III which provides for the civil liability of the employer resulting from the acts of his employee, and from the nature of the carriage contract as mentioned above. to the acts committed by his employees³.

¹Lorsque l'entrepreneur n'a pas la maîtrise du déplacement du véhicule qu'il fournit, il ne mérite pas la qualité de transporteur : il est un simple bailleur ou plus exactement un fréteur engagé dans un contrat d'affrètement avec un chauffeur. Cependant, si l'engin de transport est loué avec son conducteur, les solutions sont différentes : le contrat doit être requalifié de location en transport, dès l'instant que le conducteur est resté sous les ordres du prétendu bailleur", François COLLART DUTILLEUL et Philippe DELEBECQUE, Contrats civils et commerciaux, 7^e édition, Paris, Dalloz, 2004, p. 698.

²The article 16 provides that « Except case of will of God and force majeure, the carrier is responsible for the persons or goods as agreed, when there is not limited period he shall respect the norm of the area...», while article 18 provides that the carrier is liable for the damaged or the lost or the accident shall occur to its persons transported when it didn't justify that the damage, the lost or accident was for external reason which it shall be prosecuted".

³ That article provides that the person is not responsible for damages caused by his own acts but rather is responsible for damages caused by his servants in the function they have employed.

[17] On the claim that ATA failed to seek the compensation from the convicted who admit it, is not also the ground which can exonerate the liability on payment of damages to the carrier who had the duty to deliver goods to their destination, since ATA which should receive goods at the agreed destination, had the option to seek the payment of damages based on the carriage contract entered into with NDIGELA, or to file a civil case against the offenders. Therefore, NDIGELA is not in position to raise that ATA should have necessarily sought the payment of damages based on criminal case.

Concerning damages requested by ATA in cross appeal

[18] ATA requests for 500,000 Rwf of advocate fees and 1,000,000 Rwf for procedural fees. NDIGELA responds that these damages have no legal basis.

[19] The Court finds that it was necessary for ATA to hire a lawyer in the appeal lodged by NDIGELA; therefore shall be awarded damages, but because the damage request is excessively high, it shall be awarded 300,000 Rwf, determined in the discretion of the Court, for advocate fees in addition to the previous award.

[20] Considering NDIGELA's grounds of appeal to this Court and their analysis as mentioned above, there is no consistent reason which would motivate it to lodge an appeal against the case it lost before the Commercial High Court. Therefore, the damages requested by ATA for being taken to court without reason have merit, but under the discretion of the Court, it is awarded 300,000 Rwf since the damage requested was excessively high.

III. THE DECISION OF THE COURT

[21] Admits to hear the appeal of NDIGELA & Co and the cross appeal of ALLIED TRANSPORT AGENT (ATA) because they were properly filed.

[22] Rules that NDIGELA & Co's appeal lacks merit and that TRANSPORT AGENT's appeal has merit.

[23] Orders NDIGELA & Co to pay ATA damages in the amount of 38.214,10 USD as decided by the Commercial High Court plus 600,000 Rwf ordered in this Court, the payment default of which, within 15 days, shall be deducted from their assets by government coercion.

[24] Orders NDIGELA & Co to pay prorated fees of 4% for the total damages, the payment default of which, within 15 days, shall be deducted from their assets by government coercion.

[25] Orders NDIGELA & Co to pay 32,400 Rwf of Court fees, the payment default of which, within 15 days, shall be deducted from their assets by government coercion.