**PAN AMERICAN WORLD AIRWAYS INCORPORATED v SA FIRE AND ACCIDENT INSURANCE CO LTD**
**[1965] 3 All SA 24 (A)**

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| **Division:** | Appellate Division |
| **Judgment Date:** | 1 April 1965 |
| **Case No:** | not recorded |
| **Before:** | Steyn CJ, Ogilvie Thompson JA, Rumpff JA, Holmes JA and Potgieter AJA |
| **Parallel Citation:** | 1965 (3) SA 150 (A) |

• Keywords • Cases referred to • Judgment •

**Keywords**

*Carriers - Liability - Air - Rights acquired as agent of postal administration - Consignment note - Necessity*

*Contract - Implied term - Intention of parties - Business efficacy of transaction*

*Post office - Agent - Liability of carrier acting as agent of postal administration*

*Statute - International convention - Embodiment in municipal law - Rights of agent of postal authority under international convention*

**Cases referred to:**

*Administrator (Transvaal) v Industrial and Commercial Timber and Supply Co Ltd* 1932 AD 25 - Considered

*Manhattan Novelty Corporation v Seabord and Western Airlines* 137 NYLT No 18 (SC) - Referred to

*Parke Davis and Co v BOAC and Others* 1958 US & Can Air Reports 122 - Referred to

*Pilgrim Apparel Inc v National Union Fire Insurance Company* 1960 US & Can Air Reports 373 - Referred to

*Pillay v Krishna and Another* 1946 AD 946 - Applied

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**Judgment**

STEYN, C.J.: In the Court below the respondent, as cessionary of a diamond merchant, sued the appellant for delictual damages in an amount of R12,138.73 arising out of the non-delivery of a registered parcel of diamonds contained in a mail bag received by the appellant at Jan Smuts Airport from the General Post Office at Johannesburg for carriage by air to New York. The merchant had handed the parcel to the Post Office on 26th October, 1961, for despatch to the Merchant's Bank of New York. The main allegations were that the appellant, through its agents and servants, knew that the mail bag contained property of value; that it was accordingly under a duty towards the owners of such property to exercise care in the custody and carriage thereof and more particularly to exercise care to ensure delivery thereof to the postal authorities in New York; that the appellant's agents and servants, acting in the course and within the scope of their employment, negligently failed to exercise due care in regard to the custody, carriage and delivery of the mail bag containing the diamonds; and that in the result the damages claimed were caused. The appellant, while admitting the receipt of a number of mail bags from the General Post Office and the non-delivery of some of them, disclaimed knowledge of the contents of any of them, denied that it owed a duty of care to the respondent or that it had been negligent in any way, and raised three alternative special defences. In regard to each of these the respondent took the exception that it was no defence to the action and that it was bad in law. The exceptions were allowed and this appeal ensued.

The first special defence is that, in terms of art. 71 of the Universal Postal Convention of 1957, which is in force as between the United

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States of America and the Republic, the liability of the appellant is limited to the equivalent of 25 French francs in South African currency, i.e. to R10. The special plea advances, *inter alia*, in substance the following contentions in support of this defence: The appellant carries air mail from South Africa to the United States in pursuance of a certificate issued by the Government of the United States authorising and requiring it to do so, and as the air carrier designated by that Government under the Bilateral Air Transport agreement entered into by that Government and the South African Government in 1947. In terms of reg. 28 of the regulations promulgated by the Postmaster-General under sec. 2 (4) of the Post Office Act, 1958, by *Government Notice* 550 of 14th April, 1960, the conveyance of such mail was subject to the provisions of the Universal Postal Convention. As contemplated by the Convention, all such mail has been consigned by the South African Postal Administration to the Postal Administration of the United States. Having regard to the provisions of the Convention and of the Bilateral Agreement, the appellant, in receiving such mail for conveyance and delivery to the United States Postal Administration, exercised the authority and rights of the United States Government (including its Postal Administration) in respect of such receipt and conveyance. One of the rights enjoyed by that Administration is the right to the limited liability conferred by art. 71 of the Convention. The appellant claims that it follows from the foregoing that it is entitled to the same immunity from a more extended liability.

It is basic to this defence that the appellant company, in carrying air mail from South Africa to the United States, has the same rights under art. 71 as the United States Postal Administration would have had, if that Administration had itself been the carrier of the mail bag here in question. Such an identity of rights, so it is said, is to be gathered from the provisions of the Convention and of the Bilateral Agreement.

In terms of the Bilateral Agreement and its annex, the South African and the United States Governments reciprocally granted to one another

> "the right to conduct air transport services by one or more air carriers"

to be designated by the country to which the right is granted, for specified routes which transit or serve commercially the territory of the other country. Air carriers so designated must be of the nationality of the designating State, and each contracting party reserved

> "the right to withhold or revoke a certificate or permit to an air carrier designated by the other contracting party in the event that it is not satisfied that substantial ownership and effective control of such carrier are vested in nationals of the other contracting party."

(Art. VI). An air carrier designated by one contracting party enjoys in the territory of the other contracting party, rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic not only in mail but also in passengers and cargo. There is, further, provision in regard to rates and tariffs, charges for the use of airports and other facilities, customs duties, certificates of airworthiness and of competency, licences, and the observance of regulations relating to the admission of aircraft to or its departure from the territory of a contracting party or its operation or navigation while within such territory, and of domestic regulations affecting passengers, crew and

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cargo in regard to matters such as entry, clearance, immigration, passports, customs and quarantine.

The only provisions which could lend some colour to the claim of identity are those to the effect that the right of a contracting party to conduct air transport services, which transit or serve the territory of the other contracting party, is to be exercised by one or more designated air carriers. It is arguable that, in the result, the designated air carrier becomes the agent of the designating State. But that would not necessarily follow. It is not apparent on what ground it could be said that the designation of an independent contractor would be a breach of or unauthorised by the Bilateral Agreement. But even if the designation should be of such a nature as to constitute the carrier an agent, it would not follow, I think, that the carrier, a separate legal entity owned and controlled not by the designating State but by its nationals, would in terms of the Agreement become a department or administrative unit of that State, vested with every right and immunity which the State is entitled to claim for itself under a treaty or convention relating to the international carriage of passengers, cargo or mail, and presumably also with its duties and obligations under such a treaty or convention. That is not what the Agreement says, and, having regard to the implications of such a situation, I have no doubt that, had such been the intention,

the contracting parties would have added some provision to that effect and would not have stopped at the matters detailed above. They would not have left so important a matter to the vicissitude of dubious inference.

As to the Universal Postal Convention, it does not purport to deal with the relations between Postal Administrations and companies or corporations carrying airmail from one country to another. It regulates, in the main, the reciprocal relations between the Postal Administrations of the State members of the Universal Postal Union. Art. 71 in particular, as also the further articles which deal with the "indemnity" mentioned in that article, are concerned with the responsibility of Postal Administrations as such, and give no indication that international mail carriers operating between the countries of member States are, in relation to such responsibility, in any way to be identified with their Postal Administrations. Art. 71 provides:

> "1. Administrations are responsible for the loss of registered articles.
>
> 2. The sender is entitled, for such loss, to an indemnity whose amount is established at 25 francs per article."

Arts. 73 to 76 make it clear that the initial responsibility for this indemnity rests with the dispatching Administration, which may under certain circumstances recover from another Administration. Art. 74 provides specifically:

> "The obligation of paying indemnity is incumbent upon the Administration under whose jurisdiction the office of mailing the article comes, subject to its rights to seek redress from the responsible Administration."

It hardly seems possible that any "office of mailing the article" could come under the jurisdiction, properly so called, of an air carrier owned and controlled by private persons. This in itself strongly suggests that such air carriers, at any rate, cannot be dispatching Postal Administrations and are not in terms of these articles to be regarded as being in the same position as the Postal Administrations of member States. It



would seem, therefore, that these articles do not render such air carriers liable, either directly to the sender or indirectly to a Postal Administration, for the indemnity mentioned in art. 71. In the absence of such liability, no relative immunity could be inferred from the limited nature of the liability. In these circumstances I cannot accept that the contracting parties to the Bilateral Agreement had in mind that, for the purposes of art. 71 of the Convention, an air carrier such as the appellant was to be identified with the Postal Administration of the designating Government, to the extent that, as against the sender, it would enjoy the same relative immunity from liability under that article.

Apart from this, there is a further difficulty in the way of the appellant. It is common cause, and trite law I think, that in this country the conclusion of a treaty, convention or agreement by the South African Government with any other Government is an executive and not a legislative act. As a general rule, the provisions of an international instrument so concluded, are not embodied in our municipal law except by legislative process. The Universal Postal Convention and the Bilateral Air Transport Agreement are no exceptions. In the absence of any enactment giving their relevant provisions the force of law, they cannot affect the rights of the subject. In regard to the Bilateral Agreement there is no such enactment. As to the Convention, the only enactment which might be invoked is reg. 28, mentioned above, which reads as follows:

> "Postal articles addressed to or received from any country beyond the borders of the Union shall be subject to the provisions of any convention or agreement in regard to the transmission of such articles through the post in force for the time being between the Government and the postal authority of such country, and to the provisions of any contract for the conveyance of mail by sea in force for the time being between the Government and any company or person or body of persons."

It purports to have been made under sec. 2 (4) of the Post Office Act, 1958, which provides:

> "The Postmaster-General may with the concurrence of the Minister establish, maintain and abolish mail services, post offices and savings bank offices as he may deem fit, make and alter postal and telegraph arrangements and enter into conventions and agreements with other postal and telegraph administrations, and may from time to time make regulations for the conduct of any business entrusted to him or as to the manner of exercising the powers and duties assigned to him by this Act, and any such conventions, agreements or regulations which have been approved by the Governor-General and published in the *Gazette*, shall have the same force and effect as if they were contained in this Act."

In terms of this section, it is the Postmaster-General who is to make the regulations, subject to the

approval of the Governor-General, now the State President. The introductory paragraph to the regulations containing reg. 28 incorrectly states that they are made by the Governor-General, but it has not been contended that they are invalid on that ground. However that may be, it is clear that the provisions of a convention or agreement cannot be given the force of law by regulation under this section. The procedure prescribed for that purpose is a very different one, namely, approval of the convention or agreement by the Governor-General and publication in the *Gazette.* While ratification of the Convention may be synonymous with approval by the Governor-General, the Convention has not been published in the *Gazette.*

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This section, moreover, authorises this procedure only in the case of conventions and agreements described therein, i.e. conventions and agreements into which the Postmaster-General has entered with other postal or telegraph administrations, with the concurrence of the Minister. The Convention does not appear to have been so entered into. It is a Convention between States, and although the Postmaster-General signed it, he did so not in pursuance of any capacity conferred by this section but as the plenipotentiary of the South African Government; and his adherence to the Convention was subject to ratification by the Government. The Convention, therefore, does not qualify for the special procedure prescribed in this section.

What then, is the effect of the regulation? It may, in terms of the enabling section, be said to be a regulation for the conduct of business entrusted to the Postmaster-General for the purposes of the Convention. Although the Act itself does not entrust any such business to the Postmaster-General, it will be observed that, having regard to the Afrikaans version of sec. 2 (4), the phrase "for the conduct of any business entrusted to him," unlike the phrase "as to the manner of exercising the powers and duties assigned to him", is not governed by the words "by this Act." It may be assumed, I think, that the necessary arrangements for the transmission of air mail from this country to other countries in accordance with the provisions of the Convention have been entrusted to the Postmaster-General, and that he is accordingly empowered to make regulations in regard to such arrangements. But if reg. 28 cannot have the effect of giving art. 71 or any other relevant article the force of law in this country, it would hardly, in regard to the sender of a postal article, have any greater effect than a regulation prescribing the conditions under which the postal article will be accepted for transmission through the post. On that basis it may be contended that the sender of the article would, by his implied acceptance of those conditions, be contractually bound by the provisions of the Convention limiting his right to compensation for the loss of the article. By a perusal of the relevant articles he would know that he could claim the indemnity under art. 71 only from the South African Postal Administration and from no other Postal Administration; and it may be argued that he would also know that in terms of the Convention that would be his only claim against the Administration with which he is contracting, and that by inference he is required to abandon, as against that Administration, all other claims, including any claim for delictual damages, which might otherwise accrue to him. For the reasons indicated above, however, it could not, I think, be contended that he would know that an air carrier such as the appellant qualifies as a Postal Administration in terms of the Convention, against which he would have no claim at all, or, as submitted on behalf of the appellant, no claim in excess of the amount of the indemnity, or that by virtue of this regulation he is binding himself to a stipulation as to limited liability in favour of an unnamed carrier who is no party to his contract. In these circumstances there is, I consider, no room for any implied abandonment by the sender of any delictual claim for damages against the carrier.

For these reasons the first special defence must fail.

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The second special defence is based on substantially the same allegations as the first, and on the following further allegations: It is said, in effect, that in terms of the Bilateral Agreement read with the Convention, the appointment, functions and duties of the air carrier designated by the United States Government, relative to the custody and conveyance of air mails from South Africa to the United States, were to be governed by the laws of the United States; and that in terms of those laws the appellant is not liable to the owner or sender of registered articles and owes no duty to the owner or sender of such an article received by the appellant for conveyance from South Africa to the United States.

The latter statement as to the purport of what are foreign laws, being on the same footing as a statement of fact, must for present purposes be accepted as correct. The correctness of the former further allegation, however, depends on the interpretation of the Bilateral Agreement read with the Convention, and I can find nothing in it, so read or otherwise, which supports the allegation. The Agreement contains no express provision even remotely to that effect, and nothing from which I am able to infer that an air carrier such as the appellant, designated by one contracting party, carries the relevant laws of the country of that contracting party as to the liability of the carrier into the territory of the other contracting party, so as *pro tanto* to oust the law applicable in that territory. What I have said above about the identification of the appellant with the Postal Administration of the United States and the effect of these international instruments upon the rights of a subject in this country, applies also in relation to this defence. In my opinion it must likewise fail.

The last alternative special defence is based upon the provisions of the Warsaw Convention of 1929, relating to international carriage by air. The relevant allegations are advanced on the assumption that the Court finds that the mail bag in question was received and conveyed by the appellant in terms of a contract with the South African Postal Administration, as alleged by the respondent in its declaration. The plea is that in that event the receipt and conveyance of the mail bag would not be a carriage in terms of any Postal Convention; that the Warsaw Convention, as applied by the Carriage by Air Act, 1946, would govern the obligations of the appellant; that in terms of that Convention and of sec. 3 (1) of the Act any right of action in respect of the lost parcel is limited to the consignor or consignee thereof; that the consignor of the parcel was the South African Postal Administration and the consignee the United States Postal Administration; and that the respondent accordingly has no claim in respect of its loss.

Sec. 3 (1) of the Act provides:

> "The provisions of the Convention shall, so far as they relate to the rights and liabilities of carriers, passengers, consignors, consignees and other persons, and subject to the provisions of this Act, have the force of law in the Union in relation to any carriage by air to which the Convention applies, irrespective of the nationality of the aircraft performing the carriage."

This section in itself does not limit the right of recovery in respect of goods carried to consignors and consignees. It speaks also of "other persons", and quite clearly leaves the question raised by this special



defence to be determined by reference to the provisions of the Convention. As to those provisions, the appellant relies more particularly upon the repeated references to consignors and consignees and upon art. 24, which provides that in the case *inter alia* of loss of goods, any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention. The submission here is that in the context of the Convention as a whole this article, although it does not in express terms say that in respect of goods the carrier is liable only to consignors and consignees, must be interpreted to mean that the carrier's liability is so limited. In support of this submission counsel referred to cases decided in other countries, mainly in the United States. The available reports of these cases unfortunately do not reflect the full reasoning leading to a conclusion favourable to the appellant. With due deference to others who have thought otherwise and conscious of the desirability of uniformity in a matter such as this, I venture to doubt whether such a conclusion would be sound. If such an interpretation were to be accepted, the result would be that persons other than consignors and consignees, who would otherwise have had rights of action against carriers, would be deprived of those rights. It is a well established rule that provisions said to have such an effect are to be narrowly construed. An intended forfeiture of rights is not to be presumed. Here there is no clear language providing for such a forfeiture. It could only be arrived at by inference, and it may well be questioned whether the inference is so obvious that an express provision must have been considered unnecessary. By contrast, the parties to the Convention embodied specific stipulations in a number of other articles to exclude or limit the liability of carriers. It is certainly arguable that, wherever such an exclusion or limitation was intended, the parties saw to it that it was expressed in the Convention; that the limitation here in question is no less important than those dealt with in the various articles, and that the absence of any provision expressing this limitation in the same way as others, rather suggests that no such limitation was intended.

For present purposes, however, I shall assume, without deciding, that in terms of the Convention the right of recovery is limited as contended by the appellant. That would mean that liability on the part of the carrier to a person other than a consignor or consignee is excluded. But that would not be the end of the

matter. Arts. 5 to 11 make provision for an air consignment note. Art. 8 prescribes the particulars which such a note shall contain. Amongst these, para. (*q*) of the article mentions

> "a statement that the carriage is subject to the rules relating to liability established by the Convention".

According to art. 5 (2), the absence, irregularity or loss of a consignment note does not affect the existence or the validity of the contract of carriage. The contract is nonetheless governed by the Convention, but subject to the provisions of art. 9, which runs as follows:

> "If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in art. 8 (*a*) to (i) inclusive and (*q*), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability."

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The scope of this sanction for non-compliance with art. 8 or with what may be described as its essential provisions, appears to be a matter of some controversy. According to Halsbury, *Laws of England*, vol. 5, para. 507 (*b*), the provisions of the Convention referred to in art. 9 include arts. 20 (2), 21 and 22, and possibly also arts. 26 (4) and 29. Art. 20 (2) excludes the carrier's liability where the damage is occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation, and the carrier and his agents have in all other respects taken all necessary measures to avoid the damage. Art. 21 excludes or limits the liability where the damage is caused by or contributed to by the negligence of the injured person, while art. 22 prescribes the maximum amounts of liability. Art. 26 (4) limits liability to the case of fraud where no complaint is made within the prescribed time, and art. 29 introduces a period of prescription. Shawcross and Beaumont, *On Air Law*, para. 391 (*b*), agree with the inclusion of arts. 20 (2), 21 and 22, and express the view that it is not clear whether arts. 18 (3) (which deals with the period of duration of carriage by air), 26 (4), 28 (which determines the Court in which the carrier may be sued for damages) and 29 are "articles which exclude or limit the liability of a carrier." According to Drion, *Limitation of Liabilities in International Air Law*, para. 69 (5), there can be little doubt that arts. 20 and 22 are included, but the authors are divided as to art. 21, and most authors consider arts. 26, 28 and 29 not to be included.

These authors do not mention the exclusion or limitation of liability upon which the appellant relies. If it is to be found, as contended, in art. 24 read with other provisions of the Convention, that article, so read, would to that extent be indistinguishable from an article stating explicitly that a carrier is liable, in the cases covered by arts. 18 and 19, to the consignor or consignee only and to no other person. It would then in my view clearly be a provision which, by limiting liability to claims by consignors and consignees, excludes liability to all other persons who may have suffered damages. Whatever doubt there may be in regard to other articles mentioned above, such a provision would fall within the plain meaning of the language used in art. 9, as much as the provisions excluding liability in the case of negligent pilotage or navigation and contributory negligence, or limiting liability to maximum amounts.

Such a provision could be taken out of the scope of that article in one way only, i.e. by importing at the end of the article the words "to the consignor or consignee". That, I consider, would require a necessary inference. I am unable to find any sufficient ground for such an inference. It is not as if, without such an inference, the applicability of the Convention would be so drastically truncated by art. 9 that the contract would for all practical purposes cease to be governed by the rules of the Convention, as contemplated in art. 5 (2). A number of those rules would remain unaffected. There are, moreover, other considerations militating against such an inference. As I understand the appellant's case, the contention is that the consignor and consignee are, for the purposes of the Convention, identified by the consignment note. A sender or intended recipient not mentioned therein is not "on notice"

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to the carrier and the latter is not liable to him. If the inference mentioned is to be drawn, the result would on this approach be that, where no consignment note has been made out, the carrier would be liable to no person whomsoever. The only person to whom he could be liable would then not be "on notice" to him, and the sanction designed to ensure compliance with art. 8 would become inoperative in a case in which its applicability would *par excellence* be called for. The parties to the Convention could without doubt not have intended to countenance such a result. If any such inference does reflect what was intended, it is

highly probable that some provision would have been made for the manner in which the consignor and consignee are in such a case to be identified.

Where a consignment note has been made out but does not contain the essential particulars, such a construction of art. 9 could lead to a somewhat similar result in cases in which the consignor or consignee *ex facie* the consignment note is not the real sender or intended recipient. In such cases the nominal consignor or consignee would not be able to sue because he would have suffered no damages, and, in spite of his non-compliance with the relevant requirements of art. 8, the carrier would be liable to no other person. In such cases, again, the sanction would then be ineffective. It is no answer to this to say that in terms of art. 14 the consignor or consignee can enforce

> "all the rights given to them by arts. 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another".

The rights referred to in that article are the rights given to the consignor and consignee by art. 12 and 13, and no other rights. Art. 12 does not mention any consignor's right in relation to damages for loss of goods. Art. 14 would therefore not enable a consignor to sue in the interest of another, for such damages. Art. 13 (3) does mention the consignee's rights "which flow from the contract of carriage" where the goods have been lost, but also in his case it is not altogether clear that he would be exercising a right given to him by art. 13 (3) if he should sue for damages suffered by another; and it is at least doubtful whether the person concerned could require him to sue for such damages.

The sanction provided for in art. 9 may no doubt be a drastic one in relation to certain cases where one or other of the "essential" particulars have been omitted from a consignment note, but on the construction of art. 24 advanced by the appellant, that is no ground for importing the above-mentioned words into this article. Unlimited liability to a person other than the consignor or consignee is no more drastic than unlimited liability to a consignor or consignee. To deprive the carrier in such cases of the protection afforded by the Convention may be a severe penalty, but that is what the article provides in clear and unambiguous language, and the carrier, after all, is not bound to accept goods in respect of which a proper consignment note has not been made out. If, as contended, part of the protection afforded to a carrier is non-liability to a person other than a consignor or consignee, I can find no sufficient reason for singling out that non-liability as a benefit excluded from the operation of this article, and consequently retained by the carrier, in circumstances in which he would undoubtedly forfeit the non-liability or limited liability provided for in arts. 20 (2), 22 (2), and possibly



also the limited liability provided for in other relevant articles mentioned above.

It follows from the above that a consignment note complying with the essential provisions of art. 8 would be a pre-requisite for the appellant's alleged non-liability to a person other than a consignor or a consignee of this mail bag or of this parcel of diamonds. The *onus* of establishing this special defence rests upon the appellant (*Pillay* v. *Krishna and Another*, 1946 A.D. 946 at p. 952), and it must plead the essential facts, including the fact that such a consignment note has been made out. In the plea there is no mention at all of this, with the result that it discloses no defence.

For these reasons the appeal is dismissed with costs. The appellant will have thirty days to amend its plea, if so advised.

OGILVIE THOMPSON, J.A.: The facts appear fully from the judgments of the CHIEF JUSTICE and my Brother RUMPFF, both of which I have had the advantage of reading. I concur with the CHIEF JUSTICE, save as regards the last alternative special defence—i.e. the defence based upon the Warsaw Convention of 1929—in respect of which I share the conclusion of my Brother RUMPFF that the appeal should succeed. In relation to the special defences other than that based upon the Warsaw Convention, I agree with the views expressed by the CHIEF JUSTICE and I have nothing to add. As regards the alternative special defence based upon the Warsaw Convention, I associate myself with the reasoning of my Brother RUMPFF and merely wish to make the following additional observations.

Para. 2 (*d*) (iv) of the plea avers that the consignor of all relevant mail bags and parcels was the South African Postal Administration and that the consignee thereof was the Postal Administration of the United States of America. In considering respondent's exception to the plea, the correctness of this averment must be assumed. Upon that assumption, the first major issue in relation to the special defence based

upon the Warsaw Convention of 1929 is whether, upon a proper construction of that Convention, the right of action, as regards the loss of or damage to goods, is restricted to consignor and consignee.

It is, in my view, indeed remarkable that so radical a question as this should be left to inference. None of the text-book writers appear to be prepared to advance any firm opinion on the point: see, for example, the inconclusive discussion by Drion *Limitation of Liabilities in International Air Law*, paras. 294 and 248. In my opinion however, the cumulative effect of the various relevant articles of the Convention, mentioned in the judgments of my Brethren, points to the correctness of appellant's contention. That contention appears to be uniformly supported by the American decisions-see particularly *Parke Davis and Co.* v. *B.O.A.C. and Others*, 1958 U.S. and Can. Air Reports p.122, and *Pilgrim Apparel Inc.* v. *National Union Fire Insurance Co.* 1960 U.S. and Can. Air Reports p. 373—referred to by Bin Cheng in his article in the *Law Society's Gazette* for June 1963. If attainable without doing violence to the language of the Convention, uniformity is, in an international matter of this kind, manifestly desirable. Although



very conscious of the contrary considerations indicated by the CHIEF JUSTICE in his judgment, I have come to the conclusion that, in the case of goods, the Convention should be construed as limiting the right to sue to consignor and consignee. Exactly what persons answer those descriptions need not be decided in this appeal.

So construing the Convention, the next major issue for decision is whether the failure of appellant's plea to aver the existence of a duly completed consignment note vitiates this final alternative defence. The vital question thus raised revolves around the meaning to be assigned to the concluding words of art. 9, namely, that in the events stated in that article,

> "the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability".

Before addressing myself to that question, I digress for a moment to make passing mention of the circumstance that, in the Warsaw Convention as amended at the Hague in 1955 (see the First Schedule to the English Carriage by Air Act 1961: Chap. 27 of 9 and 10 Elizabeth II) the above-cited words have in the new art. 9 been altered to read that

> "the carrier shall not be entitled to avail himself of the provisions of art. 22, para. (2)"

The art. 22 thus mentioned, although somewhat wider than the art. 22 of the original Convention as incorporated in Act 17 of 1946, is still confined to limitations of amount. Cf. also art. III (2) of the Schedule to the later Carriage by Air (Supplementary Provisions) Act 1962 (Ch. 43 of 10 and 11 Elizabeth II). According to the latest supplement to *Halsbury* vol. 5 paras. 478 *et seq*, presently available, neither of the above-mentioned English Acts are as yet of force in England.

Reverting now to the construction of art. 9 of the Warsaw Convention as it appears in the Schedule to Act 17 of 1946, I would first draw attention to the fact that arts. 3 (2) and 4 (4) (which respectively deal with passenger tickets and luggage tickets) are provisions couched in substantially the same terms as art. 5 (2).) As in this last-mentioned article, both arts. 3 (2) and 4 (4) provide that the absence, as the case may be, of the passenger ticket or luggage ticket

> "does not affect the existence or the validity of the contract of carriage".

Art. 5 (2) states that, subject to the provisions of art. 9, the contract of carriage shall

> "be nonetheless governed by the rules of this Convention".

The corresponding words in arts. 3 (2) and 4 (4) are:

> "shall nonetheless be subject to the rules of this Convention".

Arts. 3 (2) and 4 (4) both conclude by stating that a carrier who has accepted a passenger without a passenger ticket, or luggage without a luggage ticket (or with a luggage ticket incomplete in certain stated particulars),

> "shall not be entitled to avail himself of those provisions of the Convention which exclude or limit his liability".

The identical situation obtains in relation to consignment notes, for arts. 5 (2) and 9 read:

> "5. (2) The absence, irregularity or loss of this document does not affect the existence or the validity of

the contract of carriage which shall, subject to the provisions of art. 9, be nonetheless governed by the rules of this Convention.

(9) If the carrier accepts goods without an air consignment note having been made out, or if the air consignment note does not contain all the particulars set out in art. 8 (*a*) to (i) inclusive and (*q*), the carrier

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shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability."

Both exclusion and limitation of liability are provided for in subsequent articles in the Convention. The consistent pattern of the Convention is thus that, notwithstanding the absence of or material deficiency in (as the case may be) a passenger ticket, luggage ticket, or consignment note, the contract of carriage is nevertheless valid and governed by (subject to) the rules of the Convention, but the carrier is deprived of the benefit of

"those provisions of the Convention which exclude or limit his liability".

In construing the relevant articles of the Convention, it is plainly necessary to give due effect to the provision that, notwithstanding the absence of or defect in the relevant ticket or consignment note, the contract of carriage shall nonetheless be

"governed by (or subject to) the rules of this Convention".

The circumstance that, in respect of goods, only the consignor or consignee may sue is, in my view, capable of being regarded as one of the "rules" of the Convention, as distinct from one of the specific provisions of the Convention which "exclude" or "limit" the carrier's liability to an otherwise qualified plaintiff. Postulating that the Convention contemplates that ordinarily only a consignor or consignee may sue the carrier in respect of goods, it would, with all due respect to the contrary view, appear to me to be somewhat anomalous that the absence of, or material defect in, a consignment note should enable persons not ordinarily entitled to do so, to bring an action against the carrier. That anomaly is avoided by construing the words

"the provisions of this Convention which exclude or limit his liability",

where they occur at the end of art. 9, as being confined to such express provisions in the Convention as exclude or limit the carrier's liability at the suit of the consignor or consignee. Such a construction appears to me also to give effect to the provision in art. 5 (2) that the contract of carriage is "nonetheless governed by the rules of this Convention". In my judgment, the concluding words of art. 9 should be construed in the above sense.

Upon that construction, the absence of a consignment note would not assist present respondent. The failure of the plea to aver the existence of a duly completed consignment note did not, therefore, render this alternative plea excipiable.

I would, accordingly, allow the appeal in relation to the special alternative defence pleaded in para. 2 (*d*) of the plea and make an appropriate apportionment of the costs.

RUMPFF, J.A.: In this matter the pleadings disclose that African Diamond Exporters (Pty.) Ltd. handed a parcel containing diamonds to the General Post Office, Johannesburg, for delivery by registered air mail to a bank in the United States of America. The sender apparently took the precaution of insuring this parcel against loss during transit.

Somewhere along the route to America the diamonds disappeared. The sender ceded its right to claim damages to the respondent who is suing, not the Postal Administration of South Africa, but the appellant, to whom the South African Postal Administration had given the diamonds to carry to New York. Had the South African Postal Administration

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attempted to deliver the diamonds through its own officers or servants, the sender or the respondent would have had no action against the South African Postal Administration on the claim as framed. This is

because the Postal Administration is protected by the provisions of sec. 115 of the Post Office Act of 1958. This section reads as follows:

> "Save as is otherwise provided in this Act, no legal proceedings shall be capable of being instituted against the Government or against the Postmaster-General or any officer by reason of any error, default, delay, omission, damage, destruction, non-delivery, non-transmission or loss, whether negligent or otherwise, in respect of any postal articles or telegram or by reason of anything lawfully done under this Act or any other law, and *bona fide* payment of any sum of money under the provisions of this Act or any other law shall, to whomsoever made, discharge the Government, the Postmaster-General and the officer by whom any such payment was made from all liability whatsoever in respect of any such payment, notwithstanding any forgery, fraud, mistake, neglect, loss or delay which may have been committed or have occurred in connection there-with: Provided that nothing in this section contained shall be construed as exempting the Government or the Postmaster-General from liability for damage or loss caused to any person by reason of fraud on the part of an officer in relation to his official duties: Provided further that if any unauthorised person by any fraudulent means obtains from the Postmaster-General payment of any sum credited to a depositor's Savings Bank account, the Postmaster-General may in his discretion make good the loss sustained by the depositor or any portion thereof."

The term "officer" as defined in sec. 11 includes

> "any person in the service or employed in connection with any business of the department".

The respondent alleges in his declaration that the General Post Office delivered the diamonds to the appellant who was under contract with the Postmaster-General to carry mail and parcels by air between Jan Smuts Airport and New York. It further alleges that it has suffered damages because the appellant has negligently failed to exercise due care in the custody and carriage of the mail bag containing the parcel of diamonds.

At first the appellant admitted that it from time to time entered into agreements with the Postmaster-General to carry mail and parcels to the United States and that pursuant to such contract the diamonds were accepted for transport to New York. It denied however that it "owed a duty of care" to the plaintiff or that it was negligent. Later the plea that it had entered into a contract with the Postmaster-General was dropped and in an amended plea the appellant denied that it was at any time under contract with the Postmaster-General to carry mails or parcels by air. The amended plea sets out the allegations as follows:

> "2. (*b*) The defendant says that:
>
> (i) At all times material hereto the Government of the United States of America, in terms of the laws of the United States of America, has had the exclusive right to carry mails to and from the United States of America, and no person has had the right to receive and/or carry such mails save with and in terms of the authority of the said Government.
>
> (ii) In terms of a certificate issued to the defendant by the Government of the United States of America, through the Civil Aeronautics Board, and by virtue of the provisions of the United States Federal Aviation Act, 1958, the defendant was authorised and required to carry certain mail, including air mail from South Africa to the United States of America as hereinafter referred to, and subject to control and regulation by the Government of the United States of America and in accordance with all treaties and agreements between the United States of America and other countries.
>
> (iii) In terms of the Universal Postal Convention (which is hereinafter referred to), all such mail from South Africa to the United

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> States of America has at all material times been consigned by the South African Postal Administration (a Department of the Government of South Africa) to the Postal Administration of the United States of America (a Department of the Government of the United States of America).
>
> (iv) In 1947 the Governments of the United States of America and of South Africa entered into a Bilateral Agreement, which is registered under the provisions of the Convention of Chicago of 1945 (to which both Governments have at all material times been parties), and which Agreement is and has at all times material hereto been of full force and effect.
>
> (v) In terms of the said Bilateral Agreement the Government of South Africa granted to the Government of the United States of America the right, *inter alia*, to carry air mails from South Africa, and the Government of South Africa undertook that one or more air carriers of American nationality, designated by the Government of the United States of America under its own laws for that purpose, would be permitted to exercise and enjoy the said right, it being an express or *alternatively* an implied term that the exercise and enjoyment of the said right by the said carrier would be on the same terms and conditions as if the said right

were exercised and enjoyed by the Government of the United States of America itself under the said Agreement.

(vi) The defendant, an air carrier of American nationality, was so designated, and has at all times material hereto exercised and enjoyed the said right.

(vii) In 1957 the Governments of the United States of America and of South Africa became parties to the Universal Postal Convention of Ottowa, and are and have at all times material hereto been parties to the said Convention.

(viii) Art. 71 of the said Universal Postal Convention limits the liability of the Postal Administrations (that is to say the Governments) of the parties thereto for the loss of registered articles carried in terms thereof to 25 French francs or its equivalent for each such article.

(ix) In terms of reg. 28 of the regulations made under the South African Post Office Act, 1958, published in *Government Notice* R550 in *Government Gazette* 6420 dated 14th April, 1960, which regulation is and has at all times material hereto been in force, the conveyance of postal articles addressed to or received from any country beyond the borders of South Africa is subject to the provisions of any Convention or Agreement in regard to the transmission of any articles through the post in force for the time being between the Government and the postal authority of such country.

(*x*) All mail (including registered articles) delivered to the defendant for conveyance by air between South Africa and the United States has been delivered to and has been received and carried by the defendant in terms of the Universal Postal Convention and of the said Bilateral Agreement.

(xi) In terms of the Universal Postal Convention and the said Bilateral Agreement the defendant, in receiving mails from the South African Postal Administration for conveyance by air and delivery to the United States Postal Administration, has exercised and exercises the authority and rights of the United States Government, including its Postal Administration, in respect of such receipt and conveyance of such mails.

(xii) Included in the said rights of the United States Postal Administration is the limitation of liability for the loss of registered articles in terms of the Universal Postal Convention to 25 French francs or its equivalent, amounting to R10 South African currency.

(*c*) Alternatively to sub-para. (*b*) hereof:

(i) The defendant repeats sub-paras. (*b*) (i), (ii), (iii), (iv), (vii), (viii), (ix) and (*x*) hereof.

(ii) In terms of the said Bilateral Agreement, read with the Universal Postal Convention (and previously read with earlier Postal Conventions in similar terms and of similar force), the Government of South Africa authorised the Government of the United States

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of America to designate an air carrier of American nationality to receive and convey air mail from South Africa to the United States of America, and the appointment, functions and duties of which, relative to the custody and conveyance of air mails from South Africa to the United States, were to be governed by the relative laws of the United States of America, save in certain respects not relevant to this matter.

(iii) The United States Government duly designated the defendant, an airline of American nationality, in terms of the said Agreement, and the defendant's appointment, functions and duties, relative to the custody and conveyance of air mails from South Africa to the United States, has at all material times been governed by the relative laws of the United States of America, save in certain respects not relevant to this matter.

(iv) In terms of the relative laws of the United States of America, the defendant is not liable to the owner or sender of registered articles, and moreover the defendant does not owe a duty of care to the owner or sender of any registered article received by the defendant for conveyance by it from South Africa to the United States by air.

(*d*) Alternatively to sub-paras. (*a*), (*b*) and (*c*) hereof:

If it should be found that any bag of air mail consigned from Johannesburg to New York, and containing a registered parcel, was received by the defendant and conveyed by it in terms of a contract so to do with the South African Postal Administration or Postmaster-General (which is denied) then the defendant says that-(i) The receipt and conveyance of such air mail under a contract as aforesaid was not a carriage in terms of any International Postal Convention.

(ii) Accordingly, the provisions of the Convention for the Unification of certain rules relating to International Carriage by Air (otherwise known as the Warsaw Convention), as applied by

Act 17 of1946, governed the obligations of the defendant in respect of its receipt and

carriage of the said registered parcel by airmail from South Africa to the United States.

(iii) In terms of the said Convention and of sec. 3 (1) of the Carriage by Air Act, 1946, any right of action in respect of the loss of any registered parcel carried as aforesaid is limited to the consignor and/or the consignee thereof.

(iv) The consignor of all such mail bags and parcels delivered to and carried by the defendant at all times material hereto was the South African Postal Administration, and the consignee thereof was the Postal Administration of the United States of America.

(v) In the premises hereof the plaintiff has no right or title to make any claim in respect of the loss of any of the contents of the said mail bags."

In the Court below the respondent filed an exception to paras. 2 (*b*), 2 (*c*) and 2 (*d*) of the amended plea on the ground that none of these sub-paragraphs referred to disclosed a defence. The exception was upheld and the appellant now appeals against the order of the Court below. In considering whether the exception ought to succeed or not the factual allegations in the amended plea must, of course, be deemed to have been proved.

When the sender in this case handed the diamonds to the servants of the South African Postal Administration his contract was subject to reg. 28 of the regulations issued by the Postmaster-General in 1960. Reg. 28 reads as follows:

> "Postal articles addressed to or received from any country beyond the borders of the Union shall be subject to the provisions of any convention or agreement in regard to the transmission of such articles through the post in force for the time being between the Government and the postal authority of such country, and to the provisions of any contract for the conveyance of mail by sea in force for the time being between the Government and any company or person or body of persons."

In my view it is clear that for purposes of this regulation, an agreement

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between the South African Government and the Government of the United States concerning postal matters must be deemed an agreement between the Government of this country and the "postal authority" of the United States, because the United States Government, in concluding such agreement, would be acting *inter alia* as the "postal authority" of the United States.

Reg. 28 is issued under sec. 2 (4) of the 1958 Act. Sec. 2 (4) reads:

> "The Postmaster-General may with the concurrence of the Minister establish, maintain and abolish mail services, post offices and savings bank offices as he may deem fit, make and alter postal and telegraph arrangements and enter into conventions and agreements with other postal and telegraph administrations, and may from time to time make regulations for the conduct of any business entrusted to him or as to the manner of exercising the powers and duties assigned to him by this Act, and any conventions, agreements or regulations which have been approved by the Governor-General and published in the *Gazette*, shall have the same force and effect as if they were contained in this Act."

In terms of this section the Postmaster-General is empowered to make

> "regulations for the conduct of any business entrusted to him or as to the manner of exercising the powers and duties assigned to him by this Act".

Under this authority he is entitled to subject his acceptance of mail to conditions set out in regulations so made by him.

In terms of reg. 28 the contract between the sender of the diamonds and the Postmaster-General, inasmuch as it related to a postal article addressed to a country beyond the borders of South Africa, was subject to any convention and agreement between the Government of the United States and the Government of this country. Of the conventions envisaged the most important would be the convention of the Universal Postal Union signed in 1957 in terms of which the contracting administrations assumed absolute liability for the loss of registered articles but only to an amount of 25 francs per article. To whatever extent the liability of a particular administration in its own country may be excluded by its own legislation, this convention nevertheless, as between administrations, recognises an absolute liability limited to the amount of 25 francs.

The Bilateral Agreement of 1947, entered into between the Government of this country and the Government of the United States, clearly recognises the sovereignty of each State in its air space. Art. 1

reads:

> "The contracting parties grant to each other the rights specified in the annex hereto for the establishment of the international air services set forth in that annex (hereinafter referred to as the 'agreed services')."

Art. 11 A (1) and (2) contain the following:

> "The agreed services may be inaugurated immediately or at a later date at the option of the contracting party to whom the rights are granted, on condition that:
>
> (1) the contracting party to whom the rights have been granted shall have designated an air carrier or carriers for the specified route or routes.
>
> (2) the contracting party which grants the rights shall have given the appropriate operating permission to the air carrier or carriers concerned pursuant to para. (B) of this article which (subject to the provisions of art. VI) it shall do with the least possible delay."

In terms of secs. 1 and 2 of the Annex each Government grants to the other "the right to conduct air transport services" by a designated carrier on specified routes. Sec. III of the Annex provides:

> "One or more air carriers designated by each of the contracting parties under the conditions provided in this agreement will enjoy, in the territory of the other contracting party, rights of transit, of stops for non-traffic purposes and of commercial entry and departure for international traffic in passengers, cargo and

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> mail at the points enumerated and on each of the routes specified in the schedules attached at all airports open to international traffic."

The first special plea suggests that the Bilateral Agreement contains an express, alternatively, an implied term, that the exercise and enjoyment of the right to carry air mails by the carrier, granted under the agreement, would be on the same terms as if the right were exercised by the Government of the United States. In my view, as between the parties, that is what is intended by the express terms of the Bilateral Agreement. Sec. II of the Annex explicitly states that

> "the Government of the Union of South Africa grants to the Government of the United States of America the right to conduct air transport services by one or more carriers of United States nationality designated by the latter country".

As far as the Government of South Africa is concerned, therefore, including the Postmaster-General, the services conducted by the carrier are services conducted by the Government of the United States, whether the designated carrier is State-owned or not. In the result the sender of the diamonds knew, or ought to have known, that, when he gave the diamonds to the Postmaster-General, they would be carried to the United States either by the South African Government or, in the eyes of the Government of South Africa, by the United States Government. As in the present case the sender's agreement with the Postmaster-General was made subject to the terms of the Bilateral Agreement the appellant is entitled to plead that the sender acknowledged that the air transport service by the carrier was to be regarded as the transport service conducted by the Government of the United States of America, and that the carrier, as far as the sender is concerned, enjoyed the rights of that Government. A plea of this nature can, of course, only be valid if it is based on the Bilateral Agreement and the sender has contracted with the Postal Administration. When a person contracts with the appellant itself for the carriage of parcels or the conveyance of passengers, the appellant will not be entitled to rely on the Bilateral Agreement because appellant's relationship with that person is governed by the terms of the contract between it and that person.

If the express terms of the Bilateral Agreement cannot be said to mean what they say, the facts set out in the amended plea establish, *prima facie*, that the alleged term must be considered to be implied in the Bilateral Agreement. The surrounding circumstances are as follows. In terms of the 1958 Act the Government of South Africa has the exclusive right to carry mails. Similarly, in the United States of America, the Government has the exclusive right to carry mails. In terms of the Bilateral Agreement each country has agreed that the Government of the other country is given the right to enter by air and carry mail. No right to carry mail is given to any private person or company. Only the Government is given the right to do so through its designated carrier.

For purposes of the Agreement, and in terms thereof, the parties are not interested in the relationship between Government and carrier according to municipal law—it is obviously left to the law of each country to determine what that relationship is. That relationship is also immaterial to the contracting parties

because whatever carrier is designated, it has no rights, and therefore no duties, *vis-à-vis* the other Government, save and except those specially provided for in the Agreement. In my opinion that must be so because in terms of the Agreement

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only the respective Governments acquire rights. In South Africa, neither the South African Government nor any of its officers, as defined, would be liable for damages arising out of the carrying of mail. In terms of the laws of the United States the designated carrier is not liable in damages to the owner or sender of registered articles. Having regard to the above-mentioned circumstances, it seems to me that neither the Government of South Africa nor the Government of the United States of America ever intended that it or its carrier would be liable in damages to a plaintiff in the country of the other Government, when, pursuant to the Bilateral Agreement, each Government accepted mail in the country of the other Government after such other Government had undertaken to the sender to carry that mail on condition that it would not be liable for damages.

When dealing with the problem of an implied term the first enquiry is, of course, whether, regard being had to the express terms of the Agreement, there is any room for importing the alleged implied term. Considering the wording of the Bilateral Agreement I see no reason to hold that the door is closed. On the contrary, the manner in which the parties have expressed themselves as to the rights granted has left an ambiguity which, in my opinion, leaves the door wide open.

The next question is what the parties must have intended if the transaction is to have any business-efficacy as between the parties. As was said by STRATFORD, J.A., in *Administrator* (*Transvaal*) v. *Industrial & Commercial Timber & Supply Co. Ltd.*, 1932 A.D. 25 at p. 38:

> "The question to be asked is based always upon the hypothesis: what would the parties have done if confronted with the situation that has arisen? The situation must, of course, be one necessarily and obviously arising out of the contract which the contract in terms has not provided for."

I have no doubt that if at the time the agreement was negotiated the question had been put to both parties: Do you intend your designated carrier to be liable in damages at the instance of a plaintiff in the other country although your carrier is not liable in your country, the answer would have been: certainly not, in regard to mails my carrier has the same rights as I have.

In the first alternative special plea the appellant, *inter alia*, states that in terms of the Bilateral Agreement read with the Universal Postal Convention the appointment and duties of a carrier designated by the Government of the United States were to be governed by the laws of the United States of America, that the appellant, as designated carrier, has at all times been governed by the relative laws of the United States of America, that in terms of those laws it is not liable to the owner or sender of registered articles and that it does not owe a duty of care to the owner or sender of a registered article received by it for conveyance from South Africa to the United States. In this plea the allegations made in the first special plea are repeated and, for the reasons which I have stated when dealing with the first special plea, I am of opinion that the sender is bound by his acknowledgment that the air transport service by which his parcel was to be conveyed would be conducted either by the Government of South Africa or the Government of the United States. The additional allegations in the first alternative special plea are complementary to those contained in the first special plea, and

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if the latter plea is good, it follows, I think, that the first alternative special plea is also not excipiable.

The second alternative special plea is based on the assumption that the receipt and conveyance of the diamonds was under a contract with the South African Postmaster-General. The plea states that the receipt and carriage of the parcel is governed by the Warsaw Convention, as applied by Act 17 of 1946, in terms of which a right of action is limited to the consignor or the consignee, in the present case the Postal Administration of South Africa and the Postal Administration of the United States respectively.

In terms of art. 1 of the Convention its operation is limited to "international carriage" and in terms of art. 2 (2) it does not apply to carriage under the terms of an international postal convention. An amendment

referred to in McNair on *Air Law*, 3rd ed. p. 250, has not been ratified by the Government of South Africa. The terms of the Convention indicate that what is sought to be regulated is the relationship between the carrier, on the one hand, and the consignor and consignee on the other. Rights that are granted are granted to the consignor and consignee and to no other interested persons. Art. 14 provides the following:

> "The consignor and the consignee can respectively enforce all the rights given them by arts. 12 and 13, each in his own name, whether he is acting in his own interest or in the interest of another, provided that he carries out the obligation imposed by the contract"

Arts. 18 and 19 impose a liability on the carrier for damage sustained in the event of destruction or loss of registered luggage or goods or for damage occasioned by delay. Art. 24 provides:

> "(1) In the cases covered by arts. 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this Convention.
>
> (2) In the cases covered by art. 17 the provisions of the preceding paragraph also apply, without prejudice to the questions as to who are the persons who have the right to bring suit and what are their respective rights."

Art. 17 makes the carrier liable for damage sustained in the event of the death or wounding of a passenger. A consideration of the terms of all the relevant sections leads to the conclusion that the intention was to confine a right of action in respect of damage to or loss of registered goods to the consignor or consignee. In an article by Bin Cheng in the *Law Society's Gazette* there is a reference to some American cases in which the Courts seem to agree that the Convention was intended to be exclusive. An extract from a judgment of the New York Supreme Court in *Manhattan Novelty Corp.* v. *Seabord & Western Airlines*, (1957), Iata, Air Carriers Liability Reports, No. 58, was quoted in which it was said:

> "The Convention gives the right of action to the consignee (arts. 12, 13, 14, 15, 30), who may sue in his own name, 'whether he is acting in his own interest or in the interest of another' (art. 14). These provisions are intended to be exclusive. The plaintiff has no right of action, even though he has a proprietary interest in the goods shipped and even though the consignee may have been the plaintiff's customs broker."

Counsel for respondent has submitted that, even if only the consignor or the consignee can institute action under the Warsaw Convention, the appellant should have alleged in its second alternative plea that the carriage of the diamonds fell within the terms of the Convention and it should also have alleged that an air consignment note was made out

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in proper form. Because it has not alleged that a note was so made out the plea is defective. In my view this argument cannot be accepted for the following reasons. Appellant has alleged explicitly in his second alternative special plea that the receipt and the carriage of the diamonds was governed by the provisions of the Convention. Art. 1 provides that the Convention applies to all international carriage of goods performed by aircraft for reward, and art. 2 (2) states that the Convention does not apply to a carriage performed under the terms of an international postal convention. By reason of these provisions the Convention *prima facie* applies to any contract for the carriage of goods by air for reward in a country in which the Convention is in force unless the carriage is performed under the terms of an international postal convention. Sec. 3 of Chap. 2 of the Convention (arts. 5 to 16) deals with consignment notes. Art. 5 provides:

> "(1) Every carrier of goods has the right to require the consignor to make out and hand over to him a document called an 'air consignment note'; every consignor has the right to require the carrier to accept this document.
>
> (2) The absence, irregularity or loss of this document does not affect the existence or the validity of the contract of carriage which shall, subject to the provisions of art. 9, be nonetheless governed by the rules of this Convention."

In art. 8 it is stated that the air consignment note shall contain the particulars set out in the article, e.g. the place of its execution, various addresses, the nature of the goods, the weight, the quantity and the volume or dimensions of the goods, the apparent condition of the goods and of the packing, the time fixed for the completion of the carriage, a brief note of the route to be followed (if agreed upon) and, in terms of sub-art. (*q*), a statement that the carriage is subject to the rules relating to liability established by the Convention. Art. 9 contains the following:

> "If the carrier accepts goods without an air consignment note having been made out, or if the air consignment

note does not contain all the particulars set out in art. 8 (*a*) to (i) inclusive and (*q*), the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability."

There are various provisions of the Convention which explicitly exclude or limit the liability of the carrier, and the object of art. 9, in my opinion, is to penalise the carrier as against those persons who can institute action against him under the Convention, the consignor or the consignee. It is not necessary to determine which of the provisions are covered by art. 9. An article which excludes the liability of the carrier is art. 20; it reads:

"(1) The carrier is not liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

(2) In the carriage of goods and luggage the carrier is not liable if he proves that the damage was occasioned by negligent pilotage or negligence in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

An article which limits the liability is art. 22, sub-art. (2) of which reads:

"(2) In the carriage of registered luggage and of goods, the liability of the carrier is limited to a sum of 250 francs per kilogram, unless the consignor has made, at the time when the package was handed over to the carrier, a special declaration of the value at delivery and has paid a supplementary sum if the case so requires. In that case the carrier will be liable to pay a sum not exceeding the declared sum, unless he proves

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that that sum is greater than the actual value to the consignor at delivery."

In terms of art. 6 the air consignment note must be in three original parts, the second of which is to be marked "for the consignee" and it must be signed by the consignor and by the carrier and it must accompany the goods. In terms of art. 11 the note is *prima facie* evidence of the conclusion of the contract, of the receipt of the goods and of the conditions of carriage. In terms of art. 13 (1) the consignee is entitled to require the carrier to hand over to him the note and art. 13 (3) provides as follows:

"(3) If the carrier admits the loss of the goods or if the goods have not arrived at the expiration of seven days after the date on which they ought to have arrived, the consignee is entitled to put into force against the carrier the rights which flow from the contract of carriage."

It follows that the note, and its contents, is of importance to the carrier, the consignor and consignee and to nobody else as far as the Convention is concerned. The duties and penalties imposed by the articles in regard to the note are reciprocal. The consignor must make out the note and he is responsible for the correctness of the particulars. He is liable for damage suffered by reason of the incorrectness or the incompleteness of the particulars (art. 10). No other person is made liable. On the other hand, if the carrier accepts goods without a consignment note, or with an uncompleted note, he loses the right given to him by certain provisions which limit or exclude his liability. In terms of art. 5 the "absence, irregularity or loss" of the note does not affect the validity of the contract which shall, subject to the provisions of art. 9, "be nonetheless governed by the rules of this Convention".

The rules of the Convention, as construed above, provide that only the consignor or consignee is entitled to institute action in respect of damage to registered goods and, when art. 9 deprives the carrier of the right to avail himself of those provisions which exclude or limit his liability, it refers in my opinion to his liability to those persons who in terms of the Convention are entitled to sue, namely, the consignor or consignee. The article only takes away rights from the carrier which he has against the consignor and consignee. It does not give the right to bring suit to persons who had no such right before. This view is also supported, I think, by a consideration of the provisions of arts. 24 (2) and 30 (3). After it is stated in art. 24 (1) that in the cases covered by arts. 18 and 19 (damage to luggage and goods and damage by delay) an action can be brought subject to the "conditions and limits" set out in the Convention, it is provided in art. 24 (2) that in cases covered by art. 17 (death or injury of a passenger) the provisions of art. 24 (1) apply but there is added:

"without prejudice to the questions as to who are the persons who have the right to bring suit".

Here, under art. 17, other persons who may bring suit are appositely referred to. Art. 30 (3) states:

"(3) As regards luggage or goods, the passenger or consignor will have a right of action against the first carrier, and the passenger or consignee who is entitled to delivery will have a right of action against the

> last carrier, and further, each may take action against the carrier who performed the carriage during which the destruction, loss, damage or delay took place. These carriers will be jointly and severally liable to the passenger or to the consignor or consignee."

To my mind it could never have been the intention to allow a person

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who is not a consignor or consignee to sue the carrier because the consignor in a particular case failed to state in the consignment note the dimensions of the parcel to be delivered or because he failed to describe the method of packing.

For these reasons I am of opinion that the failure to allege that a consignment note was issued in proper form does not vitiate the defence set out in the second alternative special plea. I would uphold the appeal with costs.

HOLMES, J.A.: I agree with the judgment of the CHIEF JUSTICE, save only that, with regard to the Warsaw Convention, I do not share his *obiter* view that (assuming a proper consignment note), persons other than the consignor or consignee might be entitled to sue the carrier of goods. This, however, does not affect the result.

With regard to the last alternative defence, I add the following reasons for respectfully differing from the conclusion of OGILVIE THOMPSON, J.A., and RUMPFF, J.A. There is in my opinion a strong correlation, in the Warsaw Convention, between carrier of goods, consignor, consignee, and consignment note. And the latter's fundamental importance is emphasised by the imposition of a sanction against the carrier in art. 9. Hence it seems to me that the true position is that claimants against the carrier of goods are restricted to consignor and consignee only upon the footing of the existence of a proper consignment note. Forfeiture of that protection is part of the price exacted by the sanction. This indicates the absence of a necessary implication that one must read, at the end of art. 9, the words "to the consignor or consignee".

This view leaves scope for the operation of the provision in art. 5 (2) that, despite the absence, irregularity or loss of an air consignment note, the contract of carriage shall, subject to the provisions of art. 9, be nonetheless governed by the rules of the Convention. For example, in the absence of a consignment note, art. 19 could still be of application. And if the consignment note is irregular in a material respect, (e.g. if it does not state the place and date of execution in terms of arts. 8 (*a*) and 9) there are nevertheless articles which could apply, e.g. 12, 13, 14, 15.

I therefore consider it incomplete to state, *simpliciter*, that the Convention contemplates that only a consignor or consignee may sue a carrier for damages in respect of goods. This incomplete premise gives rise in my view to the following erroneous reasoning:

(*a*) Only the consignor and consignee may sue the carrier; therefore

(*b*) it would be anomalous if the absence of a proper consignment note allowed other persons to sue; therefore

(*c*) by necessary implication one must read the words "to the consignor or consignee" at the end of art. 9.

I would add that I am not at all sure that there is not an air of unreality about the footing upon which we are asked to deal with the last alternative defence. The footing in question is that it is averred in the plea (and therefore must be accepted as fact for the purposes of these proceedings on exception) and it was common cause in argument,

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that the consignor and consignee of the postal bag and the parcel in question were respectively the South African Postal Administration and the Postal Administration of the United States. As to that, it occurs to me to doubt whether the Warsaw Convention contemplated National Postal Administrations as consignor and consignee. For example, art. 12 (4) makes provision for the position where "the consignee cannot be communicated with", i.e. on arrival of the goods at the place of destination. Art. 13 entitles the consignee

to delivery "on payment of the charges due". Art. 8 requires *inter alia* the address of the consignor to be stated. Furthermore, the Afrikaans translation of the Convention interprets consignee as "geadresseerde" (addressee). All these suggest the notion of the consignor being stated in the note to be the actual sender, or his agent, and the expressed consignee being the intended recipient, or his agent. However, the case falls to be decided upon the footing upon which it was presented to us.

I agree with the order proposed by the CHIEF JUSTICE.

POTGIETER, A.J.A., concurred in the judgment of HOLMES, J.A.

**Appearances**

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*S Kentridge* - Advocate/s for the Respondent/s

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