MAZVITA BANGA
(Represented herein by her guardian)
CHARLES BANGA
and
TANAKA BANGA
(Represented herein by her guardian)
CHARLES BANGA
and
TSUNGIRAI BANGA
versus
AIR ZIMBABWE (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MATANDA-MOYO J
HARARE, 7 & 21 June 2017

Opposed

T Zhuwarara, of the excipient (defendant)
Ms *J Chanjack*, for the respondent

MATANDA-MOYO J: The plaintiffs issued summons against the defendant for damages for psychological trauma, pain and suffering allegedly caused to the first and second plaintiffs arising from Air Carriage. The allegations are that the first and second plaintiff who are minors, travelled on the defendant's airline to South Africa on 30 March 2016. The third and fourth plaintiffs who are parents to the minor children alleged that they had entered into a contract with the defendant on the following agreed terms;

1. that the two minor children would be escorted onto the flight and off the flight;
2. that they would be monitored and assisted through-out the flight;
3. that they would be cared for on the plane;
4. that they would be taken through immigration and handed over to a designated person, namely Haruchemwi Christine Masuta;
5. that their documents would be kept safely by the airline staff who would handle over same to Hamuchemwi C Masuku and

6. that Hamuchemwi C Masuku would sign documents acknowledging receiving the minor children. The plaintiffs alleged, that, in breach of the terms of the contract, the minors were not taken care of nor provided any assistance. Instead a stranger who happened to be a passenger on the plane was asked to assist the children. The plaintiffs alleged that as a result they suffered psychological trauma, pain and suffering and claimed $75 000.00 damages in respect of 1st and 2nd plaintiffs and $100 000-00 damages in respect of third and fourth plaintiffs.

The defendant excepted to the summons and declaration on the following grounds;

1) That since the carriage by air of the first and second plaintiffs from Harare to Johannesburg constituted an international carriage within the meaning of Article 1 (2) of the Convention for Unification of Certain Rules relating to International Carriage by Air (Warsaw Convention) as ratified by s 3 of the carriage by Air Act [*Chapter 13:04*], the cause of action should be premised on the Warsaw Convention.
2) That the plaintiffs cause of action being founded on the defendant's alleged breach of contract cannot be sustained at law; and
3) That the claims of the carriage by Air Act and Warsaw Convention being limited to instances of death or wounding of a passenger or any other bodily injury by a passenger, and plaintiffs not having pleaded the essential elements, their claim is incurably bad at law. The defendant prayed for dismissed of the plaintiffs claim with costs of suit on an attorney client scale.

I am indebted to the parties for the detailed heads of argument filed.

The defendant argued that claims arising out of Air Travel are specifically governed by the Warsaw Convention. Any claims should fall squarely within the four corners of the Warsaw Convention. Any claims falling outside the Warsaw Convention could not be sustained. Since the plaintiff's claim arose from a breach of contract and possibly delict, their claims ought to be dismissed.

The plaintiffs on the other hand argued that the Warsaw Convention does not provide the "sole and exclusive" remedies to claims arising from carriage by air. The Convention as it stands does not specifically ouster claims arising under common law. In any case the plaintiffs submitted that Article 17 of the Warsaw Convention does incorporate psychological trauma and distress. In case it is found that Article 17 is applicable, the plaintiffs argued that

Article 17 is an archaic piece of legislation which is not justifiable in a dynamic and democratic legal system such as ours.

The first issue falling for determination is whether the Warsaw Convention provides the exclusive remedy to claims arising from carriage by air. Article 1 (1) of the Warsaw Convention provides;

> "For the purposes of this Convention, the expression "international carriage" means any carriage in which, according to the agreement between the parties, the place of departure and the place of destination, whether or not there be a breath in the carriage or a trans-shipment, are situated either within the territories of two High Contracting Parties or within the territory of a single High Contracting Party if there is an agreed stopping place within the territory of another state, even if that state is not a High Contracting Party. Carriage between two points within the territory of a single High Contracting Party without an agreed stopping place within the territory of another state is not international carriage for purposes of this carriage."

The Warsaw Convention was ratified by s 3 of the Carriage by Air Act [*Chapter 13:04*]. That means that where there is conflict between the Warsaw Convention and Common Law, the Warsaw Convention should prevail and apply.

In the case of *Sidhu and Others* v *British Airways (Pvt) Ltd; Abnett (known as Sykes)* v *British Airways* PLC 1997 (1) ALL ER 193 (HC) Lord Hope stated that:

> "The convention describes itself as a 'convention for the Unification of certain Rules relating to International Carriage by Air'. The aim of the convention is to unify the rules to which it applies. If this aim is to be achieved, exceptions to these rules should not be permitted, except where the Convention itself provides for them. The language used and the subject matter with which it deals demonstrate that what was sought to be achieved was a uniform international code, which could be applied by the courts--- without reference to the rules of their own domestic law. The Convention does not purport to deal with all matter relating to contract of international carriage of law. But in those areas with which it deals and the liability of the carrier is one of them – the code is intended to be uniform and to be exclusive also of any resort to the rules of domestic law." See also *Eastern Airlines Inc* v *Floyd* 499 US 530 (1999) where the United States Supreme Court held that an air carrier could not be held liable under Article 17 when an accident had not caused the passenger's death or to suffer physical injury or any physical manifestation of injury.

Lord Hope in *Sidhu* case *(supra)* went further to say;

> "….To permit exceptions whereby a passenger could sue outwith the convention for losses sustained in the course of intentional carriage by air would distort the whole system, even in case in which the convention did not create any liability on the part of the carrier. Thus the purpose is to ensure that in all questions relating to the carriers liability, it is the provisions of the convention which apply and that the passenger does not have access to any other remedies whether under the common law or otherwise, which may be available in any particular country where he chooses to raise his action."

In the case of *Impala Platinum Limited* v *Kolinklijke Lunchtraat Maatshappij NV and another* 2008 (6) SA 600 the court found that exceptions should not be allowed unless where the Convention itself provides for those exceptions.

From the law cited above and case law it is clear that claims arising out of carriage by Air, are exclusively governed by the Warsaw Convention. Where the convention provides no remedy it follows there is no remedy. The reason is so as to achieve a uniform application of air carriage laws without resorting to domestic law. It is therefore trite that the cause of action should be premised on the Warsaw Convention. Having found the above it is clear or apparent that plaintiff's cause of action having been founded on an alleged breach of contract and delict cannot be sustained at law. See *El Al Israel Airlines Ltd* v *Tsui Yuan Tseng* 525 US155 (1999).

It is also trite that in terms of the Carriage by Air Act and Warsaw Convention claims are limited to instances of death or wounding of a passenger or any other bodily injury, suffered by the passengers. In the case of *Morris* v *KLM Royal Dutch Airlines, King* v *Brishow Helicopters Ltd* (2002) Z ALL ER 565 (HL) the court had the opportunity to consider the meaning of 'bodily injury' as provided for under Article 17 of the Convention. It was held that such expression did not cover "a mental injury or illness that lacked a physical cause". See also *Portgieter* v *British Airways*/l 2005 (3) SA 133 (c) where a claim for negligently causing psychological shock to a passenger by an employee was dismissed.

Article 17 of the Warsaw Convention provides as follows;

> "The carrier is liable for damages sustained in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage took place on board the air craft or in the course of any of the operations of embarking or disembarking".

From a reading of the above it seems that only physical injury is recoverable under Article 17. It has been established that purely psychological injury is not sufficient in order to recover under the convention. Once an injury is psychological in nature, it is not recoverable.

In the matter *in casu* the plaintiffs have not pleaded that they suffered physical injury leading to psychological injury. It is my view therefore that plaintiffs claim falls outside the purview of the Warsaw Convention. The Warsaw Convention was designed to protect carriers from opportunistic claims as the one *in casu*.

I am of the view that the exception has been well taken and is upheld. That brings me to the issue of costs. The defendant argued for costs on a higher scale. Looking at the

circumstances of the matter, l do not see how the plaintiffs can escape such obvious consequences. Counsel for the plaintiff having conceded on the day of hearing that the matter falls within the ambit of the Warsaw Convention, and plaintiffs having persisted with a claim falling outside the convention, it is only fair that the defendant recover costs on a higher scale.

Accordingly I order as follows;

1. The exception be and is hereby upheld.
2. The plaintiff's claim is dismissed with costs on an attorney-client scale.

Mhishi Legal Practice, plaintiff's legal practitioners