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Jurisdiction	France
Tribunal	Cour d'appel de Grenoble (Court of Appeal of Grenoble)
Date of the decision	22 February 1995
Case no./docket no.	93/3275
Case name	*BRI Production "Bonaventure" S.a.r.l. v. Pan African Export*

Translation[*] by Gary F. Bell[**]

Court of Apppeal of Grenoble, 22 February 1995 [93/3275]

Commercial Chamber

In the Name of the French People

Decision of Wednesday 22 February 1995

[Between:]

SARL BRI PRODUCTION «BONAVENTURE», with its head office at 44 rue de la Libération – BP 35 à GIERES (38610)

Appellant of a judgement delivered by the Tribunal of Commerce of GRENOBLE on 14 May 1993, following a declaration of appeal issued on 29 June 1993

Represented by SCP d'Avoués PERRET & POUGNAND

Assisted by Me FESSLER, Avocat

AND:

Société PAN AFRICAN EXPORT, with its head office at 27 Commander Boulevard, Nesconset NEWYORK, USA, 11767

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[*] All translations should be verified by cross-checking against the original text. For

[**] Assistant Professor Faculty of Law, National University of Singapore lawbellg@nus.edu.sg Thanks to my colleagues Loy Wee Loon (NUS), David Lametti and Geneviève Saumier (McGill) for their help. [text in square brackets is added by the translator]

RESPONDENT

Represented by SCP d'Avoués GRIMAUD

Assisted by Me KAPLAN, Avocat at the Bar of Paris

[Coram:]

At the pleadings and during the deliberations

Monsieur BERAUDO, Président

Monsieur BAUMET, Conseiller

Monsieur FALLET, Conseiller

Assisted during the pleadings by Mme COMBE, Greffier (Clerk).

[Pleadings:]

At the public hearing of 18 January 1995

The solicitors having been heard in their [written] conclusions

and the advocates in their pleadings

Then the decision was delivered at the session on Wednesday 22 February 1995

1 The Court rules on the appeal by BRI PRODUCTION against the judgement of the Tribunal of Commerce of GRENOBLE rendered on 14 May 1993 which orders it to pay some sums of money as damages to PAN AFRICAN EXPORT for refusing to honour orders it had accepted.

2 At the time of the first contacts between BRI PRODUCTION and PAN AFRICAN, the latter had written, in a fax dated 27 May 1991, that it was not interested in importing jeans to the USA but that it was interested in buying for clients in Africa and South America.

The correspondence ended with a request for a catalogue and price lists.

3 On 6 and 11 June 1991, in faxes sent to BONAVENTURE in Spain, PAN AFRICA wrote the following:

«We have clients in Africa and in South America and we would like to reach an agreement with you so that we can buy Bonaventure Jeans for them».

Having received no answer from BONAVENTURE SPAIN, PAN AFRICAN sent a copy to BRI PRODUCTION and informed BRI PRODUCTION that it would like to get supplies from it. **4**

On 31 August 1991, PAN AFRICAN orders for Boutique Petete in Guayaquil (ECUADOR). The delivery address on the six delivery slips dated 10 and 17 October 1991, is Petete Boutique, Guayaquil. **5**

On 14 October 1991, at 9:36 a.m., PAN AFRICAN informs BRI PRODUCTION that it is considering a second order. In a fax on the same day, at 6:05 p.m., BRI PRODUCTION asks what will be the destination of the goods. **6**

In a second fax the next day, BRI PRODUCTION sets the price and the quantity and again requests to be informed of the destination of the goods.

By fax on 17 October 1991, PAN AFRICAN makes an order specifying the quantities to be delivered without delay by 15 November and asks for a confirmation. The identity of the final client is not mentioned. **7**

On 21 October 1991, BRI PRODUCTION again requests for the name and address of the client. **8**

By a hand written note on the fax received on 21 October, PAN AFRICAN indicates «La Palestina N.A. DE RYDERKADE CURACAO NA». **9**

On 24 October 1991, BRI PRODUCTION agrees to deliver and indicates on the fax the address of the client «La Palestina . . . » as indicated by PAN AFRICAN.

On 27 October 1991, PAN AFRICAN informs BRI PRODUCTION that it will take care of the shipping and that it will inform BRI PRODUCTION of the clients and destination. **10**

The order slip of 29 October 1991 indicates the name of the client and delivery address as «PAN AFRICAN EXPORT La Palestina... » The same appears on the pro-forma invoice of 4 November 1991.

In early November, BRI PRODUCTION asks PAN AFRICAN to prove the delivery to Guayaquil of the goods sold at the end of October 1991. **11**

PAN AFRICAN answers that this request was not clearly formulated from the beginning and that for the future, it authorises its forwarding agent LEPP INTERNATIONAL to provide the documents that BRI PRODUCTION will require. **12**

PAN AFRICAN adds that for the past delivery, the client had demanded that it abandon this request [for documents] but indicates that it is willing to show the bill of lading establishing that the goods were put on board.

On 15 November 1991, BRI PRODUCTION indicates that without written evidence of the final destination of the goods delivered at the end of October 1991, it would not make any new deliveries. **13**

On 18 November 1991, BRI PRODUCTION states that «before talking about the future and about new deliveries, we want you to give us evidence that we can rely on you» [literally: we want you to give of the evidence of your reliability] **14**

PAN AFRICAN answers at the bottom of the request that the documents can be inspected at the office of its advocate, Me Philip Kaplan. **15**

It is learned from a letter of Me Kaplan to BONAVENTURE that a «maritime bill of lading of CGM concerning the first sale of goods with pro forma invoice of 26 September 1991» was shown to the commercial director of BRI PRODUCTION. The request for a copy of this bill of lading was denied.

No document relating to this shipping was produced in this court.

BRI PRODUCTION produced a Customs declaration, for export, bearing the stamp of the French Customs of 25 October 1991, mentioning as shipper PAN AFRICAN EXPORT Cordoya Guayaquil Ecuador and as recipient LEP Madrid. The declaration is regarding three pallets of Jeans. **16**

In a fax on 16 November 1989, PAN AFRICAN proposed to deliver some jeans trousers to Madrid to Mr Ricardo PELAEZ, the final recipient of the goods sent in October 1991. **17**

In this Court, BRI PRODUCTION concludes [i.e. argues] that there is avoidance [of the contract] after arguing, essentially that it is bound by contracts with many foreign distributors and that, more specifically in the case of Spain where the brand name «Jeans Bonaventure» is sought after, it has an interest in not allowing a parallel network of sale [parallel imports]. **18**

It adds that it has received numerous complaints by its Spanish distributors who complain that Bonaventure Jeans have flooded the market and that it has encountered counterfeiting problems. It adds that, with respect to the USA, it is not the owner of the trade mark «Bonaventure» and that it risks having its products seized.

It therefore asserts that, for itself, the final destination of the goods is an essential condition of the contract.

It further states that the goods that were the object of the contract of September 1991, destined [literal translation] for Petete in Guayaquil (Ecuador) were in fact delivered to the store «Moda Joven Vaquero» in Madrid, in Spain. It explains that this diversion took place because PAN AFRICAN so instructed its forwarding agent in France and that the goods were shipped

to Spain with an invoice by PAN AFRICAN such that it has never received custom documents that would allow it to prove an export to the Tax Authorities.

BRI PRODUCTION deduces from the behaviour of PAN AFRICAN that it is justified to require PAN AFRICAN to prove the actual destination of the goods before proceeding to any new deliveries and, in cases of refusal to do so, to refuse to deliver. **19**

It seeks 10,000 francs as damages, 10,000 francs under article 700 of the new code of civil procedure and the payment of cost to the benefit of SCP d'Avoués PERRET & POUGNAND.

PAN AFRICAN EXPORT concludes that the judgement should be confirmed, seeks the capitalisation of the cumulated interest, «the sum of US$ 118,000 or its equivalent in francs on the day of payment as compensation for the loss of profits on future orders», 20,000 francs as damages, 20,000 francs under article 700 of the new code of civil procedure and the payment of cost to the benefit of SCP d'Avoués PERRET & POUGNAND. **20**

It argues, essentially, that, as requested by BRI PRODUCTION, it had revealed the final destination of the goods, and that [BRI PRODUCTION was late in requesting] as a condition for delivery pursuant to later orders, that documents be produced proving that the earlier order was indeed delivered in Quayaquil, and [late] in requesting a cheque guaranteeing the destination, and that these requests put in question [i.e. reopen] a contract that had been agreed as final and they constitute a contractual fault.

In its additional conclusions in rebuttal, PAN AFRICAN EXPORT declares it is unable to confirm the authenticity of the custom documents produced by the appellant but «concedes that the recipient of the goods took responsibility for them [= took possession of them] ... in Spain where it had a place of business». It adds that «Spain never was an explicitly forbidden destination». It adds, as a subsidiary argument, that «even if (and it considers this impossible) the Court would be of the opinion that there was no formation of new contracts of sale and that the new demands of BRI PRODUCTION are justified from a contractual point of view, they would be null under Community law as it would amount to a prohibition of exportation to another country of the European Union.»

[On this, the Court:]

Whereas, on the law applicable to the contract of sale, by the letters of 23 January 1995, the parties have been invited to conclude [i.e. to argue], if they so wished, on the application of the Vienna Convention of 11 April 1990 [sic] on contracts for the international sale of goods; **21**

Whereas the applicability of this instrument comes from the seller having a place of business in France and the buyer in the USA, two different States, both parties to the convention as provided by article 1 paragraph 1, sub paragraph a of the convention;

Whereas the parties informed us that they did not intend to conclude [argue] on the application to this case of the provisions of this text; **22**

Whereas, on the juridical effect of the stipulation relating to the destination found in the contracts concluded in September and October 1991 for shipping to Guayaquil (Ecuador) and Curacao (Dutch Indies), article 8 paragraph 1 of the Vienna Convention states:

«For the purposes of this Convention statements made by and other conduct of a party are to be interpreted according to his intent where the other party knew or could not have been unaware what that intent was»;

[Please note that the official French version which the court uses, uses the word «indications» which is probably much broader than «statement». «Indication» in French corresponds roughly to this definition of indication in the Oxford English Dictionary: «The action of indicating, pointing out, or making known; that in which this is embodied; a hint, suggestion, or piece of information from which more may be inferred.» To remind you of this, I will translate references to the word «indication» in the French version of article 8 as «indication», but remember that it refers to the French version of the convention which in the English version is «statement»].

Whereas this text, when applied to the present case, means that the indications and conduct of BRI PRODUCTION must be interpreted according to the intention of their author, BRI PRODUCTION, where PAN AFRICAN knew or could not have been unaware what that intent was; **23**

Whereas from the first contract with a view to establishing long-term business relations between BRI PRODUCTION and PAN AFRICAN, one can see that the latter knew that the commercial relations could be only with respect to goods to be shipped to South America or Africa, and that the fax of PAN AFRICAN dated 27 May 1991 reassured BRI PRODUCTION on this point; **24**

Whereas it follows that the mention of the ultimate client's address on the various documents relating to the sales cannot be understood as abstract indications, the truth of which would be immaterial [would make no difference] to BRI PRODUCTION; **25**

Whereas, in the intent of the latter, the ultimate client's address had to be the actual address of delivery; whereas the insistence of BRI PRODUCTION to know the identity of the final client demonstrated to PAN AFRICAN that the assurances that it had itself made in numerous communications (faxes of 27 May 1991, 6 and 11 June 1991) to resell to recipients in Africa and South America had to be truthful. **26**

Whereas, as a consequence of this, BRI PRODUCTION was justified in asking for evidence establishing that the places of delivery stated on the contractual documents were the actual places of delivery; whereas before the trial, PAN AFRICAN did not contest the principle of such verification; whereas in a first message of 8 November 1991, it guaranteed to BRI PRODUCTION that it would provide a document within a week; it then avoided this commitment saying that its client opposed it; it then pretended to agree to it in the end by having its advocate intervene to show a maritime bill of lading to the commercial director of BRI PRODUCTION; whereas, by its conduct, PAN AFRICAN shows that it also understood that places mentioned as the destination of the goods had to be truthful and that evidence of the actual delivery at the destination by it might be requested; **27**

Whereas, regarding the remedy for the lack of evidence of the place of actual delivery, this lack of evidence or the mere production as evidence of a bill of lading without providing any copy, and which upon further investigation and the admission of PAN AFRICAN proves to be falsified, deprives substantially BRI PRODUCTION of what it was entitled to expect from the contract; whereas the conduct of PAN AFRICAN amounts to a fundamental breach of contract as provided by article 25 of the Vienna Convention; **28**

Whereas article 64 of this instrument states that «the seller may declare the contract avoided . . . if the failure of the buyer to perform any of his obligations under the contract or this convention amounts to a fundamental breach of contract»; **29**

Whereas, moreover, BRI PRODUCTION granted PAN AFRICAN an additional period of time of reasonable length considering the circumstances, from 21 October 1991 to 25 November 1991, to abide by its contractual obligations; **30**

Whereas, in the absence of a satisfactory performance of the first contract, BRI PRODUCTION is justified to break the contractual relations for further operations that entail similar obligations; **31**

Whereas article 73, paragraph 2 of the Vienna Convention indeed authorises, in cases of contracts for delivery of goods by instalments, a party who is the victim of a fundamental breach for a delivery and who has [*]serious reasons to think[*] that the disregard of the obligations will recur, to declare the contract avoided for the future if it does so within a reasonable time; Whereas the reaction of BRI PRODUCTION, without being abrupt [sudden and strong], occurred after a period of time allowing PAN AFRICAN to find another supplier; **32**

[The English version of art. 73 says «good grounds to conclude» but the French version which the court uses says «de sérieuses raisons de penser» which leads the court to talk of «serious reasons to think».]

Whereas, regarding the disregard by BRI PRODUCTION of the rules regarding competition within the Community, PAN AFRICAN which declared that it was conducting its business with Africa and South America and has entered into contracts mentioning these destinations has no standing to ask for the enforcement of such rules; **33**

Whereas, to the extent that the fraud committed by PAN AFRICAN could be of such a nature as to confer on it a legally protected interest in the enforcement of Community rules on the Spanish market, it would have to show precisely how the contract of exclusive distribution of the brand name Bonaventure entered into by BRI PRODUCTION and the Spanish company NO WAY OUT, approved on 11 March 1991 by the Director of the Chamber of Commerce and Industry of Bilbao contravenes article 85 of the EEC treaty, notably the third paragraph of that text; whereas, in fact exclusive concessions are not null in themselves and whereas with respect to generic products such as trousers, jeans of the Bonaventure brand name, these products are competing with many other brands of Jeans and can easily be substituted [by other products]; **34**

Whereas a violation of Community rules regarding competition must be demonstrated; whereas in the absence of more details, we must rule that the requests of BRI PRODUCTION that the destinations mentioned by PAN AFRICAN be complied with and that the goods not be diverted to the Spanish market, are not null; **35**

Whereas the judgement appealed from must be reformed; Whereas we must deny all of the remedies requested by PAN AFRICAN; **36**

Whereas, regarding the sum of 10,000 francs claimed by BRI PRODUCTION for abusive and unjustified actions, the conduct of PAN AFRICAN, going against the principle of good faith in international trade promulgated by article 7 of the Vienna Convention, made worse by the judicial position taken by the plaintiff at trial constitutes an abuse of procedure; Whereas the inconvenience caused by this trial to BRI PRODUCTION justifies the sum requested; **37**

Whereas, regarding the request for 10,000 francs under article 700 of the new code of civil procedure, it is appropriate to grant it; **38**

[For these Reasons:]

[The Court:]

Pronouncing judgement publicly and on a contested case after deliberations as required by law; **39**

REFORMS the judgement appealed from;

REJECTS all the remedies sought by PAN AFRICAN

ORDERS it to pay to BRI PRODUCTION:

* 10,000 francs as damages for abusive actions [abuse of process];

* 10,000 francs under article 700 of the new Code of Civil Procedure

PRONOUNCED publicly by Monsieur BERAUDO, Président who signed with Madame COMBE, Greffier.