

IN THE SUPREME COURT OF NIGERIA

Suit No: SC43/2002

Petitioner: Hilary Farms Ltd & ors

And

Respondent: M/V "Mahtra" (Sister Vessel to M/V "Kadrina") & ors

Date Delivered: 2007-06-15

Judge(s): Sylvester Umaru Onu, Dahiru Musdapher, Sunday Akinola Akintan, Mahmud Mohammed, Ikechi Francis Ogbuagu

Judgment Delivered

The facts of this case are not complicated nor are they disputed. The three Plaintiffs/Appellants companies (which were owned and managed by the same persons) ordered from Moscow in 1993 a consignment of electric water heaters and electric irons. The said consignment was loaded into five containers and the containers which were in turn placed on board the 2nd Defendant's vessel M/V "Kadrina" in the port of Tallin for carriage to Lagos, Nigeria. The 2nd Defendants issued a number of bills of lading dated the 22nd March, 1993 covering the aforesaid consignment and the vessel sailed for Lagos.

On the 12th April, 1993 the vessel arrived Lagos and on the 10th May, 1993 (a month later), the aforesaid containers were discharged from the aforesaid vessel at Tin Can Island Container Terminal. Be it noted that as a substantial quantity of goods imported into Nigeria now come in containers, where a container is loaded on a vessel and transported from a foreign country to Nigeria, there is only one means of guaranteeing that the contents of the containers are not tampered with or pilfered in the course of the transit from the shipper to the consigner in Nigeria. That is the purpose of the metal seal on the container.

The off loading from the vessel on 10th May, 1993 was witnessed by the Nigerian Ports Authority (NPA for short) officials and by representatives of the 3rd Defendants, Alraine (Nigeria) Limited (who at all material times the agents of the 2nd Defendant ship owners in Nigeria) as well as by the Plaintiffs clearing agent.

The Nigerian Ports Authority tally clerk, it is stressed, tallied the containers being off loaded and issued Landing Tally Sheets, whilst the Alraine representative issued Container Intercharge Receipt/Damage Reports. The Appellants' chairman and managing director PW3 (Hilary Obi) testified that he received information from his clearing agent that three out of five containers consigned to his company had been discharged on 10th May, 1993 aforesaid with their seals intact whilst the seals on the remaining two containers had been tampered with.

He then asserted that based on the information that the two containers bore "wire seals", he called for a joint examination of the two containers. This examination was conducted on the 3rd June, 1993 in the presence of customs & excise officials, representatives of the Defendants, the Police, representatives of N.P.A and two surveyors appointed by himself and by the 3rd Defendants. At the inspection, the two containers were opened for the first time and found to be completely empty. Following this discovery, the Plaintiff's Solicitors wrote to the 3rd Defendant lodging a formal claim for the loss of the contents of the two said containers, namely 1011 boxes of the aforesaid electric water heaters and irons. In their reply, Alraine did not challenge the allegation, but said they would refer the claim to their principal, the 2nd Defendant.

Emanating from the above facts, the present action arose herewith was commenced by the Plaintiff/Appellants claiming that the two relevant containers had been tampered with prior to off-loading from the 2nd Defendant's vessel and that the ship owners as well as their agents (Alraine) were liable to the Plaintiff/Appellants for the loss of the contents of the two containers. The evidence relied upon (which will be expatiated or elaborated upon at length in due course) was that the seals on the two containers bearing the inscriptions "Frezekova s.t.c" and Elektrozaved s.t.c" had been removed and replaced with twisted wire at some stage during the voyage from Tallin. The Appellant's case was that this cast the

onus on the Defendants to explain the circumstances of the loss.

Auta, J. of the trial court, the Federal High Court, dismissed the Plaintiff/Appellant's case. On appeal to the Court of Appeal, the appeal was on the 2nd December, 1999 dismissed. It is against the said judgment of the Court of Appeal that this appeal, has been brought to this court.

In dismissing the Appellant's case, the Court of Appeal (hereinafter referred to as the court below) held concurring with the findings made by Auta, J. as follows:

1. That the Plaintiffs had not given 'strong proof' that the relevant containers had been interfered with.
2. That the containers had been discharged, with seals, albeit 'wire seals.'
3. That there was no evidence of physical damage to the containers. . . :
4. That the inscriptions 'Frezekova' and 'Elektrozaved' specified in the bills of lading as being on the relevant seals on the container had disappeared due to 'oxidation.'
5. That according to DW4 he knew that when the container was off-loaded from the vessel, it was full because 'of the sound it made.'
6. That the Plaintiff did not state how he knew that the containers had been tampered with.

Against the above findings, the Appellants filed five grounds of appeal out of which two issues were formulated as arising for determination; to wit:

1. Whether there was evidence that the relevant containers were off-loaded from the vessel with their original seals.
2. What inferences a court is entitled to draw when the seal specified in a bill of lading is not seen on a container at the time of its off-losing from a carrying level.

The Respondents on the other hand, respectfully submitted that the following two issues for determination arise from the Appellants' grounds of appeal, namely:

1. From the facts and evidence before the Federal High Court and the Court of Appeal, did the Respondents discharge the Appellants' containers into the custody of the Nigerian Ports PLC with their contents and original seals intact' This is a question of fact.
2. Did the Respondents discharge their duty under the contract of carriage and bailment evidenced by the relevant Bills of Lading'

Having taken a careful look at the two sets of issues, I have come to the irresistible conclusion that the consideration of Respondent's' two issues will suffice to dispose of the issues.

Arguments on Issue 1

It is the Respondents' respectful submission that a careful study of the evidence tendered during the trial of the case would lead to the ultimate conclusion that the two relevant containers numbers mmmu3606825 and mmmul357739 were discharged by the Respondents into the custody of the Nigerian Ports PLC with their contents and seals intact.

The evidence may be stated thus:

- a) The evidence of PW4, Mr. Otitobi Olasukemi at page 31 of the Records:

'It containers (sic) came with wire seals. I did not open the container but from the sound I know that it was full. The containers as per my Report were not tampered with. If there is any damage on the container the Captain will not sign it. But this one the report was signed by the Captain.

b) The evidence of DW1, Mr. Dennis Aribuzo, a Tally Clerk with the Ministry of Labour, with 25 years experience at pages 35 of the Record in examination in chief, states as follows:

'When a ship is discharging a container both Nigerian Ports Authority and other insurance companies will be present. Where the container is landed from the Horn to the N.P.A compared (sic) (meaning compound) we will take the prefix and the number of the container, both the Tally Clerks will go round the container to see whether it has seals. If it has a seal we will take the number of the container, if it has no seal we will make a remark to that effect. I was present when the container arrived in the ship. The ship contains other containers. The containers arrived with a seal. It was a wire seal. All the containers I tallied came with wire seals. If the container arrived with a seal we will draw the attention of the supervisors of the ship to it. The supervisor will call the Captain of the ship with the N.P.A and insurance clerks and both the Tally Clerks will go round the container to see whether it has seals. The Supervisor will call the Captain of the ship with the Nigerian Ports Authority and Nigerian Ports Authority will order that the container be taken back to the ship for checking. The seals were not tampered with when there is no seal on the container we will indicate so on the tally sheet under Remark column. There is no remark made on exhibit 'J'. If there was (sic) no numbers on the seal I countersigned the Tally with the N.P.A and we exchanged signature is on ex 'C', I was present when ex 'C', was prepared. There is a seal affixed on the twisted wire. We normally know whether a container is full from the sound it makes when it landed.'

Be it noted that the Appellants as Plaintiffs did not call or lead any evidence that contradicted or controverted the evidence of DW1, neither were they able to discredit the witness and his testimony during cross-examination.

c) The evidence of DW2, Mr. Jerome Nkonranta, tally clerk with the Dock Labour Board. Tin Can Island with 15 years experience at pages 36-37 of the Record stated as follows:

'..... They were all in order, they have seals on them. There is no problem on them. There was no remark made on exhibit 'K'. We only make remarks when the container has no seal container is broken. If it is broken the Nigerian Ports Authority and the ship supervisor will also be called upon and the chief of the ship will inspect it and make remarks I cannot remember the type of seals that came with the containers but I know they have seals

From the above evidence given by the Tally Clerks who witnessed the discharge of the containers from the Respondent's vessel into the custody of the Nigerian Ports Authority establishes beyond reasonable doubt that the 5 containers belonging to the Appellants inclusive of containers Number mmmu3606825 and mmmu1357739 were discharged into the custody of the Nigerian Port Authority with their contents intact.

By virtue of clause 10 of the relevant, Bills of Lading (exhibit E. pages 77-82 of the Record) the onus was on the Appellants to prove that the loss of the contents of the above containers occurred prior to when both containers crossed the second Respondent's ship's rail into the custody of the Nigerian Ports Authority.

The Appellants in attempting to discharge the onus called 5 witnesses. The Learned Justices of the Court of Appeal analysed the effect of the evidence of these witnesses in their judgment at page 167 -169 of the Record as follows:

'The evidence of PW1-3 was unhelpful to the Plaintiffs' case as none of them had been present when the containers were discharged from the ship.

The evidence of PW4 was destructive of Plaintiffs' case The Plaintiff himself testified as, PW5 If the Plaintiff himself was not in the vessel how could he Say categorically that the containers were tampered with on 10/5/93. Remarkably, he did not say who tampered with the containers on 10/5/93'

At page 168 of the Record of Appeal the court below had this to say:

"On the evidence available, it is difficult to see how the lower court could have given judgment in favour of the Plaintiffs"

It is for this reason amongst others that I agree that the Appellants did not discharge the burden of proof to establish that the containers were tampered with and the goods were lost whilst in the custody of the Respondents. Thus, no onus shifted to the Respondents as contained on page 110 of the Appellants' Brief of Argument to contend that the containers did not arrive in Nigeria with their original seals bearing the "Elektrozaved" and "Frezekova" but only arrived with "twisted wire seals" or "wire seals".

It was rather submitted that in view of the evidence earlier elicited, the relevant containers were discharged with their contents intact. The Appellants' arguments that the wordings on the seals i.e "Elektrozaved" and "Frezekova" were not present is immaterial and irrelevant as the three (3) other containers belonged to the Appellants which had their contents full (see PW5's testimony) did not record those same words on their Tally notes (exhibits C & L).

I agree with the Respondents submission that all the 5 containers containing the Appellants' goods arrived in Nigeria with their original seals intact and that the assertion was plausible may be deduced from the testimony of the Plaintiffs Chairman and Managing Director, i.e PW5 ' Mr. Hilary Obi - who stated as follows:

I had five containers on the vessel the other three were found with the original seals and the goods inside were intact ""

The three (3) containers referred to above are container numbers:

(i) Mmmul32598-4 discharged on the 7th May 1993.

(ii) Mmmul426193 discharged on the 7th May 1993 and

(iii) Mmmu08300 discharged on the 10th May 1993.

A perusal exhibit 'C' at page 72 of the Record i.e Nigerian Ports Authority Tally sheet shows clearly that the seal numbers registered against containers No Mmmul325984 and 1426193 were "wire". What emerges from the perusal of the above extract of exhibit C at page 72 of the Record shows clearly that the seal numbers registered against container number mmmu0038300 was "twisted wire seal".

Furthermore, a perusal of exhibit 'L' at page 97 of the Record also shows clearly that the seal numbers registered against containers numbers mmmul325984 and 1426193 were "wire". Be it noted that the Chairman and Managing Director of the Appellants' company conceded and indeed admitted that the original seals that came with the 3 containers were twisted wire and wire seals.

It is important to note that it was this same twisted wire seals which the Appellants stated as being the original seals that were registered against containers numbers mmu3606825 and mmmul357739 at the time of discharge from the ship to the custody of the Nigerian Ports Authority. (Please see p. 72 of the Record).

Thus, the argument of the Appellant that the seals on container No 3606825 and 1357739 were not their original seals from the Port of Talin, not sustainable. From the interplay of words used by the Appellants in their brief, it would appear they would like the court to believe that ordinary wire was used as a form of seal to secure the doors of the relevant container rather than real lead seals, a proposition that is wrong. Reference was made in the Respondents' to the Concise Oxford Dictionary of Current English which defines a seal at page 1023 inter alia as a:

"Stamped piece of lead holding ends of wire used as fastening"

Exhibit 'N' (at page 108 of the Record) clearly establishes that all containers destined to Lagos were sealed with similar sound lead seals. Contrary to the Appellants arguments that only twisted wire were found on the Appellants containers,

it is submitted that seals were defined by the Oxford Dictionary and described in exhibit \"N\" were found on containers numbers mmmu3606825 and mmul357739. The evidence of DWI Mr. Dennis Aribuzo at page 35 of the Record is conclusive in this regard. According to this witness:

\"I was present when exhibit C was prepared. There is a Seal Affixed on the twisted Wire.\"

According to the Master of M.V. 'Kadrina' in Exhibit \"N\" (vide Page 108 of the Record) those seals oxidated due to long period of carriage in damp/humid conditions. It is submitted that upon the tendering and acceptance of exhibit 'N' evidence at the trial of the suit, the onus shifted to the Appellants to lead evidence to show that the wordings on seals of that nature do not oxidize. Furthermore, the onus was also on the Appellants who had three (3) of the 'twisted wires' or 'wire seals', having taken possession of the three (3) containers which had their contents and seals intact, to tender those seals in evidence to show that they were ordinary wires and not lead seals welded on both sides to twisted wire for the purpose of fastening them around the locks on the container doors.

The Appellants failed to discharge this onus. In further support of the fact that the Respondents discharged the Appellants containers numbers (particularly containers numbers mmmu3606825 and mmmu1357739) into the custody of the Nigeria Ports Authority with their contents and seals intact. In stating this, the under listed highlights need be made.

a. It is not in issue that the words 'Frezekova' and 'Elekrozaved' were not legible on the seals affixed to the Appellants' 3 containers that had their contents intact. If those words had been legible on those seals, then the presumption would have arisen, that the illegibility of those words on the seals in respect of container numbers mmmu3606825 and mmmu1357739 meant that their original seal may have been removed leading to the theft of their contents. Consequently since the above words were not legible on the seal in respect of 8 Appellants containers which had their contents intact this presumption does not arise.

b. As clearly transpired, container nos. mmmu3606825 and mmmu1357739 were discharged into the custody of the Nigerian Ports Authority on the 10/5/93 (see exhibit 'C' at page 72 of the Record). When these containers were discharged, no seal numbers were registered against them. Only twisted wire seal was written. The Containers were in the custody of the Nigerian Ports Authority for 24days before the 3rd of June, 1993 when a joint survey was conducted for the purpose of custom examination. It was at this stage that seal number 1946588 was found on container number mmmu3606825 while seal number 1946551 was found on container number mmmu1357739 were the above seal numbers inscribed on the seals affixed to both containers prior to their discharge from the Respondents vessel, the M.V. 'Kadrina', the tally clerks who prepared exhibits 'C' and 'J' (Pages 72 and 95 of the Record) would have registered those numbers in the column of their Tally sheets marked 'SEAL NOS' and 'Marks' and Numbers respectively at the time of discharge of the container. This view is supported by the evidence of DW1 at page 35 of the Record where he testified as follows:

'There was no numbers on the seal.'

It is thus clear that those seals were affixed to both containers after discharge from the 2nd Respondents' vessel and while those containers were in the custody of the Nigerian Ports Authority. It raises the presumption that the theft of the contents of both containers occurred while they were in the custody of the Nigerian Ports Authority and the persons liable affixed the new seals to the containers to create the semblance of normality. See with emphasis the following extracts from the evidence of PW1 at page 29 and PW2 at page 29-30 of the Record thus:

1. 'The cargo was stored in an open space. Anybody can have access to them. The containers have steel seals
2. 'The two containers were presented to us at the stacking area through Tin Can. It was open storage facility people were freely passing that area. It is accessible'.

Furthermore, the seals that were found on both containers 24days after their discharge from the 2nd Respondent's vessel were steel seals and not lead seals as stated by the Captain of M.V. 'Kadrina' in exh. 'N'.

From the forgoing, it is clear that the two relevant containers were stored by the Nigerian Ports Authority in an open storage facility area where people have access to them. From the evidence of DW1 and DW2, the Nigerian Ports Authority would not have accepted the relevant containers into their custody if the seals were broken and their contents empty. Be it noted also that there was no evidence before the lower courts as well as in this court to show that the 'twisted wire' or 'wire seals' were broken. They were all intact when the Appellants' five containers were discharged into the custody of the Nigerian Ports Authority.

It is also note worthy that the Nigerian Ports Authority did not issue a T.Form 33 ' Notice of cargo landed discrepant/damaged in respect of the two containers. Thus the letter written by the Nigerian Ports Authority on the 10th August, 1993 (exhibit 'H' page 94 of the record) to Messrs Patrick Okoh & Co. (the plaintiff's Solicitors) was written three (3) months after the Respondents discharged the Appellants' containers in N.P.A custody. It is important to note that the containers had been in the Nigerian Ports Authority's custody for 24 days prior to the 3rd of June 1993 when the contents of the relevant containers were found missing. Furthermore, the content of the letter (exhibit H) i.e. 'That the containers in question landed without seal' is not correct.

In the case of *Agbeje v. Ajibola* (2002) 2 NWLR (PT 750) 127 at pages 132, 134 and 135 Ratios 5 and 10, this court held as follows:

Ratio 5:

'In considering an appeal before it what an appellate court ought to decide is whether the decision of the trial court was right and not whether its reasons were and a misdirection not occasioning injustice is immaterial.'

Ratio 10:

'A trial court having had the opportunity of hearing witnesses at the trial and watching their demeanour in the witness box is entitled to select witnesses to believe on facts established. An appellate court should not ordinarily interfere with such findings of fact except in certain circumstances, such circumstances include:

- (a) Where the trial court has not made a proper use of the opportunity of seeing and hearing the witnesses at the trial; or
- (b) Where the trial court has drawn wrong conclusions from accessed credible evidence; or
- (c) Where the trial court has taken an erroneous view of the evidence adduced before it; or
- (d) Where the trial courts findings are perverse in the sense that they are unsupported by evidence or do not flow from evidence accepted by it.

The Respondents further submitted that in this case, none of the above circumstances manifested itself in any of the findings of the Federal High Court and so, it is Respondents' submission that this issue be resolved in their favour. I so order.

Arguments on Issue 2

The Respondents' contention under issue 2 is that the contract for the carriage of the Appellants goods and the Terms of Bailment existing there under were evidence by the relevant Bill of Lading (exhibit E at page 77 ' 82 of the record). For this proposition of the law, the Respondents relied on the case of *Elder Dempster & Co. Ltd. v. Patterson Zochonis & Co. Ltd* (1924) 18 (L.I.L) Rep.320; (1924) A.C 522 at 333 Col. 1 LIL) at page 564 (where Lord Summer held inter alias thus:

". in the circumstances of this case, the obligations to be informed from the reception of the cargo for carriage to the United Kingdom amount to a Bailment upon terms, which include the exemptions and limitations of liability stipulated in the known and contemplated form of Bill of lading.'

Also in the case of *K. H. Enterprise* (1994) 1 Lloyd's Rep. Page 593 particularly at page 594 ratio 4, the Privy Council followed the decision of the House of Lords in the above case where it held thus:

'This was a case where the goods were shipped under Bills of Lading which documents operated as receipts for the goods and which contained or evidenced the terms of the contract of carriage such terms included provision relating to the ship owners obligation in respect of the goods while in their care, and so regulated their responsibility for the goods as bailees "

The above position of laws was also conceded by the Appellants at page 11 of their Brief. The terms of the contract are contained in the conditions printed on the back of the relevant Bills of Lading Clause 10 of the conditions provides as follows:

Extent of Responsibility:

'In no event shall the carrier be liable for damage to and/or loss of goods prior to loading or after discharge, not even if such damage or loss is due to the negligence of his servant and even though the goods are in the custody of the carrier, his agents or servant as warehouse men or howsoever. In no event shall the carrier's liability commence before the goods have been loaded over the ship's rail and shall cease at the latest when the goods have passed the ship's rail upon discharge. The merchant shall be required to prove that the goods were damaged within this period of responsibility.'

The Respondents having in Issue 1 above adduced evidence that they successfully delivered the containers carrying the Appellants' goods into the custody of the Nigerian Ports Authority with the contents and seals of the containers intact, they had discharged their duty to the Appellants by direct evidence and not by circumstantial evidence. The Bailee of the goods, in whose custody of the goods were at time of loss of the containers was the Nigerian Ports Authority (the statutory warehouse body) who was not sued by the Appellants in this suit.

On the legal relevance of seals adumbrated in this appeal when they relied on the case of *Hagemeyer Nigeria Ltd v. Container Terminal Co. Ltd and Alraine Nig Ltd* (1985) vol.2 NSCC 367, the Appellants' contention that the present case is on all fours with the one in hand is a misconception of the facts from the present one as follows:

1. *Hagemeyer Nigeria Limited* case was a contract of bailment which was a contract of carriage of goods by sea evidenced by a Bill of Laden.
2. The issue in *Hagemeyer Nigeria Limited* concerned the removal of seals from containers as opposed to the present case where the seals were intact vide the uncontroverted oral and documentary evidence adduced.
3. The issue in the present case concerned the absence of the letterings on the seals, not the removal of the seals. The Appellants also cited and rallied on the case of *Mofas shipping Line (Nig) Ltd v. National Maritime Authority* (2000) 9 NWLR (PT.672) page 391 and argued that there was joint and several liability between the Defendants.

Rather, I accept the Respondents' submission that the Appellants woefully failed to discharge the burden of proof that it was the Respondents who caused the loss of their (Appellants') cargo whilst in the Respondents custody.

Even if the 3rd Respondents' Principal were liable, the use of the word 'may' in section 16(3) of Admiralty Jurisdiction Act, 1991 suggests that a principal's liability does not automatically attach to an agent. Rather, I agree with the Respondents that the Appellant had to lead evidence to show reason why the agent should be held liable irrespective of the liability of its principals. In the case in hand the Appellants did not lead any such evidence. For this reason I agree with the Respondents that the 3rd Respondent is not liable either jointly or severally to the Appellants.

The appeal having been resolved against the Appellants on the two issues argued against the Respondents this appeal fails.

Accordingly, I dismiss this appeal and award N10,000 cost against the Appellants.

Judgment delivered by
Dahiru Musdapheu, J.S.C.

I have read before now the judgment my Lord Onu, JSC just delivered with which I entirely agree. By the provisions of the Bill of Lading in the instant case, the liability of the carrier for loss or damage to the goods shall cease immediately the containers are discharged from the ship. It is common ground that all the containers were offloaded from the ship and were entrusted in the usual manner to the Nigerian Ports Authority. The respondents had thus discharged their obligations under the contract of carriage. It is the bailee of the goods in whose custody of the goods were at the time of the loss or damage, that is liable. In any event, it is the duty of the appellants to establish that the loss or damage to their goods was caused by the negligence of the respondents. This they woefully failed to do. I accordingly resolve all the issues posed against the appellants and I dismiss the appeal I award N10,000 cost against the appellants.

Judgment delivered by
Sunday Akinola Akintan. J.S.C

The dispute that led to the filing of this case at the Federal High Court, Lagos by the present appellants, as plaintiffs, against the present respondents, as defendants, was over the loss of the contents of the appellants' goods in two of the five containers shipped to them through the Tin-can Island port, Lagos, The five containers were shipped from the Russian port of Tallin. According to the pleadings and the undisputed evidence led at the trial, the ship carrying the 5 Containers arrived the Lagos port on 12th April, 1993. The 5 Containers were discharged from the ship on 10th May, 1993 and were stacked at the Port Authority ware-house. The plaintiffs' allegation was that when the containers were examined at the said ware-house on 3/6/93, it was discovered that the contents of two of the containers had been stolen. The action was therefore for the recovery of the value of the contents of the two Containers stolen.

The learned trial Judge found that the plaintiffs failed to prove that the stealing of the contents of the two containers took place while the containers were still in the custody of the defendants and therefore dismissed the claim. An appeal to the court below against that verdict was also dismissed. The present appeal is from the judgment of the court below dismissing the appeal.

There is no doubt that there was sufficient credible evidence on record in support of the conclusions reached by both the trial High Court and the Court of Appeal. The case therefore is one in which there has been concurrent findings of fact by the two lower courts. The position of the law is that this court will not disturb such concurrent findings of fact made by the two courts below unless it is shown that either they were perverse or that there was a substantial error either in the substantive or procedural law which if not corrected, will lead to a miscarriage of justice: See *Akimunya v. U.B.A Ltd.* (1986) 4 NWLR (Pt. 35) 273; *Animashaun v. Olojo* (1990) 6 NWLR (Pt. 111) 111; *Odonigi v. Oyeleke* (2001) 6 NWLR 6 (Pt. 708) 12; and *Nmadogo v. The State* (2001) 3 NWLR (Pt.699) 192. The appellants have failed to show that any of the conditions warranting the interference with the concurrent findings of fact made by the two courts below existed in the instant case.

In the result, I had the privilege of reading the lead judgment prepared by my learned brother, Onu, JSC. The facts of the case are well set out therein and all the issues raised in the appeal are fully discussed. I entirely agree with his conclusion that the appeal lacks any merit. For the reasons I have given above, and the fuller reasons given in the lead judgment which I also adopt, I dismiss the appeal with costs as assessed in the lead judgment.

Judgment delivered by
Mahmud Mohammed, J.S.C

This appeal is against the decision of the Court of Appeal Lagos Division delivered on 2nd December, 1999, upholding the judgment of Auta J. of the Federal High Court Lagos given on 27th July, 1994, dismissing the suit filed by the Plaintiffs/Appellants in that Court against the Defendants/Respondents. The claims of the Plaintiffs Appellants in their action was that as owners of 858 boxes of Electric Water heaters and Electric Flat Irons carried in two containers on board the Defendants/Respondents ship and as consignees under a Bill of lading claimed damages for loss of, or non delivery of the 858 boxes carried by sea from Talim in Russia to Lagos Nigeria. The total damages claimed with interest came to US\$108,050.87.

The trial Court after giving the parties full hearing, came to the conclusion that the Plaintiffs/ Appellants have failed to prove their case on the evidence adduced by them and dismissed the action after making the following findings on the evidence at page 13 of the record.

"In conclusion, all these witnesses testified to the effect that the two containers and indeed all the containers arrived with wire seals and they did not notice anything wrong with them, and as far as they are concerned the goods were intact. All the witnesses especially the Tally Clerks also testified to the fact that, if to say, that there is something irregular with the containers they would have stated so under the remark column on the Tally Sheets and most importantly, the N.P.A. would not have accepted the goods into their custody. From the testimony of these witnesses and documentary evidence brought before the Court, there is strong evidence, that the 2 containers in dispute arrived sound and intact and that the loss of the content of the two containers could not occur while in their custody."

In affirming the decision of the trial Court in dismissing the Plaintiffs/Appellants' appeal, the Court below after closely analysing the evidence on record and applying the applicable law on evaluation of evidence in its leading judgment at page 171, came to the following conclusion -

"I have no reason whatsoever to interfere with or disturb the solemn findings of fact made by the lower Court; and as those findings lead irresistibly to the final conclusion in the judgment, I must uphold the judgment."

In the present appeal now under consideration by me, I find no reason whatsoever to disagree with the concurrent findings of fact by the two lower Courts with which I entirely agree.

In the result, having read in draft the leading judgment of my learned brother Onu, JSC, in this appeal, I completely agree with him that there is no merit in this appeal which must suffer the fate of being dismissed. Accordingly I also dismiss the appeal with N10,000.00 costs to the Respondents against the Appellants.

Judgment delivered by
Ikechi Francis Ogbuagu. J.S.C.

This is an appeal against the decision of the Court of Appeal, Lagos Division and (hereinafter called "the court below") delivered on 2nd December, 1999 dismissing the appeal by the Appellants and affirming the Judgment of the trial Federal High Court, Lagos delivered on 27th July, 1994 -per Auta, J, dismissing the Appellants' suit. There are six grounds of appeal. The facts in this case which appear to be undisputed, are substantially contained in the lead Judgment of my learned brother, Onu, JSC, just delivered. Brief of Arguments have been filed and exchanged including the Reply Brief of the Appellants.

The Appellants, have formulated two (2) issues for determination, namely,

"1. Whether there was evidence that the relevant containers were off-loaded from the vessel with their original seals.

2. What inferences a Court is entitled to draw when the seal specified in a Bill of Lading is not seen on a container at the time of its off-loading from a carrying vessel".

On their part, the Respondents, formulated also two (2) issues for determination, namely,

"1. From the facts and evidence before the Federal High Court and the Court of Appeal, did the Respondents discharge the Appellants containers into the custody of the Nigerian Ports PLC with their contents and original seals intact' This is a question of fact.

2. Did the Respondents discharge their duty under the contract or carriage and bailment evidenced by the relevant Bills of Lading' "

In dealing with the issues of the parties, particularly Issue 1 respectively of the parties, I will reproduce herein, the terms of the contract contained in the conditions printed at the back of the relevant Bills of Lading. Clause 10 (1) of the conditions, reads as follows:

"Extent of Responsibility

In no event shall the Carrier be liable for damages to and for loss of goods prior to loading or after discharge, not even if such damage or loss is due to the negligence of his servants and even though the goods are in the custody of the Carrier, his agents or servants as warehousemen or howsoever. In no event shall the Carrier's liability commence before the goods have been loaded over the ship's rails and shall cease at the latest when the goods have passed the ship's rail upon discharge. The Merchant shall be required to prove that the goods were damaged within this period of responsibility".

[the underlining mine]

The above conditions are clear and unambiguous that they need no interpretation. It need be stressed and this is also settled, that if parties, enter into an agreement, they are bound by its terms. See the cases of *Evbuomwan & 3 ors. v. Elema & 2 ors.* (1994) 7-8 SCNJ. (Pt.II) 243 and *Koiki & 2 ors. v. Magnusson* (1999) 5 SCNJ. 296 @ 320 citing several other cases therein. In other words, where parties enter or agree in a solemn contract, they are expected to honour its terms. Bearing this principle in mind therefore, in the instant case, while the Plaintiffs/Appellants assert, that the goods were removed, lost or stolen, when they were in transit, the Defendants/Respondents, state, that they discharged their obligation, when the goods were off-loaded from the ship. This being the case or position, the Appellants, were bound to prove their said assertion as it is now firmly settled, that he who asserts, must prove. See Section 135(i) and 137(i) of the Evidence Act and the cases of *Are v. Adisa* (1967) NMLR 304; *Nigerian Maritime Services Ltd. v. Alhaji Afolabi* (1978) 2 S.C. 79; *Kate Enterprises Ltd, v. Daewoo Nig. Ltd.* (1985) 3NWLR (Pt.5) 116; *Udih v. Idemudia* (1998) 3 S.C. 50; (1998) 3 SCNJ. 36 and recently, *Chief Archibong & 6 ors. v. Chief Ita & 4 ors.* (2004) 1 SCNJ. 141 @ 160 - per Tobi, JSC and *International Messengers (Nig.)Ltd. v. Pegofor Industries Ltd.* (2005) 5 SCNJ. 120 @ 135 - per Onu, JSC and many others.

Clause 10 of the Bill of Lading, makes it abundantly clear, that the Respondents', will never be held liable, the moment, the containers are discharged after the goods had passed the ship's rails or railings. Period!

I note that at page 22 of the Records, the Respondents in paragraphs 6 and 7 of their Amended Statement of Defence, pleaded as follows:

"6. The defendants avers (sic) with reference to paragraphs 8, 11 and 12 of the Plaintiffs' Statement of Claim that all the 11 containers described in paragraph 4_and 5 above (sic) were discharged without any report of broken or_damaged seals and all the 11 containers were described as having been discharged,full sound and intact with "wire seals". The defendants shall rely on the following documents at the trial.

(A) Nigerian Ports PLC Landing Tally Sheets, Nos. 00590 and 00592 dated 7th of May, 1993 and 10th of May, 1993 respectively.

(B) Alraine 's Landing Tally Sheets Nos. 61228 and 61229 dated 7th of May, 1993 and 10th of May, 1993 respectively.

(C) Alraine Interchange Receipt/Damage, Report Nos. 029040 - 47B and Nos. 029048-50B dated the 7th of May, 1993 and 10th of May, 1993 respectively\

[the underlining mine].

\7. The defendants avers (sic) with further reference to paragraph 5 above that the Plaintiffs took delivery of 5 out of the 11 containers bearing the description 'wire seals' from the custody of Nigeria Ports Authority PLC after its discharge by the Defendants\

[the underlining mine]

I note that at page 26 of the Records, the Appellants in their REPLY, joined issues with the Respondents, only in respect of the averments in paragraph 6 of the Respondents said Amended Statement of Defence and not in respect of paragraph 7 thereof. The effect, and as settled in a number of decided authorities, is that unchallenged or uncontroverted fact or facts, need no further proof more so, if the said fact or facts pleaded, are given in evidence. See Phoenix Motors Ltd, y. Mr. Ojewunmi & 2 ors. (1992) 6 NWLR (Pt.248) 501@ 508C.A.; Uredi v. Dada (1988) 1 NWLR (Pt.69) 237@-246, (1988)_2 SCNJ. 128; Egbunike v. ACB Ltd. (1995) 2 NWLR (Pt.376) 34 @53; (1995)2 SCNJ. 58;

I also note that the Appellants called five (5) witnesses and tendered documents. The trial court, found as a fact at page 12 of the Records; that PW1 and PW2, were not present when the goods were off-loaded from the ship. He also found that PW4 - a Ship Agent with the 3rd Respondent, stated that he was present when the goods were off-loaded from the ship and that the containers, arrived with wire seals and that by his Report, the containers, were not tampered with. The trial court also stated that the PW1, testified that he was present, when the ship arrived with the containers secured by Wire Seals and that the seals had not been tampered with, I note that the court below at pages 167 and 168 of the Records, stated inter alia, as follows:

\The evidence of P.Ws 1-3 was unhelpful to the Plaintiff's (sic) case as none of them had been present when the containers were discharged from the ship.

The evidence of the P.W. 4 was destructive of Plaintiff's (sic) case. He said under cross-examination, \I carried out the report. I was present when the two containers were discharged vessel. There were other people present when I prepared the report. Other Tally clerks were also present. Its containers came with wire seals. I did not open the containers but from the sound I know it (sic) was full. The containers as per my report were not tampered with. If there is any damage on the containers the Captain will not sign it\.

[the underlining mine]

The learned trial Judge at Page 10/13 of the Records, stated inter alia, as follows:

\The 2nd defendant witness also testified accordingly with regard to the Seals. In conclusion, all these witnesses testified to the fact that the two containers and indeed all the containers arrived with Wire Seals and they did not notice anything wrong with them, as far as they are concerned the goods were intact. All the witnesses especially the Tally clerks also testified to the fact that, if to say, that there is something irregular with the containers they would have stated so under the remark column on the Tally Sheets and most importantly, that N.P.A. would_not have accepted the goods into their custody. From the testimony of these witnesses and documentary evidence brought before the court, there is a strong evidence, that the 2 containers in dispute arrived sound and in intact (sic) and that the loss of the content of the two containers could not occur while in their, custody\,

[the underlining mine]

I agree as I cannot fault the above finding of fact as they are borne out from the evidence in the Records and what is more, the learned trial Judge saw and heard the witnesses testify.

At page 11 of the Records, the learned trial Judge, stated inter alia, as follows:

"In fact Exhibit 'J' revealed that all the containers landed with Wire Seals. It is therefore my opinion that as far as hard facts are concerned the said numbers, were not seen, noticed or not there at all when the said containers were offloaded from the ship. The obvious conclusion is that the said numbers must have been inserted or written while the goods were in the custody of The Nigerian Ports PLC. This is because the said discrepancy was noticed 24 days after the ship had discharged the said containers.....".

[the underlining mine]

I agree.

His Lordship continued as follows:

"Another area that have to be looked at is the way and manner the said containers were stored. From evidence, which has not been contradicted, the containers were stacked in an open area accessible to all and sundry. Since it (sic) has been so stacked for 24 days, the possibility of the containers being tampered with cannot be removed or ruled out"

[the underlining mine]

I also agree. All the above facts, conclusively show, that the Appellants, were not standing on a firm ground, when they turned their grouse or complaint/claims, on the Respondents, instead of the Nigerian Ports PLC which surprisingly and regrettably, was not joined or made a party to the suit leading to this instant appeal. There is abundant and uncontroverted evidence in fact agreed to by all the parties, that the Nigerian Ports PLC, had complete custody of the said containers for about twenty four (24) days when the joint inspection took place after the containers had been discharged from the Ship. There is also this solid uncontradicted evidence that if anything had been found wrong with the containers including the state of the Seals or Wire Seals, the Captain, would/could not have signed the necessary document or documents.

Still at page 11, of the Records, His Lordship stated inter alia, as follows:

"It is trite law that once the containers on goods have left the said Ships railings, the ship owners will not be held, liable to the goods any longer. This has also been entrenched as a Clause 10 of the Bill of Lading. I am therefore from the facts disclosed in this case and established, there is no strong evidence to prove that the said containers and the content (sic) were tampered with while on transit and that means, while in the custody of the Defendants. But I am of the opinion that the N P PLC or N.P.A., should have been joined as a party or sued on their own considering the fact that the goods have been in their actual custody for about 24 days".

[the underlining mine]

I have already said so hereinabove in this Judgment. The court below - per Oguntade, JCA, (as he then was), at page 170 of the Records, also referred to the above findings and holdings of the learned trial Judge and thereafter, stated inter alia, as follows:

"The lower court had seen and heard the witnesses testify. It has not been alleged that the findings of fact made and the conclusions arrived at were not supported by the evidence before the lower court".

His Lordship then referred to the case of Lawal v Dawodu (1972) All NLR 707 @ 722, S.C which he reproduced and the cases of Eriiri v. Erhurhobare (1991) 2 NWLR (Pt. 173) 252 @ 272 and Ebba v, Ogbodo (1984) 1 S C NLR 372 @385 as to the evaluation of evidence by a trial court and its ascribing of probative values to the said evidence and stated that an Appellate Court will only interfere, in exceptional circumstances. He refused to interfere.

Nzeako, JCA (now Rtd.) in his/her concurring Judgment at page 173 of the Records, stated inter alia, as follows:

"The findings of fact made by the learned trial Judge seem to emanate from the evidence before him.

As one went through the record of proceedings, one question that kept recurring to one's mind was why the Nigerian Ports Authority was not made a party to this suit. They were significant players, who also had custody of the goods between the period of shipment and the period of the discovery of the loss, giving the rise to Plaintiffs cause of action.

The evidence before the lower court did not seem to effectively pin on the Defendants the tampering with the seals of the containers and the loss suffered by the Plaintiff. An Appeal Court does not inquire into disputes. It is not meant to fill a gap in the evidence before the Court below or interfere with the findings of facts. *Woluchem v Gudi* 1981)5 S.C 319"

[the underlining mine]

It is abundantly clear to me that in the instant case, there are concurrent findings of fact by the two lower courts. The attitude of this Court in such circumstances, is now firmly established in a line of decided authorities. See the cases of *Engr. Osolu v. Engr. Osolu & 6 ors.* (2003) 11 NWLR(fPt.832) 608 @, 631-632, 645; (2003) 6 SCNJ. 162 @, 178; *First African Trust Bank Ltd, v. Partnership Investment Co. Ltd.* (2003) 12 SCNJ. 1 @20 and recently. *Madam Amadi v. Orisakwe & 2 ors.* (2005) 1 SCNJ. 20 @ 27 (2005)1 S.C. (Pt.,I) 35 and *Chief Awoyoolu & anor. Aro & anor.* (2006) 2 SCNJ. 44 (&60 and many others.

In conclusion, this appeal lacks merit. It fails and it is also dismissed by me. I hereby affirm the decision of the court below affirming the Judgment of the trial court. I abide by the consequential order on costs as contained in the said lead Judgment of my learned brother, Onu, JSC.

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