

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
COMMERCIAL DIVISION CIVIL SUIT NO. 129 OF 2003
TESCO INTENATIONAL.....PLAINTIFF
VERSUS
P&O NEDLLOYED.....DEFENDANT

Before: The Hon. Mr. Justice E.S. Lugayizi

JUDGMENT

The plaintiff sued the defendant for breach of contract and prayed for Court's orders as follows:

1. A sum of US\$ 78,000.
2. General damages.
3. Interest at commercial rate from the date of default till the filing of the suit.
4. Interest at Court rate from the date of filing the suit till payment in full.
5. Costs of the suit.

In its Written Statement of Defence the defendant denied the plaintiff's claim and averred that it did not breach the contract. For that reason, it prayed Court to dismiss the suit with costs.

At the scheduling conference Messrs. Kiryowa Kiwanuka and Odhiambo, respectively, represented the plaintiff and the defendant. The said advocates agreed to admit the following facts on behalf of their clients:

- (a) that the defendant was a carrier of the goods in question for hire;
- (b) that a Bill of Lading No. PON4CANO1 100362 and dated 15/8/2002 governed the contract of carriage;

- (c) that under the said contract the defendant undertook to transport, safely and securely 10 containers of batteries from China to Dar-es-Salaam;
- (d) that 8 of the said containers were safely and securely delivered to Dares-Salaam;
- (e) that Altco was the clearing and forwarding agent for the plaintiff;
- (f) that 10 containers were delivered to Altco in Dar-es- Salaam;
- (g) that the alleged emptiness of 2 of the 10 containers was brought to the defendant's attention after the containers arrived in Kampala;
- (h) that the defendant promised to investigate the alleged loss and inform the plaintiff of the outcome;
- (i) that the defendant has not compensated the plaintiff in respect of the said loss.

In addition to the foregoing, counsel for the parties also agreed to introduce the following documents on record as exhibits without formally proving them:

- (a) a Bill of Lading - Exh. P1;
- (b) a letter that the Tanzania Container Terminal Services Ltd wrote - Exh. P2;
- (c) a document called Proof List Discharge Report - Exh. D1.

At the time of hearing the suit the plaintiff called four witnesses in support of its case. They were Francis Drake Lubega (PW1), Bernard Kamugisha (PW2), Michael Kituuka (PW3) and Ronald Busingye (PW4).

Briefly, the plaintiff's case was as follows:

Sometime in 2002 the plaintiff entered a contract with the defendant for the shipment of 10 containers of Tiger batteries from China to the port of Dar-es-Salaam in Tanzania. The defendant made the necessary preparations for the shipment and sent the plaintiff a Bill of Lading (Exh. P1) showing that its good had been duly shipped. In December 2002 the defendant communicated to the plaintiff that its goods had arrived at the port of Dar-es-Salaam and were ready to clear. The plaintiff, in turn, instructed Altco (i.e. a firm of Clearing and Forwarding Agents) to clear the said consignment and to bring it to Kampala. Altco endeavoured to do so, but when it found that the seals on the Bill of Lading did not match the defendant's seals on the 10 containers it became suspicious. Therefore, it returned to the plaintiff for further instructions. The plaintiff advised that Altco should not clear the consignment until verification of the goods had been done in Dar-es- Salaam. In view of the difficulties that had arisen in respect of the consignment Altco went to the defendant in Dar-es- Salaam and explained to it the new instructions it had from the plaintiff. The defendant convinced Altco that since all the seals on the 10 containers were in tact it was not necessary to verify the goods in Dar-es-Salaam before clearing them. Altco agreed. Therefore, it cleared the goods and forwarded them to Kampala through Uganda Railways. On arrival at Kampala, the 10 containers had all their seals in tact (i.e. the defendant's seals and the Tanzania Customs Authorities seals), but the details in the defendant's seals on all the containers did not tally with the corresponding details on the Bill of Lading. On verification of the consignment Altco, the plaintiff and the Railway Police found that 2 of the 10 containers were absolutely empty.

All in all, the plaintiff lost goods worth US\$ 78,000 in respect of the above 2 containers. Therefore it prayed Court, among other things, to make an order to enable it to recover the money in question. That was the plaintiff's case.

The defendant on the other hand called one witness namely, Rebecca Nakiyingi (DW1) in support of its case. Essentially, its case was as follows:

That it fulfilled, to the letter, all the requirements of the contract it entered into with the plaintiff for the shipment of the goods in question from China to Dar-es-Salaam. In other words, the goods reached Dar-es-Salaam safely and securely and the defendant handed them to the plaintiffs agents Altco in that state. Thereafter, whatever happened to the said goods was the plaintiff's responsibility and not the defendant's. The above aside, the defendant's witness insisted that the defendant was not invited to attend the verification exercise when the goods arrived in Kampala. In the circumstances, the defendant prayed Court to dismiss the plaintiff's suit with costs.

Be that as it may, the parties herein agreed that Court should resolve the suit that is the subject of this judgment on the basis of the following issues:

1. Whether or not the defendant was in breach of a duty of care and/or contract to deliver the 2 containers safely and securely.
2. The available remedies.

Court will, below, dispose of the said issues in turn.

With regard to the first issue **(i.e. whether or not the defendant was in breach of a duty of care and/or contract to deliver the 2 containers safely and securely)** Court has this to say. There is no doubt that under the contract the defendant undertook to deliver from China to Dar-es-Salaam all the plaintiff's 10 containers with their contents in tact. Therefore, the heart of this issue is simply whether the defendant delivered all the containers safely and securely? If Court finds that it did, then it would follow that the defendant did not breach the contract. On the other hand, if Court finds that the defendant did not deliver the said containers safely and securely Court will have no choice but to find, too, that the defendant breached the contract. It is now Court's duty to determine exactly what happened. Did the defendant deliver all the containers safely and securely or did it not?

According to the plaintiff the defendant did not safely and securely deliver all the containers in Dar-es-Salaam, for on arrival in Dar-es-Salaam 2 of the said containers were empty and devoid of contents. For that reason, the plaintiff insisted that the defendant breached the contract.

The defendant did not agree with the plaintiff's version above. Its witness Nakiyingi (DW 1) testified that the defendant delivered all the containers to the port in Dar-es-Salaam safely and securely. At that point, the plaintiff's agents Altco cleared the containers. Thereafter, whatever happened to the consignment was not the defendant's responsibility. It was the responsibility of the plaintiff and its agent Altco.

It is clear from the record that the defendant did not dispute the following facts:

- (a) that the Bill of Lading (**Exh.P1**) accurately described the serial numbers of the containers that carried the goods in question from China to Dar-es-Salaam;
- (b) that the plaintiff's 10 containers did not leave the shippers' hands (i.e. the defendant) while on their way from China to Dar-es-Salaam;
- (c) that despite that the 10 containers reached Dar-es-Salaam when the defendant's seals were in tact those seals were fundamentally different from the ones the defendant cited in the Bill of Lading (**Exh. P1**);
- (d) that when Busingye (PW4) insisted on verifying the goods before Altco cleared them in Dar-es-Salaam the defendant dissuaded him from doing so saying that it was not necessary given that the defendant's seals on all the containers were unbroken.;
- (e) that ultimately when the 10 containers reached Kampala despite the fact that all the defendant's seals on the containers were still in tact, 2 of the containers were

absolutely empty;

In addition to the foregoing, Busingye (PW4) also testified that the discrepancies referred to in paragraph (c) above strongly suggested that some where along the way between China and Dar-es-Salaam some one must have fraudulently interfered with the goods in question. It is worth noting that again the defendant did not challenge that area of Busingye's testimony nor did it bother to explain why the said discrepancies occurred. In Court's opinion that, too, was tacit admission on the defendant's part of the truthfulness of that piece of evidence.

Putting together all the above facts Court thinks that they lead to this logical conclusion. The defendant is the one that interfered with or stole the plaintiff's goods. It must have done so either before or after the dispatch of the containers from China. As a result, it did not deliver the said goods safely and securely in Dar-es-Salaam as was agreed. Needless to say, the act of interfering with the goods in question or "**theft**" thereof was not in compliance with the contract, but in breach of it. For that reason, Court has no hesitation in finding that the defendant was in breach of the contract to deliver the 2 containers in question safely and securely.

With regard to the second issue (**i.e. the available remedies**) the law is quite clear on this. The usual remedy for breach of contract is damages. In awarding damages the guiding principle is that the person injured must, as far as is possible in terms of money, be put in as good a position as if the wrong had not been committed. (**See Phillips v Ward (1956) 1 All E.R. 874**). In the instant case, the plaintiff prayed Court to grant it special and general damages. Court will begin with special damages.

Special damages:

In addition to the foregoing, the law requires that special damages must be particularly pleaded and specifically proved if the claimant thereof is to obtain them. (**See Estate of Kurji Karsan v Maganlal Bhatt and another Civil Appeal No. 25 of 1964 (1965) E.A. 789**)

at page 796). On a perusal of the plaint Court thinks that the plaintiff particularly stated the special damages it suffered as a result of the breach of contract i.e.US\$ 78,000. However, the remaining question to answer is whether the plaintiff specifically proved the said damages. Court thinks that it did. Although the plaintiff did not adduce documentary evidence to prove the above figure, in his testimony Lubega (PW1) revealed that in all the value of the batteries the plaintiff lost was to the tune of US\$ 78,000. In cross- examination the defendant's advocate did not challenge or contradict that figure, but he only wished Lubega to clarify whether the figure represented the cost price or the sale price. Lubega replied that it represented the latter. Therefore, in view of what transpired above, Court is of the opinion that there is evidence on record to prove the special damages that the plaintiff suffered as a result of the breach of contract, that is to say US\$ 78,000.

General damages:

There is no doubt that the plaintiff suffered inconvenience as a result of the fact that it was unable to get the goods that were supposed to be in the 2 containers as it expected. For that reason it is only fair that it should be compensated for that inconvenience. Therefore, taking into account all, Court thinks that a sum of shillings 10m/= is adequate compensation. That takes care of the damages to be awarded in this case.

Interest:

Looking at the plaint Court thinks that the plaintiff did not express itself clearly in this area. Therefore, Court is almost at a loss as to what the plaintiff wants. However, bearing in mind the fact that the loss of US\$ 78,000 was in respect of a commercial transaction Court will award interest on it at the rate of 15% p.a. from the date of the arrival of the 2 empty containers in Dar-Salaam till payment in full.

The above aside, the award of shillings 10m/ in general damages will attract interest at Court rate from the date of judgment till payment in full.

In conclusion, Court must enter judgment in favour of the plaintiff in the following terms:

1. The defendant shall pay the plaintiff a sum of US\$ 78,000 as special damages.
2. The defendant shall further pay the plaintiff a sum of shillings 10m/ as general damages.
3. The defendant shall pay interest on the above sums as follows:
 - (a) on US\$ 78,000 (i.e. special damages) - at the rate of 15% p.a. from the date of the arrival of the 2 empty containers in Dar-es-Salaam till payment in full;
 - (b) on the award of shillings 10m/=- general damages-at Court rate from the date of judgment till payment in full.
4. The defendant also shall bear the costs of the suit.

Read before: At 11.30 a.m.

Mr. T.

Ochaya for the plaintiff

Mr. Odhiambo for the defendant

Mr. Sewanyana c/clerk

10/9/2004