THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0 595 OF 2003

SURGIPHAM UGANDA LTD :::::::::::::::::::::::
PLAINTIFF

VERSUS

1. NOBLE HEALTH LTD]
2. TONY BADEBYE]
3. SUSAN MUNALWA] :::::::::::::::::::::::::
DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Plaintiff's case against the Defendants is for recovery of Shs.26,575,293- arising out of an alleged breach of contract, general damages, interest and costs of the suit. It is not disputed that on 17/8/2001, at the 1st Defendant's own request and instance the Plaintiff supplied the 1st Defendant with goods/drugs worth Shs.21,288,000- for which payment was to be made within one month from the date of receipt of the goods. The dispute is about:

1. Whether the Defendants are indebted to the Plaintiff in the sums claimed.

2. Whether the Defendants are jointly and severally liable to the Plaintiff for the debt, if any.

3. Remedies.

Representations:

Mr. Adriko for the Plaintiff.

Mr. Nagemi for the Defendants.

I will go straight to the resolution of the above issues.

As to whether the Defendants are indebted to the Plaintiff in the sums claimed in the plaint, I have considered the evidence of the Plaintiff's very witness, PW1 Chary. He is an accountant with Surgi Pharm (U) Ltd since 1999. The company sells human drugs. It is his evidence that on 17/8/2001 the Plaintiff supplied to the 1st Defendant, itself a dealer in human drugs as well, drugs worth Shs.21,288,000-. That the said sale on credit was subject to payment of the cost price within one month. The sale transaction is not denied by the defence. I can therefore safely make a finding that the sale took place and I do so.

It is also the evidence of the said PW1 Chary that following that sale, the 1st Defendant issued to the Plaintiff two post dated cheques for Shs.11,288,000- dated 31/8/2001 and Shs.10,000,000- dated 7/9/2001. This much is also

admitted by the 1st Defendant's Managing Director, DW1 Badebye. Court is therefore satisfied that the cheques were issued to the Plaintiff as averred.

It is further claimed by the Plaintiff that the cheques were presented to their bank on 20/9/2001 and that on presentation the same were dishonoured. According to PW1 Chary, on 30/8/2001 the Defendant's Managing Director wrote to the Plaintiff explaining to them the financial difficulties the 1st Defendant was experiencing and requesting that the same be not presented till 20/9/2001 when they hoped to have overcome those difficulties. The letter is on record as P. Exh. VIII and again this much is not denied by the 1st Defendant's Managing Director. From the Defendant's own evidence, the defence stopped the presentation of the cheques by the Plaintiff to its bank on the due date. I so find.

It is further averred by PW1 Chary that upon presentation of the cheques on 25/9/2001, they bounced. The fact of the 2 cheques bouncing is not denied by the defence. They are on record as P. Exh. VII. It is indicated on both of them that payment was stopped. I am satisfied that DW1 Badebye stopped the payment.

It is further claimed by PW1 Chary that the fact of the cheques dishonour was brought to DW1's attention and that he promised to settle the debt as soon as possible. That on 10/10/2001 the Plaintiff was paid a sum of

shs.7,000,000- out of the outstanding amount. This much is also admitted by the defence save that according to DW1 Badebye he ordered stoppage of the payment after paying Shs.7m. I'm not persuaded by DW1's evidence on this point. From the records, the 1st Defendant was experiencing financial problems. On or around 21/9/2001, he stopped the payment of the cheques. The Shs.7m was paid in October, 2001. Court is of the view that DW1 stopped the payment because the company had not recovered from its financial difficulties. Later, it managed to mobilize Shs.7m. For this reason, I have not accepted DW1's evidence that he ordered stoppage of the payment because the parties had sat and varied the terms of the payment. By the time the Shs.7m was paid, the 1st Defendant's indebtedness stood at Shs.21,288,000-. This therefore reduced it to Shs.14,288,000-.

It is the evidence of PW1 Chary that in October 2001 the parties agreed that the 1st Defendant deposits stocks of drugs with the Plaintiff worth Shs.16.000.000=. That they were to be kept as security for the debt pending payment. DW1 does not agree. He claims that the stock of drugs was to offset the indebtedness.

I have addressed my mind to the evidence and arguments of both Counsel on the matter.

The agreement between the parties is on record as D. Exh. 1 and none of them claims that it was doctored. It is dated 19/10/2001, in a form of a letter to DW1 Badebye. It reads:

"RE: ACCOUNTS SETTLEMENT

This is to acknowledge resolutions passed and agreed upon in today's meeting with the Surgi Pharm Management Team.

You have agreed to send us stocks of Nobaquin and Curamol to secure your account balance of Shs.14,388,000-. The modalities agreed upon were as follows:

1. Send us 100 (one hundred) ctns of Nobaquin at Ug. Shs.160,000- per ctn less 10%. If stocks of Nobaquin are insufficient, top up with Curamol at Shs.165,000- less 10% to the value of the outstanding.

2. This goods (sic) shall be held as security, however should we get a buyer, we shall sell them with your consent and offset the monies against your account.

3. The balance of goods shall be returned to you on completion of the payment of your account.

We are sure this settlement plan will be quite convenient and help us proceed with our normal business terms."

From the construction of the above letter, it is clear to me that the parties did not contemplate an outright set off. The agreement, properly construed, was for the drugs to act as security for the outstanding debt. This is clear from the agreement itself: *"You have agreed to send us stocks of Nobaquin and Curamol to secure your account" and "This (sic) goods shall be held as security, however, should we get a buyer, we shall sell them with your consent and off set the monies against your account."*

If the parties had intended an out right set off, they would have stated so. The defence argument that the Plaintiff received the drugs as settlement of the debt is flawed considering the agreement contained in the same document that the Plaintiff would account to the Defendant for the proceeds of the sale of the drugs and return the unsold stocks to the 1st Defendant. The argument simply lacks logic.

The Court's finding on this point is that the drugs were deposited as security for the outstanding debt. The parties agreed that in the event of the Defendants getting a buyer, the stocks would be sold to off set the amount still outstanding at the time. The Defendants did not provide such a buyer and the Plaintiff got none until April 2004 when Neon Pharmacy Ltd agreed to take them at a much reduced cost of Shs.3,200,000-. They were expiring in 10 months time. Certain matters must be considered when an issue like this arises. One such factor is the role of the injured party following the breach of

the contract. He is expected to do what he can to look after his own interest. He must, in other words, mitigate the loss. Court is satisfied that the drugs were not deliberately sold to Neon Pharmacy Ltd at a loss. They were sold in a bid to mitigate the loss, when the drugs had only 10 months to expire.

It is the evidence of PW1 Chary that the terms of the credit were contained in a credit application form, P. Exh. 1. DW1 Badebye has feigned ignorance of that document. Court doubts his (DW1's) sincerity on that point. He knew that since the principal sum was Shs.21,288,000-, upon payment of Shs.7,000,000-, the amount was reduced to Shs.14,288,000-. However, in the memorandum of understanding, D. Exh. 1, he acknowledged the balance to be Shs.14,388,000-, one hundred thousand shillings more, implying that he was aware that the bounced cheques had attracted a penalty of Shs.50,000- each. This penalty is stipulated in the Credit Application Form, P. Exh. 1, which DW1 claims not to have been aware of. In these circumstances, Court is satisfied that what was Shs.11,288,000- became Shs.11,338,000- and the Shs.10,000,000- became Shs.10,050,000-. Accordingly, after the payment of Shs.7m, the balance was Shs.14,388,000- (i.e. Shs.11,338,000- + Shs.10,050,000- minus Shs.7,000,000). The sale of the drug stocks in 2004 reduced the indebtedness to Shs.11,188,000-.

It is stipulated in the said Form, P. Exh. 1, that over due accounts will incur interest of 3% per month which translates into 36% per annum. While this

penalty may have been intended to discourage willful defaults, it is the view of this Court that the interest at 36% p.a. was excessive. This Court has a discretion to award interest at less than the contractual rate when that rate is manifestly excessive and unconscionable: **Juma –Vs- Habib [1975] EA 103 (T).** The Plaintiff has in the plaint prayed for interest of 21% p.a, implying that this was the obtaining rate of interest at the time of filing. While there is merit in the Plaintiff's claim regarding interest between October 2001 – October 2003, a period of 2 years, the most this Court can allow is interest at the rate of 21% p.a. The effect of this is to reduce the Plaintiff's claim under this head from Shs.11,088,000- to Shs.6,042,960- (that is, Shs.$\frac{14,388,000 \times 21 \times 2}{100}$).

The Plaintiff prays for Shs.1,438,000- which it allegedly spent on a Debt Collector. I'm of the view that engaging the debt collector at that stage was entirely the Plaintiff's debt recovery mechanism. It's not a matter that the parties had agreed upon. In any case, no evidence of such payment has been given to Court, other than the fact that it was pleaded, to raise inference that the expense was indeed incurred. I'm inclined to disallow this claim and I do so. The Plaintiff further prays for a sum of Shs.2,392,500- as legal costs. Although such expense is to be assumed, the usual practice is for the winning party to submit to Court its bill of costs for taxation. I would disallow this claim, subject to its inclusion in the Plaintiff's final bill of costs.

As to whether the Defendants are jointly and severally liable to the Plaintiff for the outstanding debt, the Plaintiff has adduced credible evidence to show that as part of its credit policy towards its prospective creditors, it obtains shareholders guarantees from them. Court is satisfied about the existence of such policy. In his testimony, DW1 Badebye accepts that he signed the share holder's guarantee, P. Exh. 11. He therefore made a personal guarantee of the payment. This makes him liable jointly and severally with the 1st Defendant for the debt due to the Plaintiff. The 3rd Defendant Susan Munalwa denied signing the shareholder's guarantee. None of the Plaintiff's officials was present when P. Exh. 11 was being executed. PW1's evidence is that he handed over the form to DW1 Badebye and that it was returned signed. It does not require the services of a handwriting expert to conclude that her signature as it appears in the Articles and Memo of Association differs materially from that on the guarantee document. In these circumstances, Court holds that she is not jointly and severally liable with the 1st and 2nd Defendants. I would discharge her from personal liability and I do so.

As regards the Plaintiff's claim for general damages, one of the duties of counsel should be to put before the Court material which would enable it to arrive at a reasonable figure by way of damages. No figure was suggested to me by the Plaintiff. Be that as it may, general damages are those damages

which are not easily quantifiable in money terms. They are not specified in the claim; instead the Court decides how much the injured person deserves in compensation for his pain and suffering, which the Court assumes the Plaintiff did sustain.

Taking the evidence as a whole and doing the best I can, I consider a sum of Shs.1,000,000- adequate compensation to the Plaintiff for breach of contract occasioned to it by the two Defendants. It is awarded to them.

In the result, Judgment is entered for the Plaintiff against 1st and 2nd Defendants in the following terms:

a. Shs.11,188,000- (eleven million one hundred and eighty thousand only) being the balance due on the supply of the drugs.

b. Shs.6,042,960- (six million forty two thousand nine hundred sixty only) being interest on the outstanding balance for the period October 2001 – October 2003.

c. Shs.1,000,000- (one million only) being general damages for breach of contract.

d. Interest of 25% per annum on (a), (b) and (c) from the date of Judgment till payment in full.

e. Costs of the suit.

Yorokamu Bamwine

J U D G E

13/10/2005