THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-00294 OF 2004

DELUXE ENTERPRISES LIMITED……PLAINTIFF

VERSUS

PETRO UGANDA LIMITED……DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff's claim against the defendant is for a total sum of Uganda shillings 113,400,000/= being accumulated unpaid dealer margin, special and general damages for breach of contract and costs of the suit.

The plaintiff's claim is that by a lease agreement dated the 17th March 2000 the plaintiff leased to the defendant, property comprised in block 1 plot 241 situated at Wakaliga Lubaga, Kampala on which the defendant was to operate a fuel station for a period of 20 years.

The plaintiff further avers that it subsequently entered in to a dealership agreement dated the 17th March 2000 to run concurrently with the lease also for a period of 20 years.

Under the lease agreement the parties have agreed to the payment of a nominal reserve rent by way of what is termed as a throughput of between 10 and 20 shillings per litre based on the litres of fuel sold at the station,

Under the dealer agreement it was agreed that the defendant would give the plaintiff a dealer profit margins of Uganda shillings 45/- per litre of fuel sold at the station. The plaintiff further avers that on the 2 December 2000 the said dealer agreement was amended. By the said amendment of the dealer agreement the defendant was to run and operate the fuel station for a period of six months and then hand the station back to the plaintiff as dealer in accordance with the amended dealer agreement. The plaintiff further avers that at the end of the six months under which the defendant ran and operated the fuel station the defendant refused to hand back the station to the plaintiff as dealer under dealer agreement. It is alleged that the defendant claimed that the plaintiff did not show proof of sufficient capital to run the fuel station as provided for in the amended dealership agreement. The plaintiff further avers that the defendant as a result of the aforegoing has breached the dealership agreement and despite various demands to hand over the station to the plaintiff to operate as dealer, has failed and or refused to do so and continues to operate the station to date to the detriment and loss of the plaintiff.

The plaintiff now seeks a declaratory order that it is the unlawful appointed dealer at the fuel station situated at Block 1 Plot 241 Lubaga Wakaliga and that the dealership be regularized accordingly. The plaintiff also seeks to

recover its accumulated dealer profit margin as in the agreement and interest thereon.

For the defendant it is admitted that it entered into a lease and dealership agreement with the defendant. However the two agreements were separate and did not depend on one another. The defendants deny that they owe the plaintiff the sum of Uganda Shillings 113,400,000/= as the plaintiff has never taken up the dealership for the reason that the defendant has never supplied proof that it has sufficient capital to run the dealership agreement. The defendants further aver that since the plaintiff did not take over the station and did not operate it there is no dealer margin to be paid to them. The defendant further denies that the plaintiff has suffered any loss of special damage as alleged in the plaint or that the defendant has failed to fulfill any of the obligations in the agreements that they signed.

Four issues were agreed for determination at the trial.

1. Whether the defendant is in breach of the dealership agreement.
2. Whether the plaintiff has ever performed its part of the dealership agreement as amended.
3. Whether the plaintiff is entitled to payment of the dealership margin under the agreement as amended.
4. What remedies are available to the parties?

Mr. Edward Mugogo Advocate appeared for the plaintiff and Mr. Geoffrey Kandebe Ntambirweki Advocate appeared for the defendant.

<u>Issue No 1</u>: Whether the defendant is in breach of the dealership agreement?

Counsel for the plaintiff argued that the defendant was in breach of the dealership agreement dated 17th March 2000 and the amendment thereof dated 2nd December 2004. It was submitted that the legal relationship between the plaintiff and the defendant was created by two agreements namely a lease agreement (exhibit P. 1) a dealership agreement both dated 17th March 2000 (exhibit P.3 and its amendment exhibit P.4). It was further submitted that the two parties had agreed that both the lease and the dealership agreements would run concurrently a period of 20 years. This is to be found in clause 1 of the lease agreement and clause 6 (d) of the dealership agreement. Counsel for the plaintiff also submitted that the consideration in both agreements was quite clear. Clause 1 of the lease agreement provided a model of payment by way of throughput of rental of between 10 and 20 Uganda Shillings per litre based on the fuel sold at the station, Clause 3 of the dealership agreement (exhibit P.3) also provided for the payment of a dealer's profit margin of Uganda shillings 45/= per litre which was to be in addition to the throughput rental stipulated in the lease agreement.

Counsel for the plaintiff submitted that the defendants had breached the dealership agreement in the following ways

- By the defendant's failure and/or refusal to hand over the fuel station to the appointed dealer after the expiry of the six months.
- By purporting to terminate the dealership agreement by a letter dated the 1st April 2004.
- By failure to issue a three months notice of termination in accordance with the dealership agreement.
- By failure to pay the accumulated dealer profit margin of Uganda Shillings 45/= per litre of fuel sold at the station to date during the period the defendants operated the station.

Counsel for the plaintiff referred to court to clause 1.4 of the amended dealership agreement (exhibit P 4) which states that

> "*This agreement shall not supersede the dealer agreement but shall be an integral part thereof and the terms of the dealer agreement shall remain valid except where expressly amended by this agreement*"

Counsel for the plaintiff then submitted that in the absence of any amendment as provided for above the plaintiff was obliged to immediately take over the station after the six-month period provided for under clause 1.1. However this did not happen. This in the view of Counsel for the plaintiff was in breach of the agreement. He submitted that the plaintiff had sufficient capital to operate the station and only

waited for a formal handover of the station by the defendant to commence operations. In support of this argument counsel for the plaintiff pointed to the following:

- That the defendant owed the plaintiff at the time Uganda Shillings 41,000,000/= as evidenced by the variation of the lease agreement dated the 24th December 2000 (exhibit P.2)
- That the defendant withheld the plaintiff's dealer profit margin as agreed under clause 3 (c) of the dealership agreement (exhibit P.3) amounting to Uganda shillings 16,200,000/=.
- That the agreement did not specify how the plaintiff would prove to the defendant that it had sufficient capital as envisaged under clauses 1.2 and 1.3 of the amendment

Counsel for the plaintiff in essence submitted that the money owed by the defendants to the plaintiff was quite sufficient capital for the plaintiff to start operating the station. Furthermore the plaintiff was left to speculate as to how the prove that it had sufficient capital i.e. by bank draft, cheque, bank guarantee, security deposit, collateral and or crash. As further evidence of breach and bad faith Counsel for the plaintiff refers court to the purported termination of the agreement by the defendant by a letter dated the 1 April 2004 a letter which was backdated after the plaintiff's decided to sue the defendant. Indeed the purported termination

was made after the alleged breach by the plaintiff and without the requisite notice.

For the defendant it is submitted that the plaintiff has never performed its part of the dealership agreement as amended. The plaintiff has therefore never fulfilled its obligations under clauses 5 and 6 of the dealership agreement and its amendment. Counsel of the defendant referred to court to clauses 1.1 -- 1.4 of the amendment to the dealership agreement which states as follows

"*1.1 Petro Uganda will run and operate the station from the date of execution of this amendment until such a time as Deluxe shall vanish Petro Uganda with sufficient proof of having obtained capital to ran the station but in any case, Petro Uganda will not hand over the station to Deluxe before the expiration of six months from the date of execution of this agreement (emphasis added).*

1.2 upon Deluxe furnishing proof in accordance with clause 1.1 above to Petro Uganda's satisfaction, the latter shall immediately hand over the station to Deluxe to run and operate.

1.3 for avoidance of doubt, in the event that Deluxe fails to provide proof in accordance with clause 1.1 above carry on with running

of the station and during Such time, Petro Uganda shall be entitled to appoint a manager or dealer of its choice.

1.4 *this and agreement shall not supersede the dealer agreement but shall be an integral part thereof and the terms of the dealership are agreement shall remain valid except where expressly amended by this agreement*"

Counsel for the defendant then submitted that the agreement allowed the defendant to operate the station until such time as the plaintiff furnished sufficient proof of capital for the plaintiff run the station as the dealer. That whereas the plaintiff was entitled after six months to take over the station upon proof of sufficient capital to do so, they never did.

Counsel for the defendant referred to the evidence of the DW1 Maxwell Kilewe Matolu and the DW2 Caleb Mwesigwa who testified that the plaintiffs never furnished sufficient proof of capital. In response to the plaintiff's claim for a dealer's profit margin of Uganda shillings 16,200,000/= and Uganda shillings 41,000,000/= under the variation of lease agreement Counsel for the defendant dismissed this as non applicable. He argued that no money could accumulate on the account of the plaintiff by way of dealerships profit margin because the plaintiff never took up the dealership. This is because a dealer's margin is the difference between the wholesale price and the pump price of the products sold at the station. In such a situation a dealer purchases petroleum products at the wholesale price from the defendants and then sells them at the station at pump price. Counsel for the defendant

submitted that the plaintiff has never done this. In any case Counsel for the defendant further submitted that a dealer who would pay himself the said margin after effecting the sale.

Counsel for the defendant further argued that the plaintiff did not adduce any proof of sufficient capital as evidence before the courts. There is no letter of any kind from the plaintiff to the defendant showing sufficient capital and readiness to take over the station.

Counsel for the defendant referring the 41,000,000/= under the variation of lease agreement submitted that the evidence showed that it had been paid in accordance with the agreement and that there was no provision to the effect that the money would be utilised to pay for products under the dealership agreement.

I have perused the submissions of both counsel and reviewed the evidence in relation to whether the defendant was in breach of the agreements. Clearly to my mind whether the defendant breached the agreements or not is a question of interpretation. One will have to construe the contracts to ascertain what the mutual intentions of the parties were as to the legal obligations by the contractual words in which they sought to express them. In the case of

> **Pioneer shipping Ltd versus B.T.P. Tioxide Ltd [1982] A.C. 724** Lord Diplock said:

"*The object sought to be achieved in construing any contract is to ascertain what the major intentions of the parties were as to their legal obligations each assumed by the contractual words in which the sought to express them*"

The legal test to be applied in a case like this has to be an objective one based on what is reasonable. In other words it is the test of the proverbial “reasonable man” in this sort of transaction. In the case of

Reardon-Smith Line Ltd v Hansen-Tangen [1976] 1 WLR 989, Lord Wilberforce said

"*When one speaks of the intention of the parties to the contract one speaks objectively-the parties cannot themselves give direct evidence of what the intention was and what must be ascertained is what is to be taken of the intention which reasonable people would have had if placed in the situation of the parties*"

A similar point was made by Lord Reid in the case of

McCutchheon V David MacBrayne Ltd [1964] 1 WLR 125 when he said

"*The judicial task is not to discover the actual intention of each party it is to decide what each was reasonably entitled to conclude from the attitude of the other.*"

In this particular case the relevant contracts are the dealerships agreements exhibit P3 as amended the exhibit P 4 (amendment of dealership agreement). Exhibit P4 clause 1.0 (in particular 1.1 to 1.4) provides;

"*1.1 Petro Uganda will run and operate the station from the date of execution of this amendment until such a time as Deluxe shall vanish Petro Uganda with sufficient proof of having obtained capital to ran the station but in any case, Petro Uganda will not hand over the station to Deluxe before the expiration of six months from the date of execution of this are agreement.*

1.2 upon Deluxe furnishing proof in accordance with clause 1.1 above to Petro Uganda's satisfaction, the latter shall immediately hand over the station to Deluxe to run and operate.

1.3 for avoidance of doubt, in the event that Deluxe fails to provide proof in accordance with clause 1.1 above carry on with running of the station and during Such time, petro Uganda shall be entitled to appoint a manager or dealer of its choice.

1.4 *this and agreement shall not supersede the dealer agreement but shall be an integral part thereof and the terms of the dealership are agreement shall remain valid except where expressly amended by this agreement*"

The main argument of the plaintiff is that the defendant did not hand over the station to them after the stipulated six months. A reading of clause 1 of exhibit P. 4 will show that the plaintiff would hand over the station after the said six months upon the defendant Furnishing proof of sufficient capital to run the station. To my mind the furnishing of sufficient proof of capital the question of evidence. The evidence Act [Cap 6] Laws of Uganda sections 101 and 102 are instructive as to the burden of proof required in evaluating such evidence.

> *"*
>
> ***101. Burden of proof***
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> *(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts existed.*
>
> *(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies in that person.*
>
> 102. ***On whom burden of proof lies.***
>
> *The burden of proof in a suit or proceedings lies on that person will would fail if no evidence at all were given on either side.*
> "

Clearly the law would put the burden of proof as to the existence of sufficient capital on the plaintiff. I like to agree with Counsel for the defendant that the plaintiff has

not discharged this burden. There is for example no evidence put before court of correspondence between the plaintiff and the defendant where the plaintiff is asserting and proving that it has sufficient capital to run the station. Any reasonable person objectively would have expected the plaintiff to write officially to the defendant showing proof of sufficient capital. Instead the plaintiff keeps referring to non payment of a dealership margin to them. There is no evidence of an invoice from the plaintiff to the defendant for this money. Furthermore I am inclined to agree with Counsel for the defendant that the dealership margin would have been payable if the plaintiff was running the station and therefore able to pay itself the said margin being the difference between the wholesale price of fuel and the pump price. I therefore find that the plaintiff has failed to prove that there was Uganda shilling16,2000,000/= owing to it from the defendant which could be evidence of sufficient capital to run the station.

With regard to the assertion by the plaintiff the defendant owed it Uganda shillings 41,000,000/= under the variation of lease agreement once again the plaintiff has brought no documentary evidence as one would reasonably expect to the court to prove the existence of this debt. Indeed the variation of lease agreement (Exb P. 5) at clause 1.1 provides;

"

... The lesse (being the defendant) here by undertakes to pay the lessor (being the Plaintiff) the balance of the advance rental of shillings 41 million under the lease agreement in the following manner:-

(a) Ug.Shs. 20 million upon the execution of this are agreement receipt of which the lessor hereby acknowledges by executing these presents. (emphasis mine).

(b) Ug.Shs. 21 million to be paid one month from the date of execution of this agreement."

Clause 1.1 (a) to any reasonable person is sufficient to show that at least Uganda shillings 20,000,000/= of the said Uganda shillings 41,000,000/= had already been paid since the plaintiff by signing the agreement acknowledged receipt of the money. I therefore find that on the basis of the evidence before court the plaintiff has failed to prove that this rental was due and owing as alleged.

In concluding this issue a find the defendant is not in breach of the dealership agreement.

Issue No 2: Whether the plaintiff has ever performed its part of the dealership agreement as amended.

In dealing with issue number 1 above I have also by and large disposed of this second issue. The main contention of the plaintiff here is that it had demonstrated proof of sufficient capital to run the station but the defendants did not give them an opportunity to do so. I have already found that the plaintiff has failed to prove this.

Therefore find that in this respect that the plaintiff has not performed its part of the dealership agreement as amended.

Issue No 3: Whether the plaintiff is entitled to payment of the dealership margin under the agreement as amended.

Based on my earlier findings it is clear that the plaintiff is not entitled to payment of the dealership margin under the agreement. I accordingly answer this issue in the negative.

Issue No 4: What remedies are available to the parties?

As to the remedies sought by the plaintiff in paragraph 8 of the plaint I find it has failed to prove them. Special damages have to be strictly proved and this has not been done. The plaintiff has also failed to prove breach of contract as alleged, so it is not entitled to the award of general damages.

I accordingly agree with the submissions by Counsel for the defendant that this suit be dismissed with costs. I accordingly dismiss this suit with costs to the defendants.

Justice Geoffrey Kiryabwire

31/03/2006