THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-MA-0804-2007

(Arising from HCT-00-CC-CS-0839-2007)

Pan Afric Impex (U) Ltd
Applicant/Plaintiff

Versus

Barclays Bank PLC
Respondents/Defendants
ABSA Bank Ltd

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

RULING

1. The applicant is seeking an order that the respondents, their officers, agents, employees, contractors, and or any persons deriving title or authority from them be restrained from taking possession, occupying, managing, selling, or otherwise dealing with advertising and or taking any action on the properties, assets and securities owned by the applicant and the subject of loan facility agreements, mortgages and debentures executed on 27th December 2006 until further orders of the court and that costs of this application abide the final result of the main suit.
2. This application is supported by two affidavits sworn by Mr. Mohammed E.M. Hamid. The application is brought under *Order 41 Rules 1 and 9, of the Civil Procedure Rules, and Section 6 of the Arbitration and Conciliation Act*. The main grounds of the application are firstly that the agreements in question are void for mistake of fact and or lack of consideration. Secondly that the there are on going arbitration proceedings between the parties in London which would resolve the dispute between the parties.
3. The respondents oppose this application, and filed an affidavit sworn by Mr.

James Agin, the Corporate Director of Barclays Bank of Uganda Ltd, a wholly owned subsidiary of the respondent no.1.

4. The applicant originally had commodity financing agreements with both respondents effective from September 2005 for the respondent no.1 and December 2004 for respondent no.2. The exact terms, date of commencement and amounts made available vary from respondent to respondent. The applicant was dealing in coffee. It would purchase coffee beans, and delivered them to a designated warehouse which was under the control of a collateral manager, Ms Cotenca, appointed by both the plaintiff and the respondents. Upon delivery, and certification thereof, it would be advanced a certain sum of money, a percentage of the value of the coffee in the warehouse, by the respondents. Title of the coffee once it was in the warehouse belonged to the respondents.

5. On 10th November 2006 Cotecna informed the respondents that there was a shortfall in the coffee stocks available between what was reported and what was actually available. The applicant and respondents discussed the situation and entered into new agreements of 27th December 2006 between the applicant and each respondent separately. Prior to doing so, they initially again separately entered into a memorandum of understanding between the applicant and respondents. It is the 27 December 2006 Loan Facility Agreements that the applicant impugns and seeks to be declared void on the grounds put forth. On the other hand the respondents contend that these agreements are valid and effectual as against the applicant.

6. The trial of the main suit is not at hand. In the meantime the applicant has come to this court, seeking basically an interlocutory injunction to issue against both respondents restraining the respondents from acting on the 27 December 2006 agreements.

7. Mr. Didas Nkurunziza, learned counsel for the applicant submitted that the grounds upon which an injunction was to be granted were well known, and he need not regurgitate them. With regard to the first one of whether there was a

serious question to be investigated, he submitted that there are two matters. Firstly the agreements in question were void for mistake of fact. The applicant and the respondents had entered into those agreements under the understanding that there was slightly over 8000 metric tons of coffee in the warehouse, but as they were implementing the agreements it discovered that the coffee available was only 10% of what it had anticipated. This therefore voided the agreement.

8. At the same time he contended that the respondents had not provided any consideration to the applicant for the new agreements, as a result of which those agreements were void.
9. Mr. Nkurunziza further submitted that the applicant would suffer irreparable damage if the injunction was not to be granted. All the applicant's properties would be sold, and the applicant would just have to wind up. Granting an injunction would afford the applicant an opportunity to fight for its survival.
10. And since the respondents had securities submitted by the applicant, the balance of convenience was towards granting the injunction rather than not granting it. The second prong of this application was that given that there were on going arbitration proceedings in London in which the applicant and the respondents were involved, Mr. Nkurunziza submitted that the applicants were entitled to an injunction under *Section 6 of the Arbitration and Conciliation Act*. He cited *Tonoka Steels Ltd v The Eastern and Southern Africa Trade and Development Bank [2000] E.A. 536* in support of maintaining the status quo until the arbitration proceedings were completed.
11. Mr. Masembe, learned counsel for the respondents, submitted that Section 6 of the Arbitration and Conciliation Act does not apply to the facts of this case, as there is no arbitration agreement the parties and the arbitration proceedings in which the respondents are involved in London are with Cotecna, the Collateral Manager, and not the applicant. The applicant has been cross petitioned by Cotecna, and to that extent the arbitration proceeding in which the applicant is involved is only between the applicant and Cotecna, and not the respondents. Such circumstances are not covered by Section 6 of the Arbitration and Conciliation Act.

12. Secondly with regard to the claim that the agreements in question were void on account of mistake of fact, Mr. Masembe submitted that there was no such mistake at all. As the 27 December Agreements were different in detail the case for each respondent is somewhat different from the other much as Counsel for the plaintiffs argued as if the two agreements were the same.
13. In respect of the respondent no.1, Mr. Masembe submitted, the applicant agreed to pay the commodity debt that was ascertained as US$15 million dollars on the terms set out in that agreement, and the loan provided was for purpose of payment of that commodity debt. It did not matter what the shortfall was. The shortfall was clearly defined and reference is made to in clause 3 thereof as only an estimate by Cotecna.
14. With regard to the respondent no.2, Mr. Masembe submitted that there was no mistake whatsoever with regard to the quantities of coffee in question with provision made for shortfall, shortfall Debt, shortfall estimate, and shortfall estimate payment. Provision was made in case the shortfall Debt was greater or less than the shortfall estimate, thus taking into account all possible scenarios. The actual shortfall would be established by Drum and the applicant would pay shortfall debt.
15. Mr. Masembe further submitted that the claim that there was no consideration furnished is simply not incorrect. There were the previous financing agreements which were not loans. These were extinguished, and new agreements made under which the applicant was granted 5 years within which to pay the loan. This was consideration.
16. Mr. Masembe then concluded on this issue that the applicant had failed to make out a prima facie case with any probability of success. He then referred to the American Cyanamid case, and the affidavit of Mr. James Agin, arguing that the applicant would not suffer irreparable loss as the respondents are more than able to compensate the applicant should it succeed in its action, and its property had been sold off by the respondents. The respondent no.1 owns all the shares of its subsidiary operating in Uganda, Barclays Bank of Uganda Ltd.

17. Mr. Masembe further submitted, applying the test in the American Cyanamid case, that the plaintiff would be unable to meet the defendants' claims against it if the injunction was granted and the defendant succeeded at the trial. The securities provided by the applicant, to the respondents, under the 27 December agreements, had no value to meet the defendants' claim, as Mr. Nkurunziza had conceded.
18. Mr. Masembe further submitted that if there was any doubt, the balance of convenience lay with not granting the injunction rather than granting it. The applicant was massively indebted to the respondents, and the indebtness is growing by virtue of interest, while the securities, are depreciating. The gap between the assets and the indebtness is growing.
19. I will first deal the application of *Section 6 of the Arbitration and Conciliation Act*. I shall set out the relevant parts therof.

> '(1) A party to an arbitration agreement may apply to the court, before or during arbitral proceedings, for an interim measure of protection, and the court may grant that measure.'

20. It is without question that a court can grant interim measures of protection under the foregoing provisions. There are conditions though for a person to take advantage of these provisions. Firstly there must be an arbitration agreement between the parties. A party to such an agreement may then apply for such an interim measure before or after the commencement of arbitral proceedings. If the arbitral proceedings have commenced, the applicant would have to be a party to these proceedings, and a party to the agreement giving rise to the arbitration proceedings.
21. As pointed out by Mr. Masembe, and quite rightly in my view, there are no arbitral proceedings between the applicant and the respondents in this case. The respondents commenced arbitration proceedings against Cotecna before the London Court of International Arbitration. The respondents did not proceed in anyway against the applicant. Cotecna cross petitioned to add the applicant, claiming some kind of indemnity, as it contended that applicant contributed to or is responsible for the circumstances in which Cotecna found itself, and for which

arbitration proceedings have been commenced against it by the respondents.

22. I take it that the respondents are not a party to the arbitral proceedings between Cotecna and the applicants. Neither has the applicant commenced or threatened to commence any arbitral proceedings against the respondents.
23. It has not been suggested that the head suit is subject to any arbitral proceeding or ought to be stayed because of the existence of an arbitration agreement between the parties to it. I am satisfied that there is no arbitral agreement between the applicant and the respondents in issue in this suit. For those reasons I am satisfied that Section 6 (1) of the Arbitration and Conciliation Act is not applicable to the facts of this case.
24. However, even if it were to be applicable, and the applicant has applied for a temporary injunction, such application must still be subject to a finding that the necessary prerequisites for the grant of such an injunction are available before such an order would issue. I shall now proceed to consider the conditions under which a temporary injunction ought to be granted.
25. It is now well settled that that where a party seeks a temporary injunction before determination of the main suit, that party must, firstly, show that there is a serious question to be tried. Secondly that it stands to suffer irreparable loss should the injunction not be granted. And in case of doubt, the matter can be resolved on a balance of convenience.
26. I am mindful of what may turn into a minefield in considering whether an applicant has shown that there is a serious question to be tried in the main case. Ordinarily a court ought not to express itself on the merits of the case before hearing of the same. Nevertheless the court must satisfy itself that the case put forth by the applicant is not vexatious or frivolous. It must disclose a serious question to be tried by the court. As was pointed out by *Lord Diplock in American Cyanamid Co v Ethicon Ltd [1975]1 All ER 504 at page 510*,

> ‘It is no part of the court’s function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to the facts on which the claims of either party may ultimately depend nor to decide difficult questions of law

> which call for detailed argument and mature considerations. These are matters to be dealt with at the trial……
> ……..
> So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought'

27. In the case at hand, there are agreements that were signed by the parties. The applicant contends that there are void for mistake of fact as to quantity of the coffee in the warehouse at the time the 27 December Agreements were signed by the parties. Paragraph 4p of the plaint states, in part,

> 'Subsequently in December 2006 the plaintiff and the two defendants, represented as aforesaid, met again and after two days of negotiations based on the Audit Report of Cotecna dated November 17,2006 which now confirmed that the actual amount of the Product in the said warehouses and stores was approximately 8,913.08 net metric tonnes (referred to herein after as the 'the expected tonnage') entered into an agreement whereby it was agreed, inter alia, that, pending a full audit of the quality and quantity of the coffee to be carried by another inspection agency known as DRUM:……'

28. The plaint then sets out the some matters which are supposed to be set out in the 27 December 2006 agreements but as if reference was made to one agreement. The plaint then goes in paragraph 4q as follows:

> 'The plaintiff contends that it was an implied fundamental term of the said agreements of 27th December 2006 that, on reliance of the said Audit Report of Cotecna dated November 17, 2006, the Commodity in the warehouses and stores would and could not be less than approximately 8,913.08 net metric tonnes, (give or take variations acceptable in the normal and ordinary course of business) i.e. the expected tonnage, the processing of which and for the generation of capital by the plaintiff was the basis of the calculation of the said instalment payments.'

29. The plaintiff's managing director in his first affidavit states, in connection with the foregoing,

> 'That the said suit has a high probability of success as a

prima facie case is clearly set out in the Plaint showing that:
a. The fundamental basis on which the applicant/plaintiff and the two respondents/defendants negotiated and eventually signed the Agreements of December 27th 2006 was that a minimum amount of 8,913.08 tonnes of coffee as reported by Cotecna, the Collateral Manager, in their Audit Report of 17th November 2006 (Annexture 'PAI 2' to the plaint), after the alleged shortfall, was actually in the warehouses and stores;
b. This basis was subsequently found, after all the coffee had been processed at the cost of the applicant/plaintiff, not to be correct and that there had (excluding the amount of 565.14 net metric tonnes processed and sold on behalf of the 2nd Defendant the proceeds of which ere paid into the Collection Account controlled by the 2nd Defendant as shown in paragraph 4y of the plaint) been approximately 1,781 net metric tonnes only (i.e.20%) of that amount actually in the warehouses and stores;'

30. The respondent deny the existence of any such fundamental implied term, pointing to both the memorandum of understanding signed between the parties to the suit, the respective agreements signed between each respondent and the applicant. I start by looking at memorandum of understanding. It is dated 22nd November 2006. It gives the background as follows:

> '1. Pan Afric is in business in Kampala, Uganda buying, processing and trading in coffee.
> 2. Barclays and Absa have provided structured agricultural commodity finance to Pan Afric to finance the purchase of coffee.
> 3. Under SCAF Agreements Barclays, Absa and Pan Afric appointed Cotecna to be the collateral manager of the Coffee.
> 4 Cotecna has reported to Barclays that in their estimation there is a substantial shortfall between the quantity and quality of coffee under their control in Pan Afric's warehouse and the quantity and quality of Coffee against which Barclays and Absa have made payments to Pan Afric, leaving Barclays and Absa substantially unsecured. Pan Afric disputes Cotecna's estimation of the shortfall.
> 5. Pan Afric, Barclays and Absa have discussed the position

> in Uganda on Monday, 20th and Tuesday 21st November 2006. The purpose of this document is to set out the way in which it is intended that the present difficulties shall be resolved subject to the consent of all relevant insurers. It does not confer any legal rights or obligations on any party and it does not take away or detract from any existing rights or obligations or liabilities. It is intended that the parties will enter the legal agreements required to give effect to the agreed course of action as quickly as possible and in particular the parties agree to do al in their power to put the Security in place by 15 December 2006.
> 6. The approximate amount of Exposure (being the amount used for the purposes of this discussion as to the way forward) is: Barclays US$15.9m. Absa US$13.5m.'

The memorandum then set out agreed courses of action and steps to be taken as the parties would move to new agreements.

31. The parties subsequently entered into new Loan Facility Agreements dated 27 December 2006, which are the subject of this suit. With respect to the respondent no.1 the applicant undertook to pay the 'commodity debt' which was ascertained as at the date of the agreement as being US$15,943,958.26. The respondent upon security being provided was to provide a loan to the applicant sufficient to pay the commodity debt, and the sole purpose of the loan so granted was to pay the commodity debt. In clause 3 thereof it is mentioned that Cotecna reported a shortfall but had only estimated its size. In clause 8 it is agreed that DRUM shall be engaged to assess the shortfall, at the Borrower's expense.
32. I have examined this agreement and I agree with Mr. Masembe that nothing turns on the shortfall, whichever its size, with regard to the obligations and benefits that the parties assumed or received under that agreement. There is simply no basis on the facts now before me, to point to the existence of an implied fundamental term, outside of the written agreement, that new agreement of 27 December 2006 would be based on the existence of a minimum of 8,913.08 metric tonnes coffee in the warehouses.
33. With regard to the respondent no.2 it is clear that the agreement between the applicant and the respondent no.2, in a detailed manner, under the Fourth

Schedule thereto, provided for either situation. It made provision for what would happen, after the true nature of the shortfall was established, in case the shortfall debt was greater or less than the shortfall estimate. It is fanciful then to contend that there is an implied term that the agreement was to be based on the existence of a minimum quantity of coffee in the warehouse.

34. In any case that would really be a condition precedent rather than an implied term.

35. Implied terms are introduced in a contract by court only when it is absolutely necessary to fill what appears to be missing. As was noted by *Lord Russel of Killowen in Luxor (Eastbourne) Ltd (in liquidation) and Others v Cooper [1941] (1) All ER 33 at page 44*,

> 'I can find no safe ground on which to base the introduction of any such implied term. **Implied terms, as we all know, can be justified only under compulsion of some necessity.** No such compulsion or necessity exists in the case under consideration.'

36. It was also noted *Lord Evershed MR in Lynch v Thorne [1956] (1) All ER 744 at page 746*,

> 'Where there is a written contract expressly setting forth the bargain between the parties, **it is, as a general rule, also well established that terms are to be implied only under compulsion of some necessity.'**

37. The term to be implied would be one which in the eyes of either of the parties would obviously not need inclusion in the written terms of the contract because it is something that would be taken as obvious. In the words of *Mackinnon L.J. in Shirlaw v Southern Foundries (1926) Ltd and Federated Foundries Ltd [1939](2) All ER 113 at page 124*,

> '"**Prima facie that which in any contract is left to be implied and need not be expressed is something so obvious that it goes without saying**." Thus, if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in their agreement, they would testily suppress him with a common: "Oh, of course." At least it is true, if a term were never implied by a judge unless it could pass that test, he could not be held to be wrong.'

38. The applicant entered into separate contracts with each of the respondents. Those

written agreements are not similar, and vary significantly in detail. No necessity has been shown to give rise to the term the applicant wants to be implied. Neither is it obvious. In fact when one examines the agreements, as I have done above, the term the applicant would wish to imply into the contracts would be inconsistent with the express terms of the written agreements. This a court cannot do. It would amount to re writing the contract for the parties. As was noted by *Parker L.J., in Lynch v Thorne, (above), at page 750*,

> 'In other words, he was forced to imply a term which, in effect, overrode the express terms of the contract. **It seems to me that that is a very bold proposition, because an implied term, by its very nature, can operate only in so far as it is permitted by the express terms of the contract so to do.'**

39. Of course this case has not come to trial as yet. However, the agreements in question are not in dispute. The term proposed to be implied is the basis for the application for an interlocutory injunction. Examining the written agreements, even at this stage, it is possible to determine, whether it is the kind of term that a court may be able to imply into the contracts in question, and therefore whether there is a serious question to be investigated, at the trial. I have come to the conclusion, for the reasons set out above, that the term proposed is not the kind that would be implied in the contracts in question.
40. The applicant further contends in the plaint, paragraph 4t thereof, that both the plaintiff and defendants were under the mistaken belief at the time of negotiating and signing the agreements of 27 December 2006 that the commodity in the warehouses and stores could not and would not be less than approximately 8,913.08 net metric tons. The defendants have denied that the defendants were under such a belief. The agreements in question clearly as explained above do not reflect in any way such a belief for either party. To the contrary, the agreement with respondent no.2 leaves it open and makes provision for whatever scenario, greater or less, after measurement by an independent party, DRUM, to be paid by the applicant for that work. Such a belief as the applicant claims is inconsistent with the agreements.

41. The applicant contends on the plaint and in this application that the defendants did not furnish consideration for the applicant to agree to pay for the shortfall reported by Cotecna which arose from the negligence and breach of terms of the Collateral Management Agreement by Cotecna. It further contends that the agreed loan facility or any part of it, were not advanced by the two defendants.
42. I have read the agreements of 27 December 2006 between the applicant and each of the respondents. It is clear that the applicant agreed to assume liability for the value of the shortfall in the stocks managed by Cotecna. It agreed to take loans from the respondents to pay off the value of the shortfall for each respondent. In return it was granted a scheduled repayment programme over a period of time. It was promised that any sums of money that may be recovered from the insurers of the stocks, under those earlier set of agreements, would be applied to reduce the either the shortfall debt, or the loan advanced to the applicant, or in event that either of those had been paid off, would be paid to the applicant. The stocks, whose title lay with the respondents, such as existed in the warehouse were released to the applicant for processing, and the proceeds thereof, were applied as agreed.
43. The applicant and the respondents made promises to each other and assumed certain obligations, classically providing consideration. It is possible that the applicant assumed onerous obligations but it did assume these obligations in exchange for some promises. It is not correct in my view, to claim that no consideration moved from one party to another.
44. I am satisfied that the case put forward by the applicant fails to meet the first threshold for grant of a temporary injunction. The applicant has failed to satisfy this court that it has a prima facie case upon which a temporary injunction should be considered to issue. However, in case I am wrong, I will proceed to consider the second ground that has to be satisfied before an interlocutory injunction is granted.
45. To support the claim that the applicant would suffer irreparable loss, the applicant’s affidavit in support refers and I will set out the relevant portions

thereof:

> ‘15. That our company has, in addition to the two coffee processing plants in Kawempe, a fleet of 80 long distance hauliers, trucks and trailers which are fully on the road servicing transport contracts with various parties in and around East Africa, Southern Sudan and the Congo, and if a Receiver is appointed and our properties and assets seized then the company will not only suffer colossal losses and irreparable damage to it’s business, credit and goodwill built up over many years of operations both locally and internationally, but will also face numerous claims and law suits for breaches of contract.
> 16. That the two applicants/Defendants do not maintain for have offices or properties in Uganda (other than the 1st Respondent/defendant which has shares in Barclays Bank of Uganda Ltd but which shares cannot be sold without consent of the regulatory authorities including Bank of Uganda) and, consequently, it will be most tedious and cumbersome to enforce any judgement for recovery of money or the value of the properties and assets of the Applicant/Plaintiff if the Respondents/Defendants are not prevented from attaching and selling the same before the determination of the main suit.
> 17. That I am advised by our lawyers, M/S Didas Nkurunziza & Co Advocates, and verily believe their advice to be true, that they have not be able to find any evidence of arrangements for reciprocal enforcement of judgments between Uganda and Mauritius and Uganda and the Republic of South Africa and there is therefore the very real possibility of our failing to enforce any Judgment that we may obtain against the two Respondents/Defendants.
> 18. That in any event, neither of the two Respondents/Defendants will be prejudiced by the issue of an Order of Temporary Injunction since they both have registered mortgages and debentures over our properties and assets and the same cannot be disposed of or sold by us without their knowledge and consent. In addition the monies payable under the disputed agreements have provision for payment of interest that will adequately cater for any delayed payments as a result of the issuance of an Order of Temporary Injunction.’

46. In the foregoing evidence put forth, it is not shown that the loss the applicant would suffer is not capable of monetary compensation, though it is claimed,

without more, that it would 'suffer colossal losses and irreparable damage to it's business, credit, and goodwill and face 'numerous claims and law suits.' What is stated, especially in paragraph 16 of the applicant's affidavit in support, is that the applicant would find recovery of judgment against the defendants tedious and cumbersome because of the nature of the property held by the respondent no.1, in its subsidiary in Uganda, Barclays Bank of Uganda Ltd, which is a financial institution. This falls short of suggesting that the defendants would be unable to meet a judgment in favour of the applicant should the applicant succeed against the respondents.

47. In deciding whether an applicant has been able to establish that it would suffer irreparable loss, the words of *Lord Diplock, in American Cyanamid Co v Ethicon Ltd, (above), at page510,* are instructive. He states,

> '… the governing principle is that the court should first consider whether if the plaintiff were to succeed at the trial in establishing his right to a permanent injunction he would be adequately compensated by an award of damages for the loss he would have sustained as a result of the defendant's continuing to do what was sought to be enjoined between the time of the application and the time of the trial. If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however strong the plaintiff's claim appeared at that stage. If, on the other hand, damages would not provide an adequate remedy for the plaintiff in the event of his succeeding at the trial, the court should then consider whether, on the contrary hypothesis that the defendant were to succeed at the trial in establishing his right to do that which was sought to be enjoined, he would be adequately compensated under the plaintiff's undertaking as to damages for the loss he would have sustained by being prevented from doing so between the time of the application and the time of the trial. If the damages in the measure recoverable under such an undertaking would be an adequate remedy and the plaintiff would be in such a financial position to pay them, there would be no reason this ground to refuse an interlocutory injunction.'

48. The applicant has not shown that if the interlocutory injunction applied for is not

granted and the applicant succeeds at the trial the loss they will suffer is incapable of monetary compensation. Neither has the applicant shown that the respondents would not be able to meet such compensation as may be ordered should they succeed in the main suit.

49. I am satisfied that this application is without merit and it is accordingly dismissed with costs.

Signed, dated and delivered this 13th day of February 2008

FMS Egonda-Ntende
Judge