THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-633-2004

PETRO UGANDA LTD:: PLAINTIFF

VERSUS

PHENNY MWESIGWA :: **DEFENDANT**

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

JUDGMENT

The Plaintiff a petroleum company and the Defendant a businessman from 1999 had a business relationship involving the sale of the plaintiff company's petroleum products. The relationship was multifaceted in the sense that the Plaintiff was a tenant at 12 fuel stations belonging to the Defendant for which he paid rent at an agreed sum per litre of fuel sold at the premises. On the other hand the Plaintiffs then sublet back to the Defendant the same petrol stations whereby the Defendant became a petroleum dealer for the Plaintiff. As a dealer the Defendant would receive the Plaintiff's products which were supplied at the invoiced price less the dealer's margin. The plaintiff also provided the Defendant with its equipment for use at the said petrol stations. The Plaintiff also under a separate arrangement supplied fuel to DFCU Bank a client of the Defendant and invoiced them separately.

The case of the Plaintiff against the Defendant is for the sum of shs 2,400,464,123/= (Two billion four hundred million four hundred sixty four thousand one hundred twenty three) on account of sums due to the Plaintiff for fuel supplied and loss of profit following the termination of their relationship in August 2003 by the Defendant. The Plaintiff also claims

the return of fuel equipment loaned to the Defendant.

In his defence the Defendant generally denies that he owes the plaintiff the money as alleged. He avers that the parties failed to agree on the dealer margin due to him and that some of the leases relied upon by the plaintiff had either expired or were ineffective. He further averred that the parties negotiated a settlement on the outstanding amounts which ultimately led to the release of a caveat on the plaintiff's property on the 27thAugust, 2003 signifying that all Pending claims had been paid. However, it was an agreed fact between the parties that there was no dispute between the parties as to the amount of fuel supplied by the Plaintiff to the defendant.

The parties agreed on the following issues for trial;

1. Whether the Plaintiff applied the correct margin for the fuel dealership accounts and if so, whether the Defendant is indebted to the Plaintiff for the unpaid fuel supplies.

2. Whether the Defendant is indebted to the Plaintiff in the sum of 10,055,765/= on account of fuel supplied to DFCU.

3. Whether the Plaintiff paid rent at the agreed rate and if so whether the Defendant is indebted on account of unutilised rent paid in advance?

4. Whether the defendant wrongfully deprived the Plaintiff of its equipment and converted the same?

5. Whether the Plaintiff has a valid lease agreement for Mbarara/Rwizi and if so, whether the plaintiff can sustain a claim on the agreement?

6. Whether the Plaintiff wrongfully terminated the lease for Mbarara/Rwizi and if so, whether the Plaintiff is estopped from bring the claim for loss of profit?

7. Remedies?

Mr. E. Karugire appeared for the Plaintiff while Mr. K. Kakuru and Mr. O. Mwebesa appeared for the Defendant.

Issue No.1. **Whether the Plaintiff applied the correct margin for the fuel dealership accounts and if so, whether the Defendant is indebted to the Plaintiff for the unpaid fuel supplies.**

Since the parties did not contest the amount of fuel supplied this issue revolved around the question as to which was the correct dealer margin to be applied? The Plaintiff company called three witnesses namely Mr. Fakir Mohammed Ladha (PW1) its General Manager, Mr. James Turner (PW2) its Group Managing Director and Mr. Caleb Mwesigwa (PW3) its legal officer. The Defendant Mr. Phenny Mwesigwa (DW1) gave evidence on his own behalf. The Plaintiff claims the following amounts of money as outstanding from the Defendant for unpaid fuel supplies: -

1. Rwizi Service station Shs. 266,546,318/=
2. Busega service station . Shs. 83,779,782/=
3. New Kyengera fuelling station.... Shs. 50,162,000/=
4. Petro Ntungamo Shs. 70,548,020/=

This is a total of Shs. 471,036,120/=. All the witnesses agree that the business relationship between the parties was largely Informal. Only the Mbarara /Rwizi service station (Ex. P.10) and Kabwohe station out of an original 15 petrol stations under business relationship between the parties had written agreements. Mr. Mohammed Ladha (PW1) testified that the problem

between the parties arises because the Defendant was applying the wrong dealer margin on the dealership accounts. Mr. Ladha testified that the Defendant applied a dealer margin of Shs.100/= instead of an agreed margin of between Shs.25/= to shs.45/= depending on the station. This rate applied by the Defendant gave him a credit balance in his favour of shs 506,969,649/= which was wrong. Mr. Turner (PW2) used exhibit P.18 and P.19 With regard to Rwizi service station to illustrate the agreed dealer margin between the parties was shs 45 and not Shs. 100/=. He further testified that the Defendant told him that he terminated their dealership agreements because he was dissatisfied with the dealer margin he was getting.

The Defendant also testified that his relationship with the Plaintiffs was largely informal. He testified that his dealer margin was supposed to be Shs.100/= which was not applied by the Plaintiffs. He disputed the agreement for Rwizi which provided for a margin of Shs.45/=. He testified that he signed the last page of that agreement without reading the earlier pages.

Counsel for the Plaintiff wondered how the Defendant could have traded with the plaintiff on the basis of the wrong margin for a period of three years without complaining. He submitted that Defendant's evidence was contradictory as he originally even denied his signature on Exhibit P.10.

He referred me to the case of;

Gachigi v Kamau [2003] 1 E.A. 69

for the proposition that the Court has to take into account the demeanour of the witness in establishing the credibility of his evidence. In this case he submitted that the Defendant's evidence was not credible compared to the truthful and steadfast evidence of the Plaintiff's witnesses.

Counsel for the Defendant submitted that each party had its own margin and that the Plaintiffs had failed on the balance of probabilities that the agreed rate was Shs.45/= and not Shs.100/=. He dismissed the lease agreement (Exh. P.10) as not valid as it was not properly

executed by the Plaintiff as a corporate body by two directors or by a director and secretary. He submitted that the said agreement was not sealed and as such was void and unenforceable. In this regard he referred me to two cases

General Parts (u Ltd V NPART SCCA No. 5 of 1999 (unreported)
and
Fredrick Zzabwe V Orient Bank & Others SCCA No.4 of 2006

He further submitted that the lease was not registered and stamp duty was not paid thus rendering it unenforceable in the courts of law.

I have perused the submissions of both counsel on this issue and the evidence presented before Court. It is clear from the evidence that the Plaintiff largely relied on the Defendant to expand its petroleum business into western Uganda by using the latter's fuel stations. In so doing the Plaintiff also made the defendant its main dealer in western Uganda using his own petrol stations. The main problem as I see it is that in so doing the parties worked largely on the basis of trust hardly signing any agreement. Indeed even the one that was signed in respect of the Rwizi station in Mbarara is heavily contested by the Defendant who insists that even that dealership was informal. Of course this does not augur well for the Plaintiffs who as a large petroleum company should have on the basis of the principles of good corporate governance had this critical business relationship well documented to avoid this kind of problem. That notwithstanding the determination of this issue in my understanding as counsel for the Plaintiff submitted revolves on whose testimony is more credible than the others as to the prevailing dealership rate.
In making this determination again notwithstanding the flaws pointed out above, it must be kept in mind at all times that this is a commercial transaction. In such commercial transactions commercial documents are important evidence to take into account in addition to the oral evidence that is given. The Defendant claims that the correct dealer margin especially for a station like Rwizi station is Shs.100/=. However the Defendant apart from his oral evidence provides no commercial documentation to back up his position. He simply contests documentation from the Plaintiffs without providing alternative commercial documentation. On the other hand the Plaintiffs have provided commercial documentation from themselves

Exh.18 a tax invoice/delivery note and an invoice from the Defendant's petrol station at Rwizi Ex. P.19 that show that the dealer margin was Shs.45/= as the Plaintiffs state. I with the greatest of respect must disagree with Counsel for Defendant that the Plaintiff determined the invoice value for Exh. P.19 for this clearly a document from the defendant's own station. I also agree with Counsel for the Plaintiffs that it is strange that the Defendant should so late in their relationship contest the dealership margin as he did. This is especially so considering that if the Defendant was correct, that would have given him a credit balance with the plaintiff of Shs.506,969,649/ a sum he has to date not claimed from the Plaintiffs. The defendants excuse for that is that is that he is not a *"good accountant'*. This to my mind is not credible evidence coming from a businessman of his stature. The defendant even at one stage sought to deny his signature on Exh. P.10 which was later retracted. I agree that in the face of this evidence of the Defendant, the evidence of the Plaintiff witnesses is clearly more credible. I accordingly agree with The Plaintiffs that various petrol stations of the Defendant had different rates for dealer margins but none of which was for Shs.100/.

Issue No. 2. **Whether the Defendant is indebted to the Plaintiff in the sum of 10,055,765/= on account of fuel supplied to DFCU?**

It is not in dispute that the Plaintiff supplied fuel to DFCU Bank the Defendant customer and then invoiced the Defendant for payment. The claim of the Plaintiff is founded on Exh. P.7 (at Page 47 of the Plaintiff's bundle) a ledger account entitled *'Phenny-DFCU A/c"* which shows a closing balance of Shs.10,055,765/= as at the 19th December, 2003. Mr. Ladha testified that this has not been paid.

Counsel for the Defendant submitted that there was no proof that the fuel claimed for had actually been supplied. The Defendant didn't testify against this figure or call addition witnesses to refute it.

Based on the evidence on record I find that Defendant has failed to dispute this amount. He has not shown by other documentation that this amount is not due and owing.

I accordingly award the Shs.10,055,765/= to the Plaintiffs.

Issue No. 3. **Whether the Plaintiff paid rent at the agreed rate and if so whether the Defendant is indebted on account of unutilised rent paid in advance?**

Counsel for the Plaintiff submitted that all stations had different rental rates and apart from Rwizi/Mbarara which had a written agreement all other rental agreements were verbal. The parties only agreed to the rental for the Kabererbere/Kabwohe station at Shs.35/=per litre. Counsel for the Plaintiff submitted that on the evidence adduced (Exh. P.2a) the outstanding due for Rwizi/Mbarara was Shs.74,558,550/=; Ishaka was Shs.3 1,571,051/=; and Ishanyu Shs.3,675,000/=. These figures when deducted from the total unutilized rent paid in advance leaves an outstanding payment due to the plaintiff of Shs.54,908,251/=

Counsel for the defendant submitted that this issue is similar to issue number one (supra) and revolves on what was the "*agreed rate*" payable per litre sold at every petrol station. He submitted that evidence showed that the parties had oral agreements and could not agree as to what the rate was. In this regard the Plaintiff had failed to prove that their rate was the agreed rate.

I have considered the evidence adduced on this issue and in particular the statement of the Plaintiff in Exh. P.2 (a) and that of the defendant in Exh. P.4. The Defendant's Exh. P.4 shows that the Plaintiff owes the Defendant Shs.506,909,649/= which is far in excess of any amount claimed by the Plaintiff in this regard. This is because of the different rates applied by the parties. Like I have already held in issue number one I agree with Counsel for the Plaintiff that the Defendant's statement is not credible. This money on the evidence before me has never been claimed and yet it is a very large amount. That indeed makes it suspicious. Again this issue will revolves around which evidence is more credible (that of the Plaintiff or that of the defendant) and I find that again that of the Plaintiff to be more credible. I accordingly award the Plaintiff the sum of Shs.54,908,251/=.

Issue No. 4. **Whether the defendant wrongfully deprived the Plaintiff of** its **equipment and converted the same?**

Counsel for the Plaintiff submitted that while some of the defendant's equipment was returned, the Defendant is still in possession of 13 nozzles; 1 compressor; 19 fire extinguishers and 23 canopy lights (as shown in Exh. P.11).

Counsel for the defendant submitted that all equipment was returned to the Plaintiffs on the 20th April 2005 and the outstanding equipment in Exh. P.11 was not specifically specified in the pleadings and so should be disallowed.

I have considered the evidence in this issue and the submissions of counsel. It is not true that the outstanding equipment has not been pleaded in the plaint. This is so pleaded in paragraph 4 (i) and attached in annexure 'E' to the plaint. The only difference between annexure 'E' to the plaint and Exh. P.11 is in the quantity. It can be explained that this is so because some of the equipment was returned on the 20th April 2005 after the plaint was filed on the 31 August 2004. Even Exh. P.3 para 4(i) envisages that the Defendant would yield up the Plaintiff's equipment except the tanks.

There is no evidence however to suggest that the outstanding equipment not handed back is being used by the Defendant. The evidence suggests that most of the Defendant's equipment was dismantled from the service stations. I suppose that is why a lot of it was given back to the Defendants. Neither is the equipment valued. I according find that on the evidence before Court the Defendant still has the equipment in Exh. P.11 and is ordered to return them to Plaintiff within a period of 30 days of this judgment. Failing which the Plaintiff shall supply court with the actual specifications of the said equipment and its age. The Registrar shall then appoint a professional valuer at the cost of the Defendant to put a value to the said equipment which must be paid within another 30 days of the Registrar notifying the Defendant of the court appointed valuer's figures.

Issue No. 5. **Whether the Plaintiff has a valid lease agreement for Mbarara/Rwizi and if so, whether the Plaintiff can sustain a claim on the agreement?**

It has been submitted by Counsel for the Defendant that the lease for the Mbarara/Rwizi petrol station Exh. P.3 is defective because it was not properly signed by the Plaintiff and the Defendant. It has also been suggested that the lease was not valid because the lease was not registered under section 51 of the Registration of Titles Act.

Counsel for the Plaintiff has submitted in response that the lease Exh. P.3 was executed over unregistered land and so was not subject to the Registration of Titles Act.

I have considered the evidence on this issue and the submission of counsel. The lease in Exh. P.3 was signed by the parties on the 2nd February, 2000 as a lease on an unregistered interest on land. However about 20 days later on the 24th February, 2000 the Defendant became the registered proprietor for the same property where the petrol stations were described in the title Lease hold Vol. 2768 folio 6 as plot 49-59 Kabale Road Mbarara. A review of the title shows that property in question has been registered land since 13th December, 1999 and first owned by Abdul Magembe and two others. It would appear to me on the evidence that the Defendant may not have let the Plaintiff know that he was preparing a lease for himself for this property. If he did I am convinced the Plaintiffs would have waited 20 days to sign the lease based on registered land! I find that in this respect the Defendant in not making this disclosure acted in a dishonest manner. I think that the Plaintiff also as a corporate body did not do their due diligence on this property and were too rush to sign this lease to the extent that they did not apply a seal to the agreement in accordance with Article 46 of the Plaintiff's own Articles of Association. To that extent I agree with Counsel for the Defendant that the Lease Exh. P.3 was defective.

That notwithstanding the parties went on to largely act on and derive benefit from the provisions of Exh. P.3 and to that extent the court will at common law impose a quasi-contract on the parties on the same terms of that of Ex. P3. I this regard I refer to my decision

in

Buildtrust construction (U) Ltd. V Martha Rugasira HCCS 288 of 2005

where I followed with approval the decision of **Lord Wright** in the case of

Fibrosa Spolka V Fairbain Lawson Combe Bardour Ltd [1943] AC 32 at 61.

To my mind this is not a question of a lease as much as it is a question of honouring the contractual obligations between the parties no matter how badly framed. Indeed in addition to the above the Defendant himself in his evidence testified and concede that he had a relationship with Plaintiff over the Mbarara/Rwizi station and he even received Shs.250,000,000/ advanced funding for it and that he subsequently terminated that relationship.

To that extent I find that a quasi contract existed between the parties.

Issue No. 6. Whether the Plaintiff wrongfully terminated the lease for Mbarara/Rwizi and if so, whether the Plaintiff is estopped from bring the claim for loss of profit?

I have already found that Exh. P.3 was defectively executed. That notwithstanding there was a quasi contract that created a relationship between the parties that they followed. According to Counsel for the Defendant this relation was terminated by mutual agreement at a meeting between Mr. Ladha and the defendant on the 20th April, 2003 when they agreed that the Plaintiff releases the caveats on the defendants land titles. According to Counsel for the defendant it was agreed that the Defendant shall pay the Plaintiffs Shs.400,000,000/= in full and final settlement which was done on the 27th August, 2003. On the same day the caveats

were released by instrument No. 339045 which states

> "*... We, Petro (U) Ltd being registered in the above named volume and fob as the lodger of a caveat registered on the 27th March, 2001 hereby* ***RELEASE AND DISCHARGE*** *the registered properties and land comprised in the said volume and fob from* ***all claims under the said caveat...*** "(emphasis added)

Counsel for the Defendant then submitted that as a result of the above instrument the plaintiff is estopped from bringing a claim for lost profits.

Mr. Mwesigwa PW3 the legal officer of the Plaintiff testified that in drafting the release of the caveat he used the wording in a legal precedent but in reality there was still money that the Defendant owed the Plaintiff. The release of the caveat was simply an incentive to get the defendant to start paying his debt with the Plaintiff which he Defendant did with an initial installment of Shs.400,000,000/=.

I have reviewed the evidence on this issue and the submissions of both Counsels. To my mind the intention of the parties was best evidenced by Exh. P.3 the lease was for a period of 10 years (renewable) though the commencement date was not filled in the agreement. According to paragraph 3
(g)

> "*…other than for breach of this agreement the lessor undertakes not to terminate this agreement until the lapse of the term created herein..."*

The evidence before Court does not dwell on particulars of breach of the agreement per se but rather a protracted reconciliation of accounts problem.

I am inclined to believe as truthful the evidence of the Plaintiffs that as a result of this reconciliation problem the Defendant who was also the dealer of the Plaintiff just shut down operations with the Plaintiffs and pulled down their signs and dismantled their equipment. I unable to discern from the evidence before Court, that this relationship was terminated by mutual consent between the parties. The agreement was for all intents and purposes unilaterally terminated by the Defendant before its time. In this regard the Defendant breached the agreement.

As to the effect of release of caveat this is more problematic. The defendant testified that by reason of the release of caveat document he did not owe the Plaintiffs any more money. He further testified that the forwarding letter that forwarded the release of caveat instrument dated 4th December, 2003 did not refer to further money to be paid.
If the release of caveat instrument did not reflect the intention of the parties then surely the lawyer Mr. Mwesigwa messed up the drafting. I am convinced that one cannot rely on the excuse of using a precedent as precedents are just guidelines on how a document is to be drafted and it is up to the lawyer to adapt it appropriately. Actually a lot of the legal documentation in this dispute have problems let alone having the bulk of this high value transaction being oral without written agreements. The legal position as when the payment of a lower amount can suffice for the extinction of a high debt can only be achieved by a process known as *"accord and satisfaction."* Estoppel as an equitable remedy cannot discharge a party by allowing him or her to pay lesser amount for a higher debt. Under Common Law a contract has to be discharged in the same way in which it was formed. As a result such a discharge must be made under seal or supported by fresh consideration. There must a fresh agreement discharging the old agreement called *4ccord"* and the performance of that agreement through fresh consideration called "satisfaction". I am not satisfied that there is sufficient evidence before court of accord and satisfaction in this agreement that the payment of a lesser sum in this case will discharge the larger sum owed in the agreement.

I therefore find that the Defendant cannot benefit from the principle of estoppel with regard to the breach of this agreement.

Issue No. 7 Remedies?

As to the remedies most of them have already been outlined in the judgment itself.

I have already found as special damages the following as due and owing from the Defendant to the Plaintiff.

1. Unpaid fuel supplies shs …….471,036,120
2. Unpaid fuel on the DFCU Bank a/c Shs……10,055,768
3. Unutilized advance rent Shs…….. 54,908,251

Total Shs 536,000,139=

I have already ordered the return of the equipment of plaintiff that is outstanding.

The plaintiff also claims as special damages the sum of Shs.2,400,464,123/= as lost profit as a result of the termination of the Mbarara/Rwizi lease. Counsel for the Plaintiff submitted that if the lease had run to 2010 this is the profit that would have been made at the rate of Shs.179.93/= per litre of fuel sold. This calculation is detailed in Exh. P.21.

Counsel for defendant submitted that this claim has not been proved and in any case cannot be claimed as a special damage. He submitted that loss of profit should have been claimed as general damages. He further submitted even as a general damage there was no proof of loss adduced as the plaintiff is still able to sell its products to other dealers.

I agree with Counsel for the Defendant that loss of profit cannot be claimed as a special damage and in that respect remains unproved under that head. I according disallow this claim as special damages. But even as general damages any loss of profit if any incurred by the Plaintiff could have been avoided and or mitigated if it exercised good corporate governance and written proper agreements for their dealerships with the Defendant. There is evidence of

negligence on the part of the Plaintiff in this regard. In such a situation they would be debarred to claim any damage which is due to their negligence **per Lord Haldane**

> **British Westinghouse Electrical & Manufacturing Co. V Underground railways [1912] A.C. 673 at 689.**

In such a situation I would not be inclined to give the Plaintiff Shs.2,400,464,123/= as general damages either.

I would however grant the Plaintiff Shs.2,000,000/= as nominal damages for breach of contract.

The plaintiff has also prayed for interest on the amounts awarded. I would award the Plaintiff interest at 21% per annum from the 27th August 2005 on the special damages until payment in full and 8% per annum on the nominal damages from date of judgment until payment in full.

I would award the Plaintiff 2/3 of the costs on account of their failure to provide for written agreements an act of poor corporate governance.

Justice Geoffrey Kiryabwire

JUDGE

Date: 22/01/09

22/01/09

9:35

Judgment read in open Court and signed in the presence of

- B Karugire for Plaintiff
- O. Mwebesa for Defendant