

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HCT - 00 - CC - CS - 0347 - 2002

**NATIONAL
STORES
PLAINTIFF**

MEDICAL

.....

Versus

**KARNAG
LTD.**

**INTERNATIONAL
DEFENDANT**

.....

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J U D G M E N T

The plaintiff filed this suit against the defendant for recovery of special damages in the sum of USD 21,693,336, being the value of a letter of credit paid to the defendant for the purchase of drugs; Ushs 6,610,500/= being the cost of destruction of the said drugs and Ushs 12,162,185/= being demurrage and storage charges.

The case for the plaintiff is that sometime in 1998, the defendant was awarded a tender for the supply of products including 50,000 units of erythromycin powder for oral suspension 125/5ml at a total value of USD 26,000, by the plaintiff. A letter of credit No. 512/0554 was opened in favor of the defendant for USD 175,700 to supply the products and in accordance with the terms of the credit, USD 21,693,336 being 80% of the total CIF Sea Entebbe which was USD

27,116.67, was then paid to the defendant on presenting the shipping documents in May 1999.

The plaintiff avers that the defendant shipped 50,000 units in quality of 100ML unit erythromycin powder for oral 125MG/ML (India) (hereinafter referred to as the drugs) from Medopharm Ltd, a manufacturer in India. The plaintiff avers that when the consignment of drugs was inspected by the National Drug Authority (NDA) at Nakawa Port, it was rejected on the grounds that it did not meet the registration requirements of the NDA. The NDA also directed that the drugs be re-exported to the supplier in the country of origin. The plaintiff avers that the defendant was notified of this position. Furthermore, it is the case of the plaintiff that clause 3 of the "other terms and conditions in addition to the bidding document" which were part of the contractual terms provided that the goods would not be accepted unless they were registered with the NDA, and that the goods would be subjected to the NDA Quality analysis/inspection and acceptance would depend on the results of the said analysis/inspection.

The plaintiff avers that the defendant failed to re-export the drugs and as a result, the drugs expired. The plaintiff further avers that when the drugs expired, they were destroyed by Luwero Industries Ltd, pursuant to a directive issued by NDA, at a cost of Ushs 6,610,500/=, after accumulating demurrage and storage charges of Ushs 12,162,185/=.

The plaintiff avers that it cancelled the letter of credit issued to the defendant, and a demand was made to the defendant, by the plaintiff, for refund of the sum of USD 21,693,336 which had been paid.

The defendant denied the averments made by the plaintiff and contended that at the time the defendant made the bid to supply the drugs it was not in the terms of the offer that the goods would not be accepted unless they were registered with NDA, or that the goods were subject to inspection by NDA. The defendant contended that this clause was contained in a letter dated 22nd October 1998, to the defendant, notifying the defendant of the acceptance of its bid, and therefore, this was an additional term that could not be part of the terms of the contract that was already formed between the parties. Furthermore, that the defendant wrote a letter dated 22nd October 1998, to the plaintiff merely accepting the award on the original terms contained in the bid documents, and it did not accept the additional terms in the plaintiff's letter dated 22nd October 1998. The defendant contended that the plaintiff did not have any justification for rejecting the drugs supplied by the defendant.

In the alternative, the defendant contended that even if the terms in the notification letter dated 22nd October 1998 were part of the contract, the drugs could not be rejected on the ground that they did not meet registration requirements of NDA, because NDA in a letter dated 10th March 2003 confirmed that the drugs in issue had been registered with them since 1997, with all the requirements having been met.

The defendant counterclaimed for the sum of USD 5,423,334, being the balance of the 20% outstanding on the contract price, general damages, interest and costs.

In its reply to the counterclaim, the plaintiff denied indebtedness to the defendant in the sum claimed in the counterclaim.

At the hearing, the plaintiff was represented by Dr. Byamugisha, while the defendant was represented by Mr. Kibuuka Musoke. The plaintiff called two witnesses; Chrysostom Patrick Kisitu (PW1) and Dr. Chrysostom Lule (PW2).

History of the Case

This is an old case that was originally being heard by the **Hon. Justice James Ogoola** (as he then was) who retired before its conclusion. The case was then reallocated to me in January 2011 on a notice to show cause. The defendant neither called witnesses nor appeared before court when the case was fixed for hearing on 10th January 2011 at the instance of the court. The plaintiff prayed that the suit be determined under Order 17 r 4 of the Civil Procedure Rules. Given the length of time this case had been in Court I agreed with this prayer as the defendant had not explained the reason for its absence. Order 17 r 4 of the Civil Procedure Rules provides for the power of the court to decide the suit notwithstanding any default by any party, to perform any act necessary to further the progress of the suit and reads

“Court may proceed notwithstanding either party fails to produce evidence.

Where any party to a suit to whom time has been granted fails to produce his or her evidence, or to cause the attendance of his or her witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the court may, notwithstanding that default, proceed to decide the suit immediately.”

I will therefore proceed under the above provision to determine the suit, in default by the defendant to call evidence and file submissions.

The issues agreed to by the parties at scheduling conference before the previous Judge are as follows;

1. Whether Annexure A (Exhibit P1) and especially paragraph 3 thereof is part of the contract between the parties.
2. Whether the parties are entitled to the remedies pleaded.

Issue one; Whether Exhibit P1 and especially paragraph 3 thereof is part of the contract between the parties.

Exhibit P1 is the notification of award by the plaintiff to the defendant, dated 22nd October 1998. Paragraph 3 of this letter, which is the basis of the dispute provides as follows;

“Registration and quality assurance

Goods shall not be accepted unless they are registered within the National Drug Authority of Uganda (NDA). All goods shall be subject to NDA Quality Analysis/Inspection and, acceptance of goods shall depend on the results of that analysis/inspection...

If you accept this award, please indicate your acceptance of the offer within 7 days from the date of this offer and send along a Pro-forma invoice broken down into the following costs:...”

The case for the plaintiff is that the drugs were required to be registered by the NDA, and had to be subjected to a quality analysis/inspection, the results of which would be the basis of acceptance of the said goods. The plaintiff avers that the drugs were rejected by the NDA. On the other hand, the defendant’s case is that this term did not form part of the contract. It was contained in the

notification of award, and the said term was never accepted by the defendant.

Mr. Chrysostom Patrick Kisitu (PW1) testified on the plaintiff and in his written statement, he stated that the defendant rightly won the tender, was notified of the award of tender in a letter dated 22nd October 1998 and the award was accepted by the defendant in a letter dated 25th October 1998. Payment of a total sum of USD 21,693,336 was made to the defendant and subsequent to payment, the drugs were imported, but they had to be subjected to the mandatory inspection by NDA. NDA in a letter dated 27th September 1999 informed the plaintiff that the drugs did not meet registration requirements under the NDA Act and requested that the said drugs be re-exported within one month from the date of the letter. The plaintiff communicated this position to the defendant but nothing was done to re export the drugs. The said drugs were destroyed but the plaintiff had incurred storage and demurrage charges.

According to Dr. Chrysostom Lule (PW2) who testified on behalf of the plaintiff, the drugs imported were labeled as 'Erythromycin Powder for oral suspension 125 MG/5ML' but this differed from what was registered in NDA register. In the register, the license holder was named as MEDOPHARM, and the license holder had two drugs; the bond name 'BACIMMYCIN-P" in addition to the general/common name 'ERYTHROMYCIN'. Dr Lule stated that when the drugs are imported, the sample of the imported drug should be exactly comparable to the sample registered; the registered names must also appear on the imported drug. Furthermore, that any difference between the registered name and that on the imports would lead to rejection by NDA and therefore, in this case, the import

sample was different from the registered sample. This was also restated in the submissions of counsel for the plaintiff.

I have considered the evidence and submissions on record and I now make my findings. The question for determination by this court is whether the terms in the notification of award dated 22nd October 1998 were part of the contract between the plaintiff and the defendant.

It is a settled principle of law that documents sent after the contract is made do not form part of the contract. According to CHITTY ON CONTRACTS Vol. 1 Par 2-019 at pg Par 2-035 pg 105,

“Documents sent after contract is made.

...the submission of such a document by one party after the making of a contract will not affect the existence of the contract; nor will the terms of the document form part of the contract unless they are, in turn, accepted as variations of the contract, either expressly or by conduct.”

The question to be answered by the court is whether the bidding documents amounted to a contract between the plaintiff and the defendant. The general position of the law is that an invitation to bid/tender amounts to an invitation to treat and not an offer. According to CHITTY ON CONTRACTS Vol. 1 Par 2-019 at pg 98,

“An invitation for tenders for the supply of goods or services or the execution of works is, generally, not an offer, even though preparation of the tender may involve very considerable expense...The offer comes from the person who submits the tender and therefore there is no

contract until the person asking for the tenders accepts one of them.”

This position of the law above is also stated in the case of SPENCER V. HARDING (1870) LR 5 CP 561. It is clear therefore that the submission of a tender amounts to an offer, which may or may not be accepted. It is also a settled principle of law that an acceptance must be unqualified. According to CHITTY ON CONTRACTS Vol. 1 Par 2-018 at pg 97;

“Acceptance must be unqualified. A communication may fail to take effect as an acceptance because it attempts to vary the terms of the offer...”

In this case, a notification of the award was made by the plaintiff to the defendant in a letter dated 22nd October 1998. The defendant avers that the notification of award included additional terms which were not in the bidding documents. The notification of award letter therefore did not amount to an unqualified acceptance of the defendant’s offer by the plaintiff. In addition to this, the letter provided that the defendant was free to accept the additional terms in the notification, or to reject the same. The letter clearly required the defendant to indicate whether it was agreeable to the terms stated therein within 7 days of the letter. The notification provided as follows;

“ ...If you accept this award, please indicate your acceptance of the offer within 7 days from the date of this offer and send along a Pro-forma invoice broken down into the following costs:...”

Indeed, the defendant wrote a letter in reply dated 25th October 1998 (Exhibit P2 (a)) to the plaintiff, in reply to the notification in which the defendant stated that,

“We thank you for the award of some items in respect of the above mentioned tender as per your notification of award dated 22nd October 1998.

We hereby accept this award and will advise you on the details of payment to us soonest.”

This to my mind shows that the defendant accepted the terms of the award, as notified, in the notification letter, without any reservations. On the basis of that reply, I find that the defendant agreed to the terms of the award. It follows therefore, and I so find that the terms in the notification letter (Exhibit P1) formed part of the contract between the parties.

In the written statement of defence, the defendant also raised an alternative defence, that the drugs could not be rejected on the ground that they did not meet the registration requirements of NDA, because NDA in a letter dated 10th March 2003 confirmed that the drugs in issue had been registered with them since 1997, with all the requirements having been met.

I have considered the letter referred to by the defendant, marked Exhibit D1. It is a letter from NDA to M/S Kibuuka Musoke & Co. Advocates dated 10th March 2004 and states as follows;

“License holder: Medopharm

Drug name: Bacimycin-P

Generic name: Erythromycin Stearate

Strength: 125MG/ML

Dosage: Suspension powder

Registration No. 2214/06/97, on product register Human since 1997."

According to the evidence of Dr. Lule, when the drugs are imported, the sample of the import should be exactly comparable to the sample registered; the registered names must appear on the imported drug and any difference between the registered name and that on the imports invites rejection by NDA. This evidence was not challenged by the defendant.

The letter above clearly indicates that the two registered names were the drug name "*Bacimycin-P*" and the generic name "*Erythromycin Stearate*". The drug imported however was labeled, '*Erythromycin Powder for oral suspension 125 MG/5ML*'. Clearly there is substantial difference between the names registered by NDA and those on the drug imported and I am persuaded by Dr. Lule's testimony that this led to the rejection of the drugs by the NDA in 1999. On that basis, I am satisfied that the drug imported failed to comply with the registration requirements of NDA.

Issue 2: Whether the parties are entitled to the remedies pleaded.

Under the main suit I find that the plaintiff is entitled to the Special damages of USD 21,693,336 being the value of a letter of credit paid to the defendant.

With regard to the sum of Ushs 6,610,500/= being the cost of destruction of drugs and Ushs 12,162,185/= being demurrage and storage charges, these sums were never proved in evidence. In the case of **KYAMBADDE V MPIGI DISTRICT ADMINISTRATION** [1983] HCB 44, the court found that special damages must be specially

pleaded and strictly proved, but must not be supported by documentary evidence in all cases. In this case, there is absolutely no evidence to prove these damages. Surely such charges should have been formally invoiced against the plaintiff first. The only mention of this sum is in the demands sent by the plaintiff to the defendant without any supporting documentation. In the premises, the plaintiff is not entitled to the said sum.

The plaintiff prayed but did not address Court on the subject of general damages. As breach of contract by the defendant has been proved I will award the plaintiff general damages of USD 2,000.

As to Interest since the award of special damages is in United States Dollars I award interest thereon at 4%pa from the date of filing the suit until payment in full and 2%pa on the general damages from the date of this Judgment until payment in full.

I also award the plaintiff costs of the main suit.

As to the counter claim it is clear that the drugs supplied by defendant were rejected in accordance with the terms of the tender. On the basis of this, the defendant is not entitled to the counter claimed sum of USD 5,423,334, being the balance of the 20% outstanding on the contract price, together other reliefs sought in the counterclaim which I now dismiss with costs.

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Justice Geoffrey Kiryabwire
JUDGE

Date: 30/04/2012

30/04/12
9:20 a.m.

Judgment read and signed in open court in the presence of;

- Dr. Byamugisha for Plaintiff

In Court

- None of the parties

- Rose Emeru - Court Clerk

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Geoffrey Kiryabwire
JUDGE

Date:30/04/12