THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT CIVIL SUIT NO. 656 OF 2005

DADA CYCLES LTD :: PLAINTIFF

VERSUS

SOFITRA S.P.R.L. LTD:: DEFENDANT

BEFORE: THE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff company sued the defendant company for breach of contract arising from the defendant's failure to deliver the plaintiff's container. The brief background is that the parties entered into a carriage agreement in January 2005 where the defendant was to transport a container of the plaintiff's of goods specified as bicycle/ spares & parts from Mombasa to Kampala. The plaintiff was to pay cash of USD 3,400 on delivery of the goods by the defendant. The goods were not delivered within the anticipated period of two weeks.

Upon follow up and demand for delivery, the defendant wrote to the plaintiff promising to deliver the same on or before 15th July 2005 subject to approval of CWR waiver by KRA. However, it failed to do so and to date the container has not been delivered hence this suit where the plaintiff is claiming for special damages of USD 51,911.50, general damages arising out of breach of contract, interest and costs.

It is noteworthy at this point that although the defendant filed a Written Statement of Defence and participated in the pre-trial preparations at least up to the stage of filing a joint

scheduling memorandum, its counsel subsequently withdrew from the conduct of the case on the ground that he had lost contact with his client. The plaintiff was directed by court to serve the defendant directly using substituted service by advertising a copy of the hearing notice in the newspaper. This was done but still no appearance was made for the defendant and the plaintiff was allowed to proceed ex parte with the scheduling and hearing of the case.

Four issues were agreed upon in the joint scheduling memorandum but at the scheduling conference, upon the guidance of court, the 1st and 2nd issues were merged thereby reducing the issues for trial to three. The three issues are:

1. Whether the defendant is liable for non delivery of the container and value of the goods.
2. Whether the defendant is liable for lost profits.
3. Whether the plaintiff is entitled to the remedies sought.

At the hearing, the plaintiff called only one witness Mr. Karmjit Singh (PW) its former General Manager to prove its case. PW testified that in 2005 he was working as the General Manager in Dada Cycles Ltd which was dealing in the business of bicycles and its spare parts. That in the course of his work he dealt with the defendant company that used to be the transporter of the plaintiff's goods from Mombasa to Kampala. He further testified in respect to the matter in dispute that the parties entered into a carriage agreement on 18th January 2005 by which the plaintiff gave the defendant documents for a container with bicycle spare parts to be transported to Kampala but the latter failed to deliver it. He identified the original of that agreement which was marked as Exhibit P1. He stated that the value of the goods as per the invoice marked as Exhibit P.5 was USD 17,344.50.

He explained that the plaintiff did not sign the said agreement because that was the practice of the defendant but hastened to add that by the defendant signing the same it bound itself to deliver the goods. He further explained that the plaintiff expected the defendant to transport the container within two weeks as the process normally took 10-15 days which is approximately two weeks. He testified that the container was never delivered within the expected two weeks whereupon he made several phone calls to remind the defendant in vain even after committing itself in writing to deliver the container on or before the 15th July 2005. He identified that letter which was written to the plaintiff by the defendant on 1st July 2005 and marked as Exhibit P 3 (i).

He further testified that when the defendant failed to deliver on or before the 15th July 2005 as promised in writing, he traveled to Mombasa to make a follow up with the defendant's office there and he was told about demurrage and storage charges at Mombasa Port and requested to pay additional USD 1500 to cater for those expenses. He stated that the defendant again committed itself in writing to deliver the container as per the letter dated 26th July 2005 marked as Exhibit P.3 (ii). He concluded that the container was never delivered and as a result the plaintiff suffered a total loss estimated at USD 52,000 inclusive of the costs of the goods, expected net profit of USD 4000, expenses and general loss which is sought to be recovered from the defendant by this suit.

In his written submission, counsel for plaintiff submitted on issue number one, that the defendant by signing the carriage agreement (Exhibit P.1) and receiving documents (Exhibit P.2) accepted to deliver the container to the plaintiff in Kampala which it failed to do. He argued that it is trite that a contract is enforceable as between the parties making it and a party who fails to carryout its obligations should have the contract enforced against it. He relied on **Printing & Numerical Registering Company v Sampson (1875) Lr Eq 462 at 465** where **Lord Jessel MR stated that:**

"If there is one thing more than another which public policy requires, it is that men of full age and competence and understanding shall have the utmost liberty in contracting and that their contracts, when entered freely and voluntarily, shall be held enforceable by the courts of justice."

Counsel argued that the assertions in the Written Statement of Defence that attributes the delay in the delivery of the container to a third party and the plaintiff's failure to pay USD 1,500 which they had committed to pay were not true. Further that the plaintiff accepted to pay the USD 1,500 in good faith and that under the carriage agreement the contract price was to be paid upon delivery.

He relied on the case of **Ronald Kasibante v Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690** where it was stated that:

"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Part renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy."

He submitted that since the defendant had failed to deliver for over five years from the date of the anticipated delivery it is liable for the non-delivery and breach of contract arising thereof as well as the loss of goods to the extent of their value as per Exhibit P.5, that is, USD 17.344.5.

On issue number two, counsel for the plaintiff argued that had the plaintiff company not lost net profit of USD 4000, it would not have sustained further loss in its business. Further that the plaintiff company is a commercial business and traded using the goods that were in the container that the defendant failed to deliver and therefore it lost net profit of USD 4000 and additional profits that could have accrued from further commercial activities. He relied on the case of **Kabona Brothers Agencies v Uganda Metal Products & Enameling Co Ltd [1981-82] HCB 74** where court relying on **Hadley v Baxendale [1843-1860] ALLER 461** stated that;

> "*Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally, i.e., according to the usual course of things, from such breach of contract itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it."*

He argued, basing on this authority, that it must have been foreseeable that failure to deliver the container would cause losses to the plaintiff's business given that the container had goods that the plaintiff use in its ordinary course of business. He concluded on this issue that the loss of profit arose naturally from the breach of contract by the defendant and the plaintiff is entitled to indemnification for all lost profits.

On the third and last issue, counsel submitted that the plaintiff's claim against the defendant as stated in the amended plaint is for special damages of USD 51911.50, general damages arising out of breach of contract, interest and costs.

On special damages, he submitted that PW testified that the value of the goods plus freight was USD 17,344.5 as per Exhibit P5. Further that PW adduced evidence of travel expenses incurred in going to Mombasa which amounts to USD 535, being air ticket cost of USD 485 as per Exhibit P6 and Visa fees of USD 50 as ascertained from Exhibit P7. He also submitted that PW testified that he made numerous phone calls to the defendant company which totaled UGX 57.174 as per the print out marked as Exhibit P.8.

He contended that PW also incurred accommodation expenses of USD 2000 while following up the issue in Mombasa although no receipt was produced to prove the same. He implored this court to take cognizance of the fact that the plaintiff had proved that PW had been in Mombasa for thirteen days and must have incurred some expenses while there.

On general damages, counsel submitted that the plaintiff having suffered grave disappointment and inconvenience is entitled to general damages. He relied on **Ronald Kasibante v Shell Uganda Ltd** (supra) and **Robbialac Paints (U) Ltd v K.B Construction Limited [1976] HCB 45** where it was held that it is now settled that substantial physical inconvenience and discomfort that is not strictly physical and discomfort caused by breach of contract will entitle the plaintiff to damages. He then submitted that on the basis of the evidence adduced and the authorities cited this is a proper case that merits the award of general damages.

As regards interest, counsel submitted basing on section 26 of the Civil Procedure Act and the case of **Dr. Vincent Karuhanga t/a Friends Polyclinic v NIC & URA HCCS No 2002 [2008] ULR 660** that this court has power to award interest. He submitted that the plaintiff in the circumstances of this case would be entitled to interest on the amounts awarded in special and general damages and prayed that the same be awarded. He also prayed for costs of the suit.

Although this matter proceeded ex parte at the stage of conducting the scheduling conference and hearing of evidence, I wish to observe that the carriage agreement was not denied in the defence that was filed by the defendant. The defendant averred in paragraph 4 of its WSD that the delay in clearing the said container was purely caused by the shipping line which refused to release the suit container to the defendant thereby causing demurrage and Kenya Port Authority charges. In Paragraphs 5 and 6 of the WSD the defendant stated that the plaintiff applied for a waiver of CWR as per letter attached thereto as annexture "A" and that the delay was further occasioned by the plaintiff's failure to pay the USD 1500 it committed itself to pay for clearing the accumulated charges.

To determine issue number one, I have carefully perused annexture "A" to the WSD and particularly the statement "*….subject to approval of extension of CWR waiver by KRA*". To my mind that statement implies that a CWR waiver had earlier been granted and had expired so it needed extension. It does not state whether extension had been applied for and if so, by who. That letter was written on 1st July 2005 almost seven months from the date of the carriage agreement. According to the evidence of the plaintiff's General Manager, the container was expected to be delivered within two weeks from the date of signing the agreement which was 18th January 2005 and as such it should have been delivered by 1st of February 2005.

According to **Chitty on Contracts, Volume 2 paragraph 36-042**, at common law a carrier, whether common or private, must deliver the goods at the agreed time, or if no time has been agreed, within a reasonable time. In the instant case the defendant was a carrier whose obligation was to deliver the container from Mombassa to Kampala as was agreed between the parties. **Black's Law Dictionary 7th Edition at page 440** defines delivery to mean the formal act of transferring or conveying something. As such delivery would entail the defendant transferring the container to the plaintiff.

I wish to note that the carriage agreement did not specify the time for delivery but the defendant did not specifically deny paragraph 4 (d) of the plaint where it was alleged that the defendant represented that the container would be delivered within two weeks and upon that basis the plaintiff entered into contract with it. The defendant conceded that it did not deliver the container as agreed despite making commitments to do so as per Exhibits P.3 (i) and P.3 (ii). It did not explain in its defence why it did not deliver the container within the agreed two weeks thereby giving rise to the demurrage and storage charges which it now seeks to use as its defence.

That defence in my view would only be available to the defendant if the demurrage and storage charges had accumulated prior to the time it was contracted to deliver the goods. In that case, it would then have been logical for the defendant to immediately raise the matter with the plaintiff for its prompt action to enable it comply with the agreed terms of the contract. But where the charges accumulated as a result of the defendant's own failure to deliver the goods in time in breach of the contract, I believe it squarely takes the blame and it cannot again be seen to use it as a defence.

For as it was stated in **Printing & Numerical Registering Company** (supra) where men of full age and competence and understanding freely and voluntarily enter into an agreement it should be held enforceable by courts. Consequently, the defendant's inability to deliver the container was a blatant breach of the contract and it is inexcusable. I therefore find it liable for non-delivery of the container and the value of the goods. This answers the first issue in the affirmative.

As regards issue number two, PW testified that the container has never been delivered to date and as a result the plaintiff has suffered loss. Further that if the plaintiff had got the

goods, it would have got a net profit of USD 4,000 upon sale that normally would take 5-8 months for one container.

There is no doubt in my mind that the plaintiff as a business entity would have got profit if it got the goods and sold them. However, I do not see the basis for the alleged expected net profit of USD 4,000. The plaintiff should have adduced evidence to prove how the said amount was arrived at. For instance it should have adduced documents of previous transactions to prove that it has always made profits within that particular profit margin. Without such evidence the alleged net profit of USD 4,000 remains a mere speculation and this court is not at all convinced that the plaintiff was making a net profit of that amount. It cannot therefore be awarded on that basis.

In making this conclusion I was fortified by the decisions in the cases of **Rosetta Cooper v Gerald Neville and Another [1961] E.A 63** where it was held that it was not open to the Court of Appeal to adopt a speculative explanation without evidence to support it and in **Ronald Kasibante v Shell Uganda Ltd HCCS NO. 542 of 2006** where it was held that;

> *"Special damages must be pleaded and strictly proved by the party claiming them. The plaintiff to succeed in the instant case ought to have put before court materials which indicated the average sales of fuel or airtime for a month, indicating margins of fuel sale and overhead costs to prove possible future loss."*

For the reason that the plaintiff has failed to prove the claim for lost profit, the second issue is answered in the negative.

Finally, on the third and last issue of whether the plaintiff is entitled to the remedies sought, the plaintiff's claim against the defendant as stated in the amended plaint is for special damages of USD 51911.50, general damages arising out of breach of contract, interest and costs.

As regards special damages, according **to Paragraph 812 of Harlsbury's Laws of England Vol. 12(1)** these are losses which can be calculated in financial terms. The principle on special damages is that they must be specifically pleaded and strictly proved by the claimant as observed by Byamugisha JA, in **Eladam Enterprises Ltd v S.G.S (U) Ltd & Others Civil Appeal No. 20 of 2002 [2004] UGCA 1. See *KCC Vs Nakaye (1972) EA 446***

In the instant case evidence was adduced to prove that the value of the goods plus freight was USD 17,344.5. This was confirmed by an invoice which was an agreed document marked as Exhibit P.5. It was not contested by the defendant. I have already made a finding on issue number one that the defendant is liable for non-delivery of the container and the value of the goods. Consequently, the plaintiff is entitled to recovery USD 17,344.5 being the value of the goods from the defendant.

As regards the travel expenses incurred by the plaintiff's Managing Director going to Mombasa, a receipt for the air ticket of USD 485 and visa fees of USD 50 were not agreed upon in the joint scheduling memorandum but were subsequently admitted as Exhibits P.6 and P.7 respectively at the hearing of the plaintiff's case. There was also an alleged accommodation expense of USD 2000 with no supporting documents. Court was requested to take judicial notice of the fact that since the plaintiff's Managing Director travelled to Mombasa and spent 13 days there he must have incurred accommodation expenses.

First of all, I find this argument contrary to the well established principle that govern claim for special damages already quoted above and I decline to consider it at all. Consequently, the claim for accommodation expenses is not allowed.

Secondly, on the claim for travel expenses, I have critically analysed the overleaf of the photocopy of the passport admitted as Exhibit P.7 and I find that it shows that visa fees of USD50 was paid and it bears the exit stamp for Kenya Port Authority Mombasa. However, no photocopy of the passport leaf bearing the departure stamp from Entebbe was attached. A receipt showing that an air ticket was purchased was attached to show that the Managing Director travelled from Uganda. I failed to understand why the more easily believable evidence of a passport leaf showing departure from Entebbe was not attached. This has left some doubt in my mind about the alleged travel from Uganda to follow up the matter. Be that as it may, since a receipt for purchase of air ticket was attached, I will give that benefit of the doubt to the plaintiff and allow the claim for the travel expenses.

There was also a claim for the sum of UGX 57,174 which was allegedly expended on telephone calls. It is based on an unauthenticated print out from UTL. There is no indication that it is from UTL as it does not even bear any stamp of UTL that is alleged to have issued the same. I find that the print out could have just been generated by the plaintiff and for that reason it has not been proved to this court's satisfaction that it is a genuine telephone expenses issued by UTL. The claim for telephone expenses is therefore not strictly proved and it is accordingly disallowed.

All in all as regards special damages, apart from the value of the goods and travel expenses, the rest of the claims have not been proved to this courts satisfaction and they are disallowed.

On general damages, this court has already made a finding that the defendant breached the carriage agreement by not delivering the container at all. There is therefore no doubt that the plaintiff has suffered loss as a result of that. I agree with the submission of counsel that the plaintiff suffered grave disappointment and inconvenience which entitles it to general damages. General damages for breach of contract are compensatory for the loss suffered and inconveniences caused to the aggrieved party so that he/she is put back in the same position as he would have been in had the contract been performed and not a better position. Court tries to restore the aggrieved party to his/her condition before he/she entered the transaction.

I find guidance and fortification in this regard by what was stated *in* ***Esso Petroleum Co Ltd Vs Mardon (1976)*** **2 All ER** that:-

> *"----damage is not measured in a similar way as the loss due to personal injury. You should look into the future so as to forecast what would have been likely to happen if he had never entered into this contract, and contrast it with his position as it is now as a result of entering into it. The future is necessarily problematic and can only be a rough and ready estimate. But it must be done in assessing the loss."*

It is my considered opinion that the plaintiff company was greatly inconvenienced by the defendant's non-delivery of the container which had its commercial goods and therefore it is entitled to general damages. I according award general damages of Shs. 30,000,000/=.

I also find that the plaintiff is entitled to interest on the special and general damages. The rationale for awarding interest was stated by Oder, JSC in ***Masembe v Sugar Corporation***

and Another [2002] EA 434 He quoted ***Lord Denning in Hambutt's Plasticine Limited v Wayne Tank and Pump Company Ltd [1970] 1 QB 447*** and stated that:-

> *"It seems to me that the basis of an award of interest is that the defendant has kept the plaintiff out of his money, and the defendant has had use of it himself. So he ought to compensate the plaintiff accordingly".*

In ***Bank of Baroda v Wilson Buyonja Kamugunda, S.C.C.A No.10 of 2004*** it was held that where there is no agreement between the parties as to the interest or rate payable, the award of interest by court is discretionary, and that the discretion must be exercised judicially.

In the instant case the defendant deprived the plaintiff opportunity to trade and make profit by not delivering its trade goods. The parties did not agree on any interest in the event of delayed or non-delivery. Counsel did not even assist this court by proposing an interest rate. However, given that these were trade goods whose value is in US Dollars, I will award interest at the rate of 10% on the value of the goods from the date of filing this suit until payment in full. For the travel expenses and general damages, I will award interest at the court rate from the date of this judgment until payment in full. The plaintiff as the successful party shall also be awarded costs of this suit.

In the result, judgment is entered for the plaintiff for:-

a) US $ 17,344.50 being value of the goods;

b) US $ 535 being travel expenses;

c) General damages of Shs.30,000,000/=;

d) Interest on (a) above at 10% from the date of filing the suit until payment in full;

e) Interest (b) & (c) above at the court rate from the date of judgment until payment in full;

f) Costs of the suit.

I so order.

Dated this 14th day of May, 2012.

Hellen Obura

JUDGE

Delivered in chambers at 1.00pm in the presence of Mr. Andrew Kibaya for the plaintiff.

JUDGE

14/05/2012