THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 244 - 2008

H & H METAL CORPORATION...PLAINTIFF

Versus

E. KRALL INVESTMENT LIMITED..DEFENDANT

BEFORE: HON. JUSTICE GEOFFREY KIRYABWIRE

J u d g m e n t

The plaintiff H & H Metal Corporation filed this suit against the defendant E. Krall Investment Ltd for recovery of special damages, general damages for breach of contract, interest and costs.

The plaintiff's case is that on or about 16th August 2007, the plaintiff entered into a contract with the defendant in which the plaintiff agreed to purchase approximately 7,500 to 12,000 metric tons of lumpy copper ore (hereinafter referred to as 'material')in several lots from the defendant at its smelter in Jinja. The defendant supplied to the plaintiff approximately 3200 metric tons of material and did not supply the balance of the material as agreed in the contract thereby, breaching the said contract. The plaintiff avers that it paid a deposit of 80% of the purchase price for lot 6, comprising 500 metric tons of material and lot 7 comprising 1000 metric tons, to be shipped by the plaintiff from the defendant's smelter, however, the plaintiff in default only shipped 430 metric tons for lot 6 and 550 metric tons for lot 7.

The plaintiff further avers that the defendant and/ or its employees or agents also prevented the plaintiff from shipping the entire lot 8 comprising of 1000 metric tons of material, for which the plaintiff had already conducted preliminary sampling, weighing and assaying, despite several efforts by the plaintiff to secure the full quantity of the material.

The defendant denied the allegations in the plaint and contended that the plaintiff has no claim whatsoever against the defendant. The defendant avers that the performance of the contract was frustrated by the plaintiff's failure to supply the packing bags in accordance with the terms of the agreement, in spite of several remainders to the plaintiff to supply the same. The defendant further contends that the plaintiff failed to produce the samples requested for by the defendant in time and that the plaintiff failed to send the certificates of assay in time, as required by the defendant. The defendant contended that the plaintiff, having failed to perform these obligations, acted in breach of contract.

The issues at scheduling to be determined by the court were;

1. **Whether the plaintiff is entitled to the 520 metric tons of materials for lots 6 and 7 for which they paid but were not supplied nor their value.**
2. **Whether the contract was frustrated?**
3. **What are the remedies available to the parties?**

The plaintiff was represented by Ms. E Kusiima and Mr D Wamala while the defendant was represented by Mr. A. Bagaayi. The plaintiff called two witnesses; Mr. David Mukama (PW1) and Mr. James William Holme (PW2). The defendant called one witness; Mr. Joseph Byamugisha. The court directed that the parties' file written submissions within the time frames provided by the court. The defendant, though a little late, filed written submissions on the 5th of May 2010, and served them also on the plaintiff the same day; which was acknowledged (though with protest because they were late). The defendant's submissions I must point out were very brief (just about two pages) and my view could have been more detailed. The plaintiff on the other hand did not file their submissions in reply. This was strange as no explanation was given for this. As it is the court was left with little assistance by both parties to determine the suit.

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 an act necessary to further the progress of the suit. According to O.17 r 4,

"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 (based on what is on record), in default of the plaintiff's failure to file submissions as more than sufficient time was afforded to the plaintiff to do so.

In the determination of the issues raised before this court, I will consider the second issue first, because the resolution of this issue, will answer the question in issue one.

Issue two; whether the contract was frustrated.

The case for the plaintiff is that the defendant failed to supply 520 metric tons, in respect of lot 6 and lot 7, which the plaintiff had paid for. On the other hand, the defendant's case is that the plaintiff frustrated the contract.

Mr. David Mukama (PW1) and Mr. James William Holme (PW2), testified that, in respect of lot 6, the defendant was supposed to supply the plaintiff with 500 metric tons. The defendant made the supply, but when the supply was weighed by an independent agency M/s Spectra International Ltd, on leaving the defendant's plant, it turned out that the material weighed 430 metric tons, and therefore, the tonnage was less by 70 metric tons. The plaintiff subsequently communicated to the defendant that the material supplied was less by 70 metric tons, and the defendant promised to top up in the subsequent

shipment, in order to compensate the 70 metric tons. Mr. Mukama testified that the defendant however did not compensate the plaintiff for the said tonnage in the subsequent shipment.

In respect of lot 7, Mr. Mukama and Mr. Holme testified that the plaintiff paid for 1000 metric tons, from the defendant, but only 540 metric tones were supplied after a long struggle, since Mr. Thomas Eggenburg the Director of the defendant was not on site and therefore, the plaintiff could not be allowed to carry the material off the site. Both Mr. Mukama and Mr. Holme testified that the defendant never supplied the remaining metric tons in respect of lot 7.

Counsel for the defendant on the other hand submitted that the plaintiff frustrated the performance of the contract when it failed to produce packing bags and assay reports in order for the contract to be performed in the stipulated time, and therefore, the defendant cannot be held liable for any resultant loss.

According to the testimony of Mr. Byamugisha, the timeframe within which the contract was to be performed was stipulated at the time of the making of the contract, because, of the drastic changes in the market for the material. Mr. Byamugisha further testified that the dispute arose after the plaintiff could not provide sufficient packing bags as stipulated under the contract. Mr. Byamugisha testified that the plaintiff was to provide properly made, one tons bags, but the plaintiff never provided the same on time, and this affected the performance of the contract thus frustrating it. He further testified that Mr. Thomas Eggenburg the director of the defendant by way of email communicated this problem to the plaintiff. Mr. Mukama further testified that the defendant had to improvise with small bags of 50 metric tons, to see that the contract would be completed within the stipulated time, but these bags were small, filling them was difficult and took a long time and this slowed down the process.

In addition to this, Mr. Byamugisha testified that when the plaintiff delivered some packing bags, some of the bags were damaged and rotten, and were therefore unfit. Furthermore, that the plaintiff did not provide the assaying certificates, which were necessary, because of the fact that the parties had agreed that, the plaintiff would pay the remaining 20% of the purchase price for the material, upon assaying.

I have considered the evidence and submissions on record for which I am grateful.

The author Edwin Peel in the book, "**TREITEL LAW OF CONTRACT" 12th Ed. at pg 931**, par 19-016 states that, the doctrine of frustration applies in cases of unavailability of a thing essential to the performance of the contract. The author writes as follows;

"A contract may be frustrated if its subject matter, or thing or person essential for the purpose of its performance, though not ceasing to exist or suffering permanent incapacity, becomes unavailable for that purpose."

At pg 932, par 19-017, the same author further writes that,

“A person or thing essential for performance may, as a result of the supervening event, be unavailable at the time fixed for performance, but became available later. Such temporary unavailability will most obviously frustrate the contract where it is clear from the terms or nature of the contract that it was performed only at, or within, the specified time, and that the time of performance of the contract was of the essence of the contract.”

Furthermore, at pg 932, par 19-081 on the issue of delay frustrating the purpose of contract, the same author notes as follows;

“Contracts in cases of this kind are frustrated because performance at the end of the day is no longer of any use to the party to whom it was to be rendered, i.e. to the charterer.”

In this case the defendant states that the plaintiff delayed to provide packing bags for the materials and when they did so 50 instead of 100 metric ton bags were provided which were smaller than what was expected and made the filing process slow. In cross examination however, Mr. Byamugisha testified that he did not see a copy of the contract between the parties, and that he was just informed about the size of the bags that the plaintiffs were supposed to provide and therefore, to that extent, his evidence is hearsay and inadmissible. That notwithstanding the material which was essential for the performance of the contract was still available. The reference to small bags of 50MT would be probably made the contract performance inconvenient but not impossible. Indeed an e-mail from Mr Archer of the plaintiff company to Mr Eggenburg of the defendant company dated 4th March 2008 indicates that it was the defendants who proposed to use the 50MT bags that they had in their possession since the 100MT Bags had delayed and the plaintiffs agreed to accommodate that shipping to January 2008. Mr. Mukama and Mr. Byamugisha for the plaintiffs had testified that shipping was to be done between September 2007 and November 2007. Clearly performance could not have been said to be of no use to the parties in these circumstances.

There was also the issue of the plaintiff not providing original assay reports to the defendants but again it is not clear how this would frustrate the contract as no evidence was led to show how this could amount to frustration. Indeed this point was not even developed at the trial.

I accordingly find that this contract was not frustrated by reason of use of 50MT bags or the absence of original assay reports.

Issue one; **whether the Plaintiff is entitled to the 520 tons of materials for lots 6 and 7 for which they paid but were not supplied for its value?**

The evidence and pleadings [Para 4(c) of the plaint] points to 80% of the payments being made for lots 6 and 7. It is not in dispute that this 80% was paid. The final payment was to be made 10 day after the

smelter report was made. Exhibit P8 shows that 80% payment for lot 6 was US $ 113,800 while that for lot 7 according to Exhibit P7 was US $ 219,400 (total of US $ 333,200).

It is also evidence on record that 430 out of a possible 500 metric tons were supplied for lot 6 and 550 out 1000 metric tons were supplied for lot 7 [Para 4(d)]. That means that out of a total of 1500 metric tons only 980 metric tons was supplied (65%) or 520 metric tons less.

In the evidence of the plaintiff, there is some inconsistency on the number of metric tons that were supplied by the defendant in respect of lot 7. Whereas Mr. Mukama testified that 450 metric tons were not supplied, Mr. Holme testified that 540 metric tons were supplied on lot 7, and therefore, the balance was 460 metric tons. In the pleadings, the plaintiff pleaded that 520 metric tons were not supplied. That is 70 metric tons on lot 6 and 450 metric tons on lot 7. A party is bound by its pleadings. Order 6 r 7 of the Civil Procedure Rules provides that,

"7. Departure from previous pleadings.

No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading."

This position of the law is also stated in the case of OPIKA OPOKA V. MUNNO NEWSPAPER [1988-90] HCB 91.

In the premises, 520 metric tons of material is what was not supplied.

It follows therefore from the above computations that material worth US $ 216,580 out of what was paid for in lot 6 and 7 was not supplied by the defendants. It again necessary to point out that in Para 6 (a) of the plaint refers to a different figure of US $ 156,000 for the 520 metric tons. That being the pleaded figure it follows that it is the figure that the plaintiffs are legally entitled to.

Issue three; **what are the remedies available to the parties?**

Having found that the plaintiff is entitled to the 520 metric tons, which the plaintiff paid for but never got from the defendant, I find that the plaintiff is entitled to the sum of USD 156,000 being the value of the 520 metric tons as special damages.

The plaintiff prayed for special damages of USD 12,000 for the initial weighing and sampling in respect of lot 6 and 7. The plaintiff in this regard only provided evidence of a payment from its bank JP Morgan Chase of US $ 4,500 (exhibit P9 dated 14 September 2007 as proof of this payment so only that sum is hereby allowed.

The plaintiff prayed for the sum of USD 19,102 for the cost of ordering for containers to ship the material withheld by the defendant. The plaintiff proved this sum by way of an invoice from M/s Interfreight EA. This figure is proved by another payment from the Plaintiff's bank JP Morgan Chase dated 9th June 2008 (Exhibit P12) and the same is accordingly awarded.

The plaintiff also prayed for the sum of USD 12,000 for the expenses incurred by the plaintiff in attending negotiations with the defendant. These were however not proved in evidence. In the premises, I am unable to award these damages.

In all a total of US $ 176,602 is awarded as proved special damages.

The plaintiff claimed general damages. It is however evident that the plaintiff had an obligation under the contract, to deliver packing bags to the defendant's premises. There is even an email dated 4th March 2007, from Glendon Archer in which the plaintiff admits to the delay in providing packing bags, and the fact that the defendant had to use smaller bags, to continue with the performance of the contract.

In the book "CHITTY ON CONTRACTS", par 27-029 at pg 1283, the author notes that,

"The doctrines of mitigation and possibly of contributory negligence may, in addition to causation, be relevant where the claimant, following the defendant's breach of contract, has suffered loss through his own voluntary act or omission."

I find that in light of the plaintiff's failure to supply the packing bags in time which contributed to the delay in performance of the contract I would award general damages of US $ 20,000 under this head.

As to interest I award interest on special damages at 4% pa from 31st January 2008 until payment in full and 2%pa on general damages from the date of Judgment until payment in full. I award Costs to the plaintiff.

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Justice Geoffrey Kiryabwire

JUDGE

Date: 26/06/2012

26/06/12

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

- L. Tumwesigye h/b for D. Wamala for Plaintiff

In Court

- Byamugisha Alan - Representative of Plaintiff
- Rose Emeru – Court Clerk.

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Geoffrey Kiryabwire

JUDGE

Date: 26/06/2012