THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HCT-00-CV-MC-0103-2007

(Arising from Miscellaneous Cause No. 92 of 2007)

PEARL FISH PROCESSORS LTD ::::::::::::::::::::::::::::::::::::::APPLICANT

VERSUS

1. THE ATTORNEY GENERAL

2. THE COMMISSIONER FOR FISHERIES **::::::::::RESPONDENT**

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

RULING

This application by Notice of Motion was filed on 11th July, 2007. The applicant sought orders by way of judicial review. The reliefs sought included orders of mandamus, injunctions and declarations. The grounds upon which the reliefs were sought were that the Commissioner of Fisheries and Officers under his direct supervision and control closed the applicant's Factory, recommended particular changes to be made to the applicant's working procedures which was done. That the Commissioner and his officers thereafter notified the applicant that the fish it was exporting contained benzo (a) pyrene which was high and unacceptable to the European Community. That instead of educating the applicant of what remedial steps to take the respondents simply prejudicially closed the applicant's factory and withdrew use of its export number (EAN). It is averred in the statement in support of the claim that the applicant sought audience with the respondents but to no avail and response hence the application. In the reply thereto the respondents denied the claims and pleaded that the withdrawal of EAN was precipitated by the introduction of new control measures on smoked products in the European Union.

The controls related to benzo (a) pyrene, a chemical secreted during the combustion of any food product. The applicant's factory, according to the Department of Fisheries, deals and at the material time dealt specifically in smoked fish products.

From the records, the parties appeared before my colleague Stella Arach Amoko, J. on 22/08/07 and indicated to her their desire to explore a settlement. They were ordered to make a report to court on 19/09/07. Come that date, Counsel for the applicant, then Mr. Peter Katutsi, informed court that the parties had met as ordered by court. He reported that the applicant wanted the 2nd respondent for inspection of the premises; that the 2nd respondent requested for samples of fish to carry out compliance tests; that inspection was done on two occasions; and, that they were awaiting a report on the matter.

After a lengthy discussion, the parties agreed on the following plan of action:

1. The applicant to provide three (3) more samples.

2. The applicant to produce for samples only (not full production).

3. Respondent to review the results of earlier samples given as well.

4. The applicants shall use 10 kgs of fish per sample.
5. The samples will be ready on:
   1st ……..21st September, 2007
   2nd …….24th September, 2007
   3rd …….26th September, 2007

   All at 2.00 p.m. on each day.

6. The respondents shall select the samples on each day in the presence of the applicants. The samples shall be packed securely and the applicants shall escort the samples to the laboratory in Kampala.

7. The payments will be made when the results are out.

8. Other issues of the technical team and manual must also be resolved.

9. The respondents have agreed to write to EU Delegation after they have got positive results attaching copies of the inspection report and the recommendations. This will be done as soon as the results are out and payments made.

10. It is agreed that the communication to EU shall be copied to the court as well as counsel for the applicant, among others.

11. This exercise should be completed by 15th October, 2007.

From the records, the parties left court on 19/09/2007 fully convinced that due compliance with the above arrangement would resolve the dispute. The matter was accordingly adjourned till 18/10/07 at noon for mention.

The record is silent as to what transpired thereafter but when Mr. Wilfred Niwagaba for the applicant appeared before me on 09/03/2009, he confirmed to court that other aspects of the case had been handled except the issue of damages. Upon the parties failing to appear before me for purposes of addressing court on damages, I directed that they file written submissions. Hence this ruling.

As regards special damages, the rule has long been established that special damages must be specifically pleaded and strictly moved. In this case there has been an attempt by the applicant to state its loss in special damages in paragraph 8 of the Notice of Motion and paragraph 17 of Ms Horvath Maria affidavit in support of the claim. In one of the leading cases on pleading and proof of damages, namely, ***Ratcliffe vs Evans [1892] 2 QB. 524***, Bowden L. J. stated (at pages 532 – 533):

> ***"The character of the acts themselves which produce the damage, and the circumstances under which these acts are done must regulate the degree of certainty and particularity with which the damage out to be proved. As such, certainty must be insisted on in proof of damage as is reasonable, having regard to the circumstances and the nature of the acts themselves by which the damage is done. To insist upon less would be to relax the old and intelligible principles. To insist upon more would be the vainest pedantry."***

I agree.

Relating the above principle to the instant case, court is unable to hold that the applicant has sufficiently proved its claim for special damages, loss of profit and general damages for unlawful closure of its premises, all put together totaling to Shs.2,500,000,000/=.

The reasons for failure to do so are in my view two fold: the procedure adopted by the applicant and the two respondents' incessant failure to attend court. As regards the procedure, P. G. Osborn in 'A Concise Law Dictionary, 5th Edn., at p. 214, defines Motion as an application to court or a judge for an order directing something to be done in the applicant's favour. By implication, it is a simple procedure of enforcing one's rights. It presupposes existence of a right in the first instance. Black's Law Dictionary, 7th Edn., at p.1031 defines it as a "*written or oral application requesting a court to make a specified ruling of order*."

By its very nature a notice of motion entails evidence at the trial to be by affidavit and yet affidavit evidence is rather unsatisfactory in some cases. I am of the view that this case is one of them. While it may have been suitable for the prerogative writs sought in the application, which remedies the parties have by consent sorted out outside court, it was not suitable for proof of special damages as claimed in paragraph 8 of the Notice of Motion and paragraph 17 of Horvath Maria's affidavit. Having said so, I have come to the conclusion that the claim for special damages has not been proved.

I accordingly grant the applicant no special damages.

As for general damages, the general principle is that they are pecuniary compensation given on proof of loss or breach.
In this regard the claimant must be able to prove some loss.

Learned Counsel for the applicant has submitted that the pleadings clearly indicate how the respondents' action made the applicant suffer loss, which losses are particularized under group annexture A9, and that other than a general denial, the respondents declined to exercise their right to challenge the applicant on its specific losses. I have already indicated how the pleadings did not bring out the claim as to special damages and declined to make the award prayed herein. Having decided so, I have also directed my mind to the evidence of the applicant's witness, Ms Horvath Maria. It is undisputed that the suit arose out of the withdrawal of an EAN (Establishment Approval Number) from the applicant. This withdrawal was in March 2006 (annexture A1 to applicant's application). The closure resulted from the EU setting new standards relating to benzo (a) pyrene, a chemical secreted during combustion of any food product. While the withdrawal was in March 2006, the notification to the applicant of the need to comply and fit into the new regime of controls set by the European Union was in August 2006 (Annexture A6 to the applicant's application). Annexture A10 specifically outlines the effect of the new changes in the European Union. The issue as I see it is whether the 2nd respondent was justified to withdraw the EAN before a dialogue with the applicants on the matter. I am of the considered view that in a substantial investment of this magnitude, it was imperative that the management of the applicant be given notice of any deficiency and a chance to correct it, and that a reasonable notice of withdrawal of EAN be given. What we have on record is the withdrawal of EAN and then the subsequent acrimony between the parties over the withdrawal. Given the measures put in place at the instance of court, which measures ended the stand off between the applicant and the respondents, I am of the considered view that the action of the Commissioner, though perhaps well intended and in the interests of the applicant's business, went against the rules of natural justice, the rule to be heard before action is taken. It is trite that the chief rules of natural

justice are to act fairly, in good faith, without bias and in a judicial temper; to give each party the opportunity to adequately state his case, and correcting or contradicting any relevant statement or position prejudicial to his case, and not to hear one side behind the back of the other. In short, not only should justice be done, but it should be seen to be done.

From the applicant's pleadings, following the EAN withdrawal they contacted the Foods Standards Agency in U.K, which responded as per annexture A10. The said correspondence did clarify that presence of benzo (a) pyrene was a natural phenomenon brought about by past and current combustion processes. The correspondence clarified on what would be required by the applicant to meet the limits set by EU. It is argued for the applicant that the information contained in this correspondence is the sort of directory and supervisory information that the Commissioner should have passed on to them rather than rush to withdraw the EAN. I agree. I think all this information should have been available to the Commissioner before acting as he did. His action was in my view un researched and it resulted in loss to the applicant, notwithstanding the positive side of it like the improvements mentioned in annexture C, to the respondents' affidavit in reply dated 4/09/06. In this correspondence, the applicant indicated that it had appointed a new quality Manager and Production Manager and that it was committed to ensuring that every batch of its exports is monitored from the beginning to the end.

It is trite that general damages are those which are not easily quantifiable in money terms. They are not specified in the claim, instead, the court decides how much the injured party deserves in compensation for his pain and suffering, which the court assumes the plaintiff did sustain. I don't hesitate to say that from the evidence before me, the applicant suffered some loss as a result of the 2nd respondent's act. I accordingly find that while the applicant has not been able to prove the loss specifically pleaded in the Notice of Motion and Ms. Horvath Maria's affidavit, it has made out a case for an award of general damages. Doing the best I can and taking into account the applicant's disallowed claim for special damages in the sum of Shs.2.5 billion, I consider an award in the sum of

Shs.50,000,000 (fifty million only) adequate compensation to the applicant against the respondents for the loss caused to them. It is awarded to them.

The award shall attract interest at the commercial rate of 24% per annum from the date of this ruling till payment in full. In the final result, the application is allowed in part on the terms stated herein above.

The applicant shall also have the costs of the application.

Orders accordingly.

Yorokamu Bamwine
JUDGE
08/07/09

08/07/09
Mr.Wilfred Niwagaba for applicant
Ms. Kampaire Inviolata holding brief for Mr. Henry Oluka for respondent.
Applicant's Directors present.

Court:
Ruling delivered.

Yorokamu Bamwine

JUDGE

08/07/09