

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[CIVIL DIVISION]

CIVIL SUIT No. 0037 OF 2008

OXY CELLURAR (MBALE) LIMITED ::::::::::::::::::::::::::::::: PLAINTIFF
- VERSUS -

CELTEL UGANDA LIMITED ::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: HON. MR. JUSTICE YASIN NYANZI

JUDGMENT

BACKGROUND FACTS:

1. The defendant as a service provider company for communication services.
The plaintiff company was incorporated with among other objectives to deal in telecommunication trade and services generally.
2. On the 27th February 2003 the plaintiff and the defendant company entered into a dealership agreement. Under this agreement inter alia it was agreed that the plaintiff sells the defendant's airtime and simpacks. Their relationship was to be regulated by a written contract termed "Exclusive Dealer Agreement" (Exhibit P1).
3. The business between the two commenced on March 2003. However by July 2003 disagreement had emerged between them. The defendant accused the plaintiff of performing below target, failing to pay the stock deposit of

shs.14m and having no capital for: sustainable purchase levels for the product such that Celtel customers in the territory failed to get airtime.

4. For basically those reasons the defendant took steps to save its business as DW2 called defendants were to take over the shop and sell airtime to the sub dealers itself and secondly to terminate the exclusive dealer agreement with the plaintiff. Under Exhibit D2 dated 14th August 2003 the plaintiff was given 30 days after which the dealership would end.
5. After the termination of its dealership, the plaintiff on 3rd March 2008 instituted this suit against the defendant company for general, specific and exemplary damages for breach of contract, an order for refund of several expenses incurred by the plaintiff in the implementation of the contract, interest and costs of the suit.
6. The scheduling conference of this case took place on 14th October 2009 before my Lord Bamwine. At that stage the parties agreed on the documents, facts and issues.

AGREED FACTS:

- (i) The parties entered into an agreement to regulate their transaction.
- (ii) The agreement was performed for some time by the parties.

(iii) Later the defendant took over the administration and operation of the business.

7. ISSUES:

(i) Whether the defendant had a cause to terminate the agreement.

(ii) Whether the plaintiff is entitled to reliefs sought.

8. At the trial the plaintiff called two witnesses. PW1 Dominic Mafabi Gidudu and Managing Director of the plaintiff and James Mbede as PW2 who operated and supervised the business at plot 30 Ben Kiwanuka Street.

9. The defence also called two witnesses, DW1 George Katendegwa who was the defendant's Regional Manager at the time. DW2 George Muhumuza who was in charge of supervision over the area of the plaintiff's operation. He directly oversaw the plaintiff's business and used to report to DW1.

10. Learned counsel Kiyimba-Mutale acted for the plaintiff company while Elizabeth Komujuni defended Celtel Uganda Ltd. The closing submissions were made in writing by both sides. I have read and considered the same in arriving at this judgment.

11. Whether the defendant had a cause to terminate the agreement:

12. The answer to the above issue solely is in interpretation of Exhibit P1.5 relevant Clause and their application to the evidence before Court.

13. The first aspect of the contract this court will consider is performance targets. The defendant accused the plaintiff of having performed below targets.

The plaintiff adduced evidence in exhibit P3 which was a compilation of receipts for purchase of products of the defendant by the plaintiff. It was argued for the plaintiff by learned counsel Mutale that the receipts totaled to over shs.320m in a period between March 2004 to July 2003.

14. Another as pointer of good performance according to Mr. Mutale was an admission by the defendant that in exhibit P9, that sales had increased from shs.53m in April 2003 to 120m in June the same year. For those reasons counsel Mutale disputed the claims of underperformance.

15. Whether the plaintiff performed per targets or under the targets is a question of contractual provision. It cannot be inferred or decided as otherwise.

Appendix II at page 25 set the performance targets in respect of airtime and simpacks.

In respect of airtime sales targets is stated as below:

“Expected over all sales purchase target per month for dealers is set at 150,000,000/=.

Then expected sales target for simpacks per month is set at 500 simpacks”

16. If the plaintiff were to perform in conformity with the terms in exhibit P1 its own evidence, its performance would have been as follows:

Period March – July 2003

March - 2003 - 150 million.

April - 2003 - 150 million.

May - 2003 - 150 million.

June - 2003 - 150 million.

July - 2003 - 150 million.

For simpacks it would have sold 500 packs x 5 months = 2500 simpacks.

17. It is now evident that the claimed sales of shs.320m/= in the period between March to July was below the expected 750 by 430m/= to attain 750m/= which was the contractual target.
18. The second Clause that is subject to interpretation is Appendix 1 at page 23. The provisions here required the plaintiff to make kind of payments each of shs.14m. For reasons of clarity I will reproduce this Clause.
19. ***“The dealer shall secure the assigned territory upon signing the dealer agreement and payment of: Shs.28 million.***

Payment of the above is to be used in the initial set up of the territory as follows and will be non-refundable:

Stock (Simpacks and airtime) – Shs.14m

Dealer Deposit - Shs.14m

The 14 million on deposit will be held by Celtel and shall be refundable upon termination of this agreement.”

20. It is not in dispute that the plaintiff paid shs.14m as security deposit for the dealership. This is proved by exhibit P2 dated 10th March 2003. It was paid by Standard Chartered Bank Cheque No. 567719. Exhibit P2 is the official receipt of Celtel. It is No. 108823.
21. When it came to the payment of shs.14m for stock PW1 testified that he did not pay it in a lump sum but the various purchases he made for airtime covered and was beyond the shs.14 million. Mr. Mutale made submissions in support of that kind of reasoning. I do not agree.
22. The requirement to pay shs.14m for stock was a specific requirement and a condition precedent to the validity of the contract. Part of the Clause read.

“The dealer shall secure the assigned territory upon signing the dealership agreement and payment of shs.28m”
(Emphasis added).

23. In my understanding payment of shs.28m was a condition precedent to the validity of the contract and its performance unless one paid shs.28 no territory would be secured. It is self explanatory as the plaintiff did not pay this money and it knew it. It paid the first 14m and got a receipt exhibit P2.

If shs.14n had been paid in respect of stock still the plaintiff would have been issued with a receipt for that payment. No receipt was presented to court simply because no such payment was done. In my view failure to honour a condition precedent to the validity of the dealership was breach of the agreement on the part of the plaintiff. This court was equally surprised why learned counsel Mutale in his main submission never bothered to explain this omission.

24. The third aspect of alleged breach is the bouncing of cheques. Was this in breach of Clause 5.2 of Exhibit P1. Clause 5.2 provides:

“It is specifically recorded that the dealer shall make payment to Celtel for Celtel products on a cash/cheque on delivery basis.”

25. In her cross-examination evidence PW1 gave the evidence below related to Clause 5.2:

“In June 2003 I did not issue a cheque for 9m. I issued several cheques that amounted to 9m/= they were returned unpaid by the bankers. The cheques were for buying airtime.”

26. Clause 5.2 of exhibit P1 pay cash on delivery of airtime or cheque on delivery of airtime. If payment is by cheque on delivery and on presentation for payment the cheque is up unpaid, it means that the airtime was taken without payment.

I agree that would be in breach of Clause 5.2 of the agreement that required payment on delivery of the product. I did not agree with Mr. Mutale that the issue of bounced cheques required any further proof. The admission in cross-examination that the cheques amounting to 9m were returned unpaid by PW1 is enough and no further proof would be required in evidence.

27. The fourth aspect of alleged breach was in the evidence of DW2. He testified in cross-examination that he used to get information to the effect that there was no airtime in the field. They would get complaints of shortages from sub dealers.

28. If a situation like the about occurred and it is true under exhibit P.1 the dealership agreement the defendant would be allowed to take over. Clause 4 of Appendix 4 at page 28 provided:

“Celtel agrees that the dealer shall be the main distributor of all Celtel products and services within the territory.....

***Celtel agrees that all outlets within the designated area..... will only purchase related products and services from the dealer at the set commission rates. However should the dealer fail to supply these outlets adequately over a period of 48 hours, Celtel reserves the right to supply those outlets directly for a period while it reviews the situation.*”**

29. I believed DW2’s evidence. I did not share Mr. Matala’s view that the defendant had to call sub-dealers in order to prove shortages. Evidence of a single witness if believed suffice to prove a fact. Amidst such shortages created by the plaintiff’s inability to purchase airtime, the plaintiff was in breach of Clause 4 Appendix 4.

30. I however agreed with Counsel Mutale that reasons which were outside the contract could not cause termination such reasons included PW1’s personal indebtedness for whatever amount. Nevertheless there exists valid reasons within exhibit P1 itself that the plaintiff breached and warranted the termination.

It is my finding therefore that the defendant had a good cause to end the dealership agreement. It had the right to do so under Clause 14.3 of the agreement where the breach is material like failure to pay shs.14 for stock or 14.4 where the breach is not material.

31. I also find the takeover justifiable under Clause 4 of Appendix 4 page 26. The plaintiff complained that his business was taken over but that what the agreement provided for in event of failure to supply airtime. The clause allowed Celtel to come in to event failure to supply for just 48 hours yet in case of the plaintiff he had failed for longer than that. I cannot fault a party for resorting to terms of a written contract and enforce them: Communication business is highly competitive and would require such strictness. For those reasons issue one is answered in the affirmative.
32. Issue two – RELIEFS:
To most of the plaintiff's claims having found that the termination was justifiable would be subject to Clause 14.3 and 14.4 and 19.1.
33. Clause 14.3 and 14.4 provide that no compensation is payable at termination of the dealership.

It is not now up to this court to find otherwise. Clause 19.1 relates to costs and expenses it states:

“Save as expressly stated in this agreement, each party shall be responsible for all costs and expenses it may incur in relation to this agreement.”

34. That means unless a cost or expense is excepted under exhibit P1 the same cannot be recovered. It is incurred as an own cost or expense.
35. I did not agree with evidence that Celtel took the plaintiff's items. I instead believed the evidence of DW2 that Celtel shop was furnished by the defendant but the plaintiff had own items in upper office which PW1 sold to one Kavuma. That evidence was not denied or challenged.
36. There were also claims based on receipts which were outside the contract period. That is before 1st March 2003. All such claims also failed. They cannot be awarded. I agreed with the challenge counsel Komujuni put up against them. Such receipts included exhibit P3 for shs.5,687,500/= dated 7th January 2001 and exhibit P7 dated 25/11/2000.
37. As to the unpaid commission according to the agreement commission would not be paid in cash but stock. The plaintiff had proved that it did not receive stock to constitute its commission. It was erroneous to assume that

it would be paid commission in cash. See Appendix 2 Clause 1 and 2 on airtime and simpacks.

38. The only award I will consider is whether shs.14m paid as security is refundable. This matter is an issue due to the language used in the agreement. The full text of the Clause was reproduced in paragraph 19 of this judgment.
39. While the first part of the Clause that refers to shs.28m/= state that the amount is not refundable the last part of the Clause refers to shs.14m/= paid as security deposit. Says it is refundable on termination of the agreement. It was the defence argument that this amount was not refundable.
40. The plaintiff's submission depended on and quoted the last part of the provision and argued that the amount is refundable. Learned counsel argued that according to the language used the refund was mandatory.
41. It is not difficult to conclude that the Clause on refund is ambiguous. While it says shs.28 million was not refundable it then states shs.14m/= was refundable on termination. The common law rule is not ambiguity of a document as interpreted against the author. I took it that the defendant company was the author of exhibit P1 as its standard form agreement for dealers of the plaintiff's nature.

42. Applying that common law rule it would mean that the provision that shs.14m/= is refundable is preferable to the provision that the 28m is not refundable. In any event the proving relating to refund is clearer. I will reproduce it below:

“The 14 million on deposit will be held by Celtel and shall be refundable upon termination of this agreement.”

43. The use of the term “will be held” to court means held as security deposit which would be returned on termination of the agreement. If the citation of the author was not to refund the shs.14m/= there was no reason why the above Clause was added. The provision would have stopped at shs.28m/= not being refundable.

44. For the above reasons I find that shs.14m/= was paid as security deposit as per exhibit P2 was refundable. I accordingly order that it be refunded. For the reason that the defendant was the author of this Clause and since termination refused to refund the deposit I order that interest of 8% per annum from the date of payment in full.

45. Otherwise this suit is dismissed in respect of all other aspect except the above refund. Except for the award of the refund of shs.14m/=, the costs of the suit are awarded to the defendant costing...pg 32... for successfulpg 32.....party of the suit.

46. Finally I will make an orbiter comment. I have read and found that much of exhibit P1 the dealership grant was on unfair documents with general one sided terms. I will give an example of the provision denying the other party compensation in case of termination of contract even at the instance of the company. The second provision is that all costs and expenses incurred are not recoverable including expenses incurred for the benefit of the company and would not be usable by the other party after the contract. This is so because materials used in the dealership are specifically for Celtel and not usable elsewhere.

47. Nevertheless the law clearly is as learned counsel for the defence stated it by citing the true position stated by SIR GEORGE JESSEL in ***printing and Numerical Registering Co. Vs Simpson [1985] LR 19 EQ 462*** where he said that

“if there is one thing more than another which public policy requires, it is that man of full age and competent understanding shall have the utmost liberty in contracting and that if their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by the courts of justice.”

48. That is the law what our “businessman” should learn is to engage legal service at the start of the contract not at its termination. Courts have no

jurisdiction to interfere with executed contracts on grounds that the terms were unfair. There exception to the rule but waiting till relying on the exception is a business risk.

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YASIN NYANZI

JUDGE

9/1/2015.

9/2/3025:-

Kiyimba Mutale for the plaintiff.

Elizabeth Komujuni for defendant.

Plaintiff present.

Defendant absent.

Liz Court Clerk.

Court:-

Judgment delivered in presence of the above.

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YASIN NYANZI

JUDGE
9/1/2015.