REPUBLIC OF UGANDA
IN THE SUPREME COURT OF UGANDA AT MENGO

(CORAM: ODOKI, CJ, ODER, TSEKOOKO, MULENGA AND KANYEIHAMBA, JJ.SC.)

CIVIL APPEAL NO. 5 OF 2001

BETWEEN

SUGAR CORPORATION OF UGANDA Ltd. :::::::::::::::::::::::: APPELLANT

AND

LAWSAM CHEMICAL (U) Ltd. :: Respondent

[Appeal from the Judgment of the Court of Appeal at Kampala (Kato, Mpagi-Bahigeine and Kitumba, JJ.A) dated 15th March, 2002 in Civil Appeal No. 28 of 2001]

JUDGMENT OF TSEKOOKO. JSC:

This is a second appeal. The appeal is from the decision of the Court of Appeal which upheld the High Court decision by Byamugisha, J. dismissing the appellant's suit. In the High Court, the learned trial judge also ordered the appellant to pay to the Respondent shs. 15,000,000/= on a counterclaim.

The facts in this appeal are simple. At the time material to this appeal, the appellant, based in Lugazi Town, carried on the business of sugar production and distribution in Uganda. The production process involved the use of boilers at some stage along the production line. A time comes in the course of production when the boilers have to be cleaned. The cleaning process is called descaling and when the cleaning is done by use of chemicals it is referred to as chemical cleaning of the boilers. Alternatively the cleaning could be done mechanically. The respondent is a company dealing in the sale and distribution of a descaling chemical code named LSR Super Acid. Prior to the dispute giving rise to these

proceedings, the respondent supplied the appellant with the said descaling chemical and apparently, Diversey Lever (EA.) Ltd., the Manufacturers of the chemical based in Nairobi, provided an expert to supervise the descaling exercise. That exercise was carried out successfully.

The undisputed facts as agreed upon by the parties during the scheduling conference and found by the courts below are that on 30/4/1999, the respondent offered to sell to the appellant the said descaling chemical on specified terms. This was subsequently followed by oral discussions between the two parties. On 29/6/1999, following the oral discussions, the appellant wrote exh.P.2 offering the respondent the job of descaling two of its boilers using 6000 litres of the acid at a total cost of US$22,335 (equivalent to Uganda shs.30,000,000/=). Of this amount, 50%, i.e., shs. 15,000,000/= was payable up-front on delivery of the chemical and 50% was payable within 45 days after the descaling. The respondent agreed to provide free of charge supervision of the descaling exercise by its expert while the appellant was to provide labour for the same exercise. The respondent supplied the chemical and the appellant made the advance payment of shs.l5m/=. Descaling was to take place on 4th - 5th September, 1999, during the period of the shut down of the sugar works factory at Lugazi when other repair work would be done in the factory. On 5th September, 1999, an expert from Nairobi visited Lugazi for the purpose of supervising the descaling but because the appellant was not ready, the expert did not supervise the descaling. So he returned to Nairobi.

The breakdown in the factory was corrected. The appellant felt that further delay thereafter would cause loss and, therefore, on 7/9/1999, the appellant decided to carry out the descaling exercise in the absence of the expert. The descaling was first done on one of the appellant's two boilers by use of half of the acid supplied by the respondent. The descaling was carried out on that boiler from 7th up to 10th September, 1999 by John Isodo (PW2) the Manager, Technical Control, of the appellant. According to John Isodo, the descaling did not occur and this is explained in his chart which was admitted in evidence as exh.P.V. Consequently, the appellant stopped further descaling using the acid, complained to the respondent by fax message (exh.P.4) and decided to clean that particular boiler as well as the second boiler by mechanical means. The appellant asked the respondent to collect and

take back the remaining half of the chemical, and demanded for the refund of shs. 15m/= paid up-front on grounds that the acid for which the appellant had paid was not suitable for the job. For its part, the respondent refused to collect the balance of the acid and instead demanded for payment of the balance of the sale price, namely, shs.l5m/=. As a result of that disagreement, the appellant instituted a suit in the High Court against the respondent for the refund of shs. 15m/=, general damages for breach of contract and costs. In its amended written statement of defence, the respondent denied the appellant's claim and counter-claimed for the balance of shs. 15m/=.

Three issues were framed for determination by the trial judge. The first issue was whether the Chemical (code named LSR Super Acid) was fit for boiler tube descaling. The second issue was whether the appellant was entitled to reject the chemical and claim damages for the days lost due to the supply of ineffective chemical. The third issue was on remedies available to the parties. The appellant called three witnesses, all of them being its employees including Mr. John Isodo. The respondent called one witness, Lydia Oile (DW1), its Managing Director.

At the conclusion of the trial the learned trial judge dismissed the suit and gave judgment in favour of the respondent on the counter-claim. The appellant appealed to the Court of Appeal which dismissed the appeal and upheld the decision of the trial judge. The appellant has now brought this appeal and has listed six grounds of appeal.

Counsel for the appellant, in a written submission, argued grounds 1 and 2 together, followed by grounds 3 and 4 also together and then argued grounds 5 and 6 separately. I notice that these grounds, and indeed the arguments thereon, were lifted wholesale, from the memorandum of appeal, and arguments in support thereof, filed in the Court of Appeal. Mr. Byaruhanga, assisted by Mr. Okuwa, Counsel for the Respondent, made oral submissions.

I shall consider these grounds in the manner they were argued beginning with grounds 1 and 2. The complaint in ground one is that the learned Justices of Appeal erred in law and fact in failing to properly evaluate the evidence on record and holding that the chemical code named LSR Super Acid was fit for its purpose. In ground two the complaint is that

the Justices erred in law and fact by holding that the evidence of Senthil Vilan (PW1) showed that the chemical, which was ordered, is the chemical, which was delivered.

In his written submissions, Mr. Lumweno for the appellant, contrasted the appellant's evidence given by its three witnesses: namely, Senthil Vilan (PW1), General Manager, Mr. John Isodo (PW2) the Senior Manager, Technical Control, and Patrick Dhikosoka, (PW3), General Manager, Administration, on the one hand, with the evidence given by Mrs. Lydia

Oile (DW1), the Managing Director of the respondent. Learned counsel's contentions in a nutshell are as follows: First he contended that although the parties discussed and agreed that the chemical to be supplied was LSR Super Acid, and although the respondent suggested the concentration of the chemical, the chemical supplied was ineffective about which the respondent was informed immediately. Secondly he contended that although Isodo as an expert, tested the acidic content of the chemical and found it to be 33.18% and formed the opinion that the acidic content was alright, that did not mean that he tested the whole chemical composition of the chemical and found it to be fit for its purpose. Counsel argued that Isodo did not test the chemical as regards its chemical properties or its composition. Thirdly Mr. Lumweno contended that Mrs. Oile lied when she said that an expert witness from Nairobi stayed for five days and not for one day as stated by Vilan and Isodo. Learned counsel maintained that the respondent should have called an expert witness from the manufacturers of the acid to give evidence that the expert came to Lugazi where he spent 5 days and that the appellant was not ready for descaling. Learned counsel asked us to hold that because the respondent failed to call evidence to prove that the chemical delivered was fit for its purpose, the chemical supplied by the respondent was not fit for the purpose of descaling.

For the respondent, Mr. Byaruhanga, submitted that the evidence of Velan clearly shows that the chemical, which the respondent supplied, is the same chemical, which was discussed and agreed upon between the parties, and which was ordered for by the appellant. Mr. Byaruhanga referred to the evidence of Isodo where this witness explained his expertise and counsel contended that the evidence shows that Isodo tested the chemical and found it suitable. Counsel submitted that the Court of Appeal was correct in upholding the decision of the trial judge.

In the trial court, Byamugisha, J, as she then was, quoted S.16 (a) of the ***Sale of Goods Act.*** She considered the facts of the case, the submissions of counsel for both sides and stated:

> *"The facts as out-lined above and the evidence given show that the chemical offered for sale by (defendant) and accepted by the plaintiff was known to both parties and the purpose for which it was required. The evidence on both sides clearly show that the plaintiff ordered a similar chemical from the manufacturer, which was delivered to the plaintiff by the defendant as its agent. The witness of the Defendant (DWl) stated that the company does not repackage the chemical and it has supplied a similar chemical to other customers who have used it successfully. There was also the evidence of PWl who negotiated the deal, which was to the effect that the chemical, which was ordered, was the Chemical, which was delivered. PW2 also testified that he carried out a test and found the acidic content to be okay. He therefore gave a go ahead for the descaling exercise to take place minus the expert. The evidence before Court does not show that there were some matters, which were left to the sellers to decide. Both parties had dealt with each before and the chemical supplied was tested and found to be fit and that is why one boiler was descaled albeit with unsatisfactory results. There is nothing to show that the defendant induced the plaintiff to purchase the chemical. Both parties in my view knew the chemical and purpose for which it was required".*

On the basis of the above findings, the learned trial judge dismissed the suit and upheld the counterclaim of the respondent. With reference to the above findings, Mr.Lumweno has not pointed out to us where the trial judge erred. It might be that Mrs Oile was wrong or mistaken when she testified that the expert from Nairobi stayed for five days before he left. But I cannot attach any significance on this since it does not affect the appellant's case one way or the other. All we know is that the expert left because the appellant was not ready as there was a break down in the factory. Velan and Isodo admitted that the expert arrived on the appointed date. Unfortunately the factory had suffered a breakdown for which neither the expert nor his employers were responsible. There is no evidence that anybody on behalf of the appellant was certain when the break down would be corrected. So probably the expert was justified in going away.

Mr. Lumweno argued that the respondent should have called an expert to come and testify to Court that the chemical which was delivered and partly used was the same chemical which was ordered for and supplied. I see no merit in this argument and I reject it.

In my opinion, in a case of this kind where parties to the dispute are not agreed on the suitability of the chemical the suitability of that chemical could not be determined by the opinion of Isodo alone. One of the reasons for saying so is that although Isodo claimed to be an expert in sugar technology, he admitted that he has never carried out, on his own, descaling using the acid in question without supervision of another expert. Moreover Mr. Isodo did not assert that the chemical was unsuitable. According to exh. P.4 Isodo complained about ineffectiveness of chemical cleaning. It therefore appears to me that despite his long experience in sugar industry, Mr. Isodo's expertise in descaling without supervision had not been tested and found reliable. Secondly, Mr. Isodo was an employee of the appellant. He carried out the descaling for his employers and as an act of desperation. It is my considered opinion that the evidence of Isodo, as an expert, was not good enough. I think that the appellant, rather than the respondent as argued by Mr. Lumweno, should have involved an outside chemist and expert in descaling, to carry out tests on the acid, make an appropriate report and if necessary give evidence in court. In that way, if this other expert confirmed the opinion of Isodo, then the latter's evidence could be reliable. In the circumstances of this particular case, in the absence of evidence of an external expert witness (external to appellant's employees), Isodo's evidence was insufficient as it could not carry credible weight.

There is one other observation I should make. During cross-examination, Mr. Isodo testified -

> **"We did the descaling without a supervision (sic) from the defendant. He was not available. The management felt that delaying the factory for one day it will lose 2,000 per 50 kg of sugar".**

Pressure for the appellant to take the risk is indicated in exh.P.6 which is a letter dated 8th September, 1999 written to the respondent by Mr. Dhikusoka. In it, he stated:

"Since we have to keep the repair work of the factory on schedule, we are highly constrained to risk and carry out the work on our own."

Clearly the appellant was disparate. It feared incurring more losses on top of that caused by the breakdown of the factory. Therefore, the appellant took a deliberate risk when it decided to descale the boilers in the absence of the expert. In moments of crisis, decisions must be made by management of any organization. Here a decision-involving a risk, the

descaling without an expert supervisor, was made. I think that the risk was taken at the peril of the appellant. Be it remembered that the provision of the expert was gratuitous. In the circumstances, as there is no satisfactory evidence to prove that the LSR Acid supplied and used by the appellant in its attempt to descale the boilers was not the acid agreed upon, the respondent cannot be held liable. On the evidence available and on the balance of probabilities, my view is that the chemical used must be taken to have been fit for the purpose for which it was ordered.

In the Court of Appeal, as I said earlier, the same ground 1 and 2 were argued by counsel for both sides in the same way the two grounds have been argued before us. Mr. Lumweno's written submissions in the Court of Appeal are virtually identical to those presented before us.

In her lead judgment with which the other two members of the panel concurred, Mpagi-Bahigeine, J.A, considered grounds 1 and 2, which as stated earlier are identical to grounds 1 and 2 in this appeal. The learned Justice of Appeal reproduced from the trial court judgement the passage, which I reproduced earlier in this judgment, and also she referred to section 16(a) of the ***Sale of Goods Act.*** She considered the documentary evidence (Exh.Pl), (P2), (P3) and the oral evidence especially that of John Isodo, before concluding that the appellant opted to purchase the chemical because they knew it having used it thrice before. The learned Justice observed that the mere fact that the appellant proceeded to apply it without the expert's supervision indicated that they did not have to rely on the respondent's skill and judgment because they were familiar with the trademark LSR. The

learned Justice concluded that the evidence showed that the chemical LSR was the one that was ordered for and was supplied. So she confirmed the findings of the trial judge that the appellants were bound.

Having reviewed all the evidence on the issues raised by the appellant concerning grounds 1 and 2, I am not persuaded by the arguments of Mr. Lumeweno that the two Courts below erred in the conclusions they reached.

In the result grounds 1 and 2 must fail. These two grounds are the substratum of this appeal and conclusion on these grounds therefore in effect disposes of this appeal. The rest of the grounds are in reality different aspects of the issues raised by these two grounds. I shall discuss ground 3 briefly. The complaint in ground 3(a) is that the learned Justices of Appeal erred in law and fact by failing to hold that the burden of proving that the chemical code named SLR Super Acid was fit for the purpose was upon the respond and that the respondent had failed to discharge it. And in paragraph 3(b) the alternative complaint is that the Justices erred in law and fact by holding that the appellant had not discharged its burden of proving the Chemical Code named LRS was not for its purpose. I think that what appears as two complaints in this ground are different sides of the same coin. And be it noted that paragraph (a) was a substantive ground 3 in the memorandum of appeal in the Court below and the appellants' written submissions there, are word for word the same as those repeated before us. Mr. Lumweno relied on S.105 of the Evidence Act to support his contentions. That section states -

> ***"In any civil proceedings when any fact is especially within the knowledge of any person the burden of proving the fact is upon him."***

Mr. Lumweno relied on this provision for the view that as it is the respondent who knew the secret contents of LSR Super Acid, and, therefore, it bore the burden, which it failed to discharge, of proving that the chemical was fit for the descaling. And that the respondent should have adduced evidence from Diversey, the manufacturer of the chemical to disapprove the appellant's testimony which was given by PW1, PW2 and PW3 that the chemical was unfit for the purpose for which it was ordered.

Again in a round about way, Mr. Lumweno advanced substantially similar arguments under the alternative paragraph (b) of ground 3. Mr. Byaruhanga in response combined

grounds 3 and 4 together. He referred to sections 102 and 105 of the ***Evidence Act*** and contended that the burden of proof was on the appellant. He argued that the provision of an expert by the respondent was not a material condition of the contract and with this I agree. Mr. Byaruhanga further argued that the appellant should have proved that the chemical was not fit. He further contended, and here I also agree, that when the appellant opted to deal directly with the manufacturers, the appellant took a risk. The documentary evidence (exh. PV) and the evidence of (PW2) and (DW1) shows that the appellant indicated the type of the chemical it wanted for descaling its boilers. According to DW1 the appellant gave the chemical specifications to technical people. The technical people gave the chemical according to the specification". During cross-examination, DW1 stated, regarding the coming of the expert, that:

> ***"I talked to Mr.Velani on phone. I told him. that I had contacted the office where the expert was coming from and he too said that he was in touch with them."***

It is clear that the appellant did not depend on the judgment and skill of the respondent. The appellant depended on its own judgment and skill. I would like to assume that the test carried out by John Isodo was to establish whether the chemical was in conformity with the specifications given to the respondent. John Isodo must have been satisfied with the

specifications before the appellant decided to do the descaling on its own without supervision by an outside expert. Indeed, according to Mr. Isodo, when the descaling process was going on, the chemical exhibitted its characteristics. What failed was proper descaling for which the appellant failed to pin responsibility on the respondent. In these circumstances, I cannot see how the provisions of Section 102 and 105 of the ***Evidence Act*** can be construed so as to place responsibility on the respondent. In my opinion, the respondent bore no burden to prove anything. The learned trial judge and the Justices of Appeal were correct in their conclusions. Accordingly both grounds 3 and 4 must fail.

As I said earlier my conclusions on grounds 1 and 2 dispose of this appeal. This has been confirmed by further conclusions on grounds 3 and 4.

I would dismiss this appeal. I would uphold the decisions of the courts below. I would award the respondent its costs here and in the courts below.

JUDGMENT OF ODOKI, CJ.:

I have had the benefit of reading in draft the judgment of Tsekooko JSC, and I agree with it and the orders he has proposed.

As the other members of the Court also agree with the judgement and orders proposed by Tsekooko JSC, this appeal is dismissed with costs here and in the courts below.

JUDGMENT OF ODER, JSC.

I have had the advantage of reading in draft the judgment prepared by Tsekooko, JSC. I agree with him that the appeal should be dismissed.

I also agree with the orders proposed by him.

JUDGMENT OF KANYEIHAMBA J.S.C.

I have had the benefit of reading in draft the judgment of my brother Tsekooko, J S C . I agree with him that the appeal should be dismissed.

I also agree with the order he has proposed.

Dated at Mengo this 20th Day of December 2002.