THE REPULIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL SUIT NO. 375 OF 1993

M/S DEMBE ENTERPRISES LTD :::::::.:::::::::::: PLAINTIFF

VERSUS

1. M/S TRANSAMI (U) LTD

2. M/S TRANSAMI (K) LTD ::::::::::::::::;:: DEFENDANTS

Before: The Hon. Lady Justice M. Kireju

JUDGEMENT

The plaintiff company brought this action against the two, defendant companies claiming general damages for breach of contract for transportation of goods which the plaintiff transported on behalf of the defendants. The cause of action is based on a verbal contract. The plaintiff claims the sum of United States dollars US 93,750 or its equivalent in Uganda or Kenya shillings on account of transporting 75 Containers of goods at the cost of US 1,250 each, it also claims general damages for breach of contract cost and interest or the principal sum from 1/3/1992 at 42% per.

The defendants filed a joint written statement of defence. The first defendant claims that it was wrongly sued, that it was the second defendant which was involved in these matters. Both defendants disputed the amount claimed by the plaintiff, and also pleaded that the amount should be in Kenya shillings if found due to the plaintiff and not US dollars. The first defendant stated that in annexture 'C' to the plaint the plaintiff each claimed only 12 containers at US $l250 each making a total of US $15,000 and not US *$93,750* as claimed in the plaint. They prayed that the suit be struck out or be dismissed. At the haring of this case the plaintiff company was represented by learned counsel Mr. Byaruhanga of M/S Kasirye, Byaruhanga & Co. Advocates and the defendant companies were represented by learned counsel Mr. Kayondo S.C. of Kayondo and Co. Advocates.

The following issues were agreed upon at the hearing of the suit.

1. Whether there was a contract between the plaintiffs with either of the defendants.

2. If there was a contract what were the terms of the contract between the plaintiff and either defendant.

3 Whether there was a breach of the said contract.

4. Who is liable for the breach?

5. What is the quantum of damages and in what currency?

The plaintiff company's evidence was led by PWl Karim Hirji, director of the said company. He testified that he knew the first defendant, Transami (U) Ltd, that when he was importing goods in the country, he was approached by the then general manager Walter Hoes who offered to import the plaintiff's goods by using a shipping company of whom he was an agent. He would give the plaintiff company transportation from Mombasa to Kampala, for him he would enjoy shipping from overseas and clearing at Mombasa. WaIter Hoes told him to insist that his suppliers use Transami (U) Ltd. This arrangement was agreed upon and the suppliers were asked to use Transami (U). When the plaintiff company was opening letters of credit in Bank of Uganda it stated that goods should be cleared by Transami (U). After the above agreement Transami (U) Ltd subcontracted **the** plaintiff company to transport goods to Kampala as it did not have trucks. He said that the plaintiff transported 75 containers between 1990 and 1992 at an agreed price of US 1250 per container of 20 ft. The defendants had agreed to pay but the plaintiff could not accept the exchange rate of Shs. K26 to a dollar, because the Kenya shilling had fluctuated, the money could **not even** buy fuel. The defendants had promised to pay after the documents had been negotiated; the promise had been made by the General Manager in Kampala. The letter offering to pay was exhibited as Exh. P.1, dated 21/8/92. He further testified that he got a call from Transami (K) asking for an a**ccount** where the money should be deposited. The witness asked them to calculate payment using dollar rate and send the money to his account in Bank of Uganda. The amount was US *93,750.* He said that the company has to account for all the money it makes for income tax purposes. It had to get border, fees which were in, foreign

exchange and the only way this could be obtained was to show the bank that the company was doing gainful transport. He said that as a result of delayed payment the company had suffered. The Lorries are on hire purchase and installments have not been paid and it is also paying interest. If the company had been paid, it would have bought 2 Lorries two years ago but now it cannot even buy one lorry. He said that he would like the court to pay interest at the bank rate of 42% and general damages.

In cross examination he said that for him Transami (U) and Transami (K) are the same. He said that Transami never disputed that that the company transported their goods to Kampala that Exh.P.1 was written after this suit was filed. He said that he was ready to receive payment at Shs (K) 24 per dollar, he did not sue Transami (K) in Kenya because the agreement was made in Kampala, Ann 'C' to the plaint was made to Transami (U) Ltd. He said that 4 companies were used to transport namely Arrows Enterprises, Anisha Dembe Enterprises, and C. Kibirige Enterprises Dembe Enterprises was acting on behalf of these companies. The money was to be paid in the account of Dembe Enterprises, The defendants called one witness Fernando Marques, General Manager, Transami (u) Ltd. He said that they had another company Transami (K) based in Mombasa and Nairobi. He said transportation contracts are entered into between Transami(K) and subcontractors. The subcontract' with' Dembo Enterprises Was entered into with Transami (K)' and not Transami (U) Ltd. Payments were always made in Kenya shillings by their Kenya office Referring to exh. P.1 he said that they wrote to Dembe Enterprises and offered to pay shs (K) 30,000 per container but this offer was turned down by the plaintiff. As far as Transami (K) is concerned it should have been sued in Kenya court. He added that Transami (K) was willing to pay the money. He said that the case against Transami (U) should be dismissed as he is a wrong party to the suit. In cross—examination he said that he started working with Transami (U) Ltd. on 9/5/1992 and he was not part of this transaction. He did not know the terms of the contract between Transami (U) and the plaintiff. He got the information from the file in their office and evidence in court.

He said that he knew *what* was written but whet was agreed verbally he did not. A letter dated11/3/1992 from the plaintiff's advocates to General Manager Transami (U) Ltd demanding payment **was a**dmitted in evidence as Exh. D.l. At the close of the defence case, both. Counsel addressed court on the issues framed I shall consider their submission as I consider the issues.

The first issue is whether there was a Contract between the plaintiff with either of the defendants and the second Issue was what were the terms of the contract with either defendant. These 2 issues were handled together by counsel for the plaintiff; I shall also handle them together as they are interrelated.

Mr. Byaruhanga submitted that P.W. I testified that he had agreed with the Managing Director of Transami (U) that the plaintiff company would transport the containers at the same cost that was quoted. in the letter of credit as is shown in Exh. P.2 (Transit Entry Form C.4), the cost was Us $1250 per 20 ft container. He submitted that his rate was not contravarted by the defendants and it was not disputed in para 6 of the written statement of defence. Counsel submitted that the discrepancy between the claim in the plaint and that one in Ex1. D.l was a typographical error which was corrected during the hearing of the case by actually counting the containers transported by the plaintiff. Counsel submitted that there was a contract between the plaintiff and the defendants and the terms were that the plaintiff be paid US S *I25* per container. Mr. Kayondo submitted that the suit was wrongly brought against Transami (U) Ltd as according to Exh. D.l, it was Transami (K) which contracted with the plaintiff Counsel submitted that the plaintiff has no cause of action against Transami (U) Ltd and the case should be dismissed. Counsel further submitted that the action against Transami (K) should have been filed in Kenya as that where the contract was entered into, he contended that this court has no jurisdiction to hear this case. Counsel submitted that the terms of the contract were not clear, that Transami (K) Ltd wanted to pay the plaintiff in Kenya shillings but the plaintiff rejected this offer and asked for US dollars.

The evidence of PW 1 is that he was approached by Walter hoe who was *General* Manager of Transami (U), he was asked to use the defendants company to import goods. Transami (U)would enjoy the shipping from overseas and clearing at Mombasa and the plaintiff company would transport the goods from Mombasa to Kampala. He said that Transami (U) Ltd subcontracted the plaintiff company as they did not have trucks at the time. The terms were US $1250 per container from Mombasa to Kampala.

The current General Manager of Transami (U) Ltd testified that there was no contract between his company and the plaintiff company that the contract was between Transmi *(K)* and the plaintiff. This witness added that he joined the company after the transaction in issue had taken place. From the evidence of P.W.l which was not seriously challenged by the defendants it is clear that there was an agreement between Transami (U) and the plaintiff company where the

plaintiff company was hired to transport some goods from Mombasa to Kampala. I am of the view that it is correct for the plaintiff company to insist that it actually entered into contract with Transami (U) ltd D.W.I show that the defendant companies work together, because and not Transami (K) Ltd. The evidence of D1W.1 gave evidence on behalf of Transami (K) Ltd., when be said that Transami (K) Ltd was willing to pay the plaintiff. He added that contracts with transporters outside their company were entered into with their Mombasa and Nairobi offices I.e. Transami (K). From his evidence the defendants appear to work together, but this fact was not known to the plaintiff, it assumed that it was contracting with Transami (U) Ltd arid not Transami (K) Ltd although it was Transami (K) which offered to pay. The plaintiff company was not expected to know the internal arrangement between the defendants and was right to insist on Transami (U) as the contracting party. I have therefore found that there was an oral contract between Transami (U) Ltd and the plaintiff. The defendants insist that there was an agreement between Transami (K) and the plaintiff, basing on Exh. P.1 where it offered to pay the plaintiff. However, they say the action should have been instituted in Kenya as the contract was concluded there. I have already found that the contract was concluded in Uganda between Transami (U) Ltd. Exh. P.1 cannot be taken seriously because it was written after this suit had long been filed.

However I have had the opportunity to look, at S. *15(3)* of Civil Procedure
Act which is as *follows* —

> ***in*** *suits arising out of the contract, the cause*
> *of action arises within the meaning of this section at any of the following places —,*
> *the place where the contract was made.*
> *(i) The place where the contract was to be*
> *performed or the performance thereof*
> *completed.*
> *(iii) the place where in performance of the contract any money to which the suit related was expressly*
> *or impliedly payable."*

The evidence on record does not show that the contract was entered into in he absence of such evidence the contract could have been concluded in Uganda or Kenya. Even if 3 above did not apply, Iam of the opinion that *3* (ii) has the answer. In this case the plaintiff was to transport goods from Mombasa in Kenya to Kampala in Uganda. The performance was therefore in both countries or better still the contract was to be the completed n Uganda. The LCS were also opened in bank of Uganda.

For the above reasons, I find that the plaintiff was free to bring action against the 2nd defendant either in Kenya or Uganda, the suit against the 2nd defendant is properly before this court. I have found that there was a contract between the plaintiff company, entered into orally between PW.l and the General Manager of Transami (u) Ltd Walter Hoes. There was an arrangement between the 1st and the 2nd defendants known to the plaintiff whereby the 2nd defendant offered to pay the plaintiff. The terms of contract as can be gathered from the oral contract testified to by PW.l was that the defendants were to pay US $1,250 per container, this rate was not disputed by the defendants except that in Exh, P.1 they offered to pay at the rate of Kenya shs 30,000 per container no evidence was called to show how this rate Was arrived at. in the absence of any other evidence to controvert PW.l's evidence I believe his evidence that the rate per container was US. 1250. I also believe PW..l when he says that the company should have been paid **3** months after the goods were supplied from India.

The next issue is whether there was a breach of the said contract.

I have found that there was a contract between the parties, whereby the p1antiff transported goods for the defendants, but the defendants failed to pay. The plaintiff company demanded payment as per Annexture' 'C' to the plaintiff dated 3/9/1991. Annexture'B'and *'C'* to the plaint are the same, I decided to use 'C, as it well, set out. No offer to pay was made until 21/8/1992 exh. **P.1.** The fact that the plaintiff company asked the 1st defendant to pay the money to someone in London should not have stopped them from meeting their obligation unless it was specifically provided in the contract that payment would only be to the plaintiff company only. PW.1 later told the defendants to pay in the company's account in Bank of Uganda but still no payment was made. I have therefore found that the defendants breached the contract by failing to pay the plaintiff.

As to the fourth issue, who is liable for the breach, I find that both defendants are liable.

The 1st defendant is the one who entered into the contract with the plaintiff. The 2nd defendant admitted liability and offered to pay as per Exh. P.1 and the evidence, of DW.l and also submission by counsel. This admission is based on quantum merit and through an arrangement with the first defendant. Both defendants are therefore liable.

The last issue is-what quantum-of' damages and in what currency. In cases of breach of contract, the aggrieved party is only entitled to recover such part of the costs actually resulting as was 'at the time of the contract reasonably foreseeable as liable to result from the breach: **Victoria Laundry (Windson) Ltd. vs. Newman Industries Ltd. *1949* 2 KB *528* - M/S Spear Motors Ltd. vs. H/S Banyakole Kweterana Growers Cooperative Union Civil Appeal. No.7/91.** PW.1 in his evidence testified that *75* containers were transported by the plaintiff together with other companies on the instructions of the plaintiff, Annexture C' to the Plaint show that a total of *75* containers were transported. Counsel for the defendants submitted that it was not clear how many containers were carried because in the letter from the plaintiff dated 22/8/91 the claim was 63 containers. This is true but there was another letter dated 3/9/91 where there was a claim of 12 containers which counsel must have overlooked. The count made in court showed that a total of 75 containers were transported. In Exh. P.1, the 2nd defendant, said that the p1aintiff company had carried 77 containers and was willing to effect payment after receiving invoices from the plaintiff. When PW.l said that the company transported only *75* containers, I believe him because his evidence was not controverted and he could also have agreed with the 2nd defendant that the plaintiff carried *77* containers if he wanted to cheat as his company stood to gain. I also believe PW.l when be says that the rate per container of 20 ft. was US 1250. The first defendant's main concern is in paragraph 6 of the written statement of defence that in Ann. *'C* the plaintiff claimed only 12 containers at $1250 makings a total of $15000 not the total of' *75* containers claimed in the plaint. The 1st defendant did not appear to dispute the cost per container. DW.l did not assist as he was not involved in negotiating in the oral contract and did not testify on the actual terms of the contract.

Counsel for the plaintiff submitted that the claim of *$83,750* in exh D.l was a typographical error. I agree with this contention ,because if one takes the number of containers to be 75 at the rate, of **$1250** each the total cost would be $93451 and

not3,75O as appeared in that notice., The money owing from the defendants to the plaintiff is *US$93,750*. .

The next question is in what currency should the money be paid, Mr. Byaruhanga submitted that payment should be in United States dollars and the whole transaction was quoted in dollars he referred to Exh.P2. He said that Sh 26 (K) to a dollar quoted in Exh. P.2 would not be enough as the Kenya shilling has been fluctuating. He said that under the Exchange

contro1 Act Cap 158 as amended b Act 9/65. s.6 states that all transactions outside Uganda shall be transacted in US dollars and a return made to the Bank of Uganda. He submitted that the letter of credit was computed in US dollars and t included clearing and forwarding and onward transportation. That Transami was already paid this money for clearing and forwarding charges in US dollars and cannot turn around and say that the last leg of the

contract was to be calculated in Kenya (sh). Court further submitted that the general rule is that conversion of a debt from one currency to another is made at the date the debt became due, he referred to the following

cases *Owners* of Steamship Celia *and* Owners of Steamship Volturno, 1921

2 AC *544:* United Railways of the Haven and Regla WarehousesLtd;, 1960 ALLER 32: Syndic in Bankrptcy of Nasaral Khoury v Khayat ALL ER 406.

The defendants pleadings were that the amount should be paid in Kenya shillings and not in US dollars, no evidence was adduced to show why payment should be in Kenya shilling.

After considering Exh. P.2 and the evidence of 'PW.l, I am convinced that this was a contract quoted in 'US dollars. This is the official currency of the agreement. I did not take the submission by counsel on the exchange Control Act seriously because from the evidence on record the plaintiff' was ready to flout this law as he had asked the 1st defendant to pay **money** in a Swiss Account instead of the Bank of Uganda. There was no way the Revenue Authority was going to catch up with the plaintiff company to **tax** that moeny. However, it is good that the plaintiff released its mistake and asked the defendants to pay the money in the Bank of Uganda.

I had the opportunity to peruse the cases cited to me by counsel for the plaintiff. Since the

decision n in the renown case of Miliagos and George Frank (Textiles) Ltd 1976AC 443 law for claim for damages for breach of contract in foreign currency is no longer calculated using the conversion exchange rate at the time of breach, known as breach date conversion. In the above cited case the House of Lords held, that the just rate would be that prevailing when the judgment is being enforced, for the plaintiff have been kept out of his money until then. Miliagos case was also referred to by the Supreme Court in the case of ESSO Standard (U) Ltd vs. Semu Amanu Opio Civil AppealNo3/93, The decision in Havan Railways case (supra)was overruled by Miliagos decision as it was found to be out of date with modern business transactions and courts have to keep step with commercial needs. The laws in this country concerning foreign exchange have been liberalized with the introduction of the Forex Bureau, we are also keeping up with changes in the commercial world. Following the authority cited the defendants are liable to pay the plaintiff company United States dollars93,750 or the Uganda shilling equivalent or the Kenya shilling equivalent at the time of payment. Date of payment day was defined by Lord, Wilberforce in miliagos case to mean the date when the court authorises enforcement of the judgment in terms of sterling, in this case I would say Uganda shilling or Kenya shilling.

Counsel for the plaintiff prayed for punitive damages for breach of contract cited several authorities including Kalema vs. Attorney General HCCS 103/90 Hadley vs. Banksdale 1843 — 1860 1 ALLEA 461, Lukwgo vs. Attorney *General* . 1156/1988. However, basing on the recent Supreme Court case of Esso Standard (U) Ltd. already cited, I did not think that I would award punitive damages for a breach of contract because they were not pleaded and the plaintiff has not satisfied court that this is one of those exceptional cases where punitive damages should be awarded like where the reputation of the plaintiff is damaged. The principles on which award of exemplary damages in tort and contract eases are based were ably discussed by his Lordship Justice Platt J.S.C. in his considered leading judgment in Esso Standard case and I am not going to repeat it in this case, The plaintiff also claimed damages, PW1 generally alleged that if he had been paid ha would have used the money to buy lorries. He also said that the Lorries the company used were bought on hire purchase that installments thereon were behind and the interest had accumulated. The plaintiff did not adduce any further evidence to prove this alleged

loss. In the absence of proof it can only be awarded nominal damages. I shall accordingly award shs. 200,000/= nominal damages.

In final conclusion, the plaintiff has successfully proved on balance of probability that there existed an oral contract between the plaintiff company and the defendants. There was a breach of the said contract by the defendants and they are both jointly liable. The plaintiff is awarded the following remedies:

1. The defendants to pay the plaintiff US *$93750* or its equivalent at market rate in Uganda or Kenya shillings at the time of the payment.
2. Nominal damages of she. 200,000/=.
3. Interest at court rate on (1) and (2) above from the date of judgment until payment in full.
4. Costs of the suit.

M. Kireju

25/2/94