THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

HIGH COURT CIVIL SUIT NO. 478 OF 2001

THE HAIR CARE CENTRE LTD. :: PLAINTIFF

VERSUS

ATACO FREIGHT SERVICES LTD. :: DEFENDANT

BEFORE: HON. AG. JUDGE REMMY K. KASULE

JUDGMENT

The plaintiff, a limited liability company brought this suit against the defendant, also a company with limited liability, claiming special and general damages.

The suit was filed in Court on 12.06.01 and for six (6) years, it was being adjourned for one reason or another whenever it came up for hearing until on 03.10.07 when Court ordered the hearing to proceed in the absence of the defendant and their Counsel.

Defendant's Counsel, M/S Byenkya, Kihika & Co, Advocates, had been served on 22.06.07 for the hearing date of 03.10.07. The affidavit of service was on Court record. Court received no reason for their absence as well as that of the defendant. Hence the order to proceed in their absence.

The plaintiff deals in cosmetics and hair dressing equipment and operates in Uganda. The defendant carries on in Uganda the business of a clearing agent.

The case of the Plaintiff Company is that around July, 2000, they imported for their business in Uganda goods from South Africa. When the goods arrived by air, at Entebbe, the defendant Company self-appointed themselves, without any written instructions from the Plaintiff, to clear the said goods. In the course of clearing the goods, the defendant, wrongly and negligently under-declared the goods, thus causing a customs offence to be committed. The Uganda Revenue Authority seized the goods and demanded of the Plaintiff or defendant to pay the due taxes, storage charges and a penalty for having committed a customs offence before the goods could be released.

The Plaintiff objected to being made liable for a customs offence committed by an agent never instructed by them to clear the goods. Plaintiff took this matter to the Tax Appeals Tribunal through Application **No. TAT 24/2000**: **The Hair Care Centre Ltd Vs. The Uganda Revenue Authority.**
Though the Tax Tribunal found and held that the Plaintiff was not responsible for the actions of the defendant, nevertheless the Tribunal ordered the Plaintiff, as owner of the goods, to pay to Uganda Revenue Authority, the taxes due, the penalty and the demurrage charges and costs.

Dissatisfied with the Ruling of the Tax Appeals Tribunal, the Plaintiff appealed against the decision to the **High Court in Civil Appeal No. 01 of 2001: The Hair Centre Ltd Vs. Uganda Revenue Authority.**

On 22.01.02, the High Court, (Okumu Wengi .J.) partly allowed the appeal holding that the Plaintiff should pay the money to URA for the taxes and storage expenses, and then recover the same from the defendant. As to the penalty, the Tax Tribunal was found to have been wrong in condemning the Plaintiff, as importer, to a penalty for a customs offence committed by the unauthorised agent, the defendant. The Court thus put aside the Tax Appeals Tribunal Order of the Plaintiff paying a penalty.

The Plaintiff paid the extra expenses incurred as a result of the defendant under declaration of the goods. Hence this suit for the Plaintiff to recover from the defendant what was so incurred.

At conferencing on 21.09.05 the following issues were agreed upon by Counsel for both parties:-

1. Whether or not the defendant acted without authority in clearing the Plaintiff's goods.
2. Whether or not the defendant was negligent in clearing the goods.
3. What are the remedies available to the parties, if any.

Mr. Stephen Richley, the managing director and majority shareholder of the Plaintiff testified that the goods imported by his company arrived by air at Entebbe earlier than they were expected.

On learning that the goods had arrived, he instructed Messrs Spedag, a clearing agent to clear them. Spedag then told him that the defendant had already taken over the clearing of the goods. This was around 9th July 2000.

The Defendant had not been appointed by Plaintiff to clear the goods. The plaintiff's way of working was to appoint a particular agent for each specific type of products that were being imported. This is because, according to the witness, different products have different taxes to be paid and thus required different clearing agents. Though the defendant had cleared some goods for the Plaintiff sometime in the past, this time and in respect of this consignment Plaintiff had given no instructions to the defendant. Plaintiff had also used on previous occasions other agents such as Spedag, Inter-freight and Transami.

In this particular case, without even notifying the Plaintiff of the arrival of the goods, Defendant had proceeded to make and lodge an entry of the goods.

By the time the Plaintiff came to know that the Defendant was the one clearing the goods, it had become very difficult to stop the defendant. A process to cancel a clearing agent takes too long and when the goods have been seized the decision to change the agent is one that is taken by the Commissioner of Customs and not the importer.

Court notes that Section 125 of the East African Customs and Transfer Management Act, as amended, makes it mandatory, that the importer must, in writing, authorize whoever is to clear such importer's goods. The importer, as owner of the goods, can only be liable for the actions of the agent under Section 127 of the Act, if that agent is that one duly authorized by the Owner/Importer to clear the goods.

The defendant has pleaded in paragraphs 4 and 5 of the written statement of defence that he had previously cleared consignments for the Plaintiff on a regular basis where documents related to the Plaintiff's goods arriving at Entebbe had always been received by the defendant from ENHAS or ROKA bond and would later proceed to inform the Plaintiff accordingly. This relationship had began in 1998 and was subsisting up to the material time in issue.

The defendant had on this occasion duly informed the Plaintiff about the documentation related to the consignment and further advised the Plaintiff that the documents had been lodged for customs clearing. In the course of the clearing of the consignment, there was, in fact, written communication between the Plaintiff and Defendant on the progress of the clearing process.

The Defendant relied on exhibit D1 a statement of A/C between Defendant and Plaintiff from 01.07.98 to 30.06.99 as proof of instructions from Plaintiff to clear goods.

With respect to the Defendant, there is nothing in the Statement of account from which Court can conclude that the Plaintiff gave specific instructions to clear this particular consignment of goods the subject of the suit. The statement of account just shows dates, particulars of invoices, debit and credit amounts and balance due.

At any rate the statement of Account stops on 29.06.99, long before the suit incident happened. Court is unable to conclude that from 29.06.99 the last date on the statement up to July 2000, a period of a whole year, defendant remained with specific instructions to clear the Plaintiff's goods.

As to Exhibit D2, the defendant's e-mail to Plaintiff forwarding the worksheet, PW1 Mr. Richley, explained that the same was forwarded to him after he requested for the same on learning of the defendant's self-appointment to clear the goods. Defendant has not pleaded and has adduced no evidence to the effect that immediate on arrival of the goods there was communication to the Plaintiff of such arrival and also of the fact that defendant was proceeding to clear the goods.

That the defendant did not do so clearly shows that defendant acted contrary to the provisions of Sections 125 and 127 of the East African Customs and Transfer Management Act (as amended).

Court accepts the evidence of Mr. Richley, the Plaintiff's Managing Director that the defendant took over the clearing of the goods without being instructed to do so from the Plaintiff; and that by the time Plaintiff came to know of the state of affairs, it was no longer possible to stop defendant from so acting.

The answer to the first issue is that the defendant acted without authority of the plaintiff in clearing the Plaintiff's goods.

The second issue is whether or not the defendants were negligent in clearing the Plaintiff's goods.

The evidence of PW1, Mr. Richley, is that when he requested and was sent by the defendant, the work sheet, Exhibit D2 on 10.07.00, he immediately communicated to the defendant that some goods had not been declared and that the value of the un declared goods was an invoice of South Africa Rand 6067.60. He demanded that this be corrected immediately. He followed this up with telephone calls to the defendant.

Defendant pleaded in paragraph 7 of the written statement of defence of submission to customs the documents that accompanied the consignment, and that it was the lack of proper documentation occasioned by the Plaintiff's suppliers that was the cause of the under declaration.

Court does not accept this explanation from the defendant because, after the Plaintiff had communicated to the defendant and pointed out that goods worth South African Rand 6067.60 had not been declared, defendant offered no evidence at all as to why the matter was not taken up with Customs as well as the suppliers of the goods and those who had handled the goods from South Africa up to Entebbe. At best defendant should have informed the Plaintiff of defendant's inability to handle the matter any further. They did not. Failure to do anything after the Plaintiff had communicated the fact of the under declaration amounts to gross negligence on the part of the defendant.

Court finds on the second issue that the defendant was negligent in clearing the Plaintiff's goods.

The third issue is what remedies are available to the parties.

Failure to clear the goods by the defendant on the ground of under-declaration resulted in the Uganda Revenue Authority seizing the goods. This in turn occasioned the incurring of storage expenses for the period the goods were under seizure.

The Plaintiff paid shs.2,823,247/= to Spedag clearing agent who took over the clearing of the goods as storage charges. A Tax Invoice No. 043817 of 04.12.2000 was exhibited as proof of the amount.

Court accepts this evidence and holds the amount of shs.2,823,247/= recoverable from the defendant.

There was no evidence adduced in respect of the claim for shs.3,093,601/= appearing in paragraph 4(IX) (b) of the Plaint. The penalty payable to Uganda Revenue Authority is not the responsibility of the Plaintiff as per the decision of this Court in Civil Appeal No. 01 of 2001. The rest of the sum claimed under this item was not explained by any evidence. Therefore the sum of Shs.3,093,601/= is disallowed as not proved.

Under the item in paragraph 4(IX) (c) of the Plaint, shs.600,000/= was claimed as instruction fees to Counsel for the application before the Tax Appeals Tribunal and in this Court in Civil Appeal No. 01 of 2001.
In his evidence to Court Plaintiff's witness claimed shs.680,000/= under this item. This was a departure from what was pleaded in the Plaint. There was no prayer to amend the Plaint. Court will thus award the pleaded sum of shs.600,000/= to the Plaintiff under this item.

The Plaintiff claimed in evidence shs.200,000/= being the value of goods lost. Court believes the evidence of PW1 as regards this claim. The amount is allowed to the Plaintiff.

As to general damages, Plaintiff's evidence is a bare statement of PW1 that he paid for the goods in advance and was denied the opportunity to sell them for three (3) months. There is no evidence as to how much was lost on a daily or a monthly basis. The evidence, in the view of Court, is too general and speculative for Court to act on it to award any damages for loss of business. None are awarded. The plaintiff must however have suffered in reputation as a business enterprise by being branded a tax evader and must have been inconvenienced by all that happened. He is awarded shs.500,000/= general damages by reason thereof.

In conclusion judgment is entered for the Plaintiff against the defendant for:-

(a) Shs.2,823,247/= storage charges
(b) Shs.600,000/= instruction fee to Counsel.
(c) Shs.500,000/= general damages.

The amounts in (a) and (b) are to carry interest at the commercial rate of 21% p.a. as from 07.07.00 till payment in full. The sum in (c) being general damages is to carry the same rate of interest from the date of judgment till payment in full.

The Plaintiff is also awarded the costs of the suit.

Remmy K. Kasule

Judge

10th December 2007