THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM; *ODOKI, CJ., ODER, TSEKOOKO, MULENGA, KANYEIHAMBA, J.J.S.C.)*

***CIVIL* APPEAL NO. 8 OF 2002**

BETWEEN

B.M. TECHNICAL SERVICES LTD. :::::::::::: APPELLANT

AND

CRESCENT TRANSPORTERS CO. LTD. ::::: RESPONDENT

[Appeal from the Judgment and decisions of the Court of Appeal at Kampala (Kato, Okello, Mpagi-Bahigeine, J.J.A.) of 7th, April, 2001, in Civil Appeal No. 25 of 2000].

JUDGMENT OF KANYEIHAMBA, J.S.C.

This is an appeal from the judgment and orders of the Court of Appeal dated 7th, April, 2001, in which the appellant's appeal against the judgment of the High Court *was* allowed with costs.

The background to this appeal may be stated as follows:

Crescent Transportation Company Limited, the present respondent, sued B.M. Technical Services Limited, the present appellant for breach of contract of carriage of goods from Mombasa to Kampala. The contract between the appellant and the respondent was partly written and partly oral. The terms of the written part of the

contract provided that the respondent was to clear the appellant's container from Mombasa and deliver it to Kampala. The respondent was to notify the appellant of the date of arrival of the container upon which the appellant would pay to the respondent a sum of US $4,050 to cover the freight and clearing charges. It was part of the same agreement that the appellant would collect the container from the respondent's premises within four days of receipt of the notice of the container's arrival. In default of such collection on the part of the appellant, the appellant would pay the sum of US $150 each day that the container remained on the respondent's trailer. According to the oral part of the contract, the respondent was obliged to return the container to Mombasa within a month of delivery of the container in Kampala and in default of that return, the respondent would pay the sum of US $20 per day of detention of the trailer.

The container was delivered in Kampala on 11.11.1998. The respondent notified the appellant of the delivery on 12.11.1998. The appellant paid to the respondent the sum of US $2,167 and promised to pay the balance on 10.12.98. The promise was not fulfilled. However, the appellant failed to take the container from the respondent's premises. Ultimately, the respondent was forced to drop the container from the trailer at its premises on 28.5.1999. Thereafter, the respondent filed a suit in the High Court claiming a total balance of US $35,820 as the cost of the freight charges and accumulated container detention charges.

In its written statement of defence, the appellant admitted the contract but contended that delivery of the container had not been effected at the agreed destination which it claimed to be Mbarara and not Kampala as alleged by the respondent. When the time for hearing of the suit came, the appellant failed to turn up and was not represented. The court heard the case *ex parte.*

The learned trial judge awarded freight and clearing charges in the sum of US $1,883 but rejected the claim in respect of the container and trailer detention. The respondent was also awarded costs and the trial judge allowed interest on the awarded amount at 4%. Dissatisfied with the judgment, the respondent appealed to

the Court of Appeal challenging the refusal by the learned trial judge to allow respondent's claim for container and trailer detention and the low rate of interest awarded. The Court of Appeal allowed the appeal and awarded an interest on the amount allowed at the rate of 22% from the date of filing the suit till payment of the judgment debt in full. It is against the judgment and orders of the Court of Appeal that this appeal has been filed.

There are four grounds of appeal framed as follows:

1. *The learned Justices of Appeal erred in fact and in law when they found that the respondent was entitled to special damages which were not properly pleaded or proved.*

2. *The learned Justices of Appeal erred in law and in fact when they found that the respondent was entitled to damages which it could have mitigated.*

3. *The learned Justices of Appeal erred in law when they found that an allied request constituted a contract between the parties.*

4. *The learned Justices of Appeal erred in law when they awarded an excessively high and unjustified interest rate.*

Dr. Byamugisha, counsel for the appellant argued the four grounds together. Counsel's submissions were of a general nature. He contended that the only amount of money supported by the evidence adduced before the learned trial judge was the sum of US $1,883 which was the balance on the costs of freight from Mombasa to Kampala. He contended that when the learned Justices of Appeal awarded further sums which they said were container storage charges and retention of trailer, they went beyond the evidence adduced before the trial court.

Dr. Byamugisha submitted that the Court of Appeal ought to have accepted the findings of the trial court that the respondent had failed to mitigate its loss. Counsel

contended that for a considerably long period of time, the respondent had retained both the container and the trailer without any attempts to mitigate its losses. He further contended that the respondent could easily have unloaded the container off the trailer and returned the latter to Mombasa without waiting for so long to hear from the appellant.

Dr. Byamugisha submitted that the contract between the parties did not impose any obligation on the respondent to retain both the container and the trailer if the appellant defaulted.

Counsel contended that the Court of Appeal erred in holding that it was an implied term of the contract that the respondent was under an obligation to take reasonable care of the goods while they were in its possession. He contended that whereas such an obligation may arise in the case of an importer, it does not arise in the case of a clearing house. He further contended that the accumulation of storage and retention fees for seven months was unreasonable and the learned Justices of Appeal ought not to have awarded unreasonable amounts of money which were contractually illegitimate.

Lastly, Dr. Byamugisha submitted that by raising the interest rate from 4% awarded by the learned trial judge to 22%, the Court of Appeal not only erred in interfering with a judge's discretion to award interest but were unreasonable to fix it at such a high rate of interest when the contract was not a commercial one but a clearing and carriage of goods contract. He argued that no interest was proved by evidence. Therefore counsel submitted that the award of interest at 4% by the learned trial judge should not have been interfered with. Counsel cited the Rules of this Court and "McGregor on Damages" in support of his submissions and on the basis of those submissions, he prayed that the appeal be allowed and the judgment of the High Court restored.

Mr. Benson Tusasirwe, learned counsel for the respondent, opposed the appeal. He contended that Dr. Byamugisha had not fully argued ground one since he had not made any submissions on the issue of special damages. He confined his submissions to the rest of the grounds of appeal. Counsel contended that Annexture 'A', (exh. P1), constituted a written contract and contained the essential ingredients of the terms and conditions of the agreement between the appellant and the respondent. He contended that moreover those terms and conditions were admitted by the appellant in the various exchanges of communication between the parties including attempts by the appellant to pay what it owed to the respondent. Counsel submitted that the Court of Appeal was correct to hold that the demand of US $ 150 per day was part of that contract and constituted a foreseeable loss for each day that the appellant did not honour its obligations under the contract after four days of being notified. The US $20 per day payable for the trailer detention was covered by the oral part of the contract. Counsel submitted that therefore the claims of US $150 and US $20 per day respectively had been improperly rejected by the learned trial judge and for wrong reasons. Counsel finally submitted that the respondent had fulfilled its obligations under the contract while correspondingly the appellant had failed to perform its own part with consequences that were clearly predictable to both parties. Counsel contended that it is not enough for the appellant to state that the respondent ought to have mitigated its losses without showing clearly how this could have been done.

I will first consider grounds 1, 2 and 3 of this appeal. In my view, with the pleadings disclosing written and admitted terms and conditions of agreement between the parties, this appeal revolves around the execution of a clear and simple contract. The terms and conditions of the contract are clearly set out in an agreement described as Allied Request No. B dated 15/10/1998 signed on behalf of both parties and marked as exh. P1 and in the oral agreement admitted by them. The appellant has not made any attempts to deny the existence and terms of this contract which by nature is a clearing and carriage of goods contract. The only bone of contention between the parties is what meaning should the court give to the contract's terms and conditions.

In her lead judgment, Mpagi-Bahigeine, J.A. said,

> *"The contract to carry the respondent's goods clearly spelt out the precise terms including the place of delivery, which was Kampala. According to the uncontroverted evidence on record, the goods arrived in Kampala on 11.10.98. The respondent was notified of their arrival the following day within the terms of the contract. The respondent did not take delivery. On 21.11.98, the respondent made a cheque for the sum of Shs.5,000,000/= which was dishonoured. On 30.11.98, the respondent wrote to the appellant acknowledging its indebtedness and promising to pay for the container on 10.12.98. On 15.12.98, the respondent tendered another cheque for Shs.3,900,000/= which was also dishonoured. On 6th January, 1999, the respondent paid the appellant the equivalent of US $2,174 for clearing and transport. No evidence was adduced to indicate that the respondent had reminded the appellant that the agreed place of delivery was Mbarara and not Kampala. The respondent still failed to take delivery at Kampala."*

It is clear and I agree with the findings of the learned Justice of Appeal on this matter that from 12th November,

1998 to 6th January, 1999, the completion of the execution of the contract was in the exclusive hands of the appellant which had already accepted its terms and conditions as binding. This is evidenced by the appellant's endeavours to honour it. The respondent having waited for some four months for the appellant to fulfil its part of the bargain was eventually forced to sue. In any event, it is an implied term of a contract of carriage of goods that the career must take reasonable care to protect the goods in its possession. In my view, there never was any period of time between notification that the container had arrived in Kampala and May, 1999, when the respondent filed its action in court, for the respondent to mitigate its losses. The admission of the contract by the appellant and its attempts to make good

its part of the bargain prohibited the respondent from contemplating loss, let alone its mitigation.

I have not found the authorities cited for the proposition that the respondent should have mitigated its losses helpful. For these reasons, grounds 1 , 2 , and 3 of this appeal ought to fail.

I now turn to ground 4 of the appeal. The contention in this ground is that the learned Justices of Appeal not only unreasonably interfered with the exercise of the learned trial judge's discretionary powers to award interest but also unjustifiably awarded excessive interest at 22%.

Dr. Byamugisha contended that the provisions of s.26(2) of the Civil Procedure Act provide that interest on a judgment award is at the discretion of the Court. On this basis, counsel submitted that it was therefore an error for the Court of Appeal to interfere with the decision of the learned trial judge who fixed the rate at 4%. He cited the cases of Ecta(U) Ltd. v. Geraldine S. Namirimu & Josephine Namukasa, Civil Appeal No. 29 of 1994, (S.C), (unreported), and Sietco v. Noble Builders(U) Ltd. (S.C), (unreported), in support of his submissions. He contended that in dollar terms, interest of 22% is too high.

Mr. Tusasirwe, learned counsel for the respondent contended that whereas it is true that the award of interest rate is at the discretion of the trial judge, there are occasions when an appellate court may be justified to interfere with the exercise of that discretion. In counsel's opinion, the contract was a commercial one where the normal rate of interest may be as high as 30%. In this contract, the payments were expressed in US dollars. However, it was counsel's contention that even then the rate of interest at 4% allowed by the trial judge was too low to be justified. Counsel submitted that therefore the rate of interest at 22% fixed by the learned Justices of Appeal was under the circumstances, reasonable and this Court ought not interfere

with it. Mr. Tusasirwe cited Ecta(U) Ltd. v. Geraldine Namirimu & Another *(supra)* in support of his submissions.

In his short judgment, Mr. Okumu Wengi, Ag. J, as he then was, fixed the interest on the sum awarded at 4% per annum from the date of filing the suit till settlement without giving any reason therefor.

This transaction was a clearing and carriage of goods contract and not an ordinary commercial transaction in which goods are normally exchanged for money or some other consideration with parties contemplating to make a profit or an interest on the business as the expected reward.

The 4% interest per annum awarded by the learned trial judge does not seem to have a basis in law and the trial judge did not give reasons for it. Be that as it may, in my view, compensatory sums even though unrelated to commercial transactions should still often carry higher rates of interest than that ordered by the learned trial judge. On the other hand, it is my view that an interest at 22% per annum in a non-commercial transaction of the nature I have described is on the high side.

In my opinion, the learned Justices of Appeal were in error to label the contract in this case commercial. S.26(3) of the Civil Procedure Act may be considered as a guide in this matter. It provides that where a decree is silent as to the payment of interest, the court shall be deemed to have ordered interest at six per centum per annum. In the

Ecta(U) Ltd. case *(supra),* this Court altered the order of the trial judge fixing the rate of interest on the decretal amount at 25% per annum to 8% because 25% was considered too high. In Sietco v. Noble Builders(U) Ltd., Civil Appeal No. 31 of 1995 (S.C), (unreported), Wambuzi, CJ., as he then was, wrote the lead judgment in which he observed that, *"The court's discretion is to be exercised if sufficient cause is shown to exist,"* and proceeded to confirm the interest rate of 12% in that case from the date of filing the suit till payment in full.

Taking the facts and circumstances of this case and the authorities reviewed above into account, I am satisfied that the rate of interest at 22% awarded by the learned Justices of Appeal is too high. I would therefore allow ground 4 of this appeal.

I would order that the decretal amount carry interest at the rate of 10% per annum from the date of filing this suit till full payment.

In the result, this appeal ought to partially succeed. I would order that the respondent be awarded 3/4 of the costs in this court and in the courts below.

JUDGMENT OF ODOKI, CJ

I had the benefit of reading in draft the judgment of my learned brother, Kanyeihamba JSC, and I agree with it and the orders he has proposal.

As the other members of the Court also agree, this appeal partially succeeds. The order of the Court of Appeal awarding the appellant interest at the rate of 22% on the decretal amount is set aside and substituted with anr order awarding interest thereof at the rate of 10%. The appellant will have three - quarters of the costs in this Court and Courts below.

JUDGMENT OF ODER

I have had the benefit of reading in draft the judgment prepared by Kanyeihamba, JSC. I agree with him that the appeal should partially succeed. I also agree with the orders proposed by him.

I have nothing further to add.

JUDGMENT OF TSEKOOKO, JSC:

I have read, in draft, the judgment prepared by my learned brother, the Hon. Mr. Justice G.W. Kanyeihamba, JSC and I agree with his conclusions that the appeal should succeeds in part. I also agree with the orders he has proposes) as to costs and the rate of interest.

Dated at Mengo this 22 day of October 2003.