IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MAKAME, J.A., KISANGA, J.A., And RAMADHANI, J.A.)

CIVIL APPEAL NO. 39 OF 1994

B E T W E E N

SAIDI SALIM BAKHRESSA & CO. LTD. . . . . APPELLANT

A N D

VIP ENGINEERING AND MARKETING LTD. . . . RESPONDENT

(Appeal from the decision and Decree of the High Court of Tanzania at Dar es Salaam)

(Mapigano, J.)

dated the 3rd day of June, 1994

in

Civil Case No. 112 of 1993

JUDGMENT OF THE COURT

RAMADHANI, J.A.:

The appellant company, Saidi Salim Bakhressa & Co. Ltd., which was the defendant, was adjudged by MAPIGANO, J. to pay US $ 1,847,527.32 to the respondent company, V.I.P. Engineering and Marketing Ltd., which was the plaintiff. The appellant is aggrieved by that decision and hence this appeal.

Three different suits have been filed between these two parties on different aspects of basically the same subject matter. In the Court of Appeal there have been three applications apart from this appeal. It is, therefore, going to be necessary at certain junctures in this judgment to pause and give some brief account of the other two suits or the three applications as the case may be.

..../2

The appellant concluded two contracts with the respondent under which the appellant was to buy from the latter some rice described as "Vietnamese Long Grain White Rice 15 per cent broken". The rice was packed in bags of fifty kilograms and labelled "VIP Long Grain White Rice". So, the rice has interchangeably been referred to by either of the above two descriptions.

The first contract was signed on 30 November, 1992 for 5,000 Metric Tons (M.T.) to be delivered in Dar es Salaam on 10 January, 1993. The total price was US $ 1,650,000 payable in Tanzanian shillings. Upon signing the contract, the appellant was to pay US $ 330,000. However, the consignment did not arrive until 15 March, 1993, that is, two months and a few days after the agreed date. At that time, also, the appellant had only paid a total of US $ 293,355.44, that is, $ 36,644.56 short of the amount agreed on. It is important to note that both parties were in breach.

Curiously enough, despite what has been narrated above, the parties entered into a second contract on 26 January, 1993, that is some 16 days after the failure to deliver the rice under the first contract. The second contract was for the sale of another 5,000 M.T. of similar rice but at a higher price of US $ 1,750.000. Delivery was to be on 25 February, 1993.

Both lots of rice were transported in the same ship which arrived in Dar es Salaam on 15 March, 1993. On that day some misunderstanding arose between the parties which was resolved by a third agreement which will be referred to in this judgment as the oral agreement. The existence of the oral agreement has

..../3

never been disputed. The parties, however, do not agree upon the content of the oral agreement.

Before we proceed, we want to make it abundantly clear that both parties have breached the two written contracts. So, it is idle for either party to accuse the other of being guilty of breach. In our view the breaches were condoned and hence the conclusion of the second written contract and the oral agreement.

Both parties agree that the first lot of 6,047.05 M.T. of rice was taken by the appellant and that the suit rice was taken by the respondent. The dispute surrounding the suit rice is as to the capacity in which the respondent took that lot. Did he take it as an agent of the appellant or as an owner of the lot? That was the issue before MAPIGANO, J. who then had to decide what was owed and to whom.

Before us and on behalf of the appellant were Messrs Said El-Maamry, M. Chandoo and Kisusi, learned advocates. The respondent had the services of Mrs. M. K. Rwebangira and Capt. A. K. Kameja, learned advocates.

With respect to the suit rice, as already said, the dispute is in what capacity the respondent handled it. The appellant claims that it sold back that lot to the respondent, that is, the respondent was the owner. The respondent, on the other hand, maintains that it was the agent of the appellant. All this boils down to what were the terms of the oral agreement.

It is necessary to explain briefly how the oral agreement was disclosed in this litigation.

..../4

The respondent in the plaint mentioned the two written contracts, when they were entered into and the schedule of payment, but said nothing about the delivery date. The plaint went straight to mention that the appellant took delivery of the rice on 15 March, 1993 and that the plaintiff (the respondent) claims US $ 1,882,391.66. In the W.S.D the appellant disclosed the existence of the oral agreement and alleged that the suit rice was re-sold to the respondent at a price of T.Shs. 8,400/= per bag of 50 kg. and that the proceeds were to be deducted "from the funds of the plaintiffs". In the reply to the W.S.D. the respondent denied the re-sale and alleged that there was an agency agreement and that the respondent was the agent of the appellant for selling the suit rice.

The learned judge then framed the first issue:

> "Whether the oral agreement entered by the parties on 15/3/93 was an agency agreement, as averred by the plaintiffs, or an agreement for resale, as averred by the defendants."

One wonders with Mr. Chandoo why such an important material fact of agency was not pleaded in the plaint. This is especially so when the respondent was aware of the appellant's assertion of re-sale since 6 May, 1993 at the meeting in the office of Dr. Idris Rashid (PW.2), then of the N.B.C. Why was that point not pleaded in the plaint drawn on 15 July, 1993?

Be it as it may, the learned judge held that "where the execution of a document and receipt of consideration are admitted, but satisfaction or discharge of the debt is pleaded, the onus of proving the plea is on the defendant, which gives the defendant the right to begin".

..../5

So, the appellant, though it was the defendant, started to prove its case that it had fully paid the contract price by showing that it had re-sold the suit rice to the respondent. At the end of the day the learned judge came to the conclusion:

> "I have considered and weighed the evidence carefully and in the last analysis I consider that the scales are evenly balanced. The rule is that where the evidence on both sides is equally balanced, the onus is not discharged. The defendant on whom the onus has been placed must accordingly fail. The suit thus succeeds."

It was thus held that the oral agreement was an agency agreement.

The appellant is agrieved and has three grounds on this aspect of how the issue of oral agreement came up in the pleadings and how it was disposed of. In ground five the appellant submits that the reply of the respondent to the W.S.D. ought to have been struck out because leave of the Court was not sought in accordance with O VIII R. 13 of the Civil Procedure Code, 1966. Alternatively in ground six, the appellant seeks to expunge paragraph eight of the reply which introduced the notion of agency to the oral agreement for being inconsistent with the plaint. If either of the two grounds succeeds, then the issue of the appellant being with the burden of proof would not arise. So, in ground two the appellant argues that the learned judge erred in shifting the legal burden of proof to the appellant and that the plaint ought to have been dismissed for lack of proof.

In the alternative the appellant submits in ground seven that if there was agency it has not been proved that there is a

..../6

custom requiring the principal to compensate the agent for losses incurred in selling the rice. Again, in ground eight the appellant contends that the respondent is guilty of breaching the alleged agency agreement and so they should not have succeeded.

However, in the first ground, the appellant submits that there was fraud, deception and concealment of facts on the part of the respondent which misled the High Court to deciding in its favour. This contention is very serious and, if upheld, it would render the other grounds superfluous. So, we intend to deal with it first.

The contentions in ground one of the appeal directly concern the order by MACKANJA, J. in Misc. Civil Application No. 117/93. It is therefore necessary to deal with that application in order to appreciate the contention in ground one of the appeal.

While the main suit, Civil Case 112/93, the subject of this appeal, was in progress the respondent opened Misc. Civil Application 117/93 on 8 September, 1993 seeking for an order to dispose of the suit rice by sale. The picture painted before MACKANJA, J. was that the suit rice was in the physical possession of the respondent, that not a single bag had been sold, that its continued existence caused inconvenience to the owners of go-downs and that it could deteriorate. MACKANJA, J. ordered sale by auction. The learned judge also ordered that the proceedings in Civil Application 117/93 form part of Civil Case No. 112/93.

Let us pause here and digress a bit. The last quoted order of MACKANJA, J. indicates what ought to have been the case. Rather than there being a separate application for the sale of the suit

..../7

rice there ought to have been an application for interlocutory orders within the main suit. We wonder why the respondent chose to multiply application unless it was to confuse the Court and thereby derive some advantage.

To go back to the subject, after the order of MACKANJA, J. the Court broker advertised in UHURU indicating that the suit rice was in Mwanza, Kigoma and Bukoba and showed how much was where. That made the appellant suspicious and caused it to make enquiries at the Tanzania Harbours Authority, as a result of which it applied to this Court to take additional evidence under Rule 34 (1)(b) in Civil Application No. 18 of 1995. That application was granted.

The appellant filed affidavits by sixteen different persons adducing additional evidence. The respondent, on the other hand, filed nine counter-affidavits, seven of which were sworn by Mr. J. B. Rugemalira (PW.1) in reply to seven additional witnesses of the appellant. Two other persons filed a counter-affidavit each corroborating two counter-affidavits of Mr. Rugemalira.

The picture painted by the additional evidence is so vivid and revealing. The whole of the rice which was brought was 200,000 bags of 50kg. each. The appellant took possession of 120,911 bags. As 721 bags were shortlanded, the respondent took 78,368 bags. Out of that lot 74,000 bags were sent up-country. So, the picture that the 10,400 bags which the Court broker found up-country was the entire consignment sent there was smashed to pieces. The broker was only told of suit rice being sent to Bukoba, Mwanza and Kigoma. He was not told that 16,000 bags were sent to Arusha and that 10,000 bags were sent to Mtwara.

..../8

All the bags sent to those two towns were completely sold, contrary to the story given to MACKANJA, J. that not a single bag had been sold. So, a total of 48,000 bags were sent to Bukoba, Mwanza and Kigoma. Most of those bags were sold except the 10,400 bags which were found by the Court broker.

Another revelation is that from Mtwara the respondent received Shs. 78/= million while from Kigoma he got Shs. 15/= million. Until the time Mr. Rugemalira swore his counter-affidavit, on August 3, 1995, the respondent was still awaiting Shs.17,754,000/ from Kigoma. The amounts realised from the sales in the other places were not given.

Mr. Rugemalira in his seven counter-affidavits admits what has been stated above. He explained that the whole of the suit rice sent to Arusha and Mtwara and those bags which were sold in Bukoba, Mwanza and Kigoma were constructively transfered back to Dar es Salaam. Thus, Mr. Rugemalira deposed, more bags were found by the Court broker in Dar es Salaam than what should have been. The broker found 68,659 bags instead of 4,368.

Mr. Chandoo submitted that all the information given above was within the full knowledge of the respondent who deliberately decided to conceal it. So, the learned advocate contended, MACKANJA, J. decided the application before him without being fully seized of all the facts and that the respondent obtained the order in his favour by fraud, deception or concealment. Mr. Chandoo cited Meek v. Fleming /1961/ 3 All E.R. 148 as authority for the proposition that a decision so obtained is void and cannot be allowed to stand.

..../9

Capt. Kameja started by submitting that the accusation of fraud is misconceived. He contended that if there was any fraud it was committed before the High Court and so it cannot be a ground of appeal. The learned advocate submitted that what the appellant should have done was to file a fresh suit in the High Court to set aside the judgment allegedly obtained by fraud. Alternatively, Capt. Kameja submitted, the respondent could have asked the High Court to review that decision. He cited our decision in Transport Equipment Ltd. v. Devram P. Valambhia Civil Application No. 18 of 1993 as authority for that submission.

Secondly, Capt. Kameja contended that the rice sold by the Court broker was the suit rice. He reminded the Court that the suit rice was described as "Vietnamese Long Grain White Rice 15% Broken" and that it was packed in bags inscribed "VIP Long Grain White Rice". Capt. Kameja pointed out that the Court broker auctioned "3952.95 metric tons of VIP Long Grain White Rice". He argued that what was auctioned was the suit rice.

The learned Counsel conceded that some of the suit rice sent up-country was sold before the auction but he reiterated the argument of constructive transfer. Capt. Kameja explained that as the respondent had received his own 14,000 M.T. of similarly described rice in Dar es Salaam, then for every bag that was sold up-country the respondent allotted another bag in Dar es Salaam from his lot and gave it to the broker to auction. That, the learned advocate said, is what they meant by constructive transfer.

Thirdly, Capt. Kameja contended that there was no concealment, deliberately or otherwise, because the respondent had no duty or

..../10

obligation to disclose that information. This, he said, was because of the matter in issue in the suit before MAPIGANO, J; agency or re-sale. The learned advocate submitted that where the rice was and how much was realised from the sales pertained to the manner of executing the agency relationship and not whether there was agency or re-sale. In addition to that Capt. Kameja submitted that the appellant knew or had opportunity to find out those facts now claimed to have been concealed. He pointed out that at the hearing of the suit Mr. El-Maamry cross-examined PW.3 on the sale of the suit rice up-country. The answer, he said, was "I do not know if any bag has been sold by our sub-agent. PW.1 probably knows". Capt. Kameja argued that Mr. El-Maamry did not pursue the matter any further. He pointed out that the learned advocate ought to have recalled PW.1 for further cross-examination on that. This, Capt. Kameja submitted, tallies with the stand taken by the appellant that there was a re-sale for then where the rice was and how much had been realised was of no concern to the appellant.

Alternatively, Capt. Kameja argued that ever if there was concealment of such facts there was no miscarriage of justice occasioned. The facts said to have been concealed, the learned advocate contended, would not, if krown, disprove agency but would go to show that there was a breach of agency duties by the respondent. Capt. Kameja argued that as the issue was not whether there was breach or not, then the concealment, if any, did not occasion injustice to the appellant. The learned advocate submitted that Meek v. Fleming is distinguishable as the matters concealed in that case, unlike in the present one, were directly in issue.

..../11

We listered to Capt. Kameja anxiously but at the end of the day we were not persuaded by his arguments. It is not easy to see why the respondent should take this implacable stand in the veritable presence of that which they deny. The ingenuous coirage of the concept of constructive transfer betrays them, to say the least.

A Concise Law Dictionary by P.G. Osborn defines "constructive" as:

> "A right, liability or status created by the law without reference to the intention of the parties; e.g. a constructive trust or constructive notice."

We are not aware that the law has created such "a right, liability or status" as constructive trarsfer. But we are also not saying that the categories of "constructive" are closed. However, we have not been persuaded to cononize this novel concept because it departs from the general basis of the presently known concepts of constructive. The basis of the existing concepts is that the subject must exist and then the law merely construes its implication. There has to be malice, for instance, which the law will then imply to have been directed against the unintended victim in constructive malice. But here what was said to be constructively transfered was the rice which had already been sold and so was not existing. We do not think that this point should detain us.

We are of the opinion that the rice sold by the Court broker was not the suit rice except for the 10,400 bags found up-country.

..../12

This fact was concealed from MACKANJA, J. Since the learned judge ordered that the proceedings before him, Civil Application No. 117/93, should form part of the proceedings of Civil Case No. 112/93 before MAPIGANO, J., the subject of this appeal, then the deceit was carried over. However, that does not portray the whole situation. Mr. Masilingi, in his written submission to MAPIGANO, J., on behalf of the respondent, said "suit rice was not sold until the plaintiff obtained an order of the Court". That, with the hind sight, is patently false.

MAPIGANO, J. also in his judgment said:

> "They /respondents/ took 3952.95 metric tons of the goods and sent part of the lot to their sub-agents at Mwanza, Bukoba and Kigoma. But the whole goods consigned to the sub-agents were not sold. The sub-agents reported that the price of Shs. 8,400/= was no longer available. This situation was occasioned by an influx of the same goods which other traders had imported and released into the market at Shs. 8,000/= per 50kg. This information was relayed to DW.1 and he was asked to reduce the price to Shs. 8,000/=. But he insisted upon a price of Shs. 8,400/=".

The learned judge did not know that out of 78,368 bags taken by the respondents, 74,000 bags were sent up-country. Had he known that he would not have said a "part of the lot" was sent to sub-agents. The learned judge was also not aware that apart from the three towns he named there were Arusha and Mtwara which had received a total of 26,000 bags. Then he was taken for a

..../13

ride when he gulped hook, line and sinker the concoction that "the whole goods consigned to the sub-agents were not sold". The respondent concealed from him the fact that 63,600 bags out of 74,000 bags had been sold and that proceeds from the sales have not been accounted for to the appellant, the so called prircipal.

So, the deceit and/or the concealment though perpetrated before MACKANJA, J. directly affected the reasoning of MAPIGANO, J. We entertain no doubt that if MAPIGANO, J. was seized with the truth he would not have held that the scales were evenly balanced and that the appellant had failed to prove his case. The new evidence would undoubtedly have tilted the scales in favour of the appellant.

We agree with Mr. Chandoo that the facts revealed go to show the conduct of the respondent with respect to the suit rice. That conduct is material in determining the issue of whether the respondent was an agent of the appellant or was the owner of the suit rice, that is, there was a re-sale.

We are satisfied that there was fraud, concealment and deception on the part of the respondent. It is trite law that judgment so obtained cannot be allowed to stand.

However, there is a question posed by Capt. Kameja and that is whether it is proper for this Court to annul the judgment of the High Court on the grounds of fraud committed in the High Court. This present appeal is distinguishable from that of Transport Equipment Ltd. v. Valambhia. In that appeal there was mere allegation of fraud. Here leave was asked for and was granted, as already said, to adduce additional evidence which has revealed

..../14

beyond doubt, and the respondent has conceded as much, that material facts which were within the knowledge of the respondent were concealed. The respondent could have sought a reference from the decision of the single judge allowing additional evidence. That was not done. Additional evidence is now before this Court. So, this Court can decide the issue.

The decision of MAPIGANO, J. that:

> "There will, therefore, be a decree granted to the plaintiffs for US $ 1,847,527.32, payable in TShs. at the National Bank official rate ruling on the day of payment, less the net amount to be realized from the auction sales; for interest at the bank rate from 15/3/93 until final payment; and for costs..."

is set aside because it was obtained by fraud.

Now we go to the 6,074.05 MT. of rice whose ownership is not disputed and so the appellant is duty bound to pay for it.

The respondent in his plaint said that the appellant on 15 March, 1993 took delivery of the 10,000 M.T. of rice worth US $ 3,400,000. The respondent then went on to describe the terms of payment as being 20% of the contract price on signing of the contract, 30% on the arrival of the ship in the port of Dar es Salaam and that the balance was to be settled sixty days from the date of the arrival of the ship. The respondent complained that the appellant failed to honour that agreed schedule of payment and concluded in paragraph 12 of the plaint:

..../15

> "The Plaintiff claims from the defendant the sum of US Dollar 1,882,391.66 or the equivalent in T.Shs. 836,162,328.40 as per the official exchange rate ruling on 14th July, 1993."

The appellant, on the other hand, in paragraph 6 of the W.S.D. stated:

> "... All in all, all payments have been made to the plaintiff for the 6047.05 tons of rice within the stipulated time from the date of arrival of the ship."

In his reply, the respondent in paragraph 8 did not categorically deny the allegations of the appellant that the latter has fully paid for the 6,047.05 M.T. The respondent merely stated:

> "As regards paragraph 6, the original payment schedule had to change following the oral agreement entered into to facilitate quick sales in order to enable the Defendants pay the price by May 7, 1993 /the date the plaintiffs were liable to the Bank for the loan/... But the Defendants did not pay the balance by May 7, 1993, nor did they pay by May 15, 1993 which was 60 days from the date of the ship's arrival when they were contractually supposed to have paid the full balance."

The respondent recapitulated his claim for US $ 1,882,391.66 in paragraphs 10 and 11 of his reply.

..../16

In Court when giving his evidence on oath, Said Bakhressa (DW.1) stated again: "I paid for the 6,047.05 M.T. which I bought from the plaintiffs." DW.1 was not contradicted in cross-examination.

That the position of the appellant has consistently been that it has fully paid for the lot it has taken is attested to by Suleiman Abdallah Abubakar (PW.3), a director of the respondent. He said, in examination-in-chief:

> "We subsequently wrote defendants about his indebtedness to us. They replied, maintaining that they had fully paid the price of the rice."

The learned trial judge (MAPIGANO, J.) did not make a finding one way or the other on this. He divided the rice into the two lots mentioned above and found that the first lot of 6,047.05 M.T. was taken by the appellant and that the suit rice was the one in dispute. He finally decided that the appellant is liable to pay US $ 1,847,527.32 less any amount that would be realised from the sale by auction of the suit rice. The learned judge did not show how that figure was arrived at. That is attacked by the appellant in ground nine of appeal.

But in all fairness to the learned judge the payment for the non-suit rice was not an issue before him. Two issues were framed:

> (1) Whether the oral agreement entered by the parties on 15/3/93 was an agency agreement, as averred by the plaintiffs, or an agreement for sale, as averred by the defendants.

..../17

JUSTICE OF APPEAL

JUSTICE OF APPEAL