THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT - 00 - CC - CS - 0819 - 2004

AGRI-INDUSTRIAL MANAGEMENT AGENCY LTD :::::::::::::::::::: PLAINTIFF

VERSUS

1. KAYONZA GROWERS TEA FACTORY LTD
2. IGARA GROWERS TEA FACTORY LTD :::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The claim by the plaintiff involves two separate suits against the defendants that were consolidated by court under **0.10A of the Civil Procedure Rules, S.I 71-1** by the consent of the parties. There is also a counter-claim by the defendants against the plaintiff.

The facts of this case, as agreed at scheduling, are that the plaintiff, Agri-Industrial Management Agency Ltd (hereinafter referred to as "Agrimag" as it is popularly known) executed management agreements with each of the defendants, Kayonza Growers Tea Factory Ltd and Igara Growers Tea Factory Ltd (in this dispute also popularly referred to as Tea Factory Companies or "Tea Factory Company"/"Tea

Factory Companies"), to run from May 1998, for 5 years, ending in May 2003. The agreements provided inter alia that the plaintiff was to provide management and secretarial services to the defendants and that the management fees were to be separately agreed upon annually and that the fees so agreed were to be contained in an Annexture "A" to each of the agreement. Annexture "A" were annually altered made for the years 1998 and 1999 to provide for the adjusted fees but no fee adjustments were specifically made for the years 2000 and 2001. However a management fee was never the less paid for the year 2000 was paid by both defendants. For the year 2001 an advance fee was paid by both defendants being Ushs.43, 000,000/- by Igara Tea Factory Company and Ushs.67, 000,000/- by Kayonza Tea Factory Company. The plaintiff and the defendants for the years 2000 and 2001 continued to carry out their contractual obligations until the agreements were terminated on 23rd September 2001. It is the termination of the agreement crystallized the dispute between the parties. At the Pre trial scheduling conference the parties agreed the on the following issues for determination:-

(1) Whether there was a valid management agreement between the parties during the years 2000 and 2001; if so,

(2) Whether the said agreement was terminated by the plaintiff or the defendants;

(3) Whether the parties suffered any damage;

(4) What remedies are available to the parties?

One other important issue was left out at the pre trial scheduling but was canvassed during the trial and that is the counter-claim of the defendants. Court shall therefore

adjust the issues for the complete and final resolution of the dispute before it add an issue as follows;

(5) Whether the defendant is entitled to the counter claim and if so what are their remedies

Mr Kahawa Muhumuza and Mr Kwemara Kafuuzi appeared for the Plaintiff while Mr B. Tusaairwe and Mr Tuhebwa appeared for the Defendants. I shall address the issues for determination before court starting with issues 1 to 4 being the main suit and then issue 5 being the counter-claim..

Issue No. 1: <u>Whether there was a valid management agreement between the parties for the years 2000 and 2001.</u>

The case for the plaintiffs is that whereas no amendments were made to the agreement to reflect the fees chargeable for those years the agreement still remained valid and enforceable.

The management agreement between the plaintiff and the 1st defendant (Kayonza Tea Factory Company) and that between the plaintiff and the 2nd defendant (Igara Tea Factory Company), Exhibits P.E 3 and P.E 15 respectively, both provided in clause 14 that

"This agreement shall be null and void if the parties hereto (Tea Factory Company and Management Agent) do not agree on the management fee. Accordingly therefore this agreement is not binding and is not in any way operational until the management fee is agreed upon. The management fee agreement shall be Annexture "A" to this agreement"

Mr. Kaahwa, counsel for the plaintiff however submitted that the defendants by accepting the plaintiff's services and actually paying the management fees for the years 2000 and 2001 the defendants waived their right to nullify the agreements for lack of an amended or expressly agreed to Annexture "A" and therefore the management agreements remained valid and were not affected by the provisions of clause 14 to the agreements.

It is an agreed fact that no Annexture "A" was signed between the parties for the years 2000 and 2001. It is also not disputed that both parties continued to carry out their obligations under the management agreement during that time and the management fees were fully paid to the plaintiff by both defendants for the year 2000 and some advances were paid on the fees for 2001.

According to the testimony of PW1 Vincent Tumuhaise an accountant and audit supervisor with the firm of accountants M/s Lawrie Prophet & Co. who were the statutory auditors for the defendants between 1998 – 2002, there was no Annexture "A" in the year 2000 and so they relied on the Annexture "A" of 1999 (Exh. P.2) to calculate the management fees payable by the defendants to the plaintiff. He

explained that the difference in the amounts paid was because sometimes the fees were paid in US Dollars and the amounts therefore depended on the exchange rate at the time.

The audited accounts of Kayonza Tea Factory Company (Exh. P.5) at page 10 show that the 1st defendant paid Ushs.205,657,000/= as management fees for the year 1999 and Ushs.185,185,000/= for the year 2000. The audited accounts for 2001 (at P.11) also show that Ushs.209,667,000/= was paid by the 1st defendant as management fees.

The accounts of Igara Tea Factory Company (Exh. P.8) at P.10, also show that the 2nd defendant paid Ushs.240,035,000/= as management fees for the year 1999, and Shs.289,145,000/= for the year 2000. Exh. P.6 at P.10, also shows that Ushs.174,829,000/= was paid as management fees for 2001. Mr. Vincent Rwakijuma PW2 the former accountant of the first plaintiff company from 1995 – 2003 however testified that in 2001 Kayonza Tea Factory Company actually paid Ushs.67,000,000/= as part payment for the management fees due to the plaintiff for the year 2001.

For his authority that the conduct of the defendants amounted to a waiver, Counsel for the plaintiff relied on the case of

National Insurance Corporation V Spans International Ltd, C.A.C.A No. 13 of 2002, at P.7 and 8 to define what constitutes a waiver.

He also quotes from 'Words and Phrases legally defined' 4th Volume at P. 404 where waiver is defined as *"the abandonment of a right in such a way that the other is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct".*

This argument was refuted by Mr. Tusasirwe, counsel for the defendants who submitted that in absence of a second agreement relating to the management fee contained in Annexture "A" for each years for the years 2000 - 2001 there was no agreement to speak of as one of the basic elements of a contract was lacking. He submitted that the payments made by the defendants to the plaintiff as management fees sought to create an agreement where none existed. He further submitted that, at best, such payments could only be said to have been deposits on fees pending conclusion of the agreement in Annexture "A".

The learned counsel for the defendants submitted in the alternative that, the arrangement and relationship between the parties can be said to have created a totally new relationship outside the (now void) written agreements and that the terms of this new relationship would have to be proved afresh from oral or other evidence. He refutes the plaintiff's contention that the defendants by their conduct waived their right to rely on clause 14 of the agreements and states that 'waiver' relates to an express or implied promise not to insist on one's rights and does not apply to the instant case because clause 14 is not a "rights" creating clause but sets down a condition precedent to the validity of the contract.

Mr. Tusasirwe submitted that the mainstream agreements P.E 3 and P.E 15 were incomplete and could not stand without Annexture "A" and therefore were not legally enforceable. He asserts that given the wording of clause 14 of the agreements, the absence of Annexture "A" would automatically render the agreements null and void.

I have considered the evidence before court on this matter and the arguments of both counsels.

It would appear to me, that the in order to answer the issue of validity one would have to consider whether requirements of clause 14 to the said agreements were waived or not.

According to **Halsbury's Laws of England**, Vol. 9(g), (4th Ed) para 1025 'waiver' in contract is most commonly used to describe the process whereby one party unequivocally, but without consideration grants a concession or forbearance to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of a term waived.

Waiver is however to be distinguished from consensual variation. Consensual variation is where the parties to a contract agree in a subsequent simple contract to vary its terms as between the parties to the original contract by way of a second contract, and as opposed to waiver, the agreement for variation must possess the characteristics of a valid contract. (Halsburys (supra) paras 1019 and 1023.

Where the contract is still executory on both sides, however, consideration may be found in the mutual surrender of rights or the conferment of benefits on each party

by the variation (See **Ficom S.A. V Sociedad Cadex Ltd [1980]2 Lloyds Rep. 118**). The authors H.G. Beale, W.D. Bishop and M.P. Furmston in their book **Contract, Cases & Materials, 4th Ed [2001] at P. 836**, also state that,

"*to be fully effective, a variation requires agreement and consideration just like a fresh contract and if these are present, the variation cannot be withdrawn unilaterally by either party".*

From the wording of clause 14 to both agreements, it would appear that the validity of the contract depended on the agreement as to management fees and this agreement was to be recorded as Annexture "A" to the mainstream agreement. How then should court construe this provision?

In the case of **Bank of Credit & Commercial International S.A. (in liquidation) V Ali [2001]1 All ER 961** it was held by **Lord Bingham of Cornhill** that

> *"In construing contractual provisions, the object of the court is to give effect to what the contracting parties intended. To ascertain the intention of the parties, the court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties relationship and all the relevant facts surrounding the transaction so far as known to the parties".*

The question therefore is whether under clause 14 and the whole contract the parties intended for each year to rescind the existing contract and replace it with a new one contained in Annexture "A", or to vary the existing contract.

Counsel for the defendant submitted that clause 14 is not a "rights" creating clause but rather is a condition precedent and therefore cannot be waived. Whereas a contractual provision in my view can create a contractual right, in this case the constant reference in clause 14 to the agreement being null and void for lack of an annexture "A" does suggest to my mind that this clause is indeed a condition precedent that goes to the whole validity of the agreement.

I agree with counsel for the defendant that the instant case clause 14 goes to the contract validity and therefore could not have been the intention of the parties that it can be waived. The clause provides for the mode of performance of the contract by the defendant without which there was no contract.

However, one cannot escape the fact that despite the absence of the annexture both parties continued with the agreement. More curiously the defendant still continued to pay for the services of the plaintiff in the years 2000 and 2001 when they claim that the agreements were null and void!

Mr Tumusiime Cales DW1, the Board Chairman of Kayonza Tea Factory Company (since 2000), testified and drew a distinction as to the effect of the said payments in that the 1st defendant actually paid what he termed as 'advances' in the absence of Annexture "A" to the agreement, but not the management fees. He however during cross examination also testified that

"...by practice the (plaintiff) were our employees so we had to pay them".

It is therefore clear from this evidence that the plaintiff rendered the services and the defendants freely accepted these services on the basis that some remuneration was to be paid to the plaintiff by the defendants. There was an implied promise by the defendants to pay what the services were worth.

It is not disputed that the plaintiff rendered and the 1st defendant accepted management services during this period and as discussed, surely it then became the intention of the parties that a reasonable price should be paid for these services. As stated by Goff & Jones in their **Book <u>The Law of Restitution, 6th Ed, (2002)</u>** at para 23-004, that if the services are supplied at the request of the recipient, or if they are freely accepted by him, he will be bound to pay a reasonable price for them. This is the position held by the House of Lords in the case of

<u>Way</u> V <u>Latilla [1937] 3 All ER 759</u>

where the appellant and the respondent had not agreed on the remuneration to be paid to the appellant for services rendered. The House of Lords held that although there was no concluded contract between the parties for they had never reached agreement about an essential term, namely; the amount of pay the appellant was to receive, the appellant was entitled to remuneration upon a quantum meruit basis.

Lord Wright stated, at P. 765 that;

> *"...the work was done by the appellant and accepted by the respondent on the basis that some remuneration was to be paid to the appellant by the respondent. There was thus an implied promise by the respondent to pay on a quantum meruit that is, to pay what the services were worth".*

It was further held that, in computing the amount of such remuneration court was entitled to have regard to what passed between the parties showing their intention. The relief of quantum meruit results from what in English law is called a quasi-contract or restitution. In the further case of

Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] A.C. 32 at 61 **Lord Wright** also held that quasi-contract is generically different from the remedies in tort and contract and form a "third" category or remedy altogether under English law that provides against unjust enrichment or benefit.

In answer therefore to issue 1 is therefore I find that there was no valid agreement in relation to clause 14 thereof but that notwithstanding there did exist a quasi-contract based on the terms of the signed contract that is enforceable by court.

Issue No. 2: <u>Whether the agreement was terminated by the plaintiff or the defendants (and whether the termination was lawful)</u>.

The plaintiff avers in para 4(b) of the plaint, that the defendants' letters dated 23rd September 2001 (Exh. D2) and that dated 28th September 2001 (Exh. D1) amounted to termination of the management agreements between the parties and therefore were in breach of clauses 1(a), 11(c)(i), 11(c)(ii), and 12 of the agreement.

The defendants on their part pleaded under para 11 of their amended written statement of defence, that on the contrary, it's the plaintiff which terminated the agreement by letters dated 2nd October 2001 (Exh. ID1) and 15th October 2001 by which letters, the plaintiff sent the entire defendant's staff away on indefinite leave.

It would appear to me that if there was any termination of the agreements by any of the parties then that is to be found in the correspondence that was clearly flying between the parties at the time.

The letter from Kayonza Tea Factory Company (Exh. D2), is entitled *"TERMINATION OF THE MANGEMENT AGREEMENT BETWEEN KAYONZA GROWERS TEA FACTORY LTD AND AGRIMAG LTD".* The letter address to the National Authorising Officer, Ministry of Finance, Planning and Economic Development, states that the Board of Directors of the 1st defendant company at its extra ordinary meeting held on 22nd September 2001. Mr. Caleb Tumwesimire, the Chairman Board of Directors testified that the said letter was addressed to the National Authorising Officer because among other reasons they did not know which of two Board of Directors that plaintiff company appeared to have was the correct Board to deal with. This is because at the time of the said letter the plaintiff company is said to have had problems stemming from the existence of two different Boards of Directors for the same company at the same time. The letter is copied to several persons, including the General Manager and the Company Secretary of the plaintiff company.

The letter of termination from Igara Tea Factory Company, (Exh. D.1) is also addressed to the National Authorising Officer and is framed in similar words to from Kayonza Tea Factory Company (Exh. D2), notifying the addressee that the Board of Directors of the 2nd defendant company had resolved, at a meeting held on 22nd September 2001, to terminate the management agreement with the plaintiff. Mr. Nuwamanya Joe, the Chairman of the Board of Directors of the 2nd defendant also

testified that the letter is addressed to the National Authorising Officer because they did not know which of two the two boards of the plaintiff company they should deal with. The letter was also copied to the General Manager and Company Secretary of the plaintiff company.

Counsel for the plaintiff submits that these letters, coupled with the subsequent conduct of the defendants which included engaging an altogether new management agency from the plaintiff, amounted to the termination of the management agreement.

Mr. Tusasirwe, counsel for the defendants refutes this assertion and submits that the said letters did not terminate the agreement because they were not addressed to the plaintiff and that it was the plaintiff's fault if it assumed that its services had been terminated and so sent its staff on indefinite leave. He asserted that by ceasing to have any presence in the defendants' business, the plaintiff in fact is the party which terminated the agreement.

To my mind whether the agreement were terminated or not is a question of fact to be discerned from the conduct of the parties and the correspondence that went on between them.

The wording of both letters in issue (Exh. D1 and Exh. D2) are clear and should be given their ordinary meaning. The letters state that the defendant's Boards had taken a decision to terminate the management agreement. This with respect to the first

defendant was from the 1st October 2001 while for the second defendant was from around the 29th September 2001 after the reconciliation of liabilities.

Although the letters were not addressed to the plaintiff, they were copied to them. The defendants' decision to terminate the agreement was therefore effectively brought to the plaintiff's notice and in my opinion the plaintiff was justified to rely on that communication. The defendants therefore terminated the management agreement. The question that follows then is whether the termination was lawful?

The plaintiff pleaded that the defendants terminated the management agreements without due notice to the plaintiff contrary to the provisions of clauses 1(a) 11(c) (i) and (ii), 12 and 13 of the agreements, and that the plaintiff as a result suffered general and special damage.

Let me begin by reviewing what these clauses provide for. Clause 1(a) of the Agreements provides for duration of the management agreements being five years.

Clause 11(c) (i) of the agreements provides, however, that the agreement may be terminated by either party by service upon the other party of a written notice of termination if the other party fails to remedy any material breach of the agreement within 90 days after the service on them by the other of a written notice specifying the breach and requiring it to be remedied.

Clause 11(c) (ii) provides that, the termination shall be subject to Arbitration under clause 13 of the Agreement.

The plaintiff's claim for damages in lieu of notice is based on clause 11(c) above and clause 11(4) which provides that –

> *"In the event that Tea Factory Company or the management agent shall purport to terminate this agreement without due notice as provided in clause 11(c) (i) and 11(c) (ii) and subject to clause 10 hereon, then the Tea Factory Company or the management agent shall pay to the other party as liquidated damages, the aggregate amount of the management fee and commissions actually paid by the Tea Factory Company to the management agent in respect of the last completed financial year of the Tea Factory Company preceding such purported termination".*

The Counsel for the defendants refutes the plaintiff's claims and submits that the termination of the agreement was lawful because the plaintiff had committed fundamental breaches as expressed by the defendants in their letter to the plaintiff dated 12th June 2001, complaining of poor services rendered by the plaintiff and requesting the plaintiff to attend to them or else they would terminate the agreement (Exh. D5). The Counsel for the defendants submits that by this letter, due notice of termination was issued to the plaintiff.

The letter was entitled *"DISSATISFACTION WITH SERVICES BEING RENDERED TO IGARA AND KAYONZA TEA FACTORIES LTD."* It informs the addressee(s) about the decline in the services rendered by the plaintiff company which put their shareholders' interests at peril. The letter lists the areas of dissatisfaction, with *"a view of amicably*

and timely resolving" the issues. The defendants express in this letter that they "*strongly feel that such an alarming situation cannot be permitted to subsist any longer".* The defendants conclude by saying that they "*wished to bring to the (plaintiff's) attention the non-observance of the agreement and do hope that within 30 days you will have corrected these points which are of concern to us",* and that they strongly put it to the plaintiff that they were not in any way interested and would not be party to wrangles that did not profit the shareholders.

According to Mr. Caleb Tumwesimire (DW1), Exhibit D5 was written to the plaintiff to express the defendant's dissatisfaction and state the reasons threatening termination.

The question for court now to find is whether this letter amounted to a notice under clause 11 (c) (i) of the agreement? What does this letter say in this respect?

Exhibit D5 dated 12th June 2001 and addressed to the Chairman of Agrimag (the Plaintiff) and signed jointly by the chairpersons of the Defendant Tea Factory Companies, inter alia provides at P2

> *"... Therefore in accordance with section (sic) of the agreement, we wish to bring to your attention the non observance of the agreement and do hope that within 30 days you will have corrected these points which are of concern to us..."*

There were eight areas of concern list in that letter.

Clause 11 (c) (i) of the agreement provides

> *"... **Termination***
>
> ***by Either Party***
>
> *By service by either party upon the other of a written notice of termination, if the party of the other part fails to remedy any material breach of this agreement within 90 days after service on them by the other of a written notice specifying the breach and requiring it to be remedied..."*

Clearly the authors of exhibit D5 had clause 11 (c) (i) of the agreement in mind but fell short of the remedy period of 90 days by 30 days thus requiring a shorter period of remedy than is required under the agreement. In any event the letters of termination from the defendant Tea Factory Companies were not written until after the 21st September 2001 well within the remedy period as required in the agreements.

So was Exhibit D5 a written notice within the meaning of the agreement, notwithstanding the 60 days notice instead of 90? I say yes in substance it was. Clearly the authors just failed to accurately state the remedy period only and I find that that is not fatal to substance of the notice. I therefore find the consequent termination of the agreements by the defendant Tea Factory Companies was with notice and thus the agreements were lawfully terminated.

Issue No. 3: Whether the plaintiff suffered any damage.

It is therefore clear from my findings above that there was an agreement between the parties enforceable by the courts which was lawfully terminated with notice by the defendants. That being the case the only damages that the plaintiff would have suffered would have been the non payment of fees, which is a special damage, up to the time of the termination.

The clearest evidence on this was given by Mr Vincent Rwakijuma (PW. 2) a former accountant with the Plaintiff Company. He relied on reconciliations' done by the parties in 2005 and summarized them in Exh P. 13 for Kayonza Tea Factory Company and Exh P. 14 for Igara Tea Factory Company. He testified as to the fees due in 2001 the year of the termination.

With respect to Kayonza Tea Factory Company the management fees were as follows (Exh P.13)

1. Management fees as per inv. 03/2001 (VAT Inc) .....Shs. 162, 337,493=
2. Fee in lieu of notice as per inv. 07/2001 (VAT Inc) .....Shs. 216, 449,991=
3. Less 2001 Management fee advance paid.....Shs. 67, 000,000=

With respect to Igara Tea Factory Company the management fees (payable part in Uganda shillings and part in United States Dollars but converted into Uganda shillings at US $1 = Ushs.1710) were as follows (Exh P. 14)

1. Management fees as per
    i. inv. 01/2001 (VAT inc).....shs 115, 045, 862
    ii. Inv. (US $) 02/2001 (VAT inc) .....shs 43, 572, 168

2. fees in lieu of notice as per

    i. inv. 04/2001 (VAT inc)……Shs.153,394,483=

    ii. inv. (US$) 05/2001 (VAT inc)……Shs. 58,092,821=

3. Bonus fee for 2000 inv. 06/2001……Shs.127,698,929=

4. Less 2001 Management fee advance paid……Shs. 43,000,000=

Since I have found that the termination actually was with notice then the claim for fees in lieu of notice is not justified. Therefore the Management fee due to plaintiff with respect to Kayonza Tea Factory Company (taking into account the advance paid) would be Ushs.95,337,493/=. On the other hand following the same find the money due to the plaintiff with respect to Igara Tea Factory Company being management fee and bonus (taking into account the advance paid) would be Ushs.115,621,030/=.

Issue No. 4: <u>What Remedies are available to the plaintiff.</u>

The plaintiff seeks to recover management fees and commission from the first defendant (Kayonza Tea Factory Company) for the period January – September 2001. These I award in the sum of Ushs.95,337,493/= as special damages.

The plaintiff also claims against the second defendant Igara Tea Factory Company Management fees for the period January – September 2001 and some bonus as well. These I award in the sum of Ushs.115,621,030/= as special damages.

The plaintiff also seeks general damages from both defendants for breach of contract largely for termination of the agreement without notice. These for reasons already given in this judgment I decline to give.

The plaintiff seeks to recover interest at bank rate on the awarded special damages. I accordingly award interest on the special damages at 24% p.a. from the 30th September 2001 until payment in full on both awards of special damages.

I award costs of the main claim to the plaintiff.

I shall now address my mind to the counter claim.

(6) Whether the defendant is entitled to the counter claim and if so what are their remedies

In their amended written statements of defence and counterclaim the defendants seek remedy against the plaintiff for breach of contract. The alleged breaches will be addressed in the same order they are enumerated by counsel for the defendants in his written submissions.

1. Failure to privatize and issue equity to the defendants

Mr. Tusasirwe argued for the defendants that the transformation of AGRIMAG, the plaintiff company, into a private company in which the Tea factories would hold majority shares and controlling interest constituted part of the terms of the respective contracts between the plaintiff and the defendants, and that the

plaintiff's failure to comply with this provision constituted a fundamental breach of the contract.

Clause 1(c) of both Management Agreements (Exh. P.3 and P.15) provides that;

"The managing agent shall within two years from the date of first signing of Annexture 'A' as defined under Clause 9(a)(ii) transform itself into an autonomous and private corporate body failure of which will be considered a material breach of this agreement".

The plaintiff stated that the process to privatize and restructure the plaintiff company started on 12th December 2000 but was not completed due to the wrangles that ensued until the defendants terminated the agreements. This is conceded to by Mr Caleb Tumusiimire (DW1) who testified that the proper procedure to restructure the plaintiff company was followed but could not be completed because the situation and the management of the plaintiff company was chaotic.

The plaintiff admits indebtedness to the defendants for the Shs.10m/= paid by each of them as part payment on the purchase of shares in the plaintiff company) para 13 of Reply to WSD) which will be refunded for failure of consideration.

This of course according to the agreement is a material breach but clearly, the defendants in their relationship with the plaintiffs chose to treat this failure to privatize / restructure as breach of a warranty rather than a condition of the contract. The distinction between the two was explained by **F. Moulton L. J.** in his dissenting

judgment in **Wallis, Son & Wells V Pratt and Haynes [1910]2 K.B. 1003** in the following terms:

> *"A party to a contract who has performed or is ready and willing to perform his obligation under that contract is entitled to the performance by the other contracting party of all the obligations which rest upon him but from a such obligations are not all of equal importance. There are some which go so directly to the substance of the contract or, in other words, are so essential to its very nature, that their non-performance may fairly be considered by the other party as a substantial failure to perform the contract at all. On the other hand, there are other obligations which though they must be performed, are not so vital that a failure to perform them goes to the substance of the contract. Both clauses are equally obligations under the contract, and the breach of any one of them entitles the other party to damages. But in the case of the former class he has the alternative of treating the contract as being completely broken by the non-performance".*

The plaintiff opposes the defendants claim for damages for breach stating that the defendants participated in the delayed privatization process without complaint and should not therefore complain about the delay or about failure to complete the process when they refused to recognize the plaintiff's legitimate board.

The defendants contend that the plaintiff company's restructuring was never completed. Counsel for the defendant further the restructuring failed even after the

defendants paid their contributions to the new share capital. The plaintiffs however claim that Uganda Tea Growers Corporation (their parent company) appointed a legitimate Board of Directors as shown by the letter dated 14th September 2001 (Exh. D13) which was also copied to the defendants also but the defendants refused to recognize this Board of Directors.

Mr. Caleb Tumusiimire (DW1) and Ms. Joy Kanyengere (DW3) the two chairpersons of the Tea Factory Companies testified for the defendants that they did not accept or agree with this new position because (in their opinion) the actions of Uganda Tea Growers Corporation were illegal.

I am inclined to agree with the defendant/counter claimants that there was total confusion as to the question of the privatisation of the plaintiff company. This can be seen clearly from the correspondences especially between the plaintiff company itself and its parent company Uganda Tea Growers Corporation. Exhibit D11 dated 3rd April 2001 is a clear example of this where Uganda Tea Growers Corporation sought to reverse actions taken by the plaintiff in this regard. Even a meeting to reconcile the whole restructuring had to be held mediated by a whole Government Minister on 24th April 2001.

The said meeting was chaired by the Minister (Hon. Kisamba Mugerwa) and discussed the privatization/restructuring of AGRIMAG, and was attended by the Chairman of AGRIMAG Mr. Ampaire Apollo, Ag. General Manager of AGRIMAG Mr. E. Kajubu , and Mr. Balisanga respectively, the chairperson of Kayonza Tea Factory Ltd, Mr.

Tumwesimire Caleb and Ntwirenabo Juliet and chairperson of Igara Tea Factory Ltd. among others.

At that meeting it was resolved that AGRIMAG arranging for its own restructuring was improper and unacceptable and that the current Board of Directors of AGRIMAG was not recognized by all concerned. It was further resolved that there was an urgent need to reconstitute a new Board of Directors recognized by all stakeholders according to the Memorandum of Understanding not later than 8th May 2001, and that the Minister of Finance, Planning and Economic Development should take a lead in the restructuring of AGRIMAG in consultation with other stakeholders.

This appeared to have resolved nothing because by a letter dated 14th September 2001 entitled *"Appointment of the Legitimate Board of AGRIMAG"* (Exh. D13), addressed to AGRIMAG and copied to the defendants in the instant case, Mr. Balisanga Apuuli the Ag. General Manager of Uganda Tea Growers Corporation states that, in accordance with the existing Memorandum and Articles of Association, the Uganda Tea Growers Corporation board at the extra-ordinary meeting held on 14th September 20001 resolved to appoint an interim Board of Directors of AGRIMAG to steer the company through the privatization/restructuring process with immediate effect and listed the said legitimated constituted board.

However Agrimag in a letter dated 18th September 2001 (Exh. D.14) states that the actions of the Uganda Tea Growers Corporation board of the 14th September 2001 were illegal and malafide as nobody had authority to reverse the decisions or

resolutions of AGRIMAG at the annual general meeting. In the same letter the Tea Factory Companies including the defendants are advised to seek court declarations inter alia that Uganda Tea Growers Corporation has unlawfully breached the agreement of sale between itself and the Tea Factory Companies.

To my mind notwithstanding whoever may have been correct in this debate, the fact remains that Agrimag's failure to privatize and transfer 15% of its shares to the defendants was a breach of contract and the defendants are entitled to damages for this breach.

2- Failure to appoint key staff, mismanagement and misappropriation

Mr. Tusasirwe, counsel for the defendants argued that under the management agreement (Exh. P.3 and P.15) the plaintiff undertook to effectively manage the business of the defendants, to engage all staff and labour required for the carrying on of the defendants' business to train and control them.

He states that since 2000, several key staff left and were not replaced by the plaintiff and that these departures without replacement negatively affected the services rendered by the plaintiff to the defendants and caused the defendants financial loss and were in breach of clause 2(d), 3(e), 4(f) and 2(a) of the management agreements.

He relied on Clause 3(e) of the agreements that provides that it shall be the duty of the plaintiff to,

"On behalf of the TFL to engage all staff and labour required for the carrying on of that TFL's business and to train an control them, the managing agent having power to dismiss any employee according to the Laws of Uganda and the TFL's rules and regulations, and further to second any member of their own staff, in particular with reference to senior factory management and the terms of service of all such staff shall conform at all times to those of the managing agent".

Clause 2(a), further provides that,

"Subject to all the terms of the agreement, the TFL hereby appoints the managing agent to be the sale and exclusive manager of the TFL business for the duration of this agreement".

Lastly Clause 2(d) provides that,

"The Managing agent shall furthermore undertake the duty of the Company Secretary".

Mr. M. Assimwe DW2 and Ms Joy Kanyengere DW3 for the defendants/counter-claimants both testified that a Mr. Biraro who was the Factory Manager of Igara Tea Factory Ltd was suspended in December 2000, and that in early 2000, the Financial Controller was suspended and Mr. Tayebwa who was the Internal Auditor also became the Acting Financial Controller (which was a conflict of interests because he was expected to audit himself). They stated that the Monitoring and Evaluation Officer left at about the same time and was not replaced.

They further testified that after the General Manager left one Mr. Lee Nyaika became both Company Secretary and Acting General Manager for 2 years until early September when he was replaced by Mr. Kimpwitu as Acting General Manager who acted until the termination of the management contracts. The defence witness all testified that during this period, supervision in the defendant Tea Factorys' was non-existent and the functions of Company Secretary remained unattended to.

The defendants contend that owing to the said staff situation the plaintiff grossly mismanaged the defendant Tea Factory Ltd. If failed to perform its core obligations, namely; staff operations and supervision, proper procurement, spending within the agreed and/or authorized limits, presentation of accounts within the time frame laid down in para 3(a) – (d) of the agreements.

The defendants then pointed to the specific instances of mismanagement and misappropriation alleged by the defendants. Igara Tea Factory Limited claimed an overall loss of Ushs.1,027,071,000/= while Kayonza Tea Factory Ltd also claimed an overall loss of Ushs.664,539,000/= being losses caused by the plaintiff in the financial year 2001 as evidenced by the audited accounts Exh. D.20 and Exh. P1.

For the plaintiff's in reply, Vincent Tumuhaise PW1 and Keneth Kyamulasire PW3 testified that the defendant companies did not have General Managers but had Group Managers. Mr. Kyamulasire stated that he was the Factory Manager and later Group Manager for Igara Tea Factory Ltd from 1999 – 2000 and Group Manager of both defendants in 1999. He was transferred from Igara Tea Factory Ltd to the plaintiff company in 2000 as Factory Superintendent. The plaintiffs' further asserted that key

staff were appointed and put in place at the defendant Tea Factory Limited and they provided the required services. That, the staff who acted in place of others did so for a very short time and were at the plaintiff's head office and this did not affect the services to the defendants for as the targets were being met and operations went on normally.

The plaintiff doesn't deny that there was a general reduction in the defendants income in 2001 but attributes this to the world prices of tea over which it had no control. Mr Vincent Tumhaise PW1, the audit supervisor with M/S Lawrie Prophet & Co. who were the statutory auditors of the defendants between 1998 – 2002, testified that there was a general improvement in the sales of the defendant Tea Factory Companies except for the year 2001 when there was a loss due to the general world tea prices which were on the down trend.

Mr. Tumhaise however admitted that he had no authoritative knowledge of the tea business and did not state the basis of his contentions. The world tea price index was not produced to substantiate this position.

What ever the situation was it would appear to me that evidence of breach in this area is hard to assert. There is even some evidence that there were some profits being made as well. There was no proof that the expenditure by the plaintiffs were not in execution of its duties and obligations to the defendants. The defendants have not on the balance of probability proved this breach.

3- Loss caused by *"Sale"* of tea to West Ankole Tea Packers:-

The defendants claim that the plaintiff in breach of its duty to provide the defendants with marketing services, sold their tea on credit to a dubious buyer known as Sam Mugisha alias Stephen Muhire t/a West Ankole Tea Packers under unclear terms and contrary to the established business practices which caused a loss of Ushs.17, 811,000/= to Kayonza Tea Factory Limited and a loss of Ushs.55, 458,000/= to Igara Tea Factory Ltd.

The defendants in asserting this breach rely on Clause 5(a) of the management agreements which provides

> *"The managing agent shall in the performance of their duties under this agreement exercise a standard of care and skill which would fairly and reasonably be expected of an experienced operator of tea factory acting in what they reasonably believe to be in the best interest of the TFLs but shall not be liable to the TFL for any loss of profit or contract that the TFL may suffer as a result of events beyond the control of the managing agent".*

The plaintiff denied this breach and stated that it took all possible steps against Sam Mugisha (aka Stephen Muhire) who handled the transaction for West Ankole Tea Packers by taking him to court, but no money was recovered as shown by the court bailiff's report (Annexture R4 and Exhibit P 18 i and ii). Mr. K. Kyamulasire PW3 adduced evidence that the plaintiff took court action to recover the sums under

H.C.C.S No. 1129 of 1998 in which the judgment debtor was arrested in execution and committed to civil prison but the said sums were not recovered.

He further testified that that Sam Mugisha used to buy tea from the defendants and would make payments in Kampala and the marketing clerk in Kampala would authorize the sale. He further testified, that this was the practice long before the plaintiff was engaged as managing agent of the defendants, and that the manager would only call Kampala office to confirm the letters of authorization. He stated that it only later that they learnt that Sam Mugisha had used forged letters of authorization. The plaintiff denied any incompetence on their side and pointed out that the defendants did not challenge the existence of the stated business practice between them and Sam Mugisha t/a West Ankole Tea Packers.

I find that the plaintiff in pursuing the said Mugisha in court exercise the necessary standard of care and skill as would be expected of a manager regardless of the fact that the judgment though in their favour did not result in the recovery of the money. This breach therefore has not been proved on the balance of probabilities.

3. Claims for specific amounts of money by the defendants

The defendants in their counter claims also make specific claims for special damages against the plaintiff.

In the case of Kayonza Tea Factory Company these are in para 22-34 of their counter-claim and include

i. Misappropriation of Ushs.6,176,092/=

ii. Granting a loan of Ushs.18,000,000/= to their general manager

iii. Failing to secure project funds of Ushs.57,987,665/=

iv. Failing to account for expenditure of Ushs.2,518,665/=

v. Ushs.10,000,000/= paid in as shares

In the case of Igara Tea Factory Company these are in para of their counter-claim and include

i. Ushs.16,000, 000/= paid for construction of a labour camp at Mari Estate Ltd as a result of falsely certified work.

ii. Ushs.12,000,000/= paid for survey work at Kakombe estate to an apparently one existing person.

iii. Ushs.10,000,000/= paid in as shares.

The evidence adduced around most of the above items was highly contentious.

However there is the evidence of Mr Rwakijuma PW2, the accountant of the plaintiff which to my mind addresses these claims against the plaintiff.

He testified that after the termination he and another were asked to carry out a reconciliation of the monies due to each of the parties and he submitted a report dated 27th May 2005 to the said parties. This report was in the main not contested by the defendants. He then gave a summary of the monies due in Exh. P13 and 14 (referred to supra). Based on the evidence before court, the reconciliation seems to have taken into account these specific claims and others not pleaded. More importantly the reconciliation shows the sums of money which the plaintiff concedes that it owes to the defendants i.e.

i. The plaintiff owes the Kayonza Tea Factory Company (Exh. P13)……Ushs.177,458,371

ii. The Plaintiff owes the Igara Tea Factory Company (Exh. P14)……Ushs.107,377,987

It is unlikely that based on the evidence before court that court can on the balance of probabilities do a more exact assessment of the monies owed by the plaintiff to the defendants in any event the figures are more than those pleaded. Since this was an attempt by the parties them to promote reconciliation among themselves court will promote and give it legal efficacy by accepting those figures therein as the figures due from the plaintiff to the defendants. To the extent that they have not already been paid there are due and owing.

These figures of course can be offset from the awards in the main claim.

Remedies of the Defendant/counter-claimant

I accordingly find that the plaintiff owes the Kayonza Tea Factory Company Ushs.177,458,371/= as special damages according to their own reconciliation to the extent that this has not already been paid. I also find that the Plaintiff owes the Igara Tea Factory Company Ushs.107,377,987/= as special damages according to their own reconciliation to the extent that this has not already been paid.

Since I found breach with regard to the issue of shares I will award each of the defendants' Ushs.2,000,000/= in general damages for breach of that and other obligations that may be encompassed that in the reconciliation.

I also award interest at 24% p.a. from the end of September 2001 on the special damages until payment in full and 8% p.a. on the general damages from the date of judgment until payment in full.

I award the defendants the costs of the counter-claim.

I so order.

.....

GEOFFREY KIRYABWIRE

JUDGE

Date: 29/01/08