

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

HCT - 00 - CC - CS - 149 - 2004

JBL BUSINESS BUREAU LTD PLAINTIFF

VERSUS

UGANDA ELECTRICITY DISTRIBUTION COMPANY LTD DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff company brought this suit against the defendant company to recover Ushs.19,250,000/= for breach of contract. The case for the plaintiffs is that pursuant to an order dated 25th August 2003 they supplied the defendant company 3,500 galvanised bolts and nuts. However, when officers of the plaintiff company sought to be paid for the supply, their managing director was instead arrested and charged with receiving stolen property and retaining it. To date they have not been paid for the goods they supplied.

The defendant company (hereinafter referred to as “UEDCL”) is charged with the duty of distribution of electricity in Uganda. It is the case for the defendants that the goods supplied by the plaintiff did not conform to the description of the goods contracted for and were not fit for the purpose contracted. The defendant avers that in order to get paid the defendant had to issue the plaintiff with an “*acceptance certificate*” to certify that goods were acceptable but this was not done. This is because the said bolts had their lengths crudely shortened from 11 to 10 inches to meet with the contract specifications.

The defendants also counter-claim the sum of US\$39,040- for the conversion of the said bolts. It is the defendants counter-claim that the bolts supplied by the plaintiff to the defendants were actually originally part of the defendants own stock of bolts that were stolen from them a year earlier in 2002. It is therefore the case of the defendant/counterclaimants that the plaintiffs fraudulent tried to sell back their property to them.

The parties then agreed on the following issues for trial;

- 1- Whether it was an express or implied term of the contract that the suit goods would only be accepted by the defendant upon the issuance of an acceptance certificate.
- 2- Whether the suit goods were part of the defendants' property which were stolen from the depot at Lugogo in March 2002.
- 3- Whether or not this suit goods were in good order and condition.
- 4- Whether the plaintiff is entitled to the recoveries sought in the suit or whether the defendant is entitled to the remedies sought in the counter-claim.

Mr. D.S Mubiru-Kalenge appeared for the plaintiff while Mr. J.F. Kanyemibwa appeared for the defendants.

Issue No. 1: Whether it was an express or implied term of the contract that the suit goods would only be accepted by the defendant upon the issuance of an acceptance certificate?

Counsel to the parties elected to argue issue No. 1 and 3 together. I shall therefore address the two issues in the same way.

Counsel for the plaintiff submitted that the plaintiffs received a Local Purchase Order (LPO) from the defendants dated 25th August 2003 (Exh. PE1) to supply 3500 galvanised bolts and nuts specifications 5/8" x 10" at a total price of Ughs. 19,250,000/= . The suit goods were then supplied by the plaintiff and received by the defendant against a delivery note dated 5th September 2003 (Exh. PE2) showing the said goods had been received in "good order and condition" (these words being printed on the delivery note). Counsel for the plaintiff submitted that there was no contractual term express or implied that payment would be made against a "certificate of acceptance".

Counsel for the defendant on the other hand refer to a delivery note marked Exh. D.15 whereby the officer of the defendant who signed the delivery note affixed a stamp of the defendant with the words

"Goods received subject to a valid inspection report and valid purchase order"

Counsel for the defendant submitted that Exh. PE2 lacked this stamp of the defendant and therefore was not the delivery note used in the transaction. He submitted that when the suit goods were inspected they were found to be unacceptable.

To establish what the terms of a contract are, one must look at the contract itself. In this particular case there was no single document that embraced the terms of the contract. One therefore has to look to the transactional documents like the L.P.O and delivery note to establish what the terms of the contract were. The plaintiff seeks to rely on wording to be found on Exh. PE1 while the defendant seeks to rely on wording to be found in Exh.D15. Both are delivery notes from the plaintiff company. My close scrutiny of the two delivery notes suggests to me that both Exh.PE2 and Exh. D15 are actually the same document but with varying degrees of clarity as to their details.

Exhibit D15 in particular appears to be a carbon copy of Exhibit PE2. Both delivery notes are numbered No. 48 of the “5th September 2003”. Both have printed on them the words.

“The above goods have been received in good order and condition”

Both also have on them the defendant’s stamp with the inscription

“Goods received subject to clean inspection report and valid purchase order”

The difference in my reading is that the defendant's stamp on Exh. D15 is much clearer than that on Exh. PE2 (where you can just about make out the impression of the defendant's stamp). I therefore find it surprising that counsel for the defendant did not see the defendant's stamp, an argument in favour of his client. Perhaps his own copy was even more faint than that on court record.

Be that as it may, both wordings relied on by the parties do exist on the delivery order. Both wordings are equally signed against by the same officers from both companies. To my mind the contradictory wordings cast some doubt as whether the parties were agreed as to what constituted goods delivery of the suit goods. The stamp of the defendant being affixed on the delivery note at the time of the delivery is a later counter term which I find negatives the printed words on the delivery note that the "*goods have been received in good order and condition...*"

This is analogous to the reasoning in the rule laid down in the case of

Glynn V Margetson [1893] AC 351 quoted by the learned author R.W. Hodgkin in his book “*Law of Contract in East Africa*” Kenya Literature Bureau 2006 at page 79 where he writes

“...where a contract is contained in a series of documents and there appears to be inconsistency between written terms in the correspondence and printed terms, then the written terms shall take precedence over the printed words...”

In other words there is legal authority for the proposition that where there is inconsistency between written terms, then the later written term introduced by the parties takes precedence over the former.

If the plaintiff had not accepted the wording on the defendant’s stamp I am sure its officers would have protested them at the time they were stamped on the delivery note. There is no evidence of such a protest. It is therefore my finding that the terms of delivery of the suit goods were expressly altered by the introduction of the defendant’s stamp on the delivery note that

“...goods received subject to a valid inspection report and valid purchase order...” (emphasis mine).

That now takes us to the third issue namely;

Issue No. 3: Whether or not the suit goods were in good order and condition.

Counsel for the Plaintiff made quick disposal of this issue when he submitted that if court found in Issue No. 1 that there was no express or implied term for an inspection report then the delivery note was sufficient evidence that the suit goods were indeed delivered in good order and condition. Of course the court has found other wise and there is therefore not much legal argument for the plaintiff to continue to hang on in this regard.

That notwithstanding, no inspection report was ever issued by the defendant suggesting that the suit goods supplied were satisfactory. There is also the evidence of Ms. Rebecca Mungati DW1 the store keeper, Mr. J.A. Burly DW2 the manager “*logistics and materials*” at the time, both of whom were involved in receiving the suit goods on behalf of the defendant that the bolts were cut. The sample of the bolts allegedly delivered to the defendants were sent to the Uganda National Bureau of Standards for analysis and was marked 03/2005E. The certificate of analysis Exhibit D16 shows that the bolt had a “*reduced shank*” and the bolt end was a “*rough finish and not galvanized*”.

Mr. Vincent Ochwo (CW1) a Standards Officer with the Uganda National Bureau of Standards who was an expert witness testified that “*reduced shank*” means that the bolt was cut and “*not galvanised*” means that it was prone to rust.

This in my view does not show that the suit goods were received in good order and condition as the plaintiff company would have it. There is of course another cross cutting finding of fact on the issues for determination by this court that relates to this matter. This relates to which bolts were supplied to defendant company. Both parties provided different samples to The Uganda National Bureau of Standards which acted as court’s expert witness. The plaintiff’s provided sample 038/2005E while the defendants provide sample 037/2005E (see Exhibit D16 and 17 which are essentially the same report from The Uganda National Bureau of Standards but addressed individually to the two parties). The order for supply Exhibit PE1 was for the supply of **Galvanised Bolts and nuts 5/8” x 10”**.

The expert witness Mr. Ochwo (CW1) from the Uganda National Bureau of Standards while comparing the two samples made some

observations. He testified that the order meant that the bolts and nuts should be galvanized. He further testified that the nominal diameter around the shank was to be 5/8" while the nominal length from the bolt head to the bolt end was to be 10". He then testified that sample No. 037/2005E provided by the defendant had a bolt diameter of 9/16" and a length of 10 3/8" and so did not comply with the order. He also observed that the sample had a distinctive letter "S" on the bolt head. On the other hand the sample No. 038/2005E which was supplied by the plaintiff had a bolt diameter of 5/8" and length of 10 1/4 which complies with the order. He observed that this second sample did not have the letter "S" on its bolt head.

Counsel for the plaintiff submits that the sample supplied for analysis to The Uganda National Bureau of Standards was obtained from stores of Mr. Jimmy Lumu's (PW2) late father who used to supply the said bolts to the defendant. Counsel for the plaintiff submitted therefore that the sample was of the same type supplied to the defendant which complied with the order specification. He further submitted that the allegation that the said bolts and nuts were stolen was baseless because the plaintiff's officers were

acquitted of the criminal charge of receiving and retaining stolen property at the Chief Magistrates Court of Nakawa in criminal case No. NAK-COA 0025/2004 **Uganda V Wanyusi and another.**

Counsel for the defendant on the other hand submitted that the bolts supplied to the bolts supplied to the defendants had a distinctive letter "S" on the bolt head which was consistent with the testimony of all the defence witnesses. He submitted that the letter "S" was also inscribed on the bolts that had been stolen from the defendants. He further submitted that the sample given to The Uganda National Bureau of Standards for analysis was taken from the bolts delivered by the plaintiff to the defendant. He also submitted the results of the criminal case had no bearing on the issues for determination before this court.

It is clear to my mind that only one of the two samples presented to The Uganda National Bureau of Standards could best reflect what was delivered to the defendants. The fact of delivery of bolts by the plaintiff to the defendant is not contested. The question is which of the two sample before court was it? This I have to determine on the balance of the evidence before me. I find that on the evidence before me and the consistent reference to the distinctive letter "S" by the

defence witnesses that sample 037/2005E supplied by the defendants best represents what was supplied to them. The defendants still have custody of what was supplied to them and it is more reasonable to expect therefore that they made available for analysis a correct sample of what they received. It is much more difficult to find that the sample provided by the plaintiff is similar to the one that they supplied to the defendants when in fact it was obtained from the stores of a third party altogether.

That being the case, since the certificate of analysis shows that sample 037/200E did not comply with the order and the evidence of Mr. Ochwo shows that the shank was reduced and was not properly galvanised the defendants were correct to reject the said bolts. I therefore find in answer to the third issue that the suit goods were not in good order and condition.

Issue No. 2: Whether the suit goods were part of the defendants property which were stolen from the depot at Lugogo in March 2002.

This is largely an issue that addresses the counter-claim. It is the case for the defendant/counter-claimant that the suit goods actually belong to them because they as they had earlier been stolen. The

defendant/counter-claimant therefore allege that the plaintiff/counter-defendants committed a fraud on them by attempting to sell to them, their own property. The defendant/counter-claimant therefore claim the value of the stolen goods or in the alternative the value of the 3,500 bolts and nuts supplied to them.

Counsel for the plaintiff submitted that the officers of the plaintiff company testified as to the source and origin of the bolts and nuts; being the stores of Mr. Lumu's (PW2) later father. Counsel for the plaintiff further submitted that Mr. Lumu testified that the bolts had been ordered from M/S Lovison Exports Ltd in India and that evidence adduced in court to this effect was not controverted. It was therefore not possible that the goods supplied to the defendants had previously been stolen from them.

Counsel for the defendant on the other hand submitted that one of the bolts that had been delivered to the defendants was sent to their suppliers in United Kingdom called M/S Sagewood Ltd who confirmed in Exhibit D7 (see e-mail dated 13th October 2003) that the said sample sent to them was indeed their product. The same correspondence stated that M/S Sagewood Ltd of UK had no

dealings with M/S Lovison Exports Ltd of India. Counsel for the defendant then submitted that this correspondence was evidence that the bolts supplied by the plaintiff was part of the stores of bolts stolen from them.

I have perused the evidence adduced in court and the submissions of both counsel on this issue. The counter-claim raises very serious issues of fraud and theft against the plaintiff company and its officers.

In situations such as this, the position of the law is that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt but rather something more than a mere balance of probabilities is required. I refer to decision of the East African Court of Appeal (as it then was) in the case of

R.G. Patel V Lalji Mahanji [1957] EA P. 314.

In this case, I have already found that the bolts and nuts supplied to the defendants are those of sample No. 037/2005E which on the evidence before court were supplied by M/S Sagewood Ltd of UK.

That in my view raises heightened suspicion that these could be the same bolts that were stolen from the defendants in 2002. Does this however prove as is alleged in the particulars of fraud in paragraph 4 of the counter-claim that the plaintiffs received and retained the defendant's stolen property? I think not. There is a missing nexus between the plaintiffs supplying the goods and having been involved in their actual theft. Clearly more evidence of this missing nexus is required in order to discharge the burden set out in the R.G. Patel case (supra). Equally without that nexus being established it is difficult without more evidence to definitively find that the suit goods are the actual goods which were stolen from the defendant in 2002.

Issue No. 4: Remedies

As to the main suit the plaintiff prayed for

- a) Ushs.19,250,000/= being the value of the 3,500 bolts and nuts supplied to the defendant.
- b) General damages for breach of contract
- c) Interest on the above amounts.
- d) Costs of the main suit

Since I have found that the defendants rightly rejected the suit goods, I hereby dismiss the main suit with costs to the defendants.

As to the counter-claim the defendant-counter-claimant prayed for

- a) US\$39,040 being the value of their bolts and nuts stolen in 2002.
- b) Interest on that amount.
- c) Costs of the suit.

In this regard, I find that there is no evidence that the plaintiffs actually stole the goods from the defendants. What has been proved is that the plaintiff supplied the defendant defective goods which were rejected; rightly so in my view. I accordingly dismiss the counter-claim with costs to the plaintiff.

I so order.

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Geoffrey Kiryabwire

JUDGE

Dated: 21/02/08