THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 824 - 2003

STEEL MAKERS LTD :: PLAINTIFF

VERSUS

AB STEEL PRODUCTS (U) LTD :: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The plaintiff company based in Kenya brought this claim against the defendant Ugandan company for the sum of US$434,325- or its equivalent in Uganda Shillings. The case for one plaintiff is that on various dates between 1995 and 2000, the plaintiff supplied Steel Products to the defendant at the defendant's order and demand. It is the case for the plaintiff that the products were mostly supplied on credit. However, on the 14th December 1999 the defendant's Managing Director is said to have executed a document (Exh. P.1) to the effect that the outstanding amount to be paid at the time was US$350,000- with terms on how to pay. The plaintiff further pleads that between the 15th December 1999 and 31st August 2001 the plaintiff supplied the defendant more steel products worth US$276,400- making a total indebtedness of US$626,400-.

The plaintiff further pleads that of the above amount the defendant paid US$192,075 (between 15th December 1999 to 31st August 2000) leaving a balance of US$434,325- which remains unpaid to date.

The defendant denies that claim as filed. The defendant's Managing Director while not denying the said document (Exh. P.1) pleads that he signed it in a transit lounge at Nairobi airport in a hurry without his reading glasses so he was not able to read it. The defendant pleads that its Managing Director thought he was signing for US$35,000- not US$350,000-. The defendant however counterclaims for the sum of US$100,000- for steel products paid for by the defendant but not supplied by the plaintiff. The defendant further claims the sum of US$265,274- being freight charges paid by the defendant which were to be refunded but were not.

The parties agreed to two general issues for trial namely;

1- Whether there is any outstanding amount from the defendant

2- Remedies.

Mr. Kalenge and G. Lule appeared for the plaintiff and Mr. C. Ndozireho appeared for the defendant.

Issues No. 1: <u>Whether there is any outstanding amount from the defendant.</u>

Before I address this issue, it is important to state the parties given the length of their business relationship run their business on a lot of trust. Indeed the Managing Director of the plaintiff company Mr. Johnson Bobby (PW1) testified that the parties did not regularly reconcile their accounts. There appears to have been no running accounts prior to the document dated 14/12/1999 (Exh. P.1) which reads;

*"**<u>A.B STEEL PRODUCTS (U) LTD</u>**.*

Discussion & agreement made on 14/12/1999 at Nairobi.

Remittance to be made:

1) 17/12/1999 - $13,200-

2) 31/12/1999 - $13,200-

Total outstanding is approximately $350,000 as on 14/12/1999.

3) US$100,000 to be paid between 1/1/2000 & 15/2/2000. During this period <u>No Goods</u> will be supplied.

4) On payment of US$100,000 goods will be supplied on cash basis only i.e. 100% Advance payment before collecting the materials. In addition to the above, will remit US$20,000 per month to clear the old account starting 15/2/2000 unconditionally. Failing which, supply of materials will stop.

Signed.

Date: 14/12/1999"

Now forms the basis of the opening balance for the subsequent statements a fact the court must make a finding on. This issue also requires the court to determine the fact of indebtness and the actual amount. In order to do so, court must address itself to the records that were kept of their business transactions. The defendant's case is that Exh. P.1 was signed in error on the understanding that it was for US$35,000- not US$350,000-. The evidence of the parties is contradictory as to whether or not it was signed at Nairobi airport. The Managing Director of the defendant Mr. Atanansi Bazzekuketta (DW1) however does not deny that he signed the document.

The question for court to determine now is what was the intention of the parties in signing Exh. P.1. The plaintiff's Managing Director Mr. Johnson Bobby (PW1) as Exh. P.1 testifies;

> *"The transaction at this stage was not questionable we only recorded what was agreed..."*

He further testified that it was him who drafted the said document in his handwriting which was signed by DW1. The defendant's Managing Director DW1 does not really contest this save for the figures therein which he testified he did not see properly because he did not have his glasses.

Counsel for the plaintiff strongly submitted the parol evidence rule and Section 92 and 93 of the Evidence Act (Cap 6) precludes the defendant from disputing the contents (i.e. the US$350,000-) of Exh. P.1 as they are unambiguous, clear and straight forward. Counsel for the plaintiff further argues that if the defendant is alleging fraud

on the part of the plaintiff then it must be specifically pleaded, particularized and then proved by the defendant which was not done in the instant case.

Counsel for the defendant submitted that Exh. P.1 did not constitute a valid contract and the possibility of a misunderstanding cannot be ruled out.

I have considered the pleadings and the submissions of both counsel on this issue of Exh. P.1. The legal argument put forward by the Managing Director of the Defendant company is that the said exhibit is *"non est factum"* or *"it is not my deed"*; as he was unable to read what was signed. In other wards that the said document was mistakenly signed. The common law position on signatures is well known and is well expounded on by Prof. D. J. Bakibinga in his book "Law of Contract in Uganda" Fountain Publishers 2001 at page 59 Prof. Bakibinga writes;

> *"The general rule is that a person is bound by his signature to a document whether he reads it or understands it or not..."*

He further writes over time this general rule developed exceptions to mainly cover persons who could not read. Further more, the mistake must be operative and of a fundamental nature to negative consent. Indeed it was decided in the case of

Gallie V Lee [1969] Ch. 17

That the doctrine of *"non – est factum"* should not be applied in favour of full age and capacity.

Indeed, absent some serious incapacity on behalf of a person signing a document he or she should be bound b his or her signature. Carelessness or negligence while

signing a document cannot be a defence. I am unable to see how the Managing Director who is a senior businessman can run away from his signature on the grounds that he signed in a hurry without reading glasses. He must be bound by his signature.

Having found as above, I find that by the agreement of the parties themselves as at 14th December, 1999 the outstanding balance due to the plaintiff from the defendant was US$350,000-. That was the level of indebitness. It was then pleaded that the indebitness grew by a further US$276,400- between 15th December 1999 and 31st August 2001.

Both counsel did not address me about this growth of indebtness came about given the agreement in Exh. P.1, but rather got immersed in mass of invoices and Telegraphic Transfers. (T.Ts) that were tendered into court. With the greatest of respect this was not very helpful to court.

The parties clearly agreed in Exh. P.1 (para 3) that

> *"...US$100,000 to be paid between 1/1/2000 and 15/2/2000 during this period*
>
> *No Goods will be supplied..."*

The plaintiff then seeks to rely on a statement of accounts as at 15th February 2002 Exh. P.2 which shows the opening balance of US$350,000 from Exh. P.1 and then a series of invoices of further suppliers between 17th December 1999 and 24th August 2001. The said Exh. P.2 does not show evidence of the payment of US$100,000 that had been agreed too by the parties. These said invoices show a total amount of

growth in the amount of US$276,400- during a period when it was agreed that no goods would be supplied. What a mess. Clearly no sooner had the ink dried on Exh. P.1 than the parties were to breach their own understanding! Para 4 of Exh. P.4 then states;

> *"...on payment of US$100,000- goods will be supplied on a cash basis only i.e. 100% advance payment before collecting the materials..."* Paragraph 4 was clearly designed to avoid an uncontrolled increase in indebtness.

However, a close look at Exh. P.2 would show that whereas the US$100,000- was not paid further supplies were not made against advance payments. Clearly the controls put in place by the parties were again breached themselves. I am at a loss why the parties bothered to agree to Exh. P.1 in the first place if they had no intention to stick to it. This is clearly poor business practice that will enviably lead to loss.

As if this is not bad enough, the defendants issued the plaintiffs with another statement of accounts as at 11th October 2001 (Exh. D1) which is configured differently from Exh. P.2 and apparently does not reflect the understanding reached by the parties on the 14th December 1999. This simply adds to the confusion in this transaction for any by stander.

Counsel for the defendant put up spirited submissions that the defendant paid off the invoices for Steel Products using T.Ts that were exhibited to court. He pointed out that some T.Ts were made to third parties at the request of the plaintiff and that such money should be a credit to the defendant.

The Managing Director of the plaintiff company during cross-examination did concede that at times he gave the defendant instructions to pay outside Kenya but that such instructions would be in writing. None of these writings were tendered in evidence but given the manner of operations between the parties such payments evidently took place. However, it is important to observe that these T.T payments were made after the reconciliation date in Exh. P.1 of the 14th December 1999.

I am satisfied on the evidence before me and in particular the statement of accounts Exh. P.2 that goods were worth US$276,400- were supplied by the plaintiff to the defendant (though contrary to their understanding in Exh. P.1) of which there is evidence of payment by the plaintiff to the tune of US$192,075-.

This as counsel for the plaintiff rightly puts it would leave a balance of US$84,325- as unpaid on supplier made after the reconciliation. There however is no evidence at all that the agreed reconciled figure of US$350,000- was ever paid as agreed. I accordingly find that the sum of US$350,000- too was not paid and is outstanding. This gives a total as pleaded of US$434,325- due to the plaintiff.

The legal question now is how should court treat this outstanding debt in light of the agreement in Exh. P.1 which the parties appear not to have followed? This area was not exhaustively tackled by both counsel. I find that court will have to, notwithstanding Exh. P.1, look at all the circumstances of the case with a view to providing substantive justice. In this regard the conduct of the parties is important.

At common law a party as a general rule will not be allowed to unjustly benefit from another.

In the case of

Fibrosa Spolka Akcyjna V Fairbaim Lawson Combe Barbour Ltd [1943] AC 32 61.

Lord Wright in this famous passage had this to say;

> *"it is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and now recognized to fall within a third category of the common law which has been called quasi – contract or restitution…"* (emphasi mine).

The area of quasi-contract or restitution at common law has evolved from its generalized beginnings into a formaliable area of law to plug deficiencies that may arise to transactions between people and especially so in contract.

The learned author "Chitty on Contracts" Vol. 1 28th Ed Sweet and Maxwell at para 30-016 sets the tests to be met for unjust enrichment as follows:-

> *"…The principles of unjust enrichment requires first, that the defendant has been "enriched" by the receipt of a benefit, secondly that the enrichment is "at*

the expense of the claimant", and thirdly that the retention of the enrichment be "unjust"..."

I find this principle relevant to this case. In this case the evidence clearly shows that the defendant did benefit from a course of commercial dealings where it got steel products from the plaintiff on credit terms but did not fully pay for them. The defendant nonetheless continues to have these steel products which is benefit to it at the expense of the plaintiff. This retention in my view constitutes unjust enrichment; for enrichment or benefit need not only be in monetary terms only but goods as well. This raises an obligation at common law that the defendant should pay for the said goods. I accordingly find that the defendant should pay for the steel products under this principle of law notwithstanding the agreement in Exh. P.1.

Let me address myself to the amended counterclaim by the defendant. This falls under two heads. The first claim is for steel products worth US$100,000 paid for by defendant to a company called M/S M.A. Farm Industries Ltd at the request of the plaintiff which products were never delivered.

The second is for US$102,154- being freight charges paid by the defendant to plaintiff. These freight charges were supposed to be capitalized into shares in the plaintiff's company owned by the defendant.

As to the claim of US$100,000- the defendant during the trial reduced it to a claim of US$75,000-. This claim was eventually abandoned all together.

As to the claim of freight charges for shares in the plaintiff company the figure was also reduced during the trial to US$101,914- on account of the available evidence in Exh. D6. The evidence around this area is very curious. Mr. Bazzekuketta (DW1) the Managing Director of the defendant company testified that this freight for shares arrangement was done verbally. He testified that he was not told how many shares he was buying and at what price the shares were so he wants a refund.

Mr. Bobby Johnson (PW1) on the other hand did not testify much around this claim. He however conceded that some invoices reflected a C.I.F price when in fact the price quoted was an F.O.B price. He further testified that all the goods sold to the defendant were collected by the defendant. This to my mind would be consisted with an F.O.B price quotation. Mr. Johnson's explanation for this was that that was done on the instructions of defendant.

The defendant tendered in exhibit D.6 in support of his claim for freight charges. Counsel for the defendant submitted that this money was recoverable as money had and received.

I am unable to understand why this was done in the manner in which it was done. However, the evidence is clear that all the goods were collected by the defendant from the plaintiff and so his payment for freight as well cannot stand. I agree that this money is refundable to the defendant as money had and received.

I accordingly order under the counterclaim a refund to the defendant of US$101,914-

Issue No.2: Remedies.

As found above I award the plaintiff the sum US$434,325- on the main claim as the value of steel goods supplied to the defendant but not paid for.

The plaintiff also claims for general damages however did not address me as to the quantum.

Given my comments on how the parties conducted their business I am inclined to award only nominal damages in this respect of US$2000-.

The plaintiff also prays for interest at 28% p.a. from the date of filing the suit until payment in full. I find that interest of 28% p.a on a sum n United States Dollars as excessive and instead do award interest at 4% p.a on the sum awarded from the date of filing and damages from the date of judgment.

I award the plaintiff the costs of the main suit.

As to the counterclaim, I award the defendant the sum of US$101,914-.

The defendant also claimed damages but counsel for the defendant did not address me as to the quantum. For the same reasons as in the main claim, I award nominal damages of US$1,000-.

The defendant also prayed for interest at 28% p.a on both the main sum in the counterclaim and damages. I for the reasons given earlier award interest at 4% p.a

on the counterclaim from the date of filing and on the damages from the date of the judgment until payment in full. I award the defendant the costs of the counterclaim.

Geoffrey Kiryabwire

JUDGE

Date: 04/09/2007