THE REPUBLIC OF UGANDA

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

CIVIL SUIT NO. 0566 OF 2020

1. COSMAS NZONZO
2. FRESHCARE UGANDA LTD
3. MARTIN ENTERPRISES (U) LTD ::: PLAINTIFFS

VERSUS

TUSKER MATTRESSES (U) LTD ::: DEFENDANT

(Before: Hon. Lady Justice Patricia Mutesi)

JUDGMENT

Background

1. The Plaintiffs brought this suit against the Defendant for the recovery of UGX 120,000,000 being the outstanding sum due for goods they supplied to the Defendant, general damages, interest and costs. The Plaintiffs' case is that, sometime in 2011, the 1st and 3rd Plaintiff entered into a verbal contract to supply fresh produce, i.e. fruits and vegetables, to the Defendant in its supermarkets in Ntinda, Nakulabye, Makerere and Seeta, among others. The 2nd Plaintiff also later joined the contract and started supplying similar goods to the Defendant.

2. The Plaintiffs assert that at all material times, the Defendant's agents would confirm delivery of the produce by signing delivery notes after which the Plaintiffs would issue invoices and financial statements to the Defendant to get payment. In 2020, the Defendant closed all of its branches in Uganda without paying the Plaintiffs all the money due to them for their supplies. They claim that at the time, the Defendant still owed them UGX 120,000,000.

3. The Defendant's defence to these claims is that it paid the Plaintiffs all that was due to them. The Defendant maintains that the Plaintiffs' case for more payment in this suit is baseless and unwarranted. The Defendant also asserts

that it requested the Plaintiffs for a joint reconciliation of accounts and, or, audited accounts to enable the parties establish any liabilities due but the Plaintiffs instead opted to file this suit.

Issue arising

4. The following issues have arisen for the Court's determination:

1. Whether the Defendant breached the contract of supply of fresh produce.
2. What remedies are available to the parties.

Representation and hearing

5. At the hearing, Ms. Nyachieo Mary of M/S Anguria & Co. Advocates appeared for the Plaintiffs. The Defendant did not enter appearance and the hearing was conducted *ex parte*. The 1st Plaintiff who doubles as the 3rd Plaintiff's Managing Director testified as PW1. The 2nd Defendant's Managing Director, Ms. Theresia Mutindi Makau, also testified as PW2. The Plaintiffs relied on 3 documents which were admitted into evidence and exhibited consecutively as P.Ex.1 to P.Ex.3.

6. In his testimony, PW1 told the Court that the 2nd Plaintiff, together with the other Plaintiffs, entered into a contract to supply the Defendant with fresh produce at the latter's supermarket in 2011. The contract remained in force until 2020. The Plaintiffs continuously and diligently supplied the Defendant with fresh produce, that is to say, fruits and vegetables, at the Defendant's supermarkets in Bugolobi, Kitintale, Makerere, Nansana, Ntinda, Nakulabye, Seeta and Shauri Yako. The said goods were received against signed invoices, delivery notes and issued statements signed on various dates.

7. PW1 testified that in early 2020, the Defendant closed its Bugolobi, Kitintale, Makerere, Nansana, Ntinda, Nakulabye, Seeta and Shauri Yako branches. This prompted the Plaintiffs to make a demand for payment of outstanding monies due to them. That at the time, the Plaintiffs had not been paid to a tune of UGX 120,000,000, and despite several reminders and demands, the same remains unpaid to-date. Eventually, the Defendant closed all of its branches and terminated all of its operations in Uganda. As a result, the 1st

Plaintiff has suffered emotional damage. The 2nd and 3rd Plaintiffs are also yet to recover from the financial impact of the Defendant's non-payment of their monies.

8. PW2 reiterated the testimony of PW1. She confirmed that the 2nd Plaintiff, together with the other Plaintiffs, entered into a contract of supply of fresh produce with the Defendant in 2011. For the 9 years that followed, the Plaintiffs diligently supplied and delivered their fruits and vegetables to the Defendant's supermarkets. In early 2020, the Defendant started closing its branches in Uganda without paying all the monies due to the Plaintiffs. Eventually, all the branches were closed without the Defendant clearing a debt of UGX 120,000,000 which it owed to the Plaintiffs. This plunged the 2nd Defendant into financial distress from which it has never recovered.

9. After the hearing, counsel for the Plaintiffs filed written submissions to argue the Plaintiff's case. I have carefully considered those submissions, the laws and authorities cited therein and all other materials on the record in reaching this decision.

Resolution of Issues

10. **Section 101(1) of the Evidence Act Cap 8** provides that whoever desires a court to give judgment as to any legal right or liability that is dependent on the existence of facts which he or she asserts must prove that those facts exist. Additionally, **Section 103** of the Evidence Act provides that the burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

11. Furthermore, it is trite law that, in civil cases of this nature, the burden lies on the plaintiff to prove the existence of his or her rights, and the liability of the defendant for breach of those rights, on a balance of probabilities. In **Miller V Minister of Pensions [1947]2 All ER 372**, Lord Denning expounded on the meaning of the phrase *"balance of probabilities"* when he stated that:

"... The degree is well settled. It must carry a reasonable degree of probability but not too high as is required in a criminal case. If evidence is such that the tribunal can say, we think it more probable than not, the burden of proof is discharged, but if the probabilities are equal, it is not." Emphasis mine.

12. I cite the above dictum with approval. I will be guided by these principles on burden and standard of proof in evaluating the evidence in this case.

Issue 1: Whether the Defendant breached the contract of supply of fresh produce.

13. When a party does not perform a contract as agreed, that party is said to be in breach of that contract. Thus, breach of contract occurs if one party to a contract fails, neglects and, or, refuses to perform his or her obligations in that contract without a legal excuse. (See **William Kasozi v DFCU Bank Ltd, HCCS No. 1326 of 2000**).

14. In the instant case, the Plaintiffs have adduced evidence to establish that, sometime in 2011 they entered into an informal contract to supply fresh produce, to wit, fruits and vegetables to the Defendant at its several supermarkets located in Bugolobi, Kitintale, Makerere, Nansana, Ntinda, Nakulabye, Seeta and Shauri Yako. The contract lasted until sometime in 2020 when the Defendant closed all of the said branches and terminated its operations in Uganda.

15. The parties' arrangement was that the Plaintiffs would deliver the produce to the Defendant's various supermarkets and the Defendant's agents would endorse delivery notes to confirm the deliveries. The Plaintiffs would then issue invoices against which the Defendant would make due payment. The Plaintiffs would also periodically issue account statements, from their own records, to the Defendant with detailed outlays of the supplies made, monies paid and arrears, if any.

16. In his cross examination, PW1 explained that previously the Defendant had duly paid for all supplies made to it by the Plaintiffs, until sometime in 2019

when it started having cash flow problems. These cash flow problems were exacerbated by the outbreak of the COVID-19 pandemic in 2020 and the effects it left on the Defendant's business. By the end of 2020, the Defendant had closed all of its branches in Uganda and retreated to Kenya. PW1 also clarified that the Defendant owned the defunct Tuskys Supermarket chain in Uganda and that all the supplies were made to the said supermarkets in the named locations.

17. Both PW1 and PW2 testified that by the time the Defendant ended its operations in Uganda, it still owed the Plaintiffs a sum of UGX 120,000,000 for supplies of fresh produce which they made to its supermarkets between late 2019 and early 2020. These testimonies were corroborated by **P.Ex.1** (Account statement of supplies made), **P.Ex.2** (Invoices sent by the Plaintiffs to the Defendant) and **P.Ex.3** (Final demand for payment to the Defendant).

18. As I stated above, the Defendant, in its Written Statement of Defence simply denied indebtedness and asserted that it paid the Plaintiffs all that was due to them. It also claimed that it reached out to the Plaintiffs severally for an account reconciliation exercise but all in vain. However the Defendant did not attach any proof of payment for the supplies to its defence. Worse still, after filing its defence, the Defendant closed business in Uganda and could not be traced at the time of the hearing. Despite being served with the hearing notice through a newspaper advert, the Defendant still failed or refused to appear at the hearing to adduce evidence to prove its defence that it fully paid for all supplies made to it.

19. I reiterate that, pursuant to Section 103 of the Evidence Act, while the legal burden of proof never shifts away from the plaintiff in a civil suit, the factual burden of proof always alternates between the plaintiff and the defendant, and the defendant has a factual burden to prove his or her defence so that the Court can believe and accept it. In this case, the Defendant was definitely aware of this suit by the time it closed operations in Uganda since it had already filed a defence to the same.

20. In my view, the Defendant's actions of closing its known locations and then omitting to follow up the proceedings in this case, are not consistent with the conduct of a buyer of goods who had fully paid up for them. Additionally, the Defendant's failure to appear at the hearing to prove its defence incurably dents its defence to the suit. Again, I am convinced that a buyer of goods who has fully paid for them would be ready and willing to come to Court and bring their evidence of full payment for the court to consider. The Defendant's failure to appear at the hearing implies that its defence of full payment has not been proved and cannot be accepted as true.

21. After analysing the Plaintiff's evidence, I made two key observations. First, the basis of the 1st Plaintiff's cause of action against the Defendant is unclear. Although para. 6(a) of the Plaint asserts that the 1st and 3rd Plaintiffs entered into the supply contract with the Defendant, the invoices adduced by the Plaintiffs (P.Ex.2) show that it is only the 2nd and 3rd Plaintiffs who made deliveries of goods to the Defendant. The 1st Plaintiff did not personally make any single delivery to the Defendant in his own name and right, and it appears to me that his involvement in this matter was, at all material times, only to the extent that he represented the 3rd Plaintiff as its Managing Director. It is, therefore, evident to me that it is the 2nd and 3rd Plaintiffs, and not the 1st Plaintiff, who have a right to claim for recovery of any arrears under the supply contracts.

22. Secondly, I realised that the evidence adduced by the Plaintiffs is not adequate to prove their claim for recovery of UGX 120,000,000. Whereas I am satisfied that the Defendant still owes some money to the Plaintiffs, I have found that it is definitely not to the tune of UGX 120,000,000. P.Ex.1 (the 3rd Plaintiff's statement showing relevant supplies to the Defendant which are alleged not to have been paid for) was not very helpful in delineating the quantum of the outstanding amount. Similarly, P.Ex.3 (the final demand for payment of UGX 120,000,000) was not very persuasive in proving the debt as there is no acknowledgment of the claim therein by the Defendant.

23. The most helpful piece of evidence adduced by the Plaintiffs in proof of their claim is **P.Ex.2**. This is a collection of invoices that were issued by the 2nd and 3rd Plaintiffs to the Defendant. It appears the invoices were all drawn at or around the time when the deliveries were made and they are duly stamped by the Defendant confirming the deliveries. This component of endorsement by the Defendant on each of the invoices, in confirmation of delivery of the goods described therein, is what renders the invoices not just persuasive but also compelling in ascertainment of the due sum.

24. I have carefully read and analysed all the invoices **(P.Ex.2)** in detail. The 2nd Plaintiff particularly claimed for a sum of UGX 50,747,930 arising from 15 invoices. However, only 14 of those invoices were actually enclosed in the Plaintiff's trial bundle. These proved an outstanding sum of UGX 44,256,114. The 2nd Plaintiff left out 1 invoice from its evidence and the sum in respect thereof cannot be conclusively ascertained and ordered to be recovered by the Court. On its part, the 3rd Plaintiff particularly claimed for a sum of UGX 50,358,250 arising from 332 invoices. However, only 221 of those invoices were actually enclosed in the trial bundle. These proved an outstanding sum of UGX 32,611,070. The 3rd Plaintiff left out 111 invoices from its evidence and the sum in respect thereof cannot be conclusively ascertained and ordered to be recovered by the Court.

25. As a result, it is my considered finding that the Defendant breached the contract of supply of fresh produce which it had with the 2nd Plaintiff and the 3rd Plaintiff, respectively, when it failed and / or refused to pay for all the produce it received. The Defendant still owes UGX 44,256,114 to the 2nd Plaintiff and UGX 32,611,070 to the 3rd Plaintiff.

Issue 2: What reliefs are available to the parties.

26. When a contractual obligation is breached, the innocent party is entitled to relief. (See **Kabagambe Matthias V Kahire Nobert, HCCS No. 389 of 2016**). In view of my findings in Issue 1 above, the Plaintiffs are entitled to relief in respect of the Defendant's failure and, or, refusal to pay for all the supplies

they made to it. The Plaintiff prayed for the following reliefs which I will now traverse and deal with.

Special damages

27. The Plaintiffs pleaded special damages to the tune of UGX 120,000,000 being the outstanding sum due from the Defendant for supplies of fresh produce made to it by the Plaintiffs. Special damages are the financial losses resulting from a defendant's breach of the plaintiff's rights which are ascertained and quantifiable at the time the suit is filed. In **Stanbic Bank (U) Ltd v Hajji Yahaya Sekalega, HCCS No. 185 of 2009**, it was reiterated that special damages must be specifically pleaded and proved, but that strict proof need not always be documentary in nature.

28. The Plaintiffs pleaded their special damages claim in para. 5 and 6(f) of the Plaint read together with Annexure C thereto. Furthermore, I reiterate the contents of paras. 23 and 24 above in which I traversed the compelling evidence adduced by the Plaintiffs in proof of their special damages claim. I am satisfied that the 2nd Plaintiff is entitled to special damages of UGX 44,256,114 from the Defendant while the 3rd Plaintiff is entitled to special damages of UGX 32,611,070 from the Defendant.

General damages

29. General damages refer to the losses which flow naturally from a defendant's breach. They are what the law presumes to be the direct, natural or probable result of a defendant's breach (See **Opia Moses v Chukia Lumago Roselyn & 5 Ors, HCCS No. 0022 of 2013**). They are also said to be the immediate, direct and proximate result, or the necessary result, of the wrong complained of.

30. The evidence adduced at the trial proved that the Defendant breached the contract for supply of fresh produce which it entered into with the Plaintiffs by failing to pay for some of the supplies it took from them between late 2019 and early 2020. The testimonies of PW1 and PW2 revealed that, while some of their monies remained unpaid, the Plaintiffs were shocked to see, in early 2020, that the Defendant had started closing its branches without prior

warning. The Plaintiffs had shared a cordial business relationship with the Defendant for close to a decade, but the Defendant did not accord them any courtesy to warn them and arrange to pay their outstanding monies before closing business in Uganda. This was most unfortunate.

31. The ordinary, natural and probable result of this conduct is that, firstly, it caused financial loss and hardship to the Plaintiffs who supplied their fresh produce to the Defendant without being fully paid for it. Second, it caused distress, inconvenience and disillusionment to the Plaintiffs when their debtor closed business and left the jurisdiction without responding to their demands for payment. In view of all this injury, the Court awards general damages of UGX 15,000,000 to the 2nd Plaintiff and general damages of UGX 12,000,000 to the 3rd Plaintiff.

Interest

32. Section 26(2) of the Civil Procedure Act Cap 71 gives the Court the power to award interest on damages awarded in a suit. Ordinarily, a successful plaintiff is entitled to interest at a rate that would not neglect the prevailing economic value of money but which would also insulate him or her against further economic vagaries, like inflation and depreciation of the currency, in the event that the money ordered to be recovered is not paid promptly when it falls due. (See **Mohanlal Kakubhai Radia V Warid Telecom Uganda Ltd, HCCS No. 0224 of 2011**).

33. In view of these principles, the Court hereby awards interest on the special damages at the rate of 18% per annum from the date of filing the suit (as prayed for in the Plaint) until full payment and on the general damages at the rate of 14% per annum from the date of judgment until full payment.

Costs

34. Section 27(1) of the Civil Procedure Act Cap 71 gives this Court the discretion to award the costs in a suit before it. The general rule is that costs follow the event. This means that an award of costs will generally flow with the result of litigation and that a successful party is entitled to costs, unless the Court,

for good reason, orders otherwise (See **Kwizera Eddie V Attorney General, Supreme Court Constitutional Appeal No. 01 of 2008**).

35. Having fully analysed this case, I have not found any reason to deny the Plaintiffs (the successful parties) the costs of the case. Accordingly, the costs of the suit are awarded to the Plaintiffs.

Reliefs

36. Consequently, judgment is entered in favour of the 2nd and 3rd Plaintiffs against the Defendant on the following terms:

i. The Defendant shall pay UGX 44,256,114 in special damages to the 2nd Plaintiff and UGX 32,611,070 in special damages to the 3rd Plaintiff.

ii. The Defendant shall pay UGX 15,000,000 in general damages to the 2nd Plaintiff and UGX 12,000,000 in general damages to the 3rd Plaintiff.

iii. The Defendant shall pay interest to the 2nd and 3rd Plaintiffs, respectively, on the special damages in (i) above at the rate of 18% per annum from 13th August 2020 when this suit was filed until full payment.

iv. The Defendant shall pay interest to the 2nd and 3rd Plaintiffs, respectively, on the general damages in (ii) above at the rate of 14% per annum from the date of judgment until full payment.

v. Costs of the suit are awarded to the 2nd and 3rd Plaintiffs.

Patricia Mutesi
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Patricia Mutesi

JUDGE

(31/07/2024)