

**MOBIL OIL ZAMBIA LIMITED v RAMESH M PATEL (1988 - 1989) Z.R. 12  
(S.C.)**

SUPREME COURT  
NGULUBE, D.C.J., GARDNER, J.S., AND BWEUPE, AG. J.S.

29TH JANUARY, 17TH MARCH , 1988  
(S.C.Z. JUDGMENT NO. 2 OF 1988)

**Flynote**

Contract - Breach - Damages - Periods of loss when contract provides right to terminate by either side.

Contract - Breach - Damages - Proof of special loss.

**Headnote**

The respondent had entered into a dealership contract with the appellant whereby he operated the appellant's service station for a monthly licence fee. The contract could be terminated by either side on one month's notice. The respondent frequently complained, *inter alia*, of losses through leakages of fuel from tanks. When the respondent fell behind with payments for products sold and delivered, the appellant commenced proceedings for money owed and possession of the premises. The respondent counter-claimed for losses through leakages and loss of profits from the date when the appellant stopped deliveries of fuel until the date of the hearing. The appellant called no evidence at the trial. The respondent gave evidence of the losses through leakages by referring to records which he said he had. The appellant did not challenge that evidence and did not call for the documents. The Judge found in favour of the respondent and awarded damages for loss up to the date of trial. The appellant appealed contending that as the respondent did not produce any documents to show how he arrived at the figures the claim should be disallowed. In respect of the period of loss, the appellant argued that the claim up to the trial could not stand.

**Held:**

- (i) Where the contract breaker had a contractual option to terminate the contract the Court should assess the damages on the footing that the party in breach would have exercised the option.
- (ii) Where the contract is no challenge to the respondent's evidence and the respondent referred to documents which could have been called for, it cannot be said there was insufficient proof of the loss.

**Cases referred to:**

- (1) Nkata and Others v The Attorney-General (1966) Z.R. 124
- (2) Mhango v Ngulube & others (1983) Z.R. 61
- (3) The Mihalis Angelos [1971] 1 QBD 164

For the appellant: A. Chiinga, Mwanawasa and Company.  
For the respondent: P. Mwale, Jaques and Partners.

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**Judgment**

**NGULUBE, D.C.J.:** delivered the judgment of the Court.

For convenience we will refer to the appellant as the plaintiff and the respondent as the defendant which is what they were in the action.

The action arose out a contract of dealership contained in a document described as a licence, and dated 1 March 1979, whereby the defendant was allowed, on payment of a licence fee, to operate one of the plaintiff's service stations in Mufulira. The contract provided for termination upon

p13

one month's notice on either side. The defendant constantly complained to the plaintiff that he was suffering losses through leakages of fuels and there was documentary evidence that, from time to time, the plaintiff's specialist maintenance subcontractors attended at the service station to attend to these complaints. The complaints persisted and they related to losses, through leakage, in some of the tanks as well as other related equipment. In response to the continued complaints, and when the defendant fell behind in making payment for some products sold and delivered, the plaintiff commenced proceedings in December 1984, and subsequently obtained summary judgment for the money owed as well as for possession of the premises. The defendant counter-claimed for losses through leakages as well as for loss of profits in the business for a period when the plaintiff stopped deliveries of fuel to the defendant. At the trial, only the defendant gave evidence and the plaintiff did not call any witnesses to challenge the evidence concerning leakages and loss of business. The learned trial Judge was satisfied, on the only evidence given, that the defendant had made out his counter claims and accordingly entered judgment for him.

The plaintiff has appealed to this Court against both the judgment on the question of liability and the amounts awarded to the defendant. The first ground of appeal alleged error on the part of the learned trial Judge in failing to pay sufficient attention to the reports compiled by the experts which were contained in the bundles of documents lodged with the Court and which dealt with the question of the leakages complained of. In his arguments, Mr *Chiinga* relied principally on a report dated 15 December 1981 from the plaintiff's forecourt trainer. This person had taken over the running of the service station in order to investigate and to verify the complaints about the leakages which the defendant had been making. The tanks were all filled and when the products were all sold out, between 14 November 1981 and various dates for each tank up to 10 December 1981, some tanks had recorded gains while some had recorded very small losses. Mr *Chiinga* argued that, from such report the learned trial Judge ought to have accepted that there were only insignificant losses which were well within the normal expectations in the business. That being the case, the learned trial Judge should have rejected the defendant's entire claim based on alleged leakages. It was submitted that the learned trial Judge had in any case misdirected himself when he accepted the defendant's contention that the losses were not insignificant on the basis that the quantities introduced in the tanks were unknown when in fact the contract document showed that the tanks were of 9,000 and 13,500 litres capacity and which were, according to the report, all filled. We were requested to reverse the judgment of the learned trial Judge for misdirecting himself on the facts before him.

While conceding the misdirection referred to, Mr *Mwale* argued that there were leakages in fact, as

testified to by the defendant and as the various documents from the plaintiff's maintenance subcontractor established.

We have given careful consideration to the arguments concerning the leakages. We find it intriguing that the plaintiff failed to call any witness to contradict the defendant's evidence when the latter explained that the

p14

leakages had persisted and that at times the maintenance subcontractors had examined the wrong tanks and left unrepaired the offending tanks. The defendant even recalled that at one stage a tank was dug out and there was evidence of leakage in the surrounding soil. In the face of such uncontested *viva voce* evidence, and even if we were tempted to regard certain aspects of the defendant's contentions with some suspicion - as where he continued to lodge complaints when someone else was running the service station - we find that it would not be open to this Court to reverse findings which were essentially resolved on a question of the credibility of the defendant in the witness box. The position of an Appellate Court when grounds of appeal attack a trial Judge's findings of fact was aptly summarised in *Nkhata & Others v The Attorney-General* (1) at page 125 where our Predecessor Court said:

" A trial Judge sitting alone without a jury can only be reversed on the facts when it is positively demonstrated to the Appellate Court that:

- (a) by reason of some non-direction or mis-direction or otherwise the Judge erred in accepting the evidence which he did accept; or
- (b) in assessing and evaluating the evidence the Judge has taken into account, or failed to take into account some matter which he ought to have taken into account; or
- (c) it unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the Judge for accepting it, that he cannot have taken proper advantage of his having seen and heard the witnesses; or
- (d) in so far as the Judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witnesses which he accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer."

We find that the single misdirection concerning the quantities of fuel introduced into the tanks during the experiment of November to December 1981, by the forecourt trainer did not materially alter the weight and effect of the defendant's direct oral evidence of continued loss through leakages which remained unchallenged. There are thus none of the conditions mentioned in *Nkhata* (1) obtaining here so as to enable us to disturb the conclusion of fact reached by the learned trial Judge. The ground of appeal in this respect is unsuccessful and the finding of liability in favour of the defendant in respect of losses through leakages is upheld.

The second ground of appeal in effect attacked the award of sums claimed by the defendant as his losses in respect of leakages. The submissions by Mr *Chiinga* were to the effect that, as the defendant did not produce any documents to show he had arrived at the figures, the learned trial Judge ought to have found that he had not proved the losses. Reliance was placed on certain

remarks which we made in *Mhango v Ngulube and others* (2), to the effect that it is for any party claiming a special loss to prove such loss and to do so with evidence which makes it possible for the Court to determine the value of that loss with a fair amount of certainty and that any shortcomings in such proof should react against the claimant. Mr *Mwale* also relied on other remarks in the same case to the effect that the Courts frequently make awards on meagre evidence. He pointed out that the defendant had, in any case, stated that he obtained the figures from records which he had. In dismissing this ground of appeal, we agree

p15

with Mr *Mwale* that, since there was no challenge to the defendant's evidence, and since the defendant referred to documents which could have been called for, it cannot now be argued that there was, in this case, insufficient proof of the losses. The learned trial Judge was, we consider, perfectly entitled to accept the defendant's figures which he said had been extracted from his records which could have been called for and examined had there been any challenge or dispute taken up on the point. The third ground related to the effect of judgment for possession obtained by the plaintiff on the defendant's claims for loss of profits due to nondelivery of products by the plaintiff after the date of such judgment. The fourth ground related to the same claims in light of an aggrieved party's obligation to mitigate his losses where the other party is in breach. In the view that we take, it is unnecessary to consider the arguments at any length since it seems obvious to us that the defendant should not have been allowed to recover loss of profits in respect of the breach by the plaintiff, for what was virtually an indefinite period. The defendant had calculated his loss of profits, by the month, from October 1984, when deliveries of fuel stopped, right down to 11 March 1986, when he gave evidence in the witness box. This is clearly an unacceptable way of compensating a party for loss of profits as a result of the deliberate refusal, of which he was aware, by the other party to perform his part of the contract. The renunciation of the contract by the plaintiff in effect resulted in its wrongful termination. Where, as here, the contract-breaker had a contractual option to terminate the contract, the Court should assess the damages on the footing that the party in breach would have exercised the option: see *The Mihalis Angelos* (3). Indeed, this is frequently done in employment cases and the principle is equally applicable to the facts of this case. In our considered view, therefore, the damages for breach of contract, in terms of loss of profit for non-supply of fuel, should be limited to a period of one month, such being the period of notice to terminate specified in the contract. The plaintiff's appeal in this regard is upheld and the damages awarded below for loss of profits are set aside. In their place, we award damages representing one month's loss of profits.

In sum, we dismiss the appeal in relation to the losses through leakages; but we allow the appeal in relation to the damages for loss of profits where we have substituted an award representing one month's loss only. That being the case, the plaintiff has been successful and will have his costs of this appeal, to be taxed in default of agreement.

Appeal allowed.

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