ZAMBIA CONSOLIDATED COPPER MINES LIMITED AND GOODWARD ENTERPRISES LIMITED

SUPREME COURT
NGULUBE C.J.,
8TH DECEMBER 1999 AND 8TH MARCH 2000
(S.C.Z. JUDGMENT NO. 7/2000)
Appeal No. 89/99

Flynote
Law of Contract - breach of contract - damages - remoteness breach of contract - whether registration a condition precedent to the contract.

Headnote
The Appellants and respondents entered into a written agreement by which the respondents would supply the appellants with cocoa. The appellants usually registered such contracts. The contract was to run for about three years and could terminate, inter alia, by giving three months notice after prior notification of a breach and to be given by the party not in breach. The respondents registered with the appellants in respect of the aforementioned transaction. The appellants claimed that they had uncovered some fraudulent transactions involving the respondents whereby the respondents prepared fraudulent vouchers to their benefit. On this basis the appellants de-registered the sellers and cancelled the cocoa contract. The respondents launched these proceedings to recover damages for breach of contract and were successful. On appeal it was argued, inter alia, that registration was a condition precedent to the cocoa contract. It was also argued that the damages awarded were excessive.

Held:
(1) The attempt to excuse or to justify the termination of the contract in breach of its own terms on the argument concerning registration so as to escape liability could not be entertained. The appellants breached a binding contract.
(2) The appeal fails on the issue of liability for breach of the cocoa contract but it is successful on the awards which we set aside. The awards were too excessive. Therefore damages must be reassessed.

Appeal partially successful.

Cases referred to:

(i) Hadley v. Baxendale (1854) 9 EXCH 341; ((1843 – 1860) All ER Reprint 461.
(ii) Victoria Laundry (Windsor) Ltd. v. Newman Industries Ltd. (1949) 2 K.B. 528.
(iii) C. Czarnikow Ltd. v. Koufos (1969) 1 A.C. 350.
(iv) Apollo Enterprises Ltd.v. Enock Percy Kavindele, Appeal No. 98 of 1995 (unreported).
(v) Trans Trust S.P.R.L. v. Danubian Trading Co. Ltd`. (1952) 1 All ER 970

Statutes referred to:

(i) Sale of Goods Act of 1893.

For the appellant J.K. Kaite, of Z.C.C.M.

For the respondent L.P. Mwanawasa, S.C, Mwanawasa and Co.

Judgment

NGULUBE C.J.: delivered the judgment of the court.

It was in evidence that the appellant (hereinafter called the buyers) had the practice of inviting through advertisements suppliers of goods and services to register with them when they would be given an account number. The respondent (hereinafter called the sellers) was one such supplier of goods. It was also in evidence that occasionally, the buyers purchased goods from some persons or entities without registration. The case here concerned the supply and sale of cocoa on a regular basis by the sellers to the buyers under a written contract dated 22nd June 1995. The contract was to run from 26th June, 1995 to 30th June 1997 and could terminate, among other ways, by three months' notice after prior notification of a breach and to be given by the party not in breach. The sellers were required to deliver substantial quantities of drinking chocolate in accordance with delivery instruction notes or orders and they were required to hold at any one-time stocks sufficient for two months to guarantee delivery. There was evidence that two months' stocks would amount to twenty-five tons of cocoa. In the event of termination, there was a term for the settlement of orders which were already in the pipeline.

The buyers claimed that they had uncovered some fraudulent transactions involving the sellers arising from earlier supplies of other goods (not under the cocoa contract) whereby some invoices already paid would again be presented resulting in double payments; that some payment vouchers were fraudulently prepared and processed to the benefit of the sellers and loss to the buyers; while prices would at times be overstated.

According to the buyers, this resulted in a loss of some K92 million in the period to May 1996 which compelled them to deregister the sellers and to cancel the cocoa contract. The sellers launched these proceedings to recover damages for breach of contract. They included in the claim the price of 85 tons of chocolate arranged under a credit facility with their South African based supplier whom they owed US dollars 262,000 plus interest at 10% together with storage charges for the 85 tons of cocoa kept in a South African warehouse at twenty rands per ton week.

The learned trial judge had to consider whether the validity and performance of the cocoa contract depended upon the sellers remaining registered as suppliers to the buyers. He found that the sellers had previously supplied other goods without being registered but that in 1993 the sellers for the first time registered as supplier of groceries and foodstuffs. The judge considered that the cocoa contract stood independently of any registration and that the buyers should have followed the termination clause in the contract. He also found that the allegations of fraud were not proved against the sellers. He found that the buyers were in breach of the cocoa contract and entered judgment for the sellers. With regard to the "nature of damages", the learned trial judge took the view that the buyers must have been aware that the sellers must have had collateral arrangements outside the country and because the buyers' conduct had been high handed and aggravated, they would have to pay the sellers:- (1) K150 million as general and compensatory damages for breach of contract; (2) the cost of 50 tonnes of drinking chocolate from the South African supplier; (3) all penalties and storage charges levied against the sellers by their South African suppliers in respect of the fifty tonnes of cocoa; (4) the cost of half of the 35 tonnes of drinking chocolate "marooned and stranded" at the sellers' warehouse in Luanshya, such award being said to have taken account of the seller's duty to mitigate the loss; (5) a refund of K35,128,051=54 wrongfully deducted from the sellers'

account as alleged double payment; (6) a refund of K11,721,420 wrongly deducted as alleged overpayment; (7) the payment of K271 million profit lost which the sellers would have earned had the balance of the contract been performed over the remaining fourteen months of the agreed duration; and (8) interest.

The appeal is against the finding of liability for breach of the cocoa contract; the orders to refund monies which had been deducted from the account; and the measure and quantum of damages.One argument which was advanced at length below and repeated here was that registration as a supplier under the policy and practice of the buyers to this effect was a condition precedent to the cocoa contract. We heard and read much learned discussion of the principles of law concerning conditions precedent. The submissions and arguments in this respect were in fact virtually a red herring. Quite apart from the finding of fact that the deregistration was on grounds which were unwarranted, it was also not in dispute that at the time when the parties signed the cocoa contract, the alleged condition precedent was not an issue. But more conclusively, the contract for the supply of cocoa or drinking chocolate was a contract in its own right which the parties who had unfettered legal capacity to enter into actually began to perform. If it was the policy of the buyers to do business of this kind only with registered suppliers, then the written document made no reference to this. In any case, the evidence showed that the buyers used to purchase supplies from the sellers even before the latter became registered. What is more, the alleged condition precedent which we do not accept but which was quite fortuitously already satisfied at the time of contracting can not be transmuted from precedent to subsequent or so as to make a perfectly valid contract continuously conditional upon the alleged prior registration remaining in force. The attempt to excuse or to justify the termination of the contract in breach of its own terms on the argument concerning registration so as to escape liability cannot be entertained. We consider the whole of the argument to have been irrelevant and misdirected. Ultimately, there was nothing wrong with the way the learned trial judge chose to dispose of that argument. It is unsuccessful even here.

This brings us to the aspect of the appeal as relates to the awards made. A surprising feature of this case was that though the whole of the subject matter of the contract was the sale of cocoa, that is, the sale of goods, there was not the slightest attempt by the parties or the court to make reference to the Sale of Goods Act, 1893 or its purport which clearly applied both as to the respective rights of the parties upon a breach and the measure of damages. Mr. Kaite complained that the damages were excessive and were not those awardable when a buyer has breached a contract of sale. He complained that the buyers' were made liable even for the sellers' transactions with a third party, contrary to the rules of remoteness as discussed in cases like *HADLEY v BAXENDALE (1854) 9 EXCH. 341;* (1843 – 1860) *All E.R. Reprint 461 and VICTORIA LAUNDRY (WINSOR) LTD. v NEWMAN INDUSTRIES LTD. (1849)* 2 K.B. 528. We had occasion to discuss these cases and the later one of *C. CZARNIKOW LTD. v KOUFOS (1969) 1 A.C. 350 in APOLLO ENTERPRISES LTD.v ENOCK PERCY KAVINDELE,* Appeal No. 98 of 1995 (unreported) and some of the principles there considered are worth repeating here where the buyers in breach have been held responsible virtually on an indemnity basis and practically for every conceivable loss suffered by the sellers, including those not even pleaded or claimed (such as the deductions ordered to be refunded) and those touching upon the sellers' liability to a third party. Mr. Mwanawasa submitted that there was nothing wrong in the trial court ordering specific performance as it were, arguing that there was no other market for this cocoa. This was untenable. Even on the availability of a market, there was evidence that the sellers had supplied thirty-five tonnes per month to the Zambian army. Mr. Mwanawasa had to concede, on the facts on record, that his clients hardly tried to mitigate their loss and suffered the cocoa to become bad and unfit because they were all the time under hope that the contract may be reinstated.

We heard many arguments and submissions. This case concerned the cocoa contract which was breached and did not concern previous alleged overpayments or duplicated payments which the parties had agreed be deducted from payments due. The awards in this respect were gratuitous since these were not part of the case put forward by the sellers nor was it simply a modification, extension or development of the case which was pleaded. A radical departure from the case pleaded should not be allowed since, invariably, the opponent is ambushed and would have had neither notice nor opportunity to meet it. We are alive that the buyers had pleaded in defence the irregularities alleged in an attempt to justify the revocation of the registration of the sellers as a supplier and the cancellation of the contract. The attempt did not succeed but this did not mean that the sellers as plaintiffs could be regarded as having raised such claims.

The major part of the appeal concerned the measure and size of damages adopted below for what was essentially the breach of a contract of sale. In this regard, it was common cause that the contract required the sellers to stock at least two months' worth of the average consumption which was about twelve and half tonnes per month. The contract also provided for three months' notice. All this meant that the sellers were expected to procure and to have in stock quantities of cocoa adequate to fulfill their contractual obligations. The basic measure of damages for breach by the buyer for non-acceptance is that described in Section 50 of the Sale of Goods Act, 1893, which reads:-

(1) "Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.
(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract.
(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or, if no time was fixed for acceptance, then at the time of the refusal to accept."

Mr. Kaite would like the damages to be reassessed to comply with the Sale of Goods Act, further submitting that the extent of the loss directly and naturally resulting from the breach should not exceed what had been contemplated by the contract nor should it extend to paying for transactions between the Sellers and their own suppliers or financiers. Thus, it was Mr. Kaite's submission that there should not have been damages for all the cocoa in the warehouse which exceeded two months' supply and for all the cocoa which had been ordered by the sellers and was kept for them in a warehouse in South Africa. He complained that the judgment in effect ordered the buyers to buy all the cocoa and in the process they had to pay for quantities of cocoa exceeding the three months notice period provided for. Mr. Mwanawasa of course supported the learned trial judge's awards but urged that if a reassessment of the damages has to be done, this be done by a Judge of the High Court rather than a Deputy Registrar of the High Court.

We have considered this case and we are satisfied that the awards and the assessment below were contrary to the measure of damages in a case of breach by a buyer. In terms of the section of the Sale of Goods Act which we have quoted, there can be no question of the sellers receiving the entire combination and extent of the awards made below, so that they can have general damages, plus a refund of the cost of all the cocoa procured and in storage in South Africa, plus penalties and storage charges; plus half the cost of the cocoa in storage locally; plus – on top of it all – all the anticipated profit they would have earned had the contract run its course! The section does not preclude the rules in *HADLEY v BAXENDALE* nor the award of consequential losses which may result in the ordinary course. Furthermore, the court is

authorized to make other awards by other sections, such as Section 54 which deals with interest and special damages. The rule in *HADLEY v BAXENDALE* was restated in *VICTORIA LAUNDRY v NEWMAN* where their Lordships rejected the notion that the purpose of an award of damages could be to provide a plaintiff with a complete indemnity for all loss de facto resulting from a breach of contract. The principle was further examined in the *CZARNIKOW* case and we regard as particularly apt Lord Reid's caution at Page 385 where he said –

> "I am satisfied that the court did not intend that every type of damage which was reasonably foreseeable by the parties when the contract was made should either be considered as arising naturally, i.e., in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties: the parties are not supposed to contemplate as grounds for the recovery of damage any type of loss or damage which on the knowledge available to the defendant would appear to him as only likely to occur in a small minority of cases.
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> In cases like *Hadley v. Baxendale* or the present case it is not enough that in fact the plaintiff's loss was directly caused by the defendant's breach of contract. It clearly was so caused in both. The crucial question is whether, on the information available to the defendant when the contract was made, he should, or the reasonable man in his position would, have realized that such loss was sufficiently likely to result from the breach of contract to make it proper to hold that the loss flowed naturally from the breach or that loss of that kind should have been within his contemplation."

The notion of a complete indemnity such as was attempted below in this case might have sat more comfortably had the learned trial judge been dealing with a case in tort. As Lord Reid put it in CZARNIKOW when he went on to contrast the position in tort with that in contract at page 385 to 386 –

> "The modern rule of tort is quite different and it imposes a much wider liability. The defendant will be liable for any type of damage which is reasonably foreseeable as liable to happen even in the most unusual case, unless the risk is so small that a reasonable man would in the whole circumstances feel justified in neglecting it. And there is good reason for the difference. In contract, if one party wishes to protect himself against a risk which to the other party would appear unusual, he can direct the other party's attention to it before the contract is made, and I need not stop to consider in what circumstances the other party will then be held to have accepted responsibility in that event. But in tort there is no opportunity for the injured party to protect himself in that way, and the tortfeasor cannot reasonably complain if he has to pay for some very unusual but nevertheless foreseeable damage which results from his wrongdoing."

These wise words cannot be ignored so that the comprehensive and unrestrained awards in this case cannot be supported. They were based on a wrong principle of granting a complete indemnity in a case involving the breach of a contract for the sale of the goods agreed upon. Thus, we do not see how loss of anticipated profits and general damages which were based on a measure which is not readily apparent could be awarded in one breath. We also do not see that it was within the knowledge and contemplation of the parties that the Sellers' own arrangements with a third party would be underwritten by the buyers who must therefore pay for all the procured cocoa regardless of an alternative market and reimburse any indebtedness

of the sellers to a third party. In this latter connection, we are persuaded to adopt the reasoning applied by the Court of Appeal in *TRANS TRUST S.P.R.L v DANUBIAN TRADING CO. LTD. (1952)* 1 All E.R. 970 where, while upholding a claim for loss of profit, the court rejected as too remote a claim by the sellers to be indemnified against possible claims against them by their own suppliers.

In sum, the appeal fails on the issue of liability for breach of the cocoa contract but it is successful on the awards which we set aside. The deduction of K35 million plus and K11 million plus was not an issue before the trial court and will not be included in the reassessment which we propose to order. With regard to the damages to be awarded, we refer the matter to the court below with the direction that the court reassess the damages in keeping with the Sale of Goods Act, 1893, and the principles in the authorities to which we have made reference and any other similar cases. That court should also take account of the terms of the cocoa contract in deciding the nature and extent of the losses which could reasonably be regarded as being within the knowledge and forceability of the parties as likely to flow from a breach, having regard to the obligations undertaken.

We will leave it up to the relevant judge-in-charge in consultation with the learned trial judge whether the learned trial judge or another judge or a registrar at chambers shall reassess the damages.

The costs below continue to be for the sellers while the costs here will be for the buyers whose appeal has succeeded to the extent indicated. Such costs will be taxed if not agreed.
