IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 77 OF 1985

BETWEEN:

P. M. CHIMWAZA ..... PLAINTIFF

- and -

S. R. NICHOLAS LTD.....DEFENDANT

Coram: MAKUTA, C.J.

Saidi, Counsel for the Plaintiff
Pitman, Counsel for the Defendant
Kalimbuka, Official Interpreter
Phiri, Court Reporter

JUDGMENT

On 17th January, 1983, the plaintiff agreed in writing to manufacture and supply to the defendants 500,000 bricks at a price of K17 per thousand; delivery of the bricks to be made in two consignments of 250,000 each; the first consignment by the end of February and the second consignment by the end of March, 1983. It was further agreed by the plaintiff that the bricks must pass the Ministry test and must be approved by the client. The defendants agreed to hire to the plaintiff a lorry for two days for firewood collection and the hire charges would be paid by the plaintiff at a rate of 14t per ton per kilometre. The defendants also agreed to provide about 350 square metres of corrugated iron sheets to allow the plaintiff to build a shed. These sheets to be returned to the defendants in good condition at the end of the contract and in the event of these sheets not being returned the cost should be deducted from the final payment to the plaintiff.

By this action the plaintiff claims the sum of K9,040 and damages for breach of contract. The defendants have denied breach of contract and have counter-claimed various sums paid to the plaintiff. They further counter-claim damages at the rate of K50 per week for late delivery of the bricks in accordance with the terms of the contract. There is also a further counter-claim for general damages for breach of contract.

The plaintiff told the Court that after signing the contract, he started clearing the place of the project on 17th January and he commenced actual production

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of the bricks on 24th January, 1983. At the end of January he approached Mr. Benettolo, the General Manager of the defendants, for a lorry to carry firewood which he had already gathered. According to the plaintiff the lorry was not made available until the 2nd March, 1983, and this delayed the burning of the bricks. It is the plaintiff's case that failure to provide the lorry in time was b reach of the contract.

It is pertinent to observe that if the bricks were to be delivered on time, namely by the end of February for the first consignment it was imperative that they be burnt before these dates. There was, therefore, need to have firewood ready. It is not disputed that the plaintiff asked for the lorry from the defendants at the end of January, 1983. According to delivery notes, exhibit number 2, the first delivery of firewood was made on 2nd March and the last delivery was made on 20th March, 1983. It is, therefore, noted that after the request for the lorry the whole month of February elapsed without action by the defendants. Yet they expected the plaintiff to fulfil his first obligation at the end of February. When asked why the lorry was not made available, Mr. Benittolo told the Court that the plaintiff was not ready for the burning of the bricks. One wonders whose responsibility it was to decide on the readiness of the bricks for burning!! The plaintiff testified that he had finished moulding the bricks in time and the kiln was ready by 20th February, 1983, for burning. He had already gathered the firewood and he was only waiting for transport. According to the plaintiff, the process of burning the bricks takes three days. If the burning had started on 20th February, the process would have been through by 23rd or 24th February. The first consignment would, therefore, have been delivered by the end of February. Mr. Benittolo told the Court in effect that so far as the defendants are concerned, they had provided transport in accordance with the contract. It is to be observed, however, that time was of essence and if transport was provided well after the date of the first consignment had passed, it cannot be said that this was in accordance with the contract. The late delivery of firewood affected the whole contract because the burning of the bricks started on 18th March, 1983, and this was near the date of the second consignment.

There was evidence of Mr. Pangani, the Storekeeper, who was working for the defendants at the material time. He told the Court that the first trip to collect firewood was made on 24th February, 1983, and he remembered this because it was recorded in a log book. He could not produce the log book. His evidence, to say the least, was most unsatisfactory. I am of the view that the defendants were in breach of this term of contract.

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I now turn to the provision of corrugated iron sheets. The moulding of the bricks was taking place during the rainy season and it was imperative that they should be covered from rain if damage to them was to be prevented. The defendants agreed to provide the iron sheets. There is no dispute on this. The dispute, however, arises as to who was to erect the shed. The defendants say that it was the plaintiff's responsibility and that is what, in fact, appears in the contract. The plaintiff, on the other hand, testified that there was a verbal contract that the defendants were going to provide carpenters to erect the shed and that the defendants were going to complete the erection by 30th January, but they completed it on the 12th February. When the iron sheets were provided carpenters, in fact, came and erected the shed. The defendants say that they provided the carpenters merely to assist the plaintiff. It must be borne in mind that this was a business undertaking and every transaction was considered in monetary terms. In my view it is inconceivable that the defendants could provide carpenters, who spent a number of days erecting the shed, unless there was some agreement,. The defendants paid wages to the carpenters for all the days spent in erecting the shed and all this cannot be a matter of favour. I prefer the evidence of the plaintiff on this.

Be that as it may, the plaintiff told the Court that when the defendants started constructing the shed, he had already started moulding the bricks and he had no problem in that respect. He, however, mentioned that the defendants removed the iron sheets too soon, and this resulted in some bricks being damaged by the rains. There is no evidence on this. On the whole I find that the defendants performed their obligation so far as this term is concerned.

I now turn to the term that the bricks must pass the Ministry test and should be approved by the client. It would appear that the Ministry concerned is Works and Supplies. Mr. Benettolo testified that is is a rule that all bricks in Malawi must pass the test before they are supplied. This is done in order to ascertain the strength of the bricks. When they are tested a certificate, indicating that the bricks have passed the test or have been rejected, is issued. Mr. Benettolo told the Court that it is the supplier's responsibility to take the bricks for testing and he did not see any certificate in respect of these bricks. He further stated that the bricks were not of good quality but they were allowed to be used for internal use, that is internal partitioning, and for hard-core. Hard-core is the base for concrete slab. The bricks were not suitable for external walls which support the whole structure.

Mr. Denn, a local partner of a firm of architects, Montgomerie, Oldfield and Denn, was a consultant of this project and was a Principal Architect acting for International Development Association, commonly called by their abbreviation - I.D.A. IDA were constructing a Secondary School at Ntcheu on behalf of the Ministry of Education. Mr. Denn, who was called by the defendants, told the Court that the bricks were of a wrong colour that he gave permission for use internally and for hard-core. His firm, according to him, always asked for a certificate of Grade 3 bricks.

The plaintiff, on the other hand, testified that when you sign a contract with a building contractor, all the responsibility for having the bricks tested is in the hands of the building contractor. It is because of that that he thought the bricks had passed the test when the defendants collected bricks from his first kiln for use. The contract itself merely provides that the plaintiff had agreed that the bricks must pass the Ministry test. It does not state that Mr. Chimwaza must take the bricks himself for testing.

Mr. Henry Mathandalizwe was the only witness called by the plaintiff. He told the Court that in 1983 he was employed by Montgomerie, Oldfield and Denn as supervisor of contractors. He was stationed at Ntcheu where a secondary school was being constructed. His work involved inspection of all items like sand and bricks, coming to the site. He stated that all his life he has been doing this type of work and he was employed to supervise in line with plans and instructions from the Architects. He once worked for Government as a Works Supervisor. On bricks, he examined them as to how they were made, their size and also how they were burnt. He knows the plaintiff because the plaintiff sold bricks to the defendants at Ntcheu Secondary School. He inspected the bricks and he was of the view that they were good. At a site meeting, the bricks were approved by Mr. Denn for use after he, Mr. Mathandalizwe, had explained that they were suitable. He stated that if the bricks were bad, the defendants would not have used them and he, the witness, would not have approved them. On the certificate, he testified that the bricks were to be tested by the Ministry and a certificate issued. He remembered to have seen a number of certificates but he was not sure whether any of them concerned the plaintiff's bricks. According to the witness the certificate is usually issued to the maker of the bricks or the applicant who may be a contractor. There was no rule as regards the colour of the bricks to be tested or to be used. This witness was firm in his evidence and he impressed me as a witness who was telling the truth. He is a man with a lot of experience in the type of work he was doing.

It would appear that the purpose of the regulation on the testing of bricks is to stop the use of any bricks which are defective. The contract in this case does not specify what the plaintiff's bricks were to be used for, In other words, it does not provide that the plaintiff's bricks were to be used for structural work or for internal partition or for hard-core. I am of the view that if they are rejected it is a rejection for all purposes. I imagine that if they are of a poor quality even their internal use could cause the internal walls to collapse. On the same basis, the hard-core, which needs to be hard, as its name implies, would indeed need a solid base, not a weak one made of poorly prepared and poorly burnt bricks. I, therefore, do not see how the bricks could be used at the site at all if they were not tested, and then approved by the clients. In my view it would be inconsistent with the contract for the defendants to reject the bricks without testing because it is only the Ministry of Works which can prescribe that on the certificate if the bricks are unsuitable. It is interesting to note that both Mr. Benettolo and Mr. Denn stated that the bricks were "allowed" to be used internally and for hard-core. They deliberately avoided the use of the word "approved" because that is what is in the contract. I do not see any difference in the use of these words in the circumstances of this case. Furthermore, if the bricks were not suitable, I do not see how the defendants, a prudent company which is cost conscious and made a recording of every tambala, even the petty cash it gave to the plaintiff's wife in Blantyre, could pay the contract price of K17.00 per thousand for rejected bricks. It defies imagination. It has been argued that this was done in order to keep the plaintiff going. It is inconceivable considering the fact that this is a business transaction and one hardly gets favours of this magnitude.

It has been stated that the client, according to this contract, was IDA who was representing the Ministry of Education. This is the client who was to approve the bricks. IDA were being represented by Mr. Denn, the architect. On the site, on behalf of the architects, was Mr. Mathandalizwe. Mr. Mathandalizwe, as already mentioned above, told the Court that he approved the bricks. They were good and the defendants could not have used them if they were bad. Can it then, in all seriousness, be said that the client did not approve them? It would be spliting hairs if that was the case.

On the balance of probabilities, when the whole case is considered in its entirety, I am of the view that the defendants were in breach of their contract. Although the defendants performed part of their contract, namely provision of iron sheets and the erection of the shed, , that alone could not help if firewood could not be collected in time. A letter, dated 6th April, 1983, by the defendants to the plaintiff, purpoting to terminate the contract was written, in my view, after the defendants had already broken their part of the contract.

I now turn to damages. The cardinal principle is that the party who sustains a loss by breach of contract is to be put, as far as money can achieve this, in the same situation as if the contract had been performed: Robinson vs Harman (1848) 1 Ex.855. If the plaintiff has in fact suffered no damage, but the defendant has broken the contract, he is entitled at any rate to nominal damages. The principle must be taken subject to the qualification made in Hadley vs Baxendale (1854) 9 Ex.354. It was said in that case that the damages for breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. A loss is deemed to have been within the contemplation of the parties though they never diverted to it, if at the time of the contract a reasonable man in the circumstances would have regarded such loss as a probable result of the breach.

In the present instance, had the contract been performed, 500,000 bricks would have been delivered at K17 per thousand at a total amount of K8,500. According to delivery notes tendered in Court, exhibit 3, there were 19 deliveries of 2,000 bricks each. The first delivery on this exhibit is dated 24th March, 1983, and the last is dated 31st March, 1983. The total number of bricks on this is 38,000. This would appear to be the first consignment. So far as the second consignment is concerned, there were 32 deliveries of 2,000 bricks each and the toal is 64,000. The date of the first delivery is 9th May, 1983. This is shown in exhibit D2 and it includes tabulation showing date, description, delivery note number and the value. It also shows the total amount payable as K1,088. Further, there were two other deliveries of 2,000 bricks each dated 6th June, 1983. This is exhibit D4. Surprisingly, the price for these two deliveries is K18 per thousand. This seems to be a departure from the K17 provided in the contract. There is no explanation for it. The total amount is K72.

It will be observed that the total number of bricks delivered is 106,000 made up as follows: 38,000 for the first consignment and 68,000 for the second consignment. The total amount payable to the plaintiff, according to the number of bricks delivered is K1,806.00.

The plaintiff received the following amounts from the defendants: K900 advance, K50 cash, K20 cash paid to his wife on his behalf, K40 paid to Mr. Puli on his behalf and K13 paid to Mr. Mathandalizwe on his behalf. He also had 61 moulds made for him at K1.50 each and this came to K91.50. Transport costs totalled K111.72. The total amount comes to K1,226.22.

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It would appear, therefore, that the amount owing to the plaintiff on the bricks delivered when the amounts paid to him are deducted is K1,806 minus K1,226.22 which comes to K579.78.

The number of bricks which could not be delivered as a result of the breach of the contract is 500,000 minus 106,000 which comes to 394,000. Following the principle in Hadley vs Baxendale this is what, in my view, may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from the breach of the contract or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Put in monetary, value the loss is 394,000 at K17 per thousand which comes to K6,698. In my view, the plaintiff is entitled to this.

In the particulars there is a claim for house rent t the site for four months at K10 per month. Had the contract been performed properly, the plaintiff would have paid this rent from the sales of the bricks. There are also claims for cost of labour and firewood expenses. I would observe that these claims leave much to be desired. I would have thought the cost of labour should show how the figure is arrived at. It should show for example, the number of labourers, their wages and for how long they were employed etc. The same goes for firewood expenses. It is not shown how the amount is arrived at. Some extra care should have been taken when preparing the particulars. As they appear now, they look like guesswork and do not merit consideration.

There is no doubt at all in my mind that the plaintiff, in the circumstances of this case, was put to considerable trouble and inconvenience . It must have been a difficult time for him; it is commendable that he was able to minimise his loss by being able to make some deliveries at all. I award general damages in the sum of K1,000. It follows that the plaintiff should be paid K8,277.78 made up as follows: K579.78 representing the difference between value of bricks delivered and the various amounts paid to the plaintiff, K6,698 representing the loss for bricks not delivered as a result of breach, K1,000 general damages.

On the counter-claim, it succeeds in so far as payment of various sums to the plaintiff totalling K1,226.22 is concerned. Since the defendants breached the contract, the counter-claim for K50 penalty per week for late delivery cannot be entertained and general damages for breach of contract is rejected.

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On costs, I am of the view that there was a lot of justification for the plaintiff to bring this action. I, therefore, order that the defendants should pay the costs of this action.

PRONOUNCED in open Court this 29th day of December, 1986 at Blantyre.

F.L. Makuta
CHIEF JUSTICE