

IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 486 OF 1987

BETWEEN:

INTERTEC CONTRACTING (CENTRAL AFRICA) LTD.

PLAINTIFF

- and -

ALDA (MALAWI) LIMITED

DEFENDANT



CORAM: UNYOLO, J.

Makhalira, Counsel for the Plaintiff
Msaka, Counsel for the Defendant
Longwe/Manda, Court Reproters
Nkhoma, Official Interpreter

J U D G M E N T

The plaintiff's claim against the defendant is for the specific performance of a contract of sale of 15 airconditioners. In the alternative the plaintiff claims damages for breach of the said contract. The plaintiff further claims interest on the amount of damages that the court may award and also claims for other relief as the court shall think just. It is pleaded that by an agreement made between the plaintiff and the defendant, the plaintiff agreed to buy and the defendant agreed to sell and deliver to the plaintiff the said 15 airconditioners at a price of K28,654. It is pleaded further that the plaintiff paid to the defendant the said sum of K28,654 in full payment of the 15 airconditioners. The plaintiff further pleads that notwithstanding such payment the defendant has failed and refused to deliver the said airconditioners to the plaintiff.

In its defence the defendant denies that the plaintiff and itself came to an agreement regarding the sale of the 15 airconditioners. The defendant pleads that it made an offer, per telex, to sell to the plaintiff 15 airconditioners. The defendant pleads that the airconditioners were then available ex-stock but that the offer was subject to prior sales. It is also pleaded that the offer price was subject to fluctuation in currency. The defendant further pleads that the said offer was not accepted by the plaintiff until the stock hereinbefore mentioned had been exhausted by prior sales. The defendant pleads that in the premises the plaintiff's acceptance was of no effect as the airconditioners had all been sold out. Further, the defendant pleads that as the plaintiff was desirous of purchasing airconditioners from the defendant, the defendant intimated that it would be prepared to sell to the plaintiff airconditioners from new stocks to be imported by the defendant and that as a result of fluctuation in currency the price of the same would, however, be higher than that quoted for the earlier stock. The defendant avers that it subsequently received from the plaintiff the sum of K25,721.30 in payment of the airconditioners. The defendant however pleads that due to the

increase in prices vis-a-vis the new stock, there was a shortfall in the amount to be paid by the plaintiff toward the purchase of the airconditioners and that it informed the plaintiff the airconditioners would be delivered only on payment by the plaintiff of the amount advised. The defendant avers that the plaintiff has refused to pay the amount in question and pleads that on these facts the plaintiff's claim is without merit and ought to be dismissed.

The following facts are not disputed : the plaintiff was asked to instal airconditioners at the National Research Programme in Mzuzu. The defendant company which deals in airconditioners was contacted for a quotation for 15 airconditioners. These were to be of two types : 14 of one type and 1 of another. The defendant responded on 15th January, 1986, by sending a quotation, Exhibit P1, by telex. In legal language this telex constituted the defendant's offer to sell the 15 airconditioners specified therein to the plaintiff. The price for the 15 airconditioners was given as K28,654, but it was said that the same was "subject to fluctuation in currency." Further, it was stated in this telex that the 15 airconditioners were "available ex-our stock, subject to prior sales." The facts show it was only on 9th May, 1986, that the plaintiff responded to the offer in Exhibit P1 when the plaintiff sent an LPO, Exhibit P2, to the defendant for the 15 airconditioners at the said price of K28,654. Again, using legal terminology the LPO herein constituted an acceptance.

Two other documents must be mentioned here. The first is Exhibit P4 viz. an invoice dated 31st December, 1986, for K28,654 from the defendant to the plaintiff in respect of the said 15 airconditioners. The second is Exhibit P6 namely, a receipt dated 15th May, 1987, for K25,721.30 from the defendant to the plaintiff. These four documents are those the plaintiff relies on as constituting an agreement between itself and the defendant.

It is a trite principle of law that an offer plus an acceptance duly communicated constitutes an agreement or a contract. I have already indicated that in the present case the defendant made an offer per Exhibit P1 and that the plaintiff tendered an acceptance by means of Exhibit P2. Ordinarily, therefore, the inference to be drawn is that a contract was entered into between the plaintiff and the defendant. The present case is, however, not as simple as this. I have indicated that the defendant's offer in Exhibit P1 was qualified by the statement that the airconditioners were "available ex-our stock, subject to prior sales." What did this statement mean?

I do not think that it was strongly challenged during the trial that this meant that the offer vis-a-vis the particular airconditioners specified in the offer was open only as long as the same were available in the defendant's stock, so long, in other words, as they remained unsold. The matter here involved specific and ascertained goods and the plaintiff could not effectively tender an acceptance for the said goods if at the material time the same had been disposed of by prior sales. I so find.

The key question is accordingly whether the said airconditioners (the dispute is actually as to 14) had been sold out by the time the plaintiff's acceptance came through as is contended by the defendant or whether they were still

available as contended by the plaintiff on the other hand.

The plaintiff's evidence is that when it responded to and accepted the defendant's offer by means of the LPO in Exhibit P2 on 9th May, 1986, the defendant did not disclose that the 14 airconditioners had been sold out. The plaintiff argues that if such were the state of affairs the defendant would have disclosed the fact then and there. The plaintiff contends that the defendant's silence on this aspect meant that the airconditioners were available. It is the plaintiff's case further that as a matter of fact, in January, 1987, the defendant's office in Lilongwe telephoned asking the plaintiff to send someone to go and collect the airconditioners. PW2 testified that in response he went to the defendant's offices to collect the airconditioners only to discover that they were so bulky that he would have no space for them at the plaintiff's offices in Lilongwe. The witness said that after talking the matter over the defendant accepted to keep the airconditioners until the plaintiff was able to find a place for them. PW2 went on to say that it was only in June, 1987, when he learnt that the defendant had increased the amount payable on the airconditioners and that the new General Manager of the defendant company had instructed that the airconditioners should only be released on the plaintiff paying the new price. PW2 said that he was told the difference in the price represented fluctuation in currency. He told the court that the defendant was, however, unable to show satisfactorily how such fluctuation was arrived at. He said further that when pressed, the defendant submitted the alleged calculations on a piece of paper. This was, however, not accepted by the plaintiff's quantity surveyors. It was in PW2's evidence that to justify such fluctuation the defendant had to produce the supplier's invoice for the airconditioners and also the bill of lading and the remittance documents in respect thereof. PW2 testified that the defendant refused to produce these documents contending that the same were private documents. In response the plaintiff refused to pay the new price and the parties were accordingly deadlocked on this issue.

It was also in the plaintiff's evidence that the defendant actually issued in invoice, Exhibit P4, on 31st December, 1986, for the 15 airconditioners for the very price of K28,654 quoted earlier in its offer, Exhibit P1. PW2 tendered in evidence Exhibit P5A viz. a cheque issued by the plaintiff payable to the defendant in respect of the 15 airconditioners. He also tendered Exhibit P6, a receipt issued by the defendant to the plaintiff on 15th May, 1987, in acknowledgment of receipt of the money paid by the plaintiff. It is the plaintiff's case that on these facts the defendant cannot be heard to say that the airconditioners were sold out by the time the plaintiff communicated its acceptance.

I now turn to the defendant's case. DW1 was a Mr. Humphreys. He was at all material times the defendant company's manager at its Lilongwe branch. It was his evidence that he was familiar with the incident involving the airconditioners herein. DW1 testified that the statement "units are available ex-our stock, subject to prior sales" used in the defendant's offer meant that the airconditioners were in stock at the time of the offer and that the defendant was likely to sell them and further that if these were sold before the plaintiff placed an order the defendant would be unable to sell them to the

plaintiff. The witness observed that while the offer was made on 15th January, 1986, the plaintiff did not respond until some four months later, on 9th May, 1986, to be precise, when the plaintiff sent its LPO, Exhibit P2. It was DW1's evidence that by this date 14 of the said airconditioners had been sold out and only one was remaining. DW1 went on to say that the defendant had by then put in an order for another consignment of airconditioners and that he told PW2 about this also and that he would communicate the outcome to the plaintiff. The witness tendered in evidence Exhibit D2 in support of his evidence on this aspect. This exhibit is a letter dated 11th June, 1987, from the defendant to the plaintiff and I think it is useful to reproduce it here. It reads as follows:

"For kind attention Mr. Beza

With reference to your order for one MER 100 ST and 14 ER 15 Split Air Conditioning unit.

As we advised to you in July last year the MER 100 ST would be supplied from stock and would be charged at the quoted price. However the ER 15 units were out of stock when we received your order and therefore these would be supplied from new stocks coming forward. Therefore the price of these units would be increased by possibly K1000 each. You stated that this was understood and would be acceptable.

Our invoice 12024 was raised by our Blantyre Head Office at the quoted prices but you were informed by them that a further debit would be coming to cover fluctuation.

We enclose our computation of the price of these units at the time they arrived and shall be grateful if you would seek the agreement of the Q.S. before we actually invoice you.

These units have been in our store in Lilongwe for months and we are anxious to deliver them to you. Before doing so we wish to settle on a final sale figure so that we all know where we stand.

Many thanks for your kind co-operation."

DW1 told the court that the defendant waited for the arrival of the airconditioners and that these finally arrived in December, 1986. He said that on 15th December, 1986, the defendant sent a telex, Exhibit D3, to the plaintiff advising the plaintiff of the arrival of the airconditioners and advising further that there would be an increase in the prices due to fluctuation. The witness said that he later sent a handwritten document setting out the new prices and how the same were arrived at. He then learnt that this was not accepted by the plaintiff's quantity surveyors who wanted the defendant to produce the bill of lading, the supplier's invoice and other related documents. It was in DW1's evidence that all these documents were in his view entirely unnecessary in that the defendant was under no compunction to substantiate its prices and that at any rate the said quantity surveyors were not privy to the contract between the plaintiff and the defendant.

Such is the parties' evidence in this case. Now the question is : whose story should the court accept, the plaintiff's or the defendant's?

I have indicated that it took some four months before the plaintiff communicated its acceptance to buy the air-conditioners from the defendant. This was a fairly long period and it is plausible the defendant could have sold out the 14 airconditioners in the interim. It is also not without significance that the defendant advised it was only 14 units which had been sold out, one was still in stock and was available to the plaintiff. Surely if the defendant simply wanted to cheat I doubt it would have simply chosen the 14 units and leave out the other unit. In my judgment, this point does lend credence to the defendant's story. I would also refer to Exhibit D2, the letter I have reproduced above. The letter clearly shows that the plaintiff was informed the airconditioners had been sold out and that the defendant was trying to procure a fresh consignment which, when available, would cost more than those from the old stock. And it is to be observed here that the contents of this letter were not refuted by the plaintiff. It is unequivocal in its language and surely if what the defendant stated therein was not correct the plaintiff would have quickly taken steps to refute the matters raised there. As this was not done and considering the total evidence the only inference to be drawn is that the plaintiff was told, in 1986, that the airconditioners were out of stock at the time the plaintiff placed its order.

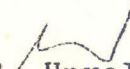
I am mindful of the fact that the defendant did issue Exhibit P4, the invoice, to the plaintiff. It is to be noted, however, that this invoice was issued on 31st December, 1986, and that is the period the defendant says the new stock of airconditioners was received. It would, in my judgment, have perhaps been different if this invoice had been issued at the time the plaintiff's LPO was received by the defendant. Finally it appears to me that exhibit P3, namely a Customs Bill of Entry does support the story that the defendant did receive some airconditioners in December, 1986. I refer in this regard to the first entry on the said Bill of Entry.

To conclude, I would prefer the defendant's story to that of the plaintiff and find that the 14 airconditioners were not in stock at the time the plaintiff's acceptance was communicated to the defendant. Any purported contract was on those facts void and of no effect.

I would go a little further. The evidence seems to suggest that a new contract was being negotiated between the parties. The plaintiff sent a cheque to the defendant in payment of the airconditioners. The defendant initially accepted the cheque and issued a receipt. The parties, however, failed to agree on the new price for the new airconditioners. And it is to be observed that the money was subsequently refunded to the plaintiff. I do not think that the plaintiff can now complain in the circumstances.

I find, therefore, that the plaintiff has failed to prove its case against the defendant and I dismiss the action with costs.

PRONOUNCED in open Court this 31st day of May, 1988, at Blantyre.


L.E. Unyolo
JUDGE