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IN THE HIGH COURT OF MALAWI
PRINCIPAL REGISTRY
CIVIL CAUSE NO. 3708 OF 2001

Force Majeure - unforseen administrative interference - contract - conditional -

BETWEEN:

CAPITAL OIL REFINING INDUSTRIES LIMITED .... PLANTIFF

-AND-

CATHOLIC RELIEF SERVICES ....DEFENDANT

CORAM: HON. KAMWAMBE , J
Makiyi of Counsel for the Plaintiff
Kalasa of Counsel for the Defendant
Nsomba, Official Interpreter
Mrs Pindani, Court Reporter

JUDGEMENT

Through a sale agreement of 23rd May, 2001 the plaintiff as the buyer agreed to buy and the defendant as the seller agreed to sell some 2770 metric tons of crude oil known as crude degummed soya bean oil. The commodity was not delivered principally because the agreed commodity price was on the lower side due to unforeseen upward price movement in inland freight. The plaintiff puts blame on the defendant and seeks the following reliefs:

1. Specific performance of the agreement
2. Damages for breach or repudiation of the agreement
3. Malawi Kwacha equivalent to US $449,939.95 from 30th September 2001 to the date of payment

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4. Interest on US$449,939.95 from 30th September 2001 to the date of payment.

5. Further or other relief

6. Costs

I should mention in the outset that the plaintiff dropped the first sought relief due to lapse of time before conclusion of the matter. Further, both counsel have agreed that of now this court should determine only the matter of liability so that everything else can follow later. I am also of the view that this is a prudent way of dealing with this matter as it may lead to reduced costs or expenses and time and will also give proper insight as how to proceed later. I will therefore deal with the issue of liability in reference to relevant documents and listed cases. I am grateful to both counsel for the wealth of case citations submitted to this court.

The first question to consider is the nature of this contract. It has been submitted by the defence that it was a conditional contract although the plaintiff has hardly considered it as such. But before I delve into the nature of the contract let me bring out the facts of the case as concisely as I may succeed bearing in mind that the facts are quite lengthy.

As stated above, through agreement dated 23rd May 2001, the defendant agreed to sell and the plaintiff agreed to purchase 2770 metric tons of the crude oil as specified in the contract. The defendant is an international non governmental organization headquartered in the United States of America and running some projects in Malawi. Funding for these projects is made through the process of monetisation whereby the United States Government, upon a reached agreement between the buyer and the seller releases the commodity such as crude oil for sale in Malawi, the proceeds of which go to the projects.

The "call forward" process whereby the defendant dispatches the agreement to Catholic Relief Services headquarters in Baltimore United States through USAID offices for approval by Food for Peace

Agency in United States of America was done. The United States Government was supposed to source the commodity from suppliers in the United States by tender, so too tenders for ocean freight and inland freight. It was agreed between the parities i.e. Capital Oil Refining Industries Limited and Catholic Relief Services that the commodity was to be sold C and F Blantyre at the price of $460 per metric ton covering ocean and landed costs to Blantyre.

Price fixing is not done by the defendant. The United States Government through their tenders advise Catholic Relief Services Malawi what the price should be. The price of $460 per metric ton C and F Blantyre was agreed as per contract to facilitate United States Government's approval of the "call forward". While the approval process was under way and before the commodity was sourced the cost of inland freight more than doubled and the United States Government found it unreasonable and unsustainable to proceed with the "call forward". The United States Government advised that the parties renegotiate the price to take into account the increase without going below the 80% bench mark which was the basis of calculating the price in monetisation transactions. The policy is that the recovery be at least 80% of the transactions. Due to the increase in inland transaction cost the benchmark had dropped to 66.7% which was unacceptable to the United States Government.

Capital Oil Refining Industries insisted that they could not allow an increase of more than $60 per m/t above the original price. However, negotiations for the second contract commenced but the United States Government could not accept the proposed price of US $378 per m/t F.O.B. Durban which meant that the buyer would be responsible for wharfarge and inland transportation cost to Blantyre. Further negotiations to come up with another price collapsed and the United States Government sold the commodity through a South African middleman F.R. Warring.

As a result of the collapse of negotiations the plaintiff insists that the contract failed due to the breach of the defendant and the defendant claims that there is no breach of contract on his part and that if there is any then the defendant should be exonerated. This situation brings us to ask what was the nature of the contract if there was any contract at all. Admittedly there was an initial contract which collapsed but we need to look at some of the pertinent clauses. The third paragraph of the preamble reads as follows:-

> *"WHEREAS the United States Government (hereafter referred to as "USG") has made available Two Thousand seven Hundred and seventy(2770) metric tonnes of bulk crude Degummed Soya Bean Oil (hereinafter referred to as "the commodity") for sale in Malawi.*

It is clear that the United States Government is not party to the contract yet this part of the preamble says that the United States Government has made available 2770 m/t of crude oil. This demonstrates the role that United States Government would play and this is to make the commodity available. United States Government is a third party but a stranger to the contract although United States Government had the powers to approve the agreed price which was a material term of the contract.

Then comes clause III (a) of the agreement which reads as follows:

> *a) "Delivery to the Buyer is contingent upon the availability of the commodity to the Seller from the United States Government."*

This clause means exactly what it says that if the United States Government did not make the commodity available to Catholic Relief Services then the contract would be frustrated for non delivery. The plaintiff did not come strongly to attack the fact that the agreement was conditional. In fact they avoided it. To me, this delivery clause shows that performance of the agreement was conditional.

PW1 Mr Karim in cross examination said, I quote

> *"I was aware at the time of signing the contract that oil was coming from United States of America also aware that the word "contingent" meant availability in United States America and providing oil to CRS. Yes, if United States America does not provide then the contract cannot be fulfilled."*

I would not be wrong to consider the above piece of testimony at an admission that the agreement was a conditional one.

Both parties have also referred to **FORCE MAJEURE** ,clause VIII which is styled in the following terms:-

> *"Except for failure to pay any sum which has become due neither party shall bear responsibility for the complete nor partial fulfillment of any of its obligations for reasons for Acts of God, strikes, riots, civil commotion, natural disasters or other circumstances beyond the parties' control, including acts or omissions of the United States Government or any of its agencies that may prevent delivery under this contract."*

I discover that most arguments revolve around the application of clause VIII. The Plaintiff submits that regardless of the clause the defendant's liability cannot be excepted. The defendant insists that it be excepted from liability because the non delivery of the commodity was due to factors beyond its control as it had no control on the acts by United States Government. It contends that further that clause VIII also shows that the contract was conditional a fact well appreciated by the plaintiff. The plaintiff also contends that we cannot say that the commodity was not available as DW3 conceded that it was available in United States of America. My understanding of this clause is not just the availability of commodity in United States of America but it being made available to the seller/defendant who shall then have control over the said commodity. I will therefore not buy the argument of the plaintiff.

The parties no doubt intended to create a legally binding contract and one was indeed created and duly signed, hence the performance bond and approval of the call forward. The question to be determined now is whether through the post conduct of the parties when the price in the contract was in contention and fresh negotiations commenced, the parties intended to amend, vary, abandon or discharge the agreement of 23rd May 2001. The plaintiff quoted the case of **United Dominions Corn (Jamaica) Ltd v Shoucair** (1969) 1 AC 340 in which the House of Lords based their argument on the intentions of the parties: I quote:- 7

> *"So the court has to make up its mind which comes nearer to their intention to leave them with an unamended agreement at all... if the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old agreement remains in force and unamended."*

United Dominions Corporation (Jamaica) Ltd v Michael Mitri Shoucair

To this the plaintiff says that it was the testimony of DW3 both when examined in chief and in cross-examination that the second contract was merely a draft and was not meant to be signed by the defendant at all. He goes further to say that the mere fact that the contract was only signed by the plaintiff and not the defendant is sufficient evidence that the second contract could not vary or discharge the contract dated 23rd May, 2001.

Where there is a second contract duly signed by both parties in the light of problems in fulfilling the terms of the first agreement, this would signify that they made a clear intention to abandon the first contract. But where they enter into fresh negotiations to come up with fresh negotiations it may not be easy to discern the intention of the parties. However, even without a second agreement in place, parties can agree by conduct or in writing that the earlier contract is rescinded or varied. We are all aware the plaintiff had written the defendant that the first contract subsisted and that they would still go by the said contract.

By their letter of 13th July, 2001 exhibit P6 Catholic Relief Services, in second paragraph made a proposal to Capital Oil Refining Industries coached as follows:-

> *"We would like to clarify the issues discussed at the meeting that due to the changes in the rates of inland transportation, which have been quoted by transport contractors to AID shipping, it has become difficult to sell the oil at CRS Blantyre. Alternatively, we would wish to sell the Oil FOB Durban at a rate of US$378.00 per metric ton."*

Capital Oil Refining Industries responded in its second paragraph of its letter of the same date being exhibit P7 as follows:-

> *"As far as we are concerned we will still go by the signed contract dated 23rd May 2001, signed between Catholic Relief Services and Capital Oil Refining Industries Ltd."*

At this point in time there was no mutuality in their intention.

Then in his letter dated 18th July 2001 exhibit P8 Mr Kalasa of counsel for the defendant unequivocally considered the contract to have ended by stating this:-

> *"We have noted with concern that you do not wish to consider the proposed variation from US $460 /mt C & F Blantyre to US$378/mt FOB Durban."*
>
> *As you are aware the subject matter of the contract is a commodity that is to be supplied by the United States Government. We regret to inform you that for reasons beyond our control we are not prepared to proceed with a C & F Blantyre contract.*
>
> *We shall hence forth and also call upon you to regard this contract as at an end."*

Despite the above, the spirit of pursuing with negotiations never failed hence the letter of 26th July, 2001 exhibit P9 from Capital Oil Refining Industries to Catholic Relief Services and I quote:-

> *"We refer to the meeting your Chris Kandulu had with the writer this morning and we have gone through a new contract, which he left with us for our signature.*
>
> US$ 378 per M/T
>
> *The price should read UDD 378/MT FOT Durban, since you are responsible to effect payment of wharfage and all other port charges.*
>
> *As we advised you that in view of our commitment to purchase the contracted quantity from you, which we were expecting to start receiving from end/early September 2001, we have not placed our usual orders with the regular suppliers to cover the anticipated sales from September through November, 2001. Time is now of the essence as delays will entail incidence of heavy losses. Therefore, your stipulated delivery period of "1st September and 30th October" is too long and we must ask you to arrange and confirm delivery of the contracted quantity at the port of Durban on or before end of August, 2001.*
>
> *We are pleased to confirm the agreement reached your Laura Mc Carthy that the current **GUARANTEE** which was already established in favour of Catholic Relief Services will be used for the full contracted quantity. "*

We note that the substantive terms in the draft or proposed agreement varying the first agreement are as follows:-

1. *The price was not C and F Blantyre but FOB Durban*

2. *The commodity was to be shipped in one lot of 2770 metric tons and not split in two as in former/original contract.*

To this the defendant says the parties intended to abandon the original contract. Whether it was abandonment or variation let me defer the matter as of now. However, suffice it to say that through exhibit P9 the plaintiff had shown his intention to vary the terms of agreement and they make a counter proposal of the price of US$378 per mt m/t FOT Durban, not FOB, so that the seller is responsible for paying wharfage and all other port charges. However we should not lose sight of the fact that this proposed price is not tentative as it is subject to approval by the United States Government

At this stage both parties had seen that they could not proceed with the original agreement particularly with the price clause because this was the main determining factor whether oil would be available or not. Even if this is a new proposed agreement which is only different from the first one in price and number of deliveries, and since the negotiations basically capitalized on price, I am reluctant to say that the original contract was abandoned, but rather that it was varied. Otherwise they were materially the same except as stated above. Their intentions were not to tamper with many other clauses which are also crucial to the agreement. They could have chosen to vary or amend the agreement by merely making an agreement varying the original one in respect of price or sign a totally new one carrying a new agreed price. Which ever method one uses it is merely mechanical. The intention remains the same regardless of what method you use. This is why the defendant's lawyer in exhibit P8 talks of <u>proposed variation</u> from \$460m/t C&F Blantyre to US dollars 378 <u>m/t</u> F.O.B. Durban. It does not matter that the variation is termed the new agreement. Hence, as far as the rest of the terms of the original contract are concerned without any intention to amend them, they are binding on both parties.

In this regard one cannot say that the proposed or draft contract, having failed to go through, the intention of the parties being to abandon the original agreement, therefore there was no contract at all as the original agreement was abandoned. This thinking would mean that since the original contract was abandoned one cannot even

US$378 per metric tonne

argue on any one clause of the abandoned contract because it is as of now non-existent. This is not the unfortunate picture I want the parties to be in. This is why I say that the proposed agreement was for all practical purposes intended principally to vary the price and nothing else. Of course delivery was now to be in one lot and not two lots. Since the other terms in the original contract are binding we can talk of Force Majeure.

The proposed contract failed to go through because Catholic Service was not happy with the proposed price by Capital Refined Industries, hence their letter of 10th August, 2001 being exhibit P11 coached as follows:-

> *"In response to your July 26, 2001 letter to the attention of Laura McCarthy , we kindly refute the conditions you posed in said letter that the proposed contract was for FOB Durban and not FOT Durban as materially different from the actual verbal agreement between you and Ms McCarthy. It follows that whafage and all related costs are to your account. Furthermore, such conditions as mentioned cannot be accepted without a significant increase in sales price.*
>
> *We would like to continue to discuss the price with you under different terms and conditions. Please let us have your response by Monday noon, August 13, 2001 so that we can conclude the deal by the close of the day. If we do not get your response by noon Monday 13, 2001, we shall take it that you do not wish to finalize the contract."*

At this stage no agreement as to price had been reached and negations were still deemed to be underway. On 14 August 2001, desirous to conclude the agreement on the price, Catholic Relief Services made what it called a last standing offer for 27770 metric ton at US$465 per metric ton plus wharfage, landing security, storage and other costs (Exhibit P12). Definitely, Capital Oil Refining Industries was not happy with this development and their lawyer A.R. Osman and Company threatened suit through their long letter of 6th September 2001, being exhibit P13. To this letter K.R. Kalasa and Company responded on behalf of the defendant and states in his last paragraph of the letter of 5th October 2001 (exhibit P14) as follows:-

> *"We trust that you will prevail upon your client to desist from making a hasty decision that will result in the deterioration of the relationship. On our part we shall counsel our client to devise a better method for*

conducting pre-contractual negotiations other than resorting to execution of contractual documents before assessing their efficacy."

At this point in time it is admitted by the defendant that there was an administrative flaw on their part in that they could have done better than this such as asking United States Government to provide the price before the contract is entered into.

But this is not the premise on which we are moving just because the agreement was clearly a conditional one and the plaintiff was aware of this. Further more DW2, Christopher Kandulu, in his evidence in chief stated that he and others on more than one meeting explained to the defendant's company the concept of monetisation and how it works and also discussed and explained other important players such as USAID, Catholic Relief Services in Baltimore (United States of America) and Food for Peace in Washington and also discussed how a commodity is ordered.

Both counsel have addressed the court adequately in Force Majeure or clause VIII of the contract. Let me in the outset state that the case of **Sir Lindsay Parkison and Company v Works and Public Building Commissioners** (1949)2 KB 632 talks of situations where catastrophic events have occurred. This is not the situation in this case and therefore that cannot be the basis to warrant a discharge of this contract. I quote the case below for the sake of clarity:-

> *"What the courts have heard in such cases is that when some catastrophic event occurs for which neither party is responsible if the result of that event is to destroy the very basis of the contract so that the venture to which the parties now find themselves committed is radically different from that originally contemplated the contract is forthwith discharged."*

The contention by the plaintiff is that a man cannot rely on his own act, negligence or omission or default as Force Majeure and he maintains that the United States Government had the oil available as per the preamble, so availability of the oil is not the issue but timely execution or fulfillment of the contract. I said it earlier on that if the preamble is read together with clause III (Delivery Clause) of the contract and so too clause VIII (Force Mejeure) then it comes clear to

Parkinson (Sir Lindsay) & Co. LD v Commissioners of His Majesty's works and Public Buildings [1949] 2 KB 632 me that it is the availability by Catholic Relief Services Malawi after United States Government had sent the commodity to Malawi and not availability in the United States of America that is meant.

I agree that the defendant cannot rely on Force Majeure if he is at fault and has contributed to the delay or non-fulfillment of the agreement. In **Yrazu v Astral Shipping Co.** (1904)9 Com. Cas. 100, a clause in a contract for the carriage by sea of livestock providing that the vessel should not call at any port before landing her live stock "except in case of Force Majeure" did not exonerate the shipping company because the ship's master and engineer miscalculated by leaving the loading port with insufficient coal and had to put into another port for more coal. Walton J, regarded Force Majeure as anything which was beyond the ship owner's control.

& Co.

In **Motsoukis v Priestman and Company** [1915]1 K B 681, where there was delay in manufacturing and delivering the ship to the plaintiff, Bailhache J had this to say:-

> *"... I think that the complete dislocation of business in the north of England as a consequence of the universal coal strike, which operated directly on the ship for building previously to the plaintiff's steamer, and only indirectly on the plaintiffs steamer, did come, within reasonable meaning of the words "force Majeure" ."*

and company

I wish to distinguish the case of **Lebeaupin v Crispin** (1920)KB 714 from this case. In Lebeaupin case the Salmon of ½ Ib flat pinks to be packed by St Mungo Cannary and the other in bigger cans to be packed by Acme Company Mc Cardic J. said:- [1920] 2KB 714

> *"They cannot rely on any defence or failure of subject matter which those companies (if they were defendants to the present proceedings) would be disabled from relying upon. This being so, I point out that it is clear that there was no failure of the fish crop at all. It was indeed larger than usual. The reason for the default was in the one case the omission of the St. Mungo Company to provide good tins, and was in the other case the deliberate choice of the Acme Company to pack I Ib. tins in priority to ½ Ib. tins in the hope that an exceptional run of fish would occur."*

In this case the non-delivery of the goods did in substance arise from causes under the control of the canners or shippers. Mac Cardie J. further says that any direct legislative or administrative interference would of course come within the terms: for example, an embargo. That there existed a policy of not selling the commodity below 80% benchmark was known to both parties. That the inland transport cost had more than doubled was if not a catastrophic event, an unforceable event which necessitated hiking the price. Catholic Relief Services Malawi was not aware of this until communicated to by the United States Government or Catholic Relief Service Baltmore. Price determination was done in United States of America even if Catholic Relief Services Malawi inserted its own price in the contract. I take this force majeure to be an administrative interference beyond the powers and will of the defendant. Unless the standing United States Government policy was changed there is nothing the defendant could do procedurally. But this is not an abrupt or unforeseeable administrative interference. This is why the contract was conditional on the availability of the commodity in United States of America to the defendant because some administrative aspects were contemplated. Nevertheless the outcome of the United States Government on the price was not foreseeable hence I put it in the realm of force majeure. I doubt if the United States Government itself could control world price fluctuations in this case. They were also rendered powerless.

I have tried to see if there has been default or miscalculation either on the part of the defendant or the United States Government as the case in the case of **Yrazu v Arstral Shipping Co** supra where the ship manager carried insufficient coal and there were forced to delay at another port and the case of **Lebeaupin v Crsipin** supra where the canner St Mungo Co and Acme caused the default, and they did what they ought not to have done. In this case international transport prices had significantly moved upward and the United States Government had to follow its policy of 80% benchmark. Otherwise the benchmark would have gone down to 66.7% which would not adequately benefit Malawi the recipient of the monetisation process. Price was the main determining factor of making the commodity available. It directly impinged on availability of the commodity otherwise policy wise, United States Government was left in dire straits as well. Sourcing and shipping arrangements are controlled by United States Government according to monetisation procedures. It does not matter that monesation and spot price or benchmark were not part of the contract or not specific conditions precedents so long as they are the crucial matters that the United Government considered before putting up tenders for the commodity and making it available to Catholic Relief Services Malawi.

The United States Government standards in world trade of this nature was the same hence reference to Argentina where the price had gone up too and the benchmark price could not go below 80%.

In conclusion, negotiations having collapsed due to the fact that the subject matter was not available to Catholic Relief Services Malawi and that the agreement was contingent upon a third party fulfilling his part, the contract is deemed frustrated by no fault of the seller who demonstrated that he was really desirous to maintain good relations with the buyer. The difficulty in which the seller was placed was not contemplated. The buyer knew that the provision of the commodity was dependant upon the same third party releasing it. This fact was part of the contract and the buyer should be deemed to have had notice of it. This is a situation which I accept to come under Force Majeure since there was not even a bad choice or deliberate omission or maladministration on the part of the of the United States Government as it were in the case of **Leabapin v Crispin** and company (supra) in which the canning companies acted imprudently.

Consequently, on the above I find that the defendant as seller was not liable for the non-delivery of the commodity to the plaintiff the buyer.

Pronounced in open Court this 26th day of April 2005 at Blantyre.

M.L. Kamwambe

JUDGE