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IN THE HIGH COURT OF MALAWI
MZUZU DISTRICT REGISTRY
CIVIL CAUSE NO. 192 OF 2011

BETWEEN

ARNOLD SHABA CLAIMANT

AND

TRANSGLOBE PRODUCE EXPORT LIMITED..... DEFENDANT

CORAM: Honourable Justice T.R. Ligowe
E. Mbotwa, Counsel for the Claimant
W. Chiwaya, Counsel for the Defendant
F. Luwe, Official Interpreter
R. Luhanga, Recording Officer and Court Reporter

JUDGMENT

Ligowe J.

Introduction

- 1 The issues in this case occurred in or around 2011. The claimant was operating a poultry farm trading as Savanna Ltd. He was keeping layers as well as broilers. According to the claimant's statement of case the defendant supplied chicken feed which was not fit for the intended purpose as a result of which egg production reduced, up to losing revenue amounting to K4 085 000 and broiler production reduced, up to losing revenue amounting to K1 254 400. He therefore claims payment of K5 339 400 loss of revenue and damages for breach of contract and for negligence from the defendant plus costs of the action.
- 2 Let me say at the outset that there is duplicity in the claim in that the damages claimed are actually the loss of revenue in a case of this nature. The claimant will have to be granted one should he succeed in this action.

3 In her defence the defendant admits supplying chicken feed to the claimant but denies it was not fit for its purpose. She denies the claimants claim for damages and costs. She has a counterclaim however for K2 600 000 money due and payable in respect of chicken feed sold and delivered to the claimant which the claimant refused or failed to pay. The claimant generally denies the counterclaim.

Issues

4 Two issues emerge from the pleadings. The first is whether the defendant supplied chicken feed that was not fit for its purpose and therefore liable to pay the damages claimed. The second arises from the counterclaim and that is, whether the claimant refused or failed to pay the price for the chicken supplied and therefore liable to the counterclaim.

The Evidence, Facts and Analysis

5 This court heard evidence on the part of the claimant from Mr Arnold Shaba himself, Mr Mordecai Chirwa, a veterinarian and an expert in animal production with a Diploma in Animal Health and Production, the manager at the claimant's poultry farm, and Mr Khumbo Shaba, the claimant's son. We also heard evidence on the part of the defendant from Mr Kelvin Chifunda, Senior Sales Executive for the defendant, and Mr James L. Mwape, Production Manager for the defendant. Mr Mwape is also a veterinarian with a Diploma in Agriculture and a Certificate in Animal Health and production.

6 Certain facts are not in dispute. Mr Kelvin Chifunda managed to convince the claimant to stop using chicken feed supplied by CP Feeds Ltd. and start using feed supplied by the defendant on his farm around February 2011. The feed was used on the chickens until April when the claimant noticed a drop in production of eggs and growth of the broilers. Mr Kelvin Chifunda confirmed this when he visited the farm and he took back 81 bags of the feed and replaced them. The chickens had not been examined medically by a neutral person to determine the cause. The feed also had not been examined scientifically to determine if it had any deficiency.

- 7 It is argued in the evidence for the claimant that the drop in production of the chickens was because the feed was substandard. It is admitted that weather, disease and feed are the main factors in poultry production. However it is stated that at the material time, the chickens were at their peak of production, 40 weeks old for the layers and six weeks for the broilers. The weather was fine and there was no outbreak of any disease but the layers produced less eggs and the broilers were underweight compared to the period before the impugned feed was used. Further to this, Mr Arnold Shaba and Mr Mordecai Chirwa stated in their evidence that Mr Kelvin Chifunga admitted that the feed had a problem when he visited the farm. And, Mr Khumbo Shaba stated that he had a meeting with the management of Transglobe Produce Export Ltd. in Blantyre where they accepted to have supplied defective chicken feed and it was agreed they would compensate the claimant for the loss and the claimant would pay any outstanding balance for the supply of the feed. What they did not agree was the manner of calculating the loss. He however stated that no minutes were taken at the meeting and he does not know the name of the person who admitted to pay compensation.
- 8 This has been contended in the defendant's evidence. It is stated that it takes 14 days to observe any defect in chicken feed while feeding the birds and that was not the case here. Growth rate of broilers is supposed to be checked on weekly basis but they were checked at harvesting in this case. Speedys Farms, Hill View Farm, Mwale Layers Farm, Mr Chauluka's Farm and Mr Machinjiri's Farm had been supplied with the same feed but no similar complaints were raised.
- 9 Mr Kelvin Chifunda admitted having replaced 81 bags of feed after which there was no complaint from the claimant. However, Mr James L. Mwape argued that this did not mean the feeds had a problem. Both witnesses for the defendant also expressed no knowledge of the agreement referred to by Mr Khumbo Shaba for the defendant to pay compensation to the claimant in respect of the feed.
- 10 Having heard the evidence for both sides and having read their skeleton arguments and final submissions, I find that the parties agree as to the implied condition in their contract

that the chicken feed needed to be of a quality, fit for the particular purpose it was supplied, in accordance with section 16 of the Sale of Goods Act. Under subsection (a), a condition as to fitness for a particular purpose is implied where the buyer made the particular purpose for which the goods are required known to the seller expressly or by implication so as to show that he relied on the skill or judgment of the seller, and the goods are of a description which it is in the course of the seller's business to supply. In this case the defendants well aware that the claimant was in poultry farming convinced him to switch from CP feeds to their feeds. The issue is whether the feed is to blame for low production in the chickens and so because of this it was unfit for its purpose.

- 11 The claimant's argument is two pronged. The first is that, since production dropped after the chickens were provided with feed supplied by the defendants and all other conditions were constant, the feed was to blame it was not fit for its purpose. The second is that the defendants actually admitted supplying faulty feed through Mr Kelvin Chifunda and the meeting Mr Khumbo Shaba had with the defendant's management in Blantyre.
- 12 The defendant argues that the feed cannot be blamed without medical examination of the chickens and scientific examination of the feed. It argues that there are other factors can cause low production apart from faulty feeds. The defendant has also denied any admission that the feed was not fit for its purpose.
- 13 It is clear from Mr Arnold Shaba's and Mr Mordecai Chirwa's evidence that their problem was with the batch of feed they received in April. Mr Arnold Shaba stated that production was not as bad with the first batch of feed they received but the second one. And Mr Chirwa stated that when Mr Kelvin Chifunda came, he suspected a factory fault with that batch. Mr Chirwa also mentioned later in his evidence that they ruled out all other possibilities in the low production because "everything was okay until that batch, and after changing the feed to normal feed, egg production and growth rose again," under the same environment and weather. From the look of things therefore, Transglobe Produce Ltd had initially supplied feed that was fit for its purpose.

- 14 On the two arguments advanced by the claimant, the second one is easier to deal with. The rule regarding the burden of proof of a fact has always been that it lies on the party who substantially asserts the affirmative of the issue. In this case the claimant. This is so, because in the nature of things, a negative is more difficult to establish than an affirmative. *Commercial Bank of Malawi v. Mhango* [2002-2003] MLR 43. Applying the rule to this case, I find that no were minutes taken at Mr Khumbo Shaba's meeting with the defendant's management and he does not know the name of the person who made the admission. On the balance of probabilities, I find that there has not been sufficient proof of the admission to pay compensation by the defendants as alleged by Mr Khumbo Shaba. In any case if there had been a sincere admission, the case would not have reached this far.
- 15 Regarding the claimant's first argument, it is admitted that by April 2011 the chickens were being provided with feed supplied by the defendants. The defendants have not disputed that production in the chickens dropped that month. They also have not disputed that there was no outbreak of any disease or that the weather was unfavourable. Bearing that the production of the chickens was at a certain level before the claimant switched to the defendant's feed, and that production was not as bad with the first batch of feed supplied by the defendants and then came the drop with the batch supplied in April, any reasonable person would conclude that the feed was faulty.
- 16 It was held in *Commercial Bank of Malawi v. Mhango* [2002-2003] MLR 43 that if the party on whom the burden of proof lies, "adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption." I find that the claimant has given sufficient evidence in this case to raise the presumption that the feed supplied by the defendants was to blame for low production in the chickens. It was therefore, incumbent upon the defendants, in my view, if they disputed, to demand medical examination of the chickens to see if they had any other problem, or scientific examination of the feed against the required standards. They had all the opportunity to do this but they did not. I find therefore, that their feed caused production in the claimant's chickens to drop and thus it was not fit for its purpose. The implied condition was breached.

- 17 The present case is different from the case of *Seguwa v. Agma Corporation* [2004] MLR 346 defence counsel cited in his final submissions. The laboratory results in that case showed that the chickens did not die of feed deficiency. The court found that it was not the quality of the feed but the quantity that caused malnutrition in the chickens. The quantity of feed given to the chickens had been dwindling as time went by, yet they required an awful amount of feed. It also found that the plaintiff had no sufficient knowledge in poultry farming evidenced by empty and dirty food troughs and dirty and poor management of the chicken houses. That is not the situation in the present case.
- 18 The claimant had alternatively argued his case in tort. There is no point discussing the same, now that he has succeeded in contract. What remains is the remedy.
- 19 Under section 13 of the Sale of Goods Act, breach of a condition gives rise to the right to treat the contract as repudiated and reject the goods. The buyer can also claim damages from the seller for the loss sustained in consequence of the seller's non-performance of his part of the contract. In *Photo Production Ltd v. Securicor Transport Ltd* [1980] AC 826, at 849 Lord Diplock referred to breach of a condition as non-performance of a primary obligation which gives rise to a secondary obligation to pay compensation to the other party. Nevertheless, the buyer may waive the right and treat the breach of a condition as a breach of a warranty, or in other cases the buyer may actually be compelled to treat the breach as a breach of a warranty as can be seen from s. 13(1) and s. 53(1) of the Sale of Goods Act. For breach of a warranty the buyer has two options under s. 53(1). He can set up against the seller in diminution or extinction of the price, or maintain an action against the seller for damages.
- 20 We have an issue in this case whether the claimant actually repudiated the contract and rejected the chicken feed in question. The determination of this issue does not have much significance as regards the claim for damages because it is a remedy for breach of a warranty anyway. Its significance is with regard to the defendant's counterclaim. Repudiation means putting an end to all obligations of the parties under the contract. Thus the goods are rejected and the buyer does not have to pay for the price. And if the price

was paid, to recover it. Under s. 54 of the Sale of Goods Act, the seller and the buyer retain their rights to recover money paid where the consideration for the payment of it has failed.

21 Reverting to the issue, the claimant argues that he informed the defendant within reasonable time that the goods were defective and he was rejecting them. He had not retained them without intimating to the seller within reasonable time that he had rejected them and he did not do anything in relation to them inconsistent with the ownership of the seller in them. So he cannot be deemed to have accepted them as provided under s. 36 of the Sale of Goods Act. The defendant on the other hand argues that reasonable time passed without the claimant intimating that the chicken feed is rejected. Defence counsel referred to Mr Arnold Shaba's witness statement where he states that, reduced production was noted immediately after he started using the defendant's feeds. Counsel argues that, that should be in February 2011, but the claimant only complained in June 2011. Counsel refers to the evidence of Mr James Mwape in this case that it only takes 14 days to notice the consequences of defective feed in chickens.

22 Sections 36 and 37 of the Sale of Goods Act are pertinent on this issue. They provide as follows:-

36. The buyer shall be deemed to have accepted the goods when he intimates to the seller that he has accepted them or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them.

37. Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he shall not be bound to return them to the seller, but it shall be sufficient if he intimates to the seller that he refuses to accept them.

23 These provisions set out three ways by which goods may be accepted. That is, intimation that the goods have been accepted, doing anything in relation to the goods inconsistent with the ownership of the seller and retaining the goods for a reasonable time without intimating that they have been rejected. This should work as a checklist when an issue as to acceptance

of goods arises. First check if there is express or implied intimation of acceptance or rejection of the goods by the buyer. If there isn't, check if the buyer has done anything in relation to the goods inconsistent with the ownership of the seller. This has been argued to be difficult to interpret where the goods have been delivered and property has passed to the buyer, because arguably the seller has at that point no ownership which the buyer can inconsistently deal. But it has also been argued that in view of the buyer's right to reject the goods, his property in the goods is conditional only on the reversionary interest in the seller, so it is this interest the buyer must not act inconsistently. Basically the goods must be in a state they can be returned to the seller. See *Chitty on Contract, Specific Contracts*, 28th Edition, para. 43-277 and 43-278. If there is nothing the buyer did to the goods inconsistent with the ownership of the seller, the next thing is to check if reasonable time has passed without the buyer intimating that he has rejected the goods. Section 56 of the Sale of Goods Act states that reasonable time is a question of fact.

24 I have carefully considered the evidence given by Mr Arnold Shaba and Mr Mordecai Chirwa and have found no intimation in any way of the rejection of the chicken feed upon delivery or any day after. I have also found nothing with regard to any act, by the claimant, inconsistent with the defendant's ownership of the feed. What we have is that Mr Chifunda collected 81 of the defective bags on 25th May 2011 and replaced them. After that is the claimant's letter of 15th June 2011 to the defendant demanding K5 339 400 loss of their business as a result of using defective feed. It is clear to me in the circumstances, that the claimant accepted the defective chicken feed. He cannot reject it now and so the defendant's breach has to be treated as breach of a warranty.

25 Under section 53(2) of the Sale of Goods Act, the measure of damages for breach of a warranty is the estimated loss directly and naturally resulting, in the ordinary course of events from the breach of warranty. Under subsection (3), in the case of breach of warranty of quality, the loss is *prima facie* the difference in value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty. Subsection (3) is the normal application of the rule in subsection (2). It lays down *prima facie* rule from which the court may depart in appropriate circumstances.

- 26 Subsection (3) is derived from the first rule in *Hadley v Baxendale* (1854) 9 Ex. 341 which states that:-

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally i.e. according to the usual course of things, from such breach of contract itself, or such as may reasonably have been supposed to have been in the contemplation of both parties, at the time they made the contract, as a probable result of the breach.”

There are other cases however, where special circumstances known between the parties have to be considered. This is where departure from the *prima facie* rule in subsection (3) is appropriate and thus the second rule in *Hadley v Baxendale* has to be followed.

The rule states:-

“...if special circumstances under which the contract was made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from breach of such contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated.”

- 27 It is clear looking at the claimant's claim for payment of K5 339 400 loss of revenue, that his focus is not on the diminution in value of the feed but the loss he made in the poultry business due to the faulty chicken feed supplied by the defendant. The defendant was aware at the time he entered into the contract with the claimants that the feed was for the claimant's poultry business. So, loss of revenue in terms broilers and eggs should have been in reasonable contemplation of both parties in case of breach of the contract by the defendant. The only problem is that the claimant gave no evidence as to how he arrived at K5 339 400 and the defendant hasn't had the opportunity to challenge it. The case is remitted to the Registrar for assessment on this aspect.

The Counterclaim

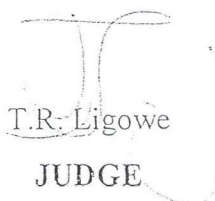
28 The defendant claims K2 600 000 plus 2% interest above the bank lending rate. The principle is money due and payable by the claimant in respect of the chicken layers and broiler feed sold and delivered at the claimant's request. It is stated that the defendant had demanded payment on several occasions but the claimant wilfully refused and failed to pay as a result of which the defendant suffered loss of income as a result of failure to invest the money. The claimant denied owing the defendant that sum of money but gave no basis for the denial. Counsel for the claimant argued in his skeleton arguments that it is not indicated in the counterclaim whether the feed is the same the claimant claims is defective. It was up to the claimant to respond to the counterclaim the way he knows the facts of the case and not to query whether the counterclaim is with respect to defective feed or not. I see no plausible defence in the defence to the counterclaim. I have already found above, that the claimant did not reject the faulty chicken feed and therefore has to pay for it. Just like the claimant, the defendant's problem is lack of evidence as to the amount of K2 600 000.

29 During trial Mr James Mwape wanted to exhibit invoices for all the chicken feed the defendant had supplied to the claimant but I did not allow him because the same had not exhibited to his witness statement filed prior to the trial and had not been disclosed in any way prior to the trial. I have found in the course of writing this judgment that the summons for directions in this case had actually not been heard and so there were no directions for trial. It is the directions for trial that should have specified among other things, how the parties were to make disclosures to each other before trial. For this reason, I also remit this aspect to the Registrar for assessment.

Costs

30 The claimant gets costs for the action and the defendant costs for the counterclaim.

31 Delivered in open court this 8th day of June 2018.


T.R. Ligowe
JUDGE