IN THE MALAWI SUPREME COURT OF APPEAL AT BLANTYRE

M.S.C.A. CIVIL CAUSE NO. 14 OF 1984

BETWEEN:

A.H.B. ENTERPRISES (FIRM) ..... APPELLANT

- and -

PRESS (PRODUCE) LIMITED ..... RESPONDENT

Before: The Honourable the Chief Justice (Mr. Justice Makuta)
The Honourable Dr. Justice Jere, J.A.
The Honourable Mr. Justice Mbalame, J.A.

Chizumila, Counsel for the Appellant
Hanjahanja, Counsel for the Respondent
Manda, Court Reporter
Kadyakale, Official Interpreter

J U D G M E N T

Makuta, C.J.

By a writ of summons dated 4th May, 1983, the appellant brought this action for breach of contract against the respondent. It was alleged in the statement of claim that the respondent had contracted to sell 635 metric tonnes of mixed beans to the appellant at K293.15 per metric tonne f.o.b. ex-warehouse Blantyre. The appellant was to re-sell the mixed beans at a price of K410 per metric tonne f.o.b. Harare, Zimbabwe. The respondent sold the mixed beans direct to purchasers in Zimbabwe instead of selling them to the appellant. The appellant, therefore, claimed K42,316.15 representing the profit it would have earned had the respondent carried out its part of the deal.

In its defence the respondent denied the existence of any contract between the parties. At the trial both parties called witnesses in support of their case. At the end of the day, after carefully weighing all the evidence before him and considering the law relating to the formation of a contract the learned Judge found that there was no contract between the parties. The appellant's claim was, therefore, dismissed with costs. It is against these findings that the appellant now appeals.

The grounds of appeal are as follows:

(i) The learned Judge erred in law in finding and concluding that the letter dated 7th June, 1981, exhibited during trial as Exhibit 8 was not

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written at the time it purports to have been written and further erred in law in holding that it only constituted a counter-offer and not an acceptance of the offer.

(ii) The trial Judge misdirected himself and totally misunderstood the explanation given by the appellant and the argument advanced by Counsel for the omission in referring to Exhibit 8 in earlier correspondences until it was exhibited in court during trial.

(iii) The trial Judge erred in law in finding that there was no contract between the appellant and its sale purchasers and further misunderstood and misrepresented appellant's Counsel's argument in support thereof.

(iv) The trial Judge erred in law in failing to deal with other crucial issues before him which had he dealt with he should certainly have found that even in the absence of Exhibit 8 there was sufficient evidence to prove the existence of and the breach of a valid contract between the appellant and the respondent.

(v) The decision of the trial Judge was against the weight of the evidence.

In the course of hearing the appeal it was observed by the Court that the appellant is described as A.H.B. Enterprises (Firm). Clearly A.H.B. Enterprises is not incorporated and it cannot, therefore, sue or be sued. In Nyasaland Trade Union Congress v. Nkolokosa (1961-63) ALR (Mal.) 367, the court was dealing with the question as to whether a Trade Union Congress, which was not incorporated, could sue or be sued. We agree entirely with Mr. Justice Cram's view that the question whether a party to proceedings is properly suing or being sued is not a mere technicality, and may not be waived even if the party concerned so chooses. Mr. Chizumila conceded that Mr. Bhadurkhan cannot, in the circumstances, sue on behalf of A.H.B. Enterprises. The only way the matter could be done was for Mr. Bhadurkhan to bring the action and describe himself as "Bhadurkhan trading as A.H.B. Enterprises." Short of throwing the matter out, the court used its discretion and allowed an application for amendment. The appeal therefore proceeded as Bhadurkhan trading as A.H.B. Enterprises. We would like to emphasize that extreme care must be taken in the preparation of court documents. This has been emphasized in the past but it would appear avoidable mistakes are still being made and this could result in cases being discontinued. This can lead to serious consequenses to the legal firms.

We now turn to Ground (i). Exhibit 8 is a letter dated 7th June, 1981, and is supposed to be an acceptance by the appellant of an offer to sell beans to him by the respondent. It was contended by the respondent in the lower court that Exhibit 7 which was a letter from the respondent to the appellant did not contain a firm offer. The learned Judge found that there was a firm offer which the respondent made to the appellant. This is not being disputed. What is in dispute is the learned Judge's

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finding that Exhibit 8 was not written at the time it purports to have been written. What led him to this conclusion was the omission of Exhibit 8 in the letters of complaint. It was also not included in the list of documents. To bring this into perspective it may help to mention some of the letters of complaint from the appellant to various people:

(a) a letter dated 10th June, 1981, to the General Manager, Press Produce, Blantyre which was copied to the then Deputy Chairman of Press Holdings Ltd., Exhibit 9;

(b) a letter dated 24th July, 1981, to the Malawi Congress Party and copied to the Governor of the Reserve Bank of Malawi, Exhibit 11; and

(c) a letter of demand from the appellant's legal advisers to the Chief Executive of Press Holdings Ltd., marked Exhibit 15.

In all these letters the message the appellant was trying to convey, and this was the basis of that complaint, was that the respondent had resiled from a contract which had been made between them; and the respondents' action in selling the mixed beans to the appellant's alleged customers was a breach of contract. It is indeed clear from the foregoing that a dispute between the parties had surfaced at the time the letters were written. Exhibit 8 being a letter of aceeptance of the alleged contract must therefore be relevant and indeed crucial. Yet it is not referred to in Exhibit 15, which, as already mentioned above, is a letter of demand from the appellant's legal advisers to the respondent. When asked why Exhibit 8 was never referred to, the appellant replied first that he had forgotten it in his files in Lilongwe although he had written it in Blantyre, where he has other offices. On further cross-examination he replied that the omission was due to human error and subsequently he stated that Exhibit 8 was not important. In our view even if it was not important, it formed part of the whole transaction, in fact, a crucial one to warrant its mention from the very beginning.

Mr. Chizumila, on behalf of the appellant, has pointed out that the learned Judge misrepresented his argument in that he, Mr. Chizumila, did not say that another reason for the omission of Exhibit 8 in the appellant's letters of complaint was that it was not, at that stage, in issue. What he submitted, according to him, was that the fact that the appellant had accepted the offer was not in issue. This argument, in our view, to say the lease, is a fallacy amounting to meaningless nothing. We cannot see how one can talk about the existence of contract without referring to both the offer and acceptance. Mr. Chizumila urged the lower court to accept his contention that Exhibit 8 was written at the time it purports to have been written. He has done the same on appeal in this Court and he has prayed in aid, as he did in the lower court, the condition of the letter to show that it was not of recent origin. In other words its condition shows that it is an old letter, not just recently written for the purpose of this case. We have considered the evidence as a whole and we find no basis on which to differ from the learned Judge's finding on this point.

We now proceed to the other leg of Ground (i), namely that the learned Judge erred in law in holding that Exhibit 8 constituted a counter-offer and not an acceptance of the offer. The letter from Press (Produce) Limited,

signed by A.E. Chibwana, General Manager read as follows:

"Ref. T.3/6/81

6th June, 1981

Mr. A.H. Bhadurkhan,
Proprietor-Manager,
A.H.B. Enterprises,
P.O. Box 5799,
LIMBE.

Dear Mr. Bhadurkhan,

635 METRIC TONS MIXED BEANS 1980 CROP

Further to my discussion with you in my office on 5th June, 1981, I wish to confirm the fact that we can offer you firm 635 metric tons mixed beans 1980 crop packed in 90 Kg. sound second hand jute bags at MK293.15 per metric ton F.O.B. Ex-Warehouse, Blantyre.

The above price includes fumigation and loading. Meanwhile we hold Export Permit which will enable you to prepare customs documents without delays.

Our terms are as follows:

Payment by Irrevocable Letter of Credit against presentation of document at the bank, Sight Bank Drafts, or cash against delivery. Our bank is Commercial Bank of Malawi, Main Branch, Victoria Avenue, P.O. Box 1297, Blantyre. Meanwhile we give you option up to 20th June, 1981, and look forward to hearing from you by return post.

Yours sincerely,

A.E. Chibwana
GENERAL MANAGER"

A reply acknowledging receipt of this letter is as follows:

"7th June, 1981

The General Manager,
Press (Produce) Ltd.,
P.O. Box 416,
BLANTYRE.

(Attention : Mr. A.E. Chibwana)

Dear Sir,

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re : FIRM OFFER FOR 635 MTS MIXED BEANS

We thankfully acknowledge receipt of your letter dated 6th instant, Ref. No. T.3/6/81. We have accepted the above offer as per your letter.

We have already collected from your warehouse some samples of beans and your Operations Manager, Mr. Mzumara, has been very helpful, as per your instructions.

We will be travelling widely to our neighbouring countries to solicit an urgent market for this commodity.

Yours faithfully,

A.H. Bhadurkhan
MANAGING DIRECTOR"

It will be observed that the terms of the offer were payment by Irrevocable Letter of Credit against presentation of documents at the bank, Sight Bank Drafts or cash against delivery. The appellant, in his reply, merely accepted in very general terms and he did not indicate which mode of payment he was going to adopt. As a matter of fact the appellant subsequently suggested payment by Post-Dated Cheques to be redeemed after establishment of a letter of credit. This indeed was contrary to the mode of payment as laid down in Exhibit 7." It is trite law that before there can be a valid contract the parties must be ad idem. Mutual assent to the same proposition is the essential basis of a contract, and consequently a party cannot be said to have contracted with another unless he accepts the identical offer made, without alteration or qualification. Thus in Hyde v. Wrench (1840) 3 Beav, 334 where defendant offered to sell plaintiff a farm at 1,000 pound Sterling and the plaintiff offered 950 Sterling, it was held that the plaintiff had rejected the original offer and the defendant was consequently entitled to refuse the plaintiff's subsequent offer of 1,000 Sterling. Having rejected the original offer the plaintiff was no longer able to revive it by changing his mind.

This Court concurs with the learned Judge's finding that the acceptance did not unreservedly assent to the terms of the offer and it cannot therefore be said that there was a binding contract. The offer to pay by post-dated cheques was a counter-offer.

There is another aspect, the option up to 20th June, 1981. An offeror can withdraw an offer before it is accepted. To be effective, however, the revocation must be communicated to the offeree. The offeror need not furnish this information. It may come to the offeree's knowledge through a third party. Furthermore the offeror may do some act which manifests his intention to revoke the offer. This will suffice should it come to the knowledge of the offeree. In Dickinson v. Dodds (1876) 2 Ch. D. 463, it was held that an offeree cannot accept a withdrawable offer after he has learnt, by whatever means, that it has been withdrawn. See also Howell Securities Ltd. v. Hughes (1974) 1 WLR, 155. In the present case the appellant knew, on the 9th June, 1981, that the respondent intended to sell the beans to purchasers from Zimbabwe. The respondent showed this by holding

direct discussions with the Zimbabwe purchasers and by indicating that they, the respondents, intended to make a deal with the Zimbabwe purchasers. It follows, therefore, that if there had been an offer between the appellant and the respondent the conduct of the respondent on 9th June, 1981, would have been sufficient notice of revocation of the offer.

We now turn to Ground (ii). We do not understand how the learned Judge misdirected himself and totally misunderstood the explanation given by the appellant and the argument advanced by Counsel for the omission in referring to the Exhibit 8 in earlier correspondence until it was exhibited in court during trial. The explanation given by the appellant was that the omission of Exhibit 8 was due to human error. On further cross-examination he stated that it was not important. There is nothing in the judgment to show that the learned Judge misdirected himself or that he misquoted the answers of the appellant. There is nothing to show that the learned Judge totally misunderstood the explanation given by the appellant. So far as the argument advanced by Counsel is concerned, it must be pointed out that Counsel's argument in a case is not evidence. Counsel may comment on how he or she understands the evidence. In other words he or she may express a view on the evidence but that comment or view is not evidence. It is the evidence given by the witnesses that matters. To bring home this point in the present case Mr. Chizumila submitted that Exhibit 8 was not referred to in the earlier correspondence because the question of an offer was not in issue. This is certainly not the answer which the appellant gave when he was giving evidence. The appellant's explanation was that the exhibit was not referred to due to human error and also that it was not important. With the greatest respect, if Counsel's view or comment is not adopted by a court because it is considered to be misleading, or is nowhere in the evidence, it cannot be a subject of appeal.

So far as Ground (iii), namely that the trial Judge erred in law in finding that there was no contract between the appellant and its sub-purchasers is concerned, we have gone through the evidence and there is nothing to show that there was a contract to sell mixed beans to the purchasers from Zimbabwe. We have examined the telex messages on this and they were all merely making enquiries and counter-offers which were not accepted. The only contract between the appellant and the Zimbabwe purchasers which can be discerned from the evidence is for the sale of other types of beans other than mixed beans. This contract was made in March, 1981, and was never fulfilled by the appellant. The latter part of Ground (iii) is that the trial Judge misunderstood and misrepresented appellant's Counsel's argument in support of this ground. The observation we have made in Ground (ii) in respect of a similar argument equally applies to this part of the Ground. Perhaps it may be pertinent to express our surprise on this Ground! Its purpose is not clear. The matter raised in it does not affect the issue in these proceedings. It is indeed of no use at all because it is not relevant.

So far as Ground (iv) is concerned we do not see what remains in the evidence in the absence of Exhibit 8. The issue in this case is whether there was a contract and Exhibit 8 is the key to this because it purports to accept an offer. If Exhibit 8 did not exist it follows that there was no contract and no other evidence can be sufficient to prove the existence

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of a valid contract. There is no substance at all in this Ground.

The appeal is dismissed with costs.

DELIVERED at Blantyre this 22nd day of September, 1986.

(Signed) _____

MAKUTA, C.J.

(Signed) _____

JERE, J.A.

(Signed) _____

MBALAME, J.A.