IN THE SUPREME COURT OF APPEAL

SITTING AT LILONGWE

MSCA CIVIL APPEAL NUMBER 59 OF 2016

(BEING COMMERCIAL CASE NO. 45 OF 2012, HIGH COURT OF MALAWI (COMMERCIAL DIVISION, LILONGWE REGISTRY)

BETWEEN:

JACK BANDA.....APPELLANT

AND

ALLIANCE ONE TOBACCO.....RESPONDENT

CORAM: BEFORE HON. CHIEF JUSTICE A.K.C. NYIRENDA SC,

HON. JUSTICE F.E. KAPANDA SC, JA,

HON. JUSTICE A. D. KAMANGA SC, JA,

Mr Chilenga; Counsel for the Appellant

Mrs Ottober; Counsel for the Respondent

Mr Minikwa; Recording Officer

Ms. Mthunzi; Reporter

JUDGMENT

THE HONORABLE THE CHIEF JUSTICE,

This appeal is from the decision of Justice Manda of the High Court (Commercial Division). In essence the appeal is against the whole of the judgment and we approach it with that understanding.

The appellant, a seasoned tobacco farmer, brought a claim for loss of 3000 kilograms of flue cured tobacco allegedly at a value of MK3,792,000.00. The respondent is a major tobacco buying and processing company in Malawi which, at the material time, was buying the appellant's tobacco under what was described as contract farming. The contracts started in 2005, although the appellant had been dealing with the respondent since 2002. On the facts, the contracts went on until 2012. It is possible that they continued beyond that year.

Further, the facts disclose that during the same period there were a number of experiments that were being undertaken on the construction of tobacco barns in order to improve both the quality and quantity of flue cured tobacco production. In the early years of the experiment until the 2007-2008 tobacco season, the experiments were done with support from German Technical Cooperation Agency (GTZ), Total Land Care and other international partners. It would appear that there was no problem with the experiments during that period except that the

barns could only take what is technically referred to as 250 sticks. The appellant was a beneficiary during that period. There were no issues with those barns. Perhaps for that reason, it does not come out clear what the role of the respondent was during the GTZ experiments. The indication though is that GTZ was dealing with individual tobacco farmers who were interested in improving the quality and quantity of their flue cured tobacco.

According to the appellant, and we will get to more details later, during 2008-2009 tobacco growing season, the respondent introduced experimental tobacco barns that were meant to be bigger and more efficient and that his farm was chosen by the respondent for the experiment. The tobacco barns are alleged to have been built by Mr. Peter Scott as an agent of the respondent. What led to the instant claim is that Mr. Scott supervised the construction of three barns, one was a bigger barn that was meant to carry 800 sticks of flue cured tobacco. The barns are said not to have worked properly as a result, the appellant lost 3000 kilograms of flue cured tobacco to the amount specified earlier. The case for the appellant, by his statement of claim, only to the extent of what is relevant, states:

> 2. In the year 2005, the Plaintiff entered into a yearly contract with the Defendant that the Plaintiff would be selling his tobacco to the Defendant only. This arrangement is known in the tobacco industry as contract buying.
>
> 3. The contract between the parties was repeated yearly from 2005 to 2012 on similar terms and conditions each year.

4. The contract between the parties was made partly orally and partly in writing. In so far as it was oral, certain terms and conditions were agreed in 2008 and 2009 between the Plaintiff and the Defendant; and in so far as it was in writing, it was partly contained in or is evidenced by a Tobacco Contract Marketing Agreement for Flue Cured Tobacco between the parties, invoices and the Defendant's standard guidelines "Zololedwa ndi zoletsedwa pa Balani"

5. It was a term of the contract that the Defendant would provide agronomy services and that the Plaintiff would co-operate on all agronomy matters.

6. It was an implied term of the contract that the Defendant would provide services that would ultimately ensure that the Plaintiff's tobacco was in a good and marketable state.

7. Pursuant to the said agreement, the Defendant built or caused to be built rocket barns for use by the Plaintiff.

8. Upon loading the barns and upon the Defendant starting the curing process, the Plaintiff's tobacco got damaged and the Plaintiff thereby suffered loss and damage.

9. The said loss and damage were caused by the Defendant's breach of the contractual term referred to in paragraph 6 hereof.

10. In the alternative the loss and damage were caused to the Plaintiff by reason of the negligence on the part of the Defendant, its servants or agents.

This is a case that will largely depend on the facts and supporting evidence. As it turns out, the facts are narrow and the evidence is not much and uncomplicated. It is relatively easy to review all the facts and evidence, which we proceed to do in our quest to

rehear the matter in accordance with our mandate. We have introduced some of the facts already. It will make a better approach and understanding of the matter if we give an account with more detail as might be necessary.

The appellant's version of events, by his written statement and testimony in court, is that he had been a tobacco farmer for some years going back to 2002. He was what was described as a contract farmer to the respondent. What that meant was that he was contracted to sell his tobacco to the respondent only. As introduced earlier, the facts are that in 2008, the respondent introduced a rocket barn project that was meant to improve the quality and quantity of tobacco production. The appellant says his farm was chosen, among many, for an experiment to build the barns that would be bigger and more efficient.

For that purpose, Mr. Ronald Ngwira, an employee of the respondent, came to his farm with Mr. Peter Scott. It is said the appellant was told by Mr. Ngwira to cooperate with Mr. Scott in the experiment. Further, it is the appellant's account that he sourced part of the material for the construction of the barns whilst the company brought builders and the respondent brought various materials for the barn. It did not come out clear from the appellant what the "company" was; presumably Mr. Peter Scott's company. What the respondent is said to have brought is in JB3(a) and JB3(b). When the barns were ready, Mr. Scott brought another person, Mr. O'Connor, who worked with him. In the first year Mr. Scott built two small barns. In the second year,

Mr. Scott came to build a third barn which was bigger than the two that he had built the previous year. As in the year before, the appellant brought bricks and the company brought builders.

It was this bigger barn, meant to carry 800 sticks of flue cured tobacco, as opposed to the smaller ones that carried about 250 sticks, which resulted into the appellant's tobacco failing to cure. According to the appellant, the tobacco failed to cure because Mr. Scott had changed the design of the barn. As a result the appellant says he lost 800 sticks of flue cured tobacco weighing 3000 kilograms to the value of MK3, 792,000.00 that he claims.

When that happened, the appellant says he reported the matter to Mr. Ngwira and he was told that he would be compensated. He produced "JB4" in support of that fact. He further said that his complaint was forwarded to the respondent's Operations Manager and in support of that he tendered "JB5". The appellant says he eventually had a meeting with Mr. Ngwira, Dr. Munthali and Mr. Peter Scott on the matter and he was told that he would be compensated; he produced "JB6" in support of the meeting or the outcome thereof. Subsequently and because the compensation was not coming through, he wrote Mr. O'Connor on 20th February, 2012, "JB7". Even then he did not succeed in getting the compensation.

In cross examination the appellant conceded that the items in "JB3(a)" and "JB3(b)" were not for the construction of tobacco barns. He also conceded that the contract document that he had

tendered was for 2011-2012 tobacco growing season and therefore not for the material season, 2008-2009. He yet conceded that Mr. Ngwira did not undertake to compensate him in the communication that went on among all that were concerned in the matter. His position was that he took Mr. Peter Scott to have been brought to his farm on behalf of the respondent because he came with Mr. Ngwira who was an employee of the respondent. He went on to say that during the construction of the barns the respondent provided builders, bamboos, nails, special bricks and cement.

Mr. Kafakalawa Banda was called for the appellant. Mr Banda was working for the respondent at the material time, but had retired at the time the matter came up in court. He used to work as Farm manager for the respondent in the area where the appellant's farm was located. He was in court basically to confirm that the appellant lost tobacco in the process of curing. He could not confirm the quantity.

The respondent called Mr. Ronald Ngwira who was its Senior Economists for Smallholders Farmers. His responsibilities included managing smallholder tobacco farmers and arranging loans for them.

Mr. Ngwira confirmed that there was an arrangement between the appellant and the respondent for buying flue cured tobacco. He was also aware that tobacco barns were being constructed at the appellant's farm by Mr. Peter Scott. According to him, the

the arrangement was between Mr. Scott and the appellant without the involvement of the respondent. He said the appellant entered into an agreement with Mr. Scott who was a Canadian researcher. Mr Scott was never introduced to the appellant as an agent of the respondent.

He went on to say that when the appellant directed his complaint about the loss of tobacco as a result of malfunctioning of the tobacco barn that was constructed by Mr. Scott, he advised the appellant to direct his claim to Mr. Scott or Mr. O'Connor, who was assisting Mr. Scott in the project. He went further and redirected the appellant's complaint to Mr. O'Connor by his email, of 20th August 2009, "RN1". Mr. O'Connor responded to the email placing blame on the appellant for not complying with the advice given by him and Mr. Scott in the construction of the barns, "RN2".

Mr. Ngwira was of the view that in any event there was no justification for the amount being claimed by the appellant which seems to have been plucked from nowhere. He also observed that the appellant, an experienced farmer, would have several barns; if one did not work, the tobacco would have been moved to other barns. Further, that a farmer of the appellant's experience could not suffer total loss of tobacco due to a barn not working properly. The most that could happen is that the quality of tobacco would be affected. He continued to say that personal knowledge of the appellant's farm where there were not less than 10 other barns to which tobacco could have been moved if one

respondent had nothing to do with the construction of the barns. That the arrangement was between Mr. Scott and the appellant without the involvement of the respondent. He said the appellant entered into an agreement with Mr. Scott who was a Canadian researcher. Mr Scott was never introduced to the appellant as an agent of the respondent.

He went on to say that when the appellant directed his complaint about the loss of tobacco as a result of malfunctioning of the tobacco barn that was constructed by Mr. Scott, he advised the appellant to direct his claim to Mr. Scott or Mr. O'Connor, who was assisting Mr. Scott in the project. He went further and redirected the appellant's complaint to Mr. O'Connor by his email, of 20th August 2009, "RN1". Mr. O'Connor responded to the email placing blame on the appellant for not complying with the advice given by him and Mr. Scott in the construction of the barns, "RN2".

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barn was not working properly. He added that in his 19 years in the tobacco industry he never witnessed a situation where tobacco had been thrown away completely for failing to cure, let alone throwing away 3,000 kilograms.

Further, Mr. Ngwira explained that the construction of barns was not only during the 2008 - 2009 tobacco season. In previous years, tobacco barns were constructed by GTZ and several other partners in the tobacco industry. The appellant was among farmers who benefited from those projects. The barns that were constructed that time worked perfectly; there were no issues arising for that period. The 250 stick barns were no longer an experiment because they had been tried and working well. He looked at "JB2" and explained that the document was produced during the 2007 - 2008 tobacco season as a general guide to tobacco farmers in the use of barns that had been constructed by GTZ and the other partners.

Mr. Ngwira confirmed that the appellant was among successful tobacco farmers at the time who was contracted to sell his tobacco to the respondent. For that reason, the respondent used to provide agronomy services to the appellant. He further accepted that Mr. Peter Scott and Mr. O'Connor were introduced to the appellant by the respondent at a time when there were attempts to improve the quality of tobacco from farmers. He however said that Mr. Peter Scott and Mr. O'Connor were not introduced as agents of the respondent and that the respondent

had never been a party to the agreements on construction of tobacco barns.

According to him, the 800 stick barn was only built on the appellant's farm because other farmers, most of whom were smaller farmers, rejected it. This was the case as most of the contract farmers with the respondent were smallholders. And, that explains why the experiment for the 800 stick barn was introduced to very few farmers and of them all, it was only the appellant who accepted the experiment on his farm.

It is not in dispute that the appellant had an arrangement with the respondent in what was termed "contract farming" where his tobacco was being sold to the respondent during the period in question, that is 2008-2009 tobacco growing season. Further, the facts are that the respondent supported the appellant as a tobacco farmer with the aim of improving both the quality and the quantity of tobacco production.

In support of the contract farming arrangement, the appellant tendered "JB1", Tobacco Contract Marketing Agreement 2011/2012. Obviously this was not the relevant contract for the tobacco season in question in this matter. The appellant did not explain why he did not produce the relevant agreement for the 2008-2009 season. The tendered document is specifically for 2011-2012 and states, in paragraph 12, that it is valid for the 2011-2012 selling season.

that the marketing agreements were repeated yearly from 2005 to 2012 on similar terms and conditions. We are unable to verify this fact. It might have been easier for us to work around this fact had the appellant produced similar contracts for the other tobacco seasons, if for some reason he did not have with him the contract for 2008 – 2009 season. What we notice is that the appellant was able to produce in evidence several other documents, "JB2", "JB4", "JB5" and JB6" for the 2008 - 2009 season. For some unexplained reason, the most critical document in support of the appellant's claim was not produced. If this was oversight, it turns out to be very costly, especially that the respondent has specifically challenged the contract document that has been rendered.

It is a cardinal principal of law, in civil cases, that he who assets must prove their case on a balance of probabilities and such proof entails presentation of relevant facts and production of appropriate evidence that would convince the court that the claimant has made out its case. It will not be for the court to take for granted the existence of facts and any evidence. If that were the case, then the whole premise of having a trial would be meaningless and worthless.

Our system of justice is adversarial. A court cannot compel production of a document if neither party wishes to adduce this in evidence; *(see Derby & Co Ltd v. Weldon, Financial Times,*

November 21, 1990). The framework of evidence is established by the parties and the court has only a limited capacity to intrude upon the parties' presentation of evidence, *(see Neil Andrews "Principles of Civil Procedure" p42).* While the court may seek clarification of issues, it should not descend into the arena. These are principles that are at the heart of our civil procedure although it is advocated in modern times that the parties and their lawyers should be encouraged to be less pugnacious and not take advantage of each other's mistakes, *(see Neil Andrews,* supra).

We mention these principles because we believe there was a serious lapse in the case for appellant which the court below, as we have, might have been bothered about. As trial went on, it must have become obvious to the appellant that failure to produce in evidence the relevant contract document needed to be explained. As we state above, there was no attempt to explain why the relevant contract was not introduced in evidence. Unfortunately, this is a gap which a court cannot remedy without being manifestly inquisitorial.

Let us though and for a moment assume that the seasonal contracts between the parties were on the same terms since 2005, and that what is in the 2011-2012 contract is exactly what was in the contract for all the previous tobacco seasons. If the contract that we are looking at is what we should go by as being similar to the 2008-2009 season contract, we would still not be

able to get much help from it on the question of construction of barns.

As we mention above, the sample contract that has been put in evidence by the appellant is largely about the sale of tobacco. The closest that the contract comes to mentioning other activities between the appellant and the respondent is in paragraph one and two where it says:

> (1) The buying company will provide agronomy services only to the extent that is deemed necessary by them.
>
> (2) The club/estate agrees to cooperate on all agronomy matters, grading and presentation....

We draw our attention to this paragraph because the appellant seems to suggest that the barn in question was constructed on the instructions of the respondent as part of agronomy services. The difficulty we then encounter is that in support of what is meant by agronomy services the appellant tendered three documents, "JB2" and "JB3(a)" and "JB3(b)'. "JB2", ZOLOLEDWA NDI ZOLETSEDWA PAMA BALANI", happens to be a pamphlet that the respondent sends, generally to all its farmers. It contains information meant to help farmers to better prepare their tobacco for sale. "JB3(a)", Smallholder Input Delivery Note" is a list of farm inputs that the respondent assisted the appellant with. They included seed, fertilizer and related inputs. "JB3(b)" is a delivery note for fertilizer supplied to the appellant in 2011. In other words, the documents that the appellant produced as evidence of agronomy services were not about the construction of tobacco barns and therefore not helpful to the appellant's case.

Further, the statement of claim avers that certain terms and conditions of the agreement between the parties were oral. The statement does not however say what the specific oral terms and conditions were and what they related to. Thus far, we are unable to uphold the appellant's claim in contract, either written or oral.

The appellant's case is in the alternative. It seems to us that the appellant alternatively seeks to rely on his long standing relationship with the respondent and contends that as a result of that relationship he accepted Mr. Peter Scott as an agent of the appellant and in that capacity he accepted him to construct the tobacco barn on his farm. Paragraph 10 of the statement of claim, which should be repeated, states:

> In the alternative the loss and damage were caused to the plaintiff by reason of the negligence on the part of the defendant, its servants or agents.

Whether a matter is in contract or in tort will best be guided by the pleadings. It is not safe to leave a court to guess on the best course of action because the pleadings are not clear enough. The first part of this action is clearly in contract. When it comes to the alternative claim, it is not clear what the agent is said to have done that founded the action because there are no particulars of the alleged negligence pleaded. Whether his actions were tortious or contrary to the terms of the contract, is unclear because the pleadings lacked such particulars. Therefore, it is not surprising

that the court below ventured into considering tort as well as contract.

It is long settled that where a party pleading alleges negligence on part of a defendant, particulars must always be given of any alleged negligence, showing in what respects the defendant was negligent. The statement of claim should state the facts on which the supposed duty is founded, the duty to the plaintiff with the breach of which the defendant is charged, the precise breach of that duty of which the plaintiff complains and lastly, the particulars of the injury and or damage caused or sustained, *(see Fawler v. Lanning [1959] 1 Q. B. 426; Bills v. Roe [1968] 1 W.L.R. 925.)*

We have it on good authority that the objective of pleadings has been outlined as follows:

First, to define with clarity and precision the issues or questions which are in dispute between the parties and fall to be determined by the court, *(see Thorp v. Holdsworth, (1876) 3 Ch.D. 637.)*

Secondly, to require each party to give fair and proper notice to his opponent of the case he has to meet to enable him to frame and prepare his own case for trial, *(see Palmer v. Guadagni, [1906] 2Ch D 494; Esso Petrolium Co. Ltd v. Southport Corporation[1956]A.C. 218.)*

Thirdly, to inform the court what are the precise matters in issue between the parties which alone the court may determine, since they set the limits of the action which may not be extended without due amendment properly made, *(see The Why Not(1868) L.R. 2Al.)*

Fourthly, to provide a brief summary of the case for each party, which is readily available for reference, and from which the nature of the claim and defence may easily be apprehended, and to constitute a permanent record of the issues and questions raised in the action and decided therein so as to prevent future litigation upon matters already adjudicated upon between the litigants and those privy to them, *(see Hoystead v. Commissioner of Taxation [1926] A. C.155.)*

As the matter went to court, we have no doubt in our minds, as regards the alternative claim as it was, that it was not immediately clear to the respondent what it is that its servants or agent were alleged to have done that resulted into loss and or damage to the appellant's tobacco. And, as we observe earlier, on account of lack of sufficient particularity, the court below tottered between tort and contract on the alternative claim. Be that as it may, we will still attempt to look at the possible basis and merits of the alternative claim in relation to the facts and the evidence.

Going back to the facts, what is clear is that there was a longstanding and well defined working relationship between the parties. The appellant sold all his tobacco to the respondent and the respondent in turn offered certain services to the appellant

towards production, preparation and care of tobacco. We have identified some of the services rendered by the respondent to the appellant from some documents that were put in evidence. The question at this point is whether the construction of barns by Mr Scott and his team was at the instance of or on any account as agent of the respondent.

On the facts that have emerged, the appellant can correctly be described as a seasoned and professional farmer. He indeed described himself as a professional farmers since 1970. He had worked as Tobacco Estate Manager for Bunda College of Agriculture and Press Agriculture. We take judicial notice of the fact that Bunda College of Agriculture is a National University in this country that offers Degrees in Agricultural Studies. Press Agriculture is one of the biggest companies in this country that owns vast agricultural farms. It is also in evidence that the appellant had been a contract farmer with the respondent since 2005.

These facts, coming from the appellant himself, introduce him as a person with vast knowledge and expertise in agriculture, in particular, tobacco growing. The appellant does not seem to us to be the kind of person who could easily be misled or misguided in his trade and profession. By his own professional summation, we are convinced that he was capable of managing his tobacco farming and processing with a high level of expertise. Therefore, we are rather curious about the appellant's account of events and the truth of what he presented.

Scott, the appellant, by his written statement, said:

> In 2009 Alliance One Tobacco Company Ltd introduced a rocket barn project. My farm was chosen to participate in the project. I received a document on the handling of the barn marked "JB2"
>
> I was told of the choice of my farm by Mr. Ronald Ngwira who came to my farm with Mr. Peter Scott. I was advised by Mr. Ngwira to cooperate with Mr. Scott in the project.
>
> I sourced bricks and grass for the barn whilst the company brought builders who built two barns. The defendant (respondent) delivered various materials to me for the barn. I produced delivery notes JB3(a) and JB3(b).

The appellant was fully aware that what was contained in the exhibits that he tendered were not materials for the construction of barns by Mr. Peter Scott. What is obvious to us is that the appellant was trying, by every measure, to draw the respondent into the construction of the barns, even at the expense of introducing inappropriate documents in support of his contention.

It is also worth noting that the construction of barns on experiment, to improve curing of tobacco, had been undertaken several times by various institutions independent of the respondent. The appellant was in fact a beneficiary of those experiments before the Peter Scott experiment. As with the other

experiments, where the appellant's farm was chosen as a beneficiary and the experiments were conducted independent of the respondent, we do not see what was different this time around about Mr. Ngwira approaching the appellant on the experiment by Mr. Scott and his team.

Following the alleged damage to his tobacco, the appellant decided to seek compensation. For that purpose he wrote the respondent on 20th June, 2009, Exhibit JB4. The first sentence of the letter reads "May you please help me." We have carefully read the letter. True to the introductory paragraph, we got the impression that the appellant was seeking the help of the respondent to get compensation from Mr. Peter Scott and his team. It becomes even more evident from the appellant's letter of 20th February, 2012, "JB7" which was addressed to Mr. O'Connor, who was part of Mr. Scott's team. The letter refers to a meeting that was held at the appellant's farm where Mr. Scott, Mr. O'Connor and Mr. Ronald Ngwira were in attendance. According to that letter when the matter was discussed, Mr. Scott promised to compensate the appellant for the loss. What comes out from these letters is that the appellant knew who was truly responsible for the situation he was in. It was Mr. Peter Scott and his team.

The impression we get is that the appellant realized that it was going to be difficult to recover his loss from Mr. Peter Scott and his team. These people seem to have been in the country mainly for the experiments and were not fully settled. From the

communication that we have seen on record, it was not easy to get Mr. Peter Scott who apparently was the team leader. It is most probably that in those circumstances the appellant decided he would try his luck suing the respondent.

We are grateful to all counsel before us for the exhaustive manner in which they researched on the law on agency and directing our attention to the principles in *Garnac Grain Company Incorporated v.H.M.F. Faure and Fairclough Ltd and others [1968] AC 1130 and Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2QB 480.* The principles in these cases will remain cardinal, but as usual, they must be supported by relevant facts and evidence.

In dealing with the appeal we realize that we have not followed the path of the grounds of appeal and discussed much of the law raised by the appellant as well as the respondent. This is because the facts of the appellant's case and the entire evidence placed before the court below fly in the face of reason. We simply do not have a credible story and therefore found it unnecessary for us to labour with all the issues raised in the grounds of appeal and the supporting principles of law.

We therefore dismiss the appeal in its entirety.

We have agonized over the question of costs, considering the history of the matter and the relationship between the appellant

and the respondent. We order that each party bears own costs of the appeal.

Pronounced in open court at Lilongwe this 19th day of July, 2019.

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HON. CHIEF JUSTICE A.K.C. NYIRENDA SC,

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HON. JUSTICE F. E. KAPANDA SC, JA,

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HON. JUSTICE A. D.KAMANGA SC, JA,