

TANZANIA / JUDGMENT

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.fu"l>vv-J"4,, ,, M~"" / I I . IN THE HIGH COURT OF TAIjZANIA . AT MBEYA ""-..... (DC) CTITIL AfP'.&A.L Nill1BER 17 OF 1m (From the decision of the Resident Magistra,e's · Court .of Mbeya. in Ci't'il Case No.52 of 19o/1Y OLAM TANZANIA LilUTED. ~ o .AFFELLANT VERSUS .- HALA.WA KWILABYA : ... RESPONDE.i"rr -- JU.ooMENT In an agreement (Exho P .I) signed b;y the litigants on 2nd July, 1997, the appellant as principal appointed the respondent as her commission agent. The agency was for the purchase of what was elescribed as good q\lality parchment coffee. It was .agreed . : " that the agent would buy the ·()f.fee, in ' consideration of ~,hat is referred to as a commission and a ~ pont: charge, each amounting to shs.10.09 per kilegramme, thereby making the total commission and charge shs~20.00 per kilogram,~e. The agency W¥ created for the coffee crop season of 1997/1998 which would last for tour months c~mmencing on 15th July, 1997. Several other principal terms of the agreement which are directly relevant here are contained in paragrap.¾ 5 of the agreement 1 namely:-

- (a) that the place of delivery of the coffee was at the premises -,f . Mbo~i Coffee Curing Company, Mlowo area at any warehouse as instructed by the principal; {b) that for the avoidance of doubt, delivery was deer.ied tto , have been effected upon the principal having tal~en deliver.y; ·oe/2 2 '
- (c) that where the principal rejected the parchment coffee upon delivery by the agent, it was up,n the agent to bear the cost of reshiping the 9offee; (d) thaf when ti,, ·· the agent tGnders delivery of parchment . coffee to the ~rincipal . 1 he shall be bound on request to afford the Principal a reasonable opportunity of exmnining the parchment· coffee for the purpose of as.certaining whether they are in conformity with the quality norms of the principal.a On his part, as stipulated in paragraph 6 of the agreement, the principal had the following obligations, that is to say:-
- (a) to pay to the agent the requisite commission after the full··· and final settlement of all accounts;
- (b) to tntiet all expenses, including transport and incidentals, related to the transi,ortation of the parchment coffee from the buying post to the a::;ipointed place of delivery; .Cc) to provide to the agent the necessary documents ,r;e . · including Goods Received Notes (GRNs) and a co.py_ of the advance payment voucher; ·

- (d) to provide such sum or sums in advance to enable the agent to purchase the parchment coffee on behalf of the principal;
- (e) to provide weighing scale properly stamped by the Weights and Measures Department at the buying post; and (f) to make proper fumigation of the buying post if required. It was further agreed in paragraph 9 that for the purpose of ascertaining the accounts between the parties -
- (a) the quantity delivered, and the value of the same was to be as per GRNs duly endorsed by the principal;
- (b) the sums advanced were to be recovered by way of deduction with the value of parchment coffee actually delivered save in case of difficulty /3 3
- where the principal could exercise her right of sale that was created by the collateral, (c) that despite the provisions of sub-paragraph (a) of paragraph 9, the signing of the agreement by the agent or any subsequent acknowledgment in the principal's documents or books by the agent was sufficient proof of amounts received by him from the principal and of outstanding liabilities owed by the agent to the principal as reflected in the latter's books of account; and
- (d) that the principal had a lien on the agent's commission and buying post charges in case of any outstandings arising from the amounts advanced. It seems that differences arose between the principal and her agent over actual quantities of coffee that the latter delivered to the former and the value thereof. As a result the principal brought a civil action against her agent before the Court of Resident Magistrate sitting at Mbeya, which became EoH Civil Case No 52 of 1997. It was found in the amended pleadings that in breach of the contract for the purchase of parchment coffee, the defendant (who was the agent) did not deliver coffee worth shs. 1,071,332/- and that he did not account for that sum of money at the close of the season. It also averred that the collateral for the sum of money that was advanced to the defendant was a house. So the plaintiff prayed for the following reliefs:- 1, payment of shs. 1,071,332.00; 2 an order for foreclosure;
- an order of sale;
 - interest at 3% per annum from the date of the suit to the date of judgment;
 - costs; and 6 the usual ... prayer for any other relief the Court may deem just. The defendant denied liability. The foregoing were the pleadings. The plaintiff and the defendant called
- On 4/4/04 witness each Joseph Mahyakende (FW1) testified for the plaintiff. ... He swore that a goods received note (GRN) was issued for each delivery of coffee. That the GRN had three copies: the duplicate was given to the defendant in acknowledgment of the coffee he delivered. It was the plaintiff's case that a total of shs. 1,000,000.00 was advanced to the defendant who accounted only for a sum of shs. 158,723,367.00. He,

therefore, failed to account for a sum of shs.,5,331 133,00. Since, however, he was entitled to shs.2 1 661 1 701.00 as commission, and when that sum of money was set off, there remained a sum of shs.3,071,332.00. This is the sum of money on which the suit was founded. Joseph Mahyandeke (PW1) tendered in evidence a number of GRNs which were marked as Exh. 1 to 6. Of these he said, GRN No.6737 brought controversy. It was evidence of the delivery of 64 bags of coffee; for instead of recording total of 3176 kg. they recorded 5355 kg. Thus he claimed that there was excess weight of 21179 valued at shs.2t387 1950.00 in favour of the defendant. PW1 swore that since a bag of coffee has a standard weight of 50 kg, 64 bags should not have made 53555 kg. The weight, he said, was 3176 kg. When cross-examined PW1 stated that the defendant bought and delivered 1411.242.7 kg. valued at shs.166,023 1 667.00 because he "doubled" the GRNs. He thought the

- actual weight that was delivered by the defendant was 133,817.84 which was valued at 159,456y557.00. That there was what was described as weight loss being the difference between the weight of coffee with a higher moisture content when delivered and the weight after the coffee had been dried. This was found to be 732,790 kg worth a sum of shs.732,790.00. PW1 testified further that he was the Unit Administrative Manager, it was his assistant who raised the GRNs. When further questioned, he said that they did not reject the coffee with a high moisture content; they took delivery of it and then dried it; and that the defendant was not called to be shown the moisture laden coffee before it was dried and that this was a breach of contract. Only the defendant testified for the defence. He admits to have entered into a crop purchase agreement with the plaintiff following which the principal could exercise her right of sale that was created by the collateral; (c) that despite the provisions of sub-paragraph (a) of paragraph 9, the signing of the agreement by the agent or any subsequent acknowledgement in the principal's documents or books by the agent was sufficient proof of amounts received by him from the principal and of outstanding liabilities owed by the agent to the principal as reflected in the latter's books of account; and (d) that the principal had a lien on the agent's commission and buying post charges in case of any outstandings arising from the amounts advanced. It seems that differences arose between the principal and her agent over actual quantities of coffee that the latter delivered to the former and the value thereof. As a result the principal brought a civil action against her agent before the Court of Resident Magistrate sitting at Mbeya, which became RoM. Civil Case No 052 of 1997. It was held in the amended plaint that in breach of the contract for the purchase of parchment coffee, the defendant (who was the agent) did not deliver coffee worth shs.3 1 071 ,332/- and that he did not account for that sum of money at the close of the season. It also averred that the collateral for the sum of money that was advanced to the defendant was a house. So the plaintiff prayed for the following reliefs:-

1. payment of shs ,3 ,071 1532 .. 00; .. (2 .. an order for foreclosure; 3. a final order of Sale;

4. interest at 391, per annum from the date of the suit to the date of judgment; 5., costs; and 6., the usual order for any other relief the Court may deem just. • The defendant denied liability., The foregoing were the pleadings. The plaintiff and the defendant called
- 0. /4 4 on", witness each Joseph Mahyakende (PVJ1) testified for the plaintiff. He swore that a goods received note (GRN) was raised for each delivery of coffee. That the GRN had three copies: the duplicate was given to the defendant in acknowledgement of the coffee he delivered.. It was the plaintiff's case that a total of shs.164,600 1000.00 was advanced to the defendant who accounted only for a sum of shs.158,723,367 .. 00. He, therefore, failed to account for a sum of shs.,5,133,;33.,00. Since, however, he was entitled to shs;2 1661 1701.00 as commission, and when that sum of money was set off, there remained a sum of shs.3,071,332.00. This is the sum of money on which the suit was founded. Joseph Mahyakende (PW1) tendered in evidence a number of GRNs which were marked as Exh. 1 to 6. Of these 1 he said, GRN No.6737 brought controversy. . It was evidence of the delivery of 64 bags of coffee; for instead of recording total of 3176 kg. they recorded 5355 kg. Thus he claimed that there was excess weight of 219 valued at shs~2,387,950.00 in favour of the defendant. PW1 swore that since a bag of coffee has a standard weight of 50 kg, 64 bags could not have made 5355 kg the weight, he said, it was 3176 kg. when cross-examined PW1 stated that the defendant bought and delivered 144 1 242.7 kg valued at shs.166,023,667 ,,00 because he had doubled the GRNs. He thought the actual weight that was delivered by the defendant was 133,817.84 kg, which was
- valued at 159,456 1 557.,00 •. That there also was what was described as weight loss being the difference between the weight of coffee with a higher moisture content when delivered and the weight after the coffee had been dried. This was found to be 732 ;790 kg worth a sum of shs. 732,790 .00. PW1 testified further that he was the Unit Administrative Manager, it was his assistant who raised the GRNs; When further questioned he said that they did not reject the coffee with a high moisture content; they took delivery of it and then dried it; and that the defendant was not called to be shown the moisture laden coffee before it was dried and that "• • This was a breach of contract • it_.. Only the defendant testified for the defence. He admits to have entered into a crop purchase agreement with the plaintiff, following a/5 ... 5 which he was advanced a total sum of shs 164,456,460.00, He stated further that he, by the end of the season; bought coffee worth shs 166 1023,667.00. Inferentially, he means that he had to spend his money amounting to shs. 1,567 1 267 .00 to reach that amount. He admitted also that some 51 GRNs were issued to him in acknowledgement of deliveries of coffee he made to the plaintiff. That according to those GRNs he bought and delivered a total of 144,242.7 kg of coffee worth shs.166,025,667.,00. He denied that the plaintiff ever told him that the coffee he bought, had a high moisture content. After considering the evidence the learned trial Senior Resident Magistrate observed that: "... a. in answer to framed issues and on preponderance of probabilities it is not clear from the evidence of both sides what value of coffee was delivered by the Agent to Principal. in respect of the advanced monies by the Principal. According to the evidence adduced there is doubt if there was any excess of coffee supplied by the ,

\gent. to the Principal all and above the advanced monies. To meet the ends of justice the suit is partly dismissed and the parties are ordered to sit down on mutual understanding to determine on the actual initial deliveries of coffee forgetting the allegations of moistured coffee and replacement of GRNS for the purposes of determining the actual commission entitled to the Agent and actual balance of the advanced monies if any to be paid back by the Agent to the Principal. Article 9 (a) and (b) of UAGP-MENT FOR PURCHASE OF

- PARAFONT: GENT COFFEE: BY COMMISSION. AGENT ON BEHALF OF OLAM TANZANIA LIMIT. SD is to be obeyed by the both parties. In the circumstances this suit was filed against the Agents. I, order each party to bear the costs, and, Both parties were aggrieved; the Plaintiff appealed and the defendant cross-appealed. I will consider the appeal first. Four grounds were raised in the appeal as follows:- 1 • that the learned trial Resident Magistrate erred on putting too much weight on the issue of weight loss in the course of his judgment, when the value of the weight loss was Tshs/7.32 1 790/- only compared to the 6 cash outstanding; that stood at Tshs.3,071 1332/-; 2 • that the learned trial Resident Magistrate erred on his failure to decide the case on the evidence available;
- 3. that the learned trial Resident Magistrate erred on considering the Respondent's defence as a cross-suit, when there was no counter-claim, and this led him to a wrong conclusion; and 4.- that the learned trial Resident Magistrate did not understand the Plaintiff's case before him otherwise there are answers to all the questions raised by him in the course of his judgment on the record which was before him. Those were the facts and Legal arguments were presented by counsel who were directed to argue the appeal by way of written submissions. Mr. Mbise, learned counsel for the appellant; was directed to file his submissions by 30th August, 2000 and the respondent was to do so by 13th September, 2000. Mr. Mbise submitted his arguments for filing within time; the respondent filed his on 18th September, 2000; five days out of time and without leave of Court. Hence Mr. Mbise, learned counsel for the appellant, urges me to have the respondent's written arguments rejected. He did not say why. Now what is the effect of a court order that carries instructions which are to be carried out within a predetermined period? Obviously such an order is binding. Court orders are made in order to be implemented, they must be obeyed. If orders made by courts are disregarded or if they are ignored, the system of justice will grind to a halt or it will be so chaotic that everyone will decide to do only that which is convenient to them. In addition, an order for filing submissions, is part of the hearing. So if a party fails to act within the prescribed time he will be guilty of 'indifference' in like measure as if he defaulted to appear. That being the position the respondent cast to the winds his right to file final submissions. It follows, then the submissions which were filed out of time by the respondent will not be acted upon. So there are only Mr. Mbise's submissions to consider. Mr. Mbise begins his arguments with a recount of the events and the facts which crystallized into these proceedings. He underscores the crux of the dispute by saying that the coffee which was delivered by the respondent was rejected by the factory because of its high moisture content. So the

appellant had to dry it before it was accepted., This process reduced the weight of the coffee that the respondent delivered to the appellant. According to PW1 the difference in weight came to 732~70 with a value of shs.,732,790.,00. It is contended that the respondent should be responsible for this loss. This claim was rejected by the trial court. I am asked to accept it. Now, according to paragraph (5) (a) and (b) of the agency agreement delivery was deemed to have been effected upon the appellant, after the latter took possession and that the point of delivery was on the premises of the Mbozi Coffee Curing Company at Mlowo. It is undisputed that that is exactly where the respondent delivered the coffee to the appellant's other agent. It would seem that where the principal had doubts about the quality of the coffee paragraph (d) of paragraph 5 of the agreement would become applicable. It provides that when the agent tendered delivery of coffee to the principal, he (the agent) was bound on request to afford the principal a reasonable opportunity of examining the coffee for ascertaining whether it was in conformity with the quality norms of the Principal. There is no evidence that the appellant ever required the respondent to have the coffee examined. Even if it is assumed that the respondent delivered wet coffee, there is just no evidence to prove that fact. In fact circumstances: at the point of delivery: militate against the appellant. First; the coffee was delivered to his agent who raised no objection; secondly, the explanation of the coffee as a result of which it is claimed was found to be wet was done behind the respondent's back and contrary to the letter and spirit of the contract. More importantly, paragraph 9 (a) of the agreement provides that the quantity and the value of the coffee was to be as per GRN duly endorsed by the principal. Evidence from the plaintiff from the defence left no doubt to the fact that every delivery was witnessed by a GRN that was duly endorsed. The appellant is therefore, estopped from denying that the coffee delivered by the respondent was not as shown on the various GRNs which were tendered in evidence by one Joseph Mahyakende (PW1). Accordingly, the first ground of appeal in which it is contended that the learned trial Resident Magistrate erred in putting too much

weight on the issue of weight loss which stood at shs.732~790.00 compared to the outstanding amount of shs. 3 1071,332400 would fail. It would also fail because according to Mr. Mbise, learned counsel for the appellant, in as much as he said at the bottom of page two of his written arguments, the documents which were executed when the appellant was taking delivery of coffee from the respondent - included; the number of the motor vehicle used, the moisture content, coffee receipt GRN11. This implies that the appellant was aware, at least there is reason to believe so that she could have easily noticed inferior coffee at the time of delivery. Consequently, she cannot be awarded damages for alleged losses which were brought about by her own failure to abide by the GRN procedures. Mr. Mbise argued that the second problem that occurred during the currency of the agency agreement related to GRN 6737, according to the evidence that document was for a consignment of 64 bags of coffee. It was the plaintiff's case that that consignment weighed 3176 kilograms; instead the weight was incorrectly recorded on the GRN as 5355 kilograms. It was contended, therefore, that there was an error which gave rise to weight

loss of 2179 kilogrammes worth 2 ;287 ,950.00o ilccording to the plaintiff? s~.oase, therefore, the actual weight was not s~s.5,622,756.,00 as shown on the disputed GRN 6737; it was shs.3,334,800.00. As l'lr. Mbise has pointed out the trial court did not decide this sticky issue. He has invited me to do so, which,, indeed, I must do~ The crux of the matter here is whether indeed the -respi!"ndent delivered 5355 kilogrctnm1es as regc.rds GRN 6737. It w2-,s in the i,18.intiff' s evidence that the bags used would bo loaded with coffee ~.Jeighing an average of 50 kilogrrunmes e • ./9 7 9. , per bag. On that evidence 64 bags x 50 kg would bring a total of 3200 kilogrammes. Thus the weig..l:tt of 3176 1•1hich it is alleged 1r1as realised from GRN 6737 of 3176 kilogrammes is within the range of the plaintiff's case. The respondent s2.id nothing concerning this particul2.r GBN • All that he said about the :tffinNs is that they were is.sued by tho pl.:...intiff, the originals of which the plaintiff tendered in evidence e.S exhibits• This implies that the weight of each consignment was correctly vcrificdo Now 1 in order for the consignment relating to GRN 6737 to bear the weight as shown on it, each bag of coffee weighed 5355 kg~ 64, namely, any average of • 83.63 kilogrammes. No evidence was adduced to establish that those bags wer~ incapable of carrying that weight~ What compounds this issue is the fact that the person who took delivery of the coffee from the defendant was not called to testify on this important mattero Indeed, Joseph Mahyakende (IW1) did not testify that he ever reweighted the disputed bags and found the actual weight of that consignment. It follows that all there is here is no more than blame that is cast on the respondent, leaving untouched the person who took delivery of the coffeaa For there is a reQl P,ossibility for that person to have stolen the coffee himselfn So the omission to call him into the witnessed box to have his veracity tested has weakened the plaintiff's case. I would, upon re-appreciation of the evidence, hold that the plaintiff failed to prove her claims in this behalf• Uph..ll the foregoing considero.tions the second ground of appeal in which it-is alleged that the learned trial Resident M3gistr~te failed to decide the case on the evidence available and the fourth issue in which it is complained that the trial court did not understand the plaintiff's case have not bee~. substan°f;_iated., It is alleged in the third ground of appecl that the learned trial Resident Magistrate erred in considering the respondent's case as a cross-suit \then there was no counter-claim. This ground was not argued; by necessary inference I deem it as having been abandonedo ~ •• /10 •• 10 Upon the foregoing considero.ticr.:s the appeal fails 311d it is hereby dismissed with costs. Delivered. For frppellant Mr. Mwangole 1 1-\d:vocate: For Respondent. Certified true copy of the original Judgement. DI S'T'RI CT REGISTRAR HBEYA

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