IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KISANGA, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 30 OF 1993

BETWEEN

INCAR TANZANIA LIMITED ..... APPELLANT

AND

M/S MAGUGU FARM LIMITED
CO-OPERATIVE & RURAL DEVELOPMENT BANK } RESPONDENTS

(Appeal from the decision of the High Court of Tanzania at Arusha)

(Nchalla, J.)

dated the 14th day of May, 1992

in

Arusha H/C Civil Case No. 84 of 1989

JUDGEMENT OF THE COURT

KISANGA, J.A.:

This appeal arises from the decision of the High Court (Nchalla, J.) allowing the respondents' claim based on a breach of contract for the sale of goods. The background to the case may be summarized briefly as follows: Under a written contract, Incar Tanzania Ltd. Arusha, the appellant in this appeal, agreed to sell a set of farming implements to the respondent company. The implements consisted of a fiat tractor, a harrow and a chisel plough. The contract was concluded at Arusha and delivery of the equipment was to be effected in Dar es Salaam. The contract price was paid partly through a loan of Shs. 4,000,000 from the Co-operative and Rural Development Bank (C.R.D.B.), the

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second respondent, and partly from the respondent's own resources in the sum of Shs. 202,000/=. After the contract price was paid PW.1, Managing Director of the respondent company, travelled to Dar es Salaam to take delivery of the implements there only to find that the items were not ready for collection. There was yet to be done pre-delivery service to these implements and a customs clearance certificate in respect of them was yet to be obtained. It was not possible to register the tractor before a customs clearance certificate was obtained in respect of the equipment by the appellant company. The respondent was asked to go and come back on a number of times but on each occasion he found the implements not yet ready for collection. Out of frustration he threatened to rescind the contract and demanded a refund of the purchase price which he had paid at Arusha but in vain.

Thereafter the appellant company alleged that PW.1 decided to take delivery of the implements despite the absence of a customs clearance certificate. P.W.1, however stated that a new arrangement was reached whereby he was to travel back to Arusha and the appellant company was to transport the implements to its Arusha branch where he (PW.1) was to take delivery of the same. The trial judge believed the version of PW.1; we think he was entitled so to do.

Again the appellant company asserted that on PW.1's own request, it took the implements to the railway station, Dar es Salaam and loaded them on a railway wagon chosen by PW.1 himself, for transportation to Arusha. The consignment so loaded included a trailer sold by the appellant to one

Mr. Mario Gikas of Arusha. The appellant claimed that before PW.1 left Arusha for Dar es Salaam, Mr. Gikas had arranged with him (PW.1) to transport his trailer to Arusha. On the basis of such arrangement, the appellant went on, it (the appellant) handed over the trailer to PW.1 in Dar es Salaam who duly made his own arrangements to transport it together with his own implements to Arusha. PW.1, however, denied completely making the alleged arrangement with Mr. Gikas, adding that at the time material to this suit Mr. Gikas was not an acquaintance of his. Yet Mr. Gikas was not called in support of the alleged arrangement with PW.1 for the transportation of his trailer.

According to PW.1, however, it is the appellant company which undertook to transport the implements to Arusha, but as he was anxious that the implements should reach Arusha as soon as possible he did a number of things, on being asked by the appellant company, in order to facilitate or speed up the process. Thus for instance he was sent to look for a railway wagon on which to load the implements, although the one he found proved to be too small and the appellant had to look for another one as an alternative. He also paid the charges for hiring the wagon and for the guard to escort the goods on a promise that these payments altogether amounting to Shs. 81,220/= would be refunded to him by the appellant's office at Arusha. Upon making those payments he signed a consignment note which shows the sender of the goods to be Incar Tanzania Ltd. Dar es Salaam and the consignee to be Incar Tanzania Ltd. Arusha. The consignment note also shows

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the goods to have been loaded by the sender. PW.1 took the consignment note to the appellant's office in Dar es Salaam. There he was instructed to take the said consignment note together with the cash receipts in respect of payment for transport and escort charges and the contract documents to the appellant's office at Arusha where the implements would be delivered to him. He did as instructed. Upon handing over the documents to the appellant's office at Arusha he was asked to go away and that the office would take delivery of the implements, register the tractor in the name of his company and C.R.D.B. and then deliver it to him. In the meantime PW.1 on behalf of his company entered into a contract to plough 200 acres of land for one Mr. K. Patel. He did this in anticipation of the new tractor because although he had seven other tractors these were old and were not enough to carry out the ploughing contract. The learned trial judge accepted PW.1's account in preference to the claim by the appellant that PW.1 received the implements in Dar es Salaam and took it upon himself to transport them to Arusha. He found that it is the appellant company which sent the implements in question together with Mr. Gikas's trailer as a single dispatch consigned from the appellant's office in Dar es Salaam to its Arusha office.

Following the handing over of the documents by PW.1 at the appellant's office in Arusha, a representative of the appellant's office there visited the Railways office at Arusha a number of times to inquire if the consignment had arrived, and at least on one occasion he also telephoned

their head office in Dar es Salaam which confirmed that the goods had been dispatched. Subsequently he was informed by the Railways office Arusha that the wagon carrying the consignment had sustained an accident at a place called Hedaru, a long distance away from Arusha. He drove all the way to Hedaru to view the scene for himself without asking PW.1 to accompany him or informing him about the accident. He noticed that the tractor had been damaged in the course of the accident.

After the consignment had reached Arusha, the railway authorities duly advised the appellant as the consignee to collect the goods. The appellant did so, after showing some reluctance, and also paid demurrage charges arising from the delay in collecting the goods. The appellant then asked PW.1 to take delivery of the implements but according to the appellant PW.1 refused to do so because of the damaged tractor. The damage was estimated at Shs. 300,000/= being the cost of purchasing the necessary spares, plus about a half that amount being labour charges. PW.1 was asked to bear the cost of buying the spares while the appellant would bear the labour charges. PW.1, however refused and insisted on replacement of the tractor, and since no agreement could be reached, the respondent brought this suit alleging breach of contract and asking for the following reliefs:-

> "(i) The plaintiff claims specific performance by the defendant of the plaintiffs written contract to deliver the said TRACTOR HARROW and CHISEL PLOUGH as specified in the contract marked annexture 'A'.

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(ii) Damages for loss of use of the said farm implements by the plaintiffs at the rate of Shs. 20,000/= per day from the day of none delivery to the date of judgement.

(iii) Damages for loss of contract of ploughing 200 acres between M/s Magugu Farm Ltd. and Niru Patel totalling at the rate of Shs. 2,000/= per acre totalling Shs. 400,000/= see attached copy of contract between M/s Magugu Farm & Niru Patel.

(iv) Costs of this action.

(v) Interest at court rate in damages and costs from till payment in full.

(vi) Any other relief or further relief as the nature of this action may admit."

Upon finding that the appellant had failed to deliver the implements in accordance with the terms of the contract, the trial judge gave reliefs set out in the decree as follows:

"It is ordered that the plaintiffs are entitled to, and are awarded the following reliefs:

(1) Specific performance, if the same is feasible, plus general and special damages, including costs and interest as claimed and set out herebelow; or

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(2) Refund of Shs. 4,283,420/= to the 1st plaintiff (PW.1) being prepaid price, plus the difference between the prepaid price and the full market price of the goods as at 15.8.89 with interest at bank rate from the date of payment of the purchase price on 24.7.89 till final payment. Thereafter if PW.1 finds it reasonable to purchase similar goods elsewhere because the type and make of the goods (New Fiat tractor 100 horse power) he had contracted for is or may not be available, he can do so with the money refunded to him, excluding the interest on the purchase price or principal sum and he may charge the defendant company with the difference, if any, in price; and

(3) Special damages under head (ii) of the reliefs. These damages are to be computed in the following manner, that is to say 20,000/= per day from 15.8.89 to 31.12.89. And thereafter for each succeeding year till the date of full payment, computation shall be Shs. 20,000/= per day from July, to December, respectively. It is considered that during the months of April to June annually, ploughing almost ceases in Arusha zone, and transportation dwindles, hence the reduction of 10,000/= from the 20,000/= daily rate earnings for that period. Also there will be a deduction of 40% from the total sum to be realized under this head to cater for mitigated damages and for service of the tractor; and

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(4) Special damages in the amount of T.Shs. 400,000/= for loss of ploughing contract (Exh. P.7) as indicated under head (iii) of the reliefs, however, less 50% to cater for mitigated damages; and

(5) Costs to be taxed; and

(6) Interest on damages and costs at court rate and in the appropriate scale effective from the date of filing the suit on 7.10.89 till full payment; and

(7) General damages which deem fit and just to assess and award basing on the devaluation of our Tanzania shilling pegged to the US Dollar and the resultant inflation rate. In 1989 when PW.1 paid the purchase price to the defendant company, about T.Shs.110 was to the dollar. Todate the current exchange rate is about T.Shs.302/= to the dollar. If my mathematical calculations serve me right, our shilling has from 1989 to 1992 fallen down to the dollar by about 274%. For this reason, and under the circumstances of this case, I award to PW.1 30% of the said devaluation and inflation rate annually on the purchase price or principal sum of Shs. 4,283,420/= from 15.8.89 till full satisfaction."

It is against that background that this appeal has been preferred.

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Before us the appellant was represented by Mr. R. C. Kesaria and Mr. J. C. D'Souza while the respondent was represented by Mr. A. Maira and Mr. W.A.L. Mirambo. Counsel for the appellant filed a total of 26 grounds of appeal and at the hearing we also granted them leave to argue another four additional grounds. Essentially the issue raised in these grounds is that the appellant duly delivered the farm implements to P.W.1, or to the Railways (the carrier) at Dar es Salaam for transmission to P.W.1, in accordance with the terms of the contract, and that once that was done then property in the goods passed so that the appellant was no longer responsible for the damage caused to the goods while in transit to Arusha. Counsel for the appellant took the view that this was a contract for the sale of unascertained goods which was governed by the provisions of Rule V of section 20 of the Sale of Goods Ordinance (Cap. 214). He therefore criticised the trial judge for failing to hold that "where there is a contract for the sale of unascertained goods by description and goods of that description, and in a deliverable state are unconditionally appropriated to the contract (as was the case here) the property in the goods thereupon passes to the buyer."

We agree with learned counsel that this was a contract for the sale of unascertained or largely unascertained goods by description. This was so because the tractor which formed part of the goods was ascertained only by its chasis and engine numbers. That was not sufficient to ascertain it because it was not known what the body looked like or what colour it was. What is even more is that the other two

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implements, namely, the harrow and the chisel were completely unascertained. We also agree that the goods were appropriated to the contract when they were pointed out to P.W.1 in the appellant's workshop at Pugu Road in Dar es Salaam or at the time of loading them on the wagon at the railway station Dar es Salaam for transmission to Arusha.

However, we do not agree that the appropriation was unconditional. Our view is that the appellant had reserved the right of disposal of the goods, and this made the appropriation conditional thereby preventing the property in the goods from passing to P.W.1. Section 21(1) of the Sale of Goods Ordinance provides that:

> "Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled."

It is clear from the evidence that when P.W.1 arrived in Dar es Salaam the goods were not ready for collection because there was yet pre-delivery service to be done on them and a customs clearance certificate to be obtained

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in respect of them. D.W.2 clearly stated that it was the duty of the appellant to obtain the certificate and D.W.1 demonstrated to P.W.1 the futility of collecting the goods without such certificate. This is what he said:

> "I replied him (P.W.1) that so long as the customs documents were not ready then it was not possible for him to collect and register the tractor. P.W.1 knew this very well."

Consistent with that stand, the appellant must have decided that in order to avoid further inconvenience of keeping P.W.1 longer in Dar es Salaam and in order to avert the threat by PW.1 to rescind the contract, he (P.W.1) could return to Arusha and take delivery of the implements there after the appellant had done the needful. In other words the appellant, appreciating its obligation to carry out pre-delivery service to the implements and, in particular, to obtain a customs clearance certificate without which it was useless for P.W.1 to take delivery of the implements, appropriated the goods to the contract but reserved its right of disposal thereof pending the doing of the two things. It was necessary to reserve the right of disposal thus in order to enable the appellant to take delivery of the goods at its Arusha branch for the purpose of doing those two things.

The trial judge rightly rejected the appellant's claim that P.W.1 insisted on, and eventually succeeded in, taking delivery of the implements at Dar es Salaam. For that would be a useless exercise, and according to D.W.1 he (PW.1) knew.

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it. Then why should P.W.1 engage in such a useless exercise? Again if he had taken delivery of the implements at Dar es Salaam, what was the point of consigning them to the appellant at Arusha instead of to himself?

It is true that P.W.1 did a number of things in connection with the dispatch of the goods to Arusha. For instance, he initially looked for a railway wagon on which to load the implements. He paid the transport charges including paying for the escort; he signed the consignment note. His explanation was that he did these things, upon being asked by the appellant, in order to facilitate the whole exercise because he was interested to see that the implements reach Arusha as soon as possible. We can find no ground for saying that the trial judge should have rejected that explanation.

Counsel for the appellant strenuously contended that there was unconditional appropriation of the goods to the contract when the appellant handed over the implements to the railway authorities for transmission to Arusha. Learned counsel further contended that following such unconditional appropriation, the property in the goods passed to P.W.1 so that even if it is held that the appellant continued to be in possession of the goods, it did so as a mere bailee. No doubt, this view is based on the provisions of Rule V (2) of section 20 of the Sale of Goods Ordinance which says that:

> "(2) Where in pursuance of the contract the seller delivers the goods to the buyer or to a carrier or other bailee

> •r custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

But as already demonstrated, this was a case of conditional appropriation of goods to the contract by reason of the appellant reserving the right of disposal.

This view is reaffirmed by the provisions of section 21 (2) of the Sale of Goods Ordinance which provides that:

> "(2) Where goods are shipped, and by the bill of lading the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal."

Since the appellant consigned the goods from its Dar es Salaam office to its Arusha office, it is prima facie deemed to have reserved the right of disposal. The appellant gave no explanation to rebut that presumption, and on the evidence we could find none. On the other hand the presumption is confirmed by the appellant's intention to take delivery of and repossess the implements at Arusha in order to do pre-delivery service and obtain the requisite customs clearance certificate in respect of them. Because of such reservation of the right of disposal, therefore, the property in the goods did not pass, and the appellant remained the owner after appropriating the goods to the contract.

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Indeed the conduct of the appellant after appropriating the goods to the contract was consistent with its ownership of those goods. The evidence shows that P.W.1 took the consignment note in respect of the implements in question to the appellant's representative at its Dar es Salaam office, whereupon the said representative in turn instructed him to take it to the appellant's representative at its Arusha office for action and he did so. The trial judge accepted that evidence and we could not fault him. The consignment note shows the consignor of the goods to be the appellant's office at Arusha. Neither the appellant's representative at Dar es Salaam office nor at Arusha expressed surprise that the goods were consigned by its office in Dar es Salaam to its office at Arusha. Quite clearly such conduct is consistent with the view that although the appellant had duly appropriated the goods to the contract, it was still the owner of those goods. In fact upon the goods arriving at Arusha the railway authorities there completely refused to recognize anyone else but the appellant as the owner of the goods.

The acts of the appellant's representative rushing to the scene of the accident at Hedaru which is so far away without informing P.W.1 about the accident, the appellant's taking delivery of the goods at Arusha and paying demurrage charges in respect thereof are consistent with the appellant's ownership of the goods. If the appellant was not the owner of the goods why should it take delivery of the goods and pay demurrage charges in the sum of Shs. 376,000/=? And why has it (the appellant) not lodged a claim against P.W.1 for a refund of this sum?

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There is yet another matter to be alluded to in this respect. The trial judge rightly accepted the evidence that there was no arrangement between P.W.1 and Mr. Mario Gikas to transport the latter's trailer from Dar es Salaam to Arusha. That goes to confirm that the whole consignment comprising P.W.1's implements and Mr. Gikas's trailer had been sent by the appellant. That is to say the appellant was the owner of the whole consignment, and that is why it (the appellant) accepted the responsibility of repairing at cost Mr. Gikas's trailer which was damaged in the accident. Now, if the appellant was the owner in respect of the trailer, how come that it was not the owner in respect of the implements comprised in the very same consignment?

The evidence on record, therefore, amply justifies the finding that upon appropriating the goods to the contract, the appellant reserved the right of disposal. That rendered the appropriation only conditional and thereby prevented the property in the goods from passing. The appellant remained the owner of the goods to-date.

We heard lengthy arguments on whether or not there was any binding variation of the written contract to change the place of delivery from Dar es Salaam to Arusha, and whether or not the goods were in a deliverable state. We were also referred to numerous authorities in that regard. However, those questions are of little or no relevance now once it is held that there has been no transfer of ownership from the appellant, because the claim is that the appellant has failed to deliver the goods, whatever state they be in and whether at Dar es Salaam or at Arusha.

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It was also submitted that after the accident which caused damage to the tractor, P.W.1 wrongly refused to take delivery of the tractor at Arusha when the damage caused to it was only slight, the evidence being that P.W.1 was asked to bear the cost of buying the necessary spares amounting to Shs. 300,000/= while the appellant was to bear the labour charges. P.W.1 denied any such offer having been made to him. But even if the appellant's version is accepted that P.W.1 refused the offer and insisted on replacement of the tractor, such refusal in our view cannot be said to be unreasonable. For, there is no legal basis for making P.W.1 responsible for damage caused to the tractor at a time when that tractor was owned by, and in the possession and care of, someone else.

Thus on the evidence we are satisfied that the appellant failed to deliver the farm implements to P.W.1 in accordance with the terms of the contract and therefore the learned trial judge was justified to find that the appellant was in breach of the contract.

As regards the award, counsel for the appellant criticised the trial judge for giving the respondent an option to purchase a new tractor of similar type on an open ended price scale and to charge the price difference to the appellant. The learned judge was also criticised for allowing the respondent to recover the difference between the pre-paid purchase price and the market price obtaining on the day of the accident when there was no evidence of any such difference. We think that there is merit in the

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complaint. Accordingly that part of the award is varied as follows:- The appellant is to refund to the first respondent (P.W.1) Shillings 4,483,420/= being the pre-paid purchase price with interest at bank rate from the date of payment of the purchase price till final payment.

Counsel criticised the award of special damages for loss of use at the rate of between Shs. 20,000/= and Shs. 10,000/= per day without proof thereof. In support of his claim for special damages P.W.1 said:-

> "To-date I have not been supplied with the tractor, harrow and chisel plough. I have sufferred great loss thereby. I used to realize 20,000/= per day from ploughing 20 acres per day at 1,000/= per acre at the material time. I used to transport sand, stones, sugar cane. This is on hire basis. Each trip cost 7,000/=. At the material time I had contracted to plough 200 acres of Mr. Patel who had paid me Shs. 400,000/= in advance. Due to lack of tractor I could not plough those acres".

That evidence was not controverted and therefore the learned trial judge rightly took it into account when assessing the award. However, we could find no evidence to support his using different rates per day in computing the damages payable for loss of use depending on the different seasons of the year. With that in mind, we think that a uniform rate of reckoning the damages would be appropriate.

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Accordingly we vary this part of the award to the extent of allowing the respondent (P.W.1) to recover damages for loss of the use at the rate of Shs. 10,000/= per day plus interest at court rate from the day of non-delivery i.e. October, 1989 till the date of judgement.

Counsel objected to the award of Shs. 400,000/= on the grounds that P.W.1 had entered into the ploughing contract prematurely, that he had other tractors and ploughs and that in any event the award was a duplication in the light of the award for loss of use already given.

We find merit in the objection on this head especially on the ground that this was a duplication. For, the award of Shs. 400,000/= damages was in respect of loss sustained for the period during which P.W.1 would have executed the ploughing contract. That period is not ascertainable; it might have been ten or fifteen days, for instance. But such period is included in the award already made for loss of use and calculated at Shs. 10,000/= per day from the day of non-delivery to the day of judgement. Such award is clearly a duplication which ought not to be allowed. We would accordingly set aside the award of Shs. 400,000/=.

Once the awards which we have upheld were made, we think that the award for general damages, taking into account devaluation and inflation was no longer justified. The award under that head is accordingly set aside.

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We now come to the question of costs. As stated earlier on in this judgement, both sides were represented by two advocates. At the conclusion of the hearing of the appeal each side asked for a certificate of costs for two counsel. The application has merit. The case was long and obviously complicated. It required a great deal of effort and patience to analyse the issues involved and to look up the relevant provisions of the law. Accordingly, for the reasons set out hereinbefore, the appeal is substantially dismissed, with a certificate of costs for two counsel.

DATED at DAR ES SALAAM this day of 1994.

R. H. KISANGA
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D. Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(B. M. LUANDA)
SENIOR DEPUTY REGISTRAR