FTCC.185/19 2019 T NO. 15

IN THE HIGH COURT OF SIERRA LEONE

(COMMERCIAL AND ADMIRALTY DIVISION)

FAST TRACK COMMERCIAL COURT

BETWEEN:

IBRAHIM SIDIBAY & OTHERS - PLAINTIFFS

AND

TAME HABTE & OTHERS - DEFENDANTS

JUDGMENT OF THE HONORABLE JUSTICE LORNARD TAYLOR DELIVERED TODAY THE 19TH JUNE 2020

The Plaintiff approached this court by writ of summons dated 14th August 2019 praying for the following orders;

1. Damages for breach of Contract
2. Immediate recovery of the sum of US$ 45,653.60 from the defendants
3. Interest on the said sum pursuant to Cap 19 Law Reform (Miscellaneous Provisions) Act 1935
4. Any further or other reliefs this honourable court my deem fit and just
5. Costs.

On the 1st October 2019, the defendants filed a defence and counter-claim in which they made the following claims against the plaintiff;

1. That the 1st defendant herein paid rent for the goods that were kept in the store waiting for the 1st defendant to travel to Sierra Leone and see the goods before dumping it as it was expired and not fit for human consumption.

2. That the initial US$15,000 which was sent by the 1st Defendant to buy the goods was not recovered due to bad products that were sent by the 1st Plaintiff herein to be refunded.
3. Any further or other relief that the honourable court may deem fit and just.
4. Costs to be borne by the Plaintiff.

On the 21st October 2019, the Plaintiff filed a reply to the defendant's defence and a defence to their counter-claim.

Directions were given for the conduct of trial and both parties eventually complied with same. The Plaintiff called 2 witnesses at trial. The defendant also called 2 witnesses.

The Plaintiffs' case is that when the 1st and 2nd Plaintiffs came to Sierra Leone, they met with the 1st Defendant who suggested that they send goods to him which would be sold and the profits shared. According to PW1, the Plaintiffs relied on the 1st Defendant's expertise to guide them on what goods would be good business in Sierra Leone since he presented himself as a business owner. The 1st defendant to show his commitment to the business, showed the 1st and 2nd Plaintiffs his store located at Sackville Street and assured them that the store can accommodate 2 (two) forty feet containers of merchandise.

The 1st defendant and his cousin one Mehari, recommended 3 flavours of the TOP Ramen dried soups and the Little Hugs drink. The Plaintiffs later communicated the prices to the 1st defendant as well as the shipping cost of the 2 containers and the 1st defendant gave them the go ahead to ship the merchandise. It was agreed that the profits were to be divided into 4 equal parts of which the 1st defendant was to receive one part. As part of his commitment to the business, the 1st defendant sent to the plaintiffs the sum of US$ 15,000. The merchandise worth US$ 35,940 was subsequently bought and shipped to Sierra Leone in the name of the 3rd Defendant. It costed the Plaintiffs US$ 550 to load the goods into the container for shipment and the shipping costs is said to be US$ 8,983.60. The bill of laden for the goods was mailed to the 1st Defendant costing another US$ 140.

When the goods arrived in Freetown, the 1st Defendant informed the plaintiffs that the sum of US$ 17,000 was needed to clear the goods otherwise, they would be confiscated. The sum of US$ 15,040 was sent to him as the Plaintiffs contribution towards the clearing of the merchandise. Since then, the Plaintiffs have not received any money as discussed with the 1st defendant nor have they received any report with regards to the business.

The defendants' case on the other hand is that the 1st defendant met with the 1st Plaintiff and they discussed business during which the 1stdefendant lend his opinion on doing business in Sierra Leone. According to the 1st Defendant, it was the 1st Plaintiff who informed him about the Little Hug drinks and the Top Ramen Shrimp, beef and chicken products to be tested in the market in Sierra Leone by the 1st defendant since he is already familiar with the business terrain here. As such the 1st Defendant sent to the 1st Plaintiff the sum of US$ 15,000 to purchase for him the said products, enough to be in a 20 feet container since it was meant to test the market. As such, he was surprised to receive two 40 feet containers of the said products. According to him, the 1st Plaintiff then sent him the sum of US$ 14,975 to help clear the goods from the quay. Before clearing the goods from the quay, the 1st defendant had to rent 2 different stores for the storage of the products. According to him, he used to call the 1st Plaintiff and updated her about the occurrences and sales until the 1st Plaintiff asked him to stop calling her as she was busy with work in the United States. He maintained that when the goods were cleared, he realised that the expiry dated was very close which made it difficult for officials of the quay to allow them to take the goods out of the quay. However the charges were paid and the goods eventually cleared. When the 1st defendant tried to sell the goods, they faced three major challenges. The same product was also available on the market with a longer life span, their product was relatively expensive compared with the other product in the market and the authorities kept on coming to their stores and discouraging them to sell it to the public. Before the expiry dated was reached, the 1st defendant was able to sell a total of Le 109,620,000 worth of the product. As a result of this business going bad, the 1st defendant stated that excluding the US$15,000 which he sent to the Plaintiffs, he lost about another US$ 50,000.

This court is faced with a number of questions. However, the following are not disputed by either party.

1. The 1st Defendant sent the sum of US$ 15,000 to the Plaintiffs prior to the purchase and shipment of the merchandise.
2. The Plaintiffs purchased and shipped two 40 feet containers to the 3rd defendant.
3. The containers arrived in Sierra Leone and the Plaintiffs sent the sum of US$15,000/US$ 14,975 for clearing same.
4. The containers were cleared and the merchandise stored by the 1st Defendant.

5. No money was sent back to the Plaintiffs after they sent the merchandise.

IS THERE A CONTRACTUAL RELATIONSHIP BETWEEN THE PARTIES WHICH THE COURT CAN ENFORCE?

The Plaintiffs maintain that there is. Their case is that there was an agreement between the parties whereby the Plaintiffs were to send two 40 feet containers of merchandise to the defendants who were to sell them and the profits evenly distributed between the 3 Plaintiffs and the 1st Defendant. The defendants deny this. In his testimony before the court, the 1st defendant states that the understanding was that he would send money to the Plaintiff who was to buy him a 20 feet container worth of the products and send it to him for him to test the product in the market. In every issue in every matter, the burden of proving an assertion rests on the party making the assertion. Then I need not and will not dwell on this issue because it is trite law. The Plaintiff thus asserting that there was a contract between them therefore bears the burden of proving same and should they succeed in discharging same on a balance of probabilities as laid down in the case of Miller v Minister of Pensions [1947] 2 All ER 372 the evidential burden of proving the contrary then shifts to the defendants whose assertion is that the only transaction between them and the 1st Plaintiff is for the 1st Defendant to send her money which was to be used to purchase and ship a 20 feet container of goods. After examining the evidence before this court with a view to reaching a conclusion on the disagreed facts, this court was further compelled to ask certain questions, the answers to which will assist the court to take a position on the issue.

Firstly, how probable is it that the Plaintiffs would ship two 40 feet containers to the Defendants if they had no such arrangement? I do not see this as a possibility. Shipping two 40 feet containers requires so much considerable resources and the sacrifice of time that I do not see a situation where a reasonable man would undertake such a venture without prior arrangement. The evidence before the court is that the 1st Defendant sent the sum of US$ 15,000 to the plaintiffs prior to the shipping of the merchandise. The Plaintiff says, this sum is the 1st Defendant's contribution to the business. The 1st defendant says it was meant for the Plaintiff to use same to purchase the merchandise for him and had nothing to do with any business between himself and the Plaintiff. However, the costs of the merchandise as contained in the said containers are testified to be the sum of US$ 35,940. This excludes the cost of packing, shipping and clearing all of which said costs were borne by the Plaintiffs. Regardless of the above, I find it most strange that the 1st defendant

even though he claimed to have no such business dealings with the Plaintiffs, would demand that the Plaintiffs send the funds needed for the clearing of the two containers. He did not request the funds less the sum needed for the clearing of a 20 feet container to which he is claiming he is entitled because he paid for same, rather he demanded the full cost for the clearing of both containers. Exhibit A9 [1-4] is an international wire transfer receipt for the sum of US$ 15,000 sent to the 2nd Defendant in this regard. Why else would you demand the cost of clearing the containers if you knew property in them or any part thereof rested in you? I can only conclude that the reason the 1st defendant demanded the cost of clearing both containers in full was because he knew that this was a joint venture and that personally, he was not the owner of the goods in the container. They were the subject of an agreement and his own part of the deal did not include paying the cost of clearing same. It is also the 1st Defendant's evidence that after the goods were cleared, he called the 1st Plaintiff on a daily basis updating her about the occurrences and sales. Is it reasonable that you would call and give updates on the sale of property to another party if indeed the property was yours? I think not. No reasonable person in the 1st Defendant's position would call to give updates on the sale of property if it was not an agreement between himself and the person called that updates should be given. I do not believe the 1st defendant's testimony to the effect that there was not contract between the defendants and the plaintiffs and that the US$15,000 he sent was only for the 1st Plaintiff to buy the products for him. Further, upon receipt of the merchandise, the 1st defendant even though he claimed he had no contract with the Plaintiffs proceeded to sell the merchandise. The evidence is that he kept selling the merchandise until the expiry date after which he handed them over to be destroyed. If the testimony of the 1st defendant was to be believed, this court would be faced with an unresolvable complication. This is because the 1st defendant maintains that he was owner of a 20 feet container worth of the goods. Why else would he proceed sell or try to sell the rest of the property if there was indeed no agreement between himself and the Plaintiffs? It can only be either because he indeed had such an agreement with the Plaintiffs or he was selling property of the Plaintiff without its consent and permission in which case he would still be liable for the costs of the goods. On this basis it is safe to hold that on a balance of probabilities there was indeed a contractual relationship between the parties which said contract this court can validly investigate and enforce at the request of either party.

WAS EITHER PARTY IN BREACH OF THE TERMS OF THE CONTRACT?

Having established that there was indeed an enforceable contract between the parties, this court must now examine the nature of the contract and whether either party was in breach of its terms. It was the terms of the contract between the parties that the Plaintiffs would purchase and ship the merchandise to the defendants who were to sell same and the profits from the proceeds applied as agreed. It was agreed that the 1st defendant was to get 25% of the profit as his share for his role in the business. This I understand to mean that after the goods had been sold and all expenses deducted (which said expenses would have included the Defendants' investment in cash inter alia sent to the Plaintiffs as well as the costs of transport and storage), whatever was still available ought to have been shared as stated above. Where the business made no profit, it would have been but fitting that the losses be shared proportionally as well. However, there is no evidence before this court that the business grew a profit. Did the Plaintiffs purchase and ship the merchandise as agreed? The answer based on the evidence before this court is in the affirmative. At the request of the 1st Defendant, the Plaintiffs even sent the funds required to pay port charges and clear the goods. There is no complaint before this court that the Plaintiffs were in breach of any term of the agreement. The defendant's defence is that the merchandise received from the plaintiff was so close to their expiry date that most of it had to be destroyed after they expired. The defence also testified that selling the product was a challenge as there was already the same product on the market which was relatively cheaper and with a longer life span. They were also being visited by the authorities who discouraged the defendants from selling the merchandise to the public. In other words, the contract was frustrated by the fact that the merchandise shipped could not be sold. Therefore, the outcome of this matter will inevitably be based on whether the merchandise shipped by the Plaintiffs was expired or reasonably too close to expiration.

By the evidence before this court, the merchandise shipped by the Plaintiff had not expired as at the date of receipt. However, if the Plaintiffs indeed sent merchandise so close to expiration that it could not reasonably have been sold before their expiration, then the defendants would bear no liability for the unsold portions of it as long as reasonable effort was made to have them sold for then the contract would have been frustrated. This assertion that the goods were too close to expiration to be sold was raised by the defendants and it is trite law that they bear the burden of proof accordingly. As such the questions this court needs to answer is whether the goods were unreasonably close to expiration that it affected the defendants' performance of their own part of the agreement, whether the Defendants took reasonable steps to have the goods

sold before their expiration and whether there is sufficient proof that there were unsold goods in the defendant's custody as at the date of expiration which were taken away by the authorities and destroyed. In discharging this burden, both parties brought before the court, evidence relating to the procedure for the destruction of expired goods. By these documents, and the testimony of the witnesses, the defence is alleging that some of the goods sent by the Plaintiff were sold and a portion of same expired before being sold and was accordingly taken away and destroyed by the Consumer Welfare Association. The Plaintiff argues that this was not the case and that the documents presented by the defendants with regards to the expiration and destruction of the unsold goods could not be relied on. They maintain that the defendant has not provided sufficient proof that the goods were indeed destroyed and accordingly they should not be counted as lost. This is the crux of the matter. For should the defendants succeed in making a case that the some of the goods were actually lawfully taken away and destroyed by the authorities, they cannot be held liable for the loss of that portion. If on the other hand the alleged destruction of the products was not proved satisfactorily, liability will rest on the defendants.

In the quest to know whether the Plaintiff sent products that were reasonably close to expiry, this court also examined Exhibit A7[1-2] which is the bill of laden of the products. By this document, the containers were delivered to the shippers on the 27th February 2018. The sum of US$15,000 was also sent and became available on the 14th April 2018 for the clearing of the containers as shown in Exhibit A9[1-4]. Assuming that the merchandise were to have expired in February 2019 as alleged by the Defendants, this means that the defendants had approximately 10 months to sell the products. There is no record of sale of the goods before this court to show the manner in which the sale was conducted. This I hold is vital evidence in this situation. It is but prudent that every businessman must keep and track his record of sales and purchases. In situations such as these, this court will not be left empty handed and in doubt as to whether the goods, were in fact sold, the price for which they were sold, and rate at which they were purchased from the defendant. Such a piece of evidence should have no doubt been made available to the court by the defence.

The defence included in their bundle Exhibit B1 which they maintain is a document from the Consumer Welfare Association which said document speaks volumes with respect to this matter. Firstly, the document is an assessment form dated 2nd February 2019 which was signed on the 11th February 2019 and has as its date of operation the 10th October 2017.

According to the said document, the two products listed thereon were both produced of the 27th December 2017 and both expired on the 11th February 2019. This means that the shelf life of the products is 1 year, 1 month and 15 days which seems odd as shelf life is usually some sort of round figure or period. Further, this is in contrast with the evidence of DW2 who testified that the some of the goods expired on the 2nd February 2019 while the remaining expired on the 15th February 2019. The brand of the products were also not specified on the document as such, this court cannot safely conclude based on that document alone that the products stated therein are indeed the products sent by the Plaintiffs to the defendants. Further, even though the form of the document states that the information contained therein was given in the presence of the Sierra Leone Police, none of the people who signed as witnesses were police officers. According to the said document, a total of 4,200 units of the goods referred to therein were the subject-matter of the document. It is this document according to DW2, which was evidence that the expired goods was handed over to the Consumer Welfare Association. He also said he was not present when the goods were dumped. DW 2 also testified that they received 9,200 units of the merchandise from the Plaintiff. If what he says is anything to go by, a total of 5,000 units still remain unaccounted for. In effect, this means that the worst case scenario is that the Defendants have admitted owing the plaintiff and account for the sale of 4,200 units of the products which by the records they have not done. Nonetheless, based on the evidence before this court, it will be unjust for this court to settle for that worst case scenario. This court is not convinced that 5,000 units of the product was not sold and was taken away and destroyed based on the above analysis of the evidence. The Plaintiffs maintain that the cost of the products was US$ 35,940 which in the present circumstances I will consider the principal claim. They also paid the following sums;

a. US$ 8,983 being the costs of shipping the said goods (proof exhibited)
b. US$ 140 to DHL for sending the original Bill of Laden (no proof exhibited)
c. US$ 550 to load the goods into the container for shipment (Was admitted by the Defendants in their defence)
d. US$ 15,040 for clearing the products from the quay (Proof exhibited)

In all this, the Defendants also sent the sum of US$ 15,000 to the Plaintiffs.

In the circumstances I will order as follows:

1. That the defendants jointly and severally refund the Plaintiffs jointly and severally the following sums;

a. The sum of US$ 35,940 being the costs of the products.
b. The sum of US$ 8,983 being the costs of shipping the said goods.
c. The sum of US$ 550 being the cost to load the goods into the container for shipment
d. The sum of US$ 15,040 for clearing the products from the quay.

2. The sums above shall be paid less the sum of US$ 15,000 sent to the Plaintiffs by the defendants.
3. General damages is awarded to the Plaintiffs jointly and severally to be paid by the defendants jointly and severally in the sum of Le 35 Million Leones forthwith.
4. The costs of this action is assessed at Le 50 Million to be paid by the defendants jointly and severally to solicitors for the Plaintiffs forthwith.

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HONORABLE JUSTICE LORNARD TAYLOR