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Judgment No. S.C. 43/2000
Civil Appeal No. 224/99

HYDERY MILLING COMPANY (PRIVATE) LIMITED

v GRAIN MARKETING BOARD

SUPREME COURT OF ZIMBABWE
GUBBAY CJ, McNALLY JA & EBRAHIM JA
HARARE, MAY 22 & 29, 2000

H Zhou, for the appellant

Ms *W T Miles*, for the respondent

McNALLY JA: The appellant (Hydery Milling) sued the respondent (the GMB) for damages for breach of contract. The contention was that the GMB was contractually bound to sell 6 000 tonnes of rain-damaged wheat to Hydery Milling for a certain price; the GMB had been able to supply only 4 148.779 tonnes; in order to fulfil its contract to supply flour to its customers, Hydery Milling had had to buy undamaged wheat to make up the balance; that wheat had cost $2 850 per tonne; therefore damages were in an amount calculable by subtracting 4 148.779 from 6 000 and multiplying the difference by the price differential.

The appellant lost in the High Court on a point which had not been argued. The learned judge held that Hydery Milling was not a party to the contract, which was between the GMB and a company called Makombe Industries (Private)

Limited (Makombe). Therefore he granted absolution from the instance on the claim and allowed the GMB's counter-claim with costs.

There is no dispute about the correctness of the judgment on the counter-claim. But Hydery Milling contends that there was indeed a contract between itself and the GMB. We thought there was substance in this contention and invited Ms *Miles*, to begin.

THE CONTRACT

I do not think it is necessary to go into a great deal of detail. It is certainly arguable on the letters exchanged between the GMB, Makonde and Hydery Milling, that the contractual nexus was between the GMB and Makonde, and that Makonde then sub-contracted with Hydery Milling in relation to 6 000 tonnes of the grain it was buying from the GMB.

In reality, however, it is clear that the real nature of the contract was that Makonde, with the full consent of the GMB, assigned to Hydery Milling its (Makonde's) rôle as purchaser in the contract to the extent of 6 000 tonnes. That is certainly how the parties acted, and their actions are often the best guide to the parties' intentions. See generally *Christie on Contract* 3 ed pp 60-62; and *Hersch v Nel* 1948 (3) SA 686 (A), in particular the judgment of SCHREINER JA at 691 *et seq*. The GMB handed over the rain-damaged wheat to Hydery Milling. They corresponded with Hydery Milling as to the availability of the wheat. And, perhaps most importantly, they billed Hydery Milling for the wheat.

But overriding all this is the fact that on the pleadings the GMB admitted the contract. It was never an issue. In para 2 of its plea the GMB said:

> "On 13 February 1995 the defendant and one Makonde Industries entered into a written contact 34W (M1) which contract was subsequently ceded to the plaintiff on or about 28 November 1995, the material terms of which were …".

It is trite that an allegation which is admitted does not require to be proved. And here the admission was entirely consistent with the evidence. There was no question of the admission being made in error. No question of an application to withdraw the admission.

Indeed had it been the GMB's intention to take this point it would not have pleaded. It would have excepted to the declaration on the ground that the wrong parties were involved. Not only did it not do that. It defended its alleged breach of contract. It denied the breach and went on to allege that it was Hydery Milling who:

> "was and still is in material breach of the agreement …".

To say that Hydery Milling was in breach of the agreement is entirely inconsistent with an allegation that there was no agreement. I am satisfied that the GMB never intended to deny that it had a contract with Hydery Milling. In fact it admitted it. The basis for granting absolution was thus misconceived.

THE ALLEGED BREACHES OF CONTRACT

The GMB pleaded that Hydery Milling had breached the contract by –

1. failing to pay cash on delivery; and

2. failing to uplift the balance.

There was only one witness on either side, Mr Msipa for Hydery Milling and Mr Takura for the GMB.

Mr Msipa, whose evidence reads well, said they had paid cash on delivery, and that it was the GMB who had run out of the rain-damaged wheat. In support of that latter contention he pointed to documents relating to their last purchase in May 1996. They had been invited to complete a sales order for 26 tonnes but the GMB had been able to find only 18.716 tonnes at one depot and 4,354 tonnes at another. So they had received only 23.07 tonnes. Those were their last deliveries. Thereafter, in order to fulfil their flour delivery contracts, they had had to buy wheat at $2 850 per tonne.

Mr Takura positively corroborated Mr Msipa's first point, and was unable to say anything about the second. So Mr Msipa's evidence stands confirmed on the first point and undisputed on the second.

There is no evidence of breach of contract on the part of Hydery Milling. The breach lay with the GMB, who failed to deliver the full amount of the contract quantity.

THE QUANTUM OF DAMAGES

1. THE SHORTFALL IN SUPPLY

Various figures of the amount supplied were bandied about, between 4 100 and 4 400 tonnes. But ultimately Hydery Milling relied on the GMB's own figure, in a document prepared by its accounts department entitled "Tonnage and Amount Collected by Hydery Milling under Contract 34W(M1)". That figure is 4 148.799. That leaves a shortfall of 1 851.201 tonnes.

2. THE PRICE DIFFERENTIAL

The contract price for the rain-damaged wheat was $950 a tonne, but there was provision for a monthly increase of $20 per tonne. In fact the figures show that the increase was more than that. Hydery Milling did not complain. The price in May 1996, on the documents, was $1 170 per tonne. Since the contract was to have been completed by the end of June it is reasonable to assume in the GMB's favour that the 1 851.201 tonnes would have been delivered at $1 190 per tonne, rather than the $1 170 proposed by Mr *Zhou*.

There is really no dispute that the going price of undamaged wheat at the time was $2 850 per tonne. The differential is thus $1 660 per tonne.

3. THE COMPLICATION OF THE OTHER TWO BUYERS

Ms *Miles* argues that we cannot say, from these figures, that the damages were $1 660 x 1 851.201, for two reasons: The first is that there were two other buyers who both had rights to buy on this contract. So we cannot say how much they might have bought, and these reduced the entitlement of Hydery Milling.

Mr Msipa, however, was clear. The other two buyers were subsidiaries of Hydery Milling. They purchased only what Hydery Milling allowed them to purchase. They would not have been allowed to purchase any of the balance.

4. WAS HYDERY MILLING NOT ABLE TO MITIGATE ITS DAMAGES BY RAISING THE PRICE OF ITS FLOUR MADE FROM THE MORE EXPENSIVE INGREDIENTS?

Here, again, we have only Mr Msipa's evidence to go on. His evidence was quite clear. He said:

> "We were contracted to supply biscuit flour at a certain price. We therefore had no way to pull out of those contractual obligations …".

That disposes of that contention in the absence of contradicting evidence.

CONCLUSION

In the result Hydery Milling has proved that it suffered damages as a result of the GMB's breach of contract. The quantum of the damages is $1 660 x 1 851.201 = $3 072 993.60. On balance therefore Hydery Milling should have succeeded in the court below. In its notice of appeal it asks only that each party should pay its own costs in that court.

Accordingly, the appeal succeeds with costs, and the following order is substituted for the orders made in the High Court, both on the claim and on the counter-claim (the order follows essentially the prayer in the notice of appeal) –

"1. Judgment is entered for the plaintiff in the sum of $3 072 993.60 with interest thereon from date of judgment to date of payment.

2. Judgment is entered for the defendant in the sum of $1 716 971.94 with interest thereon from 14 May 1997 to date of payment.

3. The defendant is entitled to set off the amount owed to it by the plaintiff against the amount it owes the plaintiff, and shall pay the balance to the plaintiff.

4. Each party shall bear its own costs."

GUBBAY CJ: I agree.

EBRAHIM JA: I agree.

Mhiribidi, Ngarava & Moyo, appellant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners