

2/1962

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IN THE PRIVY COUNCIL

No. 29 of 1960

ON APPEAL FROM THE COURT OF APPEAL

FOR EASTERN AFRICA

B E T W E E N :-

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES

29 MAR 1963

25 HUSSAR SQUARE
LONDON, W.C.1.

ALIMAHOMRD OSMAN

... Appellant

- and -

NEONI-MATENGO CO-OPERATIVE

MARKETING UNION LIMITED ... Respondents

68189

CASE FOR THE RESPONDENTS

RECORD

10 1. This is an appeal from an order, dated the 3rd December, 1959, of the Court of Appeal for Eastern Africa (Forbes, V.-P., Gould and Windham, JJ.A.), setting aside a decree, dated the 4th November, 1958, of the High Court of Tanganyika (Crawshaw, J.), declaring the Respondents liable to the Appellant for depriving him of his rights under a certain contract to transport produce sold by the Respondents and ordering the taking of accounts.

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p.60

20 2. By his Complaint, dated the 26th of August, 1957, the Appellant alleged that he was entitled, under a contract in writing with the Respondents dated the 14th April, 1955, to the exclusive right to supply motor transport for the carriage of goods mentioned in the schedule to the contract. In breach of that contract, the Appellant alleged, the Respondents had entered into contracts with a third party providing for the transport of the crops for the year then current of oilseed and other produce handled by the Respondents, and had allowed, and were permitting, these crops to be carried in motor vehicles other than those of the Appellant. The Appellant alleged that he had suffered damage amounting to 121,635 shillings, and claimed that sum by way of damages together with interest and costs.

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pp.107-113

3. The contract with the Respondents upon which the Appellant relied was annexed to the Plaint. It is called hereinafter "the transport contract". By clause 1 of it the Respondents agreed to use, and the Appellant to supply, the Appellant's vehicles exclusively for the period of the agreement for the transport

(a) of leaf tobacco, bagged paddy and bagged wheat from all markets maintained by or for the affiliated societies of the Respondents, or agricultural produce of any kind being handled by the Respondents from these markets or any markets established by or for a native authority in the District of Songea, to the factory of the Respondents at Songea or any other place in the Songea District desired by the Respondents; 10

(b) of baled tobacco or any other primary produce from the Respondents' factory or godown at Songea to the ports of Lindi or Mbamba Bay or any point on the Southern Province Railway or port served by that railway, or Njombe in the Southern Highlands Province; 20

(c) of such other goods or building materials as the Respondents might require to be transported from place to place in the Southern Province or between Songea and Njombe.

The agreement obliged the Appellant to keep available for the Respondents lorries sufficient to carry not less than 25 tons of goods in any one day, and to maintain an office and staff in Songea. It specified the payments to be made by the Respondents for transport of the different kinds of goods on the various routes to which the agreement referred. The period of the agreement was from the 1st April of 1955 to the 31st March of 1958. 30

pp. 3-5

4. By their Defence, dated the 2nd of December, 1957, the Respondents admitted the contract annexed to the Plaint. They admitted that between the 4th of July, 1957 and the 24th of September, 1957 they had entered into six contracts with the United Africa Company (T), Limited for the sale of sunflower seed and sesame seed "ex sellers' godown at buying centres". They also admitted that they had entered into a contract with the Tanganyika Transport Company, Limited for the sale of paddy 1957 crop. As to oilseeds, no road transport was 40

used or required before delivery to the buyer at the buying centres, and after that delivery the Respondents had no property in the seeds and the seeds were not being handled by them. As to paddy, the Tanganyika Transport Company, Limited took delivery at the buying centres, the property passed to them at those centres and after delivery the paddy was not being handled by the Respondents. The Respondents denied that they had allowed, or were allowing, groundnuts, sunflower, simsim or paddy to be transported in vehicles other than those of the Appellant, and stated that all transport of crops over which they had control had been offered, and was being offered, to the Appellant under the transport contract.

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5. The action came on for trial before Crawshaw, J. on the 16th and 17th of June and the 11th, 14th, 15th and 19th of July, 1958.

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6. The following were the contracts between the Respondents and the United Africa Company and the Tanganyika Transport Company mentioned in the defence;

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(a) 4th July, 1957, for the sale by the Respondents to the United Africa Company of 100 tons of Tanganyika sunflower seed, to be delivered in August, 1957, "the goods are to be rebagged at sellers' godowns on the main road between Songea/Tunduru.....transport from buying centre to Mtwara to be arranged by buyers". (Mtwara is a port on the east coast of Tanganyika, outside the District of Songea.)

pp.126-127

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(b) 6th of August, 1957, for the sale by the Respondents to the United Africa Company of 50 tons of Tanganyika sesame seed, to be delivered in August, 1957, "transport from buying centres to Mtwara to be arranged by buyers".

pp.127-128

(c) 19th of August, 1957, for the sale by the Respondents to the United Africa Company of 100 tons of Tanganyika sunflower seed, to be delivered in August/September, 1957, "the goods are to be rebagged at sellers' godowns on the main road between Songea/Tunduru.....transport from buying centres to Mtwara to be arranged by buyers".

pp.128-129

(d) 23rd August, 1957, for the sale by the Respondents to the United Africa Company of 50 tons of Tanganyika sunflower seed, to be delivered in

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- September, 1957, "seeds are to be rebagged at sellers' godowns on the main road between Songea/Tunduru..... transport from buying centres to Mtwara to be arranged by buyers".
- pp.130-131 (e) 2nd September, 1957, for the sale by the Respondents to the United Africa Company of 20 tons of Tanganyika sesame seed, to be delivered in September, 1957, "transport from buying centres to Mtwara to be arranged by buyers".
- pp.131-132 (f) 24th September, 1957, for the sale by the Respondents to the United Africa Company of 50 tons of Tanganyika sunflower seed, to be delivered in October, 1957, "the goods are to be rebagged at sellers' godowns on the main road between Songea/Tunduru.....transport from buying centres to Mtwara to be arranged by buyers". 10
- p.137 (g) a letter from the Respondents to the Tanganyika Transport Company dated the 31st of May, 1957, confirming acceptance of the Company's offer for the 1957 paddy crop of 60 cents per kilogram "without bag at Mbamba Bay and Lituhi" and 65 cents per kilogram "without bag at Songea (godowns at Songea, Litola and Mamtumbo)", and letter from the Company to the Respondents dated the 1st June, 1957 acknowledging this; the Respondents and the Company subsequently agreed that the Company should take delivery of the paddy at the buying centres. 20
- p.138
- p.30, 11.2-5
- pp.28-29 7. Evidence was given of the composition and activities of the Respondents. The Respondents are a Co-operative Society registered under the provisions of the Co-operative Societies Ordinance, the members being other societies known as primary societies. One of the objects of the Respondents is to sell agricultural produce handed over by the primary societies, and in fact the Respondents always sold this produce on commission. The primary societies covered the whole of the District of Songea, and produce is normally brought in the first place by head load to one of the buying centres scattered over the District. From the buying centres it is transported by lorry. The buying centres are on minor roads leading to the main road, which runs from Mbamba Bay, on Lake Nyasa, through Songea to Mtwara on the east coast. The main road also gives access to Nachingwea, the inland terminus of the railway which runs down to Mtwara. On the main road 30 40
- See Map

there are five godowns used by the Respondents, one at Songea, owned by the Respondents and four, at other places on the road, owned by primary societies.

8. The evidence showed that throughout 1957, and up to the end of March, 1958, when the transport contract expired, the Appellant had from time to time provided transport for the Respondents' produce. On one occasion, in August, 1957, he had refused to comply with a request of the Respondents to provide transport for paddy. The Respondents had not used any vehicles other than those of the Appellant to carry their produce, unless it could be said that they did so in the cases of the contracts with the United Africa Company and the Tanganyika Transport Company mentioned in paragraph 6 above. In these cases, the United Africa Company had transported the produce from the buying centres to Mtwara and the Tanganyika Transport Company had transported the paddy straight from the buying centres to their mill at Tunduru, outside the District of Songea.

p.54, 11.19-27

9. Crawshaw, J. delivered a reserved judgment on the 4th of November, 1958. He set out certain terms of the transport contract and summarized the pleadings and the evidence. He said there was nothing in the transport contract to prevent the Respondents from agreeing with a purchaser for the latter to take delivery at a buying centre or main road godown or anywhere else. The question, in his opinion, was whether there was a condition to be implied in the transport contract, or "in the wording" of that contract, that the Respondents would do nothing to alter the circumstances in such a way as to deprive the Appellant of the right to transport produce which otherwise he would have had under clause 1(a) or (b) of the contract. The learned Judge referred to certain authorities on implied terms. He said it was alleged by the Respondents that there was no obligation upon them to have any produce transported by anyone. If produce was handed to the Respondents, they might dispose of it by delivery to purchasers at the buying centres, and, it was argued, unless the produce was under the control of the Respondents at the time of transportation the transport contract did not apply to it. Crawshaw, J. said that in his view clause 1(a) of the transport contract gave the Appellant the exclusive right to transport tobacco, paddy and wheat "from all markets maintained by or for" the primary societies if there was any such transporting to be done. The chief bone of contention

pp.48-59
pp.48-54p.54, 1.28 -
p.55, 1.36.p.55, 1.37 -
p.56, 1.6.p.56, 1.7 -
p.57, 1.23.

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- had been the meaning of the word "handled". The learned Judge thought that it should be given a broad interpretation, and applied to any produce of the primary societies over which the Respondents exercised any control, including produce the sale of which the Respondents negotiated. The Respondents, he said, were under an obligation to do nothing which would avoid produce which they handled being transported by the Appellant. Sales ex markets, he added, were clearly such avoidance, and therefore breaches of the transport contract. Passing to the question of damages, Crawshaw, J. referred to the Appellant's having continued to transport produce for the Respondents until the end of March, 1958, and accordingly held that the agreement had never been repudiated. The Appellant, therefore, could claim damages for individual breaches of the contract by the Respondents, but only for breaches occurring before the institution of the proceedings on the 26th of August, 1957. The learned Judge said he could award damages for the sales of the 4th July and the 6th, 19th and 23rd of August to the United Africa Company, and also for the sale of paddy to the Tanganyika Transport Company. Since there was no evidence before him of the distances covered by the transport concerned, the learned Judge held the Respondents liable to the Appellant in respect of the individual breaches which he had mentioned, but "before arriving at the quantum" ordered that accounts be taken.
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10. The Respondents appealed to the Court of Appeal for Eastern Africa. In their memorandum of appeal, dated the 6th of January, 1959, they set out the following, amongst other, grounds:
1. that Crawshaw, J. had erred in holding that clause 1(a) of the transport contract imposed upon them an absolute duty to see that, if there was any transporting to be done, it was given to the Appellant.
2. that the learned Judge had erred in holding that the Respondents were under an obligation to do nothing which would avoid the transportation of produce by the Appellant, and in his construction of the word "handled".
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3. that the learned Judge had erred in ordering an account; since the Appellant had failed to prove damage, the learned Judge should have dismissed the action or awarded only nominal damages.
- pp.61-62
- p.57, l.24 -
p.58, l.40.
- p.59, l.25-
41.

11. The appeal was heard by Forbes, V.-P. and Gould and Windham, JJ.A. on the 23rd October, 1959. Judgment was reserved, and was delivered on the 3rd December, 1959.

12. The leading judgment was delivered by Forbes, V.-P., with whom the other two learned Judges agreed. The learned Vice-President summarized the facts, the pleadings and the provisions of the transport contract. He then referred to the reasoning and conclusions of Crawshaw, J. and the grounds set out in the memorandum of appeal. He then first set

pp.64-83

pp.64-78

10 aside clause 1(c) of the transport contract, holding that that referred to goods different in kind from those mentioned in clause 1(a) and (b). The

p.78, 1.45 -
p.79, 1.8.

learned Judge had been wrong in holding that the contract gave the Appellant the exclusive right to transport the commodities mentioned from all markets maintained by or for the primary societies. Clause

p.79, 1.9 -
p.80, 1.13.

20 1(a) was restricted to transport from buying centres either to the Respondents' factory at Songea or to any other place in the District of Songea desired by the Respondents. Clause 1(b) was restricted to transport from the factory or godown of the Respondents at Songea, as was confirmed by clause 5(2) providing rates for transport from Songea alone to points outside the District. Consequently, transport from godowns outside the town of Songea to points outside the District of Songea were not within the terms of the transport contract. If the

30 produce sold under the contracts between the Respondents and the United Africa Company had first to be transported to the Respondents' godowns on the main road to be rebagged and thence to be taken to Mtwara, so that the two stages of the journey were separable, the transport from the godowns to Mtwara was clearly outside the contract. As to local

p.80, 11.14-
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transport mentioned in clause 1(a) of the transport contract, the learned Vice-President thought that the broad construction placed by Crawshaw, J.

40 on the word "handled" was to be supported. Clause 1(a) did give the Appellant an exclusive right to transport the produce from the buying centres to any destination in the District of Songea. Apart from the contention that the local and external

p.80, 1.43 -
p.

parts of the journey under the agreements with the United Africa Company were separable, all the agreements upon which the Appellant relied provided for transport from buying centres to points outside the District of Songea, and such transport did not fall

50 within the express terms of the transport contract.

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No term prohibiting such contracts should be implied. The transport contract provided for an exclusive right to transport produce from buying centres to destinations within the District of Songea and from the Respondents' godown in Songea to specified points outside the District. It was not expressed to give the Appellany any right to transport produce from any place other than the Respondents' godown in Songea to destinations outside the District. This limitation appeared to be deliberate, and it might well be that the Respondents had had in mind precisely the type of sale agreement with which the case was concerned and wished to limit their obligation to use the Appellant's vehicles to produce passing through their own godown. It had been argued that the journey under the agreements with the United Africa Company fell into local and external parts, the Appellant having the exclusive right to provide transport for the local portion as far as the godown on the main road, where rebagging was to take place. The learned Vice-President held this was not the correct interpretation of the agreements. The whole journey had to be regarded as one. The provision for rebagging amounted to no more than a licence to use the godowns in question for that purpose, and the transport was from the buying centres to the coast. Under the agreement with the Tanganyika Transport Company, the produce was transported from the buying centres to Tunduru, and that was clearly outside the terms of the transport contract. On this view of the construction of that contract, it was unnecessary to go into any other points. The learned Vice-President therefore did not consider the propriety of Crawshaw, J's. order for an account. The appeal was allowed, the decree of the High Court set aside and the action dismissed.

p.82, 11.19
-41.

p.82, 11.42
-46.

13. The Respondents respectfully submit that clause 1 of the transport contract did not oblige them to transport any particular goods. Their obligation under that clause was only to use the Appellant's vehicles exclusively for transporting specified kinds of goods on specified routes. They broke that obligation only if they used vehicles other than the Appellant's for transporting such goods on such routes. In none of the cases on which the Appellant relies did the Respondents use any vehicles for transporting the goods concerned, for in all those cases the goods were transported, not by the Respondents nor on their behalf, but by, or on behalf of, buyers from them.

14. Even if (contrary to the Respondents' contention) the transport of the goods in the cases on which the Appellant relies did constitute use of vehicles by the Respondents, the Respondents respectfully submit that it did not constitute a breach of their obligations under clause 1 of the transport contract. That clause applied to agricultural or primary produce only if transported (a) from certain specified markets to the Respondents' factory at Songea or some other place in the Songea District desired by the Respondents, or (b) from the Respondents' factory or godown at Songea to certain specified places. In all the cases upon which the Appellant relies, the goods transported were agricultural or primary produce; in none of the cases were they transported either to the Respondents' factory at Songea or to any other place in the Songea District, and in none of the cases were they transported from the Respondents' factory or godown at Songea.

15. The Respondents respectfully submit that in none of the cases upon which the Appellant relies were the goods handled by them within the meaning of clause 1(a) of the transport contract. They also submit that there is no ground for implying a term of the transport contract prohibiting the Respondents from selling produce on the terms of the contracts made in those cases.

16. The Respondents respectfully submit that Crawshaw, J. was wrong in ordering the taking of accounts. He found that five contracts made by the Respondents for the sale of produce constituted breaches of the transport contract. The Appellant did not give any evidence to shew what damage (if any) he had suffered as a result of these five transactions. In the Pleint he did not claim an account, but simply damages; nor, in the Respondents' submission, was there on Crawshaw, J.'s findings any account to be taken, the only possible effect of the learned Judge's order being to allow the Appellant an opportunity of adducing evidence which he had not adduced at the trial. In these circumstances the learned Judge ought either to have dismissed the action or to have awarded nominal damages.

17. The Respondents respectfully submit that the order of the Court of Appeal for Eastern Africa was right and ought to be affirmed, and this appeal

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ought to be dismissed, for the following (amongst other)

R E A S O N S

1. BECAUSE the Respondents did not use any vehicles other than those of the Appellant for carrying goods to which the transport contract applied:

2. BECAUSE the Respondents did not use any vehicles other than those of the Appellant for carrying goods on routes to which the transport contract applied:

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3. BECAUSE the Respondents did not handle any of the goods sold under the five contracts held by Crawshaw, J. to be breaches of the transport contract:

4. BECAUSE those five contracts did not constitute breaches of any term of the transport contract, express or implied:

5. BECAUSE there was no evidence that the Appellant had suffered any damage as a result of the breaches found by Crawshaw, J.:

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6. BECAUSE of the other reasons given in the judgment of Forbes, Vice-President.

J.G. LE QUESNE

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- and -

NGONI-MATENGO CO-OPERATIVE
MARKETING UNION LIMITED Respondents

CASE FOR THE RESPONDENTS

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