Kenya

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No. 41 of 1955

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

SHEIKH BROTHERS LIMITED . . . . . *Appellant*

AND

1. **ARNOLD JULIUS OCHSNER**
2. **OCHSNER LIMITED** . . . . . *Respondents*

RECORD OF PROCEEDINGS

T. L. WILSON & CO.,
6 WESTMINSTER PALACE GARDENS,
LONDON, S.W.1,
Solicitors for the Appellant.

FIELD, ROSCOE & CO.,
52 BEDFORD SQUARE,
LONDON, W.C.1,
Solicitors for the Respondents.

The Solicitors' Law Stationery Society, Limited, Law and Parliamentary Printers, Abbey House, S.W.1. WL5612–16878

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2. OCHSNER LIMITED . . . . . *Respondents.*

RECORD OF PROCEEDINGS

In the Supreme Court.

No. 1.
Letter, F. S. Modera to Registrar, Supreme Court, 23rd September 1953.

No. 1.

LETTER, F. S. Modera to Registrar, Supreme Court.

F. Stewart Modera,
Shell House,
Room 312.
Reference 10/F/5.

P.O. Box 2038,
Nairobi.

23rd September, 1953.

The Registrar,
H.M. Supreme Court,
Nairobi.

Sir,

Civil Case No. 327 of 1953. In the Matter of the Arbitration Ordinance and in the Matter of an Arbitration.
Sheikh Brothers Ltd. v. *A. J. Ochsner and Ochsner Ltd.*

Following upon the Court's Order of Remission dated the 23rd July 1953 the Arbitrators have made a Revised Award which has been handed to both parties. Messrs. Stephen & Bickerton Williams on behalf of the Lessors have requested that this Revised Award be filed in Court in accordance with the provisions of Section 9 of the Arbitration Ordinance. Mr. Wilkinson is on leave in the United Kingdom but on behalf of us both I enclose the Revised Award duly stamped. I shall be glad if this document may be filed and if I may be notified of the appropriate charge which I undertake to remit on hearing from you. I will thereafter inform the parties of the filing and payment of the charges.

Yours faithfully,

(Sgd.) F. STEWART MODERA.

NOTE: The Revised Award referred to in the above letter is the same document as annexure "E" to No. 3, the Affidavit of Sheikh Mohamed Bashir.

In the Supreme Court.

No. 2. Chamber Summons, 16th November 1953.

No. 2.

CHAMBER SUMMONS.

IN THE COLONY AND PROTECTORATE OF KENYA.

In the Supreme Court.
at Nairobi.

Civil Case No. 327 of 1953.

IN THE MATTER of the Arbitration Ordinance,
and
IN THE MATTER of an ARBITRATION.

Between SHEIKH BROTHERS LIMITED . . Lessors
and
ARNOLD JULIUS OCHSNER . . . Licensee
and
OCHSNER LIMITED . . . . . Company.

CHAMBER SUMMONS.

Let all parties concerned attend the Judge in Chambers on Monday the 7th day of December 1953 at 9.30 o'clock in the forenoon on the hearing of an application on the part of the Lessors.

That the Revised Preliminary Award filed in Court by Colonel Frederick Stewart Modera and James Henry Wilkinson, the Arbitrators, on the 24th September, 1953, be set aside or remitted for the reasons mentioned in the Affidavit of Sheikh Mohamed Bashir, sworn on the 11th day of November 1953,, annexed hereto and for the reasons to be offered at the hearing of this application and that the costs of this application be provided for.

This application is made under the Arbitration Ordinance Cap. 22 Laws of Kenya (Revised Edition) and rules 7, 8 and 16 made thereunder.

(Sgd.) H. F. HAMEL,
Dy. Registrar.

Seal of
H.M. Supreme Court of Kenya.

Dated the 16th day of November 1953.

This Summons was taken out by Counsel for the Lessors.

STEPHEN & BICKERTON WILLIAMS.
(Sgd.) D. H. PEACOCK,
Advocates,
Mansion House, Nairobi.

H.M. Supreme Court of Kenya,
Civil Side, Nairobi, 16 Nov. 1953.
Copy to : Messrs. Ennion & Macdougall, Advocates, Nairobi.

No. 3.

AFFIDAVIT of Sheikh Mohamed Bashir in support of Chamber Summons.

In the Supreme Court.

No. 3. Affidavit of Sheikh Mohamed Bashir in support of Chamber Summons, 11th November 1953.

IN HER MAJESTY'S SUPREME COURT OF KENYA AT NAIROBI.

Civil Case No. 327 of 1953.

IN THE MATTER of the Arbitration Ordinance

and

IN THE MATTER of an ARBITRATION

Between SHEIKH BROTHERS LIMITED . . Lessors

and

ARNOLD JULIUS OCHSNER . . . Licensee

and

OCHSNER LIMITED . . . . . Company.

I, SHEIKH MOHAMED BASHIR, Managing Director of the Lessors and duly authorised to act on behalf of the Lessors make oath and say as follows :—

1. By an agreement dated the 9th December 1950 (hereinafter called the licence) and made between the Lessors of the one part and the Licensee of the other part (a copy of which is annexed hereto and for the purpose of identification only marked " A ") the Lessors granted to the Licensee full power, licence and authority to cut, decorticate, process and manufacture all sisal then or at any time thereafter growing upon certain areas of Kedai Sisal Estate adjoining Ndi Station in the Coast District of the Colony of Kenya being Land Office Number 4718 and 5981 and to occupy and use certain premises and to use certain plant, machinery and equipment as set out therein for a term of 5 years from the First day of January 1951, subject to the conditions set forth in the Licence. I depose to this fact of my own personal knowledge having been one of the witnesses to the affixing of the Lessor's Common Seal.

2. By Clause 3 (n) of the Licence the Licensee was authorised without the consent of the Lessors to assign the Licence to a private Limited Liability Company with shareholders consisting only of himself and members of his family.

3. On or about the 1st May 1951 the Licensee purported to assign to the Company his rights and obligations under the Licence with effect from the 1st January 1951. I was informed of this fact by the Licensee.

4. The cutting and manufacture of sisal under the Licence was carried on by the Licensee or the Company until the 31st January 1952 when possession of the premises the subject of the Licence was resumed by the Lessors at the request of the Company such resumption by the

In the Supreme Court.

No. 3. Affidavit of Sheikh Mohamed Bashir in support of Chamber Summons, 11th November 1953, *continued.*

Lessors being strictly without prejudice to the rights and remedies of the Lessors under the Licence. I depose to this fact from my own personal observation and information.

5. By an Agreement of Submission dated the 27th November 1952 and made between the Lessors, the Licensee and the Company, all questions, difficulties and disputes between the Lessors of the one part and the Licensee and/or the Company of the other part, concerning the construction, meaning or effect of the Licence or any clause or thing therein contained or the rights or liabilities of the parties thereunder or otherwise howsoever in relation thereto, were thereby referred to the determination of Colonel Frederick Stewart Modera, D.S.O., M.C., and James Henry Wilkinson, both of Nairobi in the said Colony (hereinafter called " the Arbitrators ") in accordance with and subject to the provisions of the Arbitration Ordinance Cap. 22, Laws of Kenya (Revised Edition).

I depose to this fact from my own personal information having signed the said agreement on behalf of the Lessors.

6. The following statements were thereafter lodged with the Arbitrators :—

(A) Statement of Claim by the Company dated 27th November 1952 (a copy of paragraphs 2 and 3 whereof is annexed hereto and for the purpose of identification only marked " B ").

(B) Reply by the Lessors dated the 5th December 1952.

(C) Rejoinder by the Licensee and the Company dated the 10th December 1952.

This information is given to me by my Advocates Messrs. Stephen & Bickerton Williams whom I verily believe.

7. In pursuance of the said Agreement of Submission certain proceedings took place before the Arbitrators in the latter half of December 1952 at which the Arbitrators were asked to decide as preliminary points whether the Licence was void upon either of the following grounds:—

(A) Mutual mistake referred to in the said paragraph 2 of the Company's Statement of Claim, or

(B) Impossibility referred to in paragraph 3 of the said Statement.

I was present at the majority of these proceedings and have been informed as to the remainder by my Advocates whom I verily believe.

8. On the 9th January 1953 the Arbitrators issued their preliminary award (a copy of which is annexed hereto and for the purpose of identification only marked " C ") the effect of which was as follows :—

(A) There was no mistake of fact but only an error of judgment and the error of judgment was not mutual. Accordingly the Licence was not void under Section 20 of the Indian Contract Act.

(B) There was impossibility but under the provisions of Section 56 of the Indian Contract Act the Licensee must make

compensation to the Lessors for his failure to carry out his promise, since had he exercised reasonable diligence he might have known it would not be possible to produce the minimum quantities stipulated for in the Licence.

This information has been given to me by my Advocates whom I verily believe.

9. At the request of the Licensee and the Company the said preliminary award was on the 19th February 1953 filed in Her Majesty's Supreme Court at Nairobi.

I am informed of this fact by my Advocates whom I verily believe.

10. On the 25th March 1953 the Licensee and the Company applied by Chamber Summons to Her Majesty's Supreme Court of Kenya at Nairobi that the preliminary award be remitted or set aside on grounds set out in the accompanying affidavit sworn by the Licensee, which application was heard by His Honour Mr. Justice de Lestang on 16th July 1953.

I have been informed of this fact by my Advocates whom I verily believe.

11. By an order dated 23rd July 1953 (copy attached and for the purpose of identification only marked " D ") His Honour Mr. Justice de Lestang directed that the award be remitted to the Arbitrators on the ground that the Arbitrators erred in holding that the Licensee's erroneous belief was not a mistake of fact.

I have been informed of this fact by my Advocates whom I verily believe.

12. On the 2nd September 1953 there was a hearing by the Arbitrators of the remitted award when the effect of the said remission was argued.

I have been informed of this fact by my Advocates whom I verily believe.

13. On the 7th September 1953 the Arbitrators issued a revised preliminary award (a copy of which is annexed hereto and for the purpose of identification only marked " E ") to the following effect :—

(A) They were bound by and accepted the ruling of His Honour Mr. Justice de Lestang that there had been a mistake of fact. They further found that the mistake was on a matter essential to the contract and was mutual. Accordingly they found that the Licence was void under Section 20 of the Indian Contract Act.

(B) While they found no occasion to vary their original decision in regard to impossibility, that decision would not become operative in view of their revised finding under Section 20 of the Indian Contract Act.

I have been informed of this fact by my Advocates whom I verily believe.

In the Supreme Court.

No. 3. Affidavit of Sheikh Mohamed Bashir in support of Chamber Summons, 11th November 1953, *continued.*

14. On the 24th September 1953 the revised preliminary award was at the request of the Lessors filed in Her Majesty's Supreme Court of Kenya at Nairobi.

I am advised of this fact by my Advocates whom I verily believe.

15. I am advised by my Advocates and verily believe that the said revised preliminary award should be remitted to the reconsideration of the Arbitrators or should be set aside on the ground that there are in it and apparent on its face the following inconsistencies and/or errors of law and/or fact :—

(A) The learned Judge in his said order held that what the Arbitrators had in their original preliminary award found to be an error of judgment was a mistake of fact. Neither the Arbitrators in their original preliminary award nor the learned Judge in his order found that there was mutuality and the Arbitrators are wrong in law and/or fact in so finding now.

(B) Further or in the alternative the Arbitrators are wrong in law and/or fact in holding that the mistake was on a matter of fact essential to the agreement and/or was of such a nature as to bring into operation Section 20 of the Indian Contract Act.

(C) Further or in the alternative the Arbitrators are wrong in law in finding that by reason of their revised decisions as to the application of Section 20 of the Indian Contract Act their original decision with regard to impossibility and the consequent application of Section 56 of the said Act will not become operative.

(D) Further or in the alternative the Arbitrators' preliminary revised award is ambiguous and/or uncertain in its finding as to mutuality and/or the operation of the Arbitrators' original finding as to impossibility.

Sworn by the said Sheikh Mohamed Bashir at Nairobi this 11th day of November 1953 } (Sgd.) S. M. BASHIR.

Before me,
M. L. ANAND,
Commissioner of Oaths.

Filed by :
STEPHEN & BICKERTON WILLIAMS,
Advocates,
Nairobi.

No. 3 " A."

MEMORANDUM OF AGREEMENT.

In the Supreme Court.

No. 3 " A." Memorandum of Agreement, 9th October 1950.

MEMORANDUM OF AN AGREEMENT made the ninth day of December One thousand nine hundred and fifty Between SHEIKH BROTHER LIMITED a Limited Liability Company having its registered office at Nairobi in the Colony of Kenya (hereinafter called the Company which expression shall include its successors and assigns where the context so admits) of the one part and ARNOLD JULIUS OCHSNER of Tanga in Tanganyika Territory Planter (hereinafter called the Licensee which expression shall include his executors administrators and assigns where the context so admits) of the other part WHEREAS :

(A) The Company is the owner as Lessee from the Crown of certain premises comprising ten thousand acres or thereabouts situate adjoining Ndi Station in the Coast District of the said Colony being land Office Nos. 4718 and 5951 and known as Kedai Sisal Estate which said premises are more particularly delineated and described on the plan annexed hereto.

(B) Certain areas of the said premises comprising five thousand acres or thereabouts which are shown bordered red on the said plan (hereinafter called the Sisal Area) are at present planted with mature sisal.

(C) The Company has agreed with the Licensee to grant to him sisal cutting rights over the said Estate upon the terms that the proceeds of all sisal produced on the said premises (subject to certain payments and deductions) shall be divided between the parties hereto in the shares hereinafter provided.

(D) Upon the treaty for the said licence it was agreed that by way of security for the fulfilment of his obligation to the Company the Licensee would deposit with the Company the sum of Shillings Fifty thousand and such sum has on or before the execution hereof been paid by the Licensee to the Company (the receipt whereof the Company doth hereby acknowledge) :

NOW IT IS HEREBY MUTUALLY AGREED by and between the parties hereto as follows :—

1. The Company hereby grants unto the Licensee FULL POWER LICENCE AND AUTHORITY First To cut decorticate process and manufacture all sisal now or at any time hereafter growing upon the Sisal Area Secondly To occupy and use in connection with his operations hereunder the area of the said Estate comprising two thousand acres or thereabouts bordered green on the said sketch plan Thirdly To occupy and use the existing labour camps tracks and roads on the said Estate and to construct new labour camps tracks and roads thereon or thereover Fourthly To occupy and use the buildings and offices on the said Estate particulars whereof are set out in the First Schedule hereto And Fifthly To use the plant machinery rails wagons locomotives implements tools and effects situate on about or belonging to the said Estate particulars whereof are set out in an Inventory which has been signed by or on behalf of the parties hereto.

In the Supreme Court.

No. 3 " A." Memorandum of Agreement, 9th October 1950, *continued.*

2. The said rights and liberties shall be held by the Licensee for a term of five years from the first day of January One thousand nine hundred and fifty-one subject to determination as hereinafter provided.

3. The Licensee to the intent that his obligations may continue throughout the said term undertakes as follows :

(A) that he will continuously and in a proper and efficient manner cut decorticate process and manufacture all mature sisal now or hereafter growing on the Mature Sisal Area :

(B) that he will deliver all sisal fibre and tow produced by him on the said premises to the Company or to such agents of the Company as it shall from time to time direct for sale :

(C) that he will as from the first day of April One thousand nine hundred and fifty-one manufacture and deliver sisal fibre in average minimum quantities of fifty tons per month : PROVIDED ALWAYS that for the purposes of this clause deliveries shall be calculated on the thirty-first day of December in each year to the intent that excess deliveries in any calendar month during such year shall be credited towards any shortfall in any calendar month during the same year :

(D) that he will use the Company's trade mark " Kedai " and stamp the same on all fibre and tow produced and delivered by him as aforesaid and on the expiration or sooner determination of the said term deliver up such trade mark to the Company.

(E) that he will not cut any sisal on the said premises other than mature sisal which for the purpose of this clause shall mean sisal leaves which branch out from the top of the sisal pole at an angle of not less than forty-five degrees :

(F) that he will keep the buildings described in the First Schedule hereto in the same repair and condition as at present fair wear and tear and damage by fire only excepted and so deliver up the same to the Company at the expiration or sooner determination of the said term except as aforesaid ;

(G) that he will keep the said plant machinery rails wagons locomotives implements tools and effects in as good working order and condition as at present fair wear and tear and damage by fire only excepted and from time to time replace renew and reinstate the same or any parts thereof which may become broken lost worn out or damaged beyond repair otherwise than aforesaid to the intent that the Licensee shall at the expiration or sooner determination of the said term deliver up to the Company the said plant machinery rails wagons locomotives tools and effects in as good working order and condition as at present except as aforesaid :

(H) that he will duly observe all rules and regulations for the time being in force of the Kenya Sisal Growers Association, The East African Sisal Board and any other board established under the Sisal Control Ordinance or any other Ordinance or Ordinances Rules or Regulations introduced by Government in connection with the production of sisal :

(I) that he will abide by and observe all rules and regulations from time to time laid down by the Labour Department of the said Colony in connection with the employment of labour on the said premises :

(J) that he will keep proper and accurate records of all sisal produced by him on the said premises and on or before the fifth day of each calendar month furnish to the Company a return showing the quantity of sisal produced by him during the immediately preceding calendar month :

(K) that he will maintain in the same condition as at present all existing firebreaks on the said premises :

(L) that he will permit the Company and its servants agents and workmen at all reasonable times during the said term to enter upon the said premises and examine the state of repair and condition thereof and in case there shall be any deficiency defect or want of repair which he shall be liable to make good under any of the agreements on his part herein contained and notice in writing thereof shall be given to him will make good the same in a proper manner within the space of two calendar months next after every such notice shall have been given to him to the satisfaction of the Company :

(M) that he will repay to the Company on demand all sums which the Company shall expend for insuring the said buildings plant machinery implements tools and effects against fire PROVIDED ALWAYS that the Licensee's liability hereunder shall not exceed Shillings one thousand six hundred per annum :

(N) that he will not assign sublet or part with the possession of the said premises or any part thereof or assign or part with any of his rights hereunder without the consent in writing of the Company first had and obtained PROVIDED ALWAYS that the Licensee shall be entitled without such consent to assign the Licence hereby granted to a private limited liability company with shareholders consisting only of himself and members of his family :

(O) that he will spend an aggregate of at least nine months out of each year of the said term in working the said premises and during such aggregate period will devote his whole time and attention to the business of producing sisal thereon and not engage directly or indirectly in any other business or occupation :

(P) that he will on the execution hereof purchase from the Company :

(i) the lorries and spares on the said premises (four of which lorries at least are guaranteed by the Company to be in running order) at the price of Shillings twenty thousand ; and

(ii) all consumable stores at present on the said premises at the cost price thereof to the Company ;

(Q) that he will clean all areas of the said premises from which sisal has been cut in accordance with the system known as " Fika " :

In the Supreme Court.

No. 3 " A." Memorandum of Agreement, 9th October 1950, *continued.*

(R) that he will not grow any crop on the said premises other than sisal without the consent in writing of the Company but this prohibition shall not intend to preclude native employees from planting small areas of maize :

(S) that he will duly and punctually pay all cess payable in respect of sisal produced on the said premises at the rate for the time being imposed under the Sisal Control Ordinance PROVIDED ALWAYS that sixty per cent. of any sum paid by him by way of cess on any consignment in excess of Shillings twenty-six Cents fifty per ton shall be refunded to him by the Company :

(T) that he will permit the Company to use the existing tracks or roads on the said premises and to construct new roads or tracks thereon without reference to him.

(U) that he will permit the Company to house in the existing labour camps any labour (not exceeding 60 persons) while employed by it in replanting the areas out by him :

(V) that he will duly and punctually pay and discharge his separate debts and engagements in connection with his operations on the said premises and will keep the Company indemnified against all actions claims and demands on account of the same.

4. The Company to the intent that its obligations may continue throughout the said term undertakes as follows :—

(A) that it will in respect of each delivery of sisal line fibre made to it or its duly authorised agent by the Licensee and certified by the Sisal Inspector as fit for export pay to the Licensee the sum of Shillings five hundred per ton such payment to be made on or before the expiration of seven days from the date of the consignment note in respect of such delivery :

(B) that it will sell all sisal fibre and tow delivered by the Licensee as aforesaid at the best free on board market price :

(C) that it will apply all such deliveries towards fulfilment of the forward contracts already entered into by it which are specified in the Second Schedule hereto and will not enter into any further contracts for the sale of fibre and/or tow without first consulting the Licensee :

(D) that it will pay all rates and taxes which are now or may at any time during the said term be assessed or imposed on the said Estate and also the head rents payable to the Government of the said Colony in respect thereof :

(E) that it will duly and punctually pay to the Licensee his share of the proceeds of all sisal produced by him on the said premises and delivered for sale as aforesaid in manner hereinafter provided :

(F) that it will on the expiration or sooner determination of the said term refund to the Licensee the said deposit of Shillings fifty thousand together with all other moneys retained by it by

way of deposit under Clause 5 hereof or so much of the same respectively as shall then remain in its hands together with interest on the said sum of Shillings fifty thousand at the rate of five per cent. per annum from the date on which the same shall have been paid PROVIDED ALWAYS that the Company shall be entitled to retain the said deposit of Shillings fifty thousand for a period not exceeding three calendar months from such expiration or sooner determination and to apply the same in the first place in satisfaction of any moneys then due to it hereunder and in the next place in paying any undischarged debts due by the Licensee in connection with his operations hereunder.

5. Out of the proceeds of each consignment of sisal fibre and tow produced on the said premises and delivered and sold as aforesaid the Company shall be entitled to a sum equivalent to Shillings One hundred per ton as development charges and the balance shall be divided as follows namely :—

(i) in respect of sisal line fibre and sansivers fibre sixty per cent. to the Company and forty per cent. to the Licensee :

(ii) in respect of tow fifty per cent. to the Company and fifty per cent. to the Licensee :

(iii) in respect of flume tow twenty-five per cent. to the Company and seventy-five per cent. to the licensee.

PROVIDED ALWAYS that all freight and port charges and all insurance charges from the said premises to port of consignments shall be borne by the Licensee and deducted from his share of such balance PROVIDED ALSO that the Company shall also be entitled to be paid and to retain ten per cent. of the Licensee's share of such balance by way of further security for the due fulfilment of his obligations hereunder but so that the aggregate amount standing to the credit of the Licensee with the Company by way of security (including the said deposit of Shillings fifty thousand) shall not at any time exceed the sum of Shillings one hundred and ninety thousand PROVIDED ALSO that if at any time the moneys standing to the credit of the Licensee with the Company by way of deposit hereunder shall fall below Shillings fifty thousand the Licensee shall on demand from the Company make up the deficiency PROVIDED ALSO that any loss occasioned or caused by reason of any sisal fibre or tow exported being rejected at destination shall be borne by the Licensee.

The amount due to the Licensee in respect of any such consignment under the foregoing provisions of this clause shall be paid to him within fifteen days from the receipt of the proceeds of sale.

6. If during any year of the said term ending the thirty-first day of December the Licensee's deliveries of line fibre shall fall below the aggregate of the average minimum monthly quantity hereinbefore provided for then the Company shall be entitled without prejudice to any other remedies it may have hereunder to be paid out of the moneys representing the Licensee's deposit a sum equivalent to the amount it would have received in the same year if the Licensee had cut and delivered the aggregate of the average minimum monthly quantities hereinbefore provided for PROVIDED that if

In the Supreme Court.

No. 3 " A." Memorandum of Agreement, 9th October 1950, *continued.*

any subsequent year of the said term ending the thirty-first day of December the Licensee's deliveries of line fibre shall exceed the aggregate of the average minimum monthly quantities hereinbefore provided for the Company shall make up the Licensee's deposit by refunding a sum equivalent to the price realised in respect of such excess but not exceeding the amount deducted therefrom in respect of the deficiency in any previous year's deliveries.

7. Any plant machinery fittings tools vehicles or equipment installed by the Licensee on the premises except for the purpose of replacement under clause 3 (G) hereof, shall remain the separate property of the Licensee who shall on the expiration or sooner determination of the said term be entitled to remove the same on making good all damage caused by such removal PROVIDED ALWAYS that the Company shall have the option to purchase the same or any part thereof prior to such removal at a fair valuation.

8. If at any time during the said term the market price of sisal fibre falls below forty pounds per ton this agreement shall automatically determine.

9. If at any time during the said term by reason of drought or by reason of fire or breakdown of machinery not due to the negligence of the Licensee or his employees the Licensee shall be unable to produce the average minimum monthly quantities of sisal hereinbefore provided for and shall forthwith give to the Company notice in writing to that effect then the Licensee shall be released for a period of three calendar months from the date of such notice from his obligations to produce and deliver the average minimum monthly quantities hereinbefore provided for.

10. The Licensee shall be relieved from all responsibility hereunder for any failure or delay in the carrying out of his obligations hereunder due to universal strikes in the said Colony floods or war but only to the extent and for the period during which any such cause shall so operate PROVIDED ALWAYS that if such cause shall operate for a period exceeding three consecutive calendar months either party shall be entitled on giving one calendar month's notice in writing to the other to determine the Licence hereby granted.

11. Subject to the provisions of Clauses 9 and 10 hereof if the Licensee shall fail for a period of three consecutive calendar months to cut and deliver the average minimum monthly quantities of sisal provided for and by reason of such failure the loss sustained by the Company shall exceed the sum of Shillings One hundred thousand or if the Licensee shall commit any other breach of the agreements on his part herein contained or if he shall be adjudicated bankrupt or have a receiving order made against him or compounds with or executes an assignment for the benefit of his creditors or suffers an execution to be levied against his goods and chattels then it shall be lawful for the Company at any time thereafter to re-enter upon the said premises or any part thereof in the name of the whole and thereupon the licence hereby granted shall cease and determine but without prejudice to any right of action or remedy of the Company in respect of any antecedent breach by the Licensee of any of the agreements on his part herein contained.

12. If any question difference or dispute shall arise between the parties hereto concerning the construction meaning or effect of these presents or any clause or thing herein contained or the rights or liabilities of the said parties respectively under these presents or otherwise howsoever in relation to the premises then every such question difference or dispute shall be referred to the determination of two arbitrators one to be appointed by each party in accordance with and subject to the provisions of the Arbitration Ordinance or any statutory modification or reenactment thereof.

13. Any notice required to be served hereunder shall be sufficiently served in the case of the Licensee if forwarded to him by registered post at Kedai Sisal Estate P.O. Ndi and shall be sufficiently served in the case of the Company if delivered to it or forwarded to it by registered post at P.O. Box 477, Nairobi. A notice sent by post shall be deemed to have given at the time when in due course of post it would be delivered at the address to which it is sent.

IN WITNESS whereof the Company has caused its Common Seal to be hereunto affixed and the Licensee has hereunto set his hand the day and year first herein written.

FIRST SCHEDULE above referred to.

Manager Bungalow.		
Kitchen.		
Boy Room.		
Building attached to Manager Bungalow 12′ × 15′ × 18′.		
Hospital 40′ × 20′ × 13′.		C.I. Sheets roof.
Locomotive engine shed		18′ × 13′ × 12′.
Wall and roof of C.I. Sheets.		
Office 24′ × 18′ × 13′.		C.I. Sheets roof.
Attached Office 28′ × 18′ × 13′.		C.I. Sheets roof.
Sisal bale store near office		40′ × 20′ × 14′.
Clerks House	5 rooms.	
2 rooms	12′ × 15′ each.	
1 ,,	10′ × 18′ dining room.	
1 ,,	,, × ,, Bathroom fitted with water connection.	
1 ,,	8′ × 6′ store.	
Mechanic house	3 rooms.	C.I. Sheets.
(1) room 15′ × 15′	(2) 12½′ × 12½′	(3) 12½′ × 12½′.
Kitchen and bathroom	25′ × 12′	C.I. Sheets.
Boy room	12′ × 9′ × 12′.	
Latrine	6′ × 6′	
Shop house	36′ × 15′ × 14′.	
Church	33′ × 16′ × 13′.	
House near shop	15′ × 14′ × 13′.	
Blacksmith shed	24′ × 21′ × 14′.	
Native huts 33 huts. 57 huts.		New huts erected in latest fashion required by authority.
24		

Store of oils, posho, etc.
Boiler and engine sheds, Brushing shed and loose fibre store.
Factory of C.I. Sheet.

In the Supreme Court.

No. 3 "A." Memorandum of Agreement, 9th October 1950, *continued.*

SECOND SCHEDULE hereinbefore referred to

Dated	Contract No.	Quantity	Grade	Price £	Price Sch.	Shipment Date
24.10.50	632	60	No. 3	160	15	March to Sept. 1951.
10. 8.50	428E	5	3L	127	–	Dec./Jan.
11. 8.50	428F	5	3L	127	–	Jan./Feb.

SEALED with the Common seal of the Company in the presence of } Common Seal of SHEIKH BROS. LTD.

S. M. BASHIR Director.
– – RASHID Director.
– – RASHID Secretary.

SIGNED by the Licensee in the presence of } A. J. OCHSNER.

– – THOMSON,
Solars. Asst.,
Nairobi.

(Copy of Sketch Plan not attached.)

In the Supreme Court.

No. 3 "B."

PARAGRAPHS 2 AND 3 OF STATEMENT OF CLAIM of Ochsner Limited.

No. 3 "B." Paragraphs 2 and 3 of Statement of Claim of Ochsner Limited, 27th November 1952.

2. The Licence was entered into under a mutual mistake as to a matter of fact essential to the agreement inasmuch as the Parties thereto believed that the leaf potential of the said sisal area would be sufficient to permit the manufacture and delivery of the said minimum quantities of mature sisal throughout the said Term whereas this belief was erroneous and consequently the licence is void.

3. In the alternative it was an implied condition of the undertaking referred to in paragraph 1 that the leaf potential of the said sisal area would be sufficient to permit the manufacture and delivery of the said minimum quantities of mature sisal throughout the said term whereas, notwithstanding the exercise of reasonable diligence by the Licensee and unknown to the Lessor, the said leaf potential was insufficient for the said purpose and consequently performance of the contract was impossible and the Licence is void.

No. 3 "C."

AWARD—Preliminary Decision.

No. 3 "C." Award—Preliminary Decision, 8th January 1953.

We have been asked to decide as preliminary points whether the Licence is void upon either of the following grounds :—

(A) Mutual mistake referred to in paragraph 2 of the Company's Statement of Claim, or

(B) Impossibility referred to in paragraph 3 of the said Statement.

Dealing with (A) we hold the view that, if for the word " mistake " one can substitute the words " error of judgment," then there was a mistake but it was not a mutual mistake and was in fact made by the Licensee only : he erred in his judgment as to the potential tonnage of sisal derivable monthly from the Estate. His judgment even as to this factor may not have been faulty had there been unusually heavy rainfalls, but this matter was of course uncertain. In order to avoid his contract the Licensee must show that there was at the time of signing the Licence a mistake of fact. We are satisfied that " error of judgment " is not the equivalent of " mistake " and that whilst there was an error of judgment on the part of the Licensee in his assessment of the sisal tonnage which the Estate could produce, there was not in our view such mistake as would render the Licence void under Section 20 of the Indian Contract Act.

With regard to (B) the Company in paragraph 3 of the Statement of Claim alleges that the contract was impossible of performance because the leaf potential was insufficient to permit the manufacture and delivery to the Lessor of an average minimum quantity of 50 tons per month of mature sisal throughout the term of the Licence. It is not suggested that the contract was impossible of performance for any other reason.

In the Supreme Court.

No. 3 "C." Award— Preliminary Decision, 8th January 1953, *continued.*

When approaching the question of impossibility it is not allowable to visualise abnormalities. The deciding factors must be those which are prevalent in normal and average conditions. Given an unusual rainfall over a period of five years it might have been that a tonnage equivalent to fifty tons per month would have been extractable from the Estate, but the evidence adduced before us shows an average low rainfall in the neighbourhood and that the Estate in the years prior to 1951 had shown an average tonnage production well below fifty tons per month.

We hold the view that there was insufficient leaf to enable the Licensee to carry out his obligations under Clause 3 (c) of the Licence, particularly having regard to the provisions of Clause 3 (e) thereof. To this extent therefore we consider that there was impossibility.

Section 56 of the Indian Contract Act, however, provides as follows :—

> " Where one person has promised to do something which he knew, or, with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise."

We consider that the Licensee had he exercised reasonable diligence before agreeing to the terms of the Licence might have known that it would not be possible to produce the minimum quantities stipulated for in the Licence, and that consequently he must make compensation as visualised in the provisions of the Section quoted.

F. STEWART MODERA,
Arbitrator.

J. H. WILKINSON,
Arbitrator.

9th January, 1953.

No. 3 "D." Order of Supreme Court, 23rd July 1953.

No. 3 "D."

ORDER of Supreme Court.

This is an application to remit or set aside an award on the ground of errors appearing on its face. Two errors are alleged in the application in these words.

> " I and the Company contend that the said insufficiency of leaf constituted a mistake as to a matter of fact essential to the agreement and that such mistake was mutual and accordingly that the Arbitrators erred in their award in these respects."

Before considering the merits of the application I wish to deal with the submission that the Court cannot question the alleged errors because they are on points of law which were specifically referred to the arbitrators. A short answer to this submission is that the points of law in question

were not specifically referred to the arbitrator in the reference but merely arose in the course of the reference and the arbitrators were, by consent of the parties, requested to decide them in limine. The objection accordingly fails.

I now pass to the merit of the application. Dealing first with the second error alleged I can see nothing on the face of the award itself to show that the arbitrators were wrong in holding that the mistake was not mutual. It is only if one reads the award in conjunction with the defence that one may conclude that this finding was erroneous. Unfortunately the defence does not form part of the award and cannot be looked at for the purpose of deciding whether the arbitrators erred or not in holding that there was no mutual mistake.

As regards the first alleged error it is contended that the Licensee's belief as to the potential tonnage of sisal derivable from the estate, which the arbitrators found was insufficient to enable him to carry out his obligations under clause 3 (C) of the Licence, was a mistake of fact and that the arbitrators were wrong to hold that it was " an error of judgment " and not the equivalent of " a mistake." To appreciate this argument it is necessary to read the award with section 3 of the statement of claim which is referred to in the award. Reading the two together it becomes clear that what the arbitrators decided in the first part of their award was that the Licensee's belief that the leaf potential of the estate would be sufficient to enable him to carry out his obligations under the Licence, which belief they found to be erroneous, was not a mistake of fact but " an error of judgment," not amounting to a mistake of fact. What the arbitrators meant by " error of judgment " I really do not know. It is one of the vaguest possible expressions and may be used colloquially to describe any mistake occasioned by faulty deduction or faulty reasoning. It seems to me, therefore, that *prima facie* the word " mistake " embraces an error of judgment. The question however is whether the Licensee's erroneous belief was a mistake as to a matter of fact within the meaning of Section 20 of the Indian Contract Act. In my view it clearly was. The subject matter of the belief, namely the sisal tonnage which the estate could produce, is not a matter of opinion but clearly a matter of fact and the arbitrators themselves acknowledge as much in their finding of fact that there was insufficient leaf to enable the Licensee to carry out his obligations and that the applicant could, by the use of reasonable diligence, have ascertained that fact. I am therefore of the opinion that the arbitrators erred in holding that the Licensee's erroneous belief was not a mistake of fact.

Nevertheless in order to avoid an agreement a mistake of fact must be :—

(A) mutual

(B) on a matter of fact essential to the agreement.

The arbitrators having found that the mistake was not mutual it is submitted that the award ought not to be remitted to them because rectification of the error will not affect their decision in the result. On behalf of the Applicants, Mr. MacDougall answers that if the award is remitted he hopes to be able to convince the arbitrators of other errors in their award and make them change their views. I am satisfied that there

In the Supreme Court.

is an error on the face of the award and as this error may have influenced the arbitrators' decision in other respects I think it is just and right that the award should be remitted.

No. 3 "D." Order of Supreme Court, 23rd July 1953, *continued.*

I order accordingly.

Costs to be costs in the award.

M. C. NAGEON DE LESTANG.
23.7.53.

Nairobi.
23rd July, 1953.

No. 3 "E." Revised Award—Preliminary Decision, 7th September 1953.

No. 3 "E."

REVISED AWARD—Preliminary Decision.

When we presented our preliminary Award we held the view that an error of judgment was the equivalent of an erroneous opinion and that when considering Section 20 of the Indian Contract Act such an opinion as to the capacity of the sisal plantation which formed the subject matter of the agreement could not be deemed a mistake as to a matter of fact. We also held the view that the licensee had formed an opinion which caused him to undertake the obligation which obligation was readily accepted by the lessor.

The learned Judge by whose decision we are bound has ruled that there was in fact a mistake and he has expressed the view that it was a mistake as to a matter of fact within the meaning of Section 20 of the Indian Contract Act. We are accordingly obliged to adopt this view. We have reached the conclusion that the mistake was mutual and was on a matter of fact essential to the agreement. We therefore hold that the licensee succeeds in his contention that the agreement was void.

We find no occasion to vary our original decision in regard to impossibility but in view of the fact that the contract is now held to be void our decision as to impossibility will not become operative.

The arbitrators fees to date shall be payable in equal proportions by the lessor and the licensee.

F. STEWART MODERA,
Arbitrator.

J. H. WILKINSON,
Arbitrator.

7th September 1953.

No. 4.

JUDGE'S NOTES.

In the Supreme Court.

No. 4. Judge's Notes, 7th December 1953.

7.12.53.

Roche for Applicants.

McDougall for Respondents.

Roche : Two points before arbitrators :—

(1) Whether mutual mistake S. 20.

(2) Whether impossibility of performance S. 56. Award remitted. New Award.

Objections—

S. 15 (*a*) *Affidavit.*

Arbitrators merely altered their views as to mutuality of mistake.

To decide whether mutual or not one has to consider the licence. Lessees could not have set aside license on ground of mistake. Lessors merely undertook to market what the licensors produced. Merely safeguard in case less is produced.

S. 15 (*b*).

Two aspects of essentiality :

(1) In nature essential (concedes that).

(2) In extent essential.

Arbitrators did not take (2) in account.

Pollock 3rd Ed. 109 (Indian Contract Act).

Sinha (I.C. Act) Vol. I, p. 354.

Arbitrators found not enough sisal to produce 50 tons.

Except in case of unusual rainfall.

Therefore a case for compensation.

Sec. 20 not applicable to such a case when a reasonable amount of sisal can be produced.

S. 15 (*c*).

S. 56 only applicable in a case like this.

Sinha Vol. 2, p. 981.

Extra contractual position.

S. 15 (*d*).

Only in case original award cannot be looked at.

In the Supreme Court.

No. 4. Judge's Notes, 7th December 1953, *continued.*

McDougall : (A) Rely on S. 20 and terms of Award.

My Order referred question of mutual mistake. Arbitrators reversed decision *re* question of fact and found mistake to be mutual.

(B) No error on face of award *re* essentiality.

(C) S. 56 does not come into play. 2 alternatives question before board.

Roche : S. 56. Agrees alternative points but lessees claim compensation under S. 56.

C.A.V.

(Sgd.) M. C. NAGEON DE LESTANG.

No. 5. Decision, 11th December 1953.

No. 5.

DECISION.

In these arbitration proceedings two preliminary points were submitted for decision by the Arbitrators, namely, whether the licence was void upon either of the following grounds :

(A) mutual mistake rendering the licence void under Section 20 of the Indian Contract Act ; or

(B) impossibility of performance under Section 56 of the Indian Contract Act.

The arbitrators found as to (A) that there was no mistake of fact but only an error of judgment and that the error of judgment was not mutual. They accordingly held that the licence was not void under Section 20 of the Indian Contract Act ; and as to (B) that there was impossibility but under the provision of Section 56 of the Indian Contract Act that the Licensee had to make compensation to the Lessors for his failure to carry out his promise.

The award was remitted to the Arbitrators for reconsideration with the direction that there was a mistake of fact and not merely an error of judgment. On the 24.9.53 the Arbitrators filed a revised award in these terms :

" Award "

The Lessors now apply that the revised award be remitted or set aside on four grounds, namely :

(1) that the Arbitrators were wrong in law and fact in finding that the mistake was mutual ;

(2) that they were wrong in holding that the mistake was on a matter of fact essential to the agreement ;

(3) that they were wrong in holding that having regard to their finding on the question of mistake their original decision on the question of impossibility under Section 56 of the Indian Contract Act would not become operative ;

(4) that the revised award is ambiguous and uncertain.

It is well settled that the Court will not remit or set aside an award unless the alleged errors are apparent on the face of the award. In the present case even if one reads both awards together it seemed to me impossible to say that the Arbitrators erred either on their finding on mutuality or in their decision that the mistake was one essential to the agreement. When the original award was referred back to the Arbitrators it was clearly envisaged that they might change their views on both the questions of mutuality and essentiality and this has now occurred. I therefore find no substance in the first and second grounds of this application.

As regards (3) I entirely agree with the view of the Arbitrators expressed in the penultimate paragraph of the revised award. Reference to Section 56 of the Indian Contract Act will show that the third paragraph of that Section only applies where an agreement is declared void on the ground of impossibility or illegality. It does not apply where as in the present case the agreement is held to be void on the ground of mutual mistake of fact.

As regards (4) I can only say that I find nothing ambiguous or uncertain in the revised award.

The application is therefore dismissed with costs.

M. C. NAGEON DE LESTANG.

Roche : Applies for leave to appeal if necessary.

MacDougall : No objection.

Order : Leave to appeal granted if necessary.

M. C. NAGEON DE LESTANG.

11.12.53.

No. 6.

ORDER.

UPON READING the application dated and filed on the 16th day of November, 1953, by Counsel for the First Party under the Arbitration Ordinance Cap. 22 Laws of Kenya (Revised Edition) and Rules 7, 8 and 16 made thereunder, for an Order (1) that the Revised Preliminary Award filed in Court by Colonel Frederick Stewart Modera and James Henry Wilkinson, the Arbitrators, on the 24th day of September, 1953, be set aside or remitted and (2) that the costs of this application be provided for :

AND UPON READING The Affidavit of SHEIKH MOHAMED BASHIR, the Managing Director of the Lessors (First Party), sworn on the 11th day of November, 1953 in support of the said application and the annexures thereto :

AND UPON HEARING Counsel for the First and Counsel for the Second and Third Parties :

In the Supreme Court.

No. 6. Order, 11th December 1953, *continued.*

THIS COURT DOTH DISMISS the application with costs:

AND DOTH GRANT leave to appeal if necessary.

Given under my hand and the Seal of the Court at Nairobi this 11th day of December, 1953.

(Sgd.) M. C. NAGEON DE LESTANG,
Judge,
Supreme Court of Kenya.

Seal: His Majesty's Supreme Court of Kenya.

In the Court of Appeal.

No. 7. Memorandum of Appeal, 10th March 1954.

No. 7.

MEMORANDUM OF APPEAL.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
at Nairobi.

Civil Appeal No. 17 of 1954.

(Being an appeal from the Decree or Order of Her Majesty's Supreme Court of Kenya at Nairobi in its Civil Case No. 327 of 1953.)

SHEIKH BROTHERS LIMITED . . . . Appellant
(Original Lessors)

versus

1. ARNOLD JULIUS OCHSNER . . . . Respondent
(Original Licensee)

AND

2. OCHSNER LIMITED . . . . . Respondent
(Original Company).

MEMORANDUM OF APPEAL.

The above-named Appellant Company hereby appeals against the Decree or Order of Her Majesty's Supreme Court of Kenya dated the 11th day of December 1953 in Civil Case No. 327 of 1953 (certified copies of which Order as drawn up and of the Order or Judgment as delivered are attached hereto) and sets forth the following principal grounds of appeal:—

1. The arbitrators having in their Preliminary Decision Revised Award (hereinafter called " the Revised Award ") of 7th September 1953 held that they found no occasion to vary their original decision as to impossibility, the learned Judge erred in upholding the arbitrators when they went on to hold in their said Revised Award that their original decision as to impossibility would not become operative.

2. The learned Judge erred in holding or impliedly holding that if an agreement is void for mistake under Section 20 of the Indian Contract Act, 1872 it cannot be void under Section 56 of the said Act on the ground of (initial) impossibility, that is to say, he erred in holding or impliedly holding that the two Sections are mutually exclusive.

3. As the first and third paragraphs of Section 56 of the said Act were applicable in terms as shown by the Revised Award the learned Judge and the arbitrators erred in thinking that the rights and liabilities under the third paragraph of that Section were taken away by the applicability also of Section 20 of the said Act and in failing to appreciate that Section 20 was a wider section than Section 56 and that therefore the applicability of Section 20 did not render inapplicable the third paragraph of Section 56.

4. The learned Judge failed to appreciate that the arbitrators in their Revised Award erred in law in thinking that the learned Judge had for the first time in his order of 23rd July 1953 held the agreement to be void whereas the arbitrators had in their award—Preliminary Decision of the 9th January 1953 already held it to be void or such finding was implicit in their decision to apply Section 56 of the said Act.

5. The learned Judge failed to appreciate that while the agreement to manufacture and deliver fibre in average minimum quantities of 50 tons per month was void on the ground of mutual mistake as to a fact essential to the contract it was also an agreement to do an act impossible in itself.

Alternatively and without prejudice to the above the learned Judge erred in upholding the arbitrators in their finding in the Revised Award that the mistake was mutual or on a matter of fact essential to the agreement.

6. The arbitrators having in their Awards found all the ingredients required for the application of the third paragraph of Section 56 of the said Act fulfilled, the learned Judge erred in failing to remit the Revised Award back to the arbitrators with directions to assess compensation under the said third paragraph.

WHEREFORE the Appellant prays that this appeal be allowed and that the Order of the Supreme Court dated the 11th day of December 1953 be set aside and that the Revised Award of the 7th day of September 1953 be remitted to the arbitrators with directions to assess compensation under the third paragraph of Section 56 of the Indian Contract Act, 1872 or that such further or other directions or order be given or made as the case may require and that the Appellant be allowed its costs here and in the Court below.

Dated at Nairobi this 10th day of March, 1954.

(Sgd.) J. M. NAZARETH,
MADAN & SHAH,
Advocates for the Appellant.

Filed by :
Madan & Shah,
Advocates, Badru House,
Government Road, P.O. Box 944.

To :
Messrs. Ennion & MacDougall,
Advocates for Respondents Nos. 1 and 2,
Sadler Street,
Nairobi.

(One copy to be served in respect of each Respondent.)

In the Court of Appeal.

No. 8.
President's Notes, 10th and 13th December 1954.

No. 8.

PRESIDENT'S NOTES.

10.XII.54.

2.30 p.m.

Coram : Nihill, P.
Jenkins, J.A.
Briggs, J.A.

Nazareth for Appellant.

MacDougall for Respondent.

Nazareth :

Recounts background history. Obligation on licensee to deliver average monthly quantity of 50 tons sisal fibre.

Licensee defaulted and surrendered.

27.11.52

Submission to Arbitrators. Two preliminary points.

9.5.53

Award on Prelim. points.

This award remitted on suit by Respondents.

7.9.53

Revised award see p. 18.

We asked for remitting back. We failed. Judge confirmed 2nd award.

Ground one—Memo. of Appeal.

Sec. 20 Indian Contract Act.

Sec. 56 First award. Arbitrators by implication found that Coy. did not know.

In second award Arbitrators adhered to their finding of impossibility.

Because case falls under Sec. 20 does that prevent application of Sec. 56.

Judge wrong in thinking that the two sections are mutually exclusive.

Note Common use of word " agreement."

Cf. Sec. 2 (*g*) and (*h*).

An agreement is an unenforceable contract.

No real distinction between a contract void for a mutual mistake of fact and a contract initially void for impossibility.

23 Hailsham p. 129 and Art. 189, Art. 191 at p. 137.

Parties here under a mistake as to quantity of subject matter.

32 A.C. p. 161 *Bell* v. *Lever Bros.* at p. 217 & 218.

A mistake on essential fact is akin to impossibility.

(1909), 26 T.L.R. at 149. In terms sec. 56 applicable to fraud case.

It doesn't cease to be a mistake of fact because if the true fact had been known the contract would have been impossible.

1950 Sinha Vol. II p. 981.

Karimjee v. *Haridas* [1928] A.I.R. Sind. 21.

Judgment Tyall AJC.

Conditions of 3rd para. of Sec. 56 entirely performed therefore compensation payable.

Arbitrators erred in law in holding that a mistake as to potentiality of output was a mistake on a matter of fact.

Essential to the agreement.

Sec. 20 would not then apply at all.

10th December 1954.

Adjourned to 10.30 *a.m. on Monday.*

(Sgd.) J. H. B. NIHILL, P.

13th December 1954.

13.XII.54.

Bench and Bar as before.

MacDougall in reply :—

One main point. Should arbitrators finding that Sec. 20 applies preclude application of Sec. 56 (para. 3).

Error must appear on face of award.

1951. 18 E.A.C.A. 96 at p. 99.

Submit " Revised award contains no error on its face."

Original award cannot be looked at.

If the arbitrators had been right the first time on mistake they would not have gone on to consider " impossibility." At any rate two findings on mistake and impossibility must be taken contemporaneous.

Main substance of appeal, Whether two sections can be read together.

Submit 56 does not apply at all. Arbitrators did not find an agreement void under sec. 56.

Clause 2 (*b*) definition of " promise ". " A proposal when accepted becomes a promise."

Salvador case. " not compensation at all."

Nothing on the face of 2nd award on which court could remit.

Mr. Nazareth :

2nd Award has referred to 1st award therefore we must look at 1st award. In so far as two awards conflict, concede must look at 2nd award. In order to understand what arbitrators meant by " essentiality " must look at 1st award. In case parties could get nothing. In this case there could be partial performance. There was not a total failure of consideration. Only essential because it was impossible. *re* Section 2 (*b*) of I.C. Act. Must be looked at in light of 2 (*b*) and 2 (*c*).

In the Court of Appeal.

No. 8. President's Notes, *continued.*

13th December 1954.

Briggs, J.A. :

Avoidance from mistake means never any due consensus. Therefore no promise.

" If you have an agreement you have a promise."

You can have agreement under Sec. 2 I.C. Act without reality of consent.

Indian Contract Act when it comes to consequences it makes a departure from English law, e.g., on penalties.

Arbitrators should have gone on to assess compensation because on the award it covers.

Should be remitted back to arbitrators or assess.

Judgment Reserved.

(Sgd.) J. H. B. NIHILL, P.

No. 9. Judgments, 22nd December 1954.

No. 9.

JUDGMENTS.

BRIGGS—Justice of Appeal.

Briggs, J.A.

This is an appeal from a decree or order of the Supreme Court of Kenya dismissing an application by the Appellant Company as party to an arbitration to set aside the award or alternatively to remit it to the arbitrators.

The Appellants are owners of a sisal estate. They granted in 1950 to the first Respondent a licence to work the estate. The licence permitted the first Respondent to assign to a private limited company on certain terms and he so assigned to the second Respondent Company. The licence required the licensees to " manufacture and deliver sisal fibre in average minimum quantities of fifty tons per month," with precise provisions as to the method of averaging. Only mature leaf was to be cut and only leaf from this estate was to be used. It was subsequently found that the estate could not produce sufficient mature leaf to enable the necessary minimum deliveries to be made. Differences having arisen between the parties, they arbitrated under a clause in the licence and the arbitrators were asked to decide the following preliminary points :—

(1) Whether the licence was void for mutual mistake ;

(2) Whether the licence was void for impossibility ; and if so,

(3) Whether the licensee was liable to compensate the licensor under the third paragraph of section 56 of the Indian Contract Act.

The arbitrators made an interim award answering the first question in the negative, and the second and third in the affirmative. On application by the licensees to the Supreme Court it was held that as regards the first issue there was error on the face of the award, since the arbitrators had held that the belief of the licensees that leaf production of the estate would be sufficient to enable them to perform their obligations under

the licence did not in law constitute a mistake of fact. The Court held that it was a mistake of fact. There was no finding in the award whether the mistake was unilateral or mutual, or whether it was on a matter of fact essential to the agreement. The Court remitted the award to the arbitrators and from that decision there was no appeal. The arbitrators then issued a revised award on the preliminary points. They found that the mistake was mutual and was on a matter of fact essential to the agreement, and that accordingly the agreement granting the licence was void for mistake. As regards the second and third issues they said :—

> " We find no occasion to vary our original decision in regard to impossibility but in view of the fact that the contract is now held to be void our decisions as to impossibility will not become operative."

The licensors asked the Supreme Court to reverse the finding that the mistake was on an essential matter, and also to hold that, even if the agreement was void for mistake, the arbitrators' original decision that compensation must be paid under section 56 still held good, contrary to their opinion. The Supreme Court rejected both these contentions and the licensors' appeal.

The licensees had for some time worked the estate in intended part performance of the agreement. They had manufactured and delivered some sisal fibre, though not enough. It was submitted for the Appellants that this made it clear that the mistake could not be on a matter essential to the agreement. I think this argument is completely fallacious. A licence of this nature might well be drawn in such terms that a deficiency of leaf-production would not be a " matter essential," but merely one affecting quantum of profits. In this licence, however, the requirement of fifty tons average per month minimum was quite deliberately made a fundamental term of the contract. Failure to produce that minimum meant not merely that profits would be reduced, but that the contract could not be performed at all. A mistake as to a fact which results in performance of the contract being impossible can hardly fail to be on a " matter essential to the agreement." I think the arbitrators were clearly right on this point.

In their first award the arbitrators had found that " in the years before 1951 the estate had shown an average tonnage production well below fifty tons per month," that " there was insufficient leaf to enable the licensee to carry out his obligations," and to that extent there was impossibility. They then quoted the third paragraph of section 56 and said :—

> " We consider, that the Licensee, had he exercised reasonable diligence before agreeing to the terms of the Licence, might have known that it would not be possible to produce the minimum stipulated for in the Licence, and that consequently he must make compensation as visualised in the provisions of the Section quoted."

This part of the first award must be considered in reference to the passage which I have quoted from the second. In particular, what did the arbitrators mean by " our original decision in regard to impossibility " ? Does it refer only to the actual finding that there was impossibility, or does it include the consequences which were to flow therefrom ? I am

In the Court of Appeal.

No. 9.
Judgments, 22nd December 1954.

Briggs, J.A. *continued.*

prepared to assume in favour of the Appellants that the latter is the correct view. One has therefore a finding that it was impossible to do what the licensee had undertaken to do and that, though he did not know this, he might with reasonable diligence have known it. It is also found in the second award, and implied in the first, that the licensor did not know it. The conditions for payment of compensation under section 56 would therefore undoubtedly exist, unless the avoidance of the agreement under section 20 removes this obligation. What the compensation would amount to, if it were payable, and what basis would be adopted if it had to be assessed, are questions which do not arise on this appeal, and which I shall not attempt to answer.

Mr. Nazareth for the Appellants opened his argument on this point by saying that this was a case of initial impossibility, not supervening impossibility. He contended that accordingly sections 20 and 56 had exactly the same effect in rendering the agreement void *ab initio*. They did not conflict and full effect should be given to the whole of both of them. I think the first part of this argument must be accepted. It was always the case that this agreement would not be able to be performed, though that fact became known to the parties only at a later date. I think therefore that the agreement was to do an act impossible in itself and was void *ab initio*. The real question, as it seems to me, is then whether the third paragraph of section 56 may be invoked where there was initial impossibility or illegality, but in addition the agreement was void *ab initio* on some other ground, It will assist to consider some of the grounds on which an agreement may be void *ab initio*.

By section 10, an agreement is a contract, i.e., valid and enforceable (s. 2 (*h*)), if made " by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and . . . not hereby expressly declared to be void." An agreement may be void *ab initio* by reason of infancy (s. 11) unsoundness of mind (s. 11), disqualification by law from contracting (s. 11), absence of consensus as to subject-matter (s. 12) or as to identity of a party (s. 12), absence of " free consent " owing to mistake (ss. 14 and 20), illegality (s. 23), lack of consideration (s. 25), restraint of marriage (s. 26), restraint of trade (s. 27), restraint of legal proceedings (s. 28), uncertainty (s. 29), wagering (s. 30), or impossibility (s. 56). This list is probably not exhaustive. The different moral qualities affecting the grounds of avoidance lead to different treatment. In certain cases of impossibility or illegality the innocent party may be entitled to compensation from the one who is to blame. Where lack of capacity exists the agreement is void and the utmost relief that can be obtained is a return of benefits received by the party unable to contract. Similarly where there is a lack of consensus. So also where there is mutual mistake. In these cases the parties are both blameless and no question of compensation should arise. In some cases both parties are to blame for making an improper agreement. It will be void and again no compensation will be payable. Mr. Nazareth argues that, if an agreement is declared by law to be void for more than one reason, it is still no more void than it is if avoided by impossibility alone. If a contract may be void for impossibility and compensation still be payable in respect of it, it may also be void for any number of other reasons and compensation will still be payable. This argument is superficially attractive, but I think it fails.

It necessarily involves, I think, the proposition that, apart from the special grounds of avoidance which lead to compensation, every ground of avoidance has, under the Indian Contract Act, the same legal consequences, and I think this must be unsound. Consider the case of an agreement by an infant or other person lacking contractual capacity. He agrees to do something impossible in such circumstances that compensation would ordinarily be payable under the third paragraph of section 56. It can hardly be suggested that he would be made to pay compensation. Consider next the case of an agreement which is void for lack of consensus as to parties, and void also for impossibility in the same circumstances. It seems to me that the lack of any true agreement between the parties precludes any right to compensation. Consider next any of the types of agreement which are avoided on grounds of public policy, e.g., a wager. Given the same conditions as to impossibility, I think public policy would preclude the payment of any compensation. A contract avoided for mutual mistake lacks the necessary element of " free consent." See section 14. But this is perhaps not a very happy expression. The real ground for avoidance, as stated by Pollock & Mulla, 6th Ed. 135, is " that the true intention of the parties was to make their agreement conditional on the existence of some state of facts which turns out not to have existed at the date of the agreement." The condition precedent to contractual obligation is not fulfilled. When the matter is put in this way it is apparent that there was never an effective agreement at all. Why then should compensation be payable if the intended agreement happened to be impossible or unlawful ?

The position in the present case is a little obscured because the same fact gave rise both to the mistake and the impossibility ; but I cannot see that this really affects the matter. Its effect must be considered separately on the two issues.

Section 56 is rather curiously drawn. The first paragraph deals only with inherent impossibility, the second with supervening impossibility or illegality, and the third with compensation in cases of impossibility or illegality. It may well be that the provisions as to illegality, which one would expect to find in section 23, were inserted in section 56 as an afterthought. See also section 54. Whether impossibility or illegality is relied on the policy of the section seems to be quite clear. In many such cases the person promising to do the impossible or unlawful act either knows, or ought to know, that it is impossible or unlawful before he makes the promise, while the other party may neither know nor have the means of knowing that that is the case. See illustration (c). In such a case it may fairly be said that the promisor is to blame, while the promisee is blameless. The Court cannot, or will not, enforce the agreement as a contract, but compensation should be paid to the promisee. It is, however, as a matter of common sense and equity alike, necessary in such a case, that, had it not been for the unknown element of impossibility or illegality, the promisee would have been able to claim performance of a valid contract. If even apart from that unknown element, his agreement was never an enforceable contract, but was void for some other reason, there is no logical or moral basis for compensation. This leads me to the view that the provision for compensation in section 56 can only be invoked by the promisee when the agreement is void only by reason of the impossibility or illegality and would otherwise have been a valid contract.

In the Court of Appeal.

No. 9. Judgments, 22nd December 1954.

Briggs, J.A. *continued.*

Another line of argument supports this view. The third paragraph of section 56 requires that a " promise " should have been made. Paragraphs (a) (b) and (c) of section 2 show what is meant by " a promise." It involves acceptance of a proposal, and if the promises are reciprocal an agreement is formed. If that agreement is enforceable, it is a contract ; if not, it is void. Going back to the statement in Pollock & Mulla as to the grounds for avoidance of an agreement for mutual mistake, it may be argued that, since the proposal was subject to a condition precedent, which remained unfulfilled, it could never be effectively accepted and therefore never in reality became a " promise." This argument was not put to us at any length and I prefer to express no final opinion on it. I am content to rest myself on the grounds previously given.

Finally I would mention the case of *The Salvador* (1909), 26 T.L.R. 149, which seems to show that, if my views on the effect of sections 20 and 56 are correct, the law of Kenya is the same as the law of England on this point. Mr. Nazareth sought to distinguish that case from this on the ground that this agreement had been partly performed. I think that makes no difference. The principle would still apply that a benefit received without consideration would have to be returned ; but where the agreement covers a series of transactions of which some are completed, the completed ones would presumably remain undisturbed. The question of compensation does not arise. I mention this English case chiefly because the commentaries on section 56 stress its difference from the common law. In this instance, and in many others, I find that their practical effect is the same, though the result may be arrived at by apparently different methods. I think the arbitrators and the Supreme Court was right, and I would dismiss this appeal with costs.

F. A. BRIGGS,
Justice of Appeal.

Nairobi.
December 22nd, 1954.

Jenkins, J.A.

JENKINS, Justice of Appeal.

I have had the advantage of reading the judgment of my learned brother Briggs, and find myself in general agreement with it.

The arbitrators have found that the agreement is void under Section 20 of the Indian Contract Act on the ground that there was mutual mistake as to a matter of fact essential to the agreement. Both parties to the agreement had the intention of making it conditional on the existence of a minimum production capacity of 50 tons of sisal a month, a capacity which did not exist. The arbitrators thus also found that the agreement is void for impossibility, and the question at issue is whether the agreement having been found void under section 20 is also void under section 56, and in particular whether paragraph 3 of section 56 applies.

I can see no reason for not holding that the agreement, void under section 20, is also void under the first paragraph of section 56. Impossibility due to non-existence of the subject matter is a species of the genus mutual mistake, and Pollock and Mulla, 6th Edition, at p. 328, in commenting on the provisions of section 56 expressly refer to the fact that they have

already dealt with impossibility by reason of the non-existence of the subject matter under the head Mistake, section 20, and accordingly do not deal with it again.

But the third paragraph of section 56 introduces factors which are entirely foreign to the conception of mutual mistake. In the first place the promisor has promised to do something which he *knew*, but which the promisee did not know, to be impossible. That removes the agreement completely from the scope of section 20, which requires that *both* parties to the agreement shall be under the mistake of fact essential to the agreement. If the promisor knew of the impossibility and the promisee did not there obviously can be no mutual mistake. This seems to me to be the governing motif of the third paragraph of section 56, a set of circumstances in which the parties are not on equal terms as they are under section 20. Thus the words "*or with reasonable diligence might have known*" again imply a set of circumstances in which the promisor is in a different position from the promisee, for the latter is presumed not to know. There is no mutuality of mistake which is the essential element under section 20.

I am therefore of opinion that the arbitrators and the learned appellate judge were correct in their view that the third paragraph of section 56 does not apply where as in the present case the agreement is held to be void on the ground of mutual mistake of fact.

I would accordingly dismiss the appeal.

ENOCH JENKINS,
Justice of Appeal.

NIHILL, President.

Nihill, P.

I have come to the same conclusion as my learned brothers. In my opinion this was never an effective agreement to which the third paragraph of section 56 of the Indian Contract Act could be applied. This conclusion is certainly consistent with the equity of the matter and for the reasons already stated in the judgments delivered I believe it to be also in accordance with the statute. The appeal is dismissed with costs.

J. H. B. NIHILL,
President.

22.12.54.

In the Court of Appeal.

No. 10. Order, 22nd December 1954.

No. 10.

ORDER.

In Court.

This 22nd day of December, 1954.

ORDER.

Before—

THE HONOURABLE THE PRESIDENT (SIR BARCLAY NIHILL),

THE HONOURABLE SIR ENOCH JENKINS, a Justice of Appeal, and

THE HONOURABLE MR. JUSTICE BRIGGS, a Justice of Appeal.

This Appeal coming on 10th and 13th December 1954 for hearing in the presence of Mr. J. M. Nazareth, Advocate for the Appellants, and Mr. J. A. Macdougall, Advocate for the Respondents and for judgment on the 22nd day of December 1954 it was ordered on the said 22nd day of December 1954 that the Appeal be and is hereby dismissed and that the Appellants do pay to the Respondents the costs of this Appeal as taxed by the proper officer of the Court.

Given under my hand and the Seal of the Court at Nairobi this 22nd day of December 1954.

C. G. WRENSCH,
Registrar,
Court of Appeal for Eastern Africa.

Issued the 17th day of February 1955.

In the Court of Appeal.

No. 11. Order granting Conditional Leave to Appeal to the Privy Council, 17th March 1955.

No. 11.

ORDER granting Conditional Leave to Appeal to the Privy Council.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA at Nairobi.

Civil Application No. 1 of 1955 (P.C.).

IN THE MATTER of an intended APPEAL to Her Majesty in Council.

Between SHEIKH BROTHERS LIMITED . . . Applicants.

and

1. ARNOLD JULIUS OCHSNER
2. OCHSNER LIMITED . . . . Respondents.

Appeal from a judgment and order of Her Majesty's Court of Appeal for Eastern Africa at Nairobi dated 22nd December, 1954,

in

Civil Appeal No. 17 of 1954.

Between SHEIKH BROTHERS LIMITED . . Appellant

and

1. ARNOLD JULIUS OCHSNER
2. OCHSNER LIMITED . . . . Respondents.

In Chambers this 17th day of March 1955.

Before

THE HONOURABLE MR. JUSTICE BRIGGS, J.A.

ORDER.

UPON application made to this Court by Counsel for the above-named Applicants on the 19th day of February 1955 for Conditional Leave to Appeal to Her Majesty in Council as a matter of right under Clause (A) of Article 3 of the Eastern African (Appeal to Privy Council) Order in Council, 1951 AND UPON HEARING Counsel for the Applicants and for the Respondents THIS COURT DOTH ORDER that the Applicants do have leave to appeal as a matter of right to Her Majesty in Council from the judgment and order of this Court dated 22nd December 1954 subject to the following conditions:—

(1) that the Applicants do within ninety days from the date hereof enter into good and sufficient security, to the satisfaction of the Registrar in the sum Shillings 8000/– (A) for the due prosecution of the appeal; (B) for payment of all costs becoming payable to the Respondents, in the event of (i) the Applicants not obtaining an order granting them Final Leave to Appeal or (ii) the appeal being dismissed for non-prosecution or (iii) the Privy Council ordering the Applicants to pay the Respondents' costs of the appeal;

In the Court of Appeal.

No. 11. Order granting Conditional Leave to Appeal to the Privy Council, 17th March 1955, *continued.*

(2) that the Applicants shall apply as soon as practicable to the Registrar of this Court, for an appointment to settle the record and the Registrar shall thereupon settle the record with all convenient speed, and that the said record shall be prepared and shall be certified as ready within ninety days from the date hereof ;

(3) that the Registrar, when settling the record shall state whether the applicants or the Registrar shall prepare the record, and if the Registrar undertakes to prepare the same he shall do so accordingly, or if, having so undertaken, he finds he cannot do or complete it, he shall pass on the same to the Applicants in such time as not to prejudice the Applicants in the matter of the preparation of the record within ninety days from the date hereof ;

(4) that if the record is prepared by the Applicants, the Registrar of this Court shall at the time of the settling of the record state the minimum time required by him for examination and verification of the record, and shall later examine and verify the same so as not to prejudice the applicant in the matter of the preparation of the record with the said ninety days ;

(5) that the Registrar of this Court shall certify (if such be the case) that the record (other than the part of the record pertaining to final leave) is or was ready within the said period of ninety days ;

(6) that the Applicants shall have liberty to apply for extension of the times aforesaid for just cause ;

(7) that the Applicants shall lodge their application for final leave to appeal within fourteen days from the date of the Registrar's certificate above-mentioned ;

(8) that the Applicants, if so required by the Registrar of this Court, shall engage to the satisfaction of the said Registrar, to pay for a typewritten copy of the record (if prepared by the Registrar) or for its verification by the Registrar and for the cost of postage payable on transmission of the typewritten copy of the record officially to England, and shall if so required deposit in Court the estimated amount of such charges.

AND IT IS FURTHER ORDERED that the costs of and incidental to the application for Leave to Appeal be costs in the intended appeal.

Dated at Nairobi this 17th day of March 1955.

C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa.

No. 12.

ORDER granting Final Leave to Appeal to the Privy Council.

IN HER MAJESTY'S COURT OF APPEAL FOR EASTERN AFRICA
at Nairobi.

Civil Application No. 1 of 1955 (P.C.).

IN THE MATTER of an intended APPEAL to Her Majesty in Council.

Between SHEIKH BROTHERS LIMITED . . . Applicants

and

1. ARNOLD JULIUS OCHSNER . .
2. OCHSNER LIMITED . . . . } Respondents.

(Appeal from a judgment and order of Her Majesty's Court of Appeal for Eastern Africa at Nairobi dated 22nd December, 1954
in
Civil Appeal No. 17 of 1954.

Between SHEIKH BROTHERS LIMITED . . Appellants

and

1. ARNOLD JULIUS OCHSNER . .
2. OCHSNER LIMITED . . . . } Respondents.

In Chambers this 1st day of October, 1955

Before—

The HONOURABLE THE PRESIDENT (Sir BARCLAY NIHILL).

UPON the application presented to this Court on the 28th day of June 1955 by Counsel for the above-named Applicants for final leave to appeal to Her Majesty in Council AND UPON HEARING Mr. J. M. Nazareth, Q.C., Counsel for the Applicants, and Mr. J. A. Macdougall, Counsel for the Respondents AND UPON READING the affidavit of Balbir Chhibber, clerk to Mr. J. M. Nazareth, Q.C., dated 27th June, 1955, in support thereof IT IS ORDERED that the application for final leave to appeal to Her Majesty in Council be granted AND that the costs of this application be costs in the appeal to Her Majesty in Council.

Dated at Nairobi this 1st day of October, 1955.

C. G. WRENSCH,
Registrar,
H.M. Court of Appeal for Eastern Africa.

Issued this 3rd day of October, 1955.

No. 41 of 1955

In the Privy Council

ON APPEAL

FROM THE COURT OF APPEAL FOR EASTERN AFRICA

BETWEEN

SHEIKH BROTHERS LIMITED . . . . . *Appellant*

AND

1. ARNOLD JULIUS OCHSNER
2. OCHSNER LIMITED . . . . . *Respondents*

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