Privy Council Appeal No. 29 *of* 1960

Alimahomed Osman – – – – – – – – *Appellant*

v.

Ngoni-Matengo Co-operative Marketing Union Limited – – *Respondent*

FROM

THE COURT OF APPEAL FOR EASTERN AFRICA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 8TH FEBRUARY 1962

Present at the Hearing:
LORD RADCLIFFE.
LORD HODSON.
LORD GUEST.
[*Delivered by* LORD RADCLIFFE]

This appeal from the Court of Appeal for Eastern Africa arises out of a written contract between the appellant and the respondent entered into upon the 14th April, 1955. The question at issue is as to the nature and extent of the obligations thereby undertaken by the respondent and the problem is to determine in the light of them whether certain actions taken in the year 1957 amounted to breaches of contract. The evidence at the trial, which took place before Crawshaw, J. in the High Court of Tanganyika, is not in all respects easy to follow, but it does not appear that there was a conflict on any facts that are material to the decision of the case.

They can therefore be stated as follows. The respondent is a registered Co-operative Society in Tanganyika. Its members are affiliated Societies which are engaged in the production of primary agricultural crops and the first of the objects stated in its Bye-Laws is to undertake the marketing of all tobacco, coffee and other agricultural produce handed over to it by the affiliated Societies or their members. It is therefore a central marketing organisation and is known as " the Union ". Its constituent members, known as " primary Societies ", cover the whole of the District of Songea, a district on the western side of Tanganyika which abuts on Lake Nyassa and is separated from the eastern or sea coast of Tanganyika by other districts. The capital of the district is the town of Songea itself.

The crops concerned are mainly export crops. The method of collecting them is to bring them by head load to one of the various " buying centres " which are scattered over the district and are situated on minor roads connecting with the single main road which runs across the district from Mbamba Bay on the lake, through Songea and then over the eastern border in the direction of Mtwara, a port on the Tanganyika sea coast. Transport from the buying centres is by lorry. There are godowns at these buying centres in which produce is assembled and there are also five godowns on the main road itself, one at Songea owned by the respondent and four others belonging to primary Societies but regularly used by it. The normal procedure, according to Mr. Hall, the local Co-operative officer who gave evidence for the respondent, is for the produce to be moved from a buying centre to a main road godown, where it is checked, weighed, if necessary rebagged, and consigned to the coast or any other destination.

The respondent handled the marketing for the primary Societies. Whether they were entitled to dispose of some of their crops independently is a question of the construction and effect of the Bye-Laws, which are not altogether clear,

but there is no evidence to suggest that they did. The respondent is therefore to be looked upon as possessing both effective power to dispose of these crops produced in the Songea District and also power to choose the terms on which it sold. In fact it was its regular practice to sell them on commission.

It is against this background that the contract of 14th April, 1955, must be interpreted. The appellant, the other party to it, was a haulage contractor in business at Songea. Before setting out the clauses that are necessary to understand its full effect, it should be said that it was a contract to remain in force from 1st April, 1955, to 31st March, 1958, subject to a certain power in the respondent to call for reasonable modifications and revisions of its terms. Prima facie therefore it covered three successive crop seasons of agricultural produce.

Clause 1 was as follows:—

" 1. The Union agrees to use, and the Contractor agrees to supply, the Contractor's lorries or other sufficient and suitable motor vehicles exclusively for the period of this agreement for the following purposes, namely:—

(*a*) for the transport of leaf tobacco, bagged paddy, and bagged wheat from all markets maintained by or for the affiliated societies of the Union, or agricultural produce of any kind being handled by the Union from these or any markets established by or for a Native Authority in the District of Songea to the factory of the Union situated at Songea, or to any other place in the Songea District desired by the Union together with such members of the Managing Committee of the Union, or Union Staff, and Members of the Committee of Primary Societies and Primary Societies Staff as may be duly authorised from time to time;

(*b*) for the transport of baled tobacco, or any other Primary produce, processed or unprocessed, in suitable packing, from its factory or Godown at Songea to the ports of Lindi and or Mbamba-Bay or to any point on the Southern Province Railway or port served by that Railway or to Njombe in the Southern Highlands Province;

(*c*) for the transport, either inwards or outwards, of all such other goods or building materials as the Union may, from time to time, require to be transported from place to place in the Southern Province or between Songea/Njombe in the Southern Highlands Province;

(*d*) for general transport in and around Songea PROVIDED ONLY THAT:—

(i) the Union shall at all times have the right to employ one 3-ton lorry, and one motor car or vanette of one ton capacity or under, both being the property of the Union, for any of the purposes above mentioned, if it so elects, and

(ii) if, after due notice of 3 days to the Contractor, the Contractor be unable to supply sufficient and suitable lorries or other motor vehicles as required by the Union, the Union shall forthwith have the right, notwithstanding this agreement, to obtain the lorries or motor vehicles so required from any other person, firm or company."

The material portions of clauses 2, 3, 4 and 5 were as follows:—

" 2. The Contractor agrees with the Union:—

(*b*) to carry and deliver to or from any point mentioned in 1(*a*), (*b*) and (*c*), above, as called upon, goods to the extent of any tonnage not exceeding five hundred in all in any calendar month from April 1st until such time as the road to such points shall be officially declared closed;

(*d*) to operate and maintain and keep available for the union at all time such minimum number of the lorries and other motor vehicles as will be sufficient and suitable to lift and carry not less than twenty

five tons of goods or produce in any one day of twenty four hours on behalf of the Union, the onus of proof of availability thereby to lie upon the Contractor;

(*e*) to indemnify the Union against any expenses incurred by the Union under the conditions of Clause 1(*d*) (ii) of this agreement, save only when such failure to provide transport shall be proved to the satisfaction of the District Commissioner, Songea, to have been due to circumstances entirely beyond his control; and against any and all damage however caused to goods of the Union in transit in his lorries or motor vehicles; and for any other breach, default or delay on the part of the Contractor, his servant or agents, occasioning actual financial loss to the Union;

3. The Contractor agrees to refrain from undertaking any contract to supply transport to another party during the period of this agreement, and to discharge such contract if in force during such period, unless he shall first satisfy the Union that he is in fact maintaining, and able to maintain, the said minimum number of lorries and motor vehicles.

4. The Contractor shall maintain within the township of Songea an office and a responsible office staff, capable, at all times within normal office hours of conducting the Contractor's business in accordance with the terms of this agreement, and the closure of such office, or the absence of such staff at any time within normal business hours shall be deemed a breach and repudiation of this agreement.

5. The Union agrees to pay, and the Contractor agrees to accept remuneration for all services rendered under this agreement at the following rates and subject to the following conditions; and both parties to this agreement undertake to accept the arbitration and final rulings of the District Commissioner, Songea, in all disputes arising out of any ambiguity contained in such rates and conditions:—

(1) Specifically for the carriage of tobacco leaf and other primary produce from any market mentioned in clause 1(*a*) to the Unions factory at Songea or any other place within the district at the rate of one shilling and fifty cents (Shs. 1/50) per running mile for a vehicle capable of loading 5 tons, the above rate being payable for a vehicle laden or unladen.

(2) Specifically at the following rates for the transport of baled tobacco and any other goods or produce inwards or outwards between the following places:—

(*a*) Songea/Lindi	.. ..	cents eighteen per kilo (–/18)
(*b*) Songea/Mtama	.. ..	cents eighteen per kilo (–/18)
(*c*) Songea/Nachingwea	..	cents eighteen per kilo (–/18)
(*d*) Songea/Mtwara	.. ..	cents twenty-two per kilo (–/22)
(*e*) Songea/Njombe	.. ..	cents twenty per kilo (–/20)
(*f*) Songea/Mbamba Bay	..	cents four per kilo (–/04)
(*g*) Songea/Mbinga	.. ..	cents four per kilo (–/04)
(*h*) Mbinga/Mbamba Bay	..	cents four per kilo (–/04)
(*i*) Mbinga/Peramiho	.. ..	cents four per kilo (–/04)

PROVIDED ONLY THAT in the case of loads of whatever nature the Union wishes to be carried from Lindi, Mtama, Nachingwea and Mtwara to Songea shall be at HALF the rates quoted in (*a*), (*b*), (*c*) and (*d*) above, respectively.

(3) Specifically for the transport of other goods from place to place within the district of Songea at the rate of one shilling and fifty cents (Shs. 1/50) per running mile for a vehicle laden or unladen."

No trouble appears to have arisen over the 1955 season. According to the appellant, there were breaches of the respondent's obligation during 1956, but he has not founded upon them in the action, so it is not necessary to refer to them. It was the respondent's terms of disposal of certain of the 1957 crops that brought about the present proceedings.

The disposals complained of are five in number. Four were sales made on various dates in July and August, 1957, to the United Africa Co. (T) Ltd., of tonnages of sunflower seed and sesame seed. They all contained the same provisions upon the point to which the appellant objects; that is, the price was stated to be " ex seller's godown at buying centres " and a stipulation was made " transport from buying centre to Mtwara to be arranged by buyers ".

The fifth sale was of paddy. It was effected by letters passing between the respondent and the Tanganyika Transport Company Ltd., dated 31st May and 1st June, 1957, and disposed of what was apparently the entire seasonal crop handled by the respondent at the price of " -/60 (sixty cents) per kilogram without bag at Mbamba Bay and Lituhi, and -/65 (sixty-five) cents per kilogram without bag at Songea (godowns at Songea, Litola and Mamtumbo) ". The five places named corresponded with the five main road godowns, or at any rate with four of them, used by the respondent.

Whatever the rights or wrongs of the matter, there are certain consequences of these transactions that are beyond dispute. First, the disposals did not involve the respondent in " using " any vehicular transport not belonging to the appellant in moving the produce. It did not therefore do anything in contradiction of the literal terms of its undertaking to him to use his motor vehicles " exclusively ". It is to be observed however that this result was brought about by the respondent's selection of a method of disposal that absolved it from the need to use vehicular transport at all for the oil seeds, because by selling ex the buying centres and putting it on the purchaser to arrange for the outward transport to the coast at Mtwara it exempted itself from having to provide any transport for the purpose of effecting disposal. The paddy sale was a little different in that it left uncovered the collection from the local centres to the main road godowns. It will appear later how this was dealt with. No doubt these terms were reflected in the price it obtained for the produce and in that sense the money that it would have had to pay the appellant for the use of his transport, if it had fallen within the terms of the contract, was conceded to the purchasers who had to bear the expenses of transport themselves.

Secondly, the journeys complained of were not on lines of movement that explicitly fell within the provisions of clause 1 of the contract. Thus sub-clause (*a*), which was evidently intended to deal with transport both originating and terminating in the Songea District, was expressed as covering only journeys which terminated at " the factory of the Union situated at Songea or in any other place in the Songea District desired by the Union ". This does not describe movements of export produce outwards to Mtwara, even if there was rebagging on the way at a main road godown in the district. On the other hand sub-clause (*b*), intended to deal with such export produce, whether consigned to the lake or the coast, describes the originating point as the respondent's " factory or godown at Songea " and nowhere else. It may be that the " godown at Songea " has an extended meaning in this context, as it has in the terms of the paddy sale, and covers other main road godowns regarded as mere enlargements of the central godown accommodation at Songea. But, prima facie at all events, sales effected ex buying centres on side roads or from main road godowns not at Songea and destined for a point outside the district are not within the terms of the respondent's obligation under any of the headings of clause 1.

Again however this consideration, which is one of the respondent's main arguments and seems to have been the foundation of the East African Court of Appeal's decision in its favour, must not be weighed without taking account of the fact that the journeys complained of took the precise form that they did because the respondent, having full choice of the method of disposal, chose to dispose of the produce ex delivery points which were different from those contemplated by the contract. There was nothing in the evidence to suggest that the produce could not have been sold ex Songea if the respondent had so stipulated. The fact therefore that the journeys actually arranged by it did not correspond with the wording of the contract cannot determine the question whether the respondent, having bound itself in the terms of the

contract for three years, was in a position to make disposals of produce in this way without breaking its contractual obligations. If it was not, it becomes unnecessary to consider the finer points of construction raised by the respondent's argument; but it is fair to say that it would be a very literal interpretation of words to hold that the respondent, having undertaken to use the appellant's transport exclusively from, say, the Songea godown to the port of Lindi, could get out of this and use some other transport that might suit it better by requiring the journey to start not from Songea but from another godown a few miles up or down the same main road to the east or west of Songea itself. It would be more reasonable to treat the various road journeys described in clause 1 of the contract as general indications of the nature of transport service required than as exhaustive definitions of what the appellant was to supply or the respondent to call for.

Whichever of the respondent's arguments is taken up there seems to be no doubt that its position amounts to saying that, notwithstanding its contractual undertaking to use the appellant's transport exclusively for the movement of agricultural produce handled by it, it could so arrange its sales of all or any part of that produce as either to absolve itself from requiring any transport or to despatch the produce on journeys which, though passing over the same roads, did not originate or terminate exactly at the points mentioned in the contract. Admittedly there is nothing impossible in such a position: the appellant may have been ready to secure nothing more for himself than the chance or likelihood of the respondent following a method of disposal which would correspond with the literal terms of the contract, and so create a need for his transport services. But whether that is the real import of the mutual obligations prescribed by this contract depends, in their Lordships' opinion, upon a consideration of other clauses than clause 1 taken by itself.

When clauses 2, 3 and 4, for instance, are looked at, it is clear that the respondent was requiring the appellant to set up and maintain the substance of a fixed establishment to carry out its transport work. His capital has to be invested in their needs. He is to be ready to carry goods to the volume of anything up to 500 tons a month; he is to operate, maintain and keep available for it at all times such minimum number of vehicles as will be sufficient and suitable to lift and carry as much as 25 tons of goods or produce in any one day, and he is not to undertake transport business for anyone else to the prejudice of this minimum available fleet; he is to indemnify the respondent for its expenses if at any time after three days' notice he cannot supply it with such transport as it requires and it obtains such transport elsewhere; he is to maintain within the township of Songea an office and responsible office staff capable at all times within normal office hours of conducting his business under the contract and indeed any failure to keep this office and staff going is to be deemed a repudiation of the agreement. It appears to their Lordships that, having regard to these obligations imposed on the appellant, it would be a very one sided and an unjust interpretation of the contract to suppose that the respondent remained at liberty, while still in control of the marketing of the District's produce, either for export or for internal use or processing, to give the appellant no work at all or opportunity of earning remuneration simply by adopting marketing methods which departed from those contemplated and, apparently, practised at the time when the contract was entered into.

They are of opinion therefore that, having entered into clause 1, the respondent committed a breach of its obligations whenever, during the three years relevant, it disposed of produce covered by the contract upon such terms that, while the produce required vehicular transport to reach its destination, vehicular transport other than the appellant's was used for the purpose. The five disposals which were the subject of the present action all fall within this category of description and the appellant was right in claiming that they involved breaches of his contractual rights.

The view which commends itself to their Lordships is the same as that of the trial Judge, Crawshaw, J., whose judgment dated 4th November, 1958, should be restored. His approach was not shared by the learned Judges of

the Court of Appeal because they thought that, while the contract gave the appellant the exclusive right to transport produce from the buying centres to any destination in the Songea District and a similar right to transport produce out of the District from the factory and godown in Songea, his contractual rights of transport had been deliberately restricted to the undertaking of these precise journeys and the journeys complained of did not fall within the required descriptions. For this reason their judgment of 3rd December, 1959, reversed the judgment of the High Court and declared that the appellant's suit ought to have been dismissed.

Their Lordships have already explained why they do not think that the rights and duties created or implied by this contract can be determined solely by a strict and a literal construction of the wording of the various sub-headings of clause 1. The principle that they think ought to be applied is that which is referred to by Cockburn, C. J., in *Stirling* v. *Maitland* 5 B. & S. 840 at p. 852 and adopted and applied in many subsequent cases. " If a party ", he says, " enters into an arrangement which can only take effect by the continuance of a certain existing state of circumstances, there is an implied engagement on his part that he shall do nothing of his own motion to put an end to that state of circumstances, under which alone the arrangement can be operative ". The important words in that statement are " of his own motion "; and the determining consideration in this case is that the terms of disposal of the produce to be marketed were at the respondent's choice. The sales that are complained of can be looked upon as a direct breach of the undertaking to use the appellant's transport for the movement of crops, or as a breach of an implied obligation not to make any disposal of such crops that avoided the need for the appellant's transport, or, again, as a breach of contract in bringing about a state of circumstances in which the crops would be moved to market without the aid of his transport. The one way of stating the duty often merges into the other and, as Lord Atkin indicated in *Southern Foundries (1926) Ltd.* v. *Shirlaw* [1940] A.C. 717, the most direct way is sometimes the simplest.

There remain two subsidiary points which require notice. It was said on behalf of the respondent that the 1957 sale of paddy to the Tanganyika Transport Co. could not in any event constitute a breach of contract with the appellant because he himself had already refused to carry out the transport of that crop before the other company took it up and moved it. This however does not represent what really happened. The paddy was sold by the respondent to the Tanganyika Co. by the 1st June, 1957, and it was not until the 3rd August that it made a requisition to the appellant for a truck to collect the paddy from local buying centres centred on Mbamba Bay and to assemble it at Mbamba Bay. As the terms of sale of the paddy were that the purchaser was to take delivery of it there and to supply his own transport to Songea or beyond, the appellant refused to do the local collecting for a rival in business who, wrongly as he believed, was being allowed by the respondent to do the main road transport that was his own right under the contract. It is plain from this that it was the respondent's original wrongful sale of the paddy that was the cause of the appellant's refusal.

Lastly, it was said that the learned trial Judge had no right to direct an account of damages arising from the respondent's breaches and that, if he did not find damages proved in the evidence given at the trial, it was his duty to dismiss the action or award nominal damages only. It is impossible to say exactly what the position was as to damages by the end of the trial, because the Judge made no finding upon the issue, merely directing the account and reserving the costs and liberty to apply. There is no reason at all to suppose, however, that he did not regard the appellant as having established some damage qualifying him for an enquiry: indeed his words " Mr. Dodd asked that, if damage was found, an order be made for accounts to be taken " assume as much. Certainly he had before him an abundance of evidence on the issue, though much of it is unintelligible when read in the record. The evidence included the appellant's statement that since June, 1957, he had an average of eight to ten lorries of his fleet idle every day and the

statement of the Director of the Tanganyika Transport Co. (which had carried out the transport for the United Africa Co. (T) as well as for itself) that it was " naturally eager to get defendant's contract—it is a valuable one."

It must be taken therefore that the trial Judge held an unspecified quantum of damages to have been proved. The reason why he did not assess a sum himself and by so doing close the matter seems to have lain in the fact that discovery prior to the trial had been very imperfect and that a voluminous document, entitled D.1, which was produced by the respondent at the trial by way of an account, was found so difficult to interpret that neither side felt itself able to base any conclusion upon it. In those circumstances, the responsibility for which they have no means of determining, their Lordships think that the Judge took a proper course in making a declaration of the respondent's liability for breaches and directing accounts, with reservation of the costs of the whole proceedings.

Their Lordships will humbly advise Her Majesty that the Order of the Court of Appeal for Eastern Africa in this matter dated 3rd December, 1959, should be reversed and that the Judgment of Crawshaw, J. in the High Court of Tanganyika dated 4th November, 1958, should be restored; and that the respondent should pay to the appellant his costs of the appeal in the Court of Appeal.

The respondent must pay to the appellant his costs of the appeal to the Board.

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