ZAMBIA HORTICULTURAL PRODUCTS LTD v NEPHAS TEMBO (1988 - 1989) Z.R. 214 (S.C.)

SUPREME COURT
SILUNGWE, C.J., GARDNER AG. J.S. AND LAWRENCE, J.S.
2ND NOVEMBER, 1989
(S.C.Z. JUDGMENT NO. 27 OF 1989)

Flynote

Contract - Exemption clause - Whether terms of exemption are wide enough to include damage caused by negligence of proferens.

Headnote

The respondent entered into an agreement with the appellant that the latter would store chickens for the respondent in its coldrooms for a limited number of days at a rental. When the chickens were stored the temperature was too low and the chickens went bad. The respondent sued for the loss. The appellant produced at the hearing a letter that contained 'the company will bear no responsibilities on the condition of the commodities stored in the coldroom by yourselves' and argued that the terms of the letter exempted it from liability by negligence. The judge found that the damage was caused by a fundamental breach of the contract, namely, that the appellant failed to sufficiently reduce the temperature in the coldroom and that they could not rely on the written terms. The appellant appealed.

Held:
If there is no express reference to negligence the court must consider whether the words used are wide enough in their ordinary meaning to cover negligence by the proferens. The appellant could not rely upon the exemption clause to avoid liability.

Cases referred to:
(1) Canada Steamship Lines v Regem [1952] 1 All ER 305
(2) Ailsa Craig Fishing Co. Ltd. v Malvern Fishing Co. Ltd. & Another [1983] 1 All E.R. 101

For the appellant: M. N. Muyenga, Director of Legal Services Corporation.
For the respondent: R.M.A. Chongwe, Chongwe & Co.

Judgment

GARDNER, AG. J.S.: delivered the judgment of the court.

This is an appeal from a judgment of the High Court awarding damages for negligence in the storage of chickens.

In this judgment we will refer to the appellant as the defendant and to the respondent as the plaintiff as they were in the court below.

The evidence of the plaintiff was to the effect that he entered into a contract with the defendant for

the storage of chickens in one of their cold storage rooms. The plaintiff said that he entered into a straightforward contract to the effect that the defendant would store chickens on his behalf for a limited number of days at a certain rental, and the only provisions as to his own responsibility were that he had to provide his own lock for the storeroom allocated to him and to pay the rental demanded. The evidence for the defendant was from two defence witnesses, one of whom alleged that the coldrooms were usually used for storing fruit and vegetables and

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that the plaintiff had been told at the time of entering into the contract that the storeroom was not suitable then for the storage of chickens and that he should wait until the temperature had been reduced before attempting to store any of his chickens in the accommodation. The plaintiff denied that there had been any such stipulation, and at the trial the learned trial judge found, after hearing the witnesses, that he believed the plaintiff when he said there was not such a stipulation. It was found that the defendant's responsibility was to provide a coldroom which was suitable for the purpose of storing chickens, and that it had not provided such facilities, in that there had been no gas in the refrigeration machines designed to lower the temperature of the coldroom, as a consequence of which the chickens stored by the plaintiff had gone bad and he had suffered loss.

The learned trial judge went further to decide some collateral issues, namely, that the terms of the contract had been reduced to writing as evidenced by a letter written from the defendant to the plaintiff dated 14 October 1982 and that his letter contained a clause which read as follows:

> "(e) The company will bear no responsibilities on condition of the commodities stored in the cold room by yourselves."

The learned trial judge found that, in view of the fact that the defendant wrote a letter to the plaintiff after the chickens had been found to have gone bad, in which there was an offer to discuss the quantum of the damages suffered by the plaintiff, this was a waiver of the exemption clause which we have just quoted. He found, however, that, if he was wrong in making such a finding, the negligence of the defendant was a fundamental breach of the contract, and, that in consequence, the defendant was not exempted from liability for its own negligence. Mr. Muyenga on behalf of the defendant has appealed against the decision of the learned trial judge on the grounds that he was wrong to find that there had been no specific agreement that the plaintiff was not to store chickens until the premises had been tested to ascertain whether they were at a correct temperature and that the learned trial judge had specifically misdirected himself in this respect by failing to take into account the evidence of DW1 to the effect that he had specifically warned the plaintiff that the premises were suitable only for sorting fruit and vegetables, and that no chickens should be put in the cold storage room allocated to the plaintiff until the temperature had been reduced and the premises had been tested. Mr Muyenga drew our attention to various passages in the record indicating that the plaintiff should have been believed, in that some of the evidence and dates put forward by the plaintiff indicated that there had been no failure on the part of the defendant to ensure that the premises were suitable for the storage of chickens.

We have considered the arguments in this respect put forward by Mr. Muyenga and we have also perused the judgment of the learned trial judge where he set out in detail the dispute between the

witnesses as to whether or not the plaintiff was warned not to deliver chickens until the cold room has been tested, and we find that in his final conclusion, when he said that he therefore accepted the plaintiff's evidence that there had been no such specific warning or condition of the contract, that he did not

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misdirect himself in any way nor did he overlook any of the evidence which he should have taken into account. We find that, as the learned trial judge had the advantage of seeing and hearing the witnesses in this respect, his opinion and finding as to their credibility cannot be challenged or interfered with by this court on any of the grounds put forward by Mr. Muyenga. This ground of appeal, therefore, fails.

Mr Muyenga abandoned his other grounds of appeal which rested on the same decision by the learned trial judge and this court accepted that the purported waiver of the exemption clause by the defendant's offer to discuss the question of a quantum of damages was not in fact a waiver. It was no more than an offer to discuss the matter. It followed, therefore, that the only possible remaining ground of appeal was in respect of the learned trial judge's finding that there had been a fundamental breach of the contract disentitling the defendant to rely on the exemption clause. In view of the recent decisions in the Privy Council and the House of Lords in England, we agree that it is inappropriate to use the words "fundamental breach."

However, Mr Muyenga very properly conceded that the later authorities in England as to exemption clauses, make it clear that, in the circumstances of this case, the defendant could not rely on the exemption clause to avoid liability. We would refer specifically to the case of *Canada Steamship Lines v Regem* (1), where, at page 310, Lord Morton of Henrytown set out the considerations to be taken into account when considering exemption clauses. These were as follows:

"(i) If the clause contains language which expressly exempts the person in whose favour it is made (hereafter called 'the proferens') from the consequence ce of negligence of his own servants, effect must be given to that provision.
(ii) If there is no express reference to negligence, the court must consider whether the words used are wide enough, in their ordinary meaning, to cover negligence on the part of the servants of the proferens."

The learned Lord Justice went on to point out that, where doubts did arise, such doubts should be resolved against the person seeking to benefit by the clause. We accept, and Mr Muyenga very properly conceded, that is the rule observed in the courts in this country.

The decision in the Canada Steamship case and the principles set out in that case have been accepted in later cases before the House of Lords and in particular in the case of *Ailsa Craig Fishing Co. Ltd. v Malvern Fishing Co. Ltd and another* (2) where, on page 105, Lord Fraser accepted that those principles still applied.

In this case the words used in the purported exemption clause are certainly not wide enough to cover the defendants own negligence.

We find, therefore, that, although we would criticise the use of the words 'fundamental breach', we should still agree with the learned trial judge that the negligence, as found by him, on the part of the defendant made it impossible for the defendant to rely upon the exemption clause.

For the reasons which we have given, this appeal is dismissed, with costs to the respondent.

Appeal dismissed.
