

2/1962

IN THE PRIVY COUNCIL

No. 29 of 1960

ON APPEAL FROM HER MAJESTY'S  
COURT OF APPEAL FOR EASTERN  
AFRICA AT DAR ES SALAAM

B E T W E E N :  
UNIVERSITY OF LONDON  
INSTITUTE OF ADVANCED  
LEGAL STUDIES  
  
29 MAR 1963  
  
25 ROSSINGTON GARDENS  
LONDON, W.C.1.

ALIMAHOMED OSMAN

Appellant

- and -

NGONI-MATENGO CO-OPERATIVE  
MARKETING UNION LIMITED

Respondent

68190

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CASE FOR THE APPELLANT

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1. This is an Appeal from the Judgment and Order of the Court of Appeal for Eastern Africa at Dar es Salaam dated the 3rd day of December, 1959 whereby the Respondent's appeal from the Judgment and Order of Her Majesty's High Court of Tanganyika dated the 4th day of November, 1958 was allowed and the suit of the Plaintiff (now the Appellant) was dismissed with costs.

Record

pp.64-83

pp.48-60

2. This action arose out of a contract between the parties made on the 14th day of April, 1955 whereby the Respondent agreed to use and the Appellant agreed to supply lorries or other sufficient and suitable motor vehicles "exclusively" for certain purposes, e.g. the transport of certain produce in and about the district of Songea in Tanganyika, and the question that arises on this appeal is the interpretation of this contract and whether or not by their sale of produce to third parties at a price that allowed for the third parties to transport those goods at their own costs the Respondent were in breach of the said contract.

Ex.p.1.

pp.107-113

3. The relevant provisions of the said contract in which the Respondent is called "the Union" and the Appellant called "the Contractor" are as follows:-

Ex.p.1.

pp.107-113

1. The Union agrees to use, and the Contractor agrees to supply, the Contractor's lorries or other

p.108

Record

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; 10
- (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 Mbamaba-Bay or to any point on the Southern Province Railway or port served by that Railway or to Njombe in the Southern High-lands Province; 20
- (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; 30
- (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 40

have the right, notwithstanding this agreement, to obtain the lorries or motor vehicles so required from any other person, firm or company.

x x x x x x x x x x x x x x x

2. The Contractor agrees with the Union:-

p.110

- (a) to carry and deliver the goods of the Union in good order and condition;  
.....
- 10 (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;
- (c) to operate and maintain in working order and carry out all necessary repairs to lorries, and other motor vehicles supplied for the use of the contract;
- 20 (d) to operate and maintain and keep available for the Union at all times 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, and onus of proof of availability thereby to lie upon the Contractor;
- 30 (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  
40 actual financial loss to the Union;
- (f) to keep insured at all times during the period of this agreement by a policy and with a company to be approved by the Union each and

Record

every lorry or motor vehicle supplied for use by the Union in accordance with the motor vehicles insurance (Third Party Risks) Ordinance 1945 and against all legal claims that may be made in respect of damage, loss or injury, including injury to passengers, caused by or arising out of the use of the said lorry or vehicle on the road.

- p.111 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. 10
- p.111 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. 20
- p.111 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; 30
- (1) specifically for the carriage of tobacco leaf and other primary produce from any market mentioned in clause 1(a) to the Union's 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. 40
- (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:-

- 10
- (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) p.112
  - (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)

20 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.

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- (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.
  - (4) Specifically without charge or payment, in respect of:-

Persons mentioned in Clause 1(a) duly authorised by the Union to travel anywhere on the legitimate business of the Union, to any place on the route of any of the Contractor's lorries engaged on the Union's business under this agreement.

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- (5) No passengers other than those aforesaid shall be carried on the Contractor's vehicles when engaged on Union business, unless such passengers hold specific authority in writing from the Union so to travel.

6. The Contractor shall not at any times assign or transfer the benefit or obligation of this agreement without the previous consent in writing by the Union. p.112

Record

p.112 7. This agreement shall remain in force for the term from the 1st day of April, 1955, to the 31st day of March, 1958, subject nevertheless to the right of revision and option to determine next herein-after contained.

pp.1-3 4. By the Plaint dated the 26th day of August, 1957, the Appellant who is a transport contractor claimed that he was entitled under the terms of the said contract to the exclusive right to supply motor transport for the carriage of the goods mentioned in the said contract and that the Respondent was bound by a corresponding obligation to employ the motor vehicles of the Appellant for the carriage of all such goods; that in breach of the said contract the Respondent had entered into contracts with a third party, upon terms which provided for the transport and carriage of the current year's crops of oil seed and other produce handled by the Respondent, in motor vehicles belonging to persons other than the Appellant; that in further breach of the said contract and in disregard of the exclusive right which it had granted to the Appellant, the Respondent had allowed, and permitted, the said crops to be transported and carried during the current produce season in motor vehicles belonging to a firm of transport contractors other than the Appellant and that by reason of the said breach of the contract the Appellant was being deprived of his exclusive right to perform the said contract for the supply of motor transport and had suffered loss and damage and was likely to suffer further loss and damage amounting to Shs.121,635/-. 10 20 30

pp.3-5 5. By its Defence the Respondent admitted the said contract and further admitted entering into contracts with certain other parties for sale to them of certain produce and gave the following particulars:-

Ex.D2, (a) with the United Africa Company (T) Limited 6  
pp.126-135 contracts for the sale of sun flower seed and  
sesameseed "ex sellers godown at buying  
centres"; four of the said contracts contained  
the following special condition:- 40

pp.126, 129,130  
& 132 "The goods are to be rebagged at Seller's  
godowns on the main road between Songea/  
Tunduru to a standard weight of 115  
lbs. nett, and cleaned if necessary, by  
our agents The Tanganyika Transport Co.  
Ltd. Sellers to provide additional new

bags as required. Transport from buying centres to Mtwara to be arranged by buyers."

and two the following special condition:- pp.127 & 131

"Sellers to provide additional new bags if required. Transport from buying centres to Mtwara to be arranged by buyers."

- 10 (b) With the Tanganyika Transport Company Limited D14(a)&(b)  
for the sale of paddy 1957 crop without bag pp.137-138  
at Mbamba Bay and Lituhi and without bag at  
Songea (godowns at Songea, Litola and  
Mamtumbo), as set out in two letters annexed  
to the Defence.

20 The Respondent further stated that in the case of p.4  
oil seeds no road transport was used or required prior  
to the delivery to the buyer at the seller's godown at  
buying centres, and that after delivery to the buyer  
at the said buying centres the Respondent had no  
property in the said oil seeds and the said oil seeds  
were not after delivery as aforesaid being handled by  
the Respondent within the meaning of the said contract  
and that the Respondent had committed no breach of the  
said contract. The Respondent further stated that in  
the case of paddy the buyer took delivery at the  
buying centres and that the property passed to the  
buyer at the places where the delivery to the buyer  
was made and that after delivery the said paddy was  
not being handled by the Respondent within the meaning  
30 of the said contract and that the Respondent had  
committed no breach of the said contract. Further the  
Respondent denied that it had allowed or permitted the  
crop of ground nuts, sun flower, simsim and paddy to  
be transported or carried in motor vehicles belonging  
to any firm of transport contractors other than the  
Appellant. The Respondent further stated that all  
transport of crops over the movements of which the  
Respondent had control had been and was offered to the  
Appellant under the contract and accordingly denied  
40 that there had been any breach of contract.

6. Evidence was given by the Appellant and by pp.15-43  
witnesses for the Respondent but save as to the quantum  
of damages there was little or no dispute between the  
parties as to the facts.

Record

7. The following extracts from the correspondence exhibited at the trial are relevant:

Ex.D.14(a)  
p.138  
11.21-23

(a) In a letter dated the 1st day of June, 1957 from the Tanganyika Transport Company Limited to the Respondent: "It is understood that ALL Paddy that will be handled by your Union or your associates shall be sold to us exclusively."

Ex.p.4-(b)  
p.140,  
11.11-14

(b) In a letter dated the 28th day of June, 1957 from the Respondent to the Appellant: "We beg to inform you that the sunflower seed has been sold ex buying centres of the societies and no transport on that produce will be made by us."

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Ex.D.16(ii)  
p.145  
11.1-9

(c) In a letter dated the 31st day of August, 1957, from the Respondent to the Tanganyika Transport Company Limited headed Sunflower Seed, "We should be pleased if you would like to purchase more quantity of this commodity which has already been or still being collected from various gullies to main godown centres so that the whole produce is shared between you and the United African Company. Meantime the U.A. Co., have purchased the total quantity of 250 tons, and the balance will be bought by you if you would so be willing.

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Please let us know."

Ex.D.16(i)  
p.145  
11.24-31

(d) In a letter dated the 23rd day of November, 1957 from the Tanganyika Transport Company Limited to the Respondent: "We wish to buy approx. 25 tons Sunflower seeds January 1958 delivery. We offer 33 cents per kg. with bag, ex your buying centres. It is understood that we have already transported your Sunflower seeds from the buying centres to main road societies, and as such if you accept our offer, we would collect the Sunflower seeds from the main road societies."

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Ex.D.15,  
p.146  
11.8-15

(e) In a letter dated the 26th day of November, 1957 from the Respondent to the Tanganyika Transport Company Limited: "We thank you for your letter dated 23rd November, 1957, requesting us to sell you 25 tons of Sunflower seeds @ cents -/33 per kilo bagged. We regret to inform you that the stock we have got is

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already sold to the United Africa Company Ltd., but we can, however, sell you any balance stock which may be available after clearing with the United Africa Co.

Meantime your offer of cents -/33 a kilo bagged has been acceptable."

8. The issues framed by the learned trial Judge were p.14

- 10 (1) What is the true construction of the contract 11.27-35 attached to the Plaint, including the meaning of the word "exclusively" in paragraph 1 of the Schedule?
- (2) Has the Defendant (Respondent herein) created a breach of the said contract?
- (3) If there has been a breach of contract by the Defendant, what damages if any has the Plaintiff suffered?

20 9. It was admitted by the Defendants that sales had taken place under the contracts referred to in the Defence and that thereunder the buyers had collected the goods concerned from the buying centres.

10. In his Judgment the learned trial Judge after pp.48-59 setting out the contract between the parties and summarising the relationship between the Respondent and its affiliated societies continued as follows:-

30 9. "With this background, let us again return to the p.52,1.44 agreement. It is clear that clause 1 of the contract provides that the plaintiff's transport shall be used to the exclusion of that of anyone else, in the circumstances thereafter prescribed. These include, under clause 1(a), firstly transport of leaf tobacco, bagged paddy and bagged wheat "from all markets maintained by or for the affiliated societies of the Union" and secondly "agricultural produce of any kind being handled by the Union from these or any markets established by or for a Native Authority . . ." I think there has been no mention of any markets established by a Native Authority.

40 10. Mr. Hall says the societies have their own bye-laws p.53,1.11 but that the bye-laws of the defendant govern the relationship between the societies and the

Record

defendant, and this I think must be so as the societies are members of the defendant. He says that in his experience the defendant has always sold the societies' crops, on commission, and has not used the other methods of disposal mentioned in the defendant's bye-law 2(1). The normal procedure is for each African to carry his produce (usually head portorage) to a society centre, where it is collected, loaded on to lorries and transported to a main road godown. There it is checked, weighed and consigned to its next destination, and if necessary rebagged. There were five of these main road godowns, and the societies owned all of them except the Songea one which the defendant owns. Mr. Hall says the defendant could not dictate on the matter of transport and that there was nothing to prevent the societies selling their produce themselves. He says that when the defendant dealt with the produce (which it appears in practice they always did) the arrangement was that it should take delivery at the main road godowns, and that it was really the responsibility of the societies to transport it there, but that in fact the defendant normally provided the transport, debiting the cost to the society. The "markets" referred to in clause 1(a) of the agreement are therefore, I take it, the society centres and the main road godowns. In cross-examination Mr. Hall said, "Produce of primary societies is not necessarily transferred from them to the defendant to sell. The practice in operation between the defendant and the primary societies was that the primary societies hand over produce to whoever they are told to by the defendant."

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p.54,1.28 13. "The terms of sale between the defendant and a purchaser are, of course, generally speaking no concern whatever of the plaintiff and there is nothing specific in the agreement between the plaintiff and the defendant to prevent the defendant agreeing with a purchaser for the latter to take delivery at one of the markets, i.e. a society's centre or main road godown, or anywhere else for that matter. The question is whether there was a condition implied or in the wording of the agreement that the defendant would do nothing which would alter the circumstances in such a way as to take from the plaintiff the right to transport

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produce which otherwise he would have under clause 1(a) and (b) of the agreement....."

After citing Cockburn C.J. in Stirling v. Maitland p.54,1.43  
5 B.M.S.840, Lord Atkin in Southern Foundries (1926) p.55,1.3  
Limited v. Shirlaw 1940 A.C.717 and Kennedy L.J. in p.55,1.30  
Measures Bros. Ltd. v. Measures (1910) 2 Ch.248 the  
learned Judge continued as follows:-

- 10 16. "The implications in the instant case are a little p.55,1.37  
different from those in the cases cited, for  
whereas in the latter express liabilities were  
avoided, in the instant case the defence is that  
the liabilities were never created. By this I  
mean that it is alleged that there was no obligation  
on the defendant to have any produce transported  
by anyone, e.g. because there might be no produce,  
or if there was it might not be handed in by the  
growers to the societies, or if handed in to the  
societies it might be disposed of by them otherwise  
20 than to or through the defendant, or, as in the  
instant case, disposed of through the agency of  
the defendant but by delivery to the purchasers ex  
primary society centres or main road godowns. It  
is argued that unless the produce at the time of  
transportation is under the control of the defendant,  
the agreement between the defendant and the  
plaintiff does not come into operation.
- 30 17. This, however, is not the interpretation I place p.56,1.7  
on the agreement. The part of clause 1(a) relating  
to tobacco, paddy and wheat would seem to be  
absolute. It gives the exclusive right to the  
Plaintiff to transport these commodities "from all  
markets maintained by or for" the societies; there  
are no words of limitation and I would say that if  
there was any such transporting to be done it was  
the duty of the defendant to see that it was given  
to the plaintiff. The clause then provides  
(presumably subject to the conditions relating to  
tobacco, paddy and wheat) for "agricultural produce  
of any kind being handled by the Union from these  
40 (markets)....." The meaning of the word "handled"  
is the chief bone of contention. It does not in  
the context apply to tobacco, paddy or wheat, but  
only to any other kind of produce. Further, it  
must I think in the light of the agreement as a  
whole, be given a broad interpretation. As I have  
said, the agreement imposed onerous conditions on  
the plaintiff, and contemplated heavy consignments

Record

of produce. Onerous conditions are often to be found in, for instance, those classes of contract which require a tenderer to supply goods on demand without any corresponding obligation on the part of the purchaser to buy any minimum quantity; I merely mention the conditions were onerous in the instant case, as being a pointer to what I think was in fact the intention of the parties at the time the agreement was made.

p.56,1.37 18. The word "handled" was I think intended to apply to any produce of the societies over which the defendant exercised any control, and this would include produce sale of which the defendant negotiated. That being so, the defendant was under an obligation to do nothing which would avoid the produce they handled being transported by anyone other than the plaintiff. The sales ex markets were clearly such avoidance, and therefore breaches of the agreement, and the plaintiff has suffered damage. Admittedly the plaintiff in evidence said, "By 'handled' is meant produce bought by the defendant". He might have thought the produce had been bought by the defendant, for it was the defendant which sold it, and in the agreements for sale it is described as the seller, and the secretary himself expressed it as his view that any claim made by the purchasers would be against the defendant. I think the plaintiff was merely mentioning circumstances as he thought them to be, and did not mean that if in fact the defendant was not the owner, but merely the agent of the societies, his negotiating the sale of the produce would not be "handling". Mention has, I think, been made of the words "desired by the Union" in clause 1(a). I think it is clear that they relate to the words "any other place", and not to the desire or otherwise of the defendant to employ the plaintiff's transport. Similar expressions appear elsewhere in the agreement which do relate to the defendant's requirement for or desire to employ transport, but they follow quite naturally the construction I have placed on the word "handled", and the duty of the defendant to the plaintiff which arises under the agreement as soon as produce became handled by the defendant. Issues one and two have now been answered.

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Record

The learned trial Judge then proceeded to deal with the issues of the quantum of damages in which he held that he could only award damages in respect of the sales to the Tanganyika Transport Company Limited and those of the 4th July, 6th August, 19th August and 23rd August to the United Africa Company (T) Limited as the remaining alleged breaches were subsequent to the filing of the plaint and further ordered that an account of these damages be taken.

10 11. The Respondent appealed against the decision of the learned trial Judge on the following grounds:-

1. (a) The learned Judge erred in holding that the first part of clause 1(a) of the Annexure to the Plaint imposed an absolute duty to see that if there was any transporting to be done it was given to the Plaintiff.

20 (b) The learned Judge erred in interpreting the second part of the said clause and in particular in holding that the defendant was under an obligation to do nothing which would avoid the produce being transported by anyone other than the plaintiff, and in construing the word "handled" in the said clause.

2. The learned Judge failed to direct himself as to certain matters of evidence and as to certain implications in particular the following:-

30 (a) That the failure of the plaintiff to take action as a result of similar conduct of the defendant in the preceding year was evidence of true intention of the parties, namely that the defendant should not be bound to see that the plaintiff transported produce in all cases.

(b) That the price tendered by the plaintiff for certain produce was operative at main road centres and included according to the plaintiff the cost of transport therefrom.

40 3. The learned Judge erred in ordering the taking of accounts. The learned Judge should have held that the plaintiff had failed to prove that he had suffered any damage as a result of any default of the defendants, and should have dismissed the claim or alternatively awarded only nominal damages.

Record

pp.64-83

12. On the 3rd day of December, 1959 the Vice-President of the Court of Appeal for Eastern Africa gave the Judgment of the Court. After setting out the facts and portions of the Judgment of the learned trial Judge, the Vice-President continued:-

p.78,1.7

"I agree that the first task in this matter must be to arrive at a true construction of the contract. Thereafter, in the light of such construction, it may be necessary to consider whether any implied term arises. There is no dispute as to the fact in the case, and the contract is written contract, so that this Court is in as good a position to consider the matter as was the trial (Court)."

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p.79,1.9

"As regards the construction of paragraphs 1(a) and 1(b), I agree, with respect, that the learned trial Judge has misdirected himself in saying that the contract gives the respondent the exclusive right to transport the commodities mentioned from all markets maintained by or for the societies without limitation. It seems to me that very definite limitations are provided. Paragraph 1(a) is restricted to what may be termed local transport from buying centres 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". Paragraph 1(b), which provides for transport to points outside the Songea District, is even more restricted. It must be considered in the light of the existing facts (a) that the appellant society owned a tobacco factory in Songea; (b) that the appellant society owned a godown in Songea; and (c) that the appellant society did not own the godowns outside Songea which were used for the storage of produce. When these facts are borne in mind it is clear that the paragraph is restricted to transport from the factory and godown owned by the appellant society. It refers specifically to transport "from its factory or godown at Songea". This cannot extend to cover transport from the other godowns outside Songea which, though used by the appellant society, were not owned by it. And this is confirmed by reference to paragraph 5(2) which, as stated above, provides rates for transport from Songea

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alone to the various points mentioned outside the Songea District. I am therefore of opinion that transport of produce from godowns outside Songea—that is, from godowns owned by the primary societies, (which, though in the Songea District are not in Songea) to points outside the Songea District are not within the terms of the contract. Accepting for the moment that by the terms of the sunflower-seed sale agreements with U.A.C. the sunflower-seed was first to be transported to "Seller's godowns on the main road between Songea/Tunduru" in order to be re-bagged, and thence was taken to Mtwara, and that the two stages of the journey are separable, I think the transport from such godowns to Mtwara was clearly outside the contract. "Seller's godowns" in the U.A.C. contracts is a misdescription of the ownership of the godowns, but it does not affect the fact that such godowns are not the appellant society's and are not at Songea and that therefore transport from them to places outside the Songea District is not provided for in the contract. I think the respondent can have no possible claim in respect of transport under the U.A.C. contracts from the main road godowns to the coast.

I turn now to the local transport, that is, the transport referred to in paragraph 1(a) of the contract. This presents more difficult problems of construction. Mr. Fraser Murray did not, I think, seriously contest the construction placed on the words "handled by the Union" by the learned trial Judge, though formally submitting that that construction was wrong. I think the broad construction placed on the words by the learned trial Judge is to be supported. That construction, in my view, accords best with the fact that leaf tobacco, bagged paddy and bagged wheat, the commodities specifically mentioned in the paragraph, are not subject to the qualification "being handled by the Union", which one would have expected if the phrase had been intended to restrict the application of the clause.

Mr. Fraser Murray relied on the words "desired by the Union" and argued that once produce was out of the appellant society's hands the appellant society was not in a position to form a "desire" as to its destination. I do not think, however, that the phrase is intended to

Record

indicate more than "any other place in the Songea District designated by the Union". On the whole I am inclined to the view that the paragraph confers an exclusive right on the respondent to transport produce from the buying centres to any destination in the Songea District.

p.81,1.1 Apart from the point raised by Mr. O'Donovan that the "local" and "external" parts of the journey under the U.A.C. sale agreements are separable, all the sale agreements complained of provide for the transport of the produce concerned from the buying centres to points outside Songea District. Such transport certainly does not fall within the express terms of the contract as I read the contract the "external" transport referred to in the contract being restricted to transport from the appellant society's factory or godown in Songea. Can it be said that there is an implied term or an obligation that the appellant society will not dispose of the produce handled by it until after it has been brought from the buying centres to a destination in the Songea District, such as the main road godowns, or that, if it does so, it must provide for transport by the respondent, at least to some point within the Songea District? I think not. I accept for the purpose of this argument the statement of the law in the passage from the judgment of Cockburn C.J. in Stirling v. Maitland 5 B & S 840 cited in Southern Foundries (1926) Ltd. v. Shirlaw A.C.712 which was referred to by the learned trial Judge in his judgment, and which runs as follows:-

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"If a party enters into an arrangement which can only take effect by the continuance of certain existing set 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."

I do not think, however, that that statement of the law is applicable in the circumstances here. The contract provides for the exclusive right to transport produce from buying centres to destinations within the Songea District; and from the appellant society's factory or godown in Songea to specified points outside the Songea District. It is not expressed to confer on the respondent

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any right to transport produce from any place other than the Songea to destinations outside the Songea District. This limitation has every appearance of having been deliberate, and it must be taken that the parties contemplated that transport other than the respondent's would or might be used for the conveyance of produce from points in the Songea District other than the appellant society's factory and godown at Songea to places outside the Songea District. It may well be that the appellant society had in mind precisely the type of sale agreement with which this case is concerned, and wished to limit their obligation to use the respondent's transport to produce which it was "handling" itself in the narrow sense of that word, being produce which would pass through its own godown. However that may be, apart from transport outwards from the appellant society's factory and godown in Songea, there is no limitation in the respondent's favour on transport of produce from any point in the Songea District to destinations outside the District. As I have said, the omission of such a provision appears to have been deliberate, and in the circumstances I can see no reason to imply in the respondent's favour an obligation on the appellant society to transport produce in the first instance from the buying centres to destinations within the Songea District, notwithstanding the fact that the produce is in fact intended for a destination outside the Songea District. If this had been the intention it could have been so expressed. The fact that it was not seems to me to indicate a contrary intention.

p.82,l.1.

As I have already mentioned, Mr. O'Donovan argued that three of the U.A.C. sale agreements provided for the produce (sunflower-seed) to be "rebagged at seller's godowns on the main road between Songea/Tunduru", and that this should be treated as a splitting of the journey into "local" and "external" parts, the respondent having the exclusive right to provide transport for the "local" portion of the journey. The argument is attractive at first sight, but I do not think that it is correct. As I read the U.A.C. sale agreements the provision amounts to no more than licence to use the godowns in question for purposes of rebagging and cleaning in course of the journey to the coast, which is to be effected by the

Record

purchasers or their agents. I think the whole journey is to be regarded as one, and that the transport is from the buying centres to the coast.

So far as the T.T. Coy sale agreement is concerned, the produce in question was transported from buying centres to Tunduru, and such transport in my view is clearly outside the terms of the contract.

Other points were argued in the course of the appeal, but in the view I take of the construction of the contract it is unnecessary to go into them. In particular it is unnecessary to consider the second and third grounds of appeal." 10

p.83 13. Gould J.A. and Windham J.A. agreed and the appeal was allowed with costs and the decree of Her Majesty's High Court of Tanganyika was set aside and the suit of the Plaintiff (Appellant herein) was dismissed with costs.

pp.84-85 14. Final Leave to Appeal to Her Majesty in Council was granted to the Appellant on the 20th day of May, 1960. 20

15. The Appellant submits that this appeal should be allowed and the Judgment and Order of the High Court of Tanganyika restored for the following amongst other

REASONS

1. Because the learned trial Judge was right in holding that the Respondent was in breach of the contract.

2. Because the learned trial Judge was correct in holding that by the contract the Appellant had "exclusive right" to transport those commodities i.e. tobacco, paddy, and wheat from all markets maintained by or for the Respondent or their affiliated societies. 30

3. Because the learned trial Judge was right in holding that the word "handled" must be given a broad interpretation, and was intended to apply to any produce of the societies over which the Respondent exercised any control.

4. Because the Respondent had by its conduct brought about the impossibility of performance by the Appellant and was therefore in breach of the said contract. 40

5. Because the Court of Appeal were wrong in failing to consider whether or not the Respondent had put it out of its power to perform the contract.

6. Because the Court of Appeal were wrong in holding that the passage cited from the Judgment of Cockburn C.J. in Stirling v. Maitland did not apply to this case.

Dingle Foot, Q.C.

Thomas O. Kellock

IN THE PRIVY COUNCIL

ON APPEAL FROM HER MAJESTY'S  
COURT OF APPEAL FOR EASTERN  
AFRICA AT DAR ES SALAAM

ALIMAHOMED OSMAN

- and -

NGONI-MATENGO CO-OPERATIVE  
MARKETING UNION LIMITED

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CASE FOR THE APPELLANT

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