IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Cockar Ag CJ & Gicheru JA)

CIVIL APPEAL NO 14 OF 1993

Between

SOUTH NYANZA SUGAR COMPANY LTD.....APPELLANT

AND

KOPAR & ASSOCIATES LTD.....RESPONDENT

(Appeal from a judgment and decree of the High Court of Kenya at Nairobi (Mr Justice Mbito) dated 24th February, 1992,

in

Civil Case No 4663 of 1988)

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JUDGMENT

Cockar Ag CJ. The respondent (hereafter Kopar) filed an action for general and special damages for breach of a four – year agency and / or brokerage contract committed by the appellant (hereafter Sony) and for defamation. Particulars of special damages are given in the plaint. The plaint also included a claim for damages for defamation.

Sony in its written statement of defence denied the existence of any four-year contract with Kopar and stated that the enforceable contract between them was for the period up to and did not go beyond the closing of the financial year of 1986/1987. With regard to the claim for defamation the defence pleaded qualified privilege.

Briefly the facts are that Kopar who are registered insurance agents (certificates Ex P1 (a) (b) and (c)) in response to tenders for insurance brokers and agents advertised by Sony, obtained quotations from American Life Insurance Co Ltd (Alico) in or about June, 1986, which were dispatched to Sony through Kopar with a forwarding letter (Ex p 2). After obtaining confirmation from Alico with regard to *inter alia* the suitability and reputation of Kopar for the insurance business that was involved and that the quotation sent to it had Alico's prior approval Sony on 30th June, 1986, sent two letters to Kopar awarding it the business of insuring all its properties and other assets (Ex 5 and Ex 6). The contents of the two letters are exactly the same except that in Ex 5 there is the addition of one matter which made it clear that the award of business was to cover 1986/87 financial year. There is no reference to this particular matter in the other letter. Mr Kopar (PW1) stated that he received the letter Ex 5 specifying one year's period first. Later the

same day he received Ex 6 which had not specified any period. Mr Kopar added that in his quotation the period specified was for four years. After the receipt of the acceptance (Ex 6) he referred the matter to Alico who insisted that Sony had to sign an agreement for four years. In consequence on 6th August, 1987, Sony signed one to the effect that the agreement (long term agreement) was to continue for another three years from 1st July, 1987, (Ex p 7). Further evidence to support the claim of a contract of four years' period that was relied upon by Kopar was the letter of 6th August, 1987, from Kopar to Alico and copied to Sony forwarding the long term agreement (Ex p 7) in which Kopar had referred to the establishment of a long term relationship that was officially to terminate on 30th June, 1990. Defamation was contained in the letter of Sony of 22nd September, 1988, to Alico that it had decided to engage services of a reputable firm of registered insurance broker to be selected from invitees through the mass media, that Alico would in due course be informed of the selected firm, and that Kopar had been informed of the arrangement.

No evidence was offered on behalf of Sony. On the evidence tendered before him the learned judge rejected the defence contention that the documentary evidence that was produced proved that two separate contracts were entered – one was between the parties for one year and the other between Sony and Alico for three years. He accepted that by its letter of 30th June, 1986, (Ex 6) Sony had duly appointed Kopar as its agent and had continued treating it as such until 26th September, 1988, when the agency was terminated after Sony had previously extended the duration of policies introduced by Kopar to four years by long term agreement signed in July, 1987. Taking all these facts together and in the absence of evidence to the contrary the learned judge was satisfied that a brokerage agency had come into existence for a four year duration between the parties. He also found defamation proved and gave judgment for Shs 3,168,661/80 cts by way of damages for breach of contract made up of Shs 667,879/80 cts as being balance of commission for 1988/89 and Shs 2,500,782/= by way of loss of expected commission for the balance of the period of four years. He also gave judgment for Shs 100,000/= as damages for defamation.

There are sixteen grounds of appeal which Mr Ojiambo for Sony (the appellant) chose to address globally.

To start with Mr Ojiambo drew attention to section 150 (1) of the Insurance Act (Cap 487) and its date of commencement which was 1st January, 1987. The sub-section has prescribed that after the expiry of 3 months from the appointed date no person was to use the name of broker, agent, ...etc in a manner to give the impression that he was registered to transact any such business unless he was so registered. Kopar was a registered agent but not a registered broker. So, in any event, Kopar was not entitled to act as a broker after 1st April, 1987. Mr Wasuna objected to any reference to the sub-section on the ground that it was not canvassed before the trial court because, otherwise, Kopar would have brought evidence to counter this point. In my view an issue involving strictly a point of law or the application of a statutory provision only cannot be excluded from an appellate court on that ground. As regards Kopar being thereby deprived of producing evidence to show that it was a registered broker Mr Kopar (PW1) himself stated in his evidence that he was the managing director of the plaintiff Co (the respondent herein) which was an insurance agent and was registered as an insurance agent during 1986, 87 and was also so registered as an insurance agent during 1989. He produced certificates of registration as an agent authorized to represent Alico for the years 1987, 88, 89. In the particulars given in para 10 of the defence, after a reference to the Insurance Act, there is an emphatic pleading that the plaintiff (Kopar) was not at the time an insurance broker. In view of the pleading and the evidence I am satisfied that no prejudice was caused to Kopar on account of our allowing this submission on a point of law to be taken for the first time at the appeal stage.

The significance of this submission made by Mr Ojiambo was that the learned judge had accepted what the evidence had shown that this was a brokerage transaction. So despite the holding of the judge that a four year contract had come into existence the coming into force of the sub-section would have terminated the same at the end of March, 1987, because Kopar was not registered as a broker. So in fact when Sony informed Kopar on 26th September, 1988, to re-tender as an insurance broker in the way advertised in the media Sony was not committing a breach of a four year contract for the simple reason that no such contract existed at the time as the same had already been terminated by the sub-section of the

Insurance Act with effect from 1st April, 1987.

Mr Wasuna's response was that what had been established was an agency between the parties. He conceded that the judge had found that a relationship of a brokerage agency had come into existence but added that the judge had used the terms broker and insurance agent loosely and interchangeably when in fact what he had in mind was the relationship of a principle and an agent. The insurance agency between the parties had not been affected in any way by the sub-section of the Act.

I have perused the judgment carefully. To start with the learned judge clearly had in the very initial stages formed the opinion that Kopar was a broker and had continued so to describe it until in the middle stages when he started using the terms "insurance agent' and "insurance agency". In the same manner he had, in the later part of his judgment, gone on to find that Sony had advertised for appointment of an insurance agent whereas Mr Kopar (PW1) had stated in his evidence that Sony had advertised for insurance brokers and agents and the learned judge had, in the earlier part of his judgment, accepted that as a fact. However, again, as conceded by Mr Wasuna, the learned judge did eventually find that a relationship of brokerage agency had come into existence between the parties. In my view Mr Ojiambo is right that the learned judge had found that a brokerage agency for a period of four years had come into existence between the parties. In fact when he came to deal with the question of defamation the judge again specifically referred to Kopar as a registered insurance broker. This is what he said:

> "On issues (f), (g), and (h) it is clear that the words complained of on their own were not defamatory. However, having regard to the fact that the plaintiff (Kopar) to the knowledge of the defendant (Sony) was a registered insurance broker, it was defamatory to that extent, especially in the eyes of the plaintiffs (Kopar) principals, Alico, to whom the letter as addressed ....."

And later he added:

> "".....and to suggest that the plaintiff (Kopar) was not duly registered insurance broker was tantamount to saying that it was not a fit and proper firm to represent the defendants. (Sony)....."

I uphold Mr Ojiambo's submission that in view of the holding by the learned judge that a brokerage agency for a period of four years between the parties had come into existence the same must be held to have been lawfully terminated with effect from 1st April, 1987, by coming into force on that day of section 150(1) of the Insurance Act. The claim for damages for breach of contract for the balance of the four year period of the agency contract, therefore, ought to have been dismissed by the judge.

However, it must be borne in mind that the finding of the learned judge was based on a totally wrong apprehension of facts. Kopar, it is common ground, was not a registered insurance broker. The thrust of Mr Wasuna's submissions has been the establishment of an insurance agency between the parties and I now proceed to deal with that submission.

The basis for the learned judge to conclude that a four year brokerage agency had come into existence were the letter of 30th June, 1986, and the continuation of the insurance granted for three years under the long term agreement dated 1st July, 1988, and signed by Sony on 6th August, 1987. Mr Ojiambo urged that even if it was accepted that Kopar acted on the letter of 30th June, 1986, (Ex 6) which was alleged to have superseded the other letter written earlier on the same day the fact that it was for an unspecified period did not mean that it was to be effective for a period of four years. In the first place there was no evidence of any immediate response from Kopar to make it clear that the award of business to it was for a period of four years. Mr Ojiambo contended that the period for which the award of business offered in the said letter was made could be ascertained from the following sentence in the letter:

> "This will be done as per your quotes duly agreed upon by M/S Alico Insurance Co Ltd."

Mr Onjimbo drew attention to the word "agreed" which was in the past tense and showed that the quotes had been agreed earlier. The only quotes that were produced in evidence were contained in the letter of

9th June, 1986 (Ex p 2 (1)) from Alico to Sony through Kopar. The letter was a tender of Alico's quotations for the various insurances required by Sony for the 1986/87 insurance period. These quotations were the "quotes duly agreed" referred to in the letter of 30th June, 1986. They were for one financial year only ie 1986/87. So it was clear that the letter of 30th June, 1986, was an award of business for one year only in respect of the quotes that had been duly agreed.

Mr Wasuna, however, referred to the long term agreement and the 2nd para of the forwarding letter of 6th August, 1987, addressed by Kopar to Mr John Fairhall of Alico. I reproduce the said para below:

> "John, on behalf of Kopar & Associates Ltd, I kindly request that Alico as principal should provide expert services to improve the risk on this account. Now that we have established a long term relationship that officially terminates on the 30th June, 1990; we expect the Board of Directors to review the contract in our favour due to the expected good performance during the period of contract."

Mr Wasuna argued that the three documents *viz*: the letter of 30th June, 1986, from Sony to Kopar, the long term agreement, and the above quoted letter of 6th August, 1987, clearly showed that the mutual intention had been to create a contract for four years between the parties. He, however, also added that the learned judge had misdirected himself when he held that by the long term agreement signed in July, 1987, Sony had extended the duration of the policies introduced by Kopar to four years.**7**

Starting with the letter of 30th June, 1986, (Ex 6) I am quite clear in my mind that the award of business made therein to Kopar was for a period of one financial year only namely 1986 / 1987 period. I have earlier referred to submissions by Mr Ojiambo that the words "quotes duly agreed upon by M/S Alico Insurance Co Ltd" in the said letter could only mean the quotations made in the letter of 9th June, 1986 (Ex p 2(1)) from Alico to Sony through Kopar. There is no other evidence to show that any quotations other than those contained in this letter had been agreed between Alico and Sony. The letter of 9th June, 1986, had explicitly stated that the tender of quotations contained therein was for the 1986/87 insurance period. The fact that no period was specifically stated in the letter of 30th June, 1986, awarding the business or that the period was unspecified does not, in my view, carry any significance. It is hardly likely for the award of business based on the said quotations to be for an indefinite period when it is well-known, and the Court can take a judicial notice of the fact, that rates of premiums as well as the value of the insured property are always variable. This letter, in my view, merely established an insurance agency between Kopar and Alico for the period of one year only ie 1986 /87.

If the letter of 30th June, 1986, was an award of business to Kopar for the period of one year only what is the position of the long term agreement in relation to the said letter. Mr Wasuna's contention was that the letter of 30th June, 1986, and the long term agreement should be read together as part of one contract of four years' duration. The part of the letter of 6th August, 1987, by Kopar to Alico which has been reproduced earlier was a confirmation of the existence of a four year contract. In my view the long term agreement is an undertaking given by Sony to Alico to continue insurance under the named policy issued by Alico for three years in consideration of the stated discount and the corresponding reduction of premiums in relation to the reduction in value of the property insured. It is an agreement between Sony and Alico and not between Sony and Kopar. Nor does it bind Sony to any obligation to Kopar. The letter of 6th August, 1987, if carefully perused, shows that Kopar was acting as an agent for Alico and in that capacity had succeeded in getting Sony to execute the long term agreement which Kopar was forwarding to Alico with that letter with a request to Alico for a favourable review of the contract between the two of them on account of their having established a long term relationship that was officially to terminate on 30th June, 1990, (a reference to three year period agreed in the long term agreement). Mr Wasuna claimed that Kopar was an agent for both Sony and Alico. However, Mr Kopar (PW1) conceded during his evidence that despite the fact that Sony paid the premiums to Kopar which the latter then transmitted to Alico, it (Kopar) never deducted any commission due to it from Sony from these premiums. Whatever commission that was due to Kopar was always paid by Alico. In fact Sony did not ever pay any commission directly to Kopar. With regard to the long term agreement it is evident that Kopar had been acting as an agent for Alico and not for Sony. In my view the long term agreement was not a part of the "award" made in the letter of 30th June, 1986, (Ex 6) nor was it meant to extend the award of business of

one year as per the "quotes" already agreed made in the said letter by another three years. The long term agreement was a transaction between Sony and Alico in which the function of Kopar can at best be described as an agent for Alico. The letter of 6th August, 1987, addressed by Kopar to Mr John Fairhall of Alico is a reflection of that relationship between Kopar and Alico.

There was therefore no breach of any agency contract by Sony because none was created nor did any come into existence between it and Kopar after the expiry on 30th June, 1987, of the first award of business agreement for one year which was made by letter of 30th June, 1986. The judgment of the High Court relating to damages awarded on an alleged breach of four year contract cannot be sustained.

As regards the claim for defamation the offending words contained in the letter dated 22nd September, 1988, from the financial controller of Sony to the managing director of Alico are pleaded in para 17 of the plaint which I quote below:

> "We are writing to inform you that Sony has decided to engage the services of a registered insurance broker to look after the insurance services of the company. Quotations have been invited through the mass media and selection of a reputable firm would be carried in due course .... Kopar and Associates have been informed about this new arrangement."

Particulars of defamatory interpretation intended to damage the reputation of Kopar are given in para 17A of the plaint. In para 17B of the plaint is pleaded that having been thereby subjected to contempt and ridicule Kopar had suffered loss and damage.

Sony in its defence denied that the said words were capable of the defamatory meanings attributed to them or that they could be taken to refer to Kopar, Sony had also claimed qualified privilege in that pursuant to the provisions of the Insurance Act the fact that Kopar was not at the time a registered insurance broker was communicated by Sony having an interest and duty to do so to its insurers Alico with a corresponding right and duty to receive such information. In view of the provisions of section 150 (1) of the Insurance Act and undisputed fact that Kopar was not a registered insurance broker the communication in question between Sony and Alico clearly was subject to qualified privilege. The judgment of the High Court with regard to this claim was not strongly defended and I will say no more except that the learned judge erred in his finding that the communication was defamatory. The judgment of the High Court in regard to this claim also must be set aside.

In the final analysis as Gicheru, JA, agrees with my judgment and with the orders that I have hereafter proposed, this appeal succeeds. The judgment of the High Court is now set aside in its entirety and the respondent's suit filed in the High Court is dismissed with costs awarded to the appellant. Costs of this appeal are also awarded to the appellant against the respondent. As Muli, JA, has since the hearing of this appeal retired, this judgment is delivered in accordance with rule 32 (3) of the Court of Appeal Rules.

Gicheru JA. I agree that this appeal be allowed in the terms proposed by Cockar, Ag Chief Justice.

Dated and delivered at Nairobi this 2nd day of February 1995

A.M COCKAR

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Ag CHIEF JUSTICE

J.E GICHERU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR