could have testified if they saw any injuries. Section 18A(1) of the Penal Code as amended by Act number 14 of 1980 reads:

> 18A(1) Subject to the provisions of the Code every person has the right to:
>
> (a) to defend himself or any other person against any unlawful act of assault or violence to the body.

In the case of *Bukulukulu Ndoma v. R.* (1) this Court observed in connection with section 18A(1)(a) as under at pages 354 – 5:

> It seems to us that the plain meaning of this provision is that where self-defence is pleaded, it has to be shown that the deceased committed an unlawful act of assault or violence to the body, and as a result of such conduct the prisoner inflicted the fatal blow on the deceased. In other words, the conduct which induces the fatal injury must have come from the deceased and not from some third party.

Whatever conclusions there are regarding the reality of the danger posed to the appellant by the deceased's conduct, this can only be drawn from the evidence on the record. The appellant in his evidence testified that the deceased attacked him first with a knife on the head, at the back and on the arm. However PW1 and PW2 did not see any such injuries on the appellant's body. These are the witnesses who arrested him as he was running away from the scence of crime. The learned trial judge termed the purported self-defence a "concoction." We, on our part, are in respectful agreement with the learned trial judge. On the totality of the evidence before the Court, the deceased did not attack the appellant with a knife. There is no evidence that the appellant was repelling an actual attack from the deceased which would then bring into play section 18A(1) of the Penal Code. With respect, we reject as untenable the appellant's defence of self-defence.

We now come to the question of intoxication. Sections 14(1) and (4) of the Penal Code provides as follows:

> 14(1) Save as provided in this section in this section intoxication shall not constitute a defence to any criminal charge.
>
> (4) Intoxication shall be taken into account for the purpose of determining whether the person charged had formed any intention, specific or otherwise, in the absence of which he would not be guilty of the offence.

As a general rule, intoxication affords no defence to a criminal charge but under subsection (4) of section 14 intoxication is taken into account in those offences requiring a specific intention "for the purpose of determining whether the person charged had formed any intention." The onus of establishing that the appellant was not by reason of the drink consumed incapable of forming the intention to kill rested on the prosecution. We rely on the appellant's own version on drunkenness and assume in his favour that he has told the truth as to what took place. We agree that the appellant had been drinking alcohol and was probably not sober. However, evidence of drunkenness per se is not enough, there must

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SANGIJO RICE MILLERS COMPANY LIMITED *v.* S.M. HOLDINGS LIMITED

HIGH COURT OF TANZANIA
(Commercial Division)
AT DAR ES SALAAM

(Massati, J.)

COMMERCIAL CASE No. 45 OF 2004

Contract – Contract of sale of goods – Whether and under what circumstances a mere purchase order may amount to an agreement to sell.

Contract – Contract of sale of goods – Delivery – Mode of delivery – Agreement is silent on mode of delivery – Delivery in one lot presumed.

Contract – Contract of sale of goods – A term of contract stipulates that presentment of documents be taken as delivery – Buyer fails to attach documents – Seller taken to have failed to deliver the goods.

Contract – Contract of sale of goods – Rules governing delivery of goods – Whether Buyer is bound to accept delivery in instalments.

Contract – Contract of sale of goods – Expiry of contract by effluxion of time – Liability of parties after such expiry of time.

Sale of goods – Contract of sale of goods – Whether and under what circumstances a mere purchase order may amount to an agreement to sell.

Sale of goods – Contract of sale of goods – Delivery – Mode of delivery – Agreement is silent on mode of delivery – Delivery in one lot presumed.

Sale of Goods – Contract of sale of goods – A term of contract stipulates that presentment of documents be taken as delivery – Buyer fails to attach documents – Buyer taken to have failed to delivery the goods.

Sale of goods – Contract of sale of goods – Rules governing delivery of goods – Whether seller is bound to accept delivery in instalments.

Sale of goods – Contract of sale of goods – Expiry of contract by effluxion of time – Liability of parties after such expiry of time.

A purchase order was relied upon by the parties as constituting a contract of sale of goods. The seller agreed to supply to the buyer 2000 bales of ginned cotton by the end of August, 2004 at the price of 58 cents per lb. Property in the goods would pass upon delivery of the goods which in turn required the seller to present documents on the strength of which the buyer would pay the price. At expiry of the time of contract the buyer had not taken delivery of the goods because the seller had not presented the requisite documents although the seller had notified the buyer that the goods were ready for delivery. Upon failure of the buyer to take delivery of the goods the seller sold the goods to other buyers at a lower than the contract price and sued the buyer to recover damages for the loss he had suffered.

The Court considered several issues including whether a purchase order may constitute an agreement, rules governing delivery of goods and liability of parties upon expiry of contract by effluxion of time.

Held: (i) The purchase order together with the conduct of the parties constituted an agreement to sell.

(ii) Where an agreement is silent on the mode of delivery, the presumption is that it is intended to be delivered in one lot, unless, by conduct the buyer accepts delivery by instalments;

(iii) By selling 500 bales out of the 2000 bales contracted before the expiry of the contract period the seller had prematurely breached the contract; full delivery of the 2000 bales within July/August 2004 was the essence of the contract and that term was breached by the seller;

(iv) The buyer was at liberty to rescind the contract.

Suit dismissed

Cases referred to:

(1) *Reuter v. Sala* [1876] 4 ChD 239

(2) *Brandt v. Lawrence* [1876] 1 QBD 344

(3) *Honck v. Muller* [1881] 7 QBD 92

(4) *R. v. Hall* (1932) 23 Cr. App. R 202

(5) *Musa andNgozi v. R.* [1970] H.C.D., n. 278

(6) *Minster Trust Ltd v. Trads Tractors Ltd* [1954] 3 All ER 136

(7) *Newton Abbot Development Co Ltd v. Stracman Brothers* (1931) 47 T.L.R. 616

(8) *Atkinson v. Maling* [1788] 2 Term Rep. 462

(9) *Smith v. Chance* [1819] 2 GB & Ad 753

(10) *Graves v. Legg* (1854) Exch. 709

(11) *Fiudon v. Parver* II M & W 675

Statutory provisions referred to:

(1) Evidence Act, 1967, sections 111, 112, 115, 122

(2) Sale of Goods Act, (Chapter. 214), sections 3(1) and (2), 29, 30, 31(1), 32(1), 33(1), 52, 53, 66(2)

(3) Cotton Industry Act, (Chapter 201), section 5(2)

Mr. Kwikima for the Plaintiff

Dr. Tenga for the defendant

JUDGMENT

(Delivered 9 November 2005)

Massati, J: The parties in this suit are both corporate persons represented by Mr. Kwikima learned Counsel, and Dr. Tenga, learned Counsel, who took over from M/s. M.A. Ismail, Advocate, for the Plaintiff and the defendant respectively.

In a plaint filed in this Court on 10 September 2004, the Plaintiff builds up its case in paragraphs 3, 4, 5, 6, 7 and 8. From these paragraphs, the Plaintiff's case is:

1. That the parties executed a contract deed for the purchase 2000 cotton lint bales or 370 metric tones on 28 May 2004.
2. That the defendant was to pay to the Plaintiff a total of USD 473 111-45 upon delivery of the crop.
3. That following this understanding the Plaintiff entered into a ginning agreement with Kahama Cooperative Union for ginning 2000 bales of lint cotton.
4. That the delivery was to be at the ginnery, Mhangalo, Kahama in the period, July and August 2004.
5. That by 30 July 2004, the Plaintiff had ginned a total of 470 bales and accordingly notified the defendant to collect the same to no vail.
6. That by the end of the contract period the Plaintiff had ginned all the contracted 2000 bales.

7. That the defendant refused to take delivery of the produced cotton bales forcing the Plaintiff to look for another buyer, who purchased 500 bales at the price lower than that offered by the defendant.
8. That by refusing to take delivery of 300 bales, the defendant acted in breach of contract.
9. That as a result, the Plaintiff suffered a loss of USD 171 298-97, for which the Plaintiff was claiming as damages in loss of anticipated earnings together with special damages in ginning and storage costs, general damages for breach of contract, interests at bank rate of 24% with effect from July 2004 to the date of this judgment, and lastly, costs.

In this plaint, the Plaintiff also annexed a number of documents, which we shall refer to later in this judgment.

The defendant, first instructed M/s M.A. Ismail, and Co. Advocates to file a petition under the Arbitration Ordinance for stay of the suit pending reference to arbitration. The petition was dismissed by Kimaro, J., on 14 December 2004. I had to refer to this event, because at the end of her ruling, the learned Madam Judge remarked:

> ... the purchase order is not an agreement worthy the name.

She was referring to what the Plaintiff had annexed to his plaint and marked P1, which was admitted in the course of the trial as Exhibit P2.

Upon dismissal of the petition, the defendant filed his Written Statement of Defence on 5 January 2005. The substance of the defence is carried in paragraphs 2, 3, 4, 5, 6 and 7 of the Written Statement of Defence. In short, the defendant's case is:

(1) The defendant executed an agreement for the supply of 2000 bales at the price of US cents 0.58 per lb, and not USD 473 111-45 for 2000 bales/370 metric tones.

(2) That the Plaintiff presented himself as the owner of a ginnery and could supply 2000 bales in one batch; therefore the ginning agreement is disputed.

(3) That the Plaintiff ought to have known that the 2000 bales were to be delivered at once, since the train could carry only 300 bales.

(4) That the Plaintiff failed to supply the contracted 2000 bales by the end of the contract period at the end of August 2004 and so the defendant was forced to look for an alternative supplier.

(5) That since the Plaintiff failed to supply the entire contracted quantity within the contracted period, and since time was of the essence for better world market prices, the defendant was forced to look for an alternative supplier.

(6) That it was the Plaintiff and not the defendant who was at fault, and so the Plaintiff's claim for loss of anticipated earnings, specific damages, storage costs and general damages were baseless.

The Plaintiff did not seek to file a reply to the Written Statement of Defence.

It was from the parties' above captioned pleadings that Kalegeya, J. framed the following issues for trial:

1. Whether the contract price for the 2000 lint cotton bales was USD 473 111-45 or USD 58-00 cts. per lb?
2. Whether it was the term of the contract that the 2000 lint cotton bales were to be supplied in one batch?
3. Whether the Plaintiff failed to deliver the 2000 lint cotton bales as contracted?
4. If the answer to issue 3 is in the affirmative, whether it was a term of the contract that upon failure by the Plaintiffs to deliver the 2000 lint bales; the defendant would be at liberty to look for an alternative supplier?
5. To what reliefs are the parties entitled?

The trial that followed was in search for the answers to the above issues. In so doing I was assisted by Mr. Mwamukonda and Mr. Khalfan gentlemen assessors. Before I embark on examining the evidence

on record, it may perhaps be opportune to remind myself that, the burden of proof is on the Plaintiff to prove his case on a balance of probabilities. Section 111 of the Evidence Act, 1967 reminds us:

> 111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.

We should not, however lose sight of section 112 of the Evidence Act 1967.

> The burden of proof as to any particular fact lies on that person who wishes the Court to believe in its existence unless it is provided by any law that the proof of that fact shall lie on any particular person.

And section 115 of the Evidence Act, 1967:

> In civil proceedings when any fact is especially within the knowledge of any person the burden of proving that fact is upon him.

And lastly section 122:

> The Court may infer the existence of any fact which it thinks likely to have happened regard being had to the common course of natural events, human conduct and public and private business in that relation to the fact of the particular case.

It is on the basis of the above principles of the law of evidence that I will now proceed to examine the evidence on record.

In this case, the Plaintiff fielded three witnesses. The first witness PW1 was Peter Paulo Sangijo the Plaintiff's Managing Director. He told the Court that he was a licenced cotton buyer and began that business in the 2004/2005 season. He had met the defendant at a cotton dealers' meeting in Mwanza on 5 May 2004. The Plaintiff and the defendant's Managing Director agreed that the Plaintiff would supply and the defendant would buy from him the equivalent of 370 metric tones of cotton lint at the price of US cents 58 per Ib. He said the lint was to be collected from Kahama ginnery. Later this agreement was followed by a written purchase order faxed to him by the defendant and dated 28 May 2004. He signed the said purchase

order to signify his acceptance of the offer. The purchase order was admitted and marked exhibit P2. be some evidence that the appellant's capacity may have been affected by it so that he may not have been able to

PW1 went on to tell the Court that he started ginning the contracted cotton on 23 July 2004 and by 27 August 2004 he had reached the target of 2000 bales but in between he had been notifying the defendant of the respective quantities attained and requesting him to take delivery. To prove that he had reached that target by 27 August 2004 PW1 produced Exh. P1 collectively consisting of receipts, statement of account and credit note from Kahama Cooperative Union Ltd, the owners of the ginnery which ginned the cotton.

He said after informing the defendant and the defendant failing to fetch the crop, and after expiry of the contract period, he decided to sell 500 out of the 2000 bales to Virian (T) Ltd at the price of US cents 30 per lb, and finished selling the last consignment on 1 November 2004 at US cents 37 per lb to various persons. The Court presumes that he did so to mitigate his loss.

PW1 said in conclusion that he has decided to come to the Court to claim loss of earnings at the rate of US cents 21 per lb, which he computed at a total of USD 171 298-97. He also claimed for special and general damages and interest.

In cross examination PW1 said Exh. P2 was not a contract but a mere order. He denied knowing Jumanne Kishimba. He confessed that he was new in the cotton business and did not know such terms as "FCA". He said no date was set for delivery, except July/August 2004. He said he paid a total of TZS. 40 438 091 as ginning fees for 2000 bales, and that he had finished ginning the 2000 bales by 27 August 2004. He said he neither knew nor accepted the accuracy of ACE reports. As far as he was concerned, he had paid all the levies to the Tanzania Cotton Board but did not have their certificates with him. He did not remember the lot numbers allotted to him for his bales. PW1 said that after selling the 500 bales, he transferred the

other 1500 bales to some other godowns, but had no receipts or any document from the owner of the godowns, because he understood he had deposited them at his own risk. PW1 admitted in cross examination that he sold the 500 bales prior to the expiry of the contract period. Lastly he answered to a question put by the defence Counsel, that he was claiming general damages because of the trouble he took in traveling to look for other customers, but had no receipts.

In re-examination by Mr. Kwikima PW1 said he never knew the Liverpool Cotton Association Rules. He said he never received any receipts for storage of his lint bales with KACU because he was never charged. He said he was not involved in the preparation of data and reports by ACE.

Examined by the gentlemen assessors, PW1 repeated that Exh. P2 was just an order. That he didn't remember even a single person who had purchased the remaining 1500 bales at USD 37 cents per lb. He said he did not know how much it cost him to purchase 2000 bales in terms of seed cotton nor the cost of ginning the same. He further said even if the order had specifically required him to deliver 2000 bales in one lot he would still sign the order, despite the storage problem. He said he was unable to quantify the loss sustained from selling the 500 bales. Lastly he said although the "order" was in English with which he was not well versed, he was nevertheless aware of the arbitration clause, although the Liverpool Cotton Association Rules were not attached.

The second witness for the Plaintiff was PW2 Kalima Christopher Dalaka Dele. He is a clerk at Kahama Cooperative Union Ltd ginnery since 1 June 2004. Led by the learned Counsel for the Plaintiff, PW2 said the Plaintiff had ginned 2000 bales by 27 August 2004. He admitted that ACE reports were issued to both KACU and the Plaintiff. He told the Court that all the 2000 bales were stored in one godown at the ginnery, but he would not know whether they are still there or who bought them.

However, in cross examination PW2 told the Court that the Plaintiff started ginning in July 2004 and by 27 August 2004, all the 2000 bales had been ginned. He told the Court that the Plaintiff stored all the bales in KACU ginneries, where a storekeeper would issue a receipt. Contrary to his previous statement in examination in chief, PW2 told the Court in cross examination that the 2000 bales could not be stored in one godown, but had to be stored in 2 godowns. He said the duty of ACE, on behalf of the Tanzania Cotton Board was to inspect seed cotton for weight and quality before ginning and after ginning the cotton is weighed again and the bales allotted with lot numbers by the Board. The Cotton Board would also issue quality certificates.

He further informed the Court that storage was only limited to the time it took to gin a customer's cotton. In the present case it was up to the end of August 2004. In reexamination PW2 said there were also other cotton buyers whose cotton was ginned at the ginnery.

Asked by the gentlemen assessors, PW2 said he was positive the Plaintiff had the 2000 bales in store by 27 August 2004 but was not aware when the 500 bales were sold, nor was he aware of the transfer of 1500 bales to another godown. He told the Court that the production figure was reflected in the ginning fee invoice and Exh. Pl collectively.

The last witness for the Plaintiff was PW3 Hassan Said, a goods clerk at Isaka Railway Station, Kahama. Led by the learned Counsel for the Plaintiff PW3, he told the Court that TRC transports cotton lint. He told the Court the capacity for one wagon was 100 bales, and that in 2004 TRC never loaded as many as 20 wagons of cotton bales from that station. He told the Court that the Tanzania Railways Corporation had no godowns at that station with a capacity to handle more than 1000 bales.

Cross-examined, PW3 told the Court that although cotton bales were mostly transported by rail, it was for the customer in each case to decide on the mode of transporting his goods.

Asked by the gentlemen assessors PW3 told the Court that although he was not in a position to know, whether or not it was cheaper, he thought it was more convenient to transport cotton bales by rail. He told the Court since he was stationed there in 1998, he never witnessed the haulage of 2000 bales.

This witness marked the end of the Plaintiff's case. Before the commencement of the defendant's case, one of the gentlemen assessors, Mr. Khalfan got involved in a motor accident which disabled him from proceeding with the case.

The defendant's case also consisted of 3 witnesses. DWI Saleh Mbarak Nahdi told the Court that he was the defendant's Managing Director. He said he was in the cotton business for more than 7 years. He told the Court that he was introduced to PWI by one Jumanne Kishimba at Mwanza in May 2004. He said all the business negotiations were done by the said Jumanne Kishimba and he signed the contract on 28 May 2004 and faxed it to the Plaintiff. He said Kishimba was a mutual agent for both parties.

Continuing with his testimony, DWI told the Court that he was expecting the consignment by August 2004. He did not get it. Instead on 23 July 2004, the Plaintiff informed him that he had ginned 300 bales for delivery. On 30 July 2002 the Plaintiff informed him that he now had 470 bales in stock. He told the Court that in neither of these occasions, did he receive any documents, nor invoice. He told the Court that on 4 August 2004 he received a letter threatening to take legal action if he did not collect and pay for 2000 bales. Later on 1 September 2004 he received a letter informing him that 500 bales had already been sold to someone else for USD 37 cents per Ib. He was therefore put on notice for breach of contract. He concluded his examination in chief by telling the Court that at no time had the Plaintiff informed him of the availability of the 2000 bales, nor an invoice together with the quantity and quality certificate sent to him, nor the Plaintiff s account number. He said it was the Plaintiff who was in breach.

Cross-examined by Mr. Kwikima learned Counsel for the Plaintiff, DW1 said his company was a private company with 3 directors. He said his Company was not listed in the stock exchange market and so could not trade there. He informed the Court that the Written Statement of Defence was signed by one of his officers. He told the Court that in the world market cotton is transacted in US cents per pound. He said that the contract did not indicate whether the Plaintiff owned a ginnery or that the 2000 bales would be ready for delivery at once in one lot but in his experience, cotton bales would be transported once they are ready for shipment. He said he did not go there physically to collect the bales from the ginnery, but he sent someone on 31 August 2004, who informed him there was no cotton.

He did not however, mention the name of the person he sent. DW1 admitted having advised the Plaintiff to contact Kishimba if he was in dire need of cash. He told the Court that after 31 August 2004 he checked with MS ACE and the Tanzania Cotton Board, where he learned that as at that date the Plaintiff had only 518 bales in stock. He said the Plaintiff was a willing party who supplied all the particulars. He described the role of Kishimba in their contract as that of an agent for negotiating the price, quantity, quality and time of delivery. He clarified that the term NL WF appearing in Exh. P2 meant Net Land Weight Finally at port of destination. He said the port of destination in this case was Indonesia. The witness also said PWI had never sent to him any document to support his claims.

On re-examination by Dr. Tenga DWI said in Exh. P2, the price was expressed in US cents per pound and not per kilogram, and that the Plaintiff signed it. He told the Court that it was a trade usage in the cotton world market to transact in these units. He told the Court that it was not necessary for him to visit the ginnery physically to verify the quality. He said he would have been contented if he received the requisite documents "and then send someone to arrange for the cargo's haulage. He told the Court that all the letters he had received from the Plaintiff were just informing him that he was going on

with ginning. He said by his letter of 23 July 2004, he did not mean to rescind the contract but only referred the Plaintiff to Mr. Kishimba for clarification and assistance. He said the Plaintiffs act of informing him subsequently that he had ginned more cotton was evidence that even the Plaintiff did not treat his letter as an act of rescission.

Asked by the remaining gentleman assessor, DWI told the Court that the cotton was finally destined to one Albert Muller of Indonesia who first contacted Kishimba, who in turn arranged the contract between the Plaintiff and the defendant. He informed the Court that the defendant was the official agent of Albert Muller in Tanzania. He told the Court that in this business, payment has to be preceded by an invoice, weight and certificate of quality followed by delivery. He said in this case the Plaintiff never sent any of those documents. He told the Court that he did not authorize the Plaintiff to sell the bales and since the Plaintiff did not produce any evidence of the availability of the 2000 bales in stock, he could not be held liable for breach of the contract. Finally DWI told the Court that on receipt of those documents he would have sent them to his principal in Jakarta, Indonesia who would in turn pay before the cotton was delivered.

The next witness was Michael Charles Mjunga (DW2) who introduced himself as a Regulatory officer with the Tanzania Cotton Board. He said his principal duties, included monitoring the production, buying, ginning and transportation of cotton in Tanzania. He told the Court that the Plaintiff was a licenced cotton buyer in 2004/5 season and so was the defendant Company. He told the Court that in such capacity he would collect and keep data of all ginned cotton from all the ginners in the country. However, he told the Court, to collect all this data, the Board had appointed various agencies. Ms Audit Control and Expertise Ltd (ACE) was one of the agencies. This agency was assigned to collect data from that zone which covered Kahama ginnery.

He told the Court, ACE compiled and sent to the Board weekly reports. Reading from those reports, DW2 said according to the reports, the Plaintiff had ginned 200 bales by 23 July 2004, 470

bales by 30 July 2004, 518 bales by 3 September 2004, and 869 bales by December 2004, and 969 bales by 3 May 2005. He told the Court that from this data it was impossible for the Plaintiff to have ginned 2000 bales by August 2004.

DW2 went on to tell the Court that every ginnery is alloted lot numbers for all the bales it gins of 100 bales per lot. He informed the Court that no bale could leave the premises of a ginnery without the approval of the Board because the Board issues Certificates of Levy, without which no bales can be delivered. He told the Court that no Certificate of Levy for 2000 bales was issued to the Plaintiff. He told the Court that Exh. P1 (a statement of account prepared by KACU) showing that the Plaintiff had paid TZS. 40 438 019 as ginnery fees for ginning 370,991 of cotton lint or the equivalent of 2049.7 bales is directly contradicted by the September Report which shows that only 91,116 kgs of the Plaintiff's cotton lint had been ginned. He said if the production figures shown in Exh. P 1 were correct then the levies due to the Board and the Cotton Fund were underpaid. DW2 finally insisted that from the records he had, the total seed cotton purchased by the Plaintiff for the whole of the 2004/5 season would not yield the bales of cotton lint as alleged by the Plaintiff. He also said the Cotton Board also issues quality certificates and export permit before any cotton lint is exported.

In cross-examination, DW2 said upon obtaining his M.Sc. in Plant Production from Ukraine, he underwent a cotton crop induction course at Ukiriguru. He said he was initially posted at Magu as a cotton inspector. He told the Court he did not know who was it that signed the weekly reports, but was positive that ACE was one of the agencies appointed to collect the data at Kahama ginnery. He told the Court that apart from the Plaintiff there were other companies who were ginning their cotton at Kahama.

He said the reports were filed weekly. He told the Court that offhand, he did not remember the lot numbers allotted to the Plaintiff's cotton, but that such data is available in his office. He told the Court

that Certificates of Levy are issued to the cotton buyer, not to the lint buyer, but no lint bale could leave the ginnery premises without the Certificate of Levy. Lastly DWI said he would not remember when did DW1 come to ascertain the Plaintiff's production in his office.

On re-examination, DW2 told the Court, that in Ukraine, an M.Sc. degree is a first degree. He said he had worked as a cotton inspector from May 1997 to December 1999. As such he was also an extension officer and represented the Board in all its regulatory functions. He said it takes 1,080,000 kgs seed cotton to produce 2000 bales. However, DW2 said it was not the board's business to see what the parties in the cotton business had agreed on. Finally he said the data his office compiles is for public consumption and is accessible to all and sundry even through the Board's website.

Asked by the gentleman assessor, DW2 told the Court that his office keeps information on all cotton buyers and exporters but he had no record of the sale of 500 bales by the Plaintiff to Virian although according to the reports such number of bales are shown to have been dispatched.

Dadi Luhwano Mwenda (DW3) was the last defence witness. He told the Court that he works with the Audit Control Expertise (T) Ltd which was an inspection house, as a collateral manager. He said their Company checks and counts goods at the request of their clients and issues reports to them. He is a Senior Support Analyst in the Company. He said in such capacity he had to oversee that all work assigned to the Company is executed to the letter and issue reports. His duty is to inspect the reports and sign them. He said in the 2004/5 cotton season ACE was appointed by the Cotton Board and assigned to the Western Zone, which covers Kahama ginnery. Their duty was to check quality of the seed cotton and cotton lint and thereafter compile statistics.

He told the Court that upon there being Certificates of Levy payments the ginned cotton lint bales are given special lot numbers, and can

only leave the ginnery premises on production of the levy certificates for payment of levy to the Cotton Board and the Cotton Fund. Then weight notes are issued for ginned cotton. He told the Court that these reports are compiled weekly. He identified his signature in the weekly reports which were identified by DW2 and accordingly marked identification "IDD". DW3 admitted those reports as exhibit D2 collectively. Reading from those reports (Exh. D2) DW3 said by 16 July 2004, the Plaintiff had purchased 350781 kgs of seed cotton and had ginned 200 bales, but had dispatched none. By 30 July 2004 the Plaintiff had purchased 458,000 kgs of seed cotton and had ginned 470 bales, without dispatching any. By 3 September 2004 the Plaintiff had purchased 548643 kgs of seed cotton and ginned 518 bales of which 500 had been dispatched. By 24 December 2004 the Plaintiff had purchased 681693 kgs of seed cotton and had ginned 869 bales, with a dispatch of 500 bales. He was positive that there was no omission in the records.

DW3 was thoroughly cross examined by Mr. Kwikima, learned Counsel for the Plaintiff. DW3 told the Court that he was a holder of a Diploma in Business English from Manchester National School of Sales, and an intermediate in principles of accounting. He confessed that he was not a Certified Public Accountant (CPA). He told the Court that although he had some experience in the cotton industry he would not know the volume of one bale of cotton lint although he was sure that the average weight was between" 180 to 190 kgs per bale. He confessed his ignorance of the amount required of seed cotton to produce a bale of cotton lint.

DW3 went on to tell the Court that as far as his Company was concerned its employer was the Tanzania Cotton Board and did not have any thing to do with the claims now under litigation. He said he knew that there were 3 ginneries in Kahama, and that apart from the Plaintiff there were 2 other cotton buyers who ginned their cotton at KACU ginnery, and the production of those others was higher than that of the Plaintiff. DW3 said he did not know the capacity of Kahama ginnery godown. He told the Court that the levy is collected

by KACU on behalf of the Board. He said the weekly reports are sent to, Tanzania Cotton Board and they (ACE) usually remain with counterparts. He wound up in cross examination by saying that ACE had nothing to do with the sales of cotton lint bales.

On re-examination, DW3 told the Court that Exh. D2 was a cumulative report in that the current report carries forward the previous ones. He said he was not required to have a CPA when he joined ACE. He said his duties were in the office and not the ginneries.

Asked by the gentleman assessor, DW3 told the Court at Kahama, the data would be prepared by a supervisor stationed at the ginnery and sent to their Dar es Salaam office, where he compiles them, sends to his manager for checking before signing them. He said Exh. D2 does not contain weekly reports for August 2004, but according to Exh. D2 by 24 December 2004, the Plaintiff had a balance of 369 bales after dispatching 500 bales. Now, the parties have also produced documentary evidence, some of which I have referred to above. It is now necessary to examine them in detail.

The Plaintiff produced a total of 4 documentary exhibits. Exh. P1 collectively consists of receipts number 1422 for TZS. 30 000 000 of 19 July 2004; Receipt number 1423 of 27 August 2004 for TZS. 438 091 and a statement of account dated 5 August 2004 and a credit note for TZS. 9 000 000 dated 27 August 2004. All these were issued by Kahama Cooperative Union Ltd and were meant to show that by 27 August 2004 the Plaintiff had ginned 370991kgs of lint at the ginning fee of TZS.109 per kg.

What confounds me is that given that there were 2 other ginners ginning their cotton at Kahama ginnery and no doubt also issued with receipts for the ginning fees, and given that the two receipts are too close serially, yet too far in the dates of their issue, is it possible that after issuing receipt number 1422 on 19 July 2004, the next receipt number 1423 had to wait for the Plaintiff again until 27 August 2004? What receipt book was used for the other ginners? I can find no immediate answers to these questions?

Exh. P2 is the purchase order from the defendant Company dated 28 May 2004. This essentially spells out the terms, conditions and warranties of the contract between the parties. Exh. P3 consists of 3 letters collectively from the Plaintiff to the defendant. The letter dated 23 July 2004 informs the defendant that 300 bales had been ginned and that the 1700 bales would be ready within the contract period. The letter of 30 July 2004 informs the defendant that there were then 470 bales ready for collection. It also undertook to avail the balance of 1570 bales within the contract period. The letter of 4 August 2004 reminded the defendant of his duty to take delivery of the 470 bales and pay therefor USD 105 999-8 within 72 hours. And finally the letter of 23 August 2004 was a warning to the defendant to collect the bales or face legal action. Exhibit P4 was an agreement for the sale of 500 bales of cotton lint by the Plaintiff to Virian (T) Ltd, dated 14 August 2004.

Undoubtedly the Plaintiff had sought it fit to inform the defendant of every stage of the production of the bales of lint cotton. It must be noted that the Plaintiff informed the defendant of the production of up to 470 bales of cotton lint. But, I must hasten to observe here that the Plaintiff did not deem it fit to inform the defendant when he attained the targeted 2000 bales.

On the defendant's part 2 documentary exhibits were tendered. Exh. D1 is a note from the Plaintiff dated 1 September 2004 containing computation of the Plaintiffs damages amounting to USD 289 576-83 Exhibit D2 are collective weekly reports of seed cotton lint bales and cotton seed at Kahama ginnery prepared by Audit Control Expertise (T) Ltd for the period 16 July 2004 to 24 December 2004. Notably the Exhibit does not contain reports for the whole of August 2004, part of September 2004, the whole of October, part of November 2004 and part of December 2004. However, according to DW3 those reports are cumulative, so that the report would also reflect data for the previous productions. It is on the basis of the above principles of the law of evidence and the evidence on record, that I will proceed to analyse that evidence. But in order to avoid duplicity, I intend to

examine the evidence of the parties on each of the agreed issues, together with the submission of the learned Counsel the opinion of the gentleman assessor and conclude with my own opinion.

As shown above the first issue relates to the price of the contracted quantity of cotton lint. Of the 3 witnesses for the Plaintiff only PWI testified on this issue. After tendering Exh. P2, the purchase order dated 28 May 2004 from the defendant, the witness said:

> According to that order the defendant needed 370,000 kgs equivalent to 370 metric tones of lint cotton. The price offered was US cents 58 per pound.

As was later to be seen, Dr. Tenga learned Counsel for the defendant did not cross examine PW1 on this because according to him, it was a non issue. We will shortly come to that. But perhaps this explains why the learned Counsel did not lead DWI, to answer that issue. Apart from acknowledging the contents of Exh. P2, DW1 had to answer the question when it was put to him in cross examination by Mr. Kwikima learned Counsel for the Plaintiff. According to DW1's testimony:

> According to the WSD, the defendant admitted to have contracted to purchase 370 metric tones or 2000 bales at the price of US cents 58 per lb (pound). That is the measurement in which cotton is sold in the world market.

Thus, the parties admitted that according to the agreement, the price was to be US cents 58 per lb. This is illustrated by Exh. P2.

The learned Counsel for the Plaintiff submitted that the Plaintiff has proved on a balance of probability that 2000 bales would weigh 315709.4 which would fetch USD. 473 111-45 at the agreed rate of USD cents 58 per Ib. With respect I am unable to pin down PWI as having orally testified to that effect. However, this piece of evidence (of the computations) is contained in a document from the Plaintiff dated 1 May 2004 and tendered by the defendant as Exh. Dl . Part of that document reads:

SELLING PRICE. 0.58 US cents/lb FOT (Gin yard Kahama Ginnery. 370,000 kgs x 0.58 x 2.20462 = USD 473 111- 5.

1. Kwa robota 2000 (370,000 kgs Tulitegemea kuuza na kupata USD 473 111-45.

This is the evidence on record which the defendant tendered. The only thing that the Plaintiff did was to plead it in paragraph 3 of the plaint.

Be that as it may, Dr. Tenga, learned Counsel, wondered why this should have been framed as an issue because, the agreement refers to 58.00 cts/lb and considering that the weight of 2000 bales would be 370 metric tonnes, then, using the established rates of conversion the contract price would surely be USD 473 111-45. The gentleman assessor concurred with Dr. Tenga that the price amount was irrelevant because it was merely a matter of arithmetic.

In my considered view, the issue as framed is important, and its answer will go a long way in solving the issue of damages. This is because, although the purchase order (Exh. P2) talks of US cents 58. per lb, the Plaintiff claims in paragraph 3 of his plaint, the total sum of USD 473 111-45 for 2000 lint cotton bales weighing 370 metric tonnes. And the answer is provided in Dr. Tenga's own submission. The total price of USD 473 111-45 is only correct on the assumption that all the bales shall have equal weight. But according to DW2 and DW3, the average weight of a bale of cotton lint is between 180 kgs and 190 kgs. So, the total price of 2000 bales would definitely vary and not fixed at USD 473 111-45 as pleaded by the Plaintiff.

Now coming back to the issue at hand, I would only say this. The price of US cents 58 per lb is not necessarily equivalent to USD 473 111-45 for 2000 bales, and that was not what was agreed between the parties. What was agreed was the price of US cents 58 per lb, and not USD 473 111-45 for 2000 bales of cotton lint. I would thus slightly differ with the gentleman assessor and Dr. Tenga.

The second issue that calls for determination is whether it was the term of the contract that the 2000 lint cotton bales be supplied in one batch? According to the Plaintiff, the 2000 bales were to be delivered within the contract period of July/August 2004. So he took the liberty to supply such quantities, as he was able to gin. The Plaintiff therefore presumed that he could supply the whole contract in instalments, provided this was done during the contract period. In the words of PW1:

> When ginning started on 23 July 2004 I sent him a message to come and collect 300 bales. The deadline for delivery was 31 August 2004. The defendant never showed up to collect the 300 bales.
>
> On 30 July 2004, 170 bales had been ginned. So the total shot up to 470 bales. I informed him. He never showed up ... I went on with the production. On 27 August 2004 I reached the target of 2000 bales. Exhibit P3 collectively are the letters that the Plaintiff sent to the defendant.

On the other hand, the defendant pleaded that the 2000 bales were to be delivered in one batch to easen up transportation by rail. In the words of DW1:

> We were to get the consignment latest by August 2004. We did not however get the contracted quantity. In 23 July 2004, he sent a letter to inform me that he had 300 bales ... I did not receive any of the documents mentioned in the contract. Then he wrote again on 30 July 2004 informing me that he had 470 bales. Again he did not send me any invoice. He said he needed money. I wrote to refer him to Jumanne Kisimba. However this was not one of the terms of contract.

On the basis of this evidence on record, Mr. Kwikima submitted that:

> It was neither specified nor implied that delivery would be in one lot. Otherwise the Plaintiff would not have been given 62 days within which to deliver.

In other words according to the learned Counsel, since the contract was silent on the mode of delivery, the Plaintiff was at liberty to

deliver in instalments. Unfortunately Mr. Kwikima learned Counsel did not show the basis of his proposition. Dr. Tenga learned Counsel for the defendant submitted that by using the term "shipment" referring to 370 tonnes July/August 2004 earliest possible in the term of the contract (Exh. P2), it is clear that 2000 bales were to be supplied at once. He submitted that the testimony of PWI that it was not a term that the 2000 bales were to be supplied at once was merely speculative. Dr. Tenga augmented his proposition by enlisting the provisions of section 33 of the Sale of Goods Act, and so submitted that if the term was not clear, then section 33 gives the defendant/buyer the option not to accept delivery of the goods by instalments.

The gentleman assessor was of the view that the contract demanded delivery of the 2000 bales of cotton lint in one lot. Before embarking on the task that is before me of resolving the second issue, let me first deal with the question of the status of Exh. P2. This document has been invariably referred to by both parties, both in their evidence and their submissions as "an order" and "contract". Kimaro J. has, as I have shown above, concluded that Exh. P2 was a mere purchase order and not an agreement. At this stage I cannot make any other finding to the contrary, because I have no jurisdiction to reverse that finding. Now, given that, Exh. P2 was a mere purchase order, I have, however, no doubt that it constitutes an offer from the defendant. The Plaintiff had accepted the offer by signing it and subsequently attempted to fulfill the terms of the offer. In my view, Exh. P2, together with the conduct of the parties constituted an agreement to sell, which is defined in section 3(2) of the Sale of Goods Act (Chapter 214):

> Where in a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future date or subject to some condition to be fulfilled after the transfer, the contract is called an agreement to sell.

In the present case, the parties had agreed that the Plaintiff was to supply 2000 bales and payment of the price depended on the presentation

of some documents mentioned in the purchase order. Title in the property would only be transferred upon payment of the agreed price. In short much as Exh. P2 was a mere purchase order, the conduct of the parties subsequent to the signing of Exh. P2, heightened the transaction to that of an agreement to sell.

Having so held, let me now go back to the subject at hand. Was there any term in the agreement of sale whether expressly or by conduct, that all the 2000 bales of cotton lint, would be supplied in one batch?

It is true that according to Exh. P2 "shipment" was to be made in July/August 2004, without specifying whether it was to be in one lot. Mr. Kwikima has suggested that therefore the Plaintiff had an option to deliver it in instalments.

I think the position of the law is very clear. According to section 31(1) of the Sale of Goods Act (Chapter 214):

> 31(1) Where the seller delivers to the buyer a quantity of goods less than contracted to sell the buyer may reject them, but if the buyer accepts the goods delivered he must pay for them at the contract rate.

And section 33(1) of the Sale of Goods Act is even more explicit:

> 33(1) *Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.*

These provisions only codified he case law developed at common law. Thus in *Reuter v. Sala* (1) 239 *Brandt v. Lawrence* (2) and *Honck v. Muller* (3) it was held that, unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments. In *Brandt v. Lawrence* it was further held that an agreement to accept delivery by instalments, may, in the absence of an express agreement, be inferred from the conduct of the parties and the circumstances of the case.

On the authorities I would, with due respect to Mr. Kwikima not agree with him on this point, and would accept the proposition laid by Dr. Tenga. If the agreement is silent as to the mode of delivery,

the presumption is that it is intended to be delivered in one lot, unless, by conduct, the buyer accepts delivery by instalments. In other words the option lays not in the seller delivering by instalments but in the buyer accepting or rejecting to accept instalments.

In the present case, it was clearly shown in Exh. P2 that delivery was expected in July/August 2004. Mr. Kwikima took this to mean that delivery could be spread out within the 62 days period. However although it was not shown which date was the delivery-to be made, it was not expressly indicated either, whether the supply would be by instalments. In the absence of such term, the fall back position is the presumption that delivery would have to be in one lot, either in July at the earliest or August at the latest.

Besides, the defendant's silence meant that he did not accept part or instalment delivery. If any of the instalments had been accepted by the defendant, that would amount to acceptance by conduct, in which case the buyer would have been bound to pay for the price as dictated by section 32(1) of the Sale of Goods Act.

It is on the above premises that I would answer the second issue in the affirmative. In the absence of any express term or conduct of the parties together, it was an implied term of the agreement to sell, that the 2000 bales of the cotton lint were to be supplied in one batch. I would therefore concur with the opinion of the gentleman assessor.

I now come to the third issue, whether the Plaintiff failed to deliver the 2000 bales as contracted?

It was contended by the Plaintiff that by the end of the contract period he had ginned the 2000 bales as contracted but the defendant failed to accept/take delivery. To prove this, PW1, testified:

> When ginning started on 23 July 2004, I sent him a message to come and collect 300 bales. The deadline for delivery was 31 August 2004. On 30 July 2004 170 bales had been ginned. So the total was 470 bales.

> I went on with the production. On 27 August 2004 I had reached the target of 2000 bales. The bales were stored at KACU godowns.

On that aspect PWI also produced Exh. P3 collectively. There are 4 letters in this Exhibit. Chronologically, the first letter is that of 23 July 2004. The letter, which is very brief, reads:

> Please take note that 300 lint bales are ready at the ginnery. Please arrange to pay and take delivery immediately. As regard the balance of 1700 bales we shall deliver within the contracted period.

The second letter is that of 30 July 2004 which informed the defendant that there were then 470 bales and asking the defendant to collect the consignment. Shown therein were lot numbers allocated to the said bales together with ACE weight note. Again it was indicated by the Plaintiff that the balance would be delivered within the contract period. In the third letter of 4 August 2004 the Plaintiff demanded that the defendant take delivery of 470 bales and pay for them USD 10 599-98 within 72 hours. The last letter dated 23 August 2004 refers to the previous letter of 4 August 2004, and puts the defendant on notice for breach of contract.

PW1 also produced Exh. Pl collectively to show that at the end of the contract period he had ginned 2000 bales. There are 3 documents in this collective exhibit. The first is a receipt for TZS. 30 000 000 from Kahama Cooperative Union Ltd dated 19 July 2004 described as an advance for ginning fees. Another receipt was for TZS. 1 438 019 from Kahama Cooperative Union Ltd and the amount is shown to be the last instalment for ginning fees for 2004/5. The next document is a statement of account between the Plaintiff and Kahama Cooperative Union Ltd dated 27 August 2004. According to this document the total lint produced for the Plaintiff was Kgs 370 991 worth 40 438-014 as ginning fees at the rate of 109 per kilogram. The last document is a credit note for 9 000 000. The Credit Note is dated 5 August 2004, being the value of baling materials.

PW2 Kalima Balakadele, also testified on this matter. He said:

> The 2000 bales target was attained on 27 August 2004 when the Plaintiff came to pay ginning fees for the bales.

Even in the vigorous cross examination to which he was subjected by Dr. Tenga the witness said:

> Although I am a stores clerk, I am sure there were 2000 bales. For the Plaintiff I opened his records when we started ginning his cotton in July and closed on 27 August 2004 with the closing balance of 2000 bales. They were taken to the godown. The storekeeper would receive them. I am sure the storekeeper would issue a receipt.

By the said pieces of evidence the Plaintiff intended to prove that he had 2000 bales by 27 August 2004, for delivery to the defendant. The defendant however, sought to show that the Plaintiff did not have the 2000 bales by end of the contract period as the Plaintiff claims. Said DW1:

> ...our contract was to expire on 31 August 2004. However by then the Plaintiff had neither informed me that he had 2000 bales in stock, nor sent any of the documents accompanying the invoice. An invoice had to contain the bale lot numbers quality certificate, quantity and the customer's account number.

In cross examination, DW1, admitted that he did not go to the ginnery physically to collect the bales, but that on 31 August 2004 he sent his official there, and found there was no cotton. He was emphatic that he would have been satisfied if he had received the relevant documents from the Plaintiff, which he did not. He further said he had cross/checked with ACE and the Cotton Board only to learn that as at 31 August 2004 the Plaintiff had ginned only 518 bales. The purport of the testimonies of DW2 and DW3 was to show that by 3 September 2004 the Plaintiff had ginned only 518 bales from 548,648 kgs of seed cotton. DW2 said the weight of cotton lint bales was 181 kgs per bale. Said DW2:

> 370,991 kgs of lint cotton divided by 181 kgs, gives a total of 2048/7 bales. This contradicts the September Report which gives the total weight of 91196 kgs of lint. If that is true it means the production exceeded the cotton purchased by Sangijo.

DW2 therefore concluded his testimony in chief thus:

> The total cotton purchased by Sangijo for the whole season would not yield the bales alleged to have been produced.

In cross-examination, DW2 said the seed cotton buyer has to be issued with a certificate of levy from the Cotton Board and that no bale can be dispatched without a certificate of levy payments. DW3 said he was an executive with the Audit Control Expertise (ACE), a firm hired by the Tanzania Cotton Board and stationed at various ginneries to check the quality and quantity of the seed cotton and cotton lint, and to prepare reports' for the consumption of the Cotton Board. He said the reports were to be prepared weekly. He tendered the Weekly Reports of Ginnery Stock and Levy Payments for the period 16 July 2004 to 24 December 2004 as Exh. D2 collectively. The witness then went on:

> In this Exhibit, it is shown that by 16 July 2004 Sangijo had bought 207, 685 kgs of seed cotton. There were no bales in stock. By 23 July 2004 Sangijo had 350, 781 kgs of seed cotton and had ginned only 200 bales. By 30 July 2004 Sangijo had 458,000 kgs of seed cotton and had ginned 470 bales. By 3 September 2004 Sangijo had 548,643 kgs of seed cotton and had ginned 518 bales, and 500 bales had been dispatched. By 24 December 2004, Sangijo had 681,693 kgs of seed cotton and 869 bales had been produced, while 500 bales were shown to have been dispatched.

Cross-examined by Mr. Kwikima, DW3 said:

> I don't know the volume of one bale of cotton lint, but the average weight is 180 - 190kgs per bale. I don't know an outright answer as to how many kgs are needed to produce a bale of cotton lint.

DW3 also said the weekly reports were cumulative in that all reports had to carry over the previous balances. On the basis of this evidence Mr. Kwikima, learned Counsel submitted that since the defendant did not visit the ginnery to see if the Plaintiff had the 2000 bales

during the contract period but in fact disowned the contract, the Plaintiff had the right to treat the defendant as in breach. Dr. Tenga, learned Counsel submitted that in terms of s. 29 of the Sale of Goods Act it was the duty of the Plaintiff as a seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of contract. And since it was a term of the contract that the documents had to be taken as delivery, and since the Plaintiff did not attach the said documents he must be taken to have failed to deliver the 2000 bales. Dr. Tenga also referred this Court to section 30 of the Sale of Goods Act. Mr. Kwikima acknowledges the fact of non-delivery of the documents, for in his submission he says:

> ...there can be no question of payment being demanded when the requisite document (*sic*) were not submitted to the defendant.

Mr. Kwikima also submitted that the weekly reports were hearsay evidence and in admissible. He also said the Plaintiff could also have borrowed from the other ginners to fill in any gap.

On the basis of the evidence on record and the submissions of the learned Counsel the gentleman assessor found PW1's credibility wanting, and opined that the Plaintiff failed to deliver 2000 bales.

Let me first deal with Mr. Kwikima's submission regarding the admissibility of the weekly reports and the suggestion that the Plaintiff could rely on other ginners to fulfill his obligation. I think, it is speculative on the part of Mr. Kwikima to suggest in his submissions that the Plaintiff could call on other ginners to fulfill his obligation. This is because that part of the Plaintiff's intention is not on record. At no time had any of the Plaintiffs witnesses suggested so. On the contrary, the Plaintiff has led evidence to show that the 2000 bales were his own. As to the admissibility of the weekly reports, it is true that the said reports were initially sought to be produced by DW2. Mr. Kwikima, rightly, I think, objected to the production of these reports by this witness, as he was not the author. However he identified the reports which were marked "IDD". DW3, the person whose signature appears in the reports tendered these documents as

ExhD2 collectively. Mr. Kwikima did not object, but he has thought fit to take it up in his final submission. I think, the law would not allow of such course of action, because the law requires that such objections be taken at the trial and not in the course of submission. At this stage the learned Counsel is estopped from raising such an objection. Besides, after admitting Exh. D2, Mr. Kwikima took time to cross examine DW3. I do not see where the learned Counsel questioned the contents of the weekly reports, apart from the fact about the missing August reports.

If, Mr. Kwikima's intention is to question the accuracy and therefore the weight to be attached to Exh. D2, his duty was to challenge the figures shown therein in cross examination. He did no such thing. This, in my view, this was a vital point on the issue whether the Plaintiff had ginned 2000 bales by 27 August 2005. As it was held in *R v. Hall* (4) that:

> It is wholly wrong for a prosecutor to make a submission to the Court to disbelieve a defence witness on a crucial point of the case when he has not cross examined on it.

And that:

> Failure to cross examine may imply acceptance of the truth of the witness's testimony.

That is the position I take of Mr. Kwikima's submission on the admissibility and weight of Exh. D2 and on the probative value and credibility of DW3's evidence. This is more so, as the Plaintiff was served with a notice that those weekly ACE Reports for 2004/5 would be produced at the trial by a notice to that effect filed on 12 July 2005 by the defence.

Furthermore the requirement to produce weekly reports is not an idle one. It has legal foundations. Under the Cotton Regulations GN 471 of 2000, both the cotton buyer and ginner have a duty to keep such records and make such returns. In particular the Plaintiff, as a cotton buyer is required to produce standard weekly reports to

the Board under paragraph (h)(ii) of the Conditions set in the Seed Cotton Buying Licence, whose form is prescribed under section 5(2)(a) of the Cotton Industry Act (Chapter 201). The said condition reads:

> (h) *buyers shall produce standard weekly reports to the Board showing:*
>
> (ii) *Weekly purchases and deliveries of seed cotton by grade for every buying post.*

The ginner is also required to produce correct weekly reports under paragraph (g) of the Conditions for Cotton Ginners Licences. At the end of the Cotton Regulations there are prescribed forms which are to be filled by the cotton buyer and the ginner and returned to the Cotton Board.

The above position takes me to the next question. Did the Plaintiff have 2000 bales by end of August 2004?

This question is vital because delivery of 2000 bales would definitely depend on whether or not the Plaintiff did have the said bales at that date. This is so, because in mercantile transactions a sale is a transfer of property and no one can pass property if he himself has no rights of those goods in the first place. For this proposition I have the support of section 3(1) of the Sale of Goods Act, which reads in part:

> A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration called the price...

Whether the Plaintiff did have the 2000 bales of lint was obviously peculiarly within the Plaintiffs knowledge, and it was therefore upon him to so prove, and not on the defendant to show that he went to Kahama to physically check for himself whether the Plaintiff did have the 2000 bales as suggested by Mr. Kwikima in his submission. But, as I will show below that is not intended to belittle Mr. Kwikima's submission altogether. Now, the Plaintiff has attempted to do so by producing Exh. P1, and P3 collectively in addition to his oral testimony.

In view of the provisions of the Cotton Regulations which require both the cotton buyer and the ginner to keep records of purchases and ginning of seed cotton and make returns in prescribed forms and since PW1 and PW2 did not produce such records as required by law, I would accord no weight to Exh. P1, as there was no explanation why the required legal forms were not produced by these witnesses. I will thus draw adverse inference against the Plaintiff on this aspect. I am fortified on this view by my misgivings on Exh. P1 generally which I expressed above. If only for the sake of emphasis, I observed above that the two receipts number 1422 of 19 July 2004 for TZS.30 000 000 and number 1423 of 27 August 2004 for 1 438 019 are too near to each other and yet so far apart. What I mean is that unless there is evidence on record that this particular receipt book was meant only for transactions with the Plaintiff, it is incredible, given that there were also other cotton buyers ginning their cotton at the said ginnery that the next receipt serially should wait for more than 6 weeks, to be issued to the Plaintiff again. Since there is no explanation for this situation and since it is not usual to happen if these documents were issued in the normal course of business, I would treat Exh. P1 as suspect. That notwithstanding, it does not mean that the whole of PW1 and PW2 evidence is discredited. For it has been said by this Court in *Musa and Ngozi v. R.* (5) that:

> Rejection of part of the testimony of a witness does not necessarily make the whole testimony suspect or discredited.

So, while I reject and accord no weight to Exhibit PI, I find that there is some truth in Exh. P3. These letters, taken together lead to the conclusion that by 30 July 2004, the Plaintiff had ginned only 470 bales of cotton lint. The truth of this fact is also confirmed by Exh. D2 which shows that by that date (i.e 30 July 2004, the Plaintiff had indeed ginned 470 bales, and that by 3 September 2004 the total number of ginned bales was 518 to the Plaintiff's credit. This can't be a coincidence, but reflects heavily in favour of the authenticity of Exh. D2. Exh. D2 is a consolidation of all the statutory forms of return prescribed under the Cotton Regulations, which as I said above,

the Plaintiff was obliged to fill in and return to the Board, as well as the ginner. So I will attach to Exh. D2, the deserving weight.

Exh. D2, apart, I also had occasion to observe the demeanour of PWI and PW2 as they testified in Court, on this particular aspect. PW1 performed very poorly in cross examination by the defence Counsel and by the gentlemen assessors, especially when he was asked to account for the disposal of the 1500 bales over and above the 500 sold to Virian (T) Ltd. In examination in chief, PW1 said:

> On 27 August 2004 I reached the target of 2000 bales. Later I transferred 1500 bales to another godown belonging to KACU at my expense. I don't have any receipts for the rent because they did not charge me.
>
> After the expiry date of 31 August 2004 I had to dispose of the lint. The 500 bales we sold to Virian (T) Ltd.

But PW1 had forgotten that he had tendered Exh. P4, an agreement for the supply of cotton lint with Virian (T) Ltd, of which clause 2 reads:

> The supplier shall supply total of 500 bales to the buyer during the month of August 2004.

And when cross examined by Dr. Tenga, learned Counsel for the defendant, PWl admitted that he disposed of the 500 bales, before the expiry of the contract period. When asked by one of the gentleman assessors he said he could not remember even a single person who purchased any of the 1500 bales.

August 2004 was within the contract period between the Plaintiff and the defendant. According to Exh. D2, the Plaintiff had already dispatched 500 bales by the week ending on 3 September 2004. So, the irresistible conclusion is that if at all he had ginned 2000 bales by 27 August 2004, then certainly he did not have all of them by the end of August 2004. Exh. D2 further disproves PW2 and Exh. P1 which shows 27 August 2004 as the last ginning date for the Plaintiff because Exh. D2 shows the ginning continued until December 2004.

Furthermore PW2's testimony did not improve matters for the Plaintiff. He said in examination in chief:

> The 2000 bales were stored in one godown which was at the ginnery.

But when cross-examined by Dr. Tenga PW2, shifted his position. Asked on the question of storage, he said:

> For lint we have 2 of them (i.e. godowns). The 2000 bales cannot fit in one godown. We had to store them in 2 godowns.

And when asked by the gentleman assessors he said:

> I don't know whether the 500 bales had been sold. I am not aware of the transfer of 1500 bales to another godown.

A close analysis of the testimony of PW2 shows that either he was not fully conversant with what he had come to testify on or ignorant of all that was happening at the ginnery or worse still what he was telling the Court was not all that true. I will therefore treat his testimony with extra caution. But there is also another dimension of the evidence of PWl and PW2. While PW1 testified both in examination in chief and cross examination that he was not aware of the role of ACE at the ginnery nor accepted the accuracy of their reports, PW2 said in examination in chief:

> When ACE was inspecting, the Plaintiff was involved. Both ACE and TLM & SB issued its certificates to both KACU and the respective cotton buyer.

And in cross examination, he added:

> Cotton seed is inspected by ACE for TLM & SB for weight and quality before it is ginned. Quality certificates are issued by TLM SB after ginning.

These contradictions have not been explained away nor commented upon by the learned Counsel in their final submissions.

In view of the provisions of' the Cotton Industry Act and the regulations thereunder the evidence of PW2 and DW3, I find and hold that weight notes quality and quantity of lint bales ginned were

necessary documents to prove the existence of 2000 bales. And that in terms of Exh. P2, the burden of producing those documents was on the Plaintiff. If he was not aware of and did not accept the ACE reports, he should have produced his own, which the law requires him to prepare and return to the Cotton Board. But that is a lame excuse because in his letter dated 30 July 2004 (part of Exh. P3) the Plaintiff himself refers to ACE weight notes numbers 02552, 02554, 02553, 02555 and 02556. This shows that the denial by PW1 of the existence of ACE was an afterthought.

Delivery of those documents was a term of the contract. It was part of the conditions for delivery and implied in law that the delivery of those bales of cotton were subject to the certification of a third party which was the Tanzania Cotton & Seed Board. At common law where goods are to be supplied to the buyer to the satisfaction of a third person, the standard required to satisfy the certifier may either be laid down in the contract or be that of the certifier or both. (See *Minster Trust Ltd v. Trads Tractors Ltd* (6) *Newton Abbot Development Co. Ltd v. Stracman Brothers* (7).

It follows that no delivery of the bales in this case could be made to the defendant in the absence of certificates of quality and quantity approved/issued by the Tanzania Cotton Lint and Seed Board. I am satisfied in this case, and on the basis of the evidence of DW2 that no such certificate were issued by the Board for 2000 bales of cotton lint as at 31 August 2004 in favour of the Plaintiff. And if the Plaintiff had them he would have produced the same in Court given that the Plaintiff had been given notice to produce them at the hearing of the suit.

On the above premises, I will proceed to hold that the Plaintiff did not have in possession the 2000 bales by the end of August 2004.

But being in possession of 2000 bales is one thing. Failing to deliver them within the contract period is another, although the two aspects are hand and glove. Let us assume for the sake of argument, as Mr. Kwikima has submitted, that the Plaintiff could have procured

the contracted goods from his fellow cotton buyers, and assuming therefore that the Plaintiff did have the 2000 bales for disposal within the contract period. Let us now examine the rules governing delivery and whether the Plaintiff complied with them.

The rules as to delivery are set out in section 31 of the Sale of Goods Act (Chapter 214). As I have set out above, under section 33 of the Act the buyer is not bound to accept delivery of the goods by instalments unless otherwise agreed. So in the absence of such contrary agreement the law presumes that delivery shall be in one lot.

With that presumption in mind, the general rule is that delivery of the goods may be made by the seller doing any act or thing whereby the goods are put into the custody or under the control of the buyer or his agent in that behalf. (See *Atkinson v. Maling* (8), or whereby the buyer or his agent is enabled to obtain such custody or control. See *Smith v. Chance* (9).

And as to delivery, the general rule is that whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer, is a question depending in each case on the express or implied terms of the contract. (See **Halsbury's Laws of England** (3 ed) Volume 34) at page 93.

In the present case, the place of delivery was at Kahama Ginnery gin yard, according to Exh. P2. It is on record that after ginning 470 bales and although he was not informed of the availability of 2000 bales and seen by the Plaintiff previous conduct towards 470 bales the Plaintiff informed the defendant to go and collect the bales. But I do not however agree with DW1 when he said he sent his officer to Kahama to check on the information, because we are not told who that person was, nor did he testify. I will therefore discard that piece of evidence and hold that neither the defendant nor his official ever went to Kahama ready for delivery of the bales. Notwithstanding however, that the bales ginned and ready for delivery were reported to be only 470, bales, it is on record that the defendant did advise the Plaintiff to contact Kishimba for clarification. According to PW1,

he did not know who Kishimba was. I find this assertion also totally unacceptable, because according to DW1, Kishimba was their mutual agent, who negotiated with the Plaintiff on the quality and price of the cotton to be purchased. DWI was not cross examined on that part of the evidence I will therefore take the Plaintiff's denial of who Kishimba was, as untrue and since he is mentioned in Exh. P2 as an agent and since the Plaintiff signed and therefore bound by the contents of Exh. P2, I will conclude that the Plaintiff knew that Kishimba was both his and the defendant's agent, for the purposes of that order.

As an agent, Kishimba could act on behalf of the defendant in deciding to accept delivery either in one lot or by instalments. But to exercise such powers the Plaintiff had to contact him, as advised by the defendant. The Plaintiff did not contact Kishimba. There is a very strong inference that the Plaintiff did not have the 2000 bales as contracted either of his own, or those that he could have obtained from the cotton buyers. For those reasons, I will hold like the gentleman assessor, that the Plaintiff failed to deliver the 2000 bales of cotton lint as contracted. Therefore the third issue is answered in the affirmative.

I now come to the fourth issue, which is: if the answer to the 3rd issue is in the affirmative, whether it was a term of contract that upon failure by the Plaintiff to deliver the 2000 bales, the defendant would be at liberty to look for an alternative supplier? As matters are, this issue is closely linked with the second and third issues above discussed.

Mr. Kwikima, learned Counsel for the Plaintiff submitted that since the terms of sale did not bind either party to trade with the other exclusively, as the contract was voidable, the parties were at liberty to trade with other buyers/suppliers regardless of whether or not the delivery was made. He submitted further that, it was not an implied term that the Plaintiff had to deliver lint cotton ginned by himself and so the defendant would not suffer any disadvantage by taking delivery of cotton not ginned by the Plaintiff.

On the other hand Dr. Tenga, learned Counsel for the defendant submitted that so long as the Plaintiff failed to honour his contract and so long as the contract period had expired after 31 August 2005, the defendant was discharged from the contract, and so neither party was bound by the term of the contract.

The view of the gentleman assessor is that since the Plaintiff failed to deliver as per contract, it was implied that the defendant was at liberty to look for an alternative supplier since he had an obligation to his principals in Indonesia.

There is, I think, some consensus among Counsel on this issue. I quite agree with Mr. Kwikima, that no party was bound to trade with the other to the exclusion of other traders. I also agree with Dr. Tenga that once a contract expires by effluxion of time, the parties are discharged from the contract; especially in this case where the suit was filed after the effluxion of the contract period. It appears that the issue arose from the defendant's reply in his Written Statement of Defence to paragraph 7 of the Plaint. In the said paragraph the Plaintiff alleged that at the end of the contract the Plaintiff had to sell 500 bales at a reduced price. Whereas the defendant, alleged that it was the Plaintiff's failure to supply 2000 bales in one batch that forced him to look for an alternative supplier in order to meet the deadline. That is why I said above, that this issue is closely linked to the second and third issues.

I have already held above that it was an implied term that the 2000 bales of lint cotton were to be supplied in one lot, and that the Plaintiff failed to deliver the same as contracted. I further held that by selling the 500 bales out of the 2000 bales contracted before the expiry of the contract period, the Plaintiff prematurely rescinded the contract. In my judgment full delivery of the 2000 bales within July/August period was the essence of the contract, and that term was breached by the Plaintiff.

Under the Sale of Goods Act (Chapter 214) the buyer has several remedies for breach of contract. He may sue for non delivery (section 52)

or for specific performance (section 53) and recover special damages and interest if he had paid the price in advance. Whether the buyer could look for an alternative supplier is implied, but not openly envisaged by the Sale of Goods Act. But at common law, whose application is saved under s. 66(2) of the Sale of Goods Act, in such cases, the buyer may rescind the contract. According to **Halsbury's Laws of England** (3 ed), Volume 34 at page 102 this is possible:

> Where the seller's breach constitutes a total failure of consideration, as ... where, a full delivery thereof is otherwise the essence of the contract.

In view of this position of the law and my findings above, I entirely agree with the gentleman assessor and proceed to hold that in the circumstances the buyer in this case (the defendant) was entitled to rescind the contract. As such the defendant was at liberty to look for an alternative supplier. So the answer to the fourth issue is also in the affirmative.

The last issue is to what reliefs' are the parties entitled? The Plaintiff in this case has filed a claim for USD 171 298-97, as loss of anticipated earnings, special damages, ginning and storage costs, general damages and interest at bank rate from July 2004 to the date of judgment. The claims are based on breach of contract. This was an action for non acceptance. Such an action can only be maintained if the buyer wrongfully neglects or refuses to accept and pay for the goods. But, as in the present case if there are certain conditions precedent to be performed by the seller and the seller fails to perform them no action can lie against the buyer. See *Graves v. Legg* (10). As Lord Arbinger said in *Fiudon v. Parver* (11) at page 680, no man shall take advantage of his own wrong.

I have, I hope, amply demonstrated above that the Plaintiff herein, has failed to prove and satisfy the Court, on a balance of probabilities, that he did have the 2000 bales of cotton lint ready for delivery between July and August 2004. The condition precedent for delivery of these bales was the production of quality and quantity certificates from the Tanzania Cotton Lint and Seed Board. The Plaintiff must

be taken to have been aware of this condition precedent because, not only is it implied by law, but also expressly provided in Exh. P2 which forms part of the Plaintiffs evidence. He failed to produce the said documents and therefore to deliver not only to the defendant the 2000 bales but failed to produce those documents in this Court. In the event, I find that, the Plaintiff has failed to prove his case on a balance of probabilities. I would with respect, once more concur with the opinion of the gentleman assessor.

Consequently, the suit is devoid of substance and I will therefore dismiss it with costs. I would however, wish to express my appreciation to the gentlemen assessors and particularly Mr. Mwamukonda and the learned Counsel for their immense contribution and assistance to the Court.

Order accordingly.

YUSUFU MANJI *v.* EDWARD MASANJA AND ABDALLAH JUMA

COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(Lubuva, Msoffe, and Kaji, JJA)

CIVIL APPEAL No. 78 OF 2002

(From the decision of the High Court of Tanzania at Dar es Salaam, Kyando, J., dated 8 February 2002, in Miscellaneous Civil Application number 227 of 2002)

Company Law – Corporate personality – Veil of incorporation – Lifting of the veil of incorporation – Circumstances under which veil of incorporation may be lifted.