IN THE HIGH COURT OF MALAWI

PRINCIPAL REGISTRY

CIVIL CAUSE NO. 3860 OF 1998

BETWEEN:

DONNIE NKHOMA t/a NYALA INVESTMENTS.....PLAINTIFF

-and-

NATIONAL BANK OF MALAWI.....DEFENDANT

CORAM: TEMBO, J
Nkhono, Counsel for the Plaintiff
Kaphale/Katundu, Counsel for the Defendant
Matekenya (Mrs) Official Interpreter

JUDGMENT

Tembo, J

This case essentially arises from a contractual relationship between Donnie Nkhoma who trades as Nyala Investments, on the one hand, and the Agricultural Development and Marketing Corporation (ADMARC). Nyala Investments had agreed to import and sale maize to ADMARC and ADMARC had agreed to buy the maize from Nyala Investments. By the instant case which was commenced by

writ of summons the plaintiff, in his amended statement of claim, claims special and general damages against the National Bank of Malawi who were his bankers and who are the defendants in this case. In the main, the plaintiff's claim is that the defendants breached an agreement it entered into with the plaintiff and others by which the defendants undertook to facilitate the importation into the Republic of Malawi of a quantity of 5,000 metric tonnes of maize for delivery and sale to ADMARC. The plaintiff has pleaded that by reason of such breach, he has suffered loss and damage for which he makes several claims in the aggregate amount of US$ 459, 966.33. The plaintiff also claims costs for this action.

On the other hand the defendants, by their re-reamended defence, deny that they breached the agreement as alleged by the plaintiff. In the main the defendants contend that the plaintiff and his business associates had subsequently required the defendants to undertake some financial risks which were not in the contemplation of the parties when the agreement in question was made . In that respect, the defendants contend that such a requirement made the agreement unworkable. In conclusion the defendants deny that the plaintiff has sustained any injury, loss or damage as pleaded in paragraph 11 of the plaintiff's amended statement of claim. Besides the defendants maintain that, if the plaintiff has sustained any alleged loss, the plaintiff has failed to mitigate such loss. Further, or in the alternative, the defendants contend that by virtue of the terms of the irrevocable letters of undertaking, respecting liability, the defendants are not liable to the plaintiff, except if the plaintiff would show that the alleged breach of the agreement in question, was caused by the defendants' gross negligence or willful misconduct.

Be that as it may, the court has notice of the position currently being espoused by the plaintiff, that is to say, that

the plaintiff is now only claiming the loss of profit on the sale of 5,000 metric tonnes. Certainly, that is the view which the court has from the written submissions of learned counsel for the plaintiff, appearing at page 36 and 37, as follows-

> "A word must be said about the state of the statement of claim. It will have been observed that counsel who took the case through to trial was not counsel who had settled the pleadings initially. The pleadings had been settled initially by the firm of Chagwanjira and Company but were amended on the firm of Mbendera, Chibambo and Associates taking over the conduct of the action on behalf of the plaintiff. The amendments which were made to the statement of claim however related to the substance of the claim and not the prayer. It will be emphasized therefore that the plaintiff is claiming in this action only the loss of profit on 5,000 metric tonnes at US$8.175 per tonne making a total of US$40,875.00. To that extent the rest of the plaintiff's claim in so far as it includes particulars irrelevant to the loss of profit is logically abandoned. It will have been observed that in the examination in chief and re-examination of the two witnesses for the plaintiff's case, those other aspects were not even adverted to except as only some of them impacted on the profits lost."

During trial, the court heard three witnesses only, thus, two for the plaintiff and one for the defendants. In respect of the case for the plaintiff, the court heard the testimonies of Donnie Nkhoma, the plaintiff, and Gerry de Wet, a South African Business man who was a principal business associate of the plaintiff relative to the intended sale of maize to Admarc. Craig Stuart Rogerson, an officer of Investec Bank in the Republic of South Africa, testified for the defendants. The following facts emerge from the testimonies of these witnesses: by an agreement in writing entered into between the plaintiff

and ADMARC dated 23rd October 1998, the plaintiff agreed to sale and ADMARC agreed to buy 5,000 metric tonnes of maize at the price of US$206.00 per metric tonne C.I.F. Limbe, ADMARC depot. This is evidenced by exhibit P2. Thereafter, on 27th October 1998, the plaintiff entered into another agreement in writing with a Botswana based company called Tsatsu (Pty) Limited. By that agreement, the plaintiff agreed to buy and Tsatsu (Pty) Limited agreed to sell 5,000 metric tonnes of white maize at the price of US$206.00 per metric tonne C.I.F. Limbe. The agreement was evidenced by exhibit P3. By clause 2 of exhibit P3, the plaintiff and Tsatsu (Pty) Limited agreed on what they termed guaranteed profit split, being a total of US$8.175 per metric tonne for Nyala Investments and US$10.00 per metric tonne for Tsatsu. Tsatsu demanded, at that point, that the plaintiff should obtain a letter from ADMARC, by which ADMARC should make its irrevocable undertaking that all the proceeds of sale would directly be remitted to a special account at the National Bank of Malawi. This the plaintiff did. On its part, ADMARC expressed its agreement to that request in its letter to the defendants dated 27th October, 1998, which is exhibit P6, as follows-

> "Dear
>
> **SALE OF MAIZE 5,000 METRIC TONNES - NYALA INVESTMENTS**
>
> In accordance with your request, the Corporation hereby undertakes to pay amounts due to Nyala Investments for deliveries made between 26th October and 30th December 1998 (as stipulated in the contract of sale) direct to National Bank of Malawi, Henderson Street Branch.
>
> It is understood that the undertaking is irrecoverable and may not be revoked without the consent of all parties concerned.

Yours faithfully

P E MULAMBA
ASST GENERAL MANAGER

B M W KAKUSA
(F)CHIEF MANAGEMENT OFFICER
FOR:GENERAL MANAGER

Consequently, the plaintiff approached the defendants for a facility for the importation of the 5,000 metric tonnes of maize into Malawi. Meanwhile it had become apparent to both the plaintiff and Tsatsu that they could not by themselves, without assistance of other suppliers, supply the quantity of maize sought to be sold and supplied to ADMARC under their written contracts in question. For that purpose, and related matters, Tsatsu and the plaintiff brought in Senwes Limited, Whelson Transport (Pty) Limited and Ben Metter Richter into the picture. These were to supply the required maize and provide transport and bagging materials from South Africa, respectively.

Eventually the defendants issued the required irrevocable letters of undertaking to all parties concerned as evidenced by exhibit P8 (A), (B), (C), (D). It is further important to note that the five irrevocable letters of undertaking issued by the defendants bank dated 10th November 1998 to Senwes Ltd, Whelson Transport (Pty) Limited, Ben Metter Richter, Tsatsu (Pty) Limited and Nyala Investments had identical terms and that they were so issued following the request made by the plaintiff and upon the advice of the defendants. The defendants had issued those irrevocable letters of undertaking upon first having closely and thoroughly discussed, with the plaintiff and Mr Gerry de Wet, the contractual arrangement of the parties for the intended importation and sale of maize to Admarc . Thus, the defendants bank had had full knowledge of the agreement between the plaintiff and ADMARC, on the one hand, and that between the plaintiff and Tsatsu, on the other (hereinafter referred to as the principal contracts) prior to the issuance of the irrevocable letters of undertaking. Such

was the uncontroverted testimony of both the plaintiff and Mr Gerry de Wet and indeed as is clearly evidenced by paragraphs 1 and 2 of those irrevocable letters of undertaking -

"Dear Sirs

IRREVOCABLE LETTER OF UNDERTAKING IN RESPECT OF THE REMITTANCE OF SALE PROCEEDS SOLD TO ADMARC

This Letter of Undertaking is written further to the Agreement of Sale and Purchase entered into between Tsatsu (Pty) Limited and Nyala Investments, Blantyre, Malawi on the one hand and another Agreement of Sale and Purchase between Nyala Investments and Agricultural Development and Marketing Corporation (ADMARC) on the other hand.

We National Bank of Malawi, are aware of the contracts aforementioned and confirm that Admarc have undertaken to pay amounts due to Nyala Investments for maize deliveries made in accordance with the Contract of Sale direct to National Bank of Malawi, Henderson Street Branch. Such remittances will be credited to a Nyala Investments No. 2 Account Maize Account No. 0141111340901. The credit balance on this account shall at all times be subject to a continuing security by way of release and or rights of set off in favour of Tsatsu (Pty) Limited of all Nyala Investments obligations and liabilities under the Agreement of Sale and Purchase aforementioned.

The following obligations will be observed by Nyala Investments in the currency of this Letter of Undertaking.

i. So long as any obligation and liability shall remain undischarged in relation to the Agreement of Sale and Purchase aforementioned, Nyala Investments shall not

be entitled to withdraw any funds from the current account No. 0141111340901 to be credited with payments from Admarc.

ii. Nyala Investments shall not agree or purport to agree to assign, transfer, encumber or, otherwise dispose of any right, title or interest (if any) in and to any sum from time to time standing to the credit of the Special Nyala Investments Current Account at Henderson Street Branch.

iii. Nyala Investments shall notify National Bank of maize deliveries made for which an instruction will be issued to Admarc to effect the payment straight to National Bank for credit of the Nyala Investments Special Current Account.

iv. It is incumbent on Nyala Investments to satisfy all Exchange Control requirements before submitting to the National Bank of Malawi remittance instructions to transfer the money in the Nyala Investments Special Current Account to Whelson Limited.

In pursuance of this irrevocable Letter of Undertaking, National Bank has no responsibility to chase for the payments from Admarc nor will the Bank have any obligation to ensure that all payments from Admarc have been credited to Nyala Investments Special Current Account.

LIABILITY

Neither National Bank nor any director, officer or employee or other agent of the Bank shall be liable to Nyala Investments or Whelson Limited for any action taken by it or them under or in connection with this Letter of Undertaking, unless caused by its or their gross negligence or willful misconduct.

INDEMNITY

Nyala Investments shall forthwith on demand indemnify National Bank for any liability, loss, cost or expense incurred by or imposed on or claimed from the Bank in any way relating to or arising out of its acting as agent or in any capacity under or pursuant to this undertaking.

Notwithstanding the foregoing, National Bank of Malawi undertakes to ensure that all moneys received from Admarc will be credited to Nyala Investments Current Account No. 0141111340901 pending remittances to Whelson Limited as per instructions to be received by Nyala Investments.

The National Bank of Malawi may retain for its own account any fees, profits or other remuneration payable to it as agent under this understanding.

Nyala Investments irrevocably appoints and constitutes Whelson Limited as the true and lawful attorney with full power to carry out any of Nyala Investment's obligations under this undertaking to ask, request, demand, receive, compound and give acquaintance for any and all money claims for money due to become due under or arising out of the Agreements Sale and Purchase aforementioned.

National Bank of Malawi irrevocably undertakes to uphold the foregoing requirements until the Sale and Purchase agreement expires which is expected to be not later than January 31st 1999."

Mr Gerry de Wet in person obtained from the defendants in Blantyre Malawi four irrevocable letters of undertaking which he carried and personally delivered to Tsatsu in Botswana, Senwes (Pty) Limited, Whelson Transport (Pty) Limited and Ben Metter Richter in the Republic of South Africa. Upon receipt of those letters, Senwes Limited and Ben Metter Richter expressed some reservations in that they had

no prior knowledge of or any dealings with the defendants' bank. In the view of Senwes Limited and Ben Metter Richter, the irrevocable letters of undertaking standing by themselves, without more, would not suffice for the intended purpose. They, therefore, sought the intervention and involvement of a commercial bank based in the Republic of South Africa. Such commercial bank would be requested to confirm the arrangement, thus the defendants' bank irrevocable letters of undertaking. This commercial bank would facilitate payment to Senwes Limited and Ben Metter Richter, in the Republic of South Africa, out of the proceeds of maize sale to Admarc. Thus, such a bank would complement the role to be played by the defendants' bank in that regard.

Consequently, the plaintiff and Mr Gerry de Wet approached Investec Bank for that purpose whilst at the same time keeping the defendants briefed of that development. It is vitally important to expressly note in that regard the fact that by their testimonies both the plaintiff and Mr Gerry de Wet made it quite clear that the South African commercial bank would only play a complementary role to that of the defendants bank as reflected by the provisions of the irrevocable letters of undertaking and in the light of the principal contracts. Thus consistent with the provisions of the principal contracts for the sale and supply of maize to Admarc, all the parties to whom payment would be paid, therefor and in connection therewith, would so be paid in accordance with the irrevocable letters of undertaking issued by the defendants. The plaintiff and Mr Gerry de Wet in their testimonies made it abundantly clear that such was throughout also the view held by the defendants, thus before and after the required intervention and involvement of Investec Bank. Yes indeed, so maintained the plaintiff and Mr Gerry de Wet, that such was the defendants' position on the matter even upon and after the defendants had expressly been requested by Investec Bank to agree otherwise on the matter. That position is highlighted and is unequivocally

evidenced by the exchange of numerous written communication between Investec Bank and the defendants, thus, resting with exhibits P9, P10, P11, and P12.

Put simply and briefly, all the parties to the transaction for the importation and sale of maize to Admarc would be paid out of the proceeds of sale of maize to Admarc, thus out of the money therefor so directly to be paid by Admarc, upon receipt by or delivery to Admarc of such imported maize. The defendants consistently, and in that regard in complete agreement with the plaintiff, maintained that such was and had to be the position of the parties upon issuance of their irrevocable letters of undertaking and indeed after the intervention and involvement of the Investec Bank in the contractual equation. This position, in the considered view of the court, was not, in the least, shaken by any frantic attempts of the defendants through the testimony of Mr Rogerson to the contrary. Yes indeed, the testimony of Mr Rogerson did not yield much in that regard. As a witness, Mr Rogerson's credibility rating was or is almost negligible in that his testimony was or is mainly characterized by illogical inconsistencies. `For instance he could not admit a simple fact that he had had sight of or had had the opportunity to read the irrevocable letters of undertaking on or about the time when he effected written communication between Investec Bank and the defendants. In that respect, he sought the court to have the impression and therefore hold the view that as a matter of fact he had only recently had the opportunity to read such letters, thus when he had been approached to testify in the instant case. Alas, what a conspicuous attempt at effecting a misstatement of fact that one was! Fortunately, in the well considered view of the court, a perusal of exh.P10, in particular subparagraph (1) at page 1 thereof, more than eloquently evidences the fact that Mr Rogerson in so stating was in fact plainly telling lies to the court..` Besides, by his testimony Mr Rogerson sought the court to have the view that the plaintiff and Mr Gerry de Wet

in seeking to have other players in the contractual equation, in the person of Senwes Limited and Ben Metter Richter, the plaintiff and Mr Gerry de Wet had sought to effect some fundamental changes to the terms of the principal contracts and the irrevocable letters of undertaking. Yes indeed that, thereupon, it was sought to effect payment to Senwes Limited and Ben Metter Richter in accordance with some trade practice obtaining in the Republic of South Africa, respecting cross border commodity trade, in particular the export of maize. Thus, that in accordance therewith, Senwes and Ben Metter Richter would have sought to be paid by Investec Bank immediately following the taking by either of them of all the measures which had to be taken in the Republic of South Africa for the export of maize to Admarc in Malawi. Such having been the position, Investec Bank sought to be covered from the risk of exposure. On its part, the court did not receive any evidence of Mr Rogerson's alleged South African practice for cross border commodity trade. Mr Rogerson assertion, in that regard, when viewed in the light of the otherwise uncontroveted oral and written evidence of the plaintiff and Mr Gerry de Wet, does not even begin to make sense to the court. To the contrary, the position remains to be that all the parties were to be paid in accordance with the irrevocable letters of undertaking and in the light of the provisions of the principal contracts in that regard. After all there is no written agreement or oral agreement respecting Senwes Limited or Ben Metter Richter or both of them which have been proved before the court to the contrary.

To begin with by its letter, herein marked exh. P10, which was co-authored by Tite and Craig Rogerson, Investec Bank sought from the defendants, via authenticated SWIFT/TELEX-

> "1. Confirmation of the authenticity of your letter of undertaking dated 10th November, 1998(a copy of which is attached for ease of reference).

2. Instruction to Investect to add confirmation to the said letter of undertaking. This instruction should indicate that the exposure will reflect against the National Bank of Malawi facility and that any claims that are made against Investec with regards to this exposure will be payable by yourselves on demand.

Kindly note that the client is now extremely anxious to deal and we would appreciate your prompt response."

As it would be naturally expected, in the circumstances, the reaction and response of the defendants to the issues raised in and by exh. P10 was quite swift. The defendants letter in question, herein exh. P 11, was co-authored by Messrs Mumba and Banda. It was issued for the attention of Mr Rogerson, as follows-

"We wish to confirm the authenticity of our letter dated 26th November, 1998. We have issued irrevocable letters of undertaking in respect of remittance of sale proceeds for maize sold to Admarc by Senwes Limited, Whelson Transport (Pty) Limited, Ben Metter Richter, Tsatsu (Pty) Limited and Nyala Investments. We understand that our letters of undertaking have been submitted to you in order that you may add your confirmation.

Please note that we have not been requested officially that we should ask you to add your confirmation to our letter of undertaking. However, you may add your confirmation to our letters if you have been approached officially by maize suppliers in South Africa or Botswana whose names are mentioned above. Please note that National Bank of Malawi only undertakes to ensure that for all maize sales to Admarc by parties mentioned above Admarc will pay money direct to Nyala Investments current account no. 01-

> 1111340901. Such moneys received will not be permitted to be drawn by Nyala Investments except to be remitted to the suppliers as per the agreed contracts. Nyala Investments are responsible to inform National Bank of maize sales made and National Bank will ensure to obtain relative payments but National Bank is not responsible to guarantee any party nor to chase for or reconcile payments from Admarc.
>
> The letter of undertaking by National Bank will not include any reimbursement clause as it is not a guarantee. However, it confirms that Admarc are a reputable organization who have undertaken to pay direct to National Bank all the maize purchased from the parties mentioned above."

Subsequently, and in addition to the foregoing, the defendants in their written communication to Investec Bank which was co-authored by Messrs Njiragoma and Mtonga formally requested Investec Bank to add its confirmation to the defendants' letters of undertaking. The defendants thereby further confirmed the view that any payments to be made by Investec Bank in that regard would be reimbursed from the Nyala Investments No. 2 account. This letter too was issued for the attention of Rogerson, as follows-

> **"RE; IRREVOCABLE LETTERS OF UNDERTAKING TO SENWES LIMITED AND BEN METTER RICHTER**
>
> Hereby our request for you to add your confirmation to our letters of undertaking in respect to the remittance of sale proceeds for maize sold to Admarc, covering Senwes and Ben Metter Richter.

> Should a legitimate claim arise from either Senwes or Ben Metter Richter in terms of the contractual arrangement between the parties. We hereby instruct Investec Bank Limited to make good such claim after deferment to ourselves, which we will reimburse from the sale proceeds held in the account styled Nyala Investments No.2 account-maize, account no. 0141111340901 or by arrangement.
>
> We trust that this is in order."

By that point, in time, the plaintiff and his business associates had in fact already lined up the first lot of trucks to ferry maize from South Africa to Admarc in Malawi. Loading had commenced. On his part, the plaintiff was obviously quite happy and relieved to issue his first written communication, herein marked exh. P13, to Admarc notifying them of the imminent first departure from the Republic of South Africa of several truck loads of maize for delivery to Admarc in Malawi. Besides, the plaintiff had called upon Admarc to exercise its contractual right of inspection respecting the quality of maize thereby to be imported. Before the plaintiff had obtained any reaction from Admarc and indeed whilst admitting the fact that for the plaintiff the issuance of exh. P13 was a turning point and indeed a happy episode, and of course unexpectedly, the defendants there and then issued their letter, purportedly revoking the irrevocable letters of undertaking. Yes indeed, such was the substantive combined effect of the defendants' separate written communication to Investec Bank and to the plaintiff, thus exh. P14 and P15, respectively. First to be issued was exh. P14, thus a letter to Investec Bank dated 7th December, 1998, as follows-

> "**RE: IRREVOCABLE LETTERS OF UNDERTAKING TO SENWES LIMITED AND BEN METTER RICHTER**
>
> We refer to our letter sent by fax on 4th December,

> 1998, in the above regard and wish to rescind our decision.
>
> Having given the matter further thought, we would advise that establishment of a banker's guarantee would be a better alternative than the present arrangement. Nyala Investments have been advised to consider this suggestion and have yet to communicate to us their decision.
>
> We are therefore requesting you to treat our faxed letter and all previous correspondence sent by our Corporate and Institutional Banking Division (Major Business) as null and void."

Finally, the letter to the plaintiff, exh. P 15 was issued on 10th December, 1998, as follows-

> "The correspondence of discussions on the above-mentioned subject refers.
>
> We regret that having given your request a thorough consideration, it is clear that you require a stand-by letter of credit to confirm the due payment of funds from Admarc, to your principals in South Africa.
>
> In the circumstances, the letters of undertaking which we had issued are inadequate for your purposes. These should be returned to the Bank as they are no longer applicable."

The contract for sale and supply of maize to Admarc was, thus, effectively dealt a fatal blow from which it could not recover. The loading of maize on trucks earlier on intended to ferry the maize to Malawi from the Republic of South Africa was thereupon immediately halted. Thereafter, no communication from the plaintiff to the defendants by way of pleas howsoever made either in writing or orally, aimed at resuscitating the collapsed contract for the supply and sale of

maize to Admarc, was heeded by the defendants, hence the plaintiff's instant action.

The issues raised by the facts in the instant case principally pertain to the law of contract. Thus, in the first place, the court must determine as to whether there was or were any valid contract or contracts between and among the parties concerned. If the finding of the court in that regard shall be in the affirmative, and only then and thereafter, the court must determine the all important question as to whether there was the breach of contract by the defendants as has been herein alleged by the plaintiff.

To begin with, it is trite law that for there to be a valid contract, parties thereto ought to ensure that there is an offer, acceptance and consideration relative to the business transaction in which they seek to be engaged. In the view of the court, the facts in the instant case clearly establish that there was a business plan or project for the importation of maize from the Republic of South Africa into Malawi for sale to Admarc. For the implementation or execution of such business project, the plaintiff entered into a number of contracts, initially, with Admarc in Blantyre, Malawi; then with Tsatsu in Botswana; thereafter with the defendants Bank in Blantyre, Malawi. These contracts are evidenced by exhibits P2, P3 and P8. Yes indeed, without expressly showing the terms of the contracts entered into, the plaintiff in association with Mr Gerry de Wet, also therefor entered into contracts with Senwes Limited, Ben Metter Richter and Whelson Transport. The evidence adduced by the witnesses during the trial does not cast any shadow of doubt on the fact that valid contracts had in fact been entered into by the parties concerned. In their defence, no where are the defendants heard or seen to even making a suggestion at making a challenge as to the validity of any of the contracts for the implementation or execution of the plaintiff's business project for the importation and sale of maize to Admarc.

Consequently, the court makes a finding that the plaintiff and his business associates had entered into valid contracts for the implementation of the business project in question.

However, before more particularly examining the plaintiff's claim relative to the position of the defendants in the matter, it is expedient for the court to put the business project of the plaintiff in proper perspective. Yes indeed, the plaintiff did not have any quantity of maize of his own to be supplied to Admarc at the time the plaintiff had entered into the contract for the supply and sale of maize to Admarc. Besides, it is indeed quite clear that in order for him so to do, he entered into contract with Tsatsu Limited, in Botswana, which had some quantity of maize for the purpose. However, it is also quite evident that Tsatsu did not, then, have the capacity to supply the contract amount or quantity, hence Senwes Limited in the Republic of South Africa were taken on board for the purpose. The other parties were to provide transport services and bagging materials.

On their part, the defendants in Blantyre Malawi were to provide banking services for ensuring that all parties were paid in accordance with the principal contracts and the irrevocable letters of undertaking. Investec Bank came into the equation to perform a complementary role to that of the defendants, thus, respecting the effecting of payments to all parties concerned based in the Republic of South Africa, especially Senwes Limited and Ben Metter Richter, who sought the intervention and involvement of Investec Bank, in that regard.

The business project, conceived, developed and sought to be implemented in the instant case was a sound business undertaking legally and commercially. In the instant case the banking instrument and facility preferred and, therefore, contracted for facilitating the implementation of the business project of the parties was the irrevocable letter of undertaking.

In other cases, given the choice and resources of the parties, a banker's guarantee or an irrevocable letter of credit is preferred.

The case of ***W. J. Alan Co. Ltd v El Nasr Export and Import Co***. (1972) 2 All ER 127, in particular the judgment of Lord Denning, MR at pages 135 and 136 provides persuasive authority for an analogous business project where, however, an irrevocable letter of credit was used-

> "In any consideration of letters of credit, it is important to know the meaning of the terms used by commercial men. I can do this best by explaining the course of business here. This is a typical case of the use of commercial letters of credit. Here we have a seller of coffee in Kenya. He sells it to a buyer in Tanzania. That buyer resells it to a second buyer in Spain.
>
> The Kenyan seller is not willing to part with the goods or the documents relating to them unless he is assured of payment. So, he stipulates with his Tanzanian buyer that payment is to be made by 'confirmed irrevocable letter of credit' ... That means that the Tanzanian buyer must establish in favour of the Kenyan seller a letter of credit by which a banker promises to pay the price – or to accept drafts for the price – in exchange for the shipping documents relating to the goods, i.e. the bill of lading, invoice and so forth. The letter of credit, must of course, be 'irrevocable'. A 'revocable' letter of credit is not of much use to the seller, because the banker, on the buyer's instructions, might then revoke it at any time. The letter of credit must, in addition, be 'confirmed'. That is to say, it must be confirmed by a banker who is readily accessible to the seller (e.g. Nairobi or Dar es salaam); because the seller wants to be able to go to such a banker and get payment against documents. The seller may stipulate for payment in cash or by drafts accepted by the confirming banker.

Such drafts may be 'at sight', that is, payable on demand, or after a fixed period, such as 90 days after sight.

The Tanzanian buyer did not himself go to his own banker to establish the credit. He resold the coffee to a Spanish buyer and stipulated that the Spanish buyer should establish a 'transferable' letter of credit in his favour. The intention of the Tanzanian buyer was, of course, to transfer so much of it as was necessary to meet his obligations to the Kenyan seller. The Spanish buyer then went to his bank in Madrid and asked them to issue a transferable irrevocable letter of credit in favour of the Tanzanian buyer. The Madrid Bank would, of course, insist on the Spanish buyer providing them with the necessary funds or otherwise giving security to back the credit. On being so satisfied, the Madrid bank issued their own transferable irrevocable letter of credit in favour of the Tanzanian buyer. The Madrid Bank were the 'issuing bank' and, by issuing the letter of credit, they gave their own promise to honour it in exchange for documents in accordance with its terms.

The Tanzanian buyer, armed with that credit from the Madrid bank, went to his own bank in Dar-es Salaam and told them that he wanted to 'transfer' to the Kenyan seller so much of it as was necessary to meet his obligations to the Kenyan seller. He also asked them to 'confirm' it; that is to say to add to it (in addition to the promise of the Madrid bank) a promise on their own account that they would honour it on presentation of the documents. The Tanzanian bank would of course, require the Madrid bank to put them in funds or otherwise satisfy, them that their 'confirmation' would be backed by the Madrid bank.

Tanzanian bank then issued, their confirmation to the Kenyan seller. They were the 'confirming' bank. By it they promised to pay the Kenyan seller the price of the goods against delivery of documents in

> accordance with the terms set out therein. The payment was to be cash or by drafts payable at sight. These promises by the issuing banker and the confirming banker are, of course, enforceable against the bank by the seller."

It must be pointed out that whereas in the case cited above the parties had contracted for an irrevocable letter of credit, in the instant case the banking instrument or facility chosen by the parties was an irrevocable letter of undertaking. A letter of credit has to be backed by funds whereas such is not the case with a letter of undertaking. A letter of credit very much operates in the same way as a banker's guarantee alluded to by the defendants in their letter to Investec Bank marked exhibit P14. However, parties are agreed that the purpose of the letter of undertaking was that when the defendant bank received the proceeds of sale from Admarc, they would not release the amounts of money to Nyala Investments or to their order unless certain conditions regarding mandates to be supplied by both the plaintiff and Mr Gerry de Wet were satisfied. The parties are also agreed that by the letter of undertaking the defendants bank did not assume responsibility to ensure that any payment was made by Admarc into the particular account in the National Bank of Malawi or that any payment was made at all. Besides, the parties are agreed that in the event that Admarc did not pay the proceeds of sale into the designated account at the defendants' bank, the defendants' bank would have no liability whatsoever or obligation to pay any sums of money in respect of the transaction to any one of the designated suppliers or other payee.

It is the considered view of the court that the defendants had breached their contract with the plaintiff in having issued their letters, marked exhibits P14 and 15. By the express provision of their irrevocable letter of undertaking, among other things, the defendants undertook as follows-

> "National Bank of Malawi irrevocably undertakes to uphold the foregoing requirements until the sale and purchase agreement expires which is expected to be not later than January 31st 1999".

It is quite apparent that both exhibits 14 and 15 were issued well before such expiry date, thus 7th and 10th December, respectively.

Besides it is the view of the court that such breach, on the part of the defendants, had been committed by them in a manner which can only be characterised as being gross negligence or wilful misconduct. Yes indeed, such must be the case in that, among other things, the defendants clearly lied in their letter, exhibit P14, when they indicated to Investec Bank that –

> "Having given the matter further thought, we would advise that establishment of a banker's guarantee would be a better alternative than the present arrangement. Nyala Investments have been advised to consider this suggestion and have yet to communicate to us their decision."

It is expedient to note that by the date of that communication, the defendants had not yet approached the plaintiff on the matter. Yes indeed it is quite evident that having issued exhibit P14 to Investec Bank, the defendants only issued their only other letter to the plaintiff relative to this issue on 10th December 1998, as per exhibit P15. Besides, the manner in which they framed exhibit P15 can only be characterised as gross negligence or wilful misconduct, as follows-

> "We regret that having given your request a thorough consideration, it is clear that you require a stand-by letter of credit to confirm the payment of funds from Admarc, to your principals

> in South Africa.
>
> In the circumstances, the letters of undertaking which we had issued are inadequate for your purposes. These should be returned to the Bank as they are no longer applicable."

It is quite evident that by 10 December, 1998, the defendants were not in the process of considering the plaintiff's request in that regard. By then, the parties, thus the plaintiff and the defendants had already settled for the irrevocable letter of undertaking, dated 10th November, 1998. The defendants by the date of exhibit P15, thus on 10 December, 1998, were under a duty to ensure that the irrevocable letter of undertaking was upheld until the sale and purchase agreement had expired, not later than January 31st 1999.

In the circumstances, the liability for the breach in question is one which cannot be saved by the limitation clause on liability. The court, therefore, finds that the plaintiff has successfully proved his case against the defendant. The defendants are found liable for breach of the contract. It is so decided.

On damages, regard being had to the law on the point, the plaintiff should be entitled to the loss of profits occasioned by such breach. Parties are agreed as to the quantum and the court concurs. Thus, the plaintiff is entitled to what the parties had termed guaranteed profit split under the agreement between the plaintiff and Tsatsu; namely US$8.175 per metric tonne of maize, and US$40,875.00 in the aggregate. It is so ordered.

On costs, it is the well-considered view of the court that the plaintiff had realised too late in the day that he ought only to have made a claim respecting the loss of profits. The concession to have the claim only relate to loss of profits was made after the close of a full trial, in particular, in the written

submissions of learned counsel for the plaintiff. No doubt the defendants by then had already been put to a great expense in their legal battle against the so many other claims made by the plaintiff. It is quite probable that if the original claim made by the plaintiff were only restricted as now proved before the court, the defendants might have settled for an out of court settlement. Yes, one may say that this is mere speculation on the part of the court. Be that as it may, it is important to note that the original claim for the plaintiff was for an aggregate amount of US$459,966.33 but at the end of the trial he has stuck to that for US$40,875.00 only. In the circumstances, the plaintiff is awarded half the costs only. It is so ordered.

Pronounced in Open Court this 30th day of March, 2005, at Blantyre.

A.K. Tembo
JUDGE