

Court judgment

in the name of the Republic of Estonia

Number of the case

2-2/111/2004

Court which made the judgment

Tallinn Circuit Court

Date of the judgment

Talinn 19 February 2004

Composition of the panel of the court

The presiding judge Reet Allikvere and the members of the panel Gaida Kivinurm and Margo Klaar

Case

Novia Handelsgesellschaft mbH versus AS Maseko for the award of USD 53 456

Contested court decision

Judgment made by Tallinn City Court in civil matter no 2/3/19-1073/02 on 15 April 2003

Complainant and type of complaint

Novia Handelsgesellschaft mbH's appeal against judgment

Date of hearings

4 February 2004 in a public court session in Tallinn

Persons participating in the session

The appellant in the person of advocate Andres Vutt as the authorised representative of the plaintiff Novia Handelsgesellschaft mbH, and the respondent in the person of Rudolf Polman as the authorised representative of the defendant AS Maseko.

Conclusion

To annul the judgment made by Tallinn City Court on 15 April 2003 and to make a new judgment in the matter. To order from AS Maseko (registry code 10040348) for the benefit of Novia Handelsgesellschaft mbh damages in the amount of 957480,00 (nine hundred fifty seven thousand four hundred and eighty) kroons, and as court expenses a state fee in the amount of 84000,00 (eighty four thousand) kroons and the cost of legal

counselling in the amount of 36518,00 (thirty six thousand five hundred and eighteen) kroons. To grant the appeal.

Filing of appeal

An appeal in cassation to the Supreme Court may be filed against the judgment through Tallinn Circuit Court within thirty days as of the date the judgment is made public.

Facts

According to sales confirmation no 11461 as of 11.11.1999, Novia Handelsgesellschaft mbH sold and AS Maseko bought 500 000 kg of tomato paste for the price of 0,7850 USD/kg. The buyer was to supply the goods on the basis of regular orders during the period from 11.11.1999 until August 2000.

Claim and proof thereof

According to the reasons set forth in the statement of claim, the defendant performed its obligations undertaken with the conclusion of the contract of sale, entered into on 11.11.1999, only partially, determining on the basis of the contract the delivery dates of 176 003 kg of tomato paste. The defendant did not determine the delivery dates for 322 997 kg of tomato paste, referring to decrease in the market price and market recess. The parties held negotiations with the aim of making two amendments to the contract, namely to extend the term for the performance and to reduce the price, but failed to reach an agreement.

Pursuant to the contract of sale entered into by the parties, the buyer undertook to determine the delivery dates, taking into account the four weeks time-limit for carriage and the amount of part-deliveries. The opposing party failed to perform those obligations and thus was in breach of its principal obligation. The plaintiff repeatedly gave the defendant extension for the performance of the contract; however, the latter acted in bad faith and justified being in breach of the contract by economic difficulties. On 05.04.2001, the plaintiff notified the defendant of the termination of the contract.

As the defendant failed to perform the obligation to accept delivery and to pay for delivery, the plaintiff suffered damage in loss of profit. As the price of tomato paste continuously decreased in 2000, the plaintiff did not reach the desired profit.

Article 76 of the United Nations Convention on Contracts for The International Sale of Goods (CISG) stipulates that if a contract is terminated and there is a current price for the goods, the party claiming damages may recover the difference between the price fixed by the contract and the current price at the time of the termination of the contract. The current price is deemed to be the price prevailing at the place where delivery of the goods should have been made. The place of delivery was determined in the contract under the CIF term, in which case the place of delivery is the port of departure, i.e. this being on the basis of the contract in question the country of origin (Turkey). According to Turkish wholesale companies, the average market price of tomato paste at the time of the termination of the contract was 0,5925 USD/kg. In case the contract had been performed, the plaintiff would have received the total of 244 831,73 USD for the sale of 322 997 kg of tomato paste for the price of 0,7580 USD/kg. At the time of the termination of the contract, the price of 322 997 kg of tomato paste was 191 375,72 USD. Thus, the plaintiff did not receive 53 456 USD.

In view of the above, Novia Handelsgesellschaft mbH claimed damages from AS Maseko in the amount of 53 456 USD.

Defendant's objections to action

The defendant refused to admit the claim and contested the claim stating that the written confirmation no 11461 is not a contract. CISG does not govern written confirmations. According to the Convention, a contract is formed by offer and acceptance. CISG does not prescribe any other method of forming a contract. The declarations of intent of the parties are not deemed to be offer or acceptance.

The plaintiff did not suffer damage in connection with the supply of tomato paste to the defendant. In the claim, the plaintiff relies on CISG article 76 which regulates a situation

where the party who suffers damage has no possibility to perform a substitute transaction, in this case to resell the tomato paste. In such case, the difference between the price fixed by the contract and the current price at the time of the termination of the contract is subject to recovery. The plaintiff is a commercial agent, not an independent merchant. The plaintiff communicated the orders received from the defendant to the suppliers in Turkey and Greece. The latter dispatched the goods to the defendant. The plaintiff did not bear any commercial risk in connection with the supply, but received commission on the supply. CISG article 76 is applicable only in a case where the goods being the object of a contract have a current price. Tomato paste had no current price. Without quotation, it is only theoretically possible to determine the current price of goods. Therefore, the general opinions of the partners of the plaintiff regarding the price of tomato paste have no evidential value. Neither can the current price of an article be determined without considering the amount thereof.

Conclusion and statement of reasons of judgment of court of first instance

, Tallinn City Court, by its judgment of 15.04.2003, dismissed the action of Novia Handelsgesellschaft mbH versus AS Maseko for the award of damages in the amount of 53 456 USD (957 480 Estonian kroons) on the grounds of lack of proof. The court gave the following reasons for the dismissal:

According to the reasons stated in the judgment, the sales confirmation no 11461 forwarded by the plaintiff to the defendant shall be deemed to be an offer. The sales confirmation set forth both the amount and the price of the goods. The defendant accepted the sales confirmation by placing an order. The parties assumed performance of the contract. The plaintiff delivered to the defendant the goods ordered by the latter. The defendant accepted the goods and paid the requested sum for the goods. Therefore, on 11.11.1999, the parties entered into an agreement on the purchase of 500 000 kg of tomato paste for the price of 0,7850 USD/kg and on the delivery of the goods in regular part-deliveries until August 2000.

The plaintiff has not proved that damage was sustained. No evidence has been provided to prove that the goods concerning which the defendant did not place an order were in the property of the plaintiff at the time of the termination of the contract and that the plaintiff could not resell the goods, which would give grounds for filing for damages on the basis CISG article 76.

Claim stated in appeal against judgment and reasons for claim

The plaintiff (appellant in the appeal proceedings) seeks the annulment of the judgment of Tallinn City Court as of 15.04.2003 in the part concerning lack of proof of the damage sustained by Novia Handelsgesellschaft mbH, and applies for award of damages in the amount of 53 456 USD and court expenses to be paid by AS Maseko for the benefit of Novia Handelsgesellschaft mbH.

According to the reasons stated in the appeal, City Court violated the provisions of substantive and procedural law. CISG articles 74 to 76 governing claim for damages were applied incorrectly. CISG provides for two methods for determining the amount of damages depending on whether or not the injured party has entered into a substitute transaction.

The termination of the contract, proof that there is a current price for the goods and the fact that a substitute transaction was not performed the are the prerequisites for the application of CISG article 76. The contract of sale was terminated at the request of the plaintiff. The plaintiff provided evidence to prove the current price of the goods and the defendant did not contest the evidence, nor was there any disagreement between the parties regarding the fact that no substitute transaction was entered into. Thus all conditions for determining and ordering the payment of the amount of damages on the basis of CISG article 76 were fulfilled. In its judgment the court did not analyse or substantiate the said evidence, which was the basis for the disregard of the evidence. As the court dismissed the action for lack of proof of the damage, the failure to analyse the above evidence must be deemed to be a material violation of a provision of procedural law.

In applying CISG article 76, the court, at its own discretion, took the position that the property of the seller in the goods and the impossibility to enter into a substitute transaction are the prerequisites for the application of article 76. The court did not specify the basis for providing such prerequisites. Thus the court violated subsection 227 (1) of the Code of Civil Procedure. Taking into account that the plaintiff is a wholesaler, the position of the court would mean to require self-damaging behaviour from the plaintiff which would also adversely affect the party in breach of the contract. By acquiring goods which cannot be resold, the damage incurred by the seller would entail not only the difference between the price fixed by the contract and the market price, but also the expenses made on the acquisition of the goods. The claim against the seller being in breach of the contract would then rise accordingly.

CISG does not, by any circumstances, require the injured party to enter into a substitute transaction and deems entry into a substitute transaction to be the right of the injured party. The fact that a substitute transaction is not entered into can not create any advantages for the obligor. Such advantages would contradict the principle of total reparation of damage according to which the injured party shall have recovery such as to restore the situation of the party as it would have been in case the contract had been performed as required.

There is a reference in CISG commentaries allowing a claim to be filed directly on the basis of article 74, in addition to the special rules governing damages (articles 74 and 76), by calculating the damages as the difference between the acquisition costs and the price fixed by the contract. On the basis of the evidence provided by the plaintiff, it is also possible to determine the amount of the damages by using the said method.. As the plaintiff did not incur any acquisition costs, the claim was reduced by corresponding amount.

It is without basis to tie the claim for damages to the issue of property in the goods. The plaintiff filed the claim on the basis of a contract under the law of obligations which can

also be entered into concerning goods to be acquired in the future, i.e. goods which are not yet in the property of the seller. In addition, according to CISG article 4b, the Convention is not concerned with the effect the contract may have on the property in the goods sold.

Objections to appeal

The defendant (respondent in the appeal proceedings) contests the appeal, seeks the dismissal of the appeal and requests that no amendments be made to the contested judgment. The respondent applies for court expenses to be ordered from the opposing party.

Statement of reasons of judgment of the Circuit Court

The Chamber of the court finds that the judgment of Tallinn City Court as of 15.04.2003 must be annulled for incorrect application of the provisions of substantive law and material violation of the provisions of procedural law.

The statement of claim of the plaintiff was based on the fact that the defendant did not perform as required the contract of sale entered into between the parties on 11.11.1999. The defendant denies entry into the contract. In order to adjudicate the matter, it was first necessary to determine whether the contract entered into between the parties is governed by CISG.

According to § 2 of the United Nations Convention on Contracts for the International Sale of Goods Ratification Act, international contracts were required to be entered into in writing at the time of entry into the contract in question. The City Court found that the defendant had accepted the sales confirmation by its actions, i.e. by placing an order for the goods. Such reasoning contradicts the above provision of law. It is correct, however, that the document with the title “sales confirmation no 11461” as of 11.11.1999 (page 19) must be deemed to be a contract. The Chamber finds that the disputed contract was entered into pursuant to the procedure as provided for in CISG. The defendant accepted

the plaintiff's offer by signing it. As the parties are located in different countries, the court rightly found that CISG applies in the adjudication of this dispute.

The Chamber does not agree with the defendant's position which states that the document specified on pages 17-19 of the case file can not be deemed to be a contract, but must be deemed to be a written confirmation concerning which the Convention does not apply. Although the document is titled "sales confirmation", there is however no reason in this case to consider the document to be a written confirmation. Pursuant to the nature of a written confirmation, it is not signed by the parties. In commerce, the contents of a contract of sale may be conclusively determined after the contract has been entered into, or be even altered in such a manner that one party determines the contents of the contract once more in a commercial written confirmation and the other party is "silent" thereby admitting that it has no intention to contest possible derogation from the agreement as negotiated by the parties. The document in question does not conform to such characteristics. The parties have certified by their signatures on the document in dispute that they have concluded an agreement by which the seller undertook to sell and the buyer undertook to buy 500000 kg of tomato paste for the price of 0,7850 USD/kg and that the supply of the goods is carried out in regular part-deliveries until August 2000. In this case we have a contract entered into by the parties which is governed by the Convention.

The defendant also objected stating that the contract was signed on behalf of the defendant by a person who did not have the authorisation to sign the contract. This statement has not been proven by any evidence, although subsection 91 (1) of the Code of Civil Procedure requires each party to prove the facts on which their claims or objections are based. The contract in question has not been contested pursuant to the procedure provided for in law. Even if it had been proven that this transaction was performed on behalf of the defendant by a person who was not authorised to do so, the transaction would have been valid according to subsection 103 (2) of the General Principles of the Civil Code Act, as it is evidenced by the materials of the matter that the defendant has approved the performance of the act. The defendant undertook to perform the contract

and the contract was performed in the part relating to 176,003 kg of tomato paste until 24.10.2000.

There is no dispute between the parties regarding the fact that the defendant did not place orders for the supply of tomato paste with the plaintiff in the amount as agreed upon by the parties and that for that reason the plaintiff notified the defendant on 05.04.2001 of the termination of the contract. As the defendant was in breach of the contract, the question remains whether the plaintiff suffered loss in profit as a result of the breach and whether the defendant has the obligation to compensate the plaintiff for the damage. In solving this question, CISG articles 74-76 governing claims for damages had to be applied. The court applied these provisions, but the Chamber upholds the statement made by the plaintiff that the application of the provisions was incorrect.

The court incorrectly took the position that in order to have the action satisfied, the plaintiff should have proven that the goods for which the defendant did not place an order were in the property of the plaintiff at the time of the termination of the contract and that it was impossible for the plaintiff to resell the goods. The provisions of CISG governing claims for damages do not provide for such condition. The plaintiff filed the claim on the basis of a contract under the law of obligations which can also be entered into concerning goods to be acquired in the future, i.e. goods which are not yet in the property of the seller. Also, according to CISG article 4b, the Convention is not concerned with the effect which the contract may have on the property in the goods sold. Therefore, it is without basis to tie the claim for damages to the issue of property in the goods.

Pursuant CISG article 74, loss as a consequence of the breach of contract by one party consist of a sum equal to the loss, including loss of profit suffered by the other party as a consequence of the breach. Subsection 76 (1) provides that if the contract is terminated and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 75, recover the difference between the price fixed by the contract and the current price at the time of the termination. It can be concluded from the above that CISG makes distinguishes cases where the parties agree to be bound

by the contract, i.e. the parties do not terminate the contract, in which case the claim for damages is governed by article 74. Cases where the contract is terminated and damages are claimed are regulated separately (articles 75 and 76).

The Chamber finds that CISG article 76 is applicable in the adjudication of this case. The application of this article is subject to the following:

- 1) Termination of the contract of sale;
- 2) proof that there is a current price for the goods;
- 3) fact that a substitute transaction was not performed.

In order to make a judgment, the court should have established the existence of the above circumstances, but failed to do that, nor did the court base its judgment on such circumstances.

The Supreme Court ruled, in its judgment as of 14.11.2003 in the same civil matter, that all the reasons of the judgment of the Circuit Court are correct. The Supreme Court found that CISG article 76 is applicable in this case. The application of this article is subject to the following:

- 1) Termination of the contract of sale;
- 2) proof that there is a current price for the goods;
- 3) fact that a substitute transaction was not performed.

The burden of proof of those circumstances lies with the plaintiff. The plaintiff submitted to the City Court evidence concerning the current price of the goods. The City Court disregarded the evidence due to incorrect application of CISG provisions.

The parties did not wish to provide any further evidence in the Circuit Court session. There is no dispute between the parties concerning the existence of circumstances no 1 and 3 for the application of CISG article 76 as the plaintiff terminated, on 05.04.2001, the contract entered into by the parties and no substitute transaction was performed. A dispute arose between the parties concerning circumstance no 2, i.e. the current price of the goods. For the purposes of CISG article 76, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current

price at that place, the price at such other place as serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

The Chamber does not agree with the opinion of the defendant that there is no current price for tomato paste as the current price can only be determined concerning quoted goods, which tomato paste is not. At the same time the defendant stated, contrary to the above, that it is also theoretically possible to determine the current price of unquoted goods, although it may turn out to be complicated. The defendant correctly states that in stock market conditions, the price is created as a result of supply and demand, however, the defendant disregards the fact that the market price of unquoted goods is created in the same manner.

The plaintiff correctly argues that the provisions of CISG cannot be construed as an obligation of the injured party to enter into substitute transaction but as the right of the injured party to conclude a substitute transaction, and the fact that a substitute transaction was not entered into can not create any advantages for the obligor. Such advantages would contradict the principle of total reparation of damage according to which the injured party shall have recovery such as restore the situation of the party as it would have been in case the contract had been performed as required.

The place of delivery was determined in the contract under the CIF term, in which case the place of delivery is the port of departure, i.e. under the terms of the contract in question it was Turkey, the country of origin. There is no dispute between the parties to this end.

The plaintiff submitted the following two pieces of evidence to prove the existence of current price: notice issued by Serra Gida LTD on 11.12.2001 certifying that the export price of aseptically packaged 36/38% cold break tomato paste within the period of February to May 2001 was approximately 545 USD per one ton on the basis of FOB IZMIR (page 78), and notice issued by AKPINAR ZIRAI ISTIHSAL VE KONSERVECILIK A.S. on 10.12.2001 certifying that the price of aseptically packaged

36/38% cold break tomato paste is 550 USD per one ton on the basis of FOB IZIMIR (page 80). The defendant also notified the plaintiff on 06.11.2000 that it reviewed the offers of other companies for tomato paste. The defendant found that the price together with the cost of transporting to Tallinn is 510-550 USD per one ton, and that in the case of such offer the defendant would prefer the plaintiff to other suppliers. This evidence shows that the price of tomato paste during the time period immediately preceding the mentioned period (February to May 2001) was in the same range, and that it was known to the defendant. The defendant has not contested the said piece of evidence in the objections to the action.

The Chamber finds that in the statement of claim, the plaintiff has confirmed that the tomato paste in question has a current price, and has provided the above evidence to that end. In the objections to the action, the defendant has provided only theoretical discussion concerning the impossibility to prove the current price and has stated, with no proof, that the evidence provided by the plaintiff does not prove the existence of the current price. At the same time the defendant has failed to provide any evidence to prove its objections as required in subsection 91 (1) of the Code of Civil Procedure which would overrule the statements made and evidence submitted by the plaintiff. As the matter at hand does not involve public interest, the court, pursuant subsection 91 (2) of the Code of Civil Procedure, may not collect evidence on its own initiative to establish whether the evidence provided by the plaintiff is sufficient to determine the current price. As the defendant has not overruled the evidence provided by the plaintiff, the Chamber finds that the plaintiff has sufficiently proven with the specified evidence that the current price of the tomato paste under dispute is 547.50 USD per one ton $[(550+545):2]$ added by the cost of transporting of 0,045 USD/kg. If the contract had been performed, the plaintiff would have gained a sum of $322997 \times 0,7580 \text{ USD} = 244831.73 \text{ USD}$. Taking into account the current price determined, the cost of the tomato paste is $322997 \times 0,5925 = 191375.72 \text{ USD}$. Therefore, the difference in price which the plaintiff did not receive is $244831.73 - 191375.72 = 53456 \text{ USD}$ (pages 4-5,83) or 957480.00 kroons, and in that part the action is to be satisfied.

In the objections, the defendant stated that the plaintiff has failed to provide evidence concerning the cost of transporting which was added to the current price, but the disregard thereof would significantly increase the claim against the defendant. There is no reason for the defendant to object to the filing of the claim against the defendant which is smaller than the damage suffered (the claim without the calculation of the cost of transporting - $322997 \times 0.7850 - 322997 \times 0.5475 = 176840.85$ USD).

The Chamber disregards the objections submitted by the defendant in the appeal which were not submitted in the objections to the action in the court of first instance.

The plaintiff has also requested that the payment of court expenses incurred by the plaintiff in the court of first instance in the amount of 72505 kroons, which entail a state fee of 46000,00 kroons and the cost of legal counselling in the amount of 26505,00 kroons, be ordered from the defendant. The defendant has not objected to the amount of the court expenses. The Chamber finds that the plaintiff, pursuant to subsections 69 (1) and (8) and clause 61 (1) 1) of the Code of Civil Procedure, is entitled to recover from the defendant the total sum of 72505,00 kroons. In the appeal procedure, the plaintiff requested that the payment of court expenses in the amount of 48013,00 kroons, which entail a state fee of 38000,00 and the cost of legal counselling in the amount of 10013,00 kroons, be ordered from the defendant. The defendant has not objected to the amount of the court expenses. The Chamber finds that the plaintiff is also entitled to recover the specified sum in full. Thus the defendant is ordered to pay the total of court expenses consisting of a state fee of 84000,00 kroons and the cost of legal counselling in the amount of 36518 kroons.

On the basis of the above, the appeal against the judgment shall be granted.

R. Allikvere

G. Kivinurm

M. Klar

