Case Number:	Civil Case 581 of 1988
Date Delivered:	20 Aug 1992
Case Class:	Civil
Court:	High Court at Nairobi (Milimani Law Courts)
Case Action:	Judgment
Judge:	James Frank Shields
Citation:	Heco uberseehandel v Mac's Phermaceuticals Ltd [1992]eKLR
Advocates:	Abuga for the Plaintiff Chaudrey and Chabeda for the Defendant
Case Summary:	**Heco Uberseehandel *v* Mac's Pharmaceuticals Ltd** High Court, at Nairobi August 20, 1992 Shields J Civil Case No 581 of 1988 ***Contract*** *– where one refused to pay for goods alleging that was not what they contracted for- where one accepted the goods but found it difficult to resale them to 3rd party- whether one can be allowed to terminate contract on this basis.* The plaintiff, a German company operating in Hamburg sold a quantity of dextrose auhdrous to the defendant, a Kenyan company. The dextrose was to be pyrogen free B P grade, injectable and it was dispatched to the defendant in 3 consignment. Payment was to have been made for these consignments 120 days after the date of bills of lading. The defendant refused to honor the bills of lading alleging that the goods were not those contracted

for, that they were not of merchantable quality and that they were not fit for resale to the Ministry of Health.

The defendant further alleged that the material supplied was not pyrogen free because according to them, if a substance was not pyrogen free then it was not suitable for injection, though they alleged that it may safely be taken orally that the material was unsuitable and therefore did not conform to the goods contracted for.

The plaintiffs therefore brought an action against the defendant for refusing to honour the bills of lading and hence the payment for the consignment.

Held:

1. The complaint about the packaging was rectified and therefore the packaging was adequte and in accordance with the contract specifications.

2. The defendants failed on the balance of probability to show that the material supplied was not of the quality contracted to be supplied.

3. Neither of the letters sent by the defendants to the plaintiff amounted to rejection of shipments. In fact it was an affirmation by defendants that they had accepted the shipment but were having some difficulty in persuading the Ministry of Health to accept the defendant’s offer to sell the materials to the Ministry. The defendants are deemed to have accepted the goods under section 36 of the Sale of Goods Acts.

Judgment for the plaintiffs.

Cases

No cases referred to

Statutes

Sale of Goods Act (cap 31) section 36

Advocates

Abuga for the Plaintiff

	Chaudrey and *Chabeda* for the Defendant
Court Division:	Civil
History Magistrates:	-
County:	Nairobi
Docket Number:	-
History Docket Number:	-
Case Outcome:	Judgment for the plaintiff
History County:	-
Representation By Advocates:	Both Parties Represented
Advocates For:	-
Advocates Against:	-
Sum Awarded:	-

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO 581 OF 1988

HECO UBERSEEHANDEL.....PLAINTIFF

VERSUS

MAC'S PHARMACEUTICALS LTD .....DEFENDANT

JUDGMENT

The plaintiff, a German company operating in Hamburg sold a quality of dextrose anhydrous to the defendant a Kenyan company at a price of D M 2.11 per Kilogram. The dextrose anhydrous was to be pyrogen free B P grade, injectable. This raw material was dispatched to the defendants in 3 consignments, the last consignment was of dextrose monohydrate at PM 1490 per metric ton (see defendant's letter of 31st October 1985 No 27 in the plaintiff's book of documents) payment was to have been made for these consignments 14 days after the date of the bills of lading. The defendant has refused to honour the bills (see protest notes form Waruhiu and Muite dated 5th September 1986/p 13 of the plaintiff's book of documents) hence this action.

The plaint pleads the 3 contracts (para 3 of the plaint). It alleges shipment pursuant to the first two contracts acceptance of the documents and taking possession of the goods and failure to pay and in respect of the 3rd contract failure to accept the goods.

The contracts were made between March and December 1985 and were made partially in writing and partially verbal.

The first consignment was shipped on the 6th July 1985 the 2nd on the 25th September 1985 and the 3rd on the 7th December 1985.

The defendant's defence commences with a series of denials but it was not seriously contended that there had not been 3 contracts such as were pleaded in the plaint and that the 3 shipments of the materials duly arrived at Mombasa. I have no hesitation in holding that the 3 contracts were agreed and concluded as alleged in the plaint and that shipment took place as alleged. I am further satisfied that the 3 consignments were found to be acceptable by SGS (see 7 of the plaintiff's bundle of documents). At this stage it is convenient to say that Abdul Waheed Chaudhri Director and General Manager of the defendants does not in his answers to interrogators in effect deny the pleaded contracts.

The defence is substantially (1) that the goods or materials supplied were not those contracted for (2) that the goods were not of merchantable quality (3) they were not fit for resale to the Ministry of Health (the known purpose of the defendant's purchase) (4) that they were never accepted but properly and timously rejected. All these issues are closely related.

There were what I shall call minor complaints packaging and the lack of batch numbers. The latter was rectified and I am satisfied that the packing was adequate and in accordance with the contract specifications. I am firmly of the view that the alleged packing deficiencies should have been disregarded by the defendant on the *de minimis* principle and I am further satisfied that the plaintiffs took the

appropriate steps to rectify the inconvenience that might have been caused to the defendants by the absence of particulars of the manufacturer's batch numbers.

The defendant's major ground of defence was that the material supplied was not "pyrogen free". According to the defendants if a substance is not pyrogen free it is not suitable for injections, though it may safely be taken orally. The material was not pyrogen free so it was unsuitable and did not conform to the goods contracted for. The first consignment was analyzed by DW2, the defendant's quality controller. She prepared a solution in pyrogen free water and sterilized. It contained pyrogen and accordingly it failed the test.

The defendants called as DW3 the Chairman of the Department of Pharmacology in the University of Nairobi. I learnt much from his evidence including the fact that it is near impossible to have material pyrogen free in this imperfect world of ours. What is desirable is to restrict the level of pyrogen to an acceptable level. Secondly I learnt from him that the only way for testing for pyrogen is by injecting the substance being tested into a rabbit. This method is very far from the method used by DW2 in her certificate of analysis and I am not impressed by defendant's counsel endeavour to introduce by his written submission a whole litter of rabbits into the defendant's laboratories. I accordingly hold that the defendants have failed on a balance of probations to convince me that the material supplied was not of the quality contracted to be supplied.

As to the question of whether the defendants had accepted the materials, the consignments were shipped in July, September and the beginning of December 1985. The first consignment was analysed on the 25th October 1985. On the 13th March 1986 (No 12 in the plaintiff's bundle) the defendants wrote to the plaintiff as follows:

'Our Ref: MAC /WC/6072882

13th March 1986

M/S Heco Uberseehandel

Kollner Chaussee 119

2200 Elmshorn (KR)

West Germany

For the Attention of Mr Tietjen

Dear Mr Tietjen,

We would like to refer to the shipment regarding dextrose.

The first lot has been received by us. The second lot is in the process of being cleared. The third lot has just arrived at the container terminal.

In view of the current problems in delay as well as the non-delivery to the eventual customer, we regret the delay in settling your bills. We would request to exercise patience as we shall pay your amount with interest upon the release of the delivery and payment of these consignments.

We regret the delay and we hope to have your understanding in this particular issue.

Once again my humble apologies for the delay.

Yours sincerely,

Mac’s Pharmaceuticals Ltd

Waheed Chaudry

Cc

Mr Dieter Holling

Nova Chemicals (NCL) Ltd,

PO Box 18698

Nairobi.”

and again on the 27th March 1986 (21A) in the defendant’s bundle.

“Our Ref MAC /WC /229/86

27th March 1986

HECO Uberseehandle

Tietjan & Co

PO Box 52 04 62

Osdorfaor Weg 147

2000 Hamburg 52

W Germany

For The Attention of Mr Tietjen

We would like to refer to the above and your first delivery of this material.

We have tried to deliver the study to the Ministry of Health as ordered by themselves and this material has now been rejected due to the following reasons:-

1. The original pack appears to have been removed.

2. There is no indication that this material is dextrose anhydrous on the pack.

3. There are perforations on the pack containing the dextrose anhydrous which would allow air to go

inside the pack. The moment this happens the material is no longer anhydrous.

4. Due to the air going inside, there is no guarantee that this material is pyrogen free.

5. There is no batch number indicating which lot this material is from.

These are the above reasons which were given by the Kenyatta National Hospital officials for rejecting our consignment.

I would like to have your immediate comments on this issue as this material was specifically brought in for the Ministry of Health.

Kindly treat this matter as urgent.

We have also informed Nova Chemicals about this issue.

I look forward to receiving your prompt reply.

Thanking you in anticipation.

Yours sincerely

Mac’s Pharmaceuticals Ltd

Waheed Chaudhry

Cc

Nova Chemical (NCL) Ltd

PO Box 18698

Nairobi

Pan African Bank

Bills Department

PO Box 42964,

Nairobi.”

Neither letter amounts to rejection of the shipments and in fact it is an affirmation by the defendants that they had accepted the shipments but were having some difficulty in persuading the Ministry of Health to accept the defendant’s offer to sell the materials to the Ministry.

Accordingly I hold that the defendants are deemed to have accepted the goods under section 36 Sale of Goods Act.

I now turn to the evidence and to the impression made on me by the witnesses. The only witness called

by the plaintiffs was its Managing Director. He struck me as an honest witness; a trader of probity and integrity embodying the virtues of the old Hanseative League Traders. I do not think he was a European adventured endeavour to dump substandard materials on a 3rd world innocent nor do I think he would behave as portrayed in the defendant's letter of the 13th September 1986 (18 A in the defendant's bundle) unless he is like a cat, a ferocious animal who defends himself when attacked.

I was not so impressed by the defendant's witnesses (other than DW3) nor with the way the defence was conducted. After PW1 had given evidence and departed to Hamburg, the defendants introduced certain letters (18 A, 18B, 22A and 22 B in the defendant's bundle) to show that the defendants had complained to the plaintiff's local agents about the materials the subject matter of the suit. These letters had not been put to the plaintiff's PW1 in cross-examination and were only introduced into the case after PW1 had left for Germany making his recall both expensive and impracticable. This tactic together with the very brief reference to Nova Chemicals in the admitted letter of the 27th March and none at all in the letter of 22nd March 1986 (both letters already quoted in full) convince me that the four letters referred to were concoved and never sent.

I am firmly of the view that the defendants are either unable to pay or unwilling (for reason I don't deem it profitable to speculate) to pay and that their defence is baseless. The plaintiffs are entailed to the relief they seek.

The defendants have in addition filed a counterclaim repeated the contents of the defence and claiming damages. Damages for breaches such as are alleged can only be special damages and they must be pleaded and proven. They have neither been pleaded or sought to be proved, the counterclaim must in consequence be dismissed with costs.

There will accordingly be judgment for the plaintiff against the defendants for DM 124, 320 interest on DM 44640 will accrue at court rates from the 3rd November 1985, interest at court rates will accrue from the 23rd January 1986 and on the sum of DM 33 480 from the filing of the plaint together with the costs of the action.

I think the plaintiffs have done themselves a dissxion by fixing the dates of payment as the date for conversion of the sums of DM due. As they have however been content to claim this sum I feel I should not give them chance to obtain more shillings than they have claimed. The date for conversion will accordingly be the dates set out in the plaint.

Dated and delivered at Nairobi this 20th day of August 1992.

J.F SHIELDS

JUDGE