

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

**CORAM: THE HON. MR. JUSTICE S.T. MANYINDO, DCJ.
THE HON. MR. JUSTICE C.M. KATO, J.A.
THE HON. MR. JUSTICE S.G. ENGWAU, J.A.**

CIVIL APPEAL 19/97

NON-PERFORMING ASSETS RECOVERY TRUST::::: :::::::::::APPELLANT

- VERSUS -

PLES QUALITY PRINTERS LTD::::: ::::::::::: RESPONDENT

PETER MUKASA KAKEMBO::::: ::::::::::: RESPONDENT

JUDGMENT OF C.M. KATO, J.A.

-

This is an appeal against the decision of Non-Performing Assets Recovery Trust Tribunal dated 4/4/97. The appellant was the plaintiff in the proceedings before the tribunal while the two respondents were the defendants.

The summary of the facts of the case is as follows. The first respondent applied for a loan of US dollars 256,600 from Uganda Commercial Bank on whose behalf the present appellant, as successor under a deed of assignment, brought this suit. The loan was granted on 13/3/90. The loan was secured by a legal mortgage on the second respondent's property known as Mengo Block 28 Plot 843 situated in Kampala. The loan was repayable within 48 months after a period of grace of 12 months. The purpose of the loan was for purchase of a printing machine. The machine was supposed to be imported either from Britain, West Germany or Denmark and it was supposed to be Heidelberg single colour offset Press model MO-E. Although ordered for, the said machine was never received by the first respondent instead he was advised by UCB staff to take another machine from Japan called Hamida B52 which the first respondent rejected. Meanwhile

the first respondent had used part of the loan money to purchase some other materials such as iron sheets, a van and some cement.

The first respondent failed to meet his obligation to repay the loan on time on the ground that the UCB had failed to deliver the machine for which the loan was obtained. The appellant instituted the present proceedings to recover the outstanding arrears amounting to Ug.shs.263,745,531/=.

The tribunal entered judgment in favor of the appellant regarding the amount spent on iron sheets, cement and the van but dismissed the claim for cost of printing machine. Hence this appeal.

Nine grounds of appeal were presented before the court. They are: -

1. The Tribunal erred in law and in fact in answering issue No.1 in the positive.
2. The Tribunal erred in law and in fact in holding that Exh.D1 “accepts the loan offer” and in answering issue No.2 in the positive.
3. The Tribunal erred in law and in fact in answering the third and fourth issues in the positive on the grounds that:
 - i) “The actions, misdeeds, improprieties and omissions of PW1 and Nyanzi as agents of UCB bound UCB, and consequently, the plaintiff.”
 - ii) “We find as a fact that UCB pressurised the defendants to quickly complete the processing of the loan. UCB supervised the placing of the order for the printery ... We think that at that time the defendants were so desperate that they had to accept any suggestions that came from PW1.”
 - iii) “In our view PW1 on behalf of UCB chose the supplier for the defendants. The exhibits connected with the application for the purchase of foreign currency were filled and processed by PW1. This leaves no doubt in our minds that the defendants were in fact all the time under the influence and direction of PW1.”
 - iv) “Further PW1’s inclusion of his son and his best man as shareholders and directors in the first defendant company clearly supports the view that unless the defendants bowed to the wishes of PW1, their application stood no chance of success.”
 - v) “Further, it appears to us from passage underlined in exh.D5 that UCB staff were paid by Inter-Economic for what they did.”
 - vi) “Certainly the expiry of the period for utilization of the loan funds and other considerations in exh.D5 clouded the minds of both PW1 and his colleagues so much that they acted negligently in

that they did not care about the consequences of their actions at the time. Their clouded minds were forced onto the defendants through the invoices of the Greek man

vii) "... that UCB, as particularly represented by PW1 is guilty of coercion and undue influence and misrepresentation. UCB was negligent."

viii) That by the time second defendant executed the mortgage any effect of coercion, undue influence, misrepresentation and negligence had not ceased.

4. The Tribunal erred in law and in fact when applying section 4(2) of the Contract Act to the case.

5. The Tribunal erred in law and in fact when they failed to hold that it is the defendants who in the first instance corrupted PW1 as an officer of Uganda Commercial Bank and brought him on their side to act for them and Uganda Commercial Bank could not be responsible for his actions thereafter.

6. The Tribunal erred in law and in fact in not holding that, even if the facts were as found by them, Uganda Commercial Bank paid the loan against conforming documents, including a clean report of findings by SGS.

7. The Tribunal erred in law and in fact in ordering that the defendants were entitled to rescind the loan contract when they were already, on the pleadings and the facts, barred by limitation.

8. The Tribunal erred in law and in fact when, without finding as a fact that machinery was not shipped, it held that Uganda Commercial Bank was liable for its non delivery.

9. The Tribunal erred in law and in fact in dismissing plaintiff's claim.

I will deal with these grounds in the same order as the two counsel did, starting with the first ground. On this ground Dr. Byamugisha who appeared for the appellant argued that the correct machine was ordered, inspected and found to be in good order by the S.G.S. According to him it was immaterial whether the first respondent got the machine or not. The appellant carried out its part when it granted the loan. He contended that the purpose of the loan was to set up a printery and the description of a particular machine was 'not part of the loan agreement. On his part Professor Sempebwa, who appeared for both respondents, argued that at the time the loan was being processed it was known to both parties that the machine to be bought was Heidelberg from

Germany and this fact was supported by subsequent conduct of the parties as evidenced in Ex.D1 (Ex.D1 is the document of acceptance of the loan).

This ground of appeal basically concerned the issue of whether or not the tribunal was correct in holding that the purpose of the loan was to purchase a printing machine of a particular nature. The tribunal's finding that Heidelberg machine was the subject of the contract and since it was not delivered the respondent should not be blamed was based on Ex.D1 and Ex.D14 together with Ex.P2. Ex.P2 is a letter offering the first respondent a loan to set up a printery at Wandegeya, Kampala. There is no mention of the machine to be purchased in that letter. Ex.D1 is an acceptance of the offer. In that letter the first respondent accepted the terms of the offer as contained in Ex.P2. The mention of the Heidelberg machine came about only when the first respondent was outlining the way it was going to utilize the loan money but that did not form terms of the loan contract which had already been stipulated in Ex.P2. Ex.D14 which was prepared in January 1990 gives detailed proposal of what the first respondent was going to do with the money. This was done before the loan was granted, the purpose must have been to enable the UCB to assess whether or not the project was commercially viable. Reference to "Heidelberg single color off set Printing Press model MO-E" in Ex.D14 was a detailed explanation of how the money was to be spent but that did not mean that the purchase of that particular machine was an important term of the loan contract.

I agree with Dr. Byamugisha when he says that the contract between the first respondent and the UCB was for a loan which was actually granted and it was not part of that contract that UCB had to procure a particular machine for the first respondent. It may be true to say that at one time parties contemplated the particular machine to be bought but that in itself did not mean that failure by the appellant to assist in getting it would result in the contract being a nullity. Professor Sempebwa's contention that subsequent conduct of the parties showed that the purpose of the loan was to purchase a particular machine cannot be sustained in view of the contents of Ex.P2. It was wrong for the tribunal to hold that the loan was for purchase of Heidelberg machine when in fact Ex.P2 never mentioned any particular machine or model to be bought, Ex.P2 clearly stated that the loan was for setting up a printing press with no mention of the type of machine. In my view the first ground of this appeal ought to succeed.

That leads me to the second ground of this appeal. In this ground of appeal the appellant is complaining that the tribunal was wrong to have held that Ex.D1 amounted to accepting the loan

offer. According to the argument of Dr. Byamugisha the loan was accepted on 13/3/90 and yet Ex.D1 is dated 21/3/90. He further argued that the machine was to come from U.K., West Germany or Denmark but not from West Germany only as the tribunal found.

On the other hand Professor Sempebwa contended that the finding of the tribunal on issue No.2 was the correct one in view of the evidence which was available to the tribunal, in particular Ex.D14. He contended that the machine was to be imported from West Germany only.

It has not been easy to discover as to why the representatives of the first respondent found it necessary to accept the loan offer twice. First on 13/3/90 under Ex.P2 and then on 21/3/90 under Ex.D1. Be that as it may one would expect the effective date of acceptance to be 13/3/90 so the subsequent acceptance was of no legal effect. With due respect I agree with Dr. Byamugisha's contention that the tribunal was wrong in holding that Ex.D1 amounted to an acceptance of loan offer which had already been accepted on 13/3/90.

As for the appellant's complaint about the country from where the machine was to be bought, Ex.D14 is clear on this point. In this exhibit it was specifically stated that the machine was to be imported from the U.K., West Germany or Denmark. The tribunal was obviously wrong to hold that the machine was to be imported from West Germany only. The second ground of appeal was validly raised and I would accordingly uphold it.

I now turn to the third ground of the appeal. This ground concerns the finding of the tribunal that there had been some elements of undue influence, misrepresentation, threats, coercion and negligence on the part of the appellant's staff which rendered the whole transaction invalid. Dr. Byamugisha argued that those allegations were not proved against the appellant and that even if they had been proved still those acts or omissions occurred long after the loan contract had been concluded so they could not affect the validity of the contract. He cited Sutton and Shannon on Contracts 7th Edition, pages 46-49, 172-189 and 200-205 as authority on this point. He further argued that Kasozi Mulindwa (PW1), an employee of U.C.B., did not influence the procurement of the machine and that his request to have his son and a friend included in the first respondent company should have been held against the respondents not the appellant.

On his part Professor Sempebwa argued that implementation of the loan contract was an important part of the whole transaction and UCB continued to take part in the exercise, so

particulars of undue influence, coercion, negligence and misrepresentation were relevant to the matter. According to him there was enough evidence to support these allegations. He finally submitted that the tribunal was justified in its finding that the respondents had been pressurized by UCB in carrying out the contract. He relied on the cases of: Lloyds Bank Ltd. –vs- Bundy [19751 OB 326, Esso Petroleum -vs- Mardon 119751 1 All ER 203 and Ngairé -vs- National Insurance Corporation (19731 EA 56.

There were two incidents which were regarded by the respondents as having been vital to the validity of the loan contract. The first was the request by Kasozi Mulindwa to have his son and a friend included in the first respondent company. The second incident concerns the choice of the supplier of the machine by the appellant's agents.

It has been the argument of the first respondent all along that by compelling it to offer shares to Mulindwa's son and a friend the appellant had coerced, and unduly influenced the first respondent into the loan contract. It was, however, conceded by the learned counsel for the respondents that these acts of Mulindwa were never intended to benefit the appellant and that they were acts of an individual. In the absence of evidence that the bank (UCB) authorized or sanctioned this arrangement, it was wrong for the tribunal to hold that the first respondent had been coerced or pressurised in what it did. By paying for shares of Michael Kyazze the son of PW1 and Eddy Bakabulindi his friend the agents of the first respondent were in fact bribing Mulindwa (PW1) so as to "vigorously pursue" the loan application; the respondents cannot be heard to use their own illegal acts to defeat the appellant's claim against them. Both Peter Mukasa Kakembo (DW2) and Dr. Louis Kasekende, who were involved in the formation of the first respondent company, were mature and understanding people, they ought to have known the seriousness of what they were doing. People in their position should not have allowed themselves to have shareholders imposed on them even if that meant losing the expected loan. It may be stated here that at that stage the respondents had made no commitment to the Bank since the first respondent was just being formed, therefore the whole issue of the loan could have been dropped without causing any harm to the parties concerned.

The issue of UCB having coerced, unduly influenced and negligently advised the first respondent to engage the Greek supplier (Inter Economy) was considered by the tribunal at length. It is not

in dispute that UCB participated in the implementation of the loan although it was under no duty to do that. It is also undisputed that the decision to have the Greek company as a supplier was reached long after the loan agreement which is the subject of the present litigation, had been signed. Although at first it was suggested that the supplier of the machine was a company called Old East Graphics (Kenya) Ltd. through Roko Technical Services of Uganda, there was no evidence to show that when Mulindwa requested DW2 and Kasekende to use Inter Economic Suppliers the two people objected to that request. In fact according to the evidence of PW1 and DW2 the first respondent's agents opted to use Inter Economic as a supplier because their invoice showed that it was cheaper to use that supplier than to use Old East Graphics. It cannot therefore be said that the respondents were coerced by the representatives of UCB into accepting that supplier. I do not share the view expressed by the tribunal that the supplier was imposed upon the respondents by UCB staff. The fact that the supplier was proposed by Mulindwa and accepted by the respondents shows that UCB was not negligent in its advice to the respondents in the choice of a supplier. The reason given by the respondents that they accepted everything that Mulindwa told them to do because they desperately needed the loan is not sound, since they must have known as prudent people that at the end of it all they would be the ones to pay that loan, they should have taken some precautions in ensuring that they were doing the right thing.

Considering the fact that the inclusion of Mulindwa's son and a friend in the first respondent company was intended to bribe Mulindwa in order to get the loan, and the fact that Inter Economic supplier was willingly accepted by Dr. Kasekende and the second respondent, I find that the tribunal was not justified in holding that the appellant was guilty of coercion, misrepresentation, undue influence and negligence. Clearly Mr. Mulindwa was acting not only for UCB but also for the first respondent in which he had acquired shares through his infant son. In these circumstances I would uphold the third ground of appeal.

Concerning the 4th ground of appeal, Dr. Byamugisha briefly addressed the court on the issue of the application of section 4(2) of the Contract Act. It was his submission that the section was wrongly applied by the Tribunal to this case. Professor Sempebwa however, argued that the tribunal was correct in holding that the section was not applicable to the present case.

According to the judgment of the tribunal, the provisions of section 4(2) of the Contract Act were found difficult to be applied to the present case, instead the tribunal decided to base its decision on doctrines of equity in determining the issue of undue influence, misrepresentation, negligence and coercion. Since the tribunal did not make any definite finding as to the application of the section to the present case and did not base its decision on the same section, I find this ground of appeal to be of no help to the appellant.

In the fifth ground of appeal the appellant is complaining that the tribunal was wrong in not holding that it was the respondent who corrupted Mulindwa (PW1) and brought him to their side, thereafter the UCB could not be responsible for his deeds or misdeeds. This ground of appeal was sufficiently considered when dealing with the third ground; suffice it to say that it was improper for the tribunal to resolve in favor of the respondents the benefit of their corrupt practices which involved the giving of shares to Mulindwa's son and a friend in order to win favors from him (Mulindwa). The appellant should not have been punished for the wrongs of the respondents who seem to have been prepared to do anything legal or illegal asked of them by Mulindwa in order to get the loan. The evidence of DW2 leaves no doubt over the fact that PW1 was bribed by both Mukasa and Kasekende, it is immaterial that the two men did not know that they were committing a crime. I find that the 5th ground of appeal was validly taken.

Dr. Byamugisha briefly submitted on the sixth ground of appeal. It was his submission that the tribunal erred in law and fact when it did not consider the issue of whether or not the bank had in fact given the loan to the first respondent. In his view if the tribunal had considered this point it would have come to a different conclusion in view of the available documentary evidence.

Professor Sempebwa dealt with the sixth and eighth grounds together. He argued that non delivery of the machine was the crux of the matter because the supplier Inter Economic was brought into the picture by UCB so it was the UCB to blame for non-delivery of the machine. According to him the duty of UCB was not only to grant the loan; as it was directly or indirectly involved in the importation of the machine it was also responsible for the delivery of the Heidelberg machine. In support of his argument he relied on Ex.D3 (v), Ex.D3 (vi) and Ex.D3 (viii).

The issue of whether or not UCB was supposed to deliver the machine to the first respondent is important in this matter. There is no doubt over the fact that UCB, through its agents participated in the implementation of the loan contract. It must be said here that whatever the UCB did was to facilitate the importation of the machine but it had no legal duty to deliver the machine to the first respondent. Ex.D3 (v)(vi) and (viii) upon which the counsel for respondents based his argument that the UCB was supposed to deliver the machine does not anywhere say that the liability to deliver rested on UCB. All those documents indicate that the UCB was acting on behalf of the first respondent. With due respect I do not agree with the finding of the tribunal that the UCB was responsible for non-delivery of the machine. This finding did not take into account the fact that there was no provision in the loan agreement requiring UCB to deliver the machine to the first respondent. The terms of the contract were clear, UCB was to provide a loan whose purpose was to enable the first respondent to set up a printing press, the fact that the first respondent was unable to achieve the purpose for which the loan was granted should not be blamed on UCB. The bank performed its part of granting the loan and assisted the first respondent in securing the machine. UCB cannot be held liable for failure by Inter Economic to deliver the machine. That disposes of the 6th and 8th grounds of appeal.

I must finally deal with the seventh ground of appeal. Dr. Byamugisha did not have much to say on this ground of appeal but Professor Sempebwa contended that the contract was rescinded from the day the 1st respondent rejected the machine and that the second respondent was only liable to the extent of the loan money which was utilized. With due respect I do not share this line of argument, because the mortgage was executed by the second respondent to ensure repayment of the loan; so long as the loan remained unpaid the second respondent remains under duty to honor the terms of the mortgage. It cannot be right that the mortgage undertaking lapsed upon the failure of the first respondent to set up the printing press for which the loan was obtained. According to the mortgage (Annexure "C" to the plaint) executed on 20/7/90 by the second respondent, there was no condition that the second respondent would not be responsible to meet his obligation if the machine was not delivered by UCB to the first respondent. There was no iota of evidence that the second respondent was ever unduly influenced, coerced or

threatened by UCB staff when he executed the mortgage. The seventh ground of appeal must succeed.

There was a counterclaim which was partly allowed, but in view of the decision I have reached, it follows that the counterclaim should also have been rejected.

In the result I would allow the appeal. I would set aside the judgment and orders of the tribunal. I would enter judgment for the appellant and the costs of this appeal and in the tribunal to the appellant.

Dated at Kampala this 29th day of .October 1998.

C.M KATO

JUSTICE OF APPEAL

JUDGEMENT OF MANYINDO D.C.J

I had the advantage of reading the Judgment of Kato, JA in draft. I agree that the appeal should succeed for reasons stated in that judgment. I think the Uganda Commercial Bank dealt with the matter correctly. The requisite machine was ordered from the agreed supplier. The change to another supplier was done by the first respondent on the advice of Mr. Mulindwa who had by then joined the first respondent, having acquired therein more shares for his infant son, as a condition for processing the loan fast the Uganda Commercial Bank did not change the supplier.

The Uganda Commercial Bank ensured that the correct machine was packed and put on the ship. The Bank was not in my view obligated to deliver the machine to the respondents. That burden fell on the supplier. If the supplier cheated the respondents then they should have sued them and not the Bank. The respondents messed up the deal by indulging in the corrupt act with Mr. Mulindwa. They should not have their cake and eat it.

Accordingly, I would allow the appeal, set aside the decision of the tribunal and enter judgment for the appellant against the respondents jointly and severally as prayed for in the plaint. I would award the appellant costs of the appeal and in the tribunal. And as Engwau JA also agrees, it is so

ordered.

Dated at Kampala this 29th Day of October 1998

S.T. MANYINDO

DEPUTY CHIEF JUSTICE

JUDGEMENT OF ENGWAU .J.A

I had the benefit of reading the Judgment of Kato, J.A. in draft and I agree with it.

In the result, I would allow the appeal with costs here and in the Tribunal.

Dated at Kampala this 29TH day of. October 1998.

S.G.ENGWAU

JUSTICE OF APPEAL