THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

AT KAMAPALA

CORAM:

HON. LADY. JUSTICE A.E.N.MPAGI-BAHIGEINE, JA

HON. MR. JUSTICE S.G.ENGWAU, JA

HON.LADY JUSTICE C.K.BYAMUGISHA, JA

CIVIL APPEAL NO. 20 OF 2002

BETWEEN

ELADAM ENTERPRISES LTD:::::::::::::::::::::::::::: APPELLANT

AND

1. S.G.S(U)LTD
2. S.G.S (K) LTD
3. S.G.S GENEVA SWITZERLAND:::::::::::::::: RESPONDENTS

[Appeal from the judgment of the High Court of Uganda sitting at Kampala (*Arach-Amoko J) *dated 11th February 2002 in HCCS NO.187/98]

JUDGEMENT OF BYAMUGISHA, JA

The appellant herein, by its amended plaint filed in the High Court on the 15th December 1998, sued the three respondents jointly and severally for special and general damages for breach of contract. The facts that led to the institution of the action as accepted by the trial judge are the following. In 1995, the appellant got a tender to supply army uniforms to the Ministry of Defence. It contracted a Kenya based textile company Rift Valley Textiles Ltd (Rivatex) to supply 175 bales of suiting fabric for the making of the uniforms. The materials were worth US. $ 168,000. This was in accordance with the Proforma Invoice No.13/95 dated

05/07/95(Exhibit P.3). The invoice described the materials to be supplied as 67% polyester, 33% cotton and the shade as UG B R421. At the time material to this appeal, the third respondent was the Inspecting Authority appointed for the inspection of all imports whose value exceeded US. $ 10,000. This was in compliance with The Bank of Uganda (Pre-Shipment Inspection of Imports) Regulations, 1982 (S.I.No.90/82). The duties of the Inspecting authority was to inspect the goods and satisfy itself that all the requirements have been complied with and then issue a Clean Report of Findings certifying that the goods have passed all the necessary inspection requirements. The appellant duly paid the sum of US $1,368 as inspection fee through the first respondent. The second respondent carried out the physical inspection of the goods and issued the reports.

The appellant contended that the respondents failed and or neglected to carry out proper inspection of the goods in accordance with the agreed terms and conditions of the pre-shipment inspection contract. The particulars of negligence were tabulated as follows: -

(a) The respondents failed and or neglected to inspect the first consignment of 6,377 metres as the proforma invoice came without an accompanying inspection report. As a result of this failure, the appellant alleged that it was penalised by the Uganda Revenue Authority in the sum of Ug.*shs* 497,818/=

(b) The second consignment of 30 bales (17,087 metres) was described as 67 % polyester and 33% cotton plain weave dyed fabrics and the colour described as U/Brown. The delivery time, the description of the goods, the colour was not in accordance with the agreed terms. The report was marked exhibit P.12.

(c) The third consignment of 10, 800 metres were described in the report (exhibit P.18) as 67% polyester and 33% cotton plain weave dyed.

(d) The fourth consignment of 20 bales was also described in the report (exhibit P.26) as in the above reports.

(e) The 5th consignment of 33 bales was loaded and shipped to Jinja on 4th November 1995.

(f) The 6th consignment of 18 bales was loaded on 9th November 1995 and sent to Jinja, whereas the inspection report was dated 10th November.

(g) The failure to carry out the pre-shipment inspection in time led to delay in delivery of the goods and a loss of 105 working days. The appellant carried out

laboratory tests on the materials and the results indicated that the fabric was not UGB 421 and the materials were not suiting fabric.

As a result of the above breaches, the appellant alleged that it suffered loss and damaged that were particularised under special and general damages. The particulars of special damages were stated to be the following:

i) Loss of profits amounting to Ug. *Sh.s* 43,275,190/=.

ii) Expenses on laboratory analysis and mailing charges - Ug.*shs.*332/=.

iii) Loss of profit for 105 days of production lost Ug.*shs.* 261,607,500/=.

iv) Cost of labour during idle time Ug.*shs.* 32,067.000/=.

v) Costs of shortage in quality supplied Ug.*shs.* 49,834,239/=.

General damages were claimed for breach of contract, negligence, inconvenience, loss of time, reputation and goodwill. The appellant also claimed interest at the rate of 23% on special damages from December 1995 till payment in full and on general damages at court rate from the date of filing the suit till payment in full.

The first respondent filed a written statement of defence in which it averred in paragraph 3 thereof that the suit was bad in law in that it did not disclose a cause of action against it. It was further averred that the first respondent was not a party to the contract that was being complained of directly or indirectly. It was averred in paragraph 4 that it was the second respondent which issued the inspection report and as such the contract was made between the appellant and the second respondent.
In paragraph 6 it averred that it received payment from the appellant on behalf of the second respondent and its role was limited to acting as agent only in so far as the transmission of the funds was required and not as to the performance of the inspection.

The second and third respondents in their joint written statements of defence also denied any wrongdoing. On the first consignment of the goods that was allegedly not inspected, the respondents averred that the appellant instructed the supplier to ship the goods without carrying out pre-inspection of the goods. It undertook to pay the penalty.
On the other consignments, it was averred that the second respondent carried out the inspection and discovered that there were defects, which it brought to the attention of the appellant. The respondents further stated that by various correspondences dated 5th

September 1995(exhibit P.14); 18th September'95 (exhibit P.22) and 5th October'95 (exhibit P.22) the supplier of the materials undertook to replace all the defective materials supplied by it. It was further averred that a representative of the supplier came to collect the materials but discovered that the appellant had used up all the fabrics.

They denied that the appellant suffered any loss and if such loss occurred, it was not occasioned by any breach of duty or negligence on their part. In particular the second respondent contended that its duty was to inspect the goods put at its disposal and was not supposed to ensure delivery of the same. It was further averred that the second respondent carried out inspection of all consignments and pointed out the defects, which it brought to the attention of the appellant. They prayed for the dismissal of the suit with costs.

At the commencement of the trial, the following issues were framed for court's determination: -

1. **Whether there was a contract between the appellant and the first respondent and if so, what were the terms?**
2. **What were the terms of the contract between the 2nd and 3rd respondents?**
3. **Whether the respondents were in breach of any of its terms.**
4. **Whether the appellant/plaintiff suffered any loss and/or damage.**
5. **Whether the appellant/plaintiff was entitled to the reliefs sought.**

The appellant called three witnesses to prove its claim. The respondents called a total of four witnesses. At the end of the trial, the learned trial judge answered the first issue in the negative and dismissed the suit against it with costs. The second, third and fourth issues were answered in the affirmative. She found that there was a breach of contract by the second and third respondents in that they failed to carry out proper inspection of the goods. She found that as a result of the failure, the appellant suffered damage for which the second and third respondents were liable. She awarded the sum of *Ug. Shs* 352,000/= as special damages; *shs* 50 million as general damages. The two sums to carry interest at the rate of 15% from the date of judgement till payment in full. She awarded the appellant costs of the suit.

Being dissatisfied with the judgement and the orders made, the appellant/plaintiff filed the instant appeal. The memorandum of appeal filed on its behalf contains the following grounds: -

1. **In view of the evidence, the learned trial judge erred in law and fact when she held that there was no breach of contract by the first respondent.**
2. **The learned trial judge erred in law and fact when she failed to evaluate evidence on record and held that the appellant failed to prove the special damage claimed in the plaint.**
3. **The learned judge erred in law and fact when in reaching her decision she failed to take into account and give effect to the admitted facts or facts not in dispute.**

It was proposed to ask the court for an order that:

(a) the appellant's appeal be allowed.

(b) Special damages disallowed in the lower court be awarded to the appellant.

(c) The appellant be awarded costs of the appeal here and below.

The second and third respondents filed a cross-appeal premised on the following grounds:

1. **The learned Judge having held that the pre-shipment inspection was to be carried out by the second respondent erred in law and fact when she at the same time included the 3rd respondent when she held that 2nd and 3rd respondents did not carry out a proper inspection.**
2. **In view of the respondents' evidence particularly D.W.4 and D.W.5 the learned trial judge came to the wrong decision when she held that the second respondent did not carry out proper inspection.**
3. **The learned trial judge erred in law and fact when she held that there was colour variation when there was no evidence to suggest that the sample shown to court came from the consignment which was inspected by the second respondent.**
4. **The learned trial Judge erred in law and fact when she awarded the appellant the sum of *shs* 50 million as general damages.**

The respondents proposed to ask this court for the following orders namely:

(a) the finding that there no proper inspection by the second and third respondents be reversed.

(b) The finding that the second respondent cleared materials with colour variation be reversed.

(c) The order granting general damages of *shs* 50 million to the appellant be reversed.

Both advocates filed written submissions. Before I deal with the submissions, I consider it important to set deal with the issue of the contract to inspect the goods in question. When I read the record of the proceedings and the submissions of both counsel filed in this court, they all seem to state that the contract to inspect the goods was oral. To me this is not legally correct. The inspection of goods whose value exceeds US $ 10,000 is a legal requirement. The provisions of S.I.No.90/82 govern the inspection of such goods. I shall now examine the said regulations and determine whether the respondents or any of them breached them. **Regulation 1(1)** states as follows:

"***No payment shall be made in or outside Uganda by or on the authority of the Bank of Uganda, or any licensed bank in Uganda, to the credit of any person, in respect of goods subject to pre-shipment inspection under these Regulations, unless and until a Clean Report of Findings issued under regulations 5 of these Regulations in respect of such goods, is presented together with the relevant shipping documents to an authorised bank".***

The wording of this regulation is clear and unambiguous and speaks for itself in that no importer of goods can pay for the same until and unless the Inspecting Authority has issued a Clean Report of Findings. There was no evidence in this case to show that the appellant paid for any of the goods that was allegedly inspected by the second respondent. The only evidence of payment that was properly documented was the inspection fee that was paid to the first respondent through Bank of Baroda. Be that at may, the process of pre-shipment inspection of goods is commenced by an application being made to Bank of Uganda by the person intending to import such goods. This is provided for under **regulation 3(1)** of the regulations. The appellant made such an application and Bank of Uganda issued the relevant order for inspection of the goods in the form of Import Declaration: Form E (exhibit P.4).

The duties of the importer and the seller are spelt out under **regulation 4,** which states as follows:

"Where the Bank of Uganda issues an inspection order under regulation 3 of these Regulations, it shall be the duty of the person intending to import the goods into Uganda to ensure that the seller of such goods,

(a) ***gives no less than fourteen days' notice to the Inspecting authority prior to the proposed date of pre-shipment inspection;***

(b) ***provides the inspecting authority with full inspection access to the goods.***

(c) ***provides the Inspecting Authority with all necessary facilities for carrying out quality and quantity inspection and price comparisons, and conducting all such tests, analyses and other processes as may be required in the circumstances;***

(d) ***Makes all the necessary arrangements for the handling, presentation, unpacking and repacking sampling, shop-testing and any other thing required in connection with the inspection of the goods;***

(e) ***Provides the Inspecting Authority with a copy of the pro-forma invoice, indent, purchase agreement, sale note, price list, tender papers and any other document relevant to the importation of the goods, which the Inspecting Authority may consider necessary;***

(f) ***Submits to the Inspecting Authority a copy of the final settlement invoice covering the goods;***

(g) ***Complies with such other conditions as may be prescribed".***

Regulation 5 governs the issuance of reports by the Inspecting Authority.

It provides as follows:

"(1) Where after inspection of the goods the Inspecting Authority is satisfied that all the necessary requirements have been complied with, the Inspecting Authority shall issue to the seller of the goods a "Clean Report of Findings" which shall be a document certifying that the goods have passed all the necessary pre-shipment inspection requirements".

(2) Where the inspection of goods reveals any discrepancies or anomalies, the Inspecting Authority shall issue to the seller of the goods a "No-negotiable Report of Findings" which shall be a document describing the discrepancies or anomalies ascertained and such Report shall not be acceptable for document negotiation".

(3) Where a seller subsequent to the issuance of a Non-negotiable Report Findings, makes the necessary and acceptable adjustments to the quality, quantity or price of the goods, as the case may be, the Inspecting Authority may issue a Clean Report of Findings in respect of such goods: provided the seller pays all the expenses of any additional further inspection".

These provisions are also couched in mandatory terms as for as the issuing of the reports is concerned. In the instant appeal, there are about five Clean Reports of Findings issued in a document with the letterheads of Societe Generale de Surveillance S.A Geneve SUISSE, the third respondent. They were marked as exhibits P.12; P.20, P.26; P.29, and P.34.

The last regulation to consider is **regulation 6**, which states as follows:

"(1) The Societe Generale de Surveillance S.A. of 1, Place des Alpes, Geneva, Switzerland, is hereby appointed the Inspecting Authority.

(2) For purposes of this regulation,"Societe Generale De Surveillance S.A." includes all its subsidiaries, affiliates, agents and other authorised representatives thereof".

The purpose of this regulation is to make all the offices representing the third respondent in any country in the world an Inspecting Authority for purposes of the regulations. To me, this would make the respondents liable jointly and severally for any breach or breaches that might occur in the inspection process, that ca be attributed to them either directly or indirectly.

I will now turn to the submissions of the parties. The appellant filed two written submissions by different law firms. I shall use the submissions that were filed in this court on 08/04/04. The first ground of appeal stated that the learned trial judge erred in law and fact when she held that there was no breach of contract by the first respondent. Mr Ntende, learned counsel for the appellant, submitted that the judge was wrong to hold that there was no contract. Counsel pointed out evidence that he considered established a contractual relationship between the appellant and the first respondent. He claimed that the appellant had a problem of importing 70,000 metres of fabrics, which needed pre-shipment inspection. He stated that through Bank of

Baroda, the first respondent was approached to do this work and the requisite fee was paid to it and it accepted payment. Learned counsel contended that the work of the first respondent was not limited to transmission of money and inspection documents to the second and third respondents, but it was to carry out the inspections itself. He pointed out various instances which he claimed point to the first respondent as being responsible for the inspection of the goods and therefore liable for failure to carry out the inspection properly.

On the other hand, Mr Peter Mulira, learned counsel for the respondents, supported the judge's conclusions on the role of the first respondent. He stated that she reviewed the operational structure of the S.G.S. group of companies and the testimony of Eyasu Sirak (P.W.1); Judith Muwesa (D.W.1); Sarah Mugenyi (D.W.2); Acuci Emmanuel (D.W.3) and Josephat Kahiri Njogu (D.W.4) before coming to the conclusion that the inspection had to be carried out by the second respondent. He invited us to uphold the judge's finding that there was no cause of action against the first respondent.

In order to resolve the issue raised in the first ground of appeal, regard must be had to the provisions of the regulations I cited above. The regulations especially regulation 4 impose obligations on the importer of goods that are a subject of pre-shipment inspection. The appellant complained in the plaint that the respondents were in breach of their statutory duties. Contrary to what the learned trial judge stated in her judgement that there was no complaint against the first respondent, in my opinion, the appellant had a complaint against all the respondents in that they breached their statutory duties. In my humble opinion, all the respondents owed the appellant a statutory duty to inspect the goods once the appellant fulfilled its own statutory obligations. The appellant paid for their services. It applied to Bank of Uganda for the goods to be inspected through the first respondent. The testimony of Josephat Kahiri Njogu (D.W.4) was instructive on the role of the first respondent. At page 63 of the record he said:

"I received instructions on the 17/7/95. This was through an Import Declaration Form "E"- originating from our office in Uganda. It had a stamp from SGS Uganda dated 13/7/95. The document had been processed on the 12/7/95. The document was between Rivatex Limited of Kenya, and Eladam Enterprises of Jinja, Uganda. It was for a consigmnent of 70,000 metres of polyester cotton materials. It

was accompanied by a Proforma Invoice No.13/95 and on top of that the Proforma Invoice had a description of the materials which was suiting fabric 67% polyester and 33% cotton……That was an indication that there was an inspection to be carried".

There are other pieces of evidence that show that the first appellant's role was more than a conduit for the collection of money on behalf of the other respondents. On 5th September 1995 the first respondent wrote to the appellant in reply to its letter of 31st August 1995 regarding a complaint about the fabrics. The letter stated that before any investigations can be carried with the SGS office in Kenya, the first respondent needed a copy of a letter that the appellant had written to the supplier of the materials. On the 5th October 1995, the appellant wrote to the first respondent about the defects in the fabrics supplied by Rivatex. In the letter, it was agreeing to accept the fabrics whose defects were 4% provided the supplier replaced any fabrics whose defects were over and above 4%. All these pieces of evidence show that the first respondent bore as much responsibility in the statutory duty of inspecting the appellant's goods. Whether the first respondent breached its statutory duties in the manner the pre-shipment of the goods was carried out is a different matter. It will be discussed at a later stage in this judgement. This ground would partially succeed.

The second ground of appeal, complained that the learned trial judge erred when she disallowed the appellant's claim of special damages. The law on special damages is, I think, settled. They must be pleaded and proved by the party claiming them as being the direct result of the wrongs or breach committed by the respondent. They are usually out of pocket expenses that have been incurred. In the plaint, the appellant had claimed the following heads of special damages:

1. Loss of profits due to poor quality (colour and weaving defects) amounting to *shs* 43,275,190/=;
2. Expenses on laboratory analysis (fees *shs* 332,000/=, mailing charges *shs* 20,000/=) *shs* 352,000/=;
3. Loss of profits for 105 days of production lost *shs* 261,607,929/=
4. Cost of labour during idle time *shs* 32,067,000/=;
5. Costs of shortage in quantity supplied *shs* 49,854,239/=. These figures gave a total grand of *shs* 387,184,929/= as special damages.

The learned trial judge disallowed all the claims except the expenses incurred on laboratory analysis. In submitting on this ground, Mr Ntende stated that the learned trial judge was wrong in refusing to award the appellant the special damages as specifically pleaded in the plaint. He stated that the appellant through its witness P.W.1 proved that a total of 2,700 uniforms were rejected by the Ministry of Defence. Counsel contended that according to exhibits P.38 and P.39 the cost of rejected uniforms was *shs* 29,205,000/= plus transport cost which gave a total of *shs* 43,275,190/= he claimed that not all special damages are proved by documentary evidence. He cited the case of **Robert Coussens v Attorney General Civil Appeal No.8/99**(SC) in which the Supreme Court accepted oral evidence on the figure of special damages since the documents which were exhibited were not easy to read. Commenting on the rest of the claims, Mr Ntende stated that the testimony of P.W.1 was not assailed by cross-examination and therefore he should have been believed.

On his part, Mr Mulira, supported the findings of the trial judge on special damages. He contended that the judge discussed the law on special damages as supported by decided case and reviewed the appellant's evidence before coming her conclusion of rejecting the damages. I have perused the record and the evidence adduced by the appellant in proof of its special damages. I agree with the submissions of counsel for the appellant that not all special damages must be proved by documentary evidence. What the law requires is strict proof. The appellant is a company that must be keeping books of accounts. In such circumstances, it is not difficult to adduce evidence of how much it was paying its workers and why the workers were idle for the period stated in the plaint. According to the testimony of P.W.1, he has been Managing Director of the appellant for 13 years. This means that the company must be making garments for sale to other organisations and the general public. It is therefore inconceivable that it can afford to keep workers idle for over 100 days because of one order from the Ministry of Defence. The learned trial judge was right to reject those claims. They had no supporting documents. Moreover the rejection of the uniforms by the Ministry of Defence cannot be termed a direct result of the breach or breaches allegedly committed by the respondents. This ground also ought to fail.

The third ground of appeal was general in nature and it offended the provisions of **rule 85(1)** of the rules of this Court. No wonder counsel for the appellant did not address it in his submission. I would consider that he abandoned it.

As for the cross-appeal, Mr Mulira in his submission on the first ground criticised the learned trial judge for finding that the 2nd and 3rd respondents did not carry out proper inspection of the goods. He claimed that there was no evidence that the third respondent was supposed to carry out any inspection. He pointed out that the judge found that the group policy was to maintain a decentralized organisation with emphasis on individual responsibility in order to provide the best possible assistance to each client in each country. He stated that in the instant case, the evidence is clear that SGS Kenya was the company which carried out the inspection and therefore should be answerable.

With due respect to learned counsel, the group policy he is talking about, could be termed an internal matter of management that does not bind third parties. The regulations that I pointed out earlier make the third respondent and all its affiliates, agents etc, Inspection Authority. The appellant paid the inspection fee to the first and not the second respondent. The third respondent having been appointed the Inspecting Authority by law is liable for any improper inspection of goods by its agents and affiliates. In any case our law permits a plaintiff to sue more than one defendant so that the court can determine which of them is liable.

I shall deal with second and third grounds of cross- appeal together.

In order for the appellant to succeed in its claim against the respondents, it had to show that under the regulations, the respondents were liable. I agree with the learned judge that the respondents had a duty to carry out the inspection of the goods with utmost care before issuing the Clean Report of Findings. The evidence before the lower court was that the inspection was carried out on about five or six consignments. However, the appellant complained that the first consignment was not inspected. The Proforma Invoice (Exhibit P.3) had the following terms:

Description: Suiting Fabric -67% Polyester 33% cotton.

Shade: UG BR421.

Quality: A.

Total amount: US $ 186,000.

Delivery: Approx. 10,000metres per week.

Terms of Payment: by cash of cheque at the time of delivery.

Insurance: To be arranged by the buyer.

The Managing Director of the appellant in his evidence stated that the first consignment of the goods sent by the supplier was called Half Panama instead of suiting fabrics of 67% polyester 33% cotton. It was a mixed shades and the metres were 6,376 instead of 10,000. This consignment was neither inspected nor rejected by the appellant for not being in conformity with the terms of the Proforma Invoice. This consignment of 12 bales of Half Panama was received at Malaba Custom's post on 12/07/95 according to exhibit P.9. In his evidence, P.W.1 claimed that he was penalised by Uganda Revenue Authority for lack of a pre-shipment inspection report. This means that P.W.1 did not reject the goods although they did not conform to the terms of the Proforma Invoice. As for the failure by the respondents to inspect the goods, D.W 4 testified that they received instructions to inspect the goods of the appellant on 17/07/95 long after the consignment had been cleared from Malaba and out of customs bonded warehouse. The appellant as the buyer had a right to reject the goods that he had not inspected, if after the inspection by itself, it was found that they did not conform to the specifications. The provisions of the **Sale of Goods Act** are clear on inspection of the goods by the buyer. **Section 34** governs the buyer's right to examine the goods. It states as follows:

"(1) Where goods are delivered to the buyer which he or she has not previously examined, the buyer is not deemed to have accepted them until he or she has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, the seller is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract"

Section 34 of the Act governs acceptance of goods by the buyer. It provides as follows:

"The buyer is deemed to have accepted the goods when he or she intimates to the seller that he or she has accepted them or when the goods have been delivered to him or her, and he or she does any act in relation to them which is inconsistent with

the ownership of the seller, or when, after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he or she has rejected them".

The appellant accepted the goods within the meaning of the above section instead of rejecting them. It cannot be heard complaining that the goods were not in conformity with the terms of the contract or that the Inspecting Authority did not inspect them. The buyer is the best inspector. The appellant had a right and duty as a buyer to do its own inspection provided under the law and reject the goods.

As for the second consignment, it had an inspection report (exhibit D.3), a Clean Report of Findings (CRF (exhibit P.12) and an invoice from the supplier (exhibit P.11). The invoice from the supplier stated that the consignment was of 30 bales of fabrics 67% polyester 33% cotton plain weave dye. Shade U/Brown quality A and the metres were 17,087 at a cost of US$ 2.40 per metre. The inspection report for this consignment stated that the goods were in accordance with attached documents and no discrepancies were found. The CRF stated that the goods were inspected in accordance with the mandate of SGS and were found acceptable as to quantity, quality and price. The process was repeated in respect of the other consignments.
The appellant's complaint on this consignment was that about 4,500 metres had colour mix and weaving defects and did not conform to what was in the inspection report. The same complaint was raised in respect of the third consignment.

The appellant lodged a formal complaint with the first respondent and the supplier. The latter promised to replace the defective materials. Apparently this was not done. The appellant's Managing Director accepted the goods with their defects. He explained his reasons for doing so thus:
"I reluctantly took the defective goods because I was under pressure to meet the demands of the army. The Ministry of Defence rejected 2,700 uniforms out of 201,000 in total. That is my complaint".

The testimony of D.W.4 as far as the defects were concerned was that the second consignment of 30 bales of fabric was inspected and found that it was in conformity with the Proforma Invoice. Accordingly a CRF was issued. The other consignments

had defects, which were pointed out in the inspection reports. However on 4/10/95, the witness went with the inspector to the supplier. The supplier informed the witness that the appellant had accepted the defects as long as they were between 3-4 %. The witness further stated that the second respondent insisted on getting a formal communication from the first respondent which they did (exhibit D.2). The communication in full reads as follows:

ELADAM ENTERPRISES LIMITED

P.O.BOX 1237, KAMAPALA, UGANDA

Date 5-10-1995

SGS Uganda Ltd

Kampala

Fax: o41-235760

Attention: Mr Kagoda

Re: <u>FABRICS FROM RIVATEX</u>

With reference to the telephone conversation between your Mr Kagoda and myself, I would like to confirm that we accept 4% defect provided as M/S Rivatex have agreed, as did in their letter of today ref A5/013/02/216, to replace any defects over and above the 4%.

Yours sincerely

Sgd.

EYASU SIRAK

Managing Director.

The first letter of Rivatex to confirm that it was willing to replace the defective fabrics was dated 18th September (exhibit P.15). The first paragraph states as follows:

With reference to today's telephone conversation, please note that all defective goods received by you will be replaced by us, as mutually agreed".

The second communication is dated 5th October 1995. It was addressed to the appellant's Managing Director. It stated in part as follows:

"We are in receipt of your letter dated October 2nd 1995.

Kindly note that re-inspection have been carried out and minor defects found to be about 4%.

In case you receive any further defective materials in the consignment of 10800 metres, we undertake to replace you defective fabrics at any time stands"

I have endeavoured to reproduce the above communications to show that the appellant accepted defective goods instead of rejecting them after being assured by the supplier that a replacement would be done. The work of the Inspecting Authority is to inspect goods availed by the supplier. One of the reasons for the inspection as I understand it, is to enable payments to be made in or outside Uganda by or on the authority of the Bank of Uganda or any licensed bank after presentation of the relevant documents including a Clean Report of Findings: See **Regulation 1(1) (supra).** The regulations have no penalty provisions. The absence of any sanctions could mean that the buyer is not bound by the CRF if the goods are later found to be defective. The remedy would lie under the Sale of Goods Act. But the appellant accepted the goods for the reasons given by its Managing Director. It was a calculated risk that he took and therefore he is estopped from blaming the inspectors. The number of uniforms that were rejected by the Ministry of Defence was 2,900. It is not clear how many of these uniforms were made out of the first consignment of Half Panama that the second respondent was not requested to inspect. There was also evidence from D.W.4 to the effect that the description of UG/Brown 421 was known to the buyer and the seller only and the sample was supplied to the inspectors not by the buyer but by the seller. The obligations of both parties are set out under **regulation 4(**supra). To hold the respondents liable, the appellant had to show that the loss it allegedly suffered was a direct result of the respondents' actions. The appellant having accepted the goods and dealt with them in a manner inconsistent with the rights of the owner, can have no cause of action against the respondents. The inspection was done and defects were pointed out. The buyer accepted fabrics whose defects were below 4%. After that acceptance, the Inspecting Authority issued a CRF for those fabrics. It is the final consumer who rejected the uniforms made out of those fabrics. The appellant was the author of its own misfortunes. When it was accepting fabrics with defects of 3-4 %, there was no evidence that the final consumer agreed to those defects. This, cannot, in my humble opinion, be blamed on the respondents as inspectors. In finding the

second and third respondents liable, the learned trial judge relied on some authorities. One of them was **International Petroleum Refining and Supply Society Ltd v Caleb Brent &Sons Ltd [1980] 1 Lloyds Report 567.** The facts of this case were that an inspector was appointed to take tests of oil on loading at the port of dispatch. The oil was liquid when it was loaded but arrived at its destination in a solid state. Proceedings were taken against the inspector for negligence. It was held on appeal that the inspector had failed in his contractual duty because he did not take sufficient samples when the oil was being loaded, did not take them in regular intervals and did not check its gravity. I think the facts of the case are different from the facts of the instant appeal. The respondents in this appeal carried out the inspection, pointed out some defects in the fabrics. The appellant accepted the fabrics whose defects were below 4% and mutually agreed with the seller to replace any fabrics whose defects were over and above 4%. The contractual duty of the respondents ended the moment some fabrics were accepted by the buyer and the rest were to be replaced by the supplier. Consequently the second and third grounds of cross- appeal ought to succeed.

The fourth ground of the cross-appeal concerned the award of general damages. In contract general damages are presumed to flow naturally from the wrong committed. There are difficult to quantify or estimate but must be awarded because they are presumed to flow from the breach committed. The law was set out in the case of **Hadley v Baxendale (1845) 9 Exch.341.** The court in delivering its judgement said:

"Where two people have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either naturally i.e in accordance to the usual course of things from such breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendants and thus known to both parties, the damages resulting from the breach of such contract, which would ordinarily follow from the breach of contract under the circumstances so known and communicated. But, on the other hand, if these circumstances were wholly unknown to the party breaking the contract, the, at the most would only be supposed to have had in his

contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected be unjust to deprive them. Now the above principles are those by which the jury ought to be guided in estimating the damages arising out of any breach of contract".

What the above authority establishes and many others that followed later such as **Victoria Laundry vNeman[1949]2K.B 528** are the tests to be used in order to determine the extent of liability. The first test is reasonable foreseeability and the second is that what is reasonably foreseeable depends on the knowledge actual or implied that the parties had at the time of making the contract. The general is that damages have to be not more than necessary to compensate the party complaining of the breach to a position he/she/it would have been in if the contract had been performed.

In the instant appeal, in awarding general damages to the appellant, the learned trial judge took into account the fact that the appellant should have mitigated its loss and inconvenience by rejecting the goods and terminating the contract when it discovered that it was being supplied with defective goods. She also took into account the fact that it accepted goods with 4% defect and even continued to receive the consignments and to use them even after discovering that the fabrics were defective. She further considered the fact that the appellant should have sued the supplier. The fourth consideration was that the delay in the inspection of goods was due to the fact that Rivatex did not place the goods at the disposal of the inspectors on time and in the correct quantities to carry out the inspection - thus awarding the sum already stated. With respect, the reasons that were advanced by the learned trial judge in awarding general damages in my opinion do not meet the tests that were set out in the authorities I referred to.

The respondents having carried out their statutory duties and pointing out defects and the appellant having agreed to accept fabrics with defects instead of rejecting them, cannot be said to have suffered any damage that was caused by the respondents' failure to inspect the fabrics properly as alleged. Indeed as pointed out by the learned trial judge, most of the faults that caused loss and damage at least on the evidence

available lay with the supplier and not the respondents. I, would, therefore, set aside the award of general damages.

In the result, I would dismiss the appeal with costs in this court and in the court below. I would allow the cross appeal with costs in this court. The orders of the lower court would be set aside and substituted with judgement in favour of the respondents.

Dated at Kampala this…01st .day of……September…….2004.

C.K.Byamugisha

Justice of Appeal