THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

CIVIL SUIT NO. 809 OF 1999

JOSEPH RWAKATOOKE MUCHOPE :: PLAINTIFF
VERSUS

CALTEX OIL (U) LTD ::: DEFENDANT

BEFORE: THE HON. LADY JUSTICE M.S. ARACH — AMOKO

JUDGMENT

The Plaintiff — Mr. Muchope Joseph is a Kampala based businessman. The Defendant is an oil company, duly incorporated under the laws of Uganda.

The brief facts leading to this dispute are straight forward. The two parties executed a dealership agreement dated 1st January 1995, which granted the Plaintiff a licence to operate Katwe Caltex Petrol Station, in Kampala; under the name and style of Regent Katwe Service Station.

At the commencement of the operations, the Defendant gave the Plaintiff a loan in form of oil products worth Shs.25m. The loan was secured by a mortgage over the Plaintiff's property comprised in LRV 2085 Folio 2 Block 75 plot 38, Bunyangabu, Rwimi, near Fort Portal. The Plaintiff took over and managed the said petrol station until January 1999, when the Defendant terminated the dealership agreement due to poor sales performance. By then the outstanding amount on the loan was Shs.10,219,087. When the Defendant sought to exercise its rights of sale under the mortgage agreement, the Plaintiff filed this suit instead, alleging breach of contract on the part of the Defendant and prayed for:

a. a declaration that his property aforementioned is not liable for sale by the Defendant.

b. a permanent injunction restraining the Defendant, its agents or servants from selling or dealing in the said land in any manner inconsistent with this ownership and occupation thereof.
c. special damages.
d. general damages.
e. an order of set off for the sum of Shs.125,499,378.
f. interest.
g. costs.
h. any other relief.

The Defendant denied liability and counterclaimed the money owed to it by the Plaintiff under the dealership agreement plus utility bills totaling Shs. 12,325,540- and costs.

The following facts were agreed at the scheduling conference:
1. That there was a dealership agreement between the Plaintiff and the Defendant dated **1st** January 1995 signed by both parties.
2. That the Defendant advanced fuel worth Shs.25m to the Plaintiff and the loan was secured by a mortgage dated 2nd June 1998.
3. That the Defendant terminated the contract by a letter dated 25th January 1999.
4. That there is a balance owing to the Defendant of Shs. 10,217,087- at the time of filing the suit.

The following were points of disagreement:
1. The Plaintiff does not agree that the agreement dated July 1998 came into force.
2. The Defendant does not agree that there were shortfalls in the fuel pumped into the station tanks as a result of leakages in the tanks, and
3. The fact that the Defendant is liable for the same.
4. The Plaintiff does not admit the counterclaim.
5. The Plaintiff challenges the validity of the termination.

The following issues were framed and agreed:

1. Whether the relationship between the parties was governed by the agreement dated 1 January 1995 alone, or by the one dated 28th July, 1998 as well.
2. Whether there was breach of the terms of the agreement in force at the relevant times, and by whom.
3. Whether the tanks and other equipments at the station were defective at the material times complained of, and if any losses occurred, whether such losses were a result of leakage and loss through defects in the tanks equipment.
4. Whether the Defendant is liable under occupier's liability, or for any losses if any suffered by the Plaintiff.
5. Whether the Defendant lawfully terminated the dealership relationship.
6. Whether the Plaintiff is liable to the Defendant in water bills and electricity.
7. What are the remedies available to the parties?

The Plaintiff called three other witnesses, apart from himself namely:
- Mr. Richard Mugisha PW2.
- Mr. Micheal Saka Mukasa PW3 and
- Mr. David Mutyaba Segulla PW4.

The Defendant called only one witness, Mr. Godfrey Kundakwe DW1.

The issues are dealt with in the same order.

The first issue is regards the agreement governing the relationship between the two parties. On Court record are two sets of agreements:
1. The Dealership agreement dated 1st January 1995 (Exh. P1) tendered by the Plaintiff, and referred to herein after as the "old agreement" and
2. The Dealership agreement dated 28th July 1998 (Exh. D7) tendered by the Defence side, referred to hereinafter as the "new agreement".

The Plaintiff's counsel contended that the old agreement of 25/1/95 is the only one which governed the relationship between the two parties for the following reasons:

Firstly, that the Plaintiff signed the new agreement of 28/7/98 (Exh. D7) on the basis that the Defendant would also sign it and return to him a duly executed copy. It could only become operational after the Defendant had signed it and notified the Plaintiff by sending him a copy of the executed document. The Defendant did not do so and the Plaintiff only got to know about the execution of the said agreement by the Defendant after he had commenced these proceedings and had pleaded the old agreement.

Secondly, throughout their dealings, the Defendant never referred to the new agreement. In fact the Defendant based its termination letter of 25/1/99 (Exh. P7) on clause 8 of the old agreement. In another letter dated 1/2/1999, the Defendant's Marketing Manager referred to the termination letter again. If the old agreement had become null and void, the said Marketing Manager would not have referred to it.

It is pertinent to note that both letters were copied to the General Manager, Finance Manager, and Sales Executive, who must have found the contents of the letter quite in order.

Counsel for Defendant submitted on his part that the old agreement was replaced in July 1998 by the new agreement. The parties envisaged this even in the old agreement which read in the last paragraph that:

> *"This agreement will automatically become null and void and shall be replaced by the new Standard RPTF Service Station Operators agreement once the latter becomes ready."*

Secondly, the new agreement was executed by both parties and it bears the Plaintiff's signature. The Plaintiff had ample opportunity to read it before signing it. After that the relationship between the parties was governed by new terms. In his view, this point need not be belabored any further.

I have considered both submissions and reached this conclusion. The existence of the old agreement is an agreed fact. The only question is whether that agreement was subsequently replaced by the new one of 28/7/98. I think it was, for a number of reasons including the following:

The last paragraph of the old agreement provided as quoted earlier on that it would automatically become null and void and would be replaced by the new standard RPTF service station operator's agreement once the latter become ready. It is clear, therefore, that at the time of signing the old agreement, both parties were aware that they would sign a new standard RTF station operator's agreement as soon as it was ready and it would replace the old one. The new agreement therefore replaced the old one upon execution by both parties.

Secondly and most importantly, the new agreement bears the signature of the Plaintiff on all pages as well as the stamp of the Regent Katwe Station Ltd under which the station was run. That fact is enough to validate an agreement in the absence of any vitiating factors such as incapacity, duress, undue influence, fraud or illegality, which is not the case in the instance dispute. The fact that the Plaintiff did not see it or that the Defendant never referred to it after execution is really in my view, immaterial. The Plaintiff must have had opportunity to read it before signing it and he should have, as a prudent businessman of his status requested for a copy of the executed document after signature. He told Court that he was the Marketing Manager of the Defendant up to 1994. He did not ask for the copy and in my view, he cannot use that as a defence. The fact that the Defendant did not refer to it in their dealings is also not a defence. It does not vitiate it. Clearly the Marketing Manager referred to clause 8 of the old agreement in his termination letter of 25/1/99 is an error because the new agreement is very clear. Clause 2 reads:

"<u>COMMENCEMENT DATE AND PERIOD</u>

This licence shall commence on 28th July 1998 and will be valid for five (5) years from the date hereof subject to termination as provided for under clause 14."

The answer to the 1st issue is clearly that the dealership between the parties was governed by the old agreement dated January 1995 from that date until 28th July 1998 when it was replaced by the new one dated 28th July, 1998.

The second issue is whether there was breach of the terms of the agreement in force at the relevant time and if so, by whom. Counsel for the Plaintiff contended that the Defendant breached the old agreement and referred to the particulars of breach set out in paragraph 9 of the plaint as follows:

a. failure to maintain equipment in proper condition.

b. failure to pressure test or to do any test of the equipment before inviting the Plaintiff to do business there.

c. failure to take appropriate action whenever the Plaintiff reported short falls in the output of the products.

d. failure to replace faulty tanks and inviting the Plaintiff to the premises where the equipment was very old and faulty.

e. termination of the Plaintiff's dealership on grounds of limited purchases when the Defendant had not replaced the faulty tanks.

f. dismissing the Plaintiff from the service station without regard to the Defendant's own defaults/omissions.

g. advertising the Plaintiff's land for sale while the Defendant was the one in breach/at fault.

h. generally causing financial loss to the Defendant.

i. generally failing to observe the terms of the dealership agreement.

The law is trite. He who alleges must prove. See: **Sebuliba —Vs- Coop** Bank [1982] HCB 129 and **Nsubuga —Vs- Kavuma** [1978] HCB 307. The question therefore is, whether the Plaintiff has proved these particularised alleged breaches to enable the Court to make a finding of breach of contract on the part of the Defendant.

Learned counsel for the Plaintiff submitted that the evidence of PW1 and PW3 was sufficient to prove that the Plaintiff lost fuel through leakages of tanks at the said petrol station. That PW3 had shown both by his report and his oral testimony that the tanks at the said station had holes in them when they were excavated. The two witnesses had also proved that the tanks recorded short falls throughout the material times. That this evidence was not controverted and in the absence of any other explanation for the short falls, it must be concluded that the holes in the tanks let out the fuel. Counsel then invited the Court to take judicial notice of the fact that a container with holes will let out the liquid substance in it.

Counsel for the Plaintiff further maintained that the conditions of the new agreement did not apply to the Plaintiff, for reasons stated earlier on. That even if it were assumed that the new agreement was applicable to the parties' dealings, the Plaintiff's evidence clearly shows that he

always called upon the Defendant to come and rectify suspected defects in the equipments. The Defendant's agents always went and either insisted that there were no defects or that the defects had been rectified. The Plaintiff was not in a position to know the specific defects and as such, he was entitled to rely on the Defendant's technical personnel's advice. In this case, there was no need for written communication since the Defendant's technicians usually claimed to have rectified the situation.

On the issue of written notices of losses (leakages), counsel submitted that the only time he came to establish that the final losses were due to leakage was after 24/12/98. His letter of claim was therefore well within the 14 days limitation.

Counsel for the Plaintiff also submitted that the Defendant was in breach of contract in terminating the agreement for the Plaintiff's failure to meet sales targets; because the failure was due to the Defendant's failure to provide sound equipment. The Plaintiff was therefore entitled to refuse to dump more of his fuel products in tanks which had by then been established to be leaking.

Finally, counsel submitted that the advertisement of the Plaintiff's land was wrongful in that the debt was supposed to be paid up in 12 months from 2/6/98 (See: Mortgage Deed — Exh. D5). Demand for full payment was made even before January, 1999, and was followed by the demand from the Defendant's advocates dated 13/5/99. This was before the 2/6/99. The demand was therefore wrongful and could not form the basis for the realization of the mortgage under the mortgage decree, 1975. He invited the Court to revist the arguments on this point in Misc. Appl. No. 911/99.

Counsel for the Defendant had the opposite view on this issue. He summarized the Plaintiff's allegations into three groups that:

1. The Plaintiff alleges that the Defendant invited him to the premises when there was old and faulty equipment, failed to maintain the equipment or take action whenever he reported shortages and that he therefore suffered financial loss.
2. That the Defendant was in breach of the dealership agreement by terminating it on the basis of limited purchase and dismissing the Plaintiff from the station without regard to the Defendant's alleged own faults and omissions.

3. That the Defendant was in breach of the contract by putting up the Plaintiff's land for sale and generally causing financial loss to the Plaintiff and generally failing to observe the dealership agreement.

Regarding the first set of allegations, counsel for the Defendant submitted that no evidence had been led at all to show that the equipment at the station was old and faulty from the outset. That such a charge lies in the month of the Plaintiff who was a former top executive of the Defendant Company. He was in a position to ensure that the equipment he took over from the Defendant was in good workable condition at the time of entering into the station. That the Plaintiff also admitted in cross- examination to being fully familiar with the terms of the dealer's agreement so he would have known the risks he was taking on. The Plaintiff must have been fully satisfied with the equipment at the time of taking over the station from the Defendant. The rights and duties of both parties were spelt out in the two dealership agreements in the event of faulty equipment. (See Exhibit P1 clause 6 (b) ii) which illustrates that the Plaintiff was under a duty to keep Caltex informed of any faults occurring on the site or any need for repairs. This was only logical because it was the Plaintiff on the ground who could detect these faults. The Defendant's duty, in turn, was to carry out the necessary repairs. Although the Plaintiff has brought this suit claiming that he experienced shortages throughout the years 1996-99, there are only two letters on the record showing that he actually ever reported any faults to the Defendants namely Exh. P3 dated 14/12/98 and Exh. Pl0 dated 7/9/96. The claim that he made several reports are accordingly exaggerated.

Be that as it may, the Plaintiff admitted under cross examination that each time he made a report Caltex would respond by sending its officials to carry out repair work and they would only tell him to continue after carrying out repairs. He did not testify that Caltex failed to respond to a single report. Caltex therefore discharged its obligations fully in this regard, every time he made a report and they responded promptly.

Secondly, clause 6 (b) (ii) shows that the Plaintiff was under a duty not to use the faulty equipment until repairs had been carried out. This was acknowledged by the Plaintiff. It follows that if he had adhered to the agreement, he could not possibly have suffered loss as result of leakage and shortages because he was only entitled to use the equipment while it was working

properly. Any loss that he may have incurred because of persistent use of faulty equipment must fall squarely at the doorstep of the Plaintiff because he acted in violation of the contract provisions. He also must be said to have acted negligently and visited the loss upon himself.

Exhibit D7, that is the new agreement which governed the question of leakages and shortages after July 1998 (when Exhibit P.3 was written) there is a detailed process set out, under clause 6 thereof, as to the manner in which losses were to be reported in order to make the Defendant liable for them. The salient features were that the Plaintiff had to make an immediate telephone report and follow it up within 14 days with a written report, accompanied by detailed calculation of losses. The Plaintiff was not entitled to continue using equipment that has, as the dealer, considered defective without the express written consent of the Defendant. If he did so, he was solely liable for the loss incurred by failure to observe the contract. The Defendant was absolved from all such liability.

Finally, it was also provided that in any event the Defendant would not be liable for losses accruing more than 14 days prior to written notice. Even a casual reading of Exhibit P3 shows that the Plaintiff did not fulfill the contractual conditions precedent for making the Defendant liable for the alleged losses suffered in 1998.

In the first place, the letter makes no reference to any telephone report made in accordance with the agreement. Secondly, the letter refers to incidences on the dates of 28th October and 16th November both of which are far more than the contractual 14 days notification period prior to 14th December 1998, the day of the written notice.

Thirdly, counsel submitted, the report makes no computation of losses as required by the contract. Fourthly, the letter illustrates deliberate continued use by the Plaintiff of defective equipment thereby absolving the Defendant of any possible liability for even the losses that allegedly occurred on November 30th 1998, because by that time the Plaintiff had already good reason to suspect the tanks more defective. He should not have therefore continued using the tanks after the incidences of 28th October and l6’ November. That is what the contract stipulated.

The Plaintiff also relies heavily on a report dated 4th January, 1999, prepared by Mutyaba Petroleum Pump Service, indicating that upon pressure testing it was found that some tanks

specifically 1K (Kerosene) and AGO (Diesel) had leaks. (Exhibit P15). According to counsel for the Defendant, all that the report established was that, as at the day of testing, there were some holes in the tanks. That Mr. Mutyaba failed to tell when the holes first appeared during cross-examination. There is also nothing in the report to establish that the holes had been there for any particular period of time. The report is therefore most unhelpful to the Court.

According to Mr. Byenkya, the report actually shows the faithful manner in which the Defendant discharged its obligations. Upon being asked to conduct a pressure test, it immediately obliged. When the tanks failed to test, the Defendant immediately offered to replace them. (See: Exhibit P5). In light of the above, counsel asked the Court to find that the Defendant had discharged all its contractual obligations by responding to reports by the Plaintiff of faults and by carrying out necessary repairs. The fact that during a three year operation, the Plaintiff only wrote twice to complain shows that the problem was not a continuous one, he would the Court to believe. At any rate, the Defendant faithfully, discharged its duties up to the end and even when some tanks were found to be defective it even agreed to replace them immediately.

Mr. Byenkya further submitted that with regard to the set of allegations that the Defendant breached the agreement by terminating the same, counsel for the Defendant submitted that the allegation is clearly unsustainable. It is not disputed that the Defendant had a right of termination under the terms of both dealership agreements. Termination for failure to meet sales targets was one of the grounds on which the Defendant could terminate the contract within its term. It cannot therefore be said that by exercising a contractual right, the Defendant was in breach of the contract.

Finally, on the allegation of breach of the dealership agreement by offering the Plaintiff's land for sale, Mr. Byenkya submitted that the allegation was also untenable. That the Plaintiff admits owing the Defendant Shs.l0m. He also admits having executed a mortgage agreement to secure the loan (See: Exhibit D5). The mortgage was secured by the Plaintiff's property that was up for sale. There is an express power of sale under the mortgage without reference to the Court. The parties had two distinct and separate agreements. Neither of them was dependant on the other. The Plaintiff's property was put up for sale under the terms of the mortgage agreement, which governed the loan to the Plaintiff. It cannot be said to be a breach of the dealership agreement,

which regulated the business relationship of the Plaintiff and the Defendant. The second issue should thus be resolved in favour of the Defendant.

I have held in the first issue that the relationship between the two parties was governed by the first agreement dated 1/1/95 up to the 28/7/98 when it was replaced by the new agreement. Clause 6 (b) (iii) reads:

"*6. During the continuance of the licence, the operator shall:*
(b). Keep the service station clean and tidy and
(iii) Notify Caltex immediately of any repair or adjustment necessary or desirable to any of the equipment referred to in paragraph (ii) of this sub — clause and mean while not use the same."

It is clear that the obligation of Caltex was to repair or make necessary adjustment to the equipment. The obligation of the Plaintiff was not only to notify the Defendant immediately of the need for repair and adjournment, but most importantly, the Plaintiff was not to use the same. During examination in chief, PW2 said "They told us that we should always tell them to come when there is such a problem. That we should not touch the tank if there is a problem." The testimony of the Plaintiff is clear. They signed the first dealership agreement on January 1995. He stated during examination in chief thus:

"I was experiencing fuel losses on a daily basis. The problem began late 1995 but became worse in 1996. Our appeals fell on deaf ears.

I started communicating in July — Sept. 1995 after they had carried out the repairs. I wrote to the Manager about the problem, and the Sales Area representative was sent to discuss the matter with us. He said the matter was not a serious one."

PW2 the station manager also informed Court that he used to take daily stock records. He noticed serious stock shortfalls and notified the Defendant. Repairs were carried out by the Defendants engineer but the shortfalls continued. PW4 told Court that in 1998, when he pressure tested the 3 tanks, they all failed the test. He made a report (Exh. P5) and later on Caltex instructed him to excavate them. He did so and replaced them with two new ones. During cross examination, he stated that the tanks had holes. That is why they failed the pressure test.

Apparently the Plaintiff continued using the equipment despite this daily loss he complained about. Although the Defendant breached the said agreement by failing to repair and maintain the equipment, it is also clear that the Plaintiff continued to use the said equipment even after the Defendant had failed to repair the same. There is also evidence on record (Exhibit D8 dated 11/9/98) to the effect that the case of the poor performance was undercapitalisation as well. The evidence on record therefore shows that both parties breached the first agreement.

Regarding the new agreement, no such provision existed. The Plaintiff however continued to experience losses and complained to the Defendant even after 1998. The Defendant kept on repairing the equipment but it is apparent that the repair was not effective. Mr. Mutyaba PW3, their technician who carried out pressure test on three underground tanks in January 1999 established that the tanks were defective and were leaking and recommended by his letter dated 4/1/99 (Exhibit P15) that the three tanks be uprooted and either repaired and treated or replaced. It is still unclear why the Plaintiff continued using the said tanks until January 1999 when the dealership agreement was terminated. The Defendant of course kept on maintaining that the underground tanks problem notwithstanding, the stations problems were due to under capitalisation and insisted on their money. (See: Exhibit P5) which reads in part:

"Subject: ***Defective tanks at Regent Service Station Katwe.***

This is in reply to your letter dated 4/1/99, on the above subject. Caltex is in the process of replacing all tanks that failed the pressure test.

Notwithstanding the underground tanks problem, the cause of the stations poor performance is due to undercapitailsation. Other causes of the stations poor performance were dearly outlined in our letter dated September 1998.

As the company rep/aces the tanks, it is advisable that you come forward with adequate funding and concrete proposals to re-utilise the station."

The new agreement obliged the Dealer under clause 7 to meet the required sales performance and targets set yearly by the Defendant; and under (g) to:

Notify Caltex promptly of any loss, damage to or defect in premises or station equipment defect."

Under clause 13, the Defendant had a right to terminate the agreement forthwith should — **'(i)** *the Dealer commits any breach of any of the provisions of the Agreement....*

(ii) ……………

(iii) the Dealer fails or is unable to pay Caltex any amounts which have become due and payable by the Dealer to Caltex either in respect of goods supplied or otherwise

(iv) ………….

(v) ……………..

(vi) ………….

(vii) the Dealer falls to achieve the sales performance and targets set up with Caltex and no valid grounds exists for the failure as per clause 8 C."

The letters on record namely exhibits D2 dated 25/1/99 are clear about poor sales performance. It reads in part:

"Subject: Poor Sales Performance — Termination of Dealership.

Reference is made to various correspondences and discussions held regarding the poor sales performance of Regent Katwe Service Station, and in particular our letter dated 18/9/98 here attached for your easy reference.

For the whole year of 1998, you operated below your target of 62,500 litres. Average sales for 1998 were 38,000 litres. This trend therefore cannot be permitted to continue in 1999."

Under clause 6 the Defendant was not to be responsible for any loss of fuel unless the loss is due to the negligence on its part; and the dealer has inter alia, reported the loss immediately by telephone, followed by written notification within 14 days and supported by calculations in support of the amount of the claim. The Plaintiff relies on the letter dated 14/1/99 (Exhibit P6) to support its claim that the loss was reported within 14 days. With due respect, this letter does not meet *the* requirements of clause 6 (iv) because it is not supported by any calculations in support of the claim as required. En the last paragraph, the Plaintiff stated:

"I am in the process of working out possible financial losses incurred due to this tanks problem which I am intending to come and discuss with management to reach an amicable solution."

Exhibit P3 (dated 14/12/98) cannot also be said to have been written in compliance with clause 6. The incidences complained of are outside the 14 days period and it makes no reference to any previous telephone conversation.

Regarding the sale of the Plaintiff's land, I respectfully agree with counsel for the Defendant that the said mortgage was a separate and distinct contract and the Defendant cannot be stopped from exercising its rights there under because of any problem arising out of the dealership agreement. The Plaintiff admits that he owes the Defendant over Shs.l0m out of the loan secured by the said land by a mortgage deed. He has failed to pay and in my view, the Defendant was perfectly in order when it attempted to realise the said security. The attempt was however premature as Mr. Mugisha pointed out. The loan was to be paid within 12 months w.e.f 2/6/98 when the mortgage Deed was executed — clause 2 of the mortgage deed provided that:

"The Borrower hereby agrees with the lender to pay to the Lender within 12 (twelve) months effective from execution hereof all money expenses."

The demand by the Defendants lawyers dated 13/5/99 was therefore pre — mature.
In conclusion on this issue, I hold that the Defendant breached the dealership agreement by failing to maintain and repair its equipment during the period of the dealership. The Plaintiff also breached the same by continuing to use the defective and leaking equipment even after establishing that the same was defective and that the Defendant had failed to repair it. Both parties are accordingly at fault.

The third issue is whether the Defendant is liable in occupier's liability. The Defendants counsel reiterated his submissions under issue 2 and contended that the relationship between the two parties was regulated by contract. Their respective rights and obligations were set out under the contract. The question of occupier's liability, which is a tort, doesn't really arise. The two cannot be mixed together. He relied on the case of **Green —Vs- Fibre Glass Ltd** 1958 2 ALL ER 521 where SALMON J. made a distinction between the two branches of law. In the alternative, counsel submitted that the evidence actually shows that the Defendant took all reasonable care by responding whenever the Plaintiff reported that he had problems and by doing its best to solve them. The Plaintiff has not suggested that the people sent to carry out repairs were not qualified

or able to do the work. On the facts no negligence has been established against the Defendant. On the contrary any negligence is likely to have been on the part of the Plaintiff for persistent use of suspect equipment.

Counsel for the Plaintiff insisted that occupier's liability and liability under contract can co-exist on the same facts just as in the instant case. The case of Green cited by counsel for the Defendant is not applicable here. In that case the dangerous condition of the premises was not due to the occupier's negligence but that of the independent contractor who had carried out cable installation in the premises. Usually invitees have contractual or other relationship of mutual benefit between them and the occupier that takes them to the premises just as was the case in the instant case. The Defendant in this case had a duty to take reasonable care to ensure that the Plaintiff did not suffer damage or loss due to the condition of the premises including equipment thereon. He relied on:

1. Winfield & Jolowicz on Tort 10th Edn. (Sweet & Maxwell) 1975 at 166, 167, 168 and 186.

2. Bakabonaki —Vs- Bunyoro District Administration (1970) EA 310.

With all due respect, I agree with Mr. Byenkya, that this relationship between the parties is purely contractual and is governed by the dealership agreement. If the Plaintiff suffered any loss, then such loss would have to be addressed according to the obligations of the parties under the contract. This issue is therefore answered in the negative.

The fourth issue is whether or not the tanks and other equipment at the petrol station were defective and whether such losses were a result of leakage through the defective tanks and equipment. The answer to the first part of this issue is affirmative. The testimony of the Plaintiff and PW3 are spot on. There were losses which were established due to leakages. The leakages were the result of defective tanks. Exhibit P15 is particularly noteworthy. It is a report made by PW3 after pressure tasting 3 underground tanks. He confirmed leakage in all the three and concluded thus:

That was on 4/1/99. This fact was acknowledged by the Defendant for example in a letter dated 11/1/99 (Exh. P5) stated in part:

"This is in reply to your letter dated 4/1/99 on the above subject. Caltex is in the process of replacing all the tanks that failed the pressure test."

According to PW4, he indeed replaced two of the tanks on the Defendants instructions. The Defendant could not replace tanks that were not defective.

The second part of the issue is obvious. If the tanks are defective and leaking, then the leakage would result in loss of fuel.

The answer to this issue is accordingly in the affirmative.

Issue No. 5 is whether the Defendant lawfully terminated the dealership relationship or not. It is not disputed that the Defendant terminated the dealership agreement. It is also on record that the agreement (both new and old) provided for a right of termination. (See: clause 8 of the old and clause 13 of the new agreement). I have ruled earlier that the new agreement replaced the old one at the time of termination. I have quoted earlier on the provision under clause 13 (vii) which stipulated that the Defendant had a right to terminate the dealership of the Plaintiff if he failed to meet the sales performance targets set up by the Defendant. This was the reason given in the termination letter (Exhibit P7). Earlier on he had been given various warnings for poor sales performance e.g. Exhibit P.2 dated 18/9/98 and Exhibit D8 dated 11/9/98. I therefore agree with Defence counsel that the Defendant was well within its contractual rights because the Plaintiff failed to meet the sales target. There is no letter on record or oral testimony that the Plaintiff meet the target. The answer to this issue is accordingly affirmative.

The sixth issue concerns water and electricity bills. Clause 7 (m) of the new agreement is clear. It says:

'The Dealer will:
(M) Be liable for all direct operating expenses incurred by the Dealer in connection with the PREMISES, including but not limited to all deposits, charges for telephone (including telephone rentals), water, sewerage, electricity, ages any other services or utilities."

The Plaintiff was responsible for water and electricity and not the Defendant.

The last issue is remedies available to the parties. Starting with the Plaintiff. Having found that the Defendant was partly to blame for, the losses incurred by the Plaintiff due to its failure to repair and maintain the equipment, it follows that the Plaintiff is entitled to some compensation as a result thereof. Liability for such loss was however pegged to 14 days written notice which is lacking in this case. Then an attempt at computation was made, but this was much later on after 14 days required. The Plaintiff claims Shs. 125,499,378- for the period January 1995 to 1999; that is 4 years and the value of products found at the station of Shs.380,508-. It is trite law that special damages must not only be pleaded but must be strictly proved. The evidence on record does not prove these two claims. They are accordingly disallowed.

I have ruled that the mortgage was distinct and separate from the dealership agreement — the prayers under (a) and (b) are for that reason disallowed. The Defendant is free to realize its security in accordance with the Mortgage Deed after the expiry of the 12 months period given to the Plaintiff to pay the loan, which has since expired.

There is evidence that the Plaintiff made several complaints and reports to the Defendant about the problems at the station. That although the complaints were addressed, they persisted and the Plaintiff did not settle down in his business. The Plaintiff is therefore entitled to general damages for this and I award him Shs.5m.

Regarding the counter claim, the Plaintiff admitted that there is an outstanding balance on the loan of Shs.10,219,087-. I award this to the Defendant.

The Defendant also claimed Shs.2,106,453- as water and electricity bills. No evidence was however adduced by the Defendant to prove this claim. Besides it was the obligation of the Plaintiff to pay this amount to UEB (them) and not that of the Defendant. The Defendant can only recover this money upon proof of payment of the amount to UEB. There was no such proof. This claim is therefore disallowed.

The Defendant also prayed for general damages for breach of contract of Shs. 5m. I have ruled that the Plaintiff also breached the contract by continued use of the defective tanks. However, no evidence was left to prove any inconvenience or loss suffered by the Defendant as a result of this. If anything, all the evidence points to the loss and inconvenience on the side of the Plaintiff.

This item is therefore disallowed.

In the result I enter Judgment for the Plaintiff:

1. For the sum of Shs.5m general damages.
2. Interest thereon at 8% p.a from date of Judgment till payment in full.
3. Costs of the suit.

I also enter Judgment on the counter claim for the Defendant for:

1. Shs. 10,219,087-.
2. Interest thereon at 18% p.a from date of filing till payment in full.
3. Costs of the counter claim.

M.S. Arach — Amoko

JUDGE

21/10/2004

Judgment delivered in the presence of:

1. Bogere Geoffrey holding brief for Mr. Ndozireho & Mr. Mugisha for the Plaintiff.
2. Ms Florence Kavuma holding brief for Mr. Byenkya for Defendant.

3, Mr. Okuni — Court clerk.

M.S. Arach — Amoko

JUDGE

21/10/2004