THE REPUBLIC OF UGANDA

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

HCT-00-CC-CS-0408 OF 2002

IMPACT SOLUTION LTD :::::::::::::::::::::::: PLAINTIFF

VERSUS

1. ALARM GROUP LTD]
2. J. TUMWIJUKYE] :::::::::::::::::::::: DEFENDANTS

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

J U D G M E N T:

The Plaintiff's claim against the Defendants jointly and severally is for recovery of Ug. Shs.9,000,000- and costs of the suit. The claim is based on an advertisement contract by which the Defendants contracted the Plaintiff to appear on the Plaintiff's celebrity shopper's year planner. The year planner was produced but the sum was allegedly not paid by the Defendants. Hence the suit.

The defence case is that there was no contract between the Plaintiff and the Defendants. That the instructions were from a junior officer who did not have authority. In the alternative, the Defendant argues that if the order was

made, the Defendants did not approve the artwork and design before publication. Hence the defence prayer that the suit be dismissed with costs.

I have been asked to decide:

1. Whether the 2nd Defendant's instructions bound the 1st Defendant.
2. Whether the 2nd Defendant can be held personally liable on the order.
3. Whether the Defendants had to approve the art work and design before publication.
4. If so, whether the advert published by the Plaintiff was unilateral and substandard.
5. Remedies.

From the records, the Defendants did participate in the proceedings up to the close of the Plaintiff's case. They did so through their counsel. Court warned the defence that if it did not produce its witnesses on the due date, hearing stood to be closed under 0.15 r 4 of the Civil Procedure Rules. Come that date the defence offered no defence and true to its prophecy the Court proceeded to determine the case on its merits in accordance with that law.

As to whether the 2nd Defendant's instructions bound the 1st Defendant, the evidence of PW1, Mirembe Julius, is that the 2nd Defendant was an employee of the 1st Defendant. There is no evidence to the contrary. From the evidence of PW1, before the agreement was signed, he had discussions with the Managing Director of the 1st Defendant. That having agreed in principle

to enter into the arrangement, the said Managing Director referred the matter to one of his staff, the 2nd Defendant. It is the evidence of this witness that on the strength of that interaction, an order was placed to that effect. This evidence has not been controverted by the defence. This is a civil suit. The standard of proof is on a balance of probabilities. A fact is said to be proved when the Court is satisfied as to its truth. The evidence by which that result is achieved is called the proof. The general rule is that the burden of proof lies on the party who asserts the affirmative of the issue or question in dispute. When that party adduces evidence sufficient to raise a presumption that what he asserts is true, he is said to shift the burden of proof: that is, his allegation is presumed to be true, unless his opponent adduces evidence to rebut the presumption. These principles form the cornerstone on which our adversarial system of adjucation rests.

In the instant case, it is noteworthy that the reason advanced by the 1st Defendant for the non-payment, in as far as it can be deciphered from its written statement of Defence is that the 2nd Defendant was not authorized to conclude the contract. The Managing Director has not appeared as a witness to challenge the evidence of PW1 Mirembe that he had discussions with him and that thereafter he, the Managing Director, referred him to his subordinate, 2nd Defendant. In these circumstances, Court has accepted PW1's evidence as truthful. It is evidence that shows that 2nd Defendant had power to conclude the deal on behalf of his boss, and therefore the

organization both of them worked for. In such a situation, the contract becomes that of the employer, known in the field of agency as the principal. This does not render the agent personally liable because it was not personally his contract. The principle of law is that he who does something through another does it himself.

I have been invited to find that the transaction in issue was authorized by the 1st Defendant's top executive and therefore is binding on it. That whether the 2nd Defendant had authority to sign advertisement orders or not was an internal matter which was not brought to the Plaintiff's attention. Going by the unchallenged evidence of PW1 on the matter, Court is persuaded by that argument. It is evidence that proves that the 2nd Defendant's instructions bound the 1st Defendant and that the 2nd Defendant is not personally liable on the order.

Accordingly, issue No. 1 is answered in the affirmative; and issue No. 2 in the negative.

As to whether the Defendants had to approve the art work and design before publication, the evidence of Mirembe Julius is that the same were approved by the Public Relations Department of the 1st Defendant. This evidence has not been challenged.

I have also considered the 1st Defendant's averment in its Written Statement of Defence that the Defendants didn't approve the art work and design before publication and that what the Plaintiff unilaterally published was erroneous and sub-standard. Once again, the evidence of Mirembe Julius that the Public Relations Department of the 1st Defendant designed all that was published has not been challenged. This Court accepts his evidence that all the Plaintiff did was to publish. Designing was done by officials of the 1st Defendant. 1st Defendant's claim that the art work was substandard has not been substantiated. In any case, even if this were so, the Defendants did not have to wait until the suit was filed to raise the complaint. As soon as the demand for payment was made to the 1st Defendant, its reaction would have been that the same was substandard and therefore unacceptable. I have not seen any communication from the Defendants, other than the averment in the WSD, that the Plaintiff's art work was substandard. Court is of the view that this was an afterthought.

Turning now to the issue of damages, the Plaintiff has shown by documentary evidence and oral testimony of PW1 that it forwarded a bill of Shs.9,000,000- to the Defendants. This amount has of course been disputed by the Defendants much as they did not lead evidence to justify the dispute.

I have considered the fact that the Defendants designed the art work themselves and gave it to the Plaintiffs to put on their chart. From the

evidence, especially P. Exh. 2, the Defendant's art piece occupied most space on the chart. Court has, however, not received any indication as to how much the other advertisers paid for comparable space. I have considered PW1's evidence that the Plaintiff offered a discount to the 1st Defendant and reduced the amount to Shs.5,500,000- which the Defendants still refused to pay. The Plaintiff may have reverted to its earlier bill of Shs.9,000,000- upon the Defendants failing to reciprocate the kind gesture. However, it shows also that the Plaintiffs may have invoiced the Defendants. Doing the best I can in the circumstances of this case and taking into account the Defendants failure to lead evidence in the matter, I consider a sum of Shs.4,500,000- adequate as compensation for the services rendered by the Plaintiff to the 1st Defendant at the 2nd Defendant's request. The sum of Shs.4,500,000- is accordingly decreed to the Plaintiff.

As regards the claim for interest, I notice that the original plaint did not have a claim for interest. The amendment seeks interest at the rate of 28% p.a from June 2002 till payment in full. Interest, unless it is part of the contract terms, is a discretionary remedy. The general rule is that interest can only be claimed if the claim is based on an agreement for it in the document sued upon or by statute.

In the instant case, the interest claimed by the Plaintiff is not based on any agreement. It is only based on the fact that the 1st Defendant has kept the

Plaintiff out of its money and that the said Defendant has been using it. In these circumstances, interest shall be awarded to the Plaintiff at a commercial rate of 25% per annum. The suit was filed in July 2002. The plaint was amended almost 2 years later. Though dated 29/4/2004, it appears not to have been filed till 29/4/2005, the date appearing on the Court stamp. I shall go by that date and order that interest be calculated from the date the claim for it was made, that is, 29/4/2005, till payment in full.

The Plaintiff shall also have the costs of the suit, to attract interest at Court rate from the date of taxation till payment in full.

I order so.

Yorokamu Bamwine
J U D G E
3/4/2006