THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0179-2004

SHELL UGANDA LIMITED ::PLAINTIFF

VERSUS

CAPTAIN NAEEM CHAUDRY :: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

JUDGMENT:

The plaintiff seeks recovery of special and general damages, interest and costs of the suit. It is the plaintiff's case that it guaranteed a loan facility from Citibank to the defendant; that the defendant defaulted on it; and, that the plaintiff made good of the default to Citibank on the defendant's behalf. Its claim is therefore for reimbursement of money paid under the said guarantee.

The defendant denies liability and blames the plaintiff for accepting a debit by Citibank for sums in excess of the guaranteed amount. He contends that the plaintiff is not entitled to the amount claimed in the plaint (that is, Shs.241,707,213/=) or at all. He instead counter-claims against the plaintiff a sum of Shs.433,486,430/= being alleged refundable interest; price adjustment losses; and, fuel evaporation losses.

At the conferencing the parties agreed that:

1. The defendant as dealer of three service stations was advanced credit facilities from Citibank upon recommendation of the plaintiff.
2. The payment of the said credit facilities was guaranteed by the plaintiff.
3. The defendant did not fully honour his obligations to Citibank.
4. In accordance with the guarantee terms, the plaintiff paid to Citibank a sum of Shs.241,707,213/= on November 22, 2002.

Issues:

1. Whether the plaintiff is entitled to any indemnification from the defendant and if so the amount.
2. Whether the defendant is entitled to his counter-claim.

Counsel:

Mr. Joseph Luswata for the plaintiff.

Mr. Philip Karugaba for the defendant.

Issue No. 1:

Whether the plaintiff is entitled to any indemnification from the defendant and if so the amount.

Whether the plaintiff is entitled to any indemnification from the defendant depends in my view on the nature of the relationship between them. It is well that I first resolve this before I make a determination as to the amount.

The Oxford Dictionary of Law, 6th Edition at p.246 defines '**Guarantee**' as:

> ***"A secondary agreement in which a person (the guarantor) is liable for the debt or default of another (the principal debtor), who is the party primarily liable for the debt."***

A guarantee requires an independent consideration and must be evidenced in writing. From the above definition, a guarantee is a promise by a guarantor to the creditor that if the debtor does not pay the debt, the guarantor will pay it. The promise is by the guarantor to the creditor. It is not to the principal debtor much as it is being made in his favour. Needless to say, the debtor and the guarantor would have agreed on the terms of such a guarantee before the guarantor makes that commitment to the creditor. Accordingly, it is in my view immaterial that Citibank issued no notice of demand to the defendant before it proceeded against the plaintiff. The guarantee was after all enforceable as between the parties to it, that is, the plaintiff and Citibank.

Turning now to the position of the principal debtor, the likes of the defendant herein, this is the person primarily liable to the creditor for the obligation guaranteed. Although sometimes bound by the same instrument as his guarantor, the principal debtor is not a party to the guarantor's contract to be answerable to the creditor. There is no necessarily any privity of contract between the guarantor and the principal debtor. They do not constitute one person in law and are not as such jointly liable to the creditor, with whom alone the guarantor contracts.

See: Francis Xavier Muhoozi t/a Kabale Kobil Station vs National Bank of Commerce (U) Ltd HCT-00-CC-CS-0303-2006 (Commercial Court – unreported).

And as to the guarantor's right of indemnity against the principal debtor, the law is that the surety who has actually met the liability which he has undertaken to answer for is entitled to be indemnified by the principal debtor. The said right to indemnity arises on actual payment by him. In the instant case, given the concession that the defendant defaulted on his obligations to Citibank; and, that in accordance with the guarantee terms the plaintiff paid to Citibank the amount due on the guarantee, the plaintiff would be entitled to recover the payment from the defendant provided that it did not exceed the amount advanced by Citibank to the defendant.

This now brings me to the issue of the amount.

From the evidence, sometime in March 1999, the plaintiff appointed the defendant as its dealer for Shell Jinja Road, Kampala. The appointment letter is on record as Exhibit PI. In the course of the said dealership, and in a bid to boost the defendant's business, the plaintiff arranged for him, together with other dealers, a banking facility with Citibank. This was in February 2001, according to Exhibit P2.

Under this arrangement, borrowers were dealers as would be mutually agreed upon between the plaintiff and Citibank. The lender would be Citibank and the loan guarantor, the plaintiff. The two parties agreed that the facility would be availed as an advance in the dealer's current account subject to annual review and repayable on demand.

The Programme size was Shs.1,000,000,000/= (Shillings one billion only) and the maximum facility size for anyone dealer a sum of Shs.150,000,000/= (One hundred fifty million only).

Further, the parties agreed on the following procedure:

1. Each approved dealer to open a current account specifically for the financing of purchases from Shell Uganda, and all proceeds from the sale of Shell (U) products to be deposited into this account.
2. A credit limit to be established on the current account and to be available solely for the purchase of products from Shell Uganda.
3. In order to facilitate payments, the dealers to provide Shell Uganda with signed cheques drawn on their Citibank accounts and payable to Shell Uganda.
4. Shell (U) to be granted viewing rights to the dealers' Citibank accounts through Citibank's Windows based Electronic Banking Software.

This was to allow Shell (U) to monitor the performance of its dealers with regard to maintaining the terms and conditions of the programme.

Under the Deed of Guarantee, the plaintiff bound itself to pay and satisfy Citibank for all sums due and owing upon one month's notice being given, provided that the claim does not exceed the advance [EXH.P3].

From the records and evidence, by this facility the plaintiff recommended the defendant to Citibank on June 25, 2001 for an overdraft facility of Shs.150m for a period of one year. This overdraft facility was wholly guaranteed by the plaintiff [EXH. P4]. From the records also [EXH. P5], the plaintiff authorized an increment in the defendant's credit line from Shs.150m to Shs.250m. On the strength of this authority, Citibank confirmed to the defendant (in a letter dated 26-09-2001) that it was willing to avail credit facilities to him to run two more stations: Shell Nakivubo and Shell Kawempe. This increased the facility size to Shs.250m [EXH. P6]. Pursuant to this commitment on the part of Citibank, the defendant applied for an overdraft facility of Shs.250m on 03-10-2001 [EXH.P7]. No follow up documentation on this has been availed to court. However, the defendant does not deny receipt of proceeds under this overdraft facility.

On 12-04-2002, the plaintiff wrote to Citibank [EXH.D29] as follows:

> *"**Dear Sir,***
>
> ***Re: DEALER FINANCING – RENEWAL OF GUARANTEE***
>
> ***We refer to your letter dated April 5, 2002 wherein you brought to our attention the fact that the guarantee issued by Shell Uganda Ltd under the dealer financing scheme expired on 16th March, 2002.***
>
> ***Please find attached a deed of renewal to the said guarantee for the period commencing 17th March 2002 and ending 31st July 2002. Please note that the renewal attached herewith is subject to our recommendation of particular dealers as per the terms of the banking facilities letter dated February 1st 2001 executed between Shell and Citibank. At the moment there are two recommended dealers namely Sonia Phaguda with an established credit limit of UGX150 million and Naeem Chaudry with a credit limit of UGX60 million (emphasis mine). Please also take note of the fact that the programme size remains UGX1 billion only (Uganda Shillings one billion only).***
>
> ***Yours faithfully,***
> ***For Shell Uganda Limited***
>
> ***Ian Geoffrey Bromilow***
> ***COUNTRY CHAIRMAN."***

It is this letter which is the source of the problem herein. Whereas the defendant evidently originally operated his business on a credit limit of Shs.150m and later had it increased to Shs.250m, the letter states a position previously undocumented, that is, that his credit limit was Shs.60m. The author, Ian Geoffrey Bromilow, did not appear as a witness. He had long left the country by the time the suit was heard.

The said letter [EXH. D29] was not copied to the defendant. The plaintiff had originally presented it as an Exhibit [EXH.P8]. However, on realizing that its content did not support the claim, learned Counsel for the plaintiff abandoned it, to the pleasure of the defendant.

Neither PW1 Nasir, Head of Corporate Banking Citibank, nor PW2 Ossiya, an accountant with the plaintiff Company, was aware of the circumstances that apparently led to the reduction of the defendant's credit limit from a hefty Shs.250m by October 2001 to a paltry Shs.60m by April 2002. They attributed it to an error on the part of the author.

According to PW2 Ms. Ossiya, for the limit to be reduced, there had to be an application by the dealer and an acceptance by the plaintiff. From their records, it is Phaguda who had a credit limit of Shs.60m, not the defendant. There is no application for a reduction by the dealer, and/or an acceptance thereof by the plaintiff.

On the basis of this evidence, learned Counsel for the plaintiff has submitted that there was never a credit limit of Shs.60m in favour of the defendant and that EXH. D29 was written in error.

I have given considerable thought to this matter. Absence of the author's in-put on this matter and that of the defendant himself has not made my work any easier. Be that as it is, the plaintiff has averred that the credit limit on which the defendant operated initially stood at Shs.150m and that it was increased to Shs.250m. The burden of proof lies on the plaintiff to prove so.

They have adduced evidence of PW1 Nasir, Head of Corporate Banking, Citibank and PW2 Josephine Ossiya, an Accountant with Shell (U) Ltd, which evidence shows that by the time the credit facility was terminated, the limit was Shs.250m. This position is sufficiently documented.

The defendant did not appear in person to indicate otherwise. He was said to be ill, undergoing treatment abroad. The defence case is basically hinged on the testimony of DW1 Godfrey Jjuuko, an Accountant with C & A Tours and Travel Ltd. He was on the staff of the defendant for a long time. He testified that the defendant ceased being dealer for the plaintiff in a personal capacity on 31-12-2001 and thereafter his outlets were taken over by C & A Tours and Travel Ltd of which the defendant is Managing Director. He sounded conversant with the operations of the defendant. However, his evidence is deficient on proof as to how the credit limit which stood at Shs.250m by October 3rd, 2001 all of a sudden slumped to Shs.60m in April, 2002, just a few months later. All that appears to support such a position is EXH. D29, a letter from the plaintiff to Citibank, which was not even copied to the defendant.

Other than this stand alone piece of evidence, there is no documented evidence that the defendant ever at any one given time operated the three stations on a credit limit of Shs.60m.

On the contrary, there is unchallenged documentary evidence that he operated on and at times in excess of Shs.250m to the displeasure of Citibank [EXH. P15]. In EXH. P15, a letter dated 12/12/2001 from Citibank to the Directors, Shell Uganda Limited (Attn: Emmanuel Sackey), one Igor Kottman, Corporate Banking Head, wrote:

> ***"Dear Sir,***
>
> ***Re: DEALER FINANCING FOR SHELL UGANDA***
>
> ***We refer to the two distributor finance dealers recommended by SHELL Uganda for financing in form of overdraft facilities against a full guarantee from Shell Uganda, <u>the two dealers namely Sonia Paguda and Naeem Chaudry have established credit limits of UGX60 million and UGX250 million respectively</u>. The two dealers have for sometime operated their overdraft accounts over the above the pre-established credit limits with a build up of uncollected funds. We permitted such excesses with the hope that SHELL Uganda would increase their credit limits to suit their respective operational needs (emphasis mine).***
>
> ***As SHELL Uganda has not increased these limits, we effective immediately advise the dealers to operate within their authorized and guaranteed overdraft limits.***
>
> ***In case SHELL increases the limits subsequently, we would have no problems in adjusting the limits upwards.***
>
> ***Assuring you of our preferential attention at all times.***
>
> ***Yours sincerely,***
>
> ***IGOR KOTTMAN***
> ***CORPORATE BANKING HEAD***
>
> ***c.c. Sonia Paguda, Naeem Chaudry."***

According to Citibank, this was the position with them as at 12-12-2001. Within the same month, to be exact on 31-12-2001, Naeem Chaudry ceased being a dealer for the plaintiff in a personal capacity and C & A Tours & Travel Ltd of which the defendant is Managing Director took over the outlets.

The quoted letter was copied to Naeem Chaudry. It indicated his credit limit as Shs.250m and Paguda's as Shs.60m. It has not been indicated to court that there was any protest on this letter

by the defendant or that any correction was ever demanded. In all these circumstances, EXH. D29 is a stand alone document, unsupported by other evidence, direct or circumstantial. Notwithstanding absence of any evidence that there was ever any protest on it by Citibank or any attempt to issue a correction by the plaintiff, court is satisfied on the balance of probabilities that the defendant never operated on credit limit as low as Shs.60m for any one or all the three service stations. I am therefore persuaded by the plaintiffs that EXH. D29 was issued in error and that the defendant is dishonestly trying to take advantage of that error.

The plaintiff is in my view entitled to indemnification from the defendant in the sum of Shs.241,707,213/= being the outstanding debit balance on his account with Citibank by November 2002.

The plaintiff's other prayer is for general damages for breach of contract. The general principle is that general damages are awarded to compensate the plaintiff and not to punish the defendant. The general effect of an award of general damages would be to place the plaintiff in the same financial position as if the contract had been performed. Likewise an order for payment of the full contract price (Shs.241,707,213/=) would have that effect. In view of the plaintiff's misleading letter, EXH. D29, which no doubt encouraged the defendant to contest the claim, I would not consider it just and equitable to make any award of general damages, be it nominal or substantial. I have therefore made none.

As regards the plaintiff's prayer for interest at 20% p.a. from 22/11/2002 till payment in full, it is submitted that this will compensate the plaintiff for loss of its money since contract performance time. An award of interest in a case of this nature is discretionary. In equity interest is awarded wherever a wrong doer deprives the other of money which he needs to use in his business. The principle that emerges from decided cases, however, notably **SIETCO VS Noble Builders (U) Ltd. SCCA NO. 31 of 1995,** is that where a person is entitled to a liquidated amount and has been deprived of it through the wrongful act of another person, he should be awarded interest from the date of filing the suit. Where, however, damages have to be assessed by the court, the right to those damages does not arise until they are assessed and therefore interest is given from the date of judgment.

The plaintiff herein sought special and general damages. In keeping with the above principle, I would award interest at the rate prayed for herein from the date of judgment till payment in full.

The plaintiff would also have the costs of the suit.

Issue No. 2:

Whether the defendant is entitled to his counter claim.

From the defendant's further amended Written Statement of Defence and counter-claim dated 24-07-2006, his counter-claim against the plaintiff is for a sum of Shs.39,363,807.66 being 50% refundable interest; Shs.82,139,661.55 being price adjustment losses and Shs.311,981,961.03 being evaporation losses; interest thereon, costs and damages.

In Counsel's closing submissions, he sought further oral amendment to make the final figures read Shs.39,315,977.76 (down from Shs.39.363,807.66); Shs.82,039,855.16 (down from Shs.82,139,661.55); and, Shs.311,602,877.54 (down from Shs.311,981,961.03). Given that the effect of the amendment would be to reduce the defendant's claim against the plaintiff, I would see no good reason to disallow the belated application as it occasions no prejudice to the plaintiff.

(i). **Refundable interest: Shs.39,315,977.76**

From the pleadings, the defendant's claim for refundable interest arises as follows:

(a). As part of its marketing strategies to expand the volumes of business handled by its dealers, the plaintiff arranged for the defendant a facility with Citibank.

(b). In consideration of the defendant taking the said credit facility, and thereby relieving the plaintiff of further trade burdens, the plaintiff undertook to meet 50% of the defendant's interest obligations with Citibank.

(c). As at the date of termination of the defendant's dealership, the plaintiff owed the defendant Shs.9,835,606/= which when taken with cumulative interest and lost opportunities now stands at Shs.39,315,977.76 as at the end of February, 2006.

The plaintiff denies all this and contends that there was no such undertaking, written or oral.

At the hearing, DW1 Jjuuko, indicated the basis of this claim as the understanding between the parties as per EXHS. D18 and 30. I have carefully addressed my mind to the two documents. In EXH. D18 the plaintiff makes reference to a meeting held in the plaintiff's office on 29-01-03. It is noteworthy that this was long after the defendant's personal dealership with the plaintiff had ceased on 31-12-2001. Be that as it is, the author (one Mark Ocitti p'Ongom – Retail Manager) lamented:

> *"**As I said at the meeting, I would like to express my extreme disappointment at the total lack of honesty shown by you where you are claiming for amounts that have already been paid, are being claimed twice or are not worthy of claiming at all as no commitment whatsoever had been made by ourselves to re-imburse you for.***
>
> ***Before ……..**"*

Then in paragraph 4 the author continues:

> *"**4. I do recall giving you a commitment to pay your claim of 1/11/01 of Shs.514,420/= but also do recall that the amount in question was paid. I will investigate further in that particular issue. We however did not make any commitment to you for all other claims prior to 2003 shown on your document apart from the Citibank claim which on your document shows a dishonest over-stated amount of Shs.24,695,982/= whereas the actual amount claimed should have been Shs.11,111,900/=. This amount has now been paid and is sitting on your account as a credit. I would therefore like to inform you that we shall not consider paying any of the claims where we did not make any commitment to pay."**

In reply, the defendant stated (EXH.D30):

> ***"I wish to clarify on the item captioned thus:***
>
> ***I furnished to yourselves the interest incurred over 1½ years (July, 2001 – October 2002) to sustain the Citibank finance facility. This amounted to Ug. Shs.49,391,963/= where 50%, that is, Ug. Shs.24,695,982/= was expected to be Shell (U) Ltd's contribution. The fact that the interest for only the month of January – August 2002, that is, eight months amounting to Shs.22,223,800/= where***

Shell (U) Ltd sought to pay 50% that is, Shs.11,111,000/= (sic) does not render my claim dishonest.

This serves……..”

The issue as I see it is whether or not the plaintiff made a commitment for the refund of interest as claimed, be it orally in writing, and if so whether the plaintiff has fulfilled that commitment.

The plaintiff strongly disputes the claim as to refundable interest. As fate would have it, the defendant did not appear as a witness for his side. The defence evidence on this point is largely hearsay. On the contrary, there is on record evidence of PW4 Christine Busingye. She was the Territory Manager for all retail sites in the Central Region. By virtue of that position, she was the defendant's supervisor. Her evidence on this point is that there was no agreement between Shell (U) Ltd and any of the dealers, including the defendant/counter-claimant herein, on the 50% interest refund. However, in the course of time, retailers complained about high interest rates on the loans from Citibank in which Shell Uganda had agreed to act as guarantor. Her evidence is that the plaintiff made a commitment, effective 1/1/2002, to meet the 50% refund. It is her evidence further that any claim before that time does not bind Shell Uganda and that interest after 1/1/02 was paid. She testified that the defendant made a claim in the sum of Shs.24,695,982/= instead of Shs.11,111,900/= and that true to its commitment, Shell Uganda settled the amount due at the time, that is, Shs.11,111,900/=.

From the pleadings and the evidence adduced at the trial, court is satisfied that the plaintiff made a commitment after the dealers, including the defendant, complained to the plaintiff about Citibank high interest rates on the loans. The evidence on record is short of proof that the commitment was to act retrospectively, that is, to cover even the period before it was made on 01/01/02. From EXH. D30, court is also able to tell that the defendant's claim of Shs.49,391,963/= was for a period of one year and half (July 2001 – October 2002). However, it is common ground that the defendant's personal dealership with the plaintiff ceased on December 31st, 2001. Between January – October, 2002 the plaintiff was dealing with C & A Tours and Travel Ltd, a limited liability company. In all these circumstances, the plaintiff was not obliged to settle the claim, for as long as it included the period before the commitment was made and after the defendant's personal dealership with the plaintiff had ceased. The claim is doubtful and it fails.

(ii). **Price Adjustment Loss**

Under this head, the defendant states that following a meeting between the plaintiff and its dealers in April, 1999, it was decided that the plaintiff would compensate dealers for any loss arising from fuel price changes. That by January 2002, he was owed Shs.20,523,760/= on account of price adjustment loss which when calculated with Fisher's Effect comes to Shs.82,139,661.55 (Shs.82,039,855.16 after the belated oral amendment).

For the avoidance of the doubt, the defendant's counter-claims are all made with a calculation that supports an allowance to determine and maintain the value of money. This formula takes into account that a shilling say in 1998 is not the same as a shilling ten years later in 2008. It therefore allows for a factor of inflation and interest. Reference to Fisher's Effect herein is reference to that formula.

The defendant has given EXH. D2, a letter dated 28-05-1999 as the basis for his claim. It reads:

> ***"Dear Sir/Madam,***
>
> ***Re: COMPENSATION FOR LOSSES DURING PRICE CHANGES***
>
> ***Reference is made to the last Dealer's Meeting that took place at Grand Imperial Hotel in late April of 1999. Following our discussion on this subject, the company has made a decision to compensate financial losses that occur as a direct result of downward price changes due to competition reaction in the trading area. For general price changes across the entire Shell network, the current rules remain in force.***
>
> ***The above policy shall apply to those purchases that were made within 48 hours preceding the price change.***
>
> ***You are requested to send copies of your most recent purchase invoice with a written note applying for a credit note to compensate you for your losses in this regard. The note shall be addressed through your Retail Sales Representative to the Retail Operations Manager. We guarantee a speedy processing of your application.***
>
> ***Shell Uganda Ltd continues to reserve the right to make a payment to compensate your price change losses when these occur.***

Once again we would like to appeal to you for fuel co-operation to boost the sales at your station.

Yours faithfully,
For: SHELL UGANDA LIMITED

P. P. M. Maes
MANAGING DIRECTOR"

DW1 Jjuuko testified that the loss would come as a result of selling the product at a reduced price which would in effect affect the dealer's margin.

PW4 Christine Busingye was directly involved in the handling of claims submitted to the plaintiff by dealers. Her evidence is that the defendant's claim of Shs.20,523,760/= was a consolidation of many claims and that those claims were settled. She has given EXH. D15 as evidence of the payment. EXH. D15 is a credit Note indicating the date of issue as 31/12/01 under Reference: REBATE AUGUST.

I have addressed my mind to this claim.

From the pleadings and evidence, the defendant used to send written claims to the plaintiff. In strict compliance with EXH. D2, all such claims had to be addressed to the Retail Operations Manager, through the Retail Sales Representative. For sometime, the Retail Sales Representative was PW4 Christine Busingye. The claims are on record as:

EXHS. D16 for Shs.1,154,371/=; D17 for Shs.2,938,600/=; D19 for Shs.8,667,760/=; D20 for Shs.2,560,000/=; D21 for Shs.206,000/=; D22 for Shs.7,480,000/=; D23 for Shs.120,000/=; and D24 for Shs.3,840,000/=.

These 8 claims in total are indicated as being for the period January – September 2001. They represent a total of Shs.26,966,731/=.

From the evidence also, the plaintiff used to settle the defendant's claims by way of Credit Notes, the likes of EXHS. D14 – 17. These 4 Credit Notes represent a total of Shs.26,016,840/=, implying a near perfect balance between the claims and the Credit Notes,

except for a paltry difference of Shs.949,891/= in between them. The Credit Notes were for the period 28-05-2001 to 31-12-2001.

In EXH. D18, the plaintiff informed the defendant that Shs.20,523,760/= had been made to his Shell Jinja Road account in respect of most claims herein. The only claim which the plaintiff indicated to the defendant as settled and has not been repeated herein is one dated 22/09/01 for Shs.6,596,000/=. It is indeed the only one whose corresponding Credit Note I have not seen. Be that as it is, the plaintiff told the defendant that Shs.20,523,760/= had been paid and was sitting on his account. No evidence has been led to challenge the plaintiff's evidence that Shs.20,523,760/= was paid into the defendant's bank account on or around 31/12/01. In the absence of any evidence that the defendant presented yet another claim of exactly the same amount, that is, Shs.20,523,760/= (which in itself would be a very strange coincidence), court has accepted PW4 Busingye's evidence that a number of claims were consolidated and payment was made to the defendant vide EXH. D15. Court has also accepted her evidence as truthful that the words **'Rebates'** and **'extra-margin'** were being used interchangeably in the dealings between the plaintiff and the defendant to mean discounts on sales effected by dealers on the plaintiff's products aimed at enhancing sales on the plaintiff's products. In all these circumstances, court is satisfied on a balance of probabilities that the plaintiff settled the defendant's claims amounting to Shs.20,523,760/= and the defendant is dishonestly claiming the amount again. His claim of Shs.82,039,855.16 as reflecting the claim of Shs.20,523,760/= with the Fisher's Effect being applied to it is rejected for being a dishonest attempt to claim the same amount twice.

(iii). **Evaporation Loss: Shs.311,602,877.54**

This claim is in respect of losses allegedly suffered at Shell Nakivubo. It owes its origin to EXH. D6, a letter from Shell Uganda Limited dated 16th June, 1999. The defendant's case on this point is that the plaintiff as far back as 1999 settled some claims in respect of evaporation loss and rejected others. It is not necessary for me to reproduce the letter here. However, it is evident that there had been evaporation loss at Shell Nakivubo whose cause the plaintiff remedied, including a compensatory payment.

The defendant states that as a result of the unremedied evaporation loss, the defendant suffered loss amounting to Shs.77,953,120/= which with cumulative interest and lost opportunities now stands at Shs.311,602,877.54/=.

The claim has been resisted by the plaintiff on the ground that it is barred by the Limitation Act. Learned Counsel for the defendant does not agree because in his view Limitation was not pleaded.

I would think that whether the defence raised the issue of limitation or not, limitation is a matter of law. It cannot be condoned and cannot be waived and therefore it can be raised at any time in the proceedings.

See: ***Allen Nsibirwa vs National Waters & Sewerage Corporation HCCS No. 811/92 reproduced in [1995] VI KALR 4.***

Applying the same principle to the instant case, the issue of alleged fuel losses as we have seen arose in 1999. On May 27, 2000, the defendant wrote to the plaintiff [EXH. D9] and stated, inter alia:

> ***"Shell (U) Ltd in the past reimbursed us for our losses. Unfortunately, we have not been reimbursed for this period in contention. The purpose of this letter therefore is to request you to reimburse us for the losses incurred for the period in question as per the attached variance analysis."***

The attached variance analysis is for the period January 1998 – March 2000. The counter-claim was filed in March 2006, more than 8 years after the first cause of action arose.

The plaintiff's claim is based on alleged contractual obligations. Section 3 (1) (a) of the Limitation Act, Cap. 80, prohibits claims in contract being filed after six years. By simple calculation, any claim presented to court after February 2006 for the bills of 1998, 1999 and the first two months of 2000 was out of time. The only borderline claim is perhaps that of March 2000. Under O.7 r.6 of the Civil Procedure Rules, where a suit is instituted after the expiration of the period prescribed by the law of Limitation, the plaint must show the grounds

upon which exemption from such law is claimed. No disability has been pleaded by the defendant and none has been demonstrated to court.

Under O.7 r.11 (d) of the said Rules, the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. In the instant suit, the defendant/counter-claimant's claim for evaporation loss appears to be barred by the Limitation Act, S.3 (1) (a) thereof. The claim is unmaintainable on account of this. I find merit in the point of law raised by Mr. Luswata.

In the event that I am wrong on the question of Limitation, even if I were to decide otherwise, I would still find no merit in the defendant's claim. Why do I say so?

DW1 Mr. Jjuuko identified the cause of the alleged loss to be a faulty duct. From the evidence, a duct is part of the tank. It was tested by all possible means and found to be intact.

The plaintiff advised the defendant in 1999 [EXH. D6] that it was normal especially considering the volatility of the product, to expect losses during the course of operations. The defendant was informed that:

> ***"As far as Shell is concerned, losses that occur as a result of faulty equipment - leakage, over delivery etc – show up cumulatively over a period of time and ring a bell early enough to call for remedial intervention. Again, such losses show a degree of consistent relativity between throughput and the 1% losses incurred. In our case in point, the relativity is very much erratic ranging from as low as less than 1% - 4.3% and above although your overall total stands at 1.8%."***

The plaintiff expressed the view that such erratic losses could be due to other factors that could equally have occurred such as under delivery by transporters, theft or non-return to tank by attendants, etc.

For the reasons above, the plaintiff refused to support the defendant for product loss refund. In all these circumstances, the possibility that the fault lay with the defendant and his staff and not

with the plaintiff's equipment at Nakivubo can not be ruled out, in the absence of any expert evidence that it was the equipment and nothing else which caused the loss.

This is a claim of special damages. The rule has long been established that special damages must be pleaded and strictly proved by the party claiming them if they are to be awarded. In the absence of any contractual obligation between the plaintiff and the defendant that the plaintiff would remedy any evaporation loss howsoever caused, the defendant's claim of Shs.311,602,877.54/= or at all is in my view superfluous. It appears to me an after thought on the part of the defendant merely intended to defeat the plaintiff's demand for payment on the guarantee transaction. I would find no merit in the claim and dismiss it.

The long and short of all this is that the entire counter-claim lacks merit. It is dismissed with costs to the plaintiff/defendant by counter-claim.

In the final result, judgment is entered for the plaintiff against the defendant on the following terms:

(i). Special damages: Shs.241,707,213/= (Two hundred forty one million seven hundred seven thousand two hundred thirteen only).

(ii). Interest on (i) above at the rate of 20% per annum from the date of judgment till payment in full.

(iii). Costs of the suit and counter-claim.

Yorokamu Bamwine
JUDGE
10-12-2008

<u>Order</u>:

This Judgment shall be delivered on my behalf by the Registrar of the Commercial Court on the due date.

Yorokamu Bamwine
JUDGE
10-12-08