THE REPUBLIC OF UGANDA

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

HCT - 00 - CC - CS - 167 - 2004

UGANDA BAATI LTD :: PLAINTIFF

VERSUS

ALAM CONSTRUCTION E.A LTD :::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE.

J U D G M E N T:

The Plaintiff company brought this suit to recover Ushs.37,910,116/= as the outstanding amount due on account of hardware goods and materials supplied to the Defendant company but not paid for.

It is the case for the Plaintiff that some time in 2002, it was mutually agreed that the Plaintiff would supply the Defendant goods on credit against the payment of post-dated cheques. The Plaintiffs aver that the Defendants introduced to them one Anthony Byaruhanga who was to act as the liaison officer for the said purchases.

The Defendant then made orders against which post-dated cheques which were drawn on Crane Bank. Some cash payments were made against these cheques but the others were dishonoured by the bank leaving a balance of Ushs.37,910,116/= as unpaid. It is the case of

the Plaintiff that the Defendant sent its employees/servants with actual and ostensible authority to collect the goods for which they should be held liable.

The Defendants deny that they are liable for the sums as claimed. It is the case for the Defendants that they did not make the orders for the goods nor did they have a credit agreement with the Defendants. They deny that Mr. Anthony Byaruhanga was introduced to the Plaintiffs by the Defendants as alleged.

That notwithstanding the Defendants issued a Third Party Notice against Anthony Byaruhanga for contribution and/or indemnification for the sum claimed of Ushs. 37,910,116/=. A perusal of the court record show no evidence that the said Third Party Notice was served on Anthony Byaruhanga.

The parties agreed to the following issues for trial;

1. Whether there was a supply agreement on credit between the parties.
2. If there was a supply agreement on credit whether Anthony Byaruhanga was authorized to act on behalf of the Defendant on that agreement.
3. Whether any goods were supplied by the Plaintiff to the Defendant and payments made.
4. Remedies.

Mr. Peter Musoke appeared for the Plaintiff while Mr. Mulema Mukasa and Muwema appeared for the Defendant.

The Plaintiff called two witnesses namely; Mr. Sanjay Kandar (PW1) the Marketing Manager of the Plaintiff and Mr. James Achilu (PW2) a Marketing Officer of the Plaintiff. The Defendant called one witness Mr. Khalid Alam the Managing Director of the Defendant company.

The trial of this case was protracted as different lawyers kept prosecuting this case. It was agreed that both parties file written submissions but the defence did not do so. Court shall therefore having given sufficient grace period to the defence now decide the case with what is on record.

Issue No. 1: Whether there was a supply agreement on credit between the parties.

Mr. Sanjay Kandar testified that the Plaintiff and the Defendant had a long business relationship. He testified that at the request of the Managing Director of the Defendant, the Plaintiff agreed to provide credit to them. He further testified that the Defendants wrote to the Plaintiff two letters requesting credit terms to which he authorized credit based on a seven day post-dated cheque. He further testified that he spoke with Mr. Khalid Alam who told him that a thirty day grace period would be better for him. Mr. Kanda testified that on the 25th April 2003, he attended a meeting together Mr. Datta (Managing Director of the Plaintiff) and Mr. Khalid Alam together with one Anthony Byaruhanga. Mr. Byaruhanga was introduced to them as a representative of the Defendant and who would collect the materials from the Plaintiff on behalf of the Defendant. A thirty day credit period was agreed between the parties and four business transactions based on this arrangement were done between the parties between April to June 2003.

Mr. Kanda testified that their modus operendi was that Mr. Byaruhanga would bring to the Plaintiff company a Local Purchase Order (LPO) with a post dated cheque. The Plaintiff would then confirm the order by calling Mr. Alam before supplying the goods. Mr. Achilu who worked more closely with Mr. Byaruhanga on the transaction testified that he had been instructed to do so by his boss Sanjay Kanda that the whole arrangement had already been agreed to between the two parties.

Mr. Khalid Alam in his testimony denied that his company had any dealing with the Plaintiffs in 2003 and that the last transaction they had was in July or August 2002.

He agreed that the 2002 transaction was a credit transaction through their sister company M/s Roof Clad which had a Memorandum of Understanding (MOU) with the Plaintiff for credit sales. He testified that this was so because the Defendant did not have an MOU with the Plaintiff company. He further testified that the only person authorized to negotiate credit under the MOU was the Managing Director of M/s Roof Clad and no one else.

Mr. Alam testified that the two letters exhibited by the Plaintiff's as coming from the Defendant were not signed by him but showed that they were signed ("P.P") on his behalf. He further testified that said letters were fraudulent and the whole transaction a scam perpetuated by Mr. Byaruhanga (who he called a subcontractor but not his employee) and Mr. Kategere (one of his officers). He never attended any meeting where he introduced Mr. Byaruhanga to the Plaintiff.

I have perused the evidence on record on this matter and the submissions that were filed. It is Mr. Khalid Alam's testimony that the Defendant had no credit dealings with the Plaintiff company in 2003 and that any credit dealings with the Plaintiff were done through on MOU signed between the Plaintiff and the Defendant's sister company M/s Roof Clad (Exhibit D.1).

A review of exhibit D.1 the MOU shows the following. First, its period of implementation is shown as from the 29th August 2003 (see preamble) until 31st December 2003 (see para 1 therein). If the last transaction between the parties to this dispute was in 2002, I wonder why Mr. Khalid Alam relied on a MOU signed in 2003? Furthermore paragraph 9 of the MOU provides

> "*…since the MOU is between UBL (i.e. Uganda Baati Ltd the Plaintiff) and RCL (M/s Roof Clad Ltd), UBL will be able to buy from RCL directly on equal terms and conditions and in any case, UBL wants to deal with Steel Rolling Mills Ltd and Casements Africa Ltd, then they should deal directly. Credit sales to any other companies of Alam Group (this includes the Defendant) will be routed through RCL. If other companies of Alam Group want to buy directly from UBL, the terms will be on cash basis…*" (additions and emphasis mine).

This provision agrees with Mr. Alam's testimony that all credit transactions from the Defendant would be routed through M/s Roof Clad. But it also provides that where this was not done, the terms of payment would be cash.

A review of letters in question (Exhibit P.1 and 2) both dated 15th April 2003 (before the period of the MOU) show that the Defendant company was requesting the Plaintiffs not to Bank

Cheques No. 144193 for Ushs.7,796,500/= and No. 144194 for Ushs.4,848,000/= (both from Crane Bank) because the Defendant had *"…experienced a slight delay in making arrangements for the above payments…"* whereas I agree that Mr. Alam did not sign letters personally as they are shown to be signed (PP) on his behalf this is not an entirely unknown business practice. Whereas Mr. Khalid Alam testified that the letter was fraudulent he did not say that the letter head had been forged in which case it would be misleading.

A third letter from the Defendant dated 19th April 2003 and signed by Mr. Khalid Alam to the Plaintiff (Exhibit) states in part

> *"…cheques of one week is difficult. Therefore, we ask to permit us to give you PDC (understood to mean "Post-dated Cheque") of one month because that can be paid there and then…"*

This seems to tally with the evidence of Mr. Kandar that the Defendant company wanted credit of one month; the only problem is that Mr. Alan denies authoring the letter.

It would appear that based on the evidence before me that there was a credit arrangement between the parties in 2003. I therefore answer the first issue in the affirmative.

Issue No. 2: **If there was a supply agreement on credit whether Anthony Byaruhanga was authorized to act on behalf of the Defendant on that agreement.**

As has been shown in the last issue, the Defendant denies that Byaruhanga was authorized to act on their behalf and that said meeting where he was alleged to have been introduced to the Plaintiffs on the 25th April 2003 never took place.

Counsel for the Plaintiff on the other hand submitted that Mr. Byaruhanga had actual and ostensible authority to act on behalf of the Defendant for which they should be held to be liable.

It was the testimony of Mr. Kandar and Achilu that orders from the Defendants would be initiated by an LPO. A review of the evidence on record show a LPO [Exhibit P.4(a)] No. 0104 of the 9th May 2003 from the Defendant company to the Plaintiffs. It reads in part "…

Please issue the following materials to Anthony B. Alam Const as per invoice/cheque No…" (emphasis mine). The reference to "Anthony B." I take it to mean Anthony Byaruhanga and "Alam Const" to mean Alarm Construction E. A. Limited (the Defendant). A further look at Exhibit P.6(a) a tax invoice from the Plaintiff to the Defendant shows that the iron sheets therein were collected by Mr. Byaruhanga on behalf of the Defendant.

Clearly based on this evidence Byaruhanga was authorized to collect material on behalf of the Defendant from the Plaintiff and actually did so. It has been argued by the defence that this was all a fraud or scam. However, as was held by **Lady Justice Stella Arach-Amoko** in the case of **Automobile Spares Ltd V Pearl Merchantile Co. Ltd & Anor** HCCS 693 of 2000 a principal can be liable for the fraud of his/her agent committed in the course of the agent's ostensible authority. The test here is not whether fraud itself has been established but rather what an ordinary person dealing with the agent can reasonably assume, in the absence of any notice to the contrary to be his authority (see judgment of **Spry J.A** (as he then was) in the case of **Edmund Schluster & Co. (Uganda) Ltd V Patel** [1969] EA 239 at 241).

I find that an ordinary person would have seen Byaruhanga with the Defendant's ostensible authority to collect the said good from the Plaintiff and also do such other things that would not be regarded as inconsistent with that authority.

Issue No. 3 **Whether any goods were supplied by the Plaintiff to the Defendant and payments made?**

Mr. Kandar testified that four transactions were made that form the basis of the dispute. The first transaction was for Ushs.7,800,000/= against a post dated cheque and LPO for which goods were supplied on this transaction Ushs.5,000,000/= was paid cash leaving a balance of Ushs.2,800,000/=.

The second transaction was for Ushs.15,600,000/= against a post-dated cheque for which goods were supplied. This cheque when presented was dishonoured and the said Ushs.15,600,000/= remains unpaid. The third transaction was for Ushs.6,900,000/= against a post-dated cheque for which goods were supplied.

This cheque when presented was dishonoured and the sum therefore of Ushs.6,900,000/= remains unpaid. The fourth transaction was for Ushs.17,707,500/= against a post-dated cheque for which goods were supplied. This cheque when presented was dishonoured leaving the said amount of Ushs.17,707,500/= as unpaid. This gives a grand total of Ushs.37,910,116/= as due and owing.

Mr. Khalid Alam disowned the cheques used in these transactions from Crane Bank on the grounds that his signature on them had been forged. Indeed Crane Bank dishonoured cheques No. 170147 (of the 15th July 2003) and 170147 (of the 30th June 2003) on the grounds that drawers signature differs. Cheque No. 170147 (of 20th June 2003) appears not to have been banked.

Mr. Khalid Alam testified that the account in question with Crane Bank was dormant and he did not know how Byaruhanga and his associates got hold of the cheque book.
Lord Finlay in the case of **London Joint Stock Bank V MacMillian and Arthur** [1918] AC 777 at pages 784 – 790 held

> *"…if the cheque is drawn in such a way as to facilitate or almost invite an increase in the amount of forgery if the cheque should get into the hands of a dishonest person, forgery is not a remote but a very natural consequence of negligence…"*

The legal point here is that the holder of a cheque book is under a duty to keep it safely to avoid forgery. In this case no evidence was led in this area all save that Mr. Khalid Alam stated that he did not know how they got the cheque book.
He even testified that one Mr. Kategere who was arrested with Mr. Byaruhanga did not have access to the company cheque book. Therefore one can only impute negligence in the manner in which the cheque book got into the hands of the wrong person.

That notwithstanding the Defendant can only be liable for supplies made through Byaruhanga for which there was ostensible authority. The transaction for Ushs.7,800,000/= where there

was an LPO and even part payment, I find it falls under the armbit of the ostensible authority principle for which the Defendant would be liable. Under that transaction the sum of Ushs.2,800,000/= is therefore due and owing.

The transaction for Ushs.15,600,000/= does not have an LPO but the tax invoice shows that Mr. Byaruhanga collected the goods. Given the course of dealings between the two parties to this case, it is reasonable also to find that this amount which is fully unpaid is also due and owing by the Defendant.

The transaction for Ushs.6,900,000/= is less straight forward. There is no LPO and the tax invoice (though not very clear) does not show that is was Byaruhanga who collected the goods. This would fall outside the testimony of Mr. Kanda that Byaruhanga collected the goods. I will therefore not allow this particular claim.

The transaction for Ushs.17,707,000/= is not clear. There is no L.P.O and the tax invoice [Exh.P.8(a)] shows that another person whose name is not Byaruhanga collected the goods. Furthermore the cheque/draft amount on the invoice is shown to be Ushs.17,697,500/= and yet a higher value of goods than indicated were supplied. That being the case ostensible authority cannot attach as testified by Mr. Kandar because he stated that Byaruhanga was also involved in this transaction. I would therefore disallow this particular claim.

Issue No. 4: Remedies.

Based on my findings above, I find that out of the total of Ushs.37,910,116/= that the Plaintiff claims, the Defendant is clearly liable for Ushs.18,400,000/= for two of the four transactions. I therefore award the sum of Ushs.18,400,000/= as special damages.

The Plaintiff also prayed for general damages but only put a figure of Ushs.15,000,000/= without any justification. I would grant in this case nominal damages of Ushs.1,00,000/= given the facts of this case.

The Plaintiff prayed for interest at court rate from filing until payment in full. I accordingly award interest at 8% p.a. on the sum of Ushs.18,400,000/= from the date of filing until

payment in full and 8% p.a. on the nominal damages from date of judgment until payment in full.

I also award the Plaintiff the costs of the suit.

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Geoffrey Kiryabwire

JUDGE

Dated: 12/11/09

12/11/09

Judgment read and signed in open court in the presence of;

- Okecha for Plaintiff
- R. Iga for Defendant
- Rose Emeru – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: **12/11/2009**