

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

HCT - 00 - CC - CS - 223 - 2008

NILE BREWERIES LTD ::: PLAINTIFF

VERSUS

NABONGO FRED T/A NABI IMPEX ::: DEFENDANT

BEFORE: THE HON. JUSTICE GEOFFREY KIRYABWIRE

JUDGMENT:

The plaintiff Nile Breweries Ltd brought this suit against the defendant Nabongo Fred T/A Nabi Impex for the recovery of Ug.Shs.82,832,484/= (Eighty two million eight hundred thirty two thousand four hundred and eighty four Uganda shillings) being the cost of beer supplied by the plaintiff to the defendant, interest, Value Added Tax refund of Ug.Shs.14,909,847/= (fourteen million nine hundred nine thousand eight hundred and forty seven Uganda shillings) and costs for the suit.

The brief facts of the case are that on 3rd October 2002 the plaintiff entered into a Distributor agreement with the defendant under which, it was agreed that the plaintiff would supply beer to the defendant pursuant to the agreement up to the time when their business transactions would cease. It is the plaintiff's case that upon signing the agreement, the defendant was supplied with different quantities of beer on different dates, which the defendant paid for leaving a balance of Ug.Shs.82,832,484/=(Eighty two million eight hundred thirty two thousand four hundred and eighty four Uganda shillings). The plaintiff avers that the defendant did not pay the full amount owed to the plaintiff including the Value Added Tax (hereinafter referred to as VAT) levied at a rate of 18% on the total amount of beer supplied which was paid by the plaintiff. It is the plaintiff's case that despite the several reminders, the defendant

has neglected, failed and or refused to pay the outstanding balance due to the plaintiff and this has therefore greatly inconvenienced the plaintiff in its operations and smooth running of the business.

The defendant in his defence however denied any liability and averred that he entered into an agreement with the plaintiff on 3rd October 2002. The defendant contends that he never breached the agreement in any way nor did he owe the purported Ug.Shs.82,832,484/= or any other money to the plaintiff under the agreement. The defendant further averred that he has never entered into any agreement with the plaintiff to supply him beer on credit and that he fully paid for all the beer he was supplied with under the agreement. The defendant contended that the VAT Tax liability cannot arise under a non existent debt on his part. The defendant therefore prayed that the plaintiff's case is dismissed with costs.

At the scheduling conference the following issues were framed;

1. Whether the defendant is indebted to the plaintiff and if so in what sum?
2. Whether the plaintiff is entitled to the remedies sought?

Mr. Jet John Tumwebaze appeared for the plaintiff while Mr. Kafuko appeared for the defendant. The plaintiff called one witness namely, Mr. Richard Itazi (PW1) an Accountant at Nile Breweries Ltd. For the defendant Nabongo Fred (DW1) a policeman/businessman testified.

Issue No.1: Whether the defendant is indebted to the plaintiff and if so in what sum?

Counsel for the plaintiff in his submission referred court to the evidence adduced by Mr. Richard Itazi (PW1) who testified that on the 3rd of October 2002 the plaintiff entered into a distributor Agreement (Marked Exhibit P.1) with the defendant for the supply of beer. Mr. Itazi testified that the defendant paid for the beer he was supplied with however leaving a balance of Ug.Shs.82,832,484/=. Mr. Itazi further testified that, a reconciliation of the debt on beer was carried out and the defendant himself signed a letter dated 6th November 2002 (exhibit P.5) agreeing to a debt of Ug.Shs.92,128,341/= as at 11th November 2002. It was Mr. Itazi's testimony that the system of payment of the plaintiff company is that once a customer places an order for beer, that beer is supplied together with delivery notes/ invoices. The customer can pay for the beer at a later date after selling the beer and that that is how indebtedness to the company arises. He further testified that once the customer makes a payment, the payment is allocated to the oldest debt. Mr. Itazi therefore testified that the defendant failed to honour his debt

obligation to the plaintiff and the plaintiff company stopped supplying the defendant with beer. Counsel for the plaintiff also made reference to the testimony of Mr. Nabongo Fred (DW1) who testified that he would pay for the beer before it was supplied and that all empty bottles were returned to the plaintiff.

It was the submission of counsel for the plaintiff that, the evidence of the Mr. Nabongo had a lot of contradictions. Counsel for the plaintiff submitted that on 17th January 2007 beer worth Ug.Shs.18,200,000/= on invoice No. 68242 was supplied to the defendant who claimed that he had paid for it on 23rd January 2007, 7 days after the supply. On 26th January 2007 beer worth Ug.Shs.19,280,000/= on invoice No.69108 was supplied to the defendant and he allegedly paid for it on 6th February 2007, 12 days after supply. However on 08th February 2007 beer worth Ug.Shs.16,400,000/= on invoice No.70133 was supplied to the defendant and he allegedly paid for it on 10th January 2007, a month before it was supplied. It is counsel for the plaintiff's submission that, it is unreasonable nor does it make business sense that beer was paid for on 10th January 2007 a month before it was taken on 08th February 2007 yet in that very month of January 2007 two other orders for beer were supplied and allegedly paid for after they had been supplied. It was counsel for the plaintiff's submission that the invoice No. 70133 worth Ug.Shs.16,400,000/= remains unpaid and that invoice No.72555 indicates that 800 crates/ empties were received by the defendant yet only 198 empties were returned leaving a balance of 602 crates/empties amounting to Ug.Shs.9,632,000/= (nine million six hundred and thirty two thousand shillings). Counsel for the plaintiff submitted that an empties' reconciliation (marked exhibit P.4) was done at the defendant's premises in Iganga and it was found that as at 17th August 2005 the outstanding balance of crates that had not been returned was 4,671.44 crates. Counsel further submitted that the cost per crate was Ug.Shs.16,000/= (sixteen thousand shillings) which brought the total outstanding amount for crates to Ug.Shs.74,743,040/= (seventy four million seven hundred forty three thousand and forty shillings). Counsel for the plaintiff submitted that the huge outstanding amounts goes to explain why future payments were allocated to settle the oldest debts leaving the last four invoices as unpaid. Counsel for the plaintiff therefore submitted that the defendant is indebted to the plaintiff to the sum claimed in the plaint and prayed that the court finds as such.

Counsel for the defendant however submitted that the defendant on relying on the Customer Payments Account for Nabi Impex showed court that he had paid for the beers supplied on invoice No.70133, No.75518, No.68242 and No.72555 (Marked exhibit P.2). Counsel for the defendant submitted that these four invoices amounted to Ug.Shs.71,280,000/= and not Ug.Shs.82,832,484/= as claimed by the

plaintiff. Counsel for the defendant further submitted that the four invoices clearly showed that all empties/crates were returned to the plaintiff and signed for by the plaintiff's workers who were delivering the beers to the defendant's stores and therefore he owed no money to the plaintiff for the empties. It was counsel for the defendant's submission that the payments for the beers were made in Standard Bank on the plaintiff's account and it is reflected on the Customer Payments Account for Nabi Impex at pages 6 and 7. Counsel for the defendant further submitted that the payments were made before the supply and at other times after the supply of beer. It was counsel for the defendant's submission that to rely on the letters adduced in evidence by the plaintiff and marked exhibit P.3, P.5, P.6 and P.7 would amount to departure from the plaintiff's pleadings as the cause of action arose on the 30th day of October 2007. He further submitted that the Ug.Shs.95,628,341/= which the defendant owed the plaintiff as at 6th November 2002 had long been paid for through the system of deductions from the payments made by the defendant which were used to pay for earlier invoices. Counsel for the defendant therefore submitted that the plaintiff has failed to prove its claim against the defendant and that court should find that the defendant does not owe Ug.Shs.82,832,484/= to the plaintiff.

I have perused the submissions of both counsels and the evidence adduced in court in this matter. This issue hinges on whether or not the defendant is indebted to the plaintiff to a tune of Ug.Shs.82,832,484/=. To understand the manner in which payments were to be effected in this matter, one needs to start by reviewing the rights and obligations of the parties under the contract. It is not a disputed fact that on the 3rd of October 2002 the plaintiff entered into a distributor Agreement (Marked Exhibit P.1) with the defendant for the supply of beer. The agreement under clause 7.1.6 states that;

“The distributor shall pay Nile Breweries Limited (NBL) for each order of the products placed, which payment shall be effected in a manner as stipulated by NBL from time to time and in accordance with his permitted credit terms as stipulated by NBL from time to time”

The agreement clearly does not state the manner in which payment for beer was to be effected however it stipulates that the manner of payment would be determined by Nile Breweries Limited. Mr. Richard Itazi an Accountant of the plaintiff company testified that usually when an order is made for beer, a customer is invoiced with the beer and the beer is delivered to his premises. After the delivery of the beer, the customer makes the payment and receipts are issued out to the customer as proof of the

payments. Mr. Itazi testified when any payments are made or empties are returned they are allocated against earlier outstanding uncleared invoices. He testified that it is possible for a customer to make a payment for a delivery that he took today but when it comes to the allocation of that payment, it will go to a previous uncleared payment and in the instant case what remained uncleared are the four invoices (marked exhibit P.2). The plaintiff adduced in evidence a list of all the transactions right from the time the plaintiff begun business with the defendant. Mr. Itazi testified that the documents included invoices to the defendant, the beer delivered, the movement of empties, empties that went with the beer, empties that were returned and the payment that was effected by the defendant. These documents were tendered in court and marked exhibit P.2. It was Mr. Itazi testimony that as at 30th April 2009 the total outstanding balance was Ug.Shs.99,762,484/=. Mr. Itazi further testified that the defendant had a collateral amount, these were payments that the customer was making to offset the balance amounting to 16,930,000/=:, and therefore the net outstanding debt as at 30th April 2009, was 82,832,484/=. Further more, the plaintiff adduced in evidence a letter dated 6th November 2002 (Marked Exhibit P.5) in which the defendant acknowledged his indebtedness to the plaintiff as at 31st October 2002 amounting to Ug.Shs.92,128,341/=(ninety two million one hundred twenty eight thousand three hundred and forty one shillings) and an Empties Reconciliation as at 17th August 2005 (Exhibit P.4) in which the defendant acknowledges that the outstanding crates/empties that had not yet been returned amounted to 4,671.44.

Apart from the general denial of the defendant that he owed no money to the plaintiff and the reference made by the defendant to Customer Payments Account for Nabi Impex which he claimed showed that he had paid for the beers supplied on invoice No.70133, No.75518, No.68242 and No.72555 (Marked exhibit P.2), the defendant has presented nothing not even a copy of his own receipts to show that he had paid for all the beer that was supplied to him. This is significant as the plaintiff has tendered in evidence a letter dated 6th November 2002 (Marked Exhibit P.5) and an Empties Reconciliation dated 17th August 2005 (Exhibit P.4) in which the defendant acknowledged his indebtedness to the plaintiff. The defendant has presented no evidence to show that these debts were ever cleared. It would therefore appear to me that despite the defendant's claim that he was not indebted to the plaintiff company the evidence before court clearly shows to the contrary that the defendant is still indebted to the plaintiff. The testimony of Mr. Nabongo that the defendant is not indebted I am afraid is inconsistent and not credible.

In the premises, as regards the first issue, this court finds that the defendant is indebted to the plaintiff in the sum claimed.

Issue No.2: Whether the plaintiff is entitled to the remedies sought?

The plaintiff prayed for the recovery of Ug.Shs.82,832,484/= (Eighty two million eight hundred thirty two thousand four hundred and eighty four Uganda shillings) being the cost of beer supplied by the plaintiff to the defendant, interest of 25% from 28th September 2007, the time the money was demanded and not paid, until payment in full, Vat refund of Ug.Shs.14,909,847/= (fourteen million nine hundred nine thousand eight hundred and forty seven Uganda shillings) and costs for the suit.

The plaintiff prayed for the recovery of Ug.Shs.82,832,484/= in the plaint being the cost of beer supplied by the plaintiff to the defendant. The plaintiff has adduced in evidence various documents namely; Nabi Impex Account Status as at 30/04/09, an account statement and invoice No.70133, No.75518, No.68242 and No.72555 (Marked exhibit P.2), showing the amount owed by the defendant to the plaintiff. According to the statement, the total amount owed by the defendant is Ug.Shs.99,762,483.95/= this amount according to the statement is reduced by Ug.Shs.16,930,000/= which was unapplied cash paid on 17th July 2003, leaving a total of Ug.Shs.82,832,484/=. In light of my findings in issue No.1 above, I accordingly award the plaintiff the sum of Ug.Shs.82,832,484/= (Eighty two million eight hundred thirty two thousand four hundred and eighty four Uganda shillings) being the cost of beer supplied by the plaintiff to the defendant

The plaintiff in addition prayed for Value Added Tax (VAT) refund of Ug.Shs.14,909,847/= (fourteen million nine hundred nine thousand eight hundred and forty seven Uganda shillings). According to the invoices and the Statement (marked exhibit P.2), the total amount owed by the defendant to plaintiff is inclusive of the VAT. On that ground, I accordingly decline to award the sum of Ug.Shs.14,909,847/= (fourteen million nine hundred nine thousand eight hundred and forty seven Uganda shillings) prayed for by the plaintiff as being a VAT refund.

The plaintiff also prays for interest on the amount of 25% p.a. from 28th September 2007, the time the money was demanded and not paid, until payment in full and costs for the suit.

It is a firmly established principle that an award of interest is made at the discretion of court. It is clear that the plaintiff ought to be compensated by an award of interest for the loss thereby occasioned to it by the defendant. I therefore award the plaintiff interest on the principle amount at the rate of 21% per annum from 28th September 2007, the time the money was demanded and not paid, until payment in full. I also award the plaintiff costs for the suit.

The plaintiff is not awarded general damages as they did not pray for them.

The court enters judgment in favour of the plaintiff.

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Geoffrey Kiryabwire

JUDGE

Date: 12/07/2010

12/07/2010

9:54am

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

- Ruth Naisamula – Court Clerk

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Geoffrey Kiryabwire

JUDGE

Date: 12/07/2010