

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT COMMERCIAL DIVISION
HCT-00-CC-CS-0246-2006

DEMBE TRADING ENTERPRISES LTD PLAINTIFF

VERSUS

WELCOME IMPEX UGANDA LTD DEFENDANT

BEFORE: HON. MR. JUSTICE LAMECK N. MUKASA

JUDGMENT

The plaintiff, M/s Dembe Trading Enterprises Ltd, filed this suit against the defendant, M/s Welcome Impex Uganda Ltd, seeking to receive special damages in the sum of Uganda shillings 22,554,925/=, general damages, interest and costs.

The defendant did not file a Written Statement of Defence and judgment was entered by the Registrar of this court in favour of the plaintiff under the provisions of Order 9 rule 6 of the Civil Procedure Rules.

The case came before me for formal proof and the plaintiff was represented by Ms Deepa Verma Jivran assisted by Mr. Edwin Tumushime.

The plaintiff's case is that on diverse dates between January and April 2005 it supplied the defendant with an assortment of goods. The defendant made part payment for the supplies leaving an outstanding balance of Uganda shillings 22,554,925/=. The defendant issued to the plaintiff various cheques which upon presentation for payment bounced or were dishonoured. Thus this suit.

The first issue is whether the defendant is indebted to the plaintiff in the sum of shillings 22,554,925/=.

The general rule of evidence is that the burden of proof lies on the party who asserts the affirmative of the question in disputes. See Section 101-104 Evidence Act. 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. His allegation is presumed to be true unless his opponent adduces evidence to rebut the presumption. The standard of proof in civil matters is on a balance of probabilities.

The plaintiff adduced evidence of two witnesses, Bobby Pereira (PW1), Operations Manager, and Chandrakant (PW2), Internal Auditor of the plaintiff company. PW1 testified that the defendant Company was their client for about four years. The plaintiff Company used to supply various commodities to the defendant Company. The plaintiff Company kept a Ledger Account of the supplies to and payments made by the defendant Company. The plaintiff issued out Tax Invoices for the supplies made to the defendant. The defendant would make payments either against an invoice or on account. PW2 explained that payment on account meant where an Invoice was not fully paid. The part payments would be under an account. The defendant had issued out four cheques corresponding to four Tax Invoices and one cheque on account, which when presented for payment were dishonoured. An audit of the Ledger Account showed an outstanding sum of shillings 22,554,925/=. The Internal Auditor of the plaintiff Company, PW2, took court through the defendant Company's Ledger Account with the plaintiff.

The Ledger Accounts run from 1st January 2005 to 31st May 2005 and was received in evidence as exhibit P3. The supplies made to the defendant were upon Tax Invoices signed by officers of both the plaintiff and the defendant Companies. PW2 explained that the Ledger Account was debited with the Tax Invoices and credited with the payments made. Five Tax Invoices were tendered in evidence as Exhibit P4 and five dishonoured cheques issued by the defendant to the plaintiff

were received as Exhibit P2. The witnesses guided court through the dishonoured cheques and their corresponding invoices.

The plaintiff 's evidence shows the following:

- Goods were supplied vide Invoice No: D/3747/05 dated 19th April 2005 in the total sum of shs 3,225,000/= . The supply was on the same day debited on the Ledger. A corresponding cheque dated 30th April 2005 was issued in the sum of shs 3,225,000/=
- On 23rd March 2005 the Ledger was debited with a supply in the sum of shs5,084,275/= made vide Invoice No: D/2898/05. A corresponding cheque dated 29th March 2005 was issued in the sum of shs 5,084,275/=.
- On 4th April 2005 the Ledger was debited with sales in the sum of shs 3,650,000/= made vide Invoice No:D/3233/05.A cheque dated 12th April 2005 was issued in the sum of shs 3,650,000/=
- On 25th April 2005 the Ledger was debited with sales in the sum of shs 3,760,000/= vide Invoice No:D/393/05. A cheque dated 26th May 2005 was issued in sum of shs 3,760,000/=
- There is also a cheque dated 26th March 2005 issued in the sum of shs 2,887,000/=.

Both witnesses explained that this cheque was not issued against an invoice but on account. The above five cheques were all dishonoured when presented for payment. Each was returned marked "Refer to Drawer". The unpaid cheques total to shs 18,606,275/=.

There is also Invoice No:D/4104/05 in the sum of shs 3,800,000/= for which no payment had been made yet. The sum total of shs 18,606,275/= plus the sum of shs 3,800,000 /= totals to shs 22,554,925/= claimed by the plaintiff. The Ledger Account as of 31st May shows a total debit of shs 86,937,200/= and a total credit of shs 64,382,275/= which gives an outstanding balance of shs 22,554,925/=. In absence of any defendant's evidence to contradict the above plaintiff's evidence , I find that the defendant company is indebted to the plaintiff in the sum of shs 22,554,925/=.

The remaining issue is whether the plaintiff is entitled to the remedies prayed for. The plaintiff claimed for shs22,554,925/= being the outstanding balance for assorted goods supplied to the defendant. Section 48(1) of the Sale of Goods Act provides that where upon a contract of sale ,the property in the goods has passed to the buyer and the buyer willingly neglects or refuses to pay for the goods, according to the laws of the contract , the seller may maintain an action against him or her for the price of the goods. The plaintiff's evidence shows that assorted goods were supplied to the defendant ,received and signed for by the defendant's representatives. The supplies were debited on the defendant's account with the plaintiff and payments made credited. The Ledger account indicated a credit balance of shs 22,554,925/=. The cheques issued in part payment of the above balance in the total sum of shs18,606,275/= had all been dishonoured. Notice of dishonour and demand for payment were made vide the plaintiff's lawyer's letter dated 20th June 2005-Exhibit P1.There was no payment . So the plaintiff is entitled to the claim for shs 22,554,925/= and the sum is awarded.

The plaintiff also claimed interest of 3% per month from the date of default till payment in full. Each of the Invoices provided "SUBJECT TO 3% INTEREST P.M ON OVERDUE ACCOUNT."

Section 26 of the Civil Procedure Act lays down the principle which governs court in awarding interest. It provides:

1) Where an agreement for the payment of interest is sought to be enforced and the court is of the opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for the payment of interest at such rate as it may think just.

2) Where and so far as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit , with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of decree to the date of payment or to earlier date as the court finds fit.

3) Where such a decree is silent with respect to the payment of further interest on the aggregate sum specified in subsection (2) from the date of the decree to the date of payment or other earlier date , the court shall be deemed to have ordered interest at 6% per year.’’

PW2 stated that the unsettled Invoices attracted a 3% interest per month which he computed at a total sum of shs 12,449,671/= as of 23rd January 2007. Each Invoice carried that provision on interest and it was signed by officials of both the plaintiff and the defendant Companies. Therefore that interest was agreed upon. However court can only enforce such contractual rate of interest if it finds it reasonable in the circumstances.

The Invoices show that terms of payment were cash on delivery (c.o.d). Deliveries were upon an invoice. Therefore each delivery from its date attracted a monthly interest at the rate of 3%.

This case was not defended. In Muhamed Vs Athman Shamte(1960) EA 1062, the High Court of Tanganyika (as it then was) held that whilst in a defended case the fact that the rate of interest is harsh and unconscionable should be pleaded, the

court could not accept the proposition that in an undefended suit the court must approve a harsh and unconscionable but contractual rate of interest, the court has an inherent equitable jurisdiction to re-open unconscionable bargains even when suits are undefended for one reason or another. In Uganda that court's discretion is provided for by section 26(1) of the Civil Procedure Act.

In the instant case interest at 3% per month can be translated as 36% per annum. Ms Jivram, counsel for the plaintiff, submitted that her client should be awarded that contractual rate. But no effort was made to show court that the rate was not harsh and unconscionable. The plaintiff failed to discharge that burden. In Muhamed Vs Shamte (supra) the trial magistrate adopted the yard stick of unconscionability laid down in the Moneylenders' Act and it was upheld by the High Court on appeal. The Moneylenders' Act , Cap 273, Section 12 provides that where it is found that the interest charged exceeds the rate of 24% per year the court shall presume that the interest is excessive and that the transaction is harsh and unconscionable. I am persuaded to use the same yardstick and I find that the interest rate of 3% per month was harsh and unconscionable. I substitute it with an interest rate of 1% per month (i.e.12% per annum).

The plaintiff has also sought for interest on the principal sum and on the 3% per monthly interest at 25% per annum from the date of filing till payment in full. To avoid a double award under the same head, the plaintiff is awarded interest at the rate of 1% per month on the sum of shs 22,554,925/= from the date of default till the date of filing this suit i.e. 3rd May 2006.

Counsel for the plaintiff argued that the plaintiff Company as a trading company would have put the money withheld into further business. She submitted that such money should attract a commercial interest which she stated is at 25% per annum. She therefore prayed for an award of interest at the Commercial rate of 25% per annum on the aggregate amount from the date of filing till payment in full. Section 26 (2) of the Civil Procedure Act gives Court the discretion to award interest at such rate as the Court deems reasonable to be paid on the principle sum adjudged from the date of the suit to the date of the decree, in addition to

any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable on the principle sum adjudged from the date of the decree, to the date of payment. The power conferred by this sub-section is to order interest upon the principal sum adjudged from the date of the decree but from that date to the date of payment it may be ordered to be paid upon the aggregate of principal and interest as at the date of the decree. See Yousuf Abdullah Gulemhusein Vs The French Somaliland Shipping Co Ltd (1959) EA 25. The plaintiff is, therefore, awarded interest on the principal sum of shs22,554,925/=; from the date of filing this suit to the date of this judgment at the Commercial rate of 25% per annum. The plaintiff is further awarded interest at the Court rate on the aggregate sum (i.e. principal sum plus interest as at the date of this judgment) from the date of this judgment until payment in full.

The plaintiff also prayed for general damages. PW2 stated in his evidence, that if payment had been made in time the money would have been re-invested and generated more income to the plaintiff company. Counsel for the plaintiff submitted that the plaintiff company had suffered loss of profits, inconveniences and attendant costs associated with the breach. She prayed for general damages at the bank interest on the principal amount as the said money would have accumulated interest at the bank rate had it been kept in the bank.

General damages for breach of contract are compensatory for the loss suffered and inconveniences caused to the aggrieved party. The intention is to put the plaintiff back in the same position as he would have been in had the contract been performed and not a better position. In my view the loss suffered by the plaintiff has already been compensated by the award of interest. The plaintiff is therefore awarded nominal damages of shs220,000/= for the inconveniences suffered.

The plaintiff prayed for costs of this suit. Costs are in the discretion of court and shall follow the event. See Section 27 of the Civil Procedure Act. I have no reason to order otherwise. The plaintiff is awarded costs of the suit.

In the final result judgment is entered in favour of the plaintiff in the following terms:-

- (a) Special damages of shs22,554,925/=
- (b) Interest at the rate of 1% per month on the above sum from the date of default till the date of filing this suit.
- (c) Interest on the special damages at the Commercial rate of 25% per annum from the date of filing this suit to the date of this judgment.
- (d) Interest on (a) and (b) at the court rate from the date of this judgment until payment in full.
- (e) General damages of shs220,000/=
- (f) Costs of this suit.

Hon. Mr. Justice Lameck N. Mukasa

Judge

26th March 2010