THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

COMMERCIAL COURT DIVISION

CIVIL SUIT NO. 424 OF 2010

SUPERIOR PROMOTIONS &
GENERAL SUPPLIERS LTD::PLAINTIFF

VERSUS

Z.K ADVERTISING (U) LIMITED::DEFENDANT

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

The plaintiff brought this action for breach of contract against the defendant claiming UGX 73,120,050/= being the balance of goods sold and delivered to the defendant by the plaintiff, general damages, interest and costs of the suit.

The background of the plaintiff's case is that in May 2009 it entered into an agreement with the defendant for the supply of assorted promotional items including T-shirts, Conference Pens, Baby Bags, Gift Bags and Branded Phone Stickers.

The defendant was required to effect payment thirty days from the date of delivery of the items. The plaintiff delivered the said items which the defendant accepted. However, four months after taking delivery of the 1000 Branded Phone Stickers the defendant rejected the items. The plaintiff contends that the rejection was in bad faith and intended to avoid payments of the actual sum owed to the plaintiff.

The defendant made several payments leaving an outstanding balance of UGX 73,120,050/=. When the plaintiff demanded the balance the defendant by a letter dated 23rd September 2010 admitted indebtedness to the plaintiff in the sum claimed.

The defendant filed a written statement of defence admitting receipt of assorted items from the plaintiff. The defendant also claimed that it verbally communicated its rejection of the 1000 branded phone stickers due to its poor quality within one month. The defendant also averred that an admission made by one of its officers was made without authority.

On the 17th of March 2011 before this suit could be scheduled and set down for hearing, counsel for the defendant filed a notice of withdrawal from the conduct of the suit on the ground that they had lost contact with the defendant. Efforts by the plaintiff to serve the defendant directly failed as they could not be found in their last known address. Upon application by the plaintiff's counsel, this court ordered service to be effected on the defendant by advertising the hearing notice in the New Vision News Paper.

When the suit came up for scheduling conference the defendant's counsel and its representative did not appear in spite of being served by substituted service. No explanation was furnished to court for their absence and on that basis this court ordered the scheduling conference to proceed ex parte.

During the scheduling conference two issues were framed. Firstly whether the plaintiff is entitled to the sum of UGX 73,120,050/= from the defendant as claimed in the plaint. Secondly, what other remedies are available to the plaintiff.

Issue 1: Whether the plaintiff is entitled to the sum of UGX 73,120,050 from the Defendant as claimed in the Plaint.

The plaintiff called one witness, its Finance and Administration Manager, Ms. Nalwanga Sunny, PW. She testified that some time in 2009 the defendant issued the plaintiff with Local Purchase Orders (LPOs) for assorted branded promotional items such as T-Shirts, Conference Pens, Baby Bags, Gift Bags and Branded Phone Stickers. The LPOs were admitted in evidence and marked Exhibits P3 (i) to P3 (x). She further testified that the plaintiff procured the promotional items and supplied them to the defendant. The delivery notes were admitted in evidence and marked Exhibits P2 (i) to P2 (xix). It was also PW's evidence that the plaintiff duly invoiced the defendant and the invoices were admitted in evidence and marked Exhibits P1 (i) to P1 (iv).

PW also testified that the amount owing on the entire transaction was a sum of UGX 157,814,050/= of which the defendant had paid a sum of UGX 84,694,000/= leaving an unpaid sum of UGX 73,120,050/=.

She maintained that the defendant's letter dated September 23rd 2010 admitted as Exhibit P10 reflected an accurate position of indebtedness of the defendant to the plaintiff. She stated that this was confirmed by Exhibit P11 which she had prepared and submitted to the defendant.

It was submitted by counsel for the plaintiff that the plaintiff had established the extent of indebtedness of the defendant and ought to be awarded the sum of UGX 73,120050/= as special damages on the basis of the LPOs, invoices and delivery notes on court record.

It is trite law that special damages must be specifically pleaded and strictly proved. The plaintiff pleaded the special damages as per paragraph 5 of the plaint dated 19th November 2010.

By September 23rd 2010, the sum of UGX 73,120,050/= was admitted as owed by the defendant to the plaintiff. This is contained in Exhibit P10 which was authored by the defendant's officer that the plaintiff had been dealing with in all the transactions. That sum of UGX 73,120,050/= ought to have been paid to the plaintiff not later than 30 days from the date of delivery as had been agreed.

This court is not convinced by the contention in the written statement of defence that the author of Exhibit P10 acted without authority because the background to that letter as per the documents on record are quite clear. On 13th September 2010, the defendant through its lawyers M/S Murangira & Co. Advocates wrote Exhibit P9 to the plaintiff's counsel. That letter was in response to a demand note/notice of intention to sue from counsel for the plaintiff dated 7th September 2010 (Exhibit P4) by which the defendant was informed that it was indebted to the plaintiff to the tune of Shs. 90,672,550/= and the same was demanded.

In the reply of 13th September 2010, that amount was disputed and a proposal for a meeting on 17th September 2010 to reconcile the figures and reach an agreed position was made by counsel for the defendant. The plaintiff's counsel replied on 16th September 2010 to confirm their client's attendance of the proposed meeting.

It appears that the meeting and other subsequent meetings took place and on 22nd September 2010 counsel for the plaintiff wrote Exhibit P 6 to counsel for the defendant referring to a meeting of that afternoon where it was agreed that:- Shs. 73,120,050/= was owed by the defendant to the plaintiff; the defendant would send to the plaintiff an acknowledgment of indebtedness in that sum in the morning of 23rd September 2010; and the defendant would prepare and deliver a payment proposal on the 24th day of September 2010.

On 23rd September 2010 the letter (Exhibit P10) was written by the defendant's Finance Manager upon receiving a statement from the plaintiff. He stated that the defendant agreed to the amount of Shs. 73, 120, 050/= indicated on the statement as the actual balance owed by the defendant to the plaintiff as at 22nd September 2010.

On the 30th September 2010, counsel for the plaintiff again wrote Exhibit P8 to counsel for the defendant to remind them that their client had not yet forwarded a payment schedule as had earlier been agreed. It appears a proposal was later forwarded to the plaintiff as gathered from the letter from the plaintiff's counsel to the defendant's counsel dated 27th October 2010 (Exhibit P7) by which the offer to pay 55,000,000/= in four installments commencing in November 2010 was rejected by the plaintiff. The issue of the stickers that were rejected was also raised in that

letter as having been done after retaining them for well over five months. This was construed to be in bad faith according to that letter.

It is noteworthy that there is an endorsement on that letter by the defendants counsel to the effect that: - *"I am of the view that you address the above issue direct to ZK (read defendant) since the proposals were direct from them. They may have responses to make as the issues touch them direct".*

As seen from the above background, the defendant undertook to send an acknowledgment of the sum that had been agreed upon in a meeting. The letter was to be sent on 23rd September 2010 the very day Exhibit P10 was also written. Could it have been a coincidence? Certainly not! This court cannot therefore be impressed by the contention that the Finance Manager who in most organizations would be a member of the top management team lacked authority in communicating what was already agreed in a meeting. I am quite sure that if that position had not been agreed upon counsel for the defendant who acknowledged receipt of that letter would have consulted their client and corrected that impression.

For the above reason, the allegation in the written statement of defence is rejected as no evidence was even led to prove it since this matter proceeded ex parte.

Similarly, this court finds that the alleged rejection of the 1000 Branded Phone Stickers as contained in the defendant's written statement of defence is no justification for failure to pay for the rest of the items that were accepted. First of all it is not clear when the verbal rejection of the items was communicated to the plaintiff. While the plaintiff has maintained that it was done four to five months after the goods were received and retained, the defendant claimed to have done so within one month.

Section 35 of the Sale of Goods Act Cap. 82 provides for acceptance of goods as follows:-

> *"**The buyer is deemed to have accepted the goods** when he or she intimates to the seller that he or she has accepted them or when the goods have been delivered to him or her, and he or she does any act in relation to them which is inconsistent with the ownership of the seller, or **when, after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he or she has rejected them**"* (emphasis added).

Both parties have not stated the specific date when the defendant communicated its rejection of the 1000 Branded Phone Stickers. However, I find the plaintiff's version that the defendant communicated its rejection after retaining the items for over five months more believable because this is stated in a letter admitted in evidence as Exhibit P7. That letter was written to the defendant's counsel after several meetings had been held with the defendant to try and sort out

the issue of outstanding payment amicably. I am of the view that if the plaintiff's counsel had not stated the correct position the defendant would have protested. There is no evidence of such protest.

To my mind the alleged rejection of the items was communicated after the lapse of reasonable time as an afterthought to try and defeat the plaintiff's claim. In view of the provisions of section 35 of the Sale of Goods Act quoted above, by that time the defendant was deemed to have accepted the goods. For that reason this court is not convinced that the defendant rejected the items within reasonable time and so that allegation is rejected.

Secondly, even if for the sake of argument this court were to believe that the 1,000 Branded Phone Stickers were rejected, the value would only be Shs. 1,500,000/= before VAT against the total claim of Shs. 73, 120, 050/=. This is because the Tax Invoice (Exhibit P1 (ii)) clearly indicated that the unit price was Shs. 1,500/=.

In the premises, I do not find any valid defence to the plaintiff's claim. The only problem this court could have had with the plaintiff's claim is in relation to Exhibit P3 (i) which is an LPO No. 60045 from the defendant to Super Station Inc. Limited and not to the plaintiff. However, upon critically scrutinizing all the documents, I discovered that the items on that LPO were actually delivered to the defendant vide several delivery notes and were duly received. For example Delivery Notes Nos. 570, 301 and 525 all quote that LPO (Exhibit P 3 (i)). That LPO also appears as item number two on the statement that was adduced in evidence as Exhibit P11.

It would therefore appear that the name on that LPO was written in error when it was meant to be the plaintiff company. It is also possible that both parties did not even realize it and that is why the items were delivered and accepted although the LPO was in a different name. For reason that the items ordered under that LPO were delivered and received, I will allow the claim that relate to it.

In conclusion of this issue, I am satisfied that the plaintiff has proved its claims on a balance of probabilities. Accordingly, its claim of Shs. 73, 120, 050/= is allowed as special damages.

Issue 2: What other remedies are available to the plaintiff?

The plaintiff also claimed for general damages, interest and costs of the suit.

(a) General damages

Counsel for the plaintiff submitted based on the evidence adduced that the plaintiff expected the last of its payments in July 2010 but the monies have been withheld since then. According to him the plaintiff is a commercial entity engaged in business activity for profit and as such a compensatory award of general damages should ordinarily take into account commercial loss.

Paragraph 812 of Harlsbury's Laws of England Vol 12(1) provides that general damages are losses, usually but not exclusively non-pecuniary which are not capable of precise quantification in monetary terms. In the case of **Stroms v Hutchinson [1905] A.C 515** Lord Macnaghten held that general damages are as such as the law would presume to be the natural or probable consequence of the act complained of on account of the fact that they are its immediate, direct and proximate result.

In the case of **Thunderbolt Technical Services Ltd v Apedu & Another HCT – 00 – CC – CS – 340 – 2009** Kiryabwire J. observed that general damages were intended to make good to the sufferer as far as money can do so, the losses he or she has suffered as the natural result of the wrong done to him.

Be that as it may, PW did not testify as to the losses the plaintiff had suffered as the natural result of the wrong done to it by the defendant. According to **Paragraph 813 of Harlsbury's Laws of England Vol. 12(1)** a plaintiff is entitled to nominal damages where inter alia his rights have been infringed, but he has not in fact sustained any actual damage from the infringement, or he fails to prove that he has.

I find that the plaintiff has failed to prove that it suffered any actual damages due to the defendant's actions. I therefore award it the sum of UGX 5,000,000/= as nominal damages.

(b) Interest

The plaintiff prayed for interest on the special damages at a rate of 25% per annum from 10th July 2010 until payment in full. Counsel for the plaintiff submitted that the rate claimed for was not onerous as it was keeping with the current market interest rates for commercial loans.

The general principle for the award of interest was stated to be premised on the fact that the defendant has taken and used the plaintiff's money and benefited. Consequently the defendant ought to compensate the plaintiff for the money. See **Sietco v Noble Builders SCCA No. 31 of 1995.**

From 10th July 2010 to date the defendant has kept the plaintiff's money and benefited. If it had been paid the plaintiff would have put the money to use in its business and earned a profit. Instead the defendant chose to hold on to the plaintiff's money without justification.

In the circumstances, I award the plaintiff interest on the special damages at a rate of 25% per annum from 10th July 2010 till payment in full.

(c) Costs of the suit.

I find the prayer for costs justifiable because costs must follow the event. Since the plaintiff is the successful party, it is awarded costs of this suit.

In the result, judgment is entered for the plaintiff against the defendant for orders that:-

(a) UGX Shs. 73, 120, 050/= be paid by the defendant as special damages

(b) Interest of 25% p.a is awarded on (a) above from 10th July 2010 till payment in full.

(c) UGX 5,000,000/= be paid by the defendant as nominal damages.

(d) Costs of the suit be paid by the defendant.

I so order.

Dated this 21st day of December 2012.

Hellen Obura
JUDGE

Judgment delivered in chambers at 3.00 pm in the presence of Mr. Gideon Barinda who was holding brief for Mr. Anthony Wabwire for the plaintiff whose officials were absent.

JUDGE
21/12/12