

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 92 OF 2007**

CITY PAYDAY ADVANCES COMPANY LTD)..... PLAINTIFF

VERSUS

ATTORNEY GENERAL OF UGANDA)..... DEFENDANT

BEFORE JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff is a limited liability company carrying out the business of money lending under the Money Lenders Act. It filed this action against the Attorney General in his capacity as the legal representative of government under article 119 of the Constitution of the Republic of Uganda and section 10 of the Government Proceedings Act Cap 77 Laws of Uganda.

The plaintiffs claim against the defendant is for breach of agreement by the Uganda Human Rights Commission of the Republic of Uganda and for recovery of **Uganda shillings 56,819,000/=** with interest thereon at a rate of 10% per annum from the date of breach till payment in full, general damages and costs of the suit. The facts alleged in the plaint are that some time on the 25th day of March 2003 the Uganda Human Rights Commission and the plaintiff made an agreement for a staff loan facility where the plaintiff would lend money to the staff of the Commission and the Commission undertook to make monthly recoveries from its staff and transmit the money to the plaintiff.

The plaintiff alleges that pursuant to the agreement with Uganda Human Rights Commission and its undertaking the plaintiff advanced loans to the recommended staff of the Commission in fulfilment of its undertaking and the Commission made

some remittances for some months. However some remittances and deductions for repayment of the loan were not made. As a result of the commission's non performance, failure and/or refusal to make agreed deductions from the salaries of the Commission staff, the Commission remains indebted to the plaintiffs in the sums claimed in the plaint amounting to **Uganda shillings 56,819,000/=** accruing from six members of staff. Consequently the plaintiff contends that the commission's non performance, failure and or refusal were in breach of agreement for which the defendant is vicariously liable for the sums due and owing and which remain unpaid. It also claims a contractual interest of 10% per month. The plaintiff sought direct recovery from the human rights commission but the human rights commission expressed unwillingness to admit responsibility. Consequently the plaintiff served a statutory notice of intention to sue on the defendant on the 18th of October, 2006 but the payments due to the plaintiff have remained unpaid and no interest thereon have been paid. The plaintiffs seeks a sum of **Uganda shillings 56,819,000/=** and an order that the defendant pays the plaintiffs the agreed contractual interest on the principal sum at 10% per month from the date of default till payment in full. The plaintiff further seeks general damages and costs of the suit.

The Attorney General's WSD denies the claim and further avers that the plaintiff will be put to strict proof of the claim. Without prejudice the Attorney General contends that the Commission did not at any one time fail to perform its part of the contract. The written statement of defence pleads that the plaint is bad in law and does not disclose a cause of action. Furthermore that the contract between the parties contravenes the Money Lenders Act cap 273 and is illegal.

The suit was originally heard by Hon. Justice Lameck Mukasa when the Attorney General's representative raised a preliminary objection on two issues namely:

1. Whether the plaint discloses a cause of action and or is bad in law?
2. Where the contract in issue is illegal under the Money Lenders Act?

The learned judge ruled that the plaint disclosed a cause of action against the Attorney General. On the question of whether the contract in issue is illegal

under the Money Lenders Act, the learned judge made no ruling on the issue and advised the parties to consider whether to address the issue as framed at the hearing or to revisit the issue framed and properly and freshly address the issue in their main submissions. Consequently the learned judge proceeded to conduct a scheduling conference and learned counsels for both parties did file a joint scheduling memorandum. In the scheduling memorandum the following facts are agreed.

The plaintiff is a duly licensed money lender. In the course of her business as money lender, the plaintiff lent money to the employees and staff of the Uganda Human Rights Commission. The plaintiff acted on the strength of a letter dated 25th of March, 2003 signed by the Commission wherein the commission agreed to make all necessary recoveries on a monthly basis from the borrower's salaries. The plaintiff granted loans to the specified persons/staff of the Uganda Human Rights Commission, namely:

- a) Veronica Eragu Bichetero, Commissioner
- b) Byaruhanga Paul, driver
- c) Babirye Faith, Office Attendant
- d) Agnes Evans Kitui, Personal Secretary
- e) Odida Felix, Gate Keeper
- f) Namukwaya Oliver, Office Attendant.

At the very beginning of the repayment process, Uganda Human Rights Commission pursuant to the undertaking made monthly remittances from the salaries of the borrowers and then stopped before the full repayment of the loans facility. The plaintiffs demanded payment by the Human Rights Commission but it did not honour the demand. The plaintiff has to date not recovered the repayments under claim.

The plaintiff made a demand for payment from the beneficiaries, The Human Rights Commission, and the defendant but no payment has ever been made. In addition to the agreed facts learned counsel agreed to all the documents exhibited.

The plaintiff was represented by Counsel Tony Arinaitwe while the Attorney General was represented by Martin Mwabutsya State Attorney.

On 28 November 2011 when the matter was mentioned before me, learned counsel for the Attorney General was absent while the plaintiff's counsel was present. The plaintiff's counsel prayed that the suit is determined on the basis of documents that had been admitted in the joint scheduling memorandum. He prayed that he is granted leave to proceed ex parte. The court ruled that the suit could proceed under order 17 rules 4 of the Civil Procedure Rules. I further directed that since the plaintiff was not going to call witnesses and would only rely on the document and exhibits admitted in the joint scheduling memorandum and the agreed facts and issues raised therein, the plaintiff will file written submissions and serve the Attorney General who will be entitled to file his submissions in reply. This is because both parties are deemed to have adduced evidence on the basis of the agreed facts and documents.

The plaintiff's written submissions:

Whether or not the Uganda Human Rights Commission contracted with the plaintiff?

Learned plaintiff's counsel submitted that under section 57 of the Evidence Act cap 6 no fact need to be proved in any proceedings where parties agree to admit them in writing. It is an agreed fact that in the joint scheduling memorandum the plaintiff acted on the strength of the letter dated 25th of March 2003 signed by the Commission agreed to make all necessary recoveries on a monthly basis from the borrower's salaries. The letter was exhibited as exhibit P1 and reads in part: *"We do hereby confirm that we shall make all necessary recoveries on monthly basis in accordance with the schedule..."*

By the said admission the defendant agreed that it contracted with the plaintiff. Furthermore the Uganda Human Rights Commission acted on the promise by making some deductions and transmitted some monthly remittances from its staff to the plaintiff as evidenced by exhibits P 15 and P 16. Learned counsel contended that the subsequent conduct of the defendants Uganda Human Rights

Commission confirmed the contract. He relied on the case of **Whitworth Street Estates (Manchester) Ltd versus James Miller and Partners and another (1969) 2 All ER 210** at page 212 holding of Lord Denning. He concluded that the admission on court record on the said exhibit coupled with the acts of the Commission in performing its promise is proof of the existence of a contract between the Commission and the plaintiff.

The second issue was **whether if so, the commission performed its duties as contracted?**

On the second issue learned counsel submitted that on the strength of the commissions undertaking/guarantee the plaintiff granted staff loans as exhibited in exhibit P2 to exhibit P 13. In the joint scheduling memorandum it is admitted that at the very beginning of the repayment process, the Uganda Human Rights Commission pursuant to the undertaking made remittances of money to the plaintiff and then stopped before the full payment of the loan facility. Consequently a reading of exhibits D 15 and exhibit P 16 leads to the conclusion that the Uganda Human Rights Commission only performed its contracted duties in part. They were liable in law for non-performance. Counsel reiterated submissions that exhibit P1 was a guarantee by the Commission to make monthly recoveries or deductions in the payment of staff loans extended by the plaintiff to the staff of the Human Rights Commission. The statement of account exhibited show that said that recoveries were not made and to date the plaintiff's loan facilities has never been fully paid. The Commission did not perform its duties as contracted.

Issue number 3: **Whether the contract in issue is illegal under the Money Lenders Act, Cap 273?**

Learned counsel submitted that this issue was settled as a preliminary issue. The Attorney General filed written submissions on the issue on 19 April 2010 while the plaintiff filed its written submissions on the 18th of May 2010. Learned counsel contended that the defendant wittingly or unwittingly abandoned making submissions on this issue. Consequently he contended that the defendant had

abandoned the same. Additionally there are no particulars of the illegality in the written statement of defence for the plaintiff to be able to address the court on the same. Learned counsel prayed that the court should treat this issue as having been abandoned.

Issue number 4: **What are the remedies available to the parties?**

Learned counsel for the plaintiff submitted that the prayers in the plaint be granted. Prayers number 1 and 2 are for specific performance of the guarantee/undertaking by the Uganda Human Rights Commission. The commission failed and/refused perform its undertaking to make monthly recoveries from the staff salaries and as a consequence the plaintiff suffered pecuniary loss as of 31st of December 2011 which amounted to **Uganda shillings 275,092,787/=**. The pecuniary loss is evidenced by the statements of account exhibited by consent of the defendant and according to the letter filed in court on 25 January 2012. He contended that the true meaning of a guarantee is that if the borrower does not pay the guarantors would have to pay. He relied on the case of **Hyundai Heavy industries Company Ltd versus Papadopoulos and others (1980) 2 All ER 29 at pages 36, 40 and 42 and 47 – 48**. The Commission guaranteed to make monthly deductions but as submitted failed in the performance of their promise. It therefore followed that the defendant is liable to pay the total sum of **Uganda shillings 275,092,787/=** outstanding by 31 December 2011. Additionally the amounts to be paid with the contractual interest of 10% per month till full payment.

On the principles governing award of damages for breach of contract learned counsel relied on the case of **Bank of Uganda versus Fred William Masaba and others Civil Appeal number 3 of 1998 per Oder JSC** where it was held that for damages to be awarded it must have been reasonably foreseeable as arising naturally from a breach of contract. Consequently learned counsel concluded that the damages sought above were foreseeable and arise naturally from the breach complained of against the Commission.

As far as general damages are concerned the plaintiff did not tender in evidence in support thereof and accordingly abandoned the prayers.

Finally learned counsel for the plaintiff submitted that under section 27 of the Civil Procedure Act the plaintiff prays for the award of costs.

Submissions of the Attorney General in reply

Issue 1

Whether or not the Uganda Human Rights Commission contracted with the plaintiff

Learned counsel for the defendant submitted that the plaintiff's contention is that by the letter dated 25th of March 2003 the Commission agreed to make all necessary recoveries on a monthly basis from the borrowers and as such the commission contracted with the plaintiff. The plaintiff argues that the commission further made some deductions which were transmitted to the plaintiff. For ease of reference the contents of the letter are reproduced as follows: "*Loan Facility: thank you for accepting to extend a loan facility to our staff. We do hereby confirm that we shall make all the necessary recoveries on monthly basis in accordance with your schedule.*" Learned counsel contended that the question arises from the above letter as to what amounts to a contract. He contended that the letter quoted above does not amount to a contract.

Firstly the pleadings do not show that the plaintiff lent money to the Uganda Human Rights Commission and therefore there was no contract of such a nature pleaded anywhere on the record.

Learned counsel further referred to section 60 of the Evidence Act cap 6 which provides that the contents of a document may be proved either by primary or secondary evidence. Secondly under section 61 thereof primary evidence means the document itself produced for inspection of court. Under section 103 of the Evidence Act the burden of proof is on the plaintiff to prove to court that there is a valid agreement/contract that binds Uganda Human Rights Commission or that Annexure P1 is an agreement in which the Commission accepted to guarantee the

loans in question. He contended that the plaintiff has not discharged its burden and has not produced any contract.

In any case the plaintiff lent money to employees of the Uganda Human Rights Commission whose names are contained in paragraphs 4 (c) of the plaint. He contended that it implied that the Uganda Human Rights Commission is a guarantor. The plaintiff did not sue it as a guarantor but rather sued for breach of agreement to recover. Consequently exhibit P1 is merely a letter of comfort for purposes of giving assurance of an intention to maintain financial support that the debtor's financial affairs will be conducted so as to remain able to satisfy its commitments to the moneylender. Learned counsel referred to the case of **Kleinwort Benson Ltd versus Malaysia Mining Corporation B HD [1989] 1 WLR 379** where it was held that such a document on its true construction cannot be intended to be legally binding. Learned counsel contended that exhibit P1 is not legally binding and does not create any legal obligations. He submitted that the parties had no intention to enter into negotiations because there is no agreement, no promise of which offer has been duly accepted, nor was there any consideration and even then, any contract should have been cleared by the Attorney General in accordance with article 119 (5) of the Constitution the Republic of Uganda 1995 (which did not occur in the plaintiffs case.)

Issues number 2 and 3.

Learned counsel for the Attorney General contended that there was no contract and therefore there was no need to argue issue number 3.

On issue number 4 the defendant prayed that the suit is dismissed with costs to the defendant and that the plaintiff is not entitled to any of the prayers in the plaint.

In rejoinder the plaintiff submitted as follows:

As far as exhibit P1 is concerned he referred to the submissions of the learned counsel for the defendant that Uganda Human Rights Commission is a guarantor. In the case of **Shell Uganda limited versus Capt Naeema Chandry HCCS 179 of**

2004 Hon Justice Bamwine held that a guarantee is a promise by the guarantor for the performance of the contractual obligations by the debtor. He contended that the guarantee is an agreement. However the gist of the plaintiff's suit is breach of promise to make monthly deductions in favour of the plaintiff. Exhibit P1 is therefore a guarantee agreement. Learned counsel relied on the case of **Whitworth Estates versus Miller (1969) 2 ALL ER 210** for the proposition that where express terms of the contract are insufficient, the court gets aids from the conduct of the parties. He submitted that in this case there is no doubt that the conduct of the parties is in favour of the plaintiff. He submitted that the letter in issue exhibit P1 explicitly, notes that there were negotiations as deduced from the opening sentence: "... Thank you for accepting..." He contended that this meant that there was a request which was accepted. This is followed by the undertaking/guarantee as deduced from the second sentence:

"We do hereby confirm that we shall make all the necessary recoveries on monthly basis..."

The plaintiff rightfully acted on the Commissioner's promise; and indeed the Commission acted on its promise by making deductions in favour of the plaintiff as shown in exhibit P 15 and 16. It is an agreed fact in the joint scheduling memorandum that Uganda Human Rights Commission guaranteed the repayment by way of promising to make monthly repayments. The loan agreements were executed and approved by the senior staff of Uganda Human Rights Commission. Exhibits P1, P 15 and P 16 are sufficient evidence that there was an agreement between the plaintiff and Uganda Human Rights Commission. The agreement was partly performed by the Uganda Human Rights Commission. Learned counsel contended that failure to make full recoveries as promised constituted breach of agreement/guarantee. Such breach is actionable against the defendant.

The submission that the contract has to be cleared by the Attorney General in terms of article 119 (5) of the Constitution is inapplicable because clearance of the contract is an internal mechanism to which the indoor management rule applies. Learned counsel relied on the case of **Protection (Uganda) verses Nkumba University HCCS 604 of 2004** the judgement of honourable Justice

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Bamwine for a statement on the indoor management rule. He contended that the non-clearance of the contract is not a defence against the guarantee agreement.

Judgment

I have considered the above written submissions filed on behalf of the parties by learned counsels and exhibits referred to. I have also read the authorities attached to the submissions.

The first issue is whether the Uganda Human Rights Commission contracted with the plaintiff. The agreed facts are that the plaintiff lent money to the employees/staff of Uganda Human Rights Commission. The plaintiff made a prior written commitment with the Commission by which the plaintiff would offer staff loans facility to approved persons of the Commission and in return the Commission agreed to make monthly recoveries by way of deductions from each individual debtor's salary and transmit it to the plaintiff. Exhibit P1, a letter dated 25th of March 2003 is an agreed document and the agreed fact thereof is that the Human Rights Commission confirmed the undertaking to make monthly recoveries in favour of the plaintiff. The letter is addressed to the Manager City Payday Advances Company Ltd by the Secretary to the Uganda Human Rights Commission. It reads as follows:

"LOAN FACILITY

Thank you for accepting to extend a loan facility to our staff. We do hereby confirm that we shall make all the necessary recoveries on monthly basis in accordance with your schedule.

Yours faithfully

S.P. Osamai Ochieng

For: SECRETARY TO THE COMMISSION"

This letter Exhibit P1 can be interpreted on the basis of its plain and ordinary language. The first sentence thanks the plaintiff's managing director for accepting to extend a loan facility to the staff of the Human Rights Commission. The first

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inference of fact is that the loan is being extended to the staff of the Human Rights Commission. Secondly, the Commission undertook to make all the necessary recoveries on a monthly basis in accordance with the schedule. It follows that the commitment of the Commission is to make recoveries from the salary its member of staff that had been advanced loans. The plaintiff opted not to call witnesses and relied on agreed facts and documents prove its case. The question that comes to mind is whether the staff advanced monies are still in the employment of Uganda Human Rights Commission. Before concluding this question of fact and any inference that may be drawn from it, it would be necessary to look at the agreement between the various members of staff and the plaintiff.

The names of the staff who borrowed money from the plaintiff have already been set out above. The agreements concerning the loan for each individual were admitted as exhibits P2 – P7. These agreements are standard and it will suffice to quote from exhibit P2 which concerned the agreement for the advancement of money to staff member Faith Babirye.

The agreement is entitled as between the plaintiff and U.H.R.C which abbreviation represents Uganda Human Rights Commission and is dated 5th of September 2003. Paragraph 2 of the agreement provides as follows:

"Whereas the borrower has applied for a loan facility from the company of Uganda shillings 800,000/= and whereas the company has agreed to grant the facility on the following terms and conditions.

The agreement provides inter alia that the loan shall be for a period of six months with interest at the rate of 10% per month. The loan was to be paid within a period of six months from the date of execution of the agreement. In case the principal sum is not paid within the period agreed upon interest is computed on the outstanding balance of the principal sum advanced to the borrower at the agreed rate. Paragraph 7 of the agreement provides that the borrower authorises the employer to deduct the agreed amount from his/her salary and pay it directly to the plaintiff company. Paragraph 8 particularly is crucial in that it provides that

the borrower has issued post dated cheques covering the loan amount and authorises the lender to present the said cheques on the due date and the borrower warrants that there will be sufficient funds on his/her salary account when each of the said cheques is presented for payment. In case of dishonour of cheques the borrower undertook to be liable on the said cheques both in civil and criminal proceedings. Furthermore paragraph 9 of the agreement provides that the borrower has given the company security by post dated cheque number 000007 for shillings 266,700/= and cheque number 000008, cheque number 000009, all of Nile bank for shillings 800,000/=. Paragraph 11 provides that in the event of default for a period of 30 days by the borrower in the payment of interest or of any Instalment for the principal falling due under the agreement the company would suspend and/or recall the loan and exercise its rights under this agreement against any security. Paragraph 14 provides that the company/plaintiff has the right to effect distress or execution levied against the salary of the borrower offered as security without obtaining a court order.

The agreement exhibit P3 concerns money advanced to Felix Odida. The terms of the agreement are the same as in exhibit P2. Felix was advanced 520,000/= but no post dated cheques were issued in this case. Exhibit P4 concerns money advanced to Paul Byaruhanga who was advanced Uganda shillings 1,600,000/=. It has no post dated cheque and the terms of the agreement are the same as the previous exhibits. Exhibit P5 concerns money advanced to Commissioner Veronica Eragu Bichetero and it has three post dated cheques of Diamond Trust Bank. She was advanced Uganda shillings 60,000,000/=. The terms of the agreement are the same as in the previous exhibits.

Exhibit P6 concerns a loan advanced to Personal Secretary Agnes Kitui and it refers to 3 post dated cheques drawn on Nile bank. She was advanced Uganda shillings 4,000,000/= and the terms of agreement are the same. The three post dated cheques amount to Uganda shillings 3,900,000/=. Exhibit P7 concerns a loan advanced to Namukwaya, an office attendant and has no post dated cheques. She was advanced 1,450,000/=. The terms of the agreement are the same as that of other members of staff.

The borrowers all executed an additional document entitled Form II, *confirmation form*. It shows that the borrower acknowledged receipt of the loan advanced and agreed to authorise the employer Uganda Human Rights Commission to deduct money from his/her salary and pay to the plaintiff a particular amount per month which amount is specified therein. The borrower also authorised the employer to pay out the final salary or any terminal benefits due to the borrower directly to the plaintiff in the event of termination of employment or death before full payment of the loan. Finally the borrower understood that the arrangement would remain in force until the full amount is fully recovered from his or her salary to the plaintiff. Even though the document is on the letterhead of the plaintiff, form 2 is addressed to the Secretary Uganda Human Rights Commission. Page 2 of form 2 contains a paragraph entitled "Employers Confirmation of Receipt of Deduction (instalments) and reads as follows:

"We confirm receipt of these instructions and that based on the employers authorisation, we shall deduct the agreed upon monthly salary instalments and pay it directly to City Pay Day Advances Company Ltd (Lender) with effect from the month of – 2003. We also confirm that will not accept any change to these instructions without prior written confirmation from the company until the full loan amount is repaid.

Ministry/Company/Institution/Organisation...

Signature of officer in charge of salary payment (Authorised Signatory)...

It is not denied that Uganda Human Rights Commission signified the consent of the employer's confirmation in writing on form 2. It is therefore an admitted fact that form 2 was endorsed by Uganda Human Rights Commission for all of the borrowers specified in the claim. These were admitted in evidence as exhibits P8, P9, P10, P 11, P12 and P13.

The documentary evidence which has been exhibited so far indicates that salary loans were advanced to staff of Uganda Human Rights Commission. Each staff member signed an individual undertaking to the plaintiff. It is specifically provided for that the staff member's salary will become liable to deductions by the

employer for payment of the plaintiff. The role of the employer is to give assurance in two things. Firstly that it would deduct monthly instalment payments from the borrower's salary and remit it to the plaintiff. Secondly, the employer undertook to pay the final salary or any terminal benefits to the plaintiff if the loan remained unpaid by the time of termination of the employment of the borrower either by death or any other form of termination. The plaintiff's advocates in their letter to the Secretary Uganda Human Rights Commission dated 19th of July 2006 which is a demand notice is explicit about the roles of the parties from paragraph 2 it provides as follows:

"Sometime about 25 March 2003, your Commission and our client made an agreement over a staff loan facility wherein our client, a licensed moneylender would lend money to your staff upon your understanding that you would make monthly recoveries and transmit the monetary repayments to our client. However, to the detriment of our client, you acted in breach of your undertaking and consequently some deductions/repayments have not been made.

Our client hereby contends that by your non performance, failure and/or refusal to make the deduction your hereafter named staff have remained indebted to our client in the sums respectively stated and our client holds your commission jointly liable.

NAMES	AMOUNT OWING AND DUE AS OF 30 TH JUNE, 2006
1. VERONICA ERAGU BICHETERO	Ug. Sh. 22,800.000=
2. BYARUHANGA PAUL A	Ug. Sh. 4,022,188=
3. BABIRYE FAITH	Ug. Sh. 2,238,750=
4. AGNES EVANS KITUI	Ug. Sh. 18,850,000=
5. ODIDA FELIX	Ug. Sh. 6,108,305=
6. NAMUKWAYA OLIVAR	Ug. Sh. 30,259,865=
TOTAL	Ug. Sh. 84,368,865=

In view of the above, we do hereby demand that the Commission immediately makes performance of the said undertaking by making the recoveries of amounts owing and/or makes the outstanding payments plus our legal/professional fees now at Uganda shillings 5,905,760/= to our law Chambers in any case within 10 days from the date hereof lest we shall without any further notice and take our clients instructions to commence court proceedings for recovery of the said sums, interest thereon, general damages and costs antecedent to such suit (s)."

The demand letter gives the role of the Commission as that of making necessary recoveries from the salaries of the borrowers. Further examination of the loan agreements and confirmation forms which were exhibited also give the primary obligation of repayment as that of the borrower. This is because in every case money is deducted from the borrower's salary. From the state of pleadings some conclusions can be made.

Paragraph 4 (c) clearly indicates that it was due to the Commissions' non-performance, failure and/or refusal to make the agreed deductions that the borrowers have remained indebted to the plaintiff in the sum specified in that paragraph. Therefore the question is whether the Commission should be made liable for the money or for the deduction. If it is liable for the money, it is obliged to pay from its own coffers. If it is liable for the deduction, its duty is to make the necessary deductions to recover the money from its staff. The order for the defendant to pay the borrowed money and interest thereon as prayed in the plaint is ambivalent in that it is capable of both meanings stated above.

To my understanding the question of liability of the defendant is a narrower question as to whether the defendant can be held liable to make the necessary deductions from its staff. In other words is the defendant liable to make the necessary deductions from the salary of the staff? If at all the staff are still employed by the defendants Uganda Human Rights Commission, then the matter is easily resolved. However, if the borrower/s has/have already left the services of the Uganda Human Rights Commission, were his/her/their terminal benefits paid? If that is the case the question of whether the defendant is liable to pay takes on a

different meaning. The meaning is clearly whether the Uganda Human Rights Commission is obliged to reimburse the plaintiff for the amounts borrowed by its staff on account of failure to make the necessary deductions and hence making it difficult for the plaintiff to recover its monies. The Attorney General's argument is that there is no contract between the parties. He asserts that the plaintiff's position is that there is a guarantee agreement between Uganda Human Rights Commission and the plaintiff. His contention is that the plaint as framed does not seek to enforce a guarantee agreement. This submission borders on an assertion that the plaint discloses no cause of action. On 25 February 2012 honourable Mr Justice Lameck Mukasa who initially presided over this case ruled on the Attorney General's preliminary objection as to whether the plaint discloses a cause of action or is bad in law. Secondly he dealt with whether the contract in issue is illegal under the Moneylender's Act. On the issue of whether the plaint discloses a cause of action the learned judge states at page 3 of his ruling:

"In effect the plaint discloses the plaintiff's right to repayment, and the right has been violated and the commission is liable. The only issue would be whether the Attorney General is the proper defendant in the circumstances."

At page 4 the learned judge concludes as follows:

"Therefore the Attorney General is in the circumstances the right party to stand in for the Uganda Human Rights Commission. I accordingly find that the plaintiff has in the plaint disclosed a cause of action against the Attorney General.

The learned judge made no ruling on the second issue which is whether the contract is illegal under the Moneylender's Act. By finding that the plaint discloses a cause of action in that it discloses the plaintiff's right to repayment which right had been violated by the Commission and the Commission is liable the learned judge partially determine the question as to the case of the plaintiff. The agreed facts do not dispute the fact that the Commission undertook to make monthly

deductions from the salary of the borrowers, who are the staff of the Uganda Human Rights Commission.

None of the parties called any witnesses. The written submissions of the plaintiff and the defendant are based on agreed facts and documents. After signing the joint scheduling memorandum, the plaintiff sought to include additional facts. On the 5 December 2011 the plaintiff's counsel applied to include the various statements of account of the borrowers. The application was made by letter dated 5 of December 2011 and addressed to the Deputy Registrar of the Commercial Court Division High Court of Uganda and copied to the Attorney General. On 25 January 2012 the Attorney General's replied by letter dated 25th of January 2012 and filed on the court record on 27 January 2012. In the letter the Attorney General writes that the defendant has no objection to the statements of account being tendered in. The statements were attached to the written submissions of the plaintiff's counsel and relied upon. The accounts of the borrowers are entitled by the name of the borrower and they would be no need to refer to them by exhibit numbers.

The accounts of Babirye Faith show that it was opened on 5 September 2003. The amount disbursed is 800,000/=. Two payments were made thereafter namely a sum of Uganda shillings 260,000/= in October 2003 and a sum of 135,000/= in November 2003. Thereafter no payments were made and by December 2011 the total amount outstanding was 4,738,500/=.

The accounts of Odida Felix show that it was opened on 4 September 2003. The loan amount disbursed is 520,000/=. Two instalment amounts were credited namely 125,000/= in March 2005 and shillings 60,000/= in April 2005. By December 2011 the outstanding amount was Uganda shillings 14,628,000/=.

As far as the accounts of Byaruhanga Paul is concerned, it was opened on 14 August 2003. 1,600,000/= was disbursed on 14 August 2003. Exhibit P 10 which is the confirmation form shows that he signed on 13 August 2003 authorising Uganda Human Rights Commission to pay his final salary or terminal benefits and monthly salary to the plaintiff. Three instalment payments were made. 250,000/=

was paid on 17 October 2003. Secondly 900,000/= was paid on 23 December 2003. Finally on 31 March 2005 100,000/= was paid. No further instalments were paid. By December 2011 the outstanding amount was 8,918,000/=.

Concerning Bichetero Veronica Erogu's accounts, the same was opened on 13 August 2003. The loan amount disbursed was 16,000,000/= dated 13th of August 2003. 600,000/= was paid in cash on 30 October 2003. On 30 November 2003 600,000/= was paid in cash. On the 30th of February 2004, a sum of 800,000/= was paid in cash. 100,000/= was paid on 30 April 2004. Again 1 million was paid on the 30th of May 2004. On 17 January 2005 a sum of 3,000,000/= is reflected as paid but this was reversed on 17 February 2005 because the cheque bounced. Again another bounced cheque is reflected on 12 April 2005. Thereafter there is no activity on the account. By December 2011 the outstanding amount was Uganda shillings 222,596,827/=.

The account of Agnes Evans Kitui shows that on September 2003 she was disbursed 2,600,000/= by cheque. No payments were ever made thereafter. By December 2011 the outstanding balance was 28,600,000/=.

As far as the account of Namukwaya Olivar is concerned, she was disbursed 1,450,000/=. No instalment payments were ever made on the loan amount. By December 2011 the outstanding amount was 19,474,950/=.

The letter of the Attorney General dated 25th of January 2012 and received on court record on 27 January 2012 not objecting to the accounts of the borrowers being exhibited in court makes a surprising statement that they are accounts pertaining to the "former employees of Uganda Human Rights Commission". In the joint scheduling memorandum, both parties refer to the borrowers as employees and staff of the Uganda Human Rights Commission. Consequently the words "former employees", is surprising because the agreed facts refer to employees without indicating whether they had left the employment of UHRC or not. I have also looked at the pleadings of the parties and have established from the plaint that no suggestion is made whatsoever that the borrowers are former employees of Uganda Human Rights Commission. The written statement of

defence also makes no averment of such fact. The letter of the Attorney General is not evidence in the suit and would be disregarded on question of the employment status of the borrowers.

Halsbury's laws of England fourth edition volume 20 paragraph 101 defines a guarantee as:

“... an accessory contract by which the promisor undertakes to be answerable to the promisee for the debt, default or miscarriage of another person, whose primary liability to the promisee must exist or be contemplated.

Additionally paragraph 102 of Halsbury's laws of England provides that an agreement will not be a guarantee unless there exists or is contemplated some other, principal, obligation of some other, principal, Obligor, to which the guarantee is to be ancillary and subsidiary. According to Geraldine Mary Andrew's Law of Guarantees second edition 1995 page 3, at paragraph 1.4 a contract of guarantee in its true sense:

“...Is a contract whereby the surety or guarantor promises the creditor to be responsible, in addition to the principal, for the due performance by the principal of his existing or future obligations to the creditor, if the principal fails to perform those obligations.”

Liability which is guaranteed may consist of performance of some other obligation other than the payment of a debt. According to Geraldine (supra) the essential distinguishing feature of the contract of guarantee is that the liability of the guarantor is always ancillary or secondary to that of the principal, who remains primarily liable to the creditor. He notes that the additional liability on the guarantor only operates unless and until the principal has failed to perform his obligations (Geraldine supra page 4).

Even if there was a guarantee, if the word “guarantee” is used loosely, the nature and kind of guarantee has to be discerned from the words of the contract. Every case depends on the construction of the actual words in which the undertaking to

the Creditor is expressed. According to **Lord Diplock in Moschi v Lep Air Services Ltd and another [1972] 2 All ER 393** at page 402:

“Whether any particular contractual promise is to be classified as a guarantee so as to attract all or any of the legal consequences to which I have referred depends on the words in which the parties have expressed the promise. Even the use of the word ‘guarantee’ is not in itself conclusive. It is often used loosely in ordinary commercial dealings to mean an ordinary warranty. It is sometimes used to misdescribe what is in law a contract of indemnity and not of guarantee. Where the contractual promise can be correctly classified as a guarantee it is open to the parties expressly to exclude or vary any of their mutual rights or obligations which would otherwise result from its being classifiable as a guarantee. Every case must depend on the true construction of the actual words in which the promise is expressed”

In this case the words used by the Commission in its letter of 25th March 2003 are:

Thank you for accepting to extend a loan facility to our staff. We do hereby confirm that we shall make all the necessary recoveries on monthly basis in accordance with your schedule

In this case, there is no contract of guarantee as such. This is because the Uganda Human Rights Commission did not promise to become liable upon the default or miscarriage of its members of staff in the repayment of their loans. What happened is that Uganda Human Rights Commission undertook to make deductions from the salary of its members of staff who had obtained what is loosely termed as salary loans from the plaintiff.

In those circumstances, the first issue of whether the Uganda Human Rights Commission contracted with the plaintiff is answered in the affirmative only to the extent that it does not answer the question of the nature of the contract. The nature of the contract was not a contract of guarantee.

The second issue is **whether the Commission performed its duties as contracted**. As a question of fact, it is clear from the statements of account admitted by consent of the parties that the Commission did not fulfil its part of the bargain in that it was not remitting the salary of members of staff who had obtained loans from the plaintiff according to their own undertaking.

Issue number 3 is whether the contract in issue is illegal under the Money Lenders Act cap 273.

Issue number three was abandoned by both parties and will not be addressed in this judgement.

Issue number four. **What are the remedies available to the parties?**

The contention of the plaintiff is that the Uganda Human Rights Commission failed or refused to perform its bargain to make monthly recoveries from the staff. Consequently learned counsel for the plaintiff submits that by 31 December 2011 the plaintiff suffered pecuniary loss up to the tune of **Uganda shillings 275,092,787/=**. Learned counsel relied on the statements of account exhibited by the plaintiff with the consent of the defendant. The plaintiff further submitted that the commission had guaranteed to make monthly deductions but did not live up to their promise.

I have already found that there was no contract of guarantee as defined in Halsbury's laws of England which had been set out above. Exhibit P1 being a letter from the Uganda Human Rights Commission addressed to the plaintiff's manager dated 25th of March 2003 and entitled "loan facility" on which the plaintiff principally relies upon states as follows: *"we do hereby confirm that we shall make all the necessary recoveries on monthly basis in accordance with your schedule."* It is explicit that the duty of the Uganda Human Rights Commission is to make all the necessary recoveries from the salaries of the borrowers. Secondly the amount of recovery per month depended on each borrower because each borrower had a different schedule and amount to pay. Thirdly, each borrower had a period within which to have cleared the loan according to the schedule.

Whereas learned counsel for the plaintiff premised his claim on a guarantee contract, the real question is whether in the circumstances of this case the Human Rights Commission is liable on the promise to make monthly deductions. The plaintiff's suit however is for recovery of special and general damages. There is no prayer for specific performance of the contract. In other words the plaintiff holds the defendant liable for any loss it has incurred due to non-performance of its obligation to make the necessary deductions from its staff.

It is my conclusion after due evaluation of the admitted facts and documents that the way the suit has been conducted is unsatisfactory. The first point to make is that the defendant has been sued in a representative capacity and stands in for the Uganda Human Rights Commission. Uganda Human Rights Commission was merely an employer of the borrowers who had borrowed money from the plaintiff. None of the borrowers are defendants to the suit. A reading of the various agreements signed by the borrowers with the plaintiff by which the plaintiff lent money to the borrowers places the primary obligation in the repayment of the loan on the borrowers. Secondly, in some of the cases the money was secured by post dated cheques. It is the borrower who authorised the employer to make the monthly deductions from their salary. The employer acted in the circumstances as an agent and on the written instructions of the employee/borrower. Uganda Human Rights Commission could not make an undertaking to deduct part of the salary of its staff without the written consent of the members of staff who would be affected. Because the primary obligation to service the loan was that of the borrower, it was absolutely necessary to sue the borrowers.

Furthermore, the plaintiff did not mitigate its losses in the circumstances of the case. Each of the agreements signed with the Borrowers paragraph 11 thereof provides as follows:

"If the borrower defaults for a period of 30 days in the payment of any interest or of any instalment for principal falling due under this agreement the company will suspend and/or recall the loan and the company shall exercise its rights under this agreement against any security."

Firstly, because no witnesses were called, the agreed facts and documents are insufficient on some very pertinent questions. The first question is why the plaintiff did not exercise its contractual right under clause 11 of each of the agreements with the borrowers. The second question is, where cheques were issued, why the plaintiff did not cash the cheque? Thirdly, where it is shown from the statement of account that a cheque bounced, why the plaintiff did not exercise its rights under clause 8 of the agreement? I further set out clause 8 of the agreement which reads as follows:

"The borrower, who has issued post dated cheques covering the loan amount hereby authorises the lender to present the said cheques on the due date and the borrower hereby warrants that there will be sufficient funds on his/her salary account when each of the said cheques is presented for payment and in the case of dishonour of any of the cheques, then the borrower hereby undertakes to be liable on the said cheques both in the civil and criminal liability."

No evidence has **been** adduced showing what happened to the persons who issued post dated cheques. However the relevant question is why if the cheques were presented and bounced the borrower/s is/were not prosecuted or subjected to civil liability in a court of law. Secondly why the cheques were not presented at all for recovery of the sums due? The plaintiff did not mitigate its losses by its failure to take action immediately under clause 11 upon the default of the borrowers. This is of material relevance on the question of damages. I must emphasise that in each of the agreements the loan period was for a limited duration of time of about 6 months only.

Under exhibit P2, Faith Babirye, the borrower, authorised Uganda Human Rights Commission to deduct a sum of 133,400/= per month from a salary. This is found in exhibit P8. Exhibit P8 is the only document endorsed by Uganda Human Rights Commission. However in exhibit P2, the duration or of the loan was only 6 months. Read together with exhibit P2, exhibit P8 gave the undertaking of the employer as the deduction of salary at a rate of 133,400/= shillings per month from the salary of the borrower for a period of only six months. It also indicated

that this was with effect from October 2003 to March 2004. This was exactly a period of six months. It was an agreement between the employee and the employer. It assumed that the employee had the right to his/her own money and employer needed authority of the employee to make the necessary deductions from his/her salary. The employer also had the obligation to pay out any final salary or terminal benefits in case the employment was terminated before payment of the loan. The obligation of the employer in this particular case is Uganda shillings 800,400. As far as the other clauses are concerned there is no evidence that the employment of the borrower was terminated.

As far as exhibit P3 is concerned the borrower is Felix Odida. He was advanced 520,000 Uganda shillings for a period of three months only. This gentleman who was employed as a gatekeeper by Uganda Human Rights Commission signed an agreement with the commission authorising the commission to deduct the sum of Uganda shillings 173,400/= from his salary for a period of three months commencing October 2003 to December 2003. Again there is no evidence that the services of the gatekeeper were terminated. The obligation to pay three months salary amounts to Uganda shillings 520,200/=.

Exhibit P4 concerns a salary loan advanced to Paul Byaruhanga. The loan amount is Uganda shillings 1,600,000/= and the duration was six months. Exhibit P 10 which is addressed to the Secretary Uganda Human Rights Commission and endorsed by the borrower is also endorsed by Uganda Human Rights Commission. The borrower authorised the Commission to deduct a sum of Uganda shillings 266,700/= from his salary per month from the period September 2003 February 2004. This is exactly a period of six months. There is no evidence whatsoever that the services of Paul Byaruhanga who is a driver with the commission has been terminated. The monthly instalment of six months amounts to Uganda shillings 1,600,200/=.

Exhibit P5 concerns Veronica Eragu Bichetero. She was loaned an amount of Uganda shillings 16 million and the loan period was a period of six months. Particularly it is pertinent to read clause 5 which applies to all the other agreements. Clause 5 of the agreement reads as follows:

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"The Borrower shall repay the loan plus interest within six months from the date hereof."

Exhibit P 11 is the confirmation form addressed to the Secretary Uganda Human Rights Commission and endorsed by the borrower. It specifies that Uganda Human Rights Commission is authorised to deduct from the salary of the borrower Uganda shillings 2,666,700/= with effect from 30th of September 2003 to 28th of February 2004. This is a period of exactly 6 months. The obligation of the Commission was to deduct 6 month's salary at the agreed rate which amounts to Uganda shillings 16,000,200/=. In this particular case the borrower endorsed three cheques of Uganda shillings 5,333,400/= each as additional security. There is no evidence as to what happened to these cheques.

Exhibit P6 relates to the loan advanced to Agnes Kitui. How particular loan agreement is dated 15th of July 2003. She applied for a loan of Uganda shillings 2,500,000/= but was advanced Uganda shillings 4,000,000/= payable within six months. Exhibit P 12 is the confirmation form addressed to the secretary Uganda Human Rights Commission endorsed by the borrower in which she authorised her employer to pay out a monthly salary at the rate of Uganda shillings 666,600/= to the plaintiff with effect from August 2003 to January 2004. There is no evidence that her services with the Uganda Human Rights Commission were terminated. The total amount she authorised the Uganda Human Rights Commission to deduct is Uganda shillings 3,999,600/=.

Finally exhibit P7 concerns the loan advanced to Namukwaya Olivar. She was advanced a sum of Uganda shillings 1,450,000 for a period of five months. The loan was supposed to be repaid with interest within a period of five months from the date of execution. In the confirmation form addressed to the Secretary of Uganda Human Rights Commission she authorised them to deduct a sum of Uganda shillings 290,000/= from salary with effect from June 2003 to October 2003. This is a period of five months. The amount authorised for the Uganda Human Rights Commission to deduct amounts to Uganda shillings 1,450,000/=.

I have already concluded that the borrowers authorised Uganda Human Rights Commission to deduct monthly specified amounts of money from the account for a fixed period of time. Each of the amounts and a specified period are set out above. The undertaking of Uganda Human Rights Commission to the plaintiff has to be read in conformity with the consent of the borrowers whose property in the salary was going to be affected in the deductions. Consequently Uganda Human Rights Commission's obligations must be confined to the periods in which it had been authorised by its employee to deduct specified amounts of money. It is also a fact that this deduction is made on behalf of the borrower and not on behalf of the Uganda Human Rights Commission.

The plaintiff's case is further complicated by failure to adduce evidence as to how much was deducted so far from the salaries of each of the borrowers. This is because it is an agreed fact in the joint scheduling memorandum that some deductions were made. The joint agreed fact to this effect is as follows: "*the Uganda Human Rights Commission pursuant to the undertaking made remittances of money to the plaintiff and then stopped before the full repayment of the loans facility.*"

It may be supposed that the court is supposed to glean these facts from the various statements which were admitted in evidence through correspondence of the parties. All the statements do not indicate who made the credits which appear in the various statements. I have already set out the credit amounts as contained in the various statements of account above. I would however summarise the payments made on the account of each of the borrowers and as reflected in the statements of account.

Babirye Faith account was credited with two payments namely a sum of Uganda shillings 260,000/= in October 2003 and a sum of 135,000/= in November 2003. This totals to 395,000/=

Odida Felix account was credited with two instalment namely 125,000/= in March 2005 and shillings 60,000/= in April 2005. This totals to 185,000/=.

Byaruhanga Paul account was credited with three instalment payments namely shs 250,000/= was paid on 17 October 2003 and shs 900,000/= was paid on 23 December 2003. Finally on 31 March 2005 100,000/= was paid. It amounts to 1,250,000/=.

Bichetero Veronica Erogu's account was credited with 600,000/= in cash on 30 October 2003, another 600,000/= on 30 November 2003. On the 30th of February 2004, a sum of 800,000/= was paid in cash. 100,000/= was paid on 30 April 2004. Again 1 million was paid on the 30th of May 2004. On 17 January 2005 a sum of 3,000,000/= is reflected as paid but this was reversed on 17 February 2005 because the cheque bounced. Again another bounced cheque is reflected on 12 April 2005.

The account of Agnes Evans Kitui was not credited at all as no payments were ever made.

The account of Namukwaya Olivar was not credited at all with any instalment payments.

The information does not show that any of the instalment payments were made by Uganda Human Rights Commission. The deductions were being made on behalf of the salaried members of staff and not on behalf of the employer. In other words, it remained open to the principal salaried employee to pay the money as agreed with the plaintiff. Last but not least no evidence has been adduced as to whether the members of staff of Uganda Human Rights Commission are still employed by the Commission and earning salary. The court cannot conclude that they were paid their final/terminal benefits by the commission. Consequently the court cannot conclude that the Commission is in breach of its undertaking to pay the final salary/terminal benefits of the various employees who obtained loans from the plaintiff. In those circumstances, it is my conclusion that the Commission is only liable for breach of its undertaking to deduct specified amounts from the salary of the employees. However because the primary obligation to pay the money rests with the borrower, the Commission

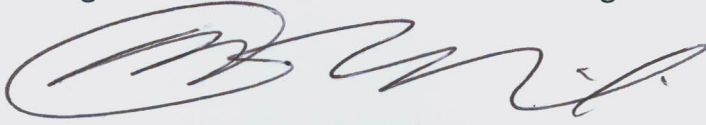
cannot be held liable for the specified amounts and interest accumulated thereon.

In the circumstances the plaintiff will only be awarded general damages. It should be open for the plaintiff to pursue the various members of staff. In assessing general damages, court will take into account the failure by the plaintiff to mitigate its losses by properly trying to recover its money upon default within a period of 30 days. Had that been done, the colossal sums of money which the plaintiff is claiming could not have arisen? Secondly the court takes into account the fact that the Commission's obligations to deduct specified amounts from the salaries of the borrowers. In other words the Commission was not going to dig into its coffers to pay the plaintiff. Failure to adduce evidence coupled with failure to sue the principal borrower's is a fault of the plaintiff. Nevertheless, the salaries of the employees were under the control of the Uganda Human Rights Commission. Secondly, the employees had authorised it explicitly make the necessary deductions to meet their obligations to the plaintiff. The borrowers expected to be paid less the money they had authorised the employer to deduct on a monthly basis from their salary. Consequently, it can be held that failure to deduct the relevant money from the salary of its employees was a serious impediment to the arrangement made. It was an assurance to the plaintiff that its monies would be deducted and paid direct from the salaries of the borrowers. This was how the borrowers were primarily going to meet their obligations to the plaintiff. A salary loan requires participation of the employer and an undertaking to the creditor to remit money in fulfilment of the contract under which the loan is secured. Such an assurance is necessary for members of staff to access loans from the banks. Failure to remit the salary as agreed by the members of staff would put creditors in jeopardy of losing their investment.

In view of the seriousness of the undertaking by the employer, the Uganda Human Rights Commission will pay the plaintiff for the period specified in each of the contracts of its employees and as undertaken less money already remitted as the quantum of general damages. It may recover the sums from the various employees who took out loans specified in the suit. The plaintiff is awarded

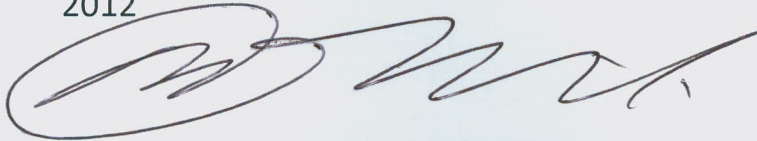
interest at 21% per annum from the date of judgment till payment in full. The defendant will pay the costs of the suit.

Ruling to be delivered on the 24th of August 2012 at 9.30

A handwritten signature in dark ink, consisting of a large, stylized initial 'C' followed by several loops and a final flourish.

Hon. Mr. Justice Christopher Madrama

Ruling signed and sent to the Deputy Registrar for delivery on the 24th of August 2012

A handwritten signature in dark ink, identical to the one above, consisting of a large, stylized initial 'C' followed by several loops and a final flourish.

Hon. Mr. Justice Christopher Madrama