THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO 116 OF 2010

KONARK INVESTMENTS (U) LTD} .....PLAINTIFF
VERSUS
STANBIC BANK UGANDA LIMITED} .....DEFENDANT

BEFORE HONOURABLE MR JUSTICE CHRISTOPHER MADRAMA

JUDGMENT

The plaintiff is a limited liability company incorporated and carrying on business in Uganda. It brought this action against the defendant bank for declaratory orders that the freezing of its account number 0140028293401 with the defendant and by the defendant was unlawful, an order to allow the plaintiff operate its account, damages for inconvenience, interest on all pecuniary awards and costs of the suit.

At the hearing the plaintiff was represented by Ivan Balyejjusa of Messrs Balyejjusa & Company Advocates while the defendant was represented by Nicholas Ecimu of Messrs Sebalu & Lule Advocates. On 7 April 2011 the parties agreed that this particular suit will be tried as a test is under order 39 rules 1 of the Civil Procedure Rules and proceedings in the case of **Mars Tours and Travel versus Stanbic Bank Uganda Limited** were stayed pending the outcome of this suit.
In the joint scheduling memorandum the following issues were agreed for trial namely:

1. Whether there was a breach of the merchant agreement by any of the parties?
2. Whether there was any breach of the banker-Customer relationship by any of the parties?
3. Where there was commission of fraud by the plaintiff and its servants/agents; which fraud the plaintiff was complicit to?
4. Whether the plaintiff is entitled to the reliefs sought?
5. Whether the defendant is entitled to judgement on the counter claim?
6. What are the remedies available in the circumstances?

The plaintiff called one witness, Mr. James Semango (PW 1) its Managing Director. The defendant on the other hand called seven witnesses namely

1. Mr. Brian Tahinduka, merchant sales analyst (DW 1)
2. Mr. Tonny Manina, forensics investigator (DW 2)
3. Mr. Paul Mbuga, trainee, Sebalu and Lule advocates (DW 3)
4. Mr. Victor Othieno the reconciliation officer, CFC Stanbic Bank Kenya and Regional Card Centre (DW 4)
5. Mr. Moses Segawa, partner, Sebalu And Lule Advocates (DW 5)
6. Mr. Cosmas Okeyo, Business Relations Manager (DW 6)
7. Mr. Kosea Byarugaba, Branch Manager, Stanbic City Branch (DW 7)

After leading evidence on their respective cases both Counsels agreed to file written submissions.

Written Submissions of Counsels

The plaintiff's case is that it executed a Merchant Agreement with the Defendant to accept Master card, Visa and Debit cards as a form of payment by its customers. A point of sale machine (POS) was installed by the defendant on the plaintiff's premises and was used by plaintiff's customers to effect payment for the plaintiff's services. Plaintiff contends that without justification, the Defendant blocked and/or froze the plaintiff's account which had Ugshs.43, 498,778/- (Uganda shillings Forty Three million Four hundred Ninety Eight thousand Seven Hundred Seventy Eight only) to the credit of the plaintiff.

The defendant's case on the other hand is that a point of sale (POS) device, the property of the defendant, was installed at the plaintiff's premises. The POS devise formed the principal authorisation tool for the transactions and by which the plaintiff keyed in authorisation codes obtained by telephone from the defendant to process transactions. On May 31, 2009 the defendant froze all operations on the plaintiff's merchant account after the plaintiff committed acts of fraud and dishonesty in discharging its duties under the agreement. The defendant does not dispute the fact that at the time of suspending the defendants account, Uganda shillings 43,498,778/= was lying on the account to the credit of the plaintiff. It is the defendant's contention that the plaintiff acted in breach of the contractual conditions and warranties and other duties owed under the agreement and in general the context of the relationship between a banker and customer.

Written submissions on issue No. 1

Whether there was breach of the Merchant agreement by the parties

Learned Counsel for the plaintiff relied on the definition of the word "breach" in Osborn's Concise Law Dictionary 8th Edition as "*the invasion of a right, or the violation of or omission to perform a legal 'duty'* and contended that it was sufficient to establish whether there was a breach by examining the terms and conditions under the Merchant Agreement. Learned Counsel submitted that the plaintiff executed its duties according to the Merchant Agreement and as a result, its account was credited. On the other hand, it is not disputed that the Defendant blocked the plaintiff's account, impounded the point of sale machine, later debited the plaintiff's account, continued to charge monthly rental fees for the point of sale machine that had already been impounded without any formal communication to the plaintiff. He contended that there was no evidence to show that any particular act of the plaintiff was in breach of the Merchant Agreement. The acts of the Defendant are contrary to the provisions of the merchant agreement in that: The defendant did not give any written notice of fraud by the plaintiff as required by clause 20 of the Merchant agreement and failure to give notice meant that it was a misconception to allege that the plaintiff was in breach of the merchant agreement. Secondly counsel contended that the merchant agreement was never even terminated and/or cancelled by the Defendant. On the other hand the plaintiff made several attempts to establish the reasons why the Defendant had blocked their account but there was no response by the Defendant until after two (2) months.

The plaintiff's case is that investigations conducted by DW2- Mr. Tonny Manina were baseless and contrary to the agreement and a bid to justify the actions of DW2 when he claimed that card holders had complained through their respective banks. DW2 could not disclose or identify any name of a complainant card holder. No issuing bank through which the alleged card holders had complained was identified. Investigations were based on what others people had informed DW2. The plaintiff furnished all details of its several transactions to the defendant and DW2 in particular. Counsel contended that the merchant agreement only authorised investigations where there were claims by card holders as provided for under clause 8:12 of the Merchant agreement. Counsel concluded that there no justification for the alleged investigations. In that there was no claim by any card holder in respect of the transactions done by the plaintiff. That the testimony of DW2 on cross examination is that his investigations concerned suspected fraud which he to

the police. Counsel contended that there was no valid explanation as to why the police could not proceed with the case.

The witness also testified that the bank debited the plaintiff's account in pursuance of clause 13:1:14 of the merchant agreement which provides that the *"The Bank may debit the merchant's account with "the total amount of POS (point of Sale) batches of transaction where the merchant has failed to provide properly reconstructed documentation within seven* (7) *days of being requested to do so by the Bank'* On page 9 of the scheduling memorandum is a letter forwarding reconstructed documents to the attention of DW2-Tonily Manina. The same included details of accommodation, names and the receipts for their respective clients and the motor vehicles that were used. The plaintiff furnished this information immediately upon request indicating the names of their clients, their countries/cities and the services rendered to them as shown at page 40 of the scheduling memorandum. This information was given on the 5th June 2009. However on page 64 (a) of the scheduling bundle, it is clear that action was taken on the 9th May 2011 after a period of two (2) years and after the plaintiff had commenced court proceedings against the Defendant and the inquiry was made by counsel for the defendant.

The Defendant had also procured a court order that barred all transactions on the account of the plaintiff among other merchants on the 10th July 2009 it was to expire after six (6) months but the defendant went ahead and debited the plaintiff's account in breach of court order. Counsel submitted that thought the order was irregular, the act of the Defendant was deliberate and an exhibition of bad faith. DW2- Tonny Manina stated in cross examination that the account of the plaintiff was blocked for purposes of debiting. Much as the defendant contends that the account was debited in answer to charge backs, the plaintiff's account statement does not reflect this. The money that was lying on the account simply disappeared in *"thin air':* No indication is made as to which card holder it was refunded. Counsel for the plaintiff contended that the blocking and debiting of the plaintiff's account was done in breach of the merchant agreement. Reconstructed documentation with regard to their services to the card holders was provided. There was absolutely no communication from the Defendant bank and/or at all to the plaintiff after receipt of the documentation. He noted that this is reflected in the attempt by counsel for the defendant to conduct inquiries into the documentation earlier provided by the plaintiff. That such inquiries were of no evidential value because the Defendant had even earlier on blocked the account. The circumstances under which the Defendant had a right to debit were not

present. The Defendant impounded the point of sale machine from the plaintiff's premises but continued to charge the monthly rental fees of Ugshs.25, OOO (Uganda shillings Twenty five thousand only) according to the bank statement admitted in evidence and these actions are glaring breaches of the Merchant agreement.

Counsel noted that the testimony of DW2 that the plaintiff had withdrawn the point of Sale Machine from its premises was a deliberate falsehood as the devices were installed by the Defendant and operated on signals and were monitored full time by the bank that could disable them as indicated in the testimony of DWI Brian Tahinduka. It was impossible for it to be used in any other place without detection by the bank. It is the DW2 who actually withdrew the POS contrary to the merchant Agreement whose procedure was not followed as indicated in the testimonies of DW2 and DW6 and DW6 Okeya Cosmas who stated that DW2 Manina Tonny had taken away the point of sale machine from the plaintiff's premises. It is the plaintiff's submission that the Defendant breached the merchant agreement.

On the other hand the defendants counsel relied on Black's Law Dictionary (eighth edition) to define a breach of contract as a "violation of a contractual obligation by failing to perform one's own promise by repudiating it or interfering with another party's performance". The material breach is defined as "a breach of contract that is significant enough to permit the aggrieved party to elect to treat the breach as total (and) as excusing the party from further performance and affording it the right to sue for damages".

The agreement (exhibit D1) laid down the principles upon which the relationship between the two parties would be governed. Counsel submitted that the plaintiff committed several cumulative acts of material breach of the terms and conditions of the agreement and it entitled the defendant to terminate the relationship and suspend any activities/transactions on the plaintiff's account. As far as the provisions of the merchant agreement were concerned, counsel submitted as follows:

Clause 6.6 provides that the authorisation granted by the defendant for the transaction to take place merely indicates that the card holder has sufficient funds for the transaction at the time. Authorisation does not warrant the validity or authenticity of the card, that the person presenting the card is

authorised to do so or that the payment by the issuer of the value of the authorised transaction will not be subject to a charge back by the defendant to the merchant.

Counsel submitted the defendant reserved the right to query the validity and authenticity of transactions and effect charge backs where necessary. The testimony of DW1 Mr. Tahinduka and DW 2 Manina show that this is a step the defendant took after receiving a significant amount of charge back requests that questioned the validity of transactions for which the plaintiff had been paid a commission. Accordingly, the bank did not act arbitrarily and did so upon a reasonable suspicion, in good faith and within the terms of the agreement.

As far as clause 7.4 of the agreement is concerned, counsel submitted that it requires the merchant to provide information regarding the transaction as the bank may reasonably require from time to time. Clauses 8.8 at 8.9 further stipulated the merchant's obligation in regard to the retention and supply of the transaction slips. As far as that is concerned, evidence of DW 2 Manina is clear in this respect. When the POS device was disabled by the bank, there was no evidence of transaction slips readily available as required by the agreement. The transaction slips were later submitted by the plaintiff. The merchant fraud forensic investigation report (exhibit D2) prepared by DW 2 Mr. Manina reveals on page 23 of the joint trial bundle, that the plaintiffs Secretary failed to make available all the transaction slips and details of the goods/services the company had rendered to the respective card holders. Further, the slips were retained beyond 180 days and when submitted, a number were found to be concocted.

As far as clause 7.9 provides that the cardholder must compulsorily be present at the time of processing and must also verify the transaction by key entering his valid pin into the POS device. Clause 8.1 provides that the merchant has an obligation to accept only valid and current cards presented by the cardholder's for payment. Clause 8.5 provides that the merchant has an obligation to obtain the signature of the cardholder at all times on transaction slips except for mail order transactions. Clause 17.6 provides that the merchant shall not present transactions to the bank to be processed that it knows or should have known are fraudulent or unauthorised by the cardholder.

Counsel submitted that breach of the requirements of these clauses informed the defendant's decision to commence investigations against the plaintiff and suspend operations on its account. The testimony of DW 2 Mr Manina and DW 4 Mr Othieno revealed that chargeback requests were issued to the defendant on the ground that the alleged individuals who transacted business were not even in Uganda at the time of the alleged transactions.

Counsel further submitted that DW1 testified that POS devices to not require a personal identification number (Pin) when credit cards are being used. PIN numbers are only used for debit card transactions and all transactions effected by the plaintiff company were credit card transactions. With respect to the plaintiffs obligation to only accept valid cards, counsel submitted that the fact that transactions were processed in respect of persons who were not even in Uganda is proof that the plaintiff knowingly accepted cloned cards.

Clause 8.11 imposes an obligation on the merchant to allow a representative of the banker conduct a physical inspection of the merchant’s business premises at any convenient time. Clause 8.12 further imposes an obligation on the merchant to allow a representative of the bank to conduct investigations in handling claims of cardholders. Learned counsel for the defendant submitted that the bank, through the office of DW 2 Manina, exercised this power. It must also be noted that DW 2 was met with evidence that informed his suspicions on the occasions that he visited the plaintiff’s premises.

The merchant fraud forensic investigation report prepared by DW 2 reveals, on page 23 of the joint trial bundle that the plaintiff’s secretary, by her own admission, had never attended to any tourists under Kornak Investments. Further, the defendant was empowered by the agreement to carry out investigations in handling claims of cardholders.

Clause 9.2 provided that the bank may debit the merchants account at any time with the amount of invalid sales vouchers and transaction slips. Clause 9.5 further provides that even after crediting the merchants account, the bank is not deprived of its right to cancel payment of invalid transaction slips by debiting the merchants bank account with the amount of any invalid transaction slips and this is what the defendant did after being notified of a fraudulent scheme that was being perpetrated at the time by several agencies.

Additionally learned counsel submitted that the defendant acted out of prudence and upon reasonable suspicion and in good faith.

Under clause 9.3, a number of warranties were assumed by the merchant upon presentation of the transaction slips: information thereon is correct, merchant has actually supplied the goods and services stated, bank to be indemnified in the event of any liability suffered, merchants due compliance with the agreement, transaction is not illegal. Counsel submitted that the evidence of DW 1 Tahinduka and DW 2 Manina, and consequent chargeback requests, indicates that these warranties were breached.

Clause 9.6 provides that the bank would be entitled to delay or withhold payment of any merchant deposits in instances where the deposit exceeds the bank's internal and confidential risk detection parameters. Counsel submitted that DW 2 Mr Manina testified that the defendant did so following the global notification of the international credit card syndicate. Additionally, and as shall be examined later, the defendant had a duty to mitigate loss and not render dishonest assistance to what was an ongoing fraudulent scheme at the time.

Clause 10.1 provides that the transactions and would be invalid if the signature that appears on the transaction slip is obviously different from the signature appearing on the card; a transaction slips differs from the copy handed to the cardholder, the merchant fails to adhere to the terms of the agreement relative to the transaction and is subject to a chargeback in terms of the MasterCard International and/or Visa International Rules. Counsel submitted that the defendant's action is justified within this clause, notably the qualification for a chargeback under the MasterCard and Visa International Rules.

Clause 13 affords the bank the authority to debit the merchants account with the total amount of POS batches of transactions where the merchant has failed to provide properly reconstructed documentation within seven days of being requested to by the bank. Counsel submitted that the report and testimony of DW 2 Mr Manina indicated that circumstances arose justifying the banks action under this head. There was a significant delay on the plaintiff’s part in providing reconstructed documentation.

Counsel submitted that from the detailed analysis of the agreement above and the totality of the oral testimony provided the court by DW 1 Mr Tahinduka, DW 2 Mr Manina and DW 4 Othieno, the plaintiff committed several cumulative acts of breach and fraud that entitled the defendant to terminate the relationship. Action taken by the defendant were informed by powers and obligations granted to it by the agreement. Counsel prayed that the court finds that the defendant did not commit any breach of the agreement and abided by it at all times. On the other hand counsel prayed that I find that the plaintiff committed several cumulative and material breaches of the agreement that entitled the defendant to terminate the relationship.

As far as the plaintiffs submissions are concerned as far as notice to the plaintiff is concerned, Counsel contended that the evidence of DW 2 and DW 6 and DW 7 revealed that the plaintiff's officials were informed that the account had been flagged and subsequently frozen because it was being used to perpetuate fraud. The plaintiff's officials were repeatedly informed that because of the incidence of fraud, Stanbic Bank City Branch, which housed the plaintiffs account, no longer possessed the mandate to address the plaintiff's queries which mandate lay with the offices of the Legal/Company Secretary and the Manager, Forensic Services of the defendant. It explains why Stanbic Bank City Branch was unable to acknowledge receipt of the plaintiff's letters or attend to any other queries.

As far as lack of written notice of the dispute from the defendant is concerned learned counsel for the defendant replied that the requirement for written notice of the dispute was rendered moot by fraud the plaintiff committed and/or was complicit to. Under clauses 20 read together with clause 17.5 the defendant reserves/reserved the right to terminate the agreement summarily or at any time on grounds of fraud. The defendant had an obligation (1) not to ignore facts placing it on the enquiry (2) to mitigate loss and (3) not to render dishonest assistance to ongoing fraud. On the failure to reveal the identity of aggrieved cardholders, counsel for the defendant Counsel submitted that the recollection of the complainant cardholder or bank is not a relevant factor in the context of four-part debit and credit card transactions. He relied on the testimony of DW 1 Tahinduka and DW 4 who explained, the central clearinghouse in the global credit and debit card program the plaintiff was

signatory to by virtue of agreement with Visa and MasterCard International. This relationship is governed by the Visa and MasterCard rules. Under the rules, Visa and MasterCard act as the conduit between the complainant cardholder's and the banks in whatever jurisdiction and the issuing bank in Uganda, Stanbic bank. Under the automated prime electronic system the identity of the complainant cardholder to the defendant is immaterial and not a ground to impeach the integrity of DW 2's report and testimony. At all times, Visa and MasterCard act as a go-between for all parties.

Last but not least in response to the plaintiff's contention that the POS devise could not have been moved without the notice of the bank, counsel referred to the testimony of DW1 who demonstrated in court that it was a portable small devise and could operate where a wireless network had been set up.

In rejoinder plaintiff's counsel reiterated his submissions that the defendant impounded the POS device from the plaintiff, failed to identify any cardholder who allegedly disputed any transaction, and also failed to identify any issuing bank through which disputes are alleged to have been made by cardholders. Identification of the cardholders alleged to have been defrauded and the issuing bank is a material fact that cannot be overlooked. The gist of this matter involves transactions the defendant alleges to have been disputed by the cardholders. Failure to identify or disclose such information is ample proof that such are fictitious claims by the defendant. Further that there is no proof of any payment made to any cardholder as a chargeback by the defendant.

Counsel contended that the defendant had not discharged the burden of proof under section 101 (1) and 103 of the Evidence Act. Counsel submitted that the court cannot believe the existence of any cardholder who disputed transactions done by the plaintiff when the defendant could not identify any. It is not proved all by the defendant that this existed. The defendant only submits that it is not material. This leaves no basis for the defendant to allege the transactions done by the plaintiff were invalid. All transactions done by the plaintiff at the point-of-sale machine were proved by the respective cardholders and this is evidenced by the fact that the receipts bore the signatures of the respective cardholders as reflected at pages 37 – 39 of the scheduling bundle. None of these signatures were proved and/or alleged to be forged and/or not genuine by the defendant. It is not enough proof that the

cardholders were present at the time of these transactions and indeed service was rendered to them by the plaintiff in accordance with merchant agreement and none of them disputed any transaction with the plaintiff. There is no basis for the defendant to allege on the behalf of cardholders that they were defrauded. The defendant therefore totally failed to discharge its burden to prove existence of any disputing cardholders.

Written submissions on issue 2

Whether there was a breach of the Banker – Customer relationship between the parties

Counsel for the plaintiff submitted that the relationship of a banker/customer was a contractual one as per Grace Patrick Tumwine-Mukubwa-*Essays in African Banking Law and Practice at Page 40*, PAGET'S LAW OF BANKING 11th Edition page 112 and the statement of Atkin LJ in **Joachimson vs. Swiss Bank Corp (1921) 3 KB 110 at 127** that a bank is a trustee receiving funds from its customers account. The cardinal duty of a bank is to honour the instructions of the customer. In the instant case the defendant bank debited the customer's account without instructions of the plaintiff and without any justification. Moreover, the defendant charged commission in respect of all the transactions it alleges to have been fraudulent. The defendant therefore breached the banker-Customer relationship.

There was also a wrongful dishonour of a cheque by the bank that was issued by the plaintiff and a banker is bound to pay cheques drawn on him by a customer provided there are sufficient funds standing to the credit of the customer. The dishonour culminated in civil action against the plaintiff as the witness **PW1** Semango James testified. PW1 had to dispose of his property in order to clear the debt to the plaintiff together with damages and costs. The conduct of the defendant amounted to breach of banker-customer relationship. The defendant also obtained a court order blocking the account. However, a restriction to the operation of the account does not affect all the money in the account and should have been limited to an amount necessary for compensation of the victim. That the plaintiff's account had funds that were from other sources other than the Point of Sale transactions. Apparently, the bank blocked the funds on the account of the plaintiff on grounds of suspected fraud and procured a court order for that purpose through in criminal proceedings.

The said Court Order was procured under S.275 of the Penal Code Act Cap 120 and counsel contended that acting on the strength of such an order was in itself a breach of banker-customer relationship as the facts of the case did not warrant it. He submitted that such orders are obtained in cases of causing financial loss, embezzlement and abuse of office and the order was irregular and of no legal effect. Blocking the plaintiff's account on the basis of such an order was therefore an abuse of the Banker-customer relationship.

Counsel further contended that it was a breach of the banker-customer relationship by the Defendant to act on the instructions of a third party (Kate Kamau) to block the plaintiffs account and without any proof of their allegations.

Counsel further submitted that contradictions as to the reason for blocking the plaintiff's account render the investigation report by DW2 suspect. He contended that the report was tailored to justify the wrongful actions by the defendant. The Defendant blocked the plaintiff's account, impounded the POS machine and later debited the plaintiff's account without instructions of the plaintiff, continued to charge monthly rental fees for POS machine. The acts of the defendant in total constitute a breach of the banker-customer relationship by the defendant.

In reply the defendants counsel submitted that the key issue that demands examination under in this issue is the effect of fraud perpetrated by the customer on the relationship between the banker and the customer. The plaintiff/customer opened a bank account with the defendant to facilitate the payment of goods and services consumed by its customers through the Visa, MasterCard and other credit cards. The nexus of the relationship between a banker and customer is the account and corresponding obligations owed on each side by either party. See judgement in **Great Western Railway versus London and county bank [1901) AC 414, Ladbroke versus Todd [1914] Com. Case 256**. The duty of a bank is to act in accordance with lawful request of its customers in normal operation of its customers account. Counsel submitted that the customer's obligations under the general duties it owe to the defendant are also concurrent with the terms and conditions it was required to abide by in the agreement. Counsel submitted that the banks duty to the customer is by no means absolute and in the context of the relationship with the customer/plaintiff, the bank had the following overriding duties:

- The defendant had a duty to act in the face of apparent fraud and dishonesty.

- The defendant had a duty not to render dishonest assistance.
- The defendant had a duty to mitigate loss following the breach of the agreement and the banker – customer relationship.

Bank's overriding duty to act in the face of dishonesty and fraud:

It is an implied term of the contract between the banker and the customer that the banker will observe reasonable skill and care in and about executing the customer's orders. Generally that duty is subordinate to the banks other conflicting contractual duties. Additionally, if a bank executes an order knowing it to be dishonestly given, or shut its eyes to the obvious fact of the dishonesty, or acted recklessly in failing such enquiries as an honest and reasonable man would make, the bank would plainly be liable see **Barclays Bank Versus Quincecare Ltd and Another (1992) for ALL ER page 331** for this proposition. This case STEYN J pointed out that while deciding on the facts of the case the banker was under a duty to refrain from executing an order if and for as long as he was put on one inquiry in the sense that he had reasonable grounds (although not necessarily proof) for believing that the order was an attempt to further a dishonest functions such as misappropriating funds. Counsel contended that the defendant was faced with the fact that fashioned a reasonable inference that the plaintiff was using the POS device to commit fraud.

The notion of dishonest assistance:

Learned counsel for the defendant relied on the testimony of DW2 in his fraud forensic investigation and report, on page 22 of the joint trial bundle which reveals that there was widespread (and global) credit card fraud in motion between March and May 2009. As per DW 2 and DW 4, fraud notices questioning a number of suspicious transactions were received from Visa, MasterCard and Barclays bank, Nairobi. The formative investigations narrowed in on eight merchants, including the plaintiff, as being a direct source or conduit through which these transactions were taking place. The defendant was confronted with a number of circumstances that raised a reasonable inference that fraud was being committed by the plaintiffs. Accordingly, the defendant had justifiable cause to exercise its election under clause 17.5 of the agreement to suspend all operations on the plaintiffs account. Counsel

submitted that to act otherwise would have amounted to providing dishonest assistance in view of the totality of the circumstances the defendant was faced with at the time.

Counsel relied on the case of **US International Marketing versus National Bank of New Zealand Ltd [2004] 1 NZLR 589 (CA)** where it was held that a bank is entitled to decline to meet a customers demand if to do so would, in all circumstances, provide dishonest assistance.

Duty to Mitigate Loss

Counsel submitted that the bank possesses a duty to mitigate loss once it became aware of breaches of the agreement and fraud. In law, the courts will penalise the claimant in damages where it has demonstrably and unreasonably failed to take any steps to mitigate its loss, or where the steps that it has taken are clearly inadequate. A succinct discussion of the law of mitigation of damages can be found in J Beatson's Anson's Law of Contract 27th edition (Oxford) pages 582 – 583. He submitted that the continued operation of the agreement would have subjected the defendant to an increased volume of chargeback's and possible claims of negligence and indemnity from Visa and MasterCard. The defendant had a legal obligation to terminate the relationship, suspend operations on account and mitigate its losses.

Counsel prayed that I find that the defendant did not commit any breach of the duties it owed as a banker to the plaintiff as its customer. And that in view of the breaches committed by the plaintiff and the totality of facts pertaining at the time, the defendant as a prudent bank, was justified in making the decisions that it did.

Written submissions on issue 3
Whether there was commission of fraud by the Plaintiff, its servants or agents which fraud the plaintiff was complicit to:

Learned Counsel for the Plaintiff submitted that transactions are dealt with under clause 17:1 of the merchant agreement but in the instant case, the plaintiff's transactions were by card holders who actually even signed on the receipts as required. The transactions within the meaning of this clause were genuine and/or valid and executed in accordance with the merchant agreement. In a bid to prove fraud on the part of the plaintiff, the Defendant

relied on mere allegations that there were suspicious transactions by the plaintiff and other companies. He submitted that fraud had to be strictly pleaded and proved though the standard of proof is not that beyond reasonable doubt it was higher than on the balance of probabilities. See **Ratlal .G. Patel vs. Dalji Makayi (l957) E.A 314 at 317**; **Davy vs. Gannet (1878)** 1 Ch.D 489.Fraud should be strictly proved and not inferred from facts. The burden of proof is higher. See **Mpungu &: Sons Transporters Ltd' vs. Attorney General and Kambe Coffee Factory (Coach) Ltd** Supreme Court Civil Appeal No. 17 of 2001. Counsel criticised the testimony of DW2 for generalisations and opinion and as lacking proof. The witness mentions cloned/stolen cards but no evidence was led to show which particular card holders claimed to have lost their cards in order to give the plaintiff a chance to use them without their knowledge and/or consent. As far as exhibit D6 is concerned, the observations that almost all transactions were confirmed to be fraudulent lacked credible investigation as it did not even have details of such card holders whose cards the witness alleges to have been cloned before imputing fraud.

Counsel submitted that the mere existence of charge backs is not evidence of fraud. The merchant agreement provides for various transactions that can result into charge backs. These do not necessarily mean that there is fraud. A company newly registered and in business is not an indication of fraud. The Defendant bank entered a merchant agreement with the plaintiff not on the basis of its date of Incorporation but on the strength of its financial status. Furthermore counsel submitted that the recommendation letter was not forged as confirmed by DW6 who testified that there was no problem at the time of opening of the account. The recommendation letter alleged to be a forged letter was confirmed by the Defendant.

That notwithstanding counsel submitted that forgery must be proved. The allegations of cloned/stolen cards are also unfounded. Several transactions took place on the point of Sale machine but the witness (DW2) does not specify in respect of which particular transactions, cloned/stolen cards were used. He stated in his evidence that whenever there are charge backs, they state the status of cards used were counterfeit or stolen from customer and that the bank has this information. The use of counterfeit or stolen cards would be an act of fraud but this has to be strictly proved. No evidence was adduced by the Defendant in proof of this allegation in respect of any of the transactions at the Point of Sale Machine.

Counsel referred to the DW2 report Exhibit D2 refers to annexure 6but DW2 in cross examination denied knowledge of the same and on re examination adduced Exhibit D3- an Excel sheet and Exhibits D6 and D7 which documents all purported to show charge backs but their content are totally different from the annexure 6 to the report of DW2 which he had relied on to assert that the plaintiff had acted fraudulently. Thought the reports are alleged to be computer generated, Counsel pointed out that the excel sheet (Exhibit D3) has errors on the name of the plaintiff. He contended that these are documents that can be edited by anyone to suit their allegations. Much as the defence claims to have obtained the above documents from the same system, it is inconceivable that their content would be different as it is clear between Annexure 6 attached to the report of DW2 at page 46-60 of the scheduling memorandum and exhibits D6 and D7. Such documents are suspect. They do not disclose their source and/or are not certified/signed by anyone and no original was adduced. The Defence failed to even exhibit the system and or the alleged Prime system from which' the above documents were purportedly obtained though their authenticity was challenged under cross examination. They can be disowned by whatever source they are purportedly obtained from and they have no evidential value.

The plaintiff presented valid transaction slips/receipts and in accordance with the merchant agreement. Among other features, the bore signatures of the respective card holders as reflected on Page 37 – 39 of the scheduling memorandum. Details of names of such card holders were also availed to the Defendant's official Mr. Manina Tonny (OW2) at page 40 of the scheduling memorandum.

Counsel criticised DW2’s report and contended that he did not make the slightest of effort to inquire into the genuiness of the signatures and names of the card holders. The investigation is a sham tailored to justify fictitious charge backs. No charge back was made in respect of any transactions handled by the plaintiff and/or at all. There was no dispute in respect of any transaction by any card holders.

It is therefore surprising that the witness who purports to have investigated does not even make the slightest indication as to any investigations about whether the signatures were genuine. Counsel invited court to find that the transactions executed by the plaintiff were genuine and/or valid and executed in line with the Merchant agreement. The witness (DW2) in his report only makes general statements that the plaintiff and other merchants engaged in

fraudulent transactions. No details at all of any particular fraudulent acts with regard to these transactions are indicated in his report. It would therefore be a misconception to impute fraud on the plaintiff and other merchants.

Indeed, it was merely a case of discomfort about the transactions as indicated in the email communication at page 30 of the scheduling memorandum. In the email communication attached to the report of DW2, reference is made to the Regional card centre but the investigator does not make any reference to the regional card centre. DW2 in his report at Page 21 of the scheduling memorandum indicates that investigations were conducted at the City Branch. However, in his testimony, he stated that he conducted investigations from the merchant's premises, the bank and Nairobi. He goes on to contradict his own testimony when he states that he conducted investigations at City Branch where the accounts were domiciled headed by the city Branch Manager. DW5-Kosea Byarugaba, the Branch Manager at City Branch stated that they have not received any communication from investigation department and investigations are still ongoing. They actually do not know the way forward. Much as the said witness is the branch manager at City branch, he does not feature in any way or at all in the purported investigation report DW2 Tonny Manina claims to have been done at that branch. These are clear indications that the purported report is a sham and no actual investigations took place.

Counsel contended that contradictions relating to place of alleged investigations is material. While DW6 testified that investigations were done at merchant's office and in connection with card centre Nairobi he later states in cross examination that investigations were done at the headquarters. DW5 Kosea Byarugaba stated that instructions to block the account came from the risk department at Crested Towers. DW6 Okea Cosmas stated that the account was blocked on the instructions from the Card Centre. In light of these contradictions and the fact that the witness denied knowledge of a document annexure 6 renders the report of no probative value. Such a report cannot be used as proof of fraud against the plaintiff and the defendant totally failed to discharge the burden of proving fraud as against the plaintiff.

In reply learned Counsel for the defendant submitted that the merchant agreement classified fraudulent transactions as any transaction which in terms of the common law or statute of Uganda would constitute fraud and will include any purchase and/or transaction arising from the use of the card by a person other than the authorised cardholder or the use of a card which had been issued by a bona fides card issuer. Counsel agreed with the statement of

law by counsel for the plaintiff that the burden of proving fraud is heavier than that on the balance of probabilities. He contended that the burden is not so heavy as to require proof beyond reasonable doubt. See **Kampala bottlers versus Damanico SACCA No. 22/1992** and **George Alenyo versus DFCU bank and others HCCS No 697/2006**. He contended that from the outset, the plaintiff's intention in entering the relationship with the defendant was informed by a fraudulent intention on the basis of the following:

Forged Recommendation letter: The plaintiff submitted a forged recommendation letter to the defendant. The letter submitted was placed on the letterhead of Jackie Okot and company advocates when no such law firm exists. The letter on page 98 of the joint trial bundle written by Jackie Okot of Jackie Okot and Company Advocates (exhibited D8) is self explanatory insofar as it debunks the authenticity of the letter submitted by the plaintiffs at the time of opening the account. In addition, PW1 Semango's testimony that the letter was procured by his secretary and that he, by implication, cannot take responsibility for it is untruthful and lacking in credibility. Counsel further submitted that the fact that the banks officials failed to detect and establish the true source of the letter and endorsed it as a proper one does not alter the character of the letter. It remains a forged document and is an indication of the plaintiff's fraudulent motives.

Facts Placing the Defendant on the Alert; a rapid rate of withdrawal of funds from account is not by itself a prima facie indication that fraud is at play. However an appreciation of the bank's response in this case requires an examination of the totality of facts and circumstances faced by the defendant. DW2 revealed in this report (page 22 of the record) and testimony that a common thread appeared across the eight merchants as behind suspicious transactions. This included the fact that:

- All companies cited in the fraudulent scheme were incorporated between January and February 2009 and the plaintiff was incorporated on the 9th of February 2009;
- Chargeback requests were being made in respect of companies in the same industry; all of them specialising in tour and travel business and the bulk of their income was through commissions obtained from POS transactions;

- A number of the companies enjoyed a shared controlling and management interest;
- There was a rapid rate of withdrawal of funds from the account of these companies;

While there is nothing suspicious in the individuality of these currencies, the wholesomeness of facts the defendant was confronted with were such as to place it on the alert that a fraudulent scheme was possibly at play and a corresponding legal duty to act accordingly arose. Counsel referred to the banks responsibility in such circumstances as stated in the case of **Barclays bank versus Quincecare Ltd and another** (cited above). Counsel submitted that the converse view is that had the defendant ignored these indicators, it would have been guilty of gross negligence.

Antecedents of plaintiff's witnesses: the plaintiff's fraudulent inclination was augmented by the antecedents of the only witness that the plaintiff called to prove its case. PW1 Mr Semango severally lied to court when he denied that he ever removed the POS devise from the premises where the devise was installed by the bank. His further untruths are when he stated that the POS could never have been moved because it was a "big machine that couldn't be lifted by one person". These may seem innocent statements but to think that they came from the controlling mind of the plaintiff speaks volumes and the witness cannot be trusted in the least. Counsel contended that the witness also made numerous personal attacks on DW2 and made unsubstantiated claims that Mr Manina asked for a bribe. This was intended to discredit the person who had unearthed their scheme. The allegation that Mr Manina asked for a bribe was never pleaded by the plaintiff. Given its gravity, counsel submitted that it is a relevant fact that should have been pleaded from the outset and it is telling that it was not.

Counsel submitted that by the testimonies of both DW 6 and DW 7 this matter has been put in its proper perspective. DW 2 Mr Manina was able to show during his re-examination that it was he who raised the concern many months before the plaintiff filed this suit, when he sent an e-mail raising the complaint that PW1 Mr Semango and his team had approached him and offered a bribe so that he can unblock the account and let them access the monies thereon. The e-mail in question was tendered in evidence in the re-examination as

exhibit D3. He prayed that the court rejects the testimony of PW1 Mr Semango in this regard and find that the plaintiff was involved in a scheme that costs the bank money in chargeback's and that the plaintiff has not met the standard that is required that whoever comes to justice must do so with clean hands.

Nature of Chargeback: counsel contended that in his submissions, counsel for the plaintiff down plays the chargeback's received in respect of the plaintiffs merchant account. The testimony of DW 2 and DW 4 clearly highlighted the underlying reason for the chargeback's: the respective cardholders, through the issuing banks, disputed transactions and claimed that at no point had they been to Uganda. He contended that this brings into sharp focus two aspects that have been examined earlier:

- In view of the fact that, as explained by PW1 Mr Tahinduka credit cards to not require pin numbers, the plaintiff knowingly and/or abetted the use of skimmed cards on its POS device. These, in view of the agreement, amounted to fraud.
- The plaintiff did not apply a proper effort to verify the identities of the persons who presented credit cards.

Counsel prayed that the court finds that on the preponderance of facts and evidence, the defendant has discharged its responsibility to prove that the plaintiff committed and/or was complicit to acts of fraud.

In rejoinder Counsel for the plaintiff reiterated that the investigations by the defendant were a mere sham and is the reason why the matter was reported to the police by DW 2 Tony Manina vide CID HQTRS GEF/677/2009 and never pursued. This was merely used to secure an order to justify the actions of the defendant.

The date of incorporation, nature of business, managerial interest, rate of withdrawal of funds does not in any way constitute fraud. All of these details were furnished by the plaintiff to the defendant much earlier and before execution of the merchant agreement. It is at such point that the defendant should have declined to enter an agreement with the plaintiff on those grounds. Also under clause 5 of the merchant agreement, the floor limit is zero. Therefore the rate of withdrawal or deposit of its funds is immaterial and the same cannot be read to mean fraud or breach.

Again, for all the above allegations, the officials of the defendant particularly DW 2 Mr Tony Manina in this report alleged that the plaintiff failed to provide properly reconstructed documentation. Counsel submitted that the said witness only requested for such information verbally and the same was availed to him immediately. Even then, there is ample evidence that no action was taken. The casual way the officials of the defendant handled the plaintiff issues leaves a lot to be desired. It is therefore not correct to assert that there was a significant delay on the plaintiff's part to provide reconstructed documents.

At page 96 of the scheduling bundle is a letter by the defendant stating that the debiting of the plaintiffs account was done on 10 July 2009 pursuant to clause 13 of the merchant agreement.

The documentation detailing services provided by the plaintiff was furnished to the defendant on 5 June 2009 by letter at page 9 of the scheduling bundle on the same day by DW 2 Mr Tony Manina requested for them. What cannot be denied and/or overlooked is the casual manner in which the defendant requested for these details. Counsel submitted that the conduct of the defendant's officials particularly Mr Tony Manina as reflected in the deliberate failure to make formal/written communication is suspect. They instead became mute upon receipt of the details of services rendered by the plaintiff to the cardholders perhaps with the view that the plaintiff will give up on its pursuit of its money. Counsel invited court to consider these antecedents. There was no formal communication from the defendant indicating whether the documentation furnished by the plaintiff was proper or not. It is also evident that much as the plaintiff furnished the documentation upon the verbal/casual request by Mr Manina, action was only taken by him after almost 2 years as reflected by the letter dated 9 May 2011 by defence counsel on page 64 (a) of the scheduling bundle probably for purposes of this trial. In light of the above, the defendant had no basis to contend that the plaintiff failed to provide properly reconstructed documentation. The debiting on this basis was therefore unjustified. It was merely a deliberate act by the defendant and hence the principles in the case of Great Western Railway versus London and Country Bank (1901) AC 414 cited by the counsel for the defendant do not apply more so in justification of the defendant's actions.

Learned counsel for the defendant further submitted that the actions by the defendant were also in accordance with the Visa and MasterCard rules. Counsel submitted that this rules only apply to invalid transaction slips under clause 10:1:14 of the merchant agreement of which the transaction by the plaintiff were not. That notwithstanding, no such rules were exhibited by the defendant in proof of how they would affect any transactions done by the plaintiff. Similarly, the defendant's action of impounding the POS devise was unjustified. The agreement provides under clause 16.1 the procedure the defendant must follow to take the POS and this is on termination of the agreement which is not the case here. The defendant continued to charge monthly rental for the point-of-sale machine though the sale had already been impounded and/or taken by the defendant.

Counsel disagreed with the submission of counsel for the defendant that the defendant acted honestly in the face of apparent fraud and hence was justified in blocking and subsequently debiting the plaintiffs account. He submitted that at most, the defendant acted mistakenly. As already indicated in both submissions of counsel for the plaintiff and defendant, the amount of money debited from the plaintiffs account is much more than what is purported to have been used in chargeback's. Any reasonable enquiries and/or investigation would reveal this fact to the defendant. Indeed if the defendant acted honestly, it would have allowed the plaintiff access the funds that are not part of the alleged chargeback's because under the merchant agreement, existence of chargeback does not imply breach of agreement neither does it amount to fraud. Instead, the defendant chose to depict the plaintiffs account to zero balance and remained silent until the plaintiff sought redress from court. It cannot be said therefore that the defendant acted honestly.

It is also not true that the plaintiff submitted a forged recommendation letter to the defendant for purposes of account opening as submitted by counsel for the defendant. Counsel submitted that the issue of the recommendation letter is not material to the plaintiffs claim for its money taken by the defendant. The transactions that took place on the plaintiffs account came much later and were independent of the account opening process. That notwithstanding, the said recommendation letter was not a forgery. The bank confirmed its content as indicated in page 41 of the scheduling bundle. DW 6 Mr Okea Cosmas

confirmed that there was no problem at the account opening stage. He was the business banker who was actually involved in the process of account opening. It is therefore surprising that a belated enquiry was made by counsel for the defendant vide letter dated 21st of February 2011 to enquire into the authenticity of the recommendation letter submitted by the plaintiff. This was long after the plaintiff instituted legal proceedings against the defendant. Counsel submitted that it is of no evidential value and accordingly invited court not to attach any weight to this kind of evidence. The defendant had an investigator in Mr Manina Tony who should have done this since he mentions it in his report.

On the antecedents of the plaintiff's witness counsel submitted as follows:

It is Mr Tony Manina who attempted to take advantage of apparent suffering and inconvenience the plaintiff was experiencing due to the refusal by the defendant to release its funds. According to PW1 the plaintiffs creditors were threatening to take legal action against it. DW2 had requested 10% of the plaintiff's funds a request that was flatly turned down and it is under such circumstances that the allegations of the bribe came up. Considering the conduct of Mr Manina that included a deliberate failure to document any of his actions during the material time, it cannot be dismissed that he didn't seek a compromise. It is probable that Mr Manina raised the issue of a bribe in the main (exhibit P3) merely as a future guard and in fear the that the same would spill over to other authorities after his request was flatly turned down.

Similarly, the claim that the plaintiffs Secretary admitted that he had never attended to any tourists is totally misconceived and is a mere allegation by DW2. He did not adduce any proof of such an admission and this cannot be relied upon. All in all, the defendant failed to prove any of the allegations. Counsel reiterated submissions that the defendant committed several acts that were in breach of the merchant agreement and the banker – customer relationship.

Written submissions on issue 4
Whether the plaintiff is entitled to the reliefs sought

Counsel for the plaintiff's submission is that the plaintiff seeks a declaration that the blocking or freezing of operations on its account is unlawful, an order

for the unfreezing of operations on the said account, general damages for breach of banker/customer relationship and inconvenience and loss suffered, interest on all pecuniary awards from the 19th May 2009 till full realization, costs of the suit and any other relief court deems fit.

On prayers for declaratory orders on the act of blocking of the plaintiff's account, learned counsel submitted that it was baseless and/or unlawful. It was not clear what the actual ground for blocking of the account is and this is reflected by contradicting positions in evidence of the defendant's witnesses. According to DW2 it was blocked on account of suspected fraud. Then according to the letter dated 24th July 2009, a court order was procured authorizing the blocking of the account. Counsel reiterated submissions that the plaintiffs case does not fall within the grounds under which a court order blocking an account could be procured. The act of blocking the account was a glaring breach of the banker-customer relationship and/or unlawful. It is accordingly prayed that the actions of the defendant in blocking the plaintiff's account is declared unlawful and an order for unfreezing of operations on the said account issues.

As far as damages are concerned the relief for damages arises where loss and inconvenience has been suffered. See **Musisi Edward vs. Babihuga Hilda Court of Appeal Civil Appeal No. 103 of 2003**. Counsel further submitted that the plaintiff was in business and suffered loss due to the unjustified and/or unlawful actions of the Defendant. The plaintiff is accordingly entitled to substantial damages. PW1 led evidence to show that a cheque had been issued and was dishonoured which resulted into a court action against the plaintiff. The plaintiff suffered loss in settling the resultant claim after the dishonour of the cheque. From the testimony of DW1, DW5 and DW6 efforts to reopen the account were rejected. Counsel contended that the conduct of the Defendant was unprofessional and not befitting a banker with the reputation of the Defendant. In all their actions, no formal explanation was offered to their customers (the plaintiff) at least before their actions of freezing operations on the plaintiff's account.

The Defendants claim that plaintiff did not furnish documentation in respect of the transactions when there was no formal request for the same to specify what particular documents were required. Even after availing it to the bank, action was taken after over two years by the search of the vehicles involved in the transactions. The conduct of the Defendant exposed and indeed caused the plaintiff loss of earnings due to failure to access its funds and

inconvenience. Counsel concluded that the plaintiff is entitled to substantial general damages and interest. The bank actually dishonoured a cheque on the account and yet there were sufficient funds on the account to pay the cheque. The plaintiff is entitled to a sum of Uganda shillings 43,972,978 (Uganda shillings Forty Three Million Nine Hundred Seventy Two Thousand Nine Hundred Seventy Eight only) available on the plaintiff's account. The plaintiff is accordingly entitled to the same with interest at the current commercial rates from May 2009 till payment in full.

In reply counsel for the defendant referred to his submissions on issues 1, 2 and 3 on the basis of which he contended that the plaintiff is not entitled to a declaration that the suspension of operations on its account was unlawful. The defendant has led evidence to show that there were cumulative breaches of the agreement and incidents of fraud that justified the defendant's actions. Furthermore breach of the bank customer relationship was actually occasioned by the plaintiff. A banker's duty to its customer is not absolute and several claw back scenarios have been provided for by the law to take into account, among others, inequitable and fraudulent conduct on the part of the customer/plaintiff and the general duty placed on the banker not to abet dishonest conduct.

The plaintiff's submission for an award of Uganda shillings 200 million in damages is excessive and goes beyond mere restitution/compensation and touches on unfair and unjust enrichment. In any event, the plaintiff is not entitled to any general damages on account of its conduct during the subsistence and termination of the agreement with the defendant.

The prayer for interest at 45% is also unsustainable in law. While the defendant is in agreement with the legal principles governing the award of interest counsel for the plaintiff laid out in his submissions, the defendant implores court to consider the following factors as relevant that is, that the plaintiff committed material breaches of the agreement; the plaintiff committed acts of fraud; the defendant has not converted the monies lying on the suspended account to its own use.

A demand for interest at the rate of 45% per annum, is manifestly unconscionable and without precedent. At all times, the courts discretion in

awarding interest is not unfettered and is guided by section 26 of the Civil Procedure Act cap 71.

Written submissions on issue 5

Whether the Defendant is entitled to judgment on the counterclaim

Plaintiff's counsel opposed the prayer in the counterclaim for a sum of Uganda Shillings 110,000,000/= (Uganda shillings One hundred and Ten Million only. Being the alleged amount refunded by the Defendant to the card holders as a result of the charge backs. Counsel contended that the purported refund to card holders is a question of fact and counsel asked court to take note of the following:

a) No card holder is shown to have queried and/or disputed any of the transactions by the plaintiff.

b) There is no proof at all of any refund to a card holder.

c) There is no proof of any dispute from any issuing bank in respect of the transactions by the plaintiff or any other merchant.

d) The total value of transactions by the plaintiff from the point of sale machine were Uganda shillings 47,330,823 (Uganda shillings Forty Seven Million Three hundred Thirty Thousand Eight Hundred Twenty Three only) and a claim in charge backs against the plaintiff of Ugshs.110, 000,000 (Uganda Shillings One Hundred Ten Million only) cannot be sustained. Counsel submitted that the total value of transactions at the Point of Sale Machine was Uganda Shillings 47,330,823/= (Uganda Shillings Forty Seven three hundred thirty thousand eight hundred twenty three only). The purported Charge backs Exhibit D6 and D7 do not justify the counter claim of Uganda shillings 110,000,000/= (Uganda Shillings One hundred ten Million only).

DW4/ Victor Othieno testified that the total charge backs in respect of the plaintiffs transactions is Uganda shillings 27,732,355/= (Uganda shillings twenty seven million seven hundred thirty two three hundred fifty five only). At the time of blocking the plaintiff's account the plaintiff had to its credit Ugshs. 43,498,778/= (Uganda Shillings Forty three million four ninety eight thousand

seven hundred seventy eight only) was lying on account to the credit to the credit of the plaintiff.

If the above sum of Ugshs. 27,732,355/= (Uganda shillings twenty seven million seven hundred thirty two three hundred fifty five only) are the charge backs in respect of the plaintiff, there would absolutely be no justification for withholding the entire sum of Ugshs. 43,498,778/= (Uganda shillings Forty three million four ninety eight thousand seven hundred seventy eight only) that was to the credit of the plaintiff.

Consequently, a claim for charge backs in the sum of Ugshs. 110,000,000 (Uganda shillings One hundred Ten thousand million only) is not only unjustified, baseless, misconceived and frivolous, but a reflection of the spirit of bad faith the Defendant acted in. Moreover counsel contended that the alleged charges backs relied on by the Defendant as proof of charge backs are not authentic. They are suspect. Much as the Defence witness DW4 testified that they are from the Prime System it is clear that they are from Standard Bank of which the Defendant is a member. They are not signed and/or certified by any source. The purported Excel sheet also has errors and the same cannot be relied upon. Counsel prayed that the defendant's counter claim is dismissed with costs.

Counsel for the counterclaimant on the other hand submitted that the defendant is entitled to judgement on the counterclaim, commensurate to the amount that has been proven to have been incurred in chargeback's viz **Uganda shillings 27,732,355** in accordance with exhibit P6 and D7. As far as the submissions of the plaintiff's counsel is concerned, highlights four particular points in opposition to which in reply, counsel submitted that, no proof of identity of the complainant cardholder or the issuing bank is required. The clearinghouse for credit card global payments is Visa and MasterCard, through which chargeback requests are recorded electronically on the prime system. The complainant registers a grievance with its bank, which contacts Visa and MasterCard which in turn contacted defendant through the regional card centres which DW 2 Tony Manina and DW 4 Victor Othieno have contact with.

The prime system, as explained by DW 4 Othieno, is representative of refunds made in respect of chargeback's.

Written Submissions on issue 6

What remedies are available to the parties in the circumstances?

Counsel for the submitted that in addition to earlier prayers the plaintiff is entitled to reimbursement in the sum of Ugshs 43, 498,778 (Uganda shillings Forty Three million Four Hundred Ninety Eight thousand Seven Hundred Seventy Eight only) that was wrongly debited by the Defendant from its account under the pleading for any other reliefs court deems fit. There was no charge back made and/or at all to a tune of Ugshs. 43,498,778/= (Uganda shillings Forty Three Million Four Hundred Ninety Eight Thousand Seven Hundred Seventy Eight only) that was lying on the account to the credit of the plaintiff. We accordingly pray for judgement against the Defendant in the above sum. The plaintiff prays for an order unfreezing the operations on its account. As far as general damages is concerned the plaintiff's counsel submitted that where loss and inconvenience has been suffered it should be awarded. See **Musisi Edward vs. Babihuga Hilda** Court of Appeal Civil Appeal No. 103 of 2003. To be eligible the plaintiff should have suffered loss or inconvenience.

In the instant case, there was breach of the merchant agreement, breach of banker customer relationship and the plaintiff has been wrongly denied access to the funds lying to its credit on its account for over two years thereby depriving it of applying it to some other investments. The defendant charged its commission on all the transactions from the point of sale machine. It is therefore estopped from denying the plaintiff its entitlement under the said transactions. No proof was adduced by the defendant to indicate that it had refunded the said commission on the transactions to any card holder.

The loss that was being suffered by the plaintiff was brought to the attention of the defendant. The plaintiff is entitled to damages that are substantial. Counsel prayed that an award of Ugshs. 200,000,000/= (Uganda shillings Two Hundred Million only) would be a just award and pray for judgement in favour of the plaintiff in the above sums as general damages.

Learned counsel for the plaintiff also prayed for interest under S. 26 (2) of the Civil Procedure Act Cap 71 which gives court discretion to award interest. See **Milly Masembe vs. Sugar Corporation &T Kagiri Richard** SCCA 1/2000, (2000 KALR Page 305), and **Charles Lwanga Vs Centenary Rural Development Bank** Court of Appeal No. 30/1999 (2000 KALR) at page 652 - 653 where it was held that evidence must show that the plaintiff has been deprived of use of the money. Counsel prayed for interest from the date the money was withheld till payment at the going bank rate. The plaintiff's account was blocked in May 2009 and for two years (2) years the plaintiff has been unable to access its funds. The loss and inconvenience suffered by the plaintiff was brought to the knowledge of the Defendant who chose to ignore the same. Counsel further relied on S**uperior Construction & Engineering Ltd versus Notary Engineering Industries (1981) Ltd 1992 KALR** at page 340,where the Defendant has been guilty of gross delay. Counsel prayed for interest at the rate of 45% p.a from May 2009 till payment in full.

Counsel also prayed for the costs of the suit.

In reply the defendants counsel submitted that the defendant is entitled to general damages for breach of contract. He submitted that in **Hajji Mutenkanga verses Equator Growers (U) Ltd** SCCA number 7/1995, the court stated that with regard to proof, general damages in breach of contract are what the court (or jury) may award when the court cannot point out any measure by which they are to be accessed, except the opinion and judgment of a reasonable man.

In view of the plaintiffs breach of the agreement and commission of fraud, counsel proposed that an award of Uganda shillings 15 million as general damages to the defendant is appropriate in the circumstances. He prayed for interest on all pecuniary awards from the date of judgment at the commercial rate of 25% per annum until payment in full and costs of the suit.

Judgment

I have carefully considered the submissions of counsel, the evidence on record and the authorities cited. The plaint avers that the plaintiff is engaged in the business of tour operation in Uganda and that sometime in April 2009, the plaintiff and the defendant executed a merchant agreement for the

acceptance of MasterCard, Visa and debit cards as a form of payment by customers for services and goods consumed while in Uganda. All transactions for Payments were to be routed through the defendant bank as the clearing medium and the defendant was entitled to a commission agreed upon on all credit and debit card transactions. The defendant provided the plaintiff with a (Point of Sale) POS machine to facilitate the transactions. On or about the 19th of May 2009 the defendant blocked or froze all operations on the said account without furnishing the plaintiff any reason. The plaintiff complained to the defendant in various correspondences attached to the plaint. The defendant's response was that the account was blocked because it was suspected to be used as a vehicle of fraud against the bank and the cardholders. The defendant further went ahead and procured court orders in a criminal court blocking the account and those of other merchant agreement operators for six months. Even after the court orders expired the accounts have not been unblocked. The plaintiff avers that at all material times it demanded for the unfreezing of its account to no avail and at the time of the freezing of the operations on the said account there was a sum of Uganda shillings 43,498,778 on the credit side. The plaintiff contended that the actions of the defendant are unlawful and unjustified and a breach of the duty between banker and customer. The plaint further avers that it has been denied the use of the above money by the defendant and the same has brought inconvenience and loss to the plaintiff for which the plaintiff claims general damages.

The defendant filed a written statement of defence and counterclaim against the plaintiffs claim. The defendant agreed that there was a merchant agreement between the parties. And that it provided the point of sale (POS) machine which was installed at the plaintiff's premises to record credit and debit card transactions. The defendant admitted that the plaintiffs account was frozen but that the freezing of the account was justified. The defendant further admitted the extracting of the court order to block all transactions in respect of the plaintiffs account with the defendant.

The defendant pleaded that the plaintiff was a front for a syndicate that aimed to defraud international credit cardholders and gave particulars of fraud. In that the plaintiff used the POS devises to perpetrate fraud; the plaintiff presented to the defendant payment slips for payments in respect of cards

that did not have Visa/MasterCard/Maestro card /proper embossments and card numbers. The defendant was presented with payment slips for payment derived from fictitious transactions. That there was collusion, participation, presiding over or connivance with perpetrators of the scheme to defraud credit card holders and the defendant. That the plaintiff submitted transactional vouchers for payments without obtaining, verifying or ascertaining the authenticity of the signatures of the cardholders. The plaintiff presented claims for payments to the defendant with forged signatures on transactional slips. There was presentation of transactional vouchers without obtaining the signatures of the cardholders on transactional slips. The defendant further alleges breach of the agreement by the plaintiff in that it alleges that the plaintiff engaged in fraudulent activities in respect of the credit/debit card transaction; presented to the defendant, payment slips for payments in respect of cards that did not have Visa/MasterCard/Maestro card/proper embossments and card numbers. The same facts were given for particulars of fraud in respect of particulars of breach.

The defendant counterclaimed for a sum of Uganda shillings 110 million for acts of fraud committed against various credit card users worldwide. This led to costs occasioned to the defendant in having to make refunds to the cardholders as a result of chargeback's and claims by the cardholders. The defendant further claimed general damages, interest and costs of the counterclaim. The counterclaim the defendant alleges that the plaintiff company in entering into the merchant agreement with the defendant bank, represented and give contractual warranties regarding the presentation of payment slips with correct information, that no fictitious transactions would be processed to increase the merchants cash flow and a commitment to comply with the terms of the agreement which it wilfully disregarded to the detriment of the defendant. That a verification exercise conducted by the defendant revealed that the claims presented by the plaintiff company were fictitious and designed to claim gratuitous and undeserved payments. That the POS devises installed were used to commit fraud against various credit card users worldwide.

In reply to the defendant's written statement of defence and counterclaim, the plaintiff averred that the defendant's action in blocking its account was

unjustified and no fraud was committed on the part of the plaintiff. The plaintiff and averred that it acted in accordance with the merchant agreement with the defendant and the same was done properly unlawfully. But the defendants claim for some of Uganda shillings 110 million is misconceived and untenable. The plaintiff replied that there has never been any complaint the plaintiff of any fraud or impropriety by any card holder or at all.

Both counsels filed a joint scheduling memorandum in which they agreed:

1. That there was a Merchant Agreement executed between the parties.

2. That a point of sale devise was installed by the defendant to record credit and debit card transactions.

3. That several transactions took place resulting in the crediting of the plaintiffs account.

That the defendant blocked the plaintiffs bank account and at the time of blocking the account, Uganda shillings 43,498, 778 was lying on the account to the credit of the plaintiff. At the scheduling conference, the following issues was set down for determination:

1. Whether there was a breach of the merchant agreement by any of the parties?

2. Whether there was any breach of the banker-Customer relationship by any of the parties?

3. Whether there was commission of fraud by the plaintiff and its servants/agents; which fraud the plaintiff was complicit to?

4. Whether the plaintiff is entitled to the reliefs sought?

5. Whether the defendant is entitled to judgement on the counter claim?

6. What remedies are available to the parties in the circumstances?

Issues number 1 and 2 are intertwined in that the banker customer relationship is defined by the merchant agreement consequently the question of breach of merchant agreement also determine the question of whether there was breach of the banker customer relationship by any of the parties. However the parties also addressed the court on the ordinary bank/customer relationship which I will deal with separately. Apart from questions of evidence of whether there was fraud, the type of fraud is defined by the merchant agreement and commission of fraud by any party would amount to breach of the merchant agreement. Consequently, issues number 1, 2, and 3 will be considered together in this judgment.

I have therefore tried to answer the following issues together namely; whether there was a breach of the merchant agreement by any of the parties; whether there was any breach of the banker customer relationship and whether the plaintiff committed any fraud, which fraud the plaintiff was complicit to.

Exhibit P1 is a merchant agreement signed between the plaintiff known as the merchant and the Messrs Stanbic Bank the defendant in this suit. The merchant agreement defines the relationship between the parties and I will refer to the relevant clauses in resolving the issues in the course of this judgment. The main controversy in this matter occurred in the actions between PW 1 Mr. James Semango and DW 2 the forensic investigator of the defendant Mr. Tonny Manina. Though the controversy between the parties began earlier, I will start by tracing the correspondence between the parties. Exhibit P2 is a letter dated 26th of May 2009 from the plaintiff to the defendant on the matter in controversy and it reads:

> "On behalf of myself and my company named as above. This is to inform you that all the transactions done by my company are genuinely recorded within 24 hours monitoring services.
>
> Further, the credit card machine was used satisfactorily to your instructions when the machine was installed to our office.
>
> To my knowledge, we have done our best to make sure, our good self and Stanbic works together and we could understand that all we have been going through are not worthy to us as a company and to you as a merchant provider.

A huge sum of fund held by your company in due time is making us to have a great loss. If you cannot sort us out within the next 24 – 48 hours, we shall be forced to apply a law sue and the media to show how your operations are falsely dubious."

The letter was signed by Mr Ssemango James PW1 and received by Stanbic bank of 5 June 2009 as shown by the received stamp. The second exhibit P2 is a letter dated 2nd of June 2009 again to the defendant which reads:

"We make reference to the above where we are your clients operating account 0140028293401.

We have been operating, said account but the same has been blocked of recent. Surprisingly, we have not been informed of the reasons behind that development. This is to request that we are furnished with events leading to this act in respect of our account.

We are a company and would like operate our account pursuance of our business.

Anticipating your Corporation."

Again on 5 June 2009 the plaintiff's wrote to the defendants and addressed a letter to the manager forensic services internal/audit Stanbic bank attention of Mr Manina Tony which letter exhibit P4 reads as follows:

"The above refers where we are customers of your bank operating current account 010028293401. Our above the court was blocked on the 19th May 2009. The reasons for this development are still unknown to us. We strongly believe that this act is unjustified and is occasioning to us severe loss of business.

However, pursuant to our discussion within your office today the 4th June 2009, we herewith forward the details of accommodation and receipts for our respective clients and the motor vehicles that you requested for.

We request you to handle this matter with utmost urgency as we are a business body and undergoing a lot of financial hardships as a result of your actions.

Anticipating your co-operation,

Yours truly,

Semango James"

PW1 testified that the company signed a merchant agreement with the defendant wherein the defendant installed a POS machine which they operated. The client comes to the office and informs them whether he or she wants to pay in cash or through a card. The client uses the card and enters a pin code and the machine gives three receipts. The first receipt is for the client, one for the plaintiff and another for the bank. He testified that the receipt contains the machine code, the amount of money and the date of the transaction and a sum of money and the client also signs the receipt. At the end of the day a batch of receipts are sent to the bank in respect of all the transactions of the day. Initially they had no problem with this mode of operation until when a man came to him with a proposal that they pay him 10% commission or else have his account blocked. PW1 also testified that DW2 Mr. Tonny Manina had asked him for a bribe. After consultations with the bank, he was assured that his account would not be blocked by anybody. The account was blocked on the 19th of May, 2009. PW 1 was informed that investigations were being conducted. He went to the defendant's offices several times and was eventually told to go to Crested Towers where he found Mr. Tonny Manina, who was the gentleman who had come to him for the 10 per cent. The first letter of the plaintiff dated 26th of May, 2009 was written on the advice of the plaintiff's bank manager. It was after he wrote the letter of the 2nd of June, 2009 that he was asked to go to the headquarters. PW1 testified that he gave the receipts of the plaintiff to DW 2 Mr. Tonny Manina and this is evidenced by the letter dated 5th of June, 2009. Even after this his account was not opened. The plaintiff's account was further closed with a court order on account of fraud and the account had 43,498,778/=.

For his part DW 2 Mr. Tonny Manina testified that he knew the plaintiff and around 2009 he was requested to investigate a transaction which occurred on the account of one Silica Hire Tours and Travel which had received a lot of money and the manager was suspicious of the source. DW 2 examined the accounts and then visited the premises where the company is located. When

he reached Bible house at Bombo Road and introduced himself one of the directors ran away and disappeared and he also failed to trace the POS device. They decided to conduct investigations and in the course of investigations he received email from Nairobi one Kate Kamau of Barclays Bank Kenya. In the mail he was requested to block the account of the plaintiff for suspected credit card fraud. He received yet another mail from Kate Kamau of Barclays bank Nairobi Kenya questioning a transaction in favour of Muganzi Tours and Travel. Within two days DW 2 received a number of disputed transactions from several Tours And Travel Companies which he sought to investigate. In the course of investigations of these companies he visited the plaintiff's offices and talked to the Secretary but the directors refused to meet him. The Secretary informed them that she had never seen the merchant slips and did not know what they looked like. When DW1 went back a day later, he did not find a director of the plaintiff but they had brought back the POS device which he decided to take away. There was no evidence of any slips. DW 2 wrote a forensic report on the investigations admitted in evidence as exhibit D2. The report shows that most of the money on the accounts of the plaintiff and other companies came from POS machines. The report notes that the companies opened a bank account with forged recommendation letters. The report shows that almost all the transactions done on the POS devices were confirmed to be fraudulent. The report attaches annexure 6 which is an excel sheet of charge backs for three merchants.

Attached to the report is annexure A2 and E mail from Kate Kamau of the Barclays card centre Kenya dated 19th of May, 2009 and addressed to Mr. Manina Tonny it states inter alia:

> "Attached please find a list of counterfeit cards accepted at your outlets. I have requested Brian my colleague in Uganda to liaise with you and arrange how the fraudsters can be arrested and also ensure payments are not released to the merchant.
>
> I would also be interested to know what type of services the fraudsters are asking for. Please put your merchants on the alert for fraudsters who book tour or accommodation which they later cancel and request funds from the cards to be sent to their bank or to western union.

Muganzi International tours and travel also attempted the transaction on card number 4263 9934 0149 70034 for Kenyan shillings 158,155.90 yesterday which did not go through as we had already blocked the card.

Please treat this as urgent and give us feedback”

Attachment shows that card number 487461004016 8920 was used at China plates chancery on the 6th of March, 2009 and the alleged date of fraud is the 16th of May, 2009 by the plaintiff in Kampala for 45,091 shillings. The second transaction is on card number 4874 6116 8502 7012 used at the China plate chancery on the 4th of May, 2009 and the date of fraud is the 12th of May, 2009 at the plaintiffs place at Kampala for a sum of 78,379/=.

The testimony of DW 2 also is that after carrying out investigations he concluded that there was a syndicate that perpetrated this fraud and the directors of the plaintiff were either used as fronts or were part of the syndicate that targeted project cardholders abroad. The defenders witness number 2 then reported the case to the Police CID headquarters.

Exhibit D3 was admitted in re-examination and shows that there were 12 transactions which were questioned emanating from the plaintiff’s POS device.

I have carefully considered the submissions of both counsel's and authorities cited and I am satisfied that within the context of the merchant agreement, the defendant had reasonable grounds to suspect the plaintiff’s involvement in alleged fraudulent acts in that the POS device which was installed with the plaintiff had been used and transactions originating there from resulted in charge backs against the defendant bank. DW 1 testified that the plaintiff was mainly involved in credit card transactions. Credit card transactions do not require the entry of pin numbers by the cardholder. According to the merchant agreement executed between the plaintiff and the Messrs Stanbic bank Uganda limited clause 3.4 defines a "chargeback" as "a transaction which is returned by the issuing bank and which Stanbic bank may debit to the merchant's account;". A "credit card" is defined as "a card issued by any institution bearing the MasterCard or Visa logo;" a “debit card” on the other hand is "a card issued by any financial institution participating in the Visa or Maestro program or such equivalent which enables the owner to access his own funds as a form of payment;"

If DW 1 is to be taken at his word, credit card transactions do not require a pin number. Other methods of identification are to be used such as the passport, national ID or driving permit. It will be crucial to scrutinise the details of the Owner in order to ascertain that they are authorised to use the card. DW1 Mr Brian Tahinduka testified that the merchant is required to take a copy of the ID, such as the passport, drivers permit of the cardholder and make a photocopy of the cardholders ID each time there is a transaction. The merchant is also required to make a photocopy of the transaction. Merchants have to ensure that the transactions done are genuine and they have to document the transaction and keep a copy of the printout. The issuing bank monitors transactions of the cards it issued in the market and is obliged to ensure that the owner is refunded his or her money upon establishing that the owner did not use the Issue card. DW 1 admitted that there was card cloning or credit card skimming by fraudsters who maybe third parties who would duplicate a card and use it to withdraw money from the accounts of unsuspecting cardholders.

In such a scenario, the duty placed on a merchant operating a POS device is onerous. Clause 6.1 provides that "if the merchant does not obtain authority and the transaction is honoured by the card issuer, such honouring will not relieve the merchant of its obligation to obtain authorisation for subsequent transactions." Under clause 6.4 the card issuer may decline an authorisation without giving any explanation or reason therefore. Under clause 6.5 where the POS device instructs the merchant to manually obtain authorisation, the merchant manually keys in the authorisation code obtained telephonically from the bank into the POS device. In the event that the merchant does not obtain an authorisation code from the bank, the merchant may not process the transaction. Under 6.6 an authorisation granted by an issuer merely indicates that the cardholder has sufficient funds for the transaction at the time. Such authorisation does not warrant the validity or authenticity of the card. That the person presenting the card is authorised to do so; or the payment by the issuer of the value of the authorised transaction will not be subject to a chargeback by the issuer to the merchant.

Clause 8.1 provides that the merchant shall "accept only valid and current cards presented by the cardholders for payment". Under clause 8.5 the

merchant is supposed to "obtain the signature of the cardholder at all times on transaction slips except for mail order transactions. Ensure that the signature on the transaction slip is the same as that appearing on the reverse of the card presented".

In addition to clause 8 the merchant is required to electronically deposit the full value of all transaction slips processed through the POS device within three working days of the transaction date to the merchants bank account. Clause 9.2 gives the bank the option whether to debit the merchant account at any time with the amount of invalid sales vouchers and/or transaction slips. The additional stringent terms of the merchant agreement provide under 9.3 that a presentation for payment of the transaction slip would be a warranty by the merchant that:

"9.3.1 the information therein is correct;

9.3.2 The merchant was supplied goods and/or services to the value stated thereon and that no fictitious transactions were processed to increase the merchant's cash flow;

9.3.3 the Bank is indemnified in respect of any liability arising from any dispute with the cardholder in respect of the goods and/or services rendered;

9.3.4 there has been due compliance with all the terms of this agreement;

9.3.5 that the transaction is not illegal

9.3.6 there has been due compliance with all the terms of this agreement

9.5 any credit effected by the bank in terms of 9.4 above does not deprive the bank of its right to cancel payment of invalid transaction slips by debiting the merchants bank account with the amount of any invalid transaction slips."

9.7 the bank would credit the merchant's bank account for processed transaction slips on business days"

The transaction slip is invalid if under 10.1 .14 "it is subject to a chargeback in terms of MasterCard International and/or Visa International rules."

Under 10.1 .16 it is subject to a chargeback in terms of MasterCard and/or Visa rules."

Last but not least clause 17 defines fraudulent transactions covered by the merchant agreement. It provides:

"17.1 in this clause, the term "fraudulent transactions" will mean any transactions which in terms of the common law or statute of Uganda would constitute fraud and will include any purchase and/or transaction arising from the use of a card by a person other than the authorised cardholder or the use of the card which had been issued by a bona fide card issuer."

From an analysis of the above clauses where a fake or skimmed card is presented the warranty given by the merchant that the information provided to the bank is accurate would mean that they would be a breach of warranty under clause 9.3 of the merchant agreement. The onus shifts on the merchant to prove that they are not in breach of clause 9.3 of the merchant agreement. In other words, the occurrence of a chargeback through the transaction carried out on a POS device operated by the plaintiff is prima facie a breach of the merchant agreement. Such a breach does not rely on the fault principle but on a contractual clause that defines it as such. Whether or not such an agreement is unconscionable was never the subject of controversy between the parties. In practical terms, a merchant warrants that whatever is presented at the point of sale machine would not be a cloned or skimmed card or that it was theft of funds from the true account owner by a third party. All that the merchant can do is to exercise due care and diligence in scrutinising all transactions to ensure that no fraudulent deals go through. Ample clauses protect the defendant in the action that it took. The presentation of an invalid transaction slip which includes a transaction slip that eventually becomes the subject of a chargeback is technically a breach of warranty to the bank.

In the circumstances, the evidence shows that transactions that went through the plaintiffs POS device were questioned at the regional card centre in Kenya. DW3 Victor Othieno a reconciliation officer with CFS Stanbic Bank testified that all reconciliation of credit card transactions is done in Nairobi Kenya. Through DW 3 exhibit D6 which gives an account of various chargeback's related to transactions done on the plaintiffs POS device was established. When the plaintiff uploads information from the credit card and the POS device on any transaction by a cardholder the information is captured under the prime system and reflected into a suspense account which he was responsible for.

The system captures all transactions coming from merchant and cardholders and reflects chargeback's and normal transactions. DW3 testified that the system could not be manipulated and a report printed from the system is unimpeachable.

The chargeback meant that the money is taken out of the merchant bank namely the defendant in this case and remitted to the account of the issuing bank to the credit of the genuine card holder. The plaintiff strongly submitted that there was no evidence of any cardholder who had complained about any transaction adduced by the defendant. Furthermore, that there was no evidence of a bank through which any complainant cardholder had complained. The defendant on the other hand submitted that chargeback are routed through the intermediary of Visa International or MasterCard International. Counsels however have not addressed the court about the Visa International or MasterCard International rules which are applicable. This would have been necessary to contextualise the international framework for the operation of the credit card system and the question of liability and the risks involved.

Notwithstanding the scanty submissions of counsel for the parties on the question of credit card fraud my little research on the subject of credit card fraud revealed no textbooks or learned articles on the subject. I have also not been able to access any decided cases in Uganda. I came across several articles from Internet resources which discuss the subject of credit card fraud and chargeback's. Generally the terms "Credit card fraud" is a term for theft and fraud committed using a credit card or similar payment mechanism as a fraudulent source of funds in a transaction. The fraud may begin with either the theft of the physical card or the compromise of the data associated with the account of the cardholder such as the card account number or other information. Information gleaned shows that the genuine cardholder may not discover the fraud and even after receiving a billing statement which are often delivered irregularly.

The common measure to cub theft of the funds is by ensuring that there is a signature that appears on the card. However signatures can be forged. Most credit cards do not include a picture or photo of the cardholder. The Stanbic Bank case is similar to other international practices. These rules are

incorporated in the merchant agreement between the parties in this court ensures that the merchants verify information on the credit card with the ID such as the drivers permit, passport of the cardholder. Identity theft includes the use of stolen data from documents to open an account in someone else's names after stealing information about the person. Criminals sometimes take over another person's account by gathering information about the intended victim through the Internet and thereby impersonating the genuine cardholder. Thirdly, credit card theft involves the skimming of legitimate cards when used in a legitimate transaction by some electronic devices used to capture relevant information from the credit card. The electronic devices are positioned in strategic places where credit cards are used. Other forms of fraud exist but there is no need to go into them. Suffice it to say that the principal players in a chargeback upon the complaint of a cardholder are the issuing bank and the merchant bank such as the defendant. In the absence of a statutory provision that regulates the relationship between the merchant bank and the merchant, the basic document that defines who is liable for the chargeback is the merchant agreement.

In theory, chargeback occurs due to the negligent processing procedures used by the merchant. A chargeback is a transaction that the issuer of the card returns to the merchant bank in the form of financial liability. In other words, the account of the credit card holder would not be debited with the amount of the transaction slip issued from the POS device. By that time goods may have been consumed by the person who used the credit card. The merchant bank which credits the account of the merchant operating the POS device reverses the credit based on the transaction slip which it used to credit the merchant account. This may only occur after the cardholder has disputed the transaction with the issuing bank. The point at which the cardholder disputes the transaction is within a framework of time that cannot be defined though the contract or statutory provisions may create a timeline within which to dispute the transaction. This dispute occurs between the card issuer and the cardholder. The intermediary in the dispute between the issuing bank and the merchant bank such as the defendant is Visa International or MasterCard International which operate under its own rules that is not the subject of this dispute.

The issuing bank normally tries to protect its cardholders by ensuring that they do not lose money through credit card fraud implying that they would not debit the cardholder's account. This also implies that the merchant bank such as the defendant would have lost money to the merchant who operates the POS device in a sale transaction. DW1 testified that the defendant in the process of recruitment of merchants ensures that they are trained to follow a rigorous procedure used to weed out any potential fraud or theft and thereby avoid chargeback's. However contractual liability is imposed on the merchants under the merchant agreement before the court. Notwithstanding the liability of the merchant bank to the issuing bank under the MasterCard or Visa International rules, liability is passed onto the merchant in the merchant agreement. The merchant agreement is not illegal and is therefore binding on the plaintiff in the absence of a statutory regulation or prohibition. It is immaterial that skimmed cards, cloned cards or credit card theft occurred and a POS machine was used to effect a transaction which the merchant by exercise of reasonable diligence could not have detected. In the interpretation of the contract, the fault principle is inapplicable.

The principles that can be discerned from the merchant agreement and several articles on the subject are that chargeback liability is primarily based on the allocation of contractual risk or liability and not on the fault principle. To my mind, the term "breach" which imports elements of the "fault principle" should be understood in the context of allocation of risk or liability. It deals with the principle of indemnity based on the occurrence of certain factors provided for under the written contract. It however, also has elements of the real fault principle in which breach of a particular clause may be proved. Both counsel submitted at length on the principle of allocation of fault between the parties. Whereas allocation of fault is a relevant factor, it is not necessary to prove if the factors provided for in the agreement have occurred.

These transactions occurred between May and June 2009 before the enactment of the Electronic Transactions Act, Act 8 of 2011 which Act came into force on 15 April 2011. By that time no safeguards had been provided for under the law. The object of the Electronic Transactions Act is spelt out under section 4 thereof and inter alia under subsection (b) provides that it is to "remove and eliminate the legal and operational barriers to electronic

transactions;" It is also under (f) to "ensure that electronic transactions in Uganda conform to the best practices by international standards". Under (i) it is to "promote the development of electronic transactions that are responsive to the needs of users and consumers". Section 24 ensures that sellers offering goods and services for sale, hire or exchange through an electronic transaction shall provide to the consumers a website or electronic communication relevant details for consumer protection. However, section 24 subsection 6 only makes the merchant liable to the consumer, in certain circumstances. The Act does not preclude contractual obligations between a merchant and the merchant bank. In the United States the Federal Law limits liability of cardholders to US$50 for loss of cards which in most cases is waived by the issuing bank so that that the cardholder has zero liability in order to maintain the integrity of the system. On the other hand it is the merchants and the financial institutions which bear the loss. The merchant loses the value of any goods or services sold and any associated fees.

In the premises, the defendant proved that it became liable to chargeback through the use of a POS device installed at the premises of the plaintiff. The plaintiff is therefore liable and can technically be said to be in breach of contract because it made a warranty to the defendant that they would present transactions that would not incur chargeback. In the same vein, issue number 3 of whether there was commission of fraud by the plaintiff and its servant/agents; which fraud the plaintiff was complicit to have been answered. Proof of fraud under the merchant agreement does not necessarily require a fault principle or deliberate act of the plaintiff. It is sufficient to show that the POS device transaction or credit card transaction which was transacted through the plaintiffs POS device resulted in a chargeback. The merchant agreement provides under clause 17.1 that "fraudulent transactions" would mean any transaction which in terms of the common law or statute of Uganda would constitute fraud or "transaction arising from the use of the card by a person other than the authorised user". The plaintiff may not be able to check the use of the card by another person other than the authorised user if the credit card is a skimmed card or founded on a stolen credit card or any other form of credit card theft or fraud defined above. An invalid transaction slips includes a transaction slip which is subject to a chargeback in terms of the MasterCard and/or Visa rules under section 10 of the merchant agreement.

The term fraud under the agreement does not strictly apply the fault principle and envisages the use of a skimmed card or a stolen credit card. It incorporates the use of the term "credit card fraud" which is the generic term for different forms of fraudulent transactions involving different kinds of theft from somebody account. The term therefore does not imply that the merchant knew or ought to have known that a card which is used is a stolen card or a skimmed card. By necessary implication, the fraud is carried out by third parties without the concurrence of the merchant. The only complicity which may be alleged is negligence in processing credit card transactions though actual fraud and complicity in the fraud may be proved.

In terms of the customer bank relationship, these are defined by the merchant agreement which allows the defendant bank to debit the plaintiffs account in the event of a chargeback. The question would be whether in the circumstances of the case, it was necessary to block the plaintiffs account and thereby render it impossible for the plaintiff to operate the account. For instance, was the chargeback equivalent to the amount of money on the plaintiffs account?

It is admitted by the defendant that the chargeback amounted to only **Uganda shillings 27,732,355.** The defendant also admits that it has not debited the plaintiffs account. It is not disputed that the plaintiffs account has been frozen since May 2009. The additional order obtained from the Magistrate's Court freezing the plaintiffs account was obtained under the Penal Code Act section 275 thereof:

> 275. Court to restrict disposal of assets or bank accounts of accused
>
> (1) Any court may, upon application by the Director of Public Prosecutions, issue an order placing such restrictions as appear to the court to be reasonable, on the operation of any bank account of the accused person or a person suspected of having committed an offence or any person associated with any such offence or on the disposal of any property of the accused person or the suspected person or a person associated with the offence or the suspected person for the purpose of ensuring the payment of compensation to any victim of the offence or

otherwise for the purpose of preventing the dissipation of any monies or other properties derived from or related to the offence.

(2) For the purposes of this section, the restriction on the operation of any bank account or disposal of property shall not exceed the withdrawal of an amount or disposal of property of a value that will be required to compensate the victim of the offence.

(3) The order imposing the restrictions shall be reviewed by the court every six months if still in force.

(4) The order shall, unless earlier revoked, expire six months after the death of the person against whom it was made.

(5) The Director of Public Prosecutions shall ensure that any order issued by a court under subsection (1) is served on the banker, or accused person or suspected person and any other person to whom the order relates.

First of all this section makes it clear that the order is obtained by the Director for Public Prosecutions. Secondly, unless otherwise renewed it was supposed to last for only six months. Thirdly, in the case of an account the money frozen cannot exceed the money suspected to have been involved in the commission of an offence i.e. 27,732,355 Uganda shillings. It is not disputed that at the time of the freezing of the plaintiffs account Uganda shillings 43,490,778 was available therein. The sum of **Uganda shillings 15,758,423**/- was supposed to be left for operations of the plaintiff. Though the plaintiff did not provide evidence of the suit that was allegedly filed on account of a bounced cheque and no amount was indicated as to the amount in the bounced cheque, the plaintiff was put to great inconvenience. The defendant strongly relied on the forged letter of recommendation allegedly written by Jackie Okot which the advocate denied, recommending the plaintiff to the defendant bank. Secondly the defendant relied on a list of vehicles allegedly used in the transactions paid for through the POS devise used by the plaintiff. These were discrepancies and one of them was a trailer owned by Kakira Sugar works whose registration number was dismissed by PW1 as a typing error. The defendant advanced the theory that the plaintiff must have preconceived the idea to defraud the defendant.

However, no evidence was led or proved that any cardholder used the card with the complicity of the plaintiff. I agree with the authorities cited by the plaintiff on the burden of proof in cases of fraud and the standard of proof which is that higher than that on balance of probabilities but not beyond reasonable doubt. In **Ronald Kayara v Hassan Ali Ahmed SCCA No.1 of 1990** it was held that the law requires a higher standard of proof of fraud than in ordinary civil cases**.** In the case of **Kampala Bottlers Ltd versus Damanico (U) Ltd Civil Appeal No. 22 of 1992** it was held that fraud has to be pleaded and strictly proved. Wambuzi CJ as he then was held at page 8 of his judgment:

> "Besides, it was not shown nor did the learned trial judge find that the appellant was guilty of any fraud or that he knew of it. Further, I think it is generally accepted that fraud must be proved strictly, the burden being heavier than on the balance of probabilities generally applied in civil matters.

Fraud has been defined in the case of **Assets Company Limited versus Mere Roiri and others (1905) AC 176** to mean actual fraud that is dishonesty of some sort, not what is called constructive or equitable fraud. Per Lindley L.J.

> "…Further it appears to their Lordships that fraud which must be proved in order to invalidate the title of a registered purchaser for value whether he buys from a prior registered owner or from a person claiming under a title certified under the Native Land Act, must be brought home to the person whose registered title is impeached or to his agents. Fraud by persons from whom he claims does not affect him unless knowledge of it is brought home to him or his agents. The mere fact that he might have found out fraud if he had been more vigilant and had made further inquiries which he omitted to make is not of itself proof of fraud on his part. But if it is shown that his suspicions were aroused and that he abstained from making inquiries for fear of learning the truth, the case is very different and fraud may be properly ascribed to him…"

The concept of common law fraud is quite different from contractual fraud under the merchant agreement and responds to different tests outlined above. As far as the banker customer relationship is concerned the duty of care of a

bank is exhaustively discussed in the case of **Karak Rubber Company Ltd verses Burden and others (No. 2) [1972] 2 ALL E.R. 1210** where the contractual duty of care is analysed and explained at length in the decision of the Chancery Division by Brightman J. The court relied on the case of **Selangor** cited below where it was held that the nature of the contract is that a relation between a banker and his customer is akin to that of a debtor and creditor. The drawing and paying of the customers' cheques as against money of the customers in the banks hands shows a relationship of principal and agent. The cheque is an order of the principal addressed to the agent and to pay out the principal's money in the agent's hands the amount of the cheque to the payee thereof.

In **Selangor United Rubber Estates Ltd verses Craddock and others (1968) 2 ALL E.R. 1073,** it was held that the paying banks' liability to its customers is in negligence. At page 1109 of the judgment:

> "The Hilton case turned on the stopping of a cheque. The drawing of a cheque and the stopping of a cheque are both instructions to a banker. The banker's obligations with regard to his customer's instructions are the same whether they be to pay or to stop (though subject, of course, to the difference in the substance of the instructions given). There seems no ground for saying that the duty of care applies to instructions to stop but not to instructions to pay, or vice versa. "

Lord Dunedin said

> "It must always be remembered that a bank can be sued just as much for failing to honour a cheque as for cashing a cheque that had been stopped."

From the authorities two points may be made. The first point is that the defendant did not prove actual fraud on the part of the plaintiff. What the defendant proved is contractual fraud, which is a definition of fraud that is peculiar to the contract in issue.

Secondly, the plaintiff has proved a breach of the customer/bank relationship as far as the freezing of the balance of its money is concerned. As I have noted above it was not necessary to prove the fault of the plaintiff as far as

chargeback liability is concerned. In common law fraud however it is crucial that actual notice and participation of the plaintiff should be proved according to the standards outlined in the above authorities.

Any money over and above that required for the chargeback liability ought to have been made available to the plaintiff to carry on its business. I must add that the banks contractual right was to debit the plaintiffs account and not to freeze it. The banks other remedy was to stop operation of the POS device as a means of payment by customers of the plaintiff. This would have been a sufficient safeguard against anticipated fraudulent transactions or ongoing fraudulent transactions. The plaintiff also proved that not all the funds on its accounts where from the POS device transactions.

Pursuant to the above findings, issues numbers 4, 5, and 6 which deal with the remedies available are resolved as follows:

1. The plaintiffs claim for a declaration that the blocking or freezing of operations for the plaintiffs account number 0140028293401 is unlawful cannot be granted. It is too general and obscures the contractual liability of the plaintiff for chargeback and the right of the defendant bank to temporarily block the plaintiffs account. No evidence was led as to whether the freezing order of the Magistrate's Court had been lifted or reviewed. Secondly, the statutory provision shows that an order of the Magistrate's Court could only have been made on the application of a state official such as a police officer or the Director of Public Prosecutions. It is not sufficient evidence to prove that there was no sufficient cause for the blocking of the plaintiffs account based on suspicion of fraudulent dealings using the plaintiffs POS device.

2. As far as the prayer for unfreezing of the operations of the said account is concerned, an order issues that the defendant bank unfreezes the plaintiffs account and allows the plaintiff to continue with operations on the said account.

3. On the issue of whether the defendant is entitled to judgment on the counterclaim, this issue has to be resolved in view of the evidence that the defendant did not debit the plaintiffs account with the amount of

chargeback it is liable to. The defendant is therefore entitled to a sum of Uganda shillings 27,710,355/=. This is a contractual right. Whereas the accounts of the defendant would be showing that this money was lying on the plaintiffs account in actual fact this money was available to the defendant for use in its operations. That also means that the money which was lying on the defendant's bank account had the potential to earn interest for the bank. Counsel had prayed that interest be awarded on the pecuniary claims. It is my presumption that all the money available with the bank can continually be invested by the bank in its businesses such as lending. If the account was frozen by court order, the order was obtained at the behest of the defendant and the defendant ought to accept the loss of any pecuniary damages that may have accrued from the use of this money. I also must add that the exact causes of the chargeback were not proved in evidence.

4. As far as the prayer for general damages of Uganda shillings 50 million is concerned, counsel for the defendant submitted that general damages in breach of contract are what the court or jury may award when the court cannot point out any measure by which they are to be assessed. No basis for the award of general damages was given by the defendant. The defendant is a financial institution that deals in money and any pecuniary damages it suffers is capable of estimation. Because no evidence was led as to how much loss it suffered due to the occurrence of chargeback claims, such damages if any have no basis for assessment. According to Halsbury's laws of England fourth edition (reissue) volume 12 (1) paragraph 802 at page 264 "damages are the pecuniary recompense given by the process of law to the person for the actionable wrong that another has done him. Damages may, on occasion, be awarded to the plaintiff who has suffered no ascertainable damage; damage may be presumed. Actions claiming money, other than those based on contract, tort or equity; are not actions claiming damages..."
5. In assessing the plaintiff’s liability for chargeback issued against the defendant bank I established that no-fault principle was used. The principle of liability was based on risk management or allocation of loss contractually of the business of credit cards use as a means of payment

for goods and services. No evidence was led or established that the plaintiff had acted negligently. DW1 at one point visited the plaintiff premises and found that the POS device was not on the premises. As to whether it had been used in other premises was highly presumptuous. It was necessary to establish whether on that day when it was missing the POS device was used and transactions took place. Taking into account all the factors and the contractual responsibility of the plaintiff to maintain the integrity of the system of credit card management, an award to the defendant of a sum of Uganda shillings 10 million as general damages would suffice.

6. On the claim for an award of 200 million Uganda shillings by the plaintiff, I have taken into account the fact that the defendant did not have to freeze the plaintiff's accounts. However, as pointed out no evidence of the amount of the bounced cheque, or a claim of civil liability arising from that was proved. Simply put, not sufficient details were given. The court has no way of calculating pecuniary damages arising from non use of the money amounting to about 15 million Uganda shillings that was lying to the credit of the plaintiffs account if the chargeback, was deducted. It was the plaintiff's contractual responsibility to take liability for chargeback arising out of the POS device installed at its premises for its business. Notwithstanding, taking into account the inconvenience suffered by the plaintiff due to the blocking of its account which was not clearly justified as the defendant had the contractual options to handle charge backs that I have outlined above, is my finding that the plaintiff is entitled to some general damages. The plaintiffs account was frozen for a period of two years. During this period, the value of the money has been eroded by inflation. Secondly the plaintiff has not been able to use this money. It is my finding that the plaintiff is entitled to pecuniary damages. Pecuniary damages are defined by Halsbury's laws of England fourth edition (reissue) volume 12 (1) paragraph 809 as "refers to any financial disadvantage, past or future, whether precisely calculable or not... loss of profits constitute pecuniary damage."
7. The plaintiff is therefore awarded a sum of Uganda shillings 50 million for the blockage of its account.

8. The plaintiff is awarded interest at 25% per annum on the decreed sum from the date of the judgment till payment in full.
9. As far as costs are concerned, credit card fraud is a new phenomenon and has never been litigated before. I have also noticed that there is no adequate statutory framework on the question of allocation of risk or losses suffered by the fraudulent activities of third parties such as credit card theft, skimming or cloning of cards, identity theft and other forms of credit card fraud. In the circumstances, each party shall bear its own costs

Judgment delivered the on 17 February 2012.

Honourable Justice Christopher Madrama

Judgment delivered in the presence of:

Michael Mafabi holding brief for Nicholas Ecimu for the defendant,

Doreen Kanyesigye Legal Officer for the defendant in court,

Ivan Balyejjusa for the plaintiff

Honourable Justice Christopher Madrama

17th of February 2012.