

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 88 OF 2009**

NIRMA INTERNATIONAL LTD}.....PLAINTIFF

VERSUS

JARIBU CREDIT (U) TRADERS LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action on 16 March 2009 and the suit was never tried owing mainly to the absence of the Defendant's directors. By the amended plaint the action against the Defendant is for recovery of **Uganda shillings 189,086,000/=** arising out of non-payment for motorcycles supplied to the Defendant by the Plaintiff, general damages for breach of contract and loss of business income, interest and costs of the suit.

The Defendant duly filed its written statement of defence in response to the summons and plaint denying liability. The matter initially proceeded before Honourable Justice Lamech Mukasa who was eventually transferred to another division of the High Court. Subsequently the suit was transferred to me for hearing after conclusion of the pre-trial scheduling conference. The Plaintiff was initially represented by Messieurs Muwema and Mugerwa Advocates and subsequently conduct of the Plaintiff's suit was taken over by Messieurs Wabagaza and Company Advocates. Counsel Ngobi Tony represented the Plaintiff in court. The Defendant was represented by Messieurs Shonubi, Musoke and Company Advocates. The Defendants advocates eventually withdrew from the conduct of the Defendant's case after several appearances on the ground of having lost touch with the Defendant and an order was made to serve the Defendant personally by way of substituted service using the media of the East African Newspaper.

In a joint scheduling conference memorandum endorsed by Counsels the parties set out the agreed facts. On the 12th of August 2008 the Plaintiff appointed the Defendant as its dealer and the Plaintiff was contracted to supply the Defendant with motorcycles on terms and rates as laid out in the appointment letter. Several orders were made between 12 August 2008 and 8 January 2009 and the motorcycles were duly delivered to the Defendant by the Plaintiff. The Defendant made part payment on the delivered motorcycles. The contracting parties had agreed that payment was to be 100% by way of post dated cheques issued with each local purchase order (LPO) before supply. The parties agreed at the time of contracting that the motorcycles would be delivered with log books and number plates.

In accordance with Order 12 of the Civil Procedure Rules, points of disagreements were included in the joint memorandum endorsed by both the Defendant and Plaintiff Counsel. The first point of disagreement was whether it was a condition of the contract that any changes in prices would only take place after the expiry of six months from the date of execution of the contract and only when the principal suppliers in India and Africa had changed their rates. Secondly whether the Plaintiff unilaterally increased prices of each of the two types of motorcycle from Uganda shillings 2,050,000/= and Uganda shillings 2,100,000/= to Uganda shillings 2,175,000/= and Uganda shillings 2,105,000/= for TVS – Max and TVS – Star motorcycles respectively. Thirdly whether the Defendant was coerced to pay for altered prices? The Defendant alleged loss of Uganda shillings 10,000,000/= as a result of an alleged unilateral revision of the prices of the motorcycles. Whether the Plaintiff acted contrary to what was agreed to the effect that it would register the logbook of 84 motorcycles in the names of Post Bank Ltd and provide number plates thereto as a condition precedent to the payment of the balance but instead and in total breach of the contract registered 49 motorcycles in its names and supplied another 9 motorcycles without logbooks and number plates. Whether as a result the Defendant was unable to secure payments from its clients for the motorcycles? Whether the alleged Plaintiffs breaches exposed the Defendant for loss of money in the amount of **Uganda shillings 25,000,000/=** as transfer fees for the motorcycles supplied with logbooks in the Plaintiffs names. Whether as a result of the Plaintiff's failure to fulfil its side of the bargain, the Defendant was forced to countermanded cheques it issued to the Plaintiff as a remedial action to force the Plaintiff to rectify the breaches.

There are several appearances of Counsel on record in attempts conclude the pre-trial conference so that I fix a date for hearing. The appearances before me were for conducting final pre-trial conference in 2011. The several appearances included appearances on 25 January 2011; 10th of March 2011; 3rd of November 2011; 8th of December 2011; 15th of February 2012; 22nd of March 2012; 14th of May 2012; 17th of December 2012; 26th of March 2013; 11th of April 2013 and several other appearances. In all the appearances adjournments were sought mainly because the Defendants were not available. Eventually on 20 August 2013 Counsel Peters Musoke of Messieurs Shonubi, Musoke and company advocates expressed an intention to withdraw from the conduct of the case and it was fixed for 24 September for the court to serve both parties with hearing notices through Counsels. At that stage of the proceedings it had been agreed that witness statements would be used. On 24 September 2013 Messieurs Shonubi Musoke and Company Advocates withdrew from the conduct of the case. Subsequently the Defendant, being a Ugandan Company with a registered office in Uganda was served by way of substituted service in the East African Newspaper when the matter had been fixed for hearing. The hearing notice indicated that the suit had been fixed for hearing on 27 March 2014.

On 27 March 2014, there was no representative from the Defendant Company in court when the Plaintiff applied to proceed ex parte. The Plaintiff had filed two witness statements and the witnesses were supposed to be cross examined. The court proceeded ex parte under the

provisions of Order 9 rule 20 (1) (a) of the Civil Procedure Rules for failure of the Defendant to appear when the suit was called for hearing.

In the absence of a Defendant for purposes of cross examination the statement on oath of PW1 Mr Hitesh Shah whose witness statement on oath was filed on court record on 21 October 2013 was not present but his statement was admitted. Cross examination on the basis of the witness statement was dispensed with and the statement admitted in evidence as the unchallenged testimony in chief of PW1. PW2 Mr Emanuel Irumba, a former accountant with the Plaintiff company also had a witness statement filed on 21st of October 2013 on oath and further supplemented his witness statement with oral testimony.

The testimony of PW1 is that he is the managing director of the Plaintiff Company and in the year 2007 the Plaintiff Company entered into an agreement to supply motorcycles on credit to the Defendant. The Plaintiff had the sole dealership of the TVS brand of motorcycles in Uganda in importing, assembling, and selling as a wholesaler and retailer of the brand Uganda. Mr Suresh Kantaria, represented as the Managing Director of the Defendant company represented himself to the Plaintiff company as one of the directors of "Prime Bank Kenya" and made a proposal for selling the Plaintiff company brand of motorcycles as a retailer to his company's customer's who were interested in purchasing on hire purchase terms from the Defendant company. PW1 committed the Plaintiff and the Defendant agreed to take a supply of 100 brand-new motorcycles for which the Defendant Company would issue post dated cheques payable within 15 days after delivery. The Plaintiff Company supplied the Defendant Company with 100 motorcycles and all the payments were paid in time against delivery. Mr Suresh Kantaria then introduced PW1 to his son Mr Keval Suresh Kantaria the managing director of the Defendant Company. Mr Suresh Kantaria had changed his earlier representation as the managing director of the Defendant Company in favour of his son whom he introduced as the Managing Director of the Defendant. Secondly his son would issue local purchase orders and also sign on all the Defendants' company cheques. The Plaintiff and the Defendant continued to do usual business smoothly and orders were made and payments were received in time.

While PW1 was out of the country, the Defendant Company contacted the Plaintiff's manager Mr Hermant Ghandi who informed him that the Defendant Company had received orders from Post Bank Uganda Limited for 90 TVS motorcycles. The said manager informed PW1 and PW1 authorised the Plaintiff Company to go ahead with the transaction on condition that post dated cheques would be issued in the Plaintiff Company's name. The Plaintiff company duly supplied and delivered to the Defendant the contracted number of motor cycles at a total purchase price of Uganda shillings 412,436,000/=. The Defendant issued several post dated cheques for the entire sum and those that matured were up to the tune of Uganda shillings 223,350,000/= but the rest of the cheques were returned unpaid up to the tune of Uganda shillings 189,086,000/= which sum remains unpaid and outstanding up to date. The bounced cheques were returned with the words "refer to drawer". The matter was followed up with Post bank and the Plaintiff established that the Defendant Company had been duly paid for all the motorcycles supplied. Mr Keval Kantaria,

the managing director of the Defendant Company had withdrawn all the money in cash from the company account and left for Kenya. Subsequently PW1 the managing director of the Plaintiff instructed his advocates to institute this suit.

The Defendant company warehouse was closed and the directors had disappeared. Upon contacting Messieurs "Prime Bank Kenya Ltd" PW1 was informed that Mr Suresh Kantaria was not a director of the said bank. The Plaintiff Company through PW1 reported the case of issuing false cheques to Central Police Station at Kampala and the Chief Magistrates Court at Buganda road issued a warrant of arrest against the directors of the Defendant Company. The warrant of arrest has never been executed against the directors. The directors lodged a complaint against PW1 in Nairobi Central Police Station alleging abduction by PW1 and a criminal court in Nairobi tried PW1 for the offence and the criminal matter was dismissed upon verification of the warrant of arrest issued by Buganda road court as authentic and issued by a competent court in Uganda. By 21 October 2013 it was five years since the Defendant Company was supplied by the Plaintiff and the outstanding payments remained unpaid. Consequently PW1 testified that he and the Plaintiff lost reputation with all customers and employees and the general public at large and the Plaintiff Company closed its business as a result of the actions of the Defendant Company.

The Plaintiff claims as against the Defendant **Uganda shillings 189,086,000/=** plus interest at the rate of 28% per annum from the date of the cause of action until payment in full. Secondly the Plaintiff claims **Uganda shillings 100,000,000/=** as general damages and interest at 28% per annum from the date of judgment until payment in full and costs of the suit. PW2 supplemented his written witness statement with oral testimony and corroborated the statement on oath of PW1.

PW2 is a former accountant of the Plaintiff Company. He testified that in the year 2007 the Plaintiff Company entered into an agreement to supply TVS motorcycles on credit to the Defendant Company. The Plaintiff Company had a sole dealership of the "TVS" brand motorcycles in Uganda. It had a dealership for importing, assembling and selling it as a wholesaler and retailer. He reiterated the testimony of PW1 which I need not repeat here. The bounced cheques were returned with the words "refer to drawer". In the supplementary oral evidence he testified that he left the company on 13 November 2011. He further testified that the Plaintiff incurred a lot of costs and its Managing Director Mr. Hitesh Shah developed brain tumour due to the problems generated by the Defendant's actions. All efforts to make sure the money was paid were futile and the Defendant's directors disappeared after the cheques bounced. They were warrants of arrest issued and still pending execution against the directors Mr Suresh Kantaria and Mr Keval Suresh Kantaria. All staff of the Plaintiff Company left because the Plaintiff could not pay its dues.

The Plaintiff closed its case and the Plaintiff's Counsel Mr Ngobi Tony filed written submissions.

In the submissions Counsel emphasised that the evidence was clear that cheques were issued by the Defendant in favour of the Plaintiff and were dishonoured upon presentation. Counsel submitted that it is trite law that a contract is enforceable as between parties making it and it is a party who fails to carry out its obligations who will have the contract enforced against it. He relied on the High Court case of **DADA CYCLES vs. SOFITRA S.P.R.L Ltd HCCS NO 656 of 2005** Judgment of Lady Justice Helen Obura on the question of freedom of contract and the binding and enforceable nature of a contract entered into by persons with legal capacity to contract. The Defendant failed to fulfil its obligations to the Plaintiff for the last seven years and the Plaintiff has lost business income and sustained further losses on account of being in business which ought to have benefited from the outstanding sum. In other words the Plaintiff would have made additional profits which could have accrued from further commercial activities if it had its own capital. In the case of **Hadley vs. Baxendale [1854] 9 Ex 341** it was held that damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as either arising naturally i.e. according to the usual course of things from such breach of contract itself or such as may reasonably be supposed to have been in contemplation of both parties at the time they made the contract as probable result of the breach of it. Counsel concluded that the court should find that the Defendant is in breach of the agreement and the contract should be enforced.

On the question of remedies available PW2 testified that as a result of the actions of the Defendants, the Plaintiffs managing director lost of business and as a result the Plaintiff company collapsed and the managing director suffered from mental stress and developed a brain tumour and to date he is in and out of hospital. In the case of **Robbialac Paints (U) Ltd versus K. T Construction Ltd [1976] HCB 45** it was held that substantial physical inconvenience and discomforts that is not strictly physical and discomfort caused by breach of contract will entitle the Plaintiff to damages. Counsel further prayed that the court awards interest.

I have duly considered the evidence on record. The Plaintiff has proved its case on the basis of documents tendered in evidence by consent of the parties. Exhibit P2 was admitted by consent of the parties on 18 March 2010 by Honourable Mr Justice Lameck Mukasa. It comprises of 15 original cheques issued by the Defendant Company in favour of the Plaintiff. It also includes a batch of deposit slips (8 in number).

I have carefully gone through the cheques. The first cheque is of Orient bank Ltd issued on 23 January 2009. The cheques are as follows:

1. Cheque number 890970 for Uganda shillings 17,500,000/=.
2. The second cheque is an Orient bank cheque dated 17th of January 2009 issued in favour of the Plaintiff by the Defendant for Uganda shillings 18,000,000/=. It is cheque number 890967.
3. Cheque number 890968 of Orient bank issued by the Defendant in favour of the Plaintiff is also dated 19th of January 2009 and is for Uganda shillings 18,000,000/=.

4. Cheque number 890981 dated 8th of February 2009 issued by the Defendant in favour of the Plaintiff being a cheque of Orient bank Ltd for the sum of Uganda shillings 16,312,500/=.
5. Cheque number 890980 dated 8th of February 2009 issued by the Defendant in favour of the Plaintiff of Orient bank Ltd for the sum of Uganda shillings 16,312,500/=.
6. Orient bank cheque number 890979 dated 8th of February 2009 issued by the Defendant in favour of the Plaintiff for the sum of Uganda shillings 16,312,500/=.
7. Orient bank cheque number 890978 dated 8th of February 2009 issued by the Defendant in favour of the Plaintiff for the sum of Uganda shillings 16,312,500/=.
8. Orient bank cheque number 890976 dated 19th of January 2009 for a sum of Uganda shillings 2,175,000/= issued by the Defendant in favour of the Plaintiff.
9. Orient bank cheque number 890975 dated 13 January 2009 issued by the Defendant in favour of the Plaintiff for the sum of Uganda shillings 3,000,000/=.
10. Orient bank cheque number 890973 dated 12th of January 2009 issued by the Defendant in favour of the Plaintiff for a sum of Uganda shillings 18,375,000/=.
11. Orient bank cheque number 890972 dated 11th of January 2009 issued by the Defendant in favour of the Plaintiff for the sum of Uganda shillings 18,000,000/=.
12. Orient bank cheque number 890971 issued by the Defendant in favour of the Plaintiff dated 10th of January 2009 for the sum of Uganda shillings 18,000,000/=.
13. Orient bank cheque number 890969 dated 21st of January 2009 issued by the Defendant in favour of the Plaintiff for a sum of Uganda shillings 18,000,000/=.
14. Orient bank cheque number 890965 dated 13th of January 2009 issued by the Defendant in favour of the Plaintiff for the sum of Uganda shillings 18,000,000/=.
15. Orient bank cheque number 890966 dated 15th of January 2009 issued by the Defendant in favour of the Plaintiff for the sum of Uganda shillings 18,000,000/=.

All the cheques were deposited on various dates and all of them indicate a handwritten writing in red that payment was stopped. In other words the Defendant stopped payment of the cheques. The stopped and bounced cheques amount to **Uganda shillings 223,300,000/=**. According to PW1 out of the cheques issued the cheques returned unpaid amount to **Uganda shillings 189,086,000/=**. PW2 repeats this testimony in paragraph 8 of his witness statement. In the plaint the sum claimed is **Uganda shillings 189,086,000/=**. On the basis of the testimony of PW1, PW2 and the documentary evidence of local purchase orders exhibit P1 and the cheques exhibit P2, the Plaintiff has proved that the Defendant took motor cycles on contract from the Plaintiff and issued post dated cheques which it stopped hence the bouncing of the cheques and the Plaintiff lost Uganda **shillings 189,086,000/=** for goods supplied to the Defendant. The loss occurred when the cheques were stopped around April 2009.

By stopping the cheques after the goods had been supplied, the Defendants acted in breach of the contract to pay for the motorcycles supplied by the Plaintiffs. The evidence of supplies is contained in a volume of documents admitted as Plaintiff's exhibits. They include a series of

local purchase orders exhibit P 31 – P 34. Tax invoice exhibit P 35; delivery acknowledgement thereof exhibit P 36; tax invoice exhibit P 37; delivery acknowledgements exhibits P 38 – P 52; tax invoice exhibit P 53; delivery acknowledgements exhibits P 54 – P68; tax invoice exhibit P 69 and delivery acknowledgements exhibits P70 – 84; tax invoice exhibit P 85 and delivery acknowledgements exhibits P86 – P 95; tax invoice exhibit P 96 and delivery acknowledgements exhibits P 97 – P111; tax invoice exhibit P112 and delivery acknowledgements exhibits P 113 – 127; tax invoice exhibit P128 and delivery acknowledgements exhibits P129 – P 138; tax invoice exhibit P139 and acknowledgement of delivery exhibits P140 – P 154. Exhibit P1 is a letter to the Defendant's directors on the subject of “Dealership for TVS Brand Motorcycles and Authorised Agency Agreement”. The Defendant by the letter was appointed an agent of the Plaintiff and the rates for each motorbike was indicated therein. The terms of payment were 100% payment by post dated cheques issued with each local purchase orders before supplies. It is also written that an official agency agreement with mutual terms will be drawn and offered for signature. The delivery acknowledgement coupled with tax invoices issued by the Plaintiff and the cheques exhibit P2 evidence a business relationship in which the Defendant issued local purchase orders and the Plaintiff supplied motor bicycles against post dated cheques exhibits P2. Some cheques which are not in evidence were honoured while the cheques in dispute admitted as exhibit P2 were dishonoured. On the basis of the evidence I find that the Plaintiff supplied TVS motorcycles to the Defendant out of which an amount of Uganda shillings 189,086,000/= has not yet been paid for.

As far as authorities on bounced cheques are concerned, I refer to the Judgment of honourable Lady Justice Irene Mulyagonja Kakooza in **Sembule Investments Ltd vs. Uganda Baati Ltd MA 0664 of 2009** where she held upon considering the definition of a bill of exchange that a cheque by its nature is unconditional. Where a cheque has been dishonoured the Plaintiffs remedy is to file a suit. Secondly a cheque constitutes a promise to pay and the Defendant becomes liable to make good the amount written on the face of the cheque. The Court of Appeal of Uganda in the case of **Kotecha vs. Mohammad [2002] 1 EA 112** held that a bill of exchange such as a cheque is to be treated as cash and unless exceptional grounds are shown when it is dishonoured, the holder thereof is entitled to judgment. The court further approved and followed English judicial precedents to the effect that the Plaintiff would be entitled to judgment even if there was a cross claim against the Plaintiff by the Defendant. A cross claim by the Defendant can be the basis of a separate action and would not debar the court from pronouncing judgment based on the face value of the cheque.

In Uganda issuing a cheque that is subsequently dishonoured is a criminal offence under the Penal Code Act. The evidence in this suit is that an arrest warrant had been issued for the directors of the Defendant Company and is yet to be enforced.

On the question of remedies the Plaintiff is entitled to recovery of Uganda shillings 189,086,000/= as special damages against the Defendant.

As far as general damages are concerned, the general principle for the guidance of court in the award of damages is laid down by the East African Court of Appeal in the case of **Dharamshi vs. Karsan [1974] 1 EA 41** and is a fundamental common law doctrine of *restitutio in integrum*. It means that the Plaintiff is to be restored as nearly as possible to a position he would have been had the injury complained of not occurred. I.e. as if he had received his money in time.

Secondly in **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 812 the distinction between general damages and special damages, is that general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms, whereas special damages are those losses which can be calculated in financial terms. Furthermore as far as pleadings are concerned, special damages refers to those losses which must be proved, whilst general damages are those which will be presumed to be the natural or probable consequence of the wrong complained of, with the result that the Plaintiff is required only to assert that such damage has been suffered.

Lastly **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 1063 thereof at page 484, lays down the common principle that upon breach of the contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow.

Flowing from the authorities quoted above, the Plaintiff's claims for special damages based on the amounts proved on the face value of the cheques issued by the Defendant which bounced. Special damages having been awarded the Plaintiff would be entitled to interest on the special damages at the rate court would allow in the absence of a specific contractual provision providing for interest. Interest should be awarded at commercial bank rates from June 2009 till the date of judgment.

As far as general damages are concerned I agree with the Plaintiff's Counsel that the Plaintiff was taken out of its money which it could have used from the time it was deprived of it. Not evidence of loss of profits was adduced. However general damages can be awarded on the basis of the probable loss suffered by the Plaintiff which loss is the natural consequence of failure to pay for goods supplied and which loss cannot be calculated in precise terms. In other words the Plaintiff could have utilised the money to generate more profits from its business.

Costs follow the event and the Plaintiff is awarded costs of the suit.

In the premises the following orders shall issue:

1. The Plaintiff is awarded Uganda shillings 189,086,000/= as special damages.
2. The award of special damages shall carry interest at a reasonable commercial rate of 17% per annum from June 2009 up to the date of judgment.

3. The Plaintiff is awarded general damages of Uganda shillings 55,000,000/=.
4. The aggregate sum is awarded in paragraphs 1, 2, and 3 shall carry interest at the rate of 14% per annum from the date of judgment till payment in full.
5. The Plaintiff is awarded costs of the suit.

Judgment delivered this 11th day of April 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Counsel Tony Ngobi for the plaintiff,

The Plaintiffs MD Mr. Hitesh Shah in court

No representatives of Defendant.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

11th April 2014