THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HIGH COURT CIVIL SUIT NO 280 OF 2010

AMONG MARY GORRETI}.....PLAINTIFF

VERSUS

TRACKS INTERNATIONAL LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff's claim against the Defendant in the plaint is for special and general damages, interests and costs for breach of contract.

The Plaintiff alleges in the plaint that on 14 October 2004 and also on 14 October 2005 at the Defendants instance and special request, the Plaintiff entered into a contract for hire of her Toyota Hilux double cabin pickup registration number UAF 657 J at the consideration of Uganda shillings 100,000/= per day for the period 2004 to 2005 amounting to Uganda shillings 78,568,400/=. The Plaintiff further averred in the plaint that there was an acknowledgement of indebtedness to the Plaintiff dated 3rd of February 2009 by the Defendant. The refusal to pay constituted breach of contract and failure to pay put the Plaintiff out of money causing general loss and inconvenience and the Plaintiff claims general damages.

In the written statement of defence the Defendant company denied liability. The Defendant alleges that it paid Uganda shillings 37,318,400/= to the Plaintiff through one Captain Francis Edimu an attorney of the Plaintiff who also happens to be husband of the Plaintiff. Payments were made by cheque totalling Uganda shillings 21,000,000/= and partly by cash. Furthermore but without prejudice the Defendant avers that pursuant to a reconciliation document dated 3rd of February 2009, a sum of Uganda shillings 39,568,400/= out of the amount claimed by the Plaintiff ought not to be considered for payment on account of being based on missing/lost invoices/audit query.

Attempts to resolve the dispute through mediation failed and the suit was subsequently heard on merits. The Plaintiff was represented by Peter Jogo-Tabu of Messrs Jogo Tabu and Company Advocates while the Defendant was represented by John Peter Nagemi of Messieurs Nagemi and Company Advocates. On 1 July 2013 the court ordered the appointment of an official referee/accountant to establish the persons to whom payments in paragraphs 2 and 3 of the written statement of defence were made.

The agreed issues for determination are as follows:

1. Whether or not there was breach of contract by the Defendant?
2. If so, what are the remedies available?

After the Plaintiff adduced her evidence and Defendant adducing its evidence, Counsel addressed the court in written submissions. I will refer to the evidence while making reference to the submissions of Counsel because the basic relevant facts in the submissions of the Plaintiff's and Defendant's Counsel are not in controversy.

Whether or not there was breach of contract by the Defendant?

The Plaintiff's Counsel relied on paragraph 2 of the written statement of defence for the existence of a validly or a duly executed contract between the Plaintiff and the Defendant. He submitted that the contract was also admitted by DW1 in his testimony in chief and cross examination. These contracts are exhibits P1 and P2 and are admitted at pages 4 – 9 of the trial bundle. The Plaintiff's Counsel submitted that all that the Plaintiff needed to prove was whether there was breach of the contracts as the existence of the contract is not in dispute.

PW1 Captain David Richard, the attorney of the Plaintiff testified that the parties entered into an agreement of hire of motor vehicle UAF 657 J Toyota double cabin pickup of Uganda shillings 36,000,000/= for the period beginning 14th of October 2004 and ending on 13 October 2005. Upon execution of the contract the Plaintiff handed over the vehicle to the Defendant and it worked for the entire period. At the expiry of the period the Plaintiff demanded payment from the Defendant who promised payment within 21 days and persuaded the Plaintiff to execute a further contract for 365 days on the same terms which contract was performed with effect from 14 October 2005 to the 13 October 2006. Thereafter the Plaintiff demanded payment from the Defendant and the Defendant promised payment immediately it received payment from the Ministry of Defence. This promise has not been kept by the Plaintiff up to date. Consequently the contract debt for the period 14th of October 2004 to the period 13th of October 2005 and the period 14th of October 2005 up to 13 October 2006 is Uganda shillings 73,000,000/=. In addition there was an outstanding amount of Uganda shillings 5,568,400/= carried over from the contract between 2003 and 2004 giving a total of Uganda shillings 78,568,400/=.

Due to non-payment by the Defendant and upon learning that the vehicle had been hired by the Ministry of Defence, the Plaintiff wrote a complaint later to the Director/Transport Ministry of Defence whereupon the Ministry of defence halted payments and advised the parties to reconcile accounts. The reconciliation by the parties is reflected in exhibit P3 and exhibit P4 and items 3 (a) dated 3rd of February 2009 endorsed by the Plaintiff. According to PW1 through exhibit P 35 dated 28th of August 2012 elicited by an order of court made on 12 June 2012, he learnt that the Defendant had paid Uganda shillings 16,800,000/= in respect of the suit vehicle. Besides the said payment, the Defendant had on 22 June 2012 been paid through electronic funds transfer

domestic arrears worth Uganda shillings 110,660,400/= but never paid the Plaintiff. The accountant of Ministry of defence PW2 corroborated the evidence of PW1 that the Defendant had been paid Uganda shillings 17,556,000/= before 2007 in respect of the suit vehicle and thereafter has been receiving payments through electronic funds transfers. According to exhibit P 35 between 25 April 2007 and 13th of June 2011 the Defendant had been paid a total of Uganda shillings 479,920,264/=. On 6 November 2012, the Defendant was paid Uganda shillings 100,471,800/=. Together with the earlier amount, the total payments made to the Defendant by the Ministry of defence came to Uganda shillings 580,392,064/= according to exhibit P 36.

PW2 further testified that the Defendant's letter exhibits P4 and P5 which is a letter to the permanent secretary Ministry of Defence to pay the Plaintiff could not be implemented as it would raise an audit query.

PW3 Odongo Nicholas testified that he is the son of the Plaintiff. In 2005 he was registered as owner of the motor vehicle in issue when he was only 16 years old. The vehicle is owned by his mother, the Plaintiff bought it and also deals with it herself notwithstanding that it is registered in his names. The first time he saw the registration book for the vehicle was in 2006. Counsel submitted that the Plaintiff had fulfilled are part of the contract by delivering the vehicle to the Defendant upon execution of the contract. From the evidence of PW1, the Defendant did not pay the Plaintiff after the contract had been performed. In those circumstances the first issue ought to be answered in favour of the Plaintiff.

In reply on the first issue the Defendants Counsel conceded to the facts contained in the submissions of the Plaintiff’s Counsel but only disputes liability and prays that the suit is dismissed with costs.

In paragraph 4 (a) of the plaint, the Plaintiff averred that the value of the two contracts totalled to a sum of Uganda shillings 78,568,400/= but she later conceded that the contract amount is Uganda shillings 73,000,000/= in the written submissions of Counsel. Notwithstanding a sum of Uganda shillings 5,568,400/= was imported or introduced in the Plaintiffs written submissions to justify a claim of Uganda shillings 78,568,400/= which materially contradicts the pleadings of the Plaintiff in paragraph 4 (a) of the plaint. The additional claim would be barred under the Limitation Act. By claiming a sum of Uganda shillings 78,568,400/= the Plaintiff implies that the Defendant did not pay a single coin over the period claimed for the hire of the vehicles.

The Defendants Counsel furthermore wanted to know how the claim of Uganda shillings 78,568,400/= arise under paragraph 5 of the plaint? In his submission the answer can be found in the document dated 3rd of February 2009 under paragraph 5 and also referred to as exhibit P3 and P4. He submitted that it was arguable that the effect of the said exhibits was to direct the Permanent Secretary, Ministry of defence to settle monies claimed and acquiesced to by the Plaintiff on the plain and literal construction of the document as a whole which in particularly paragraph 2 thereof mention the reconciliation period covered as between 2004 and 2008. It is

arguable that the figure of Uganda shillings 78,568,400/= includes monies for that period and the parties agreed that the amount payable was to be reconciled and the final position agreed to after locating lost invoices.

The question was therefore how one would ascertain breach of contract to pay a purported sum of **Uganda shillings 78,568,400/=** after the express agreement to reconcile and agree to a final position after locating lost invoices? Counsel suggested that the alleged breach to pay the amount of **Uganda shillings 78,516,400/=** had to be determined after lost invoices are located and the parties have reconciled their accounts according to exhibits P3 and P4. At the close of the Plaintiff's case, none of the Plaintiff's witnesses discharged the burden of proof to the standard required. In any case the amount documented not to be due and payable according to exhibits is **Uganda shillings 38,568,400/=** particularly item 2 of the last sentence and item 3 (a) (iii) of exhibits P3 and before as well as paragraph 3 of the written statement of defence which had not been rebutted by the Plaintiff. The sum agreed to by the parties is **Uganda shillings 39,000,000/=** to be due and payable to the Plaintiff by the Permanent Secretary Ministry of Defence.

In the said document item 3 (iii) the sum of **Uganda shillings 39,568,400/=** is constituted by missing/lost invoices for 12 months and was not due and payable. The sum of **Uganda shillings 39,000,000/=** added to the sum of **Uganda shillings 39,568,400/=** amounts to **Uganda shillings 79,568,400/=.**

The Plaintiff sued the Defendant for a sum of **Uganda shillings 79,568,400/=**, it appears that elsewhere she acknowledged payments from the Defendant by cheques and cash over the same period of 2004 to 2005 according to the testimony of DW1. The Defendant tabulated cheque payments to the Plaintiff which totalled to **Uganda shillings 21,000,000/=**. On the basis of that submission, **Uganda shillings 21,000,000/=** if deducted from **Uganda shillings 39,000,000/=** which the parties agreed to be payable by the Permanent Secretary Ministry of Defence according to exhibit P3 or exhibit P4 leads to a sum of **Uganda shillings 18,000,000/=** would remain as the outstanding balance. This would be subject to further submission based on the testimony of DW1.

The Plaintiff in a letter copied to court and addressed to the Defendants Counsel dated 14th of July 2011 unambiguously made it clear that that she will rely on vouchers for the payment of **Uganda shillings 16,318,400/=** and counterfoils of lost invoices from the Defendant. If the cash payment of **Uganda shillings 16,318,400/=** is deducted, what would be left is a negligible amount of **Uganda shillings 1,681,600/=** and the effect thereof would be to further reduce or wipe out altogether a purported balance claimed in the plaint. This material fact was averred by the Defendant in paragraph 2 (d) of the written statement of defence and has not been rebutted by the Plaintiff.

According to exhibits P1 and P2 clause 2 (b) the parties explicitly and unambiguously agreed to levy VAT on **Uganda shillings 36,500,000/=** on each hire contract. The total VAT chargeable on both contracts would be an amount of **Uganda shillings 13,140,000/=** which if deducted from the amount of **Uganda shillings 1,681,600/=** would leave a balance payable to the Plaintiff of less than zero.

Furthermore the Plaintiff violated a well laid out procedure by coming direct to this honourable court to claim a sum of **Uganda shillings 78,568,400/=** which ought to have been ironed out prior to filing the suit. Secondly under exhibits P3 the Plaintiff was supposed to seek redress directly from the Permanent Secretary Ministry of Defence. Notwithstanding the testimony of court witness number 1 Mr Pulle Patrick, the official referee appointed by the court is superfluous because the Plaintiff has expressly relied on exhibit P5, P6, P7 and P8. According to the testimony of PW2, while being cross examined on exhibit P 35, PW2 the Defendant was paid a sum of **Uganda shillings 11,844,000/=** covering the periods 14th of October 2004 up to July 2005 respectively. Secondly the Defendant still has outstanding bills owed by the Ministry of Defence in respect of the suit vehicle.

In the premises the Defendants Counsel prayed that issue number one is resolved in the negative.

In rejoinder the Plaintiff's Counsel on the question of the importation of **Uganda shillings 5,568,400/=** and whether it is caught by the law of limitation submitted that the testimony of PW1 shows that in a reconciliation of accounts between the parties, the Defendant in exhibit P4 paragraph 3 (a) acknowledged this balance as forming part of **Uganda shillings 39,568,400/=** and in the premises the acknowledgement revived the cause of action on 19 July 2005 when the Plaintiff was to be paid by virtue of exhibit P6 and section 22 (4) of the Limitation Act cap 80 laws of Uganda.

On the question of outstanding amounts the Plaintiff relies on the testimony of PW1 that the Defendant paid the Plaintiff by exhibit P6 **Uganda shillings 4,000,000/=** which was used to reduce **Uganda shillings 9,568,400/= Uganda shillings 5,468,400/=** which was then added to **Uganda shillings 73,000,000/=** to bring the total to **Uganda shillings 78,468,400/=** according to paragraph 4 (a) of the plaint. Exhibit P 34 Table (a) is further evidence of this.

As far as privity of contract is concerned a stranger to a contract cannot take advantage of the provisions of the contract even if it was apparent from the contract that some provision in it intended to benefit him. The Plaintiff was not a party to the contract executed between the Defendant and the Ministry of Defence and the Ministry of Defence cannot be faulted for not paying the Plaintiff even though the Defendant had by exhibit P3 and before requested it to pay. PW2 Mr Robert Kato confirmed that the Ministry of Defence could not pay the Plaintiff because she was not a prequalified person contracted to supply vehicles to the Ministry of Defence. Counsel further submitted that exhibit P3 and P4 did not ascertain the debt owed by the Defendant to the Ministry of defence to pay the Plaintiff but was a mere letter to the Permanent

Secretary Ministry of Defence requesting it to pay the Plaintiffs directly. By subscribing his signature to the letter, the Plaintiff intended to show her agreement to the figures indicated in the document.

Additionally the Plaintiff's Counsel maintained that the Defendant's Counsel digressed from the point of breach of contract by laying emphasis on the fact that once it had written exhibit P3, it was discharged from liability to pay the contract debt to the Plaintiff when clause 2 (a) of the contract exhibit P1 puts obligation to pay on the hirer of the vehicle. The vehicle performed work for which it was charged daily and the Plaintiff was entitled to be paid per day if she made a request for payment. From the evidence of PW1 the request for payment was made 365 days after and the Defendant failed to pay within 21 days upon demand constitutes breach of contract. This submission on breach of contract also applies to the second contract on 13 October 2006, when the Defendant failed to pay **Uganda shillings 36,500,000/=.** Finally the Plaintiff's Counsel rejoined that the obligation to pay the contract sum for the hire of the Plaintiff's vehicle lay with the Defendant and not with the Ministry of Defence. Exhibits P3 and P4 could not have the effect of amending the contract as they were not supplementary contracts.

On the question of the input of the mechanism for arbitration of any disputes under the contract agreement exhibits P1 and P2, the argument is that once accounts are reconciled by the parties on 3 February 2009, the purposes of clauses 12 (the arbitration clause) had been achieved and there was no dispute to refer to arbitration. In any case any contractual provision to refer disputes to arbitration does not oust the jurisdiction of the High Court.

On the question of VAT and withholding tax, liability to pay VAT and withholding tax is that of the service provider to the Ministry of Defence and it is also provided for under exhibit P1 and P2. As far as VAT is concerned, the Plaintiff is obliged only after being paid by the Defendant. The testimony of PW2 an accountant of the Ministry of Defence is that according to exhibit P 35 the Defendant submitted to the Ministry of defence tax invoices implying that he should have added tax on the invoices. Inclusion of VAT tallies with paragraph 2 (b) of the contracts exhibits P1 and P2 that all monies therein include VAT of 17% and accordingly the Defendant is obliged to pay the VAT.

Regarding submissions that certain payments were made to PW1 captain David Richard Edimu, the Plaintiff's Counsel relied on the report of the official referee appointed by the court. The report shows that between 7 February 2004 and 21st of July 2004, the Defendant paid PW1 a total of **Uganda shillings 32,848,000/=.** The payments were made before 14 October 2004 and therefore fall outside the suit contracts. There is one payment of **Uganda shillings 4,000,000/=** made to the Plaintiff by the Defendant on 19 July 2005 which falls within the contract period between 14th of October 2004 and 13th of October 2005. That payment is acknowledged by the Plaintiff in exhibit P6 on the basis of which substantial submissions have been made. PW1 became the Plaintiff's attorney on 28 February 2011 according to exhibit P 33. Consequently the Defendant cannot record that payment is made to PW1 before the suit contracts were executed

Payments made to the Plaintiff and the submissions to that effect are misconceived and ought to be rejected.

Resolution of issue number one: Whether or not there was breach of contract by the Defendant?

I have carefully considered the evidence on record together with the written submissions and authorities cited.

The defence primarily directed its efforts on a reconciliation of accounts based on evidence adduced. The submission amounts to a contention that there is no money due to the Defendant without avoiding the question of whether there was a contract between the parties or that payment was supposed to be made under the contracts. It is therefore an admitted fact that there was a contract between the parties whose terms are embodied in exhibits P1 and P2. Secondly a lot of emphasis has been put on the document exhibits P3 and P4 executed between the Plaintiff and the Defendant which reveal the point at which the parties had reached after a reconciliation of accounts. This submission is also reveal that the controversy in this suit primarily deals with matters of fact as to what amount owing if any and secondly whether the amounts are due.

Starting with the plaint, the Plaintiffs claim is for the hire of the vehicle per day by the Defendant at the rate of **Uganda shillings 100,000/=** for the period 2004 and ending in 2005 with a total claim of **Uganda shillings 78,568,400/=.** In paragraph 5 the Plaintiff avers that there is an acknowledgement of indebtedness to the Plaintiff by the Defendant dated 3 February 2009 and there was a breach of the same as a consequence of which the Plaintiff suffered special and general damages. The particulars of special damages disclose that the value of the claim is the alleged unpaid contract debt. Secondly it is alleged that refusal to pay the amount was in breach of the contract. The contracts were tendered in evidence by agreement and are not in dispute as exhibits P1 and P2. Exhibit P1 is dated 14th of October 2004 between the Plaintiff and the Defendant. The consideration in paragraph 1 of the contract for the hire of a motor vehicle is **Uganda shillings 100,000/=** per day. It was also agreed that the Defendant would take the vehicle for a period of 365 days from the contract date and the total consideration payable was **Uganda shillings 36,500,000/=**

Exhibit P2 contains the same terms and is a contract made on 14 October 2005 between the Plaintiff and the Defendant. Subsequently the most important document after the contract is a letter on the letterhead of Tracks International Ltd (the Defendant) dated 3rd of February 2009 addressed to the Permanent Secretary Ministry of Defence and endorsed by the Plaintiff and the Defendant. The letter gives a breakdown of monies owing to the Plaintiff with regard to motor vehicle UAF 657 J which indicates a sum of **Uganda shillings 39,000,000/=** broken down according to invoices processed by the UPDF for 4 months x3 amounting to **Uganda shillings 12,000,000/=** and invoices in debt management for 9 months x3 amounting to **Uganda shillings 27,000,000/=** giving a sum total of **Uganda shillings 39,000,000/=.** In that letter it is provided

that the above amount would be offset from the invoices with the department of Debt Management and to be paid to the above. The third category of indebtedness involves missing/lost invoices which were to be traced and processed for payment to the Plaintiff amounting to **Uganda shillings 39,568,400/=.** The endorsed letter was admitted as exhibit P4.

I have carefully considered exhibits P4 without having to consider first the rest of the evidence, and would set it out as far as is relevant. As indicated above the letter is addressed to the Permanent Secretary Ministry of Defence. It is endorsed on each page by three signatories namely the Defendant with a stamp of the Defendant, the Plaintiff and another person. The letter ends with the words "we authorise the above as stated and hope for your timely payment."

The letter is entitled in the subject line as: "Payment Claim for Transport Services Rendered to the Ministry of Defence/UPDF." The first three paragraphs are as follows:

> "Reference is made to the above subject matter wherein I address as hereunder:
>
> 1. That Tracks International Ltd outsourced motor vehicles registration number UAF 657 J Toyota Hilux Double Cabin 4WD and UAE 512 M Toyota Land Cruiser Prado station wagon 4WD from Ms AMONG MARY GORETTY and AKELLO JESSICA SUSAN respectively.
> 2. That Tracks International Ltd in turn hired the motor vehicles to Ministry of Defence/UPDF during the period between 2004 and 2008. The amount that has been reconciled and agreed on in respect to the said motor vehicle hire totals to 148,322,400/= only. The figure of 39,568,400/= has to be reconciled and final position agreed (after locating lost invoices).
> 3. The breakdown is as follows:
>   a. M/Vehicle registration number UAF 657 J hired to Major General JF Oketta. Owner MS AMONG MARY GORRETY. Stanbic Bank: A/C; 012101020790. Amount: 39,000,000/=. Billed as follows: (i) Invoices as processed by UPDF 4 months x3 = 12,000,000/=. (ii) Invoices in Debt Management 9 months x3 = 37,000,000/= sub – total = 39,000,000/= (thirty-nine million shillings) only. This amount should be offset from the bills with debt management and to be paid to the above. (iii) missing/lost invoices: 12 months hence, invoices missing, these are to be traced and processed for payment to Ms Among Mary Gorrety 39,568,400/= only.
>   b. M/Vehicle Toyota land cruiser…
>
> We authorise the above as stated and hope for your timely payment."

The document clearly acknowledges two figures namely the sum of Uganda shillings 39,000,000/= and another amount of Uganda shillings 39,568,400/=. The total amount indicated in the above document is a total of Uganda shillings 78,468,400/=. This also happens to be the

amount of money claimed in the plaint exactly. In paragraph 5 of the plaint it is averred that there was a written acknowledgement of the indebtedness of the Defendant to the Plaintiff dated 3rd of February 2009 for the said amount.

The first line of defence is that it is apparent on the face of exhibit P4 that the parties to the said document intended the money to be paid by the Permanent Secretary Ministry of Defence. The Plaintiffs counter argument is that the Plaintiff is not privy to any contract between the Ministry of Defence and the Defendant and therefore the Plaintiff cannot enforce any obligations of the Ministry of defence under the said contract. Furthermore the Plaintiff relies on the testimony of Mr Robert Kato, an accountant with the Ministry of Defence who testified that the Plaintiff could not be paid because the contract was with the Defendant. Lastly it was submitted for the Plaintiff that the Defendant has refused to pay the Plaintiff. Whereas it is true that the Defendant hired the vehicle in question to the Ministry of Defence and consequently any contract that existed was between the Defendant and the Ministry of Defence, the question is not so plain. In the first place there is an implicit acknowledgement by both parties that the Ministry of Defence owes some money on the basis of hiring the vehicle of the Plaintiff but on a contract with the Defendant. In other words the Defendant subcontracted the vehicle to the Defendant. Exhibit P1 and exhibit P2 which is the contract between the Plaintiff and the Defendant as noted earlier is between the Plaintiff and the Defendant. Under that contract the vehicle was hired by the Defendant. There is no indication anywhere that the vehicle could be subcontracted in exhibit P1 and P2. However in paragraph 3 of both exhibits, it is indicated that the Defendant would notify the owner/Plaintiff where the motor vehicle is proceeding. If the motor vehicle goes to undisclosed destinations for instance to areas occupied by rebels or in danger zones or in any place where there is no security, the Defendant would be responsible for any damages inflicted on the vehicle or the driver. It was only envisaged that the vehicle could go into dangerous zones at the risk of the Defendant. Secondly hiring the vehicle to the Ministry of Defence is a subcontract by the Defendant. Thirdly any monies owing under the hiring arrangement between the Defendant and the Ministry of defence is enforceable only between the Defendant and the Ministry of defence. I agree with the Plaintiff's submission that obligations to pay and the exhibits P1 and P2 arise under the wording of those contracts and the obligation is imposed on the Defendant. Missing invoices do no avoid the period of hire by the Defendant.

In the premises, the document exhibit P4 has the effect of putting it to the knowledge of both parties thereto that the Defendant expected money from the Ministry of defence for purposes of payment of the Plaintiff. Secondly it put to the knowledge of both parties the amounts of monies which were due to the Plaintiff at the time of writing exhibit P4 on 3 February 2009. On the basis of a statement of the amount of monies owing to the Plaintiff by 3 February 2009, further evidence shall be examined to come to a conclusion as to whether any money is still owing to the Plaintiff.

The question of whether the Defendant could bind the Ministry of Defence in its contract with the Plaintiff, for the Ministry to pay the Plaintiff is easy to answer. The Defendant could not bind the government of Uganda since all contracts involving the government or government departments have to be cleared by the Attorney General. The Ministry of Defence is a Department of government and any contract affecting it has to be cleared by the Attorney General under article 119 of the Constitution of the Republic of Uganda. Article 119 (5) of the Constitution (supra) provides that no agreement, contract, treaty or convention or document of whatever name called to which the government is a party or in respect of which the government has an interest, shall be concluded without the legal advice from the Attorney General. This article was considered by the Constitutional Court/Court of Appeal of Uganda in the case of **Nsimbe Holdings Limited versus Attorney General and Inspector General of Government in Constitutional Petition Number 2 of 2006** where the court considered whether a contract executed without the input of the Attorney General was a nullity (where the government is a party). The Constitutional Court held that it was unconstitutional for NSSF to enter into a merger agreement without submitting such an agreement to the Attorney General for legal advice. They further held that by virtue of article 2 of the constitution, any law or act that contravenes the constitution is void to the extent of the contradiction and consequently the merger agreement was in contravention of the constitution and was null and void. It follows that the Ministry of defence cannot be bound by exhibit P4 because the underlying agreement is between the Defendant and the Ministry of Defence presumably with the consent of the Attorney General. However the agreement is not on the court record and the issue does not arise in the suit.

Furthermore the doctrine of privity of contract is a common law doctrine and is to the effect that a contract cannot usually give rights or impose obligations on anyone who is not a party to the contract (see Osborn's Concise Law Dictionary 11th edition at page 324). This doctrine has been variously applied by the courts of Uganda. I will only refer to the case of **Dr Vincent Karuhanga t/a Friends Polyclinic versus National Insurance Corporation and Uganda Revenue Authority HCCS No 617 of 2002 Honourable** Justice Bamwine held that only a person who is a party to a contract can sue or be sued upon it. A stranger to a contract cannot take advantage of the provisions of the contract even where its provisions were intended to benefit him. The Ministry of Defence is not a party to exhibit P4 which is executed between the Defendant and the Plaintiff. What the Defendant could do was to appoint the Plaintiff its agent for purposes of its contract with the Ministry of Defence so as to authorise the Plaintiff to receive money on its behalf. In such a case the Plaintiff would act as an agent of the Defendant. The conclusion is that exhibits P1 and P2 remained enforceable as between the Plaintiff and the Defendant because the Defendant cannot lawfully transfer its right to the Plaintiff in a way that would be binding on the Ministry of Defence. Because the aspect of the Plaintiff having a right to claim proceeds of the hire agreement between the Defendant and Ministry of Defence is not enforceable in law, the specific provision as confers a right on the Plaintiff to claim payment from the Ministry of defence for the amount agreed upon in exhibit P4 is not enforceable against the Plaintiff or the Defendant. In other words it is inoperative being in contravention of the

constitution to the extent that it purports to bind the government to pay the Plaintiff. Since the Ministry of defence is not obliged to honour exhibit P4, the obligations of the Defendant and the exhibits P1 and P2 to pay the Plaintiff for the hire of her vehicle remains. In any case the Plaintiff could only act as a representative of the Defendant.

The remaining question is therefore whether the sum mentioned in exhibit P4 is due and owing and whether the Defendant is liable to pay the Plaintiff for the said sum. I agree with the Defendants Counsel that exhibit P4 has to be construed on the basis of its language and wording. In the first place exhibit P4 provides that the amount of **Uganda shillings 39,000,000/=** comprises of invoices processed by UPDF arising from 4 months x3 amounting to **Uganda shillings 12,000,000/=** and invoices in Debt Management comprising of 9 months x3 amounting to **Uganda shillings 27,000,000/=** giving a sum total of **Uganda shillings 39,000,000/=**. I must emphasise that this amount is separate from the third category comprising of missing/lost invoices. Exhibit P4 clearly stipulates that the invoices are to be traced and processed. In other words the previous invoices are available and in the system. On the other hand the third category comprises of missing/lost invoices and amounts to **Uganda shillings 39,568,400/=**. Lastly as far as exhibit P4 is concerned, it assumes that the work had been done. The first category of **Uganda shillings 39,000,000/=** is in the process of Ministry of Defence while the second category of **UGSHS 39,568,400/=** involves missing invoices. The basis of the missing invoices is not provided for in exhibit P4. Invoices are generated by the hirer on the basis that the hire services envisaged were provided. On the other hand exhibit P1 and P2 clearly indicates that the vehicle was hired to the Defendant. However as I have noted above the Defendant further hired the vehicle to the Ministry of Defence/UPDF. The subsequent contract has not been produced in evidence and is between the Defendant and the Ministry of defence. Arrangements to avail invoices would be the contractual responsibility of the Defendant. The same doctrine of privity of contract would imply that the Defendant is solely responsible for whatever happens between it and the Ministry of Defence. On the other hand the Plaintiff has a right to rely on the hire agreement between herself and the Defendant. The terms of that agreement do not impose an obligation to produce invoices or avail them for purposes of payment. Exhibits P1 and P2 provide for a daily hire charge and the amount of hire for 365 days is expressly agreed to.

In the premises I will consider whether further payments were made so as to reduce or extinguish the claim of the Plaintiff against the Defendant after execution of exhibit P4 on 3 February 2009. By execution of exhibit P4 on 3 February 2009, the parties were stating the state of affairs prevailing in their contractual relationship at that time. The first category of payments is stated to be reflected in the written statement of defence and comprises of cheques for **Uganda shillings 21,000,000/=.** The category of payments by cheque was pleaded in paragraph 2 of the written statement of defence and was referred by the court to an official referee appointed on 1 July 2013 to establish the persons to whom payments in paragraphs 2 and 3 of the written statement of defence were made. Messieurs Lawrie Prophet and Company Certified Public Accountants in their report were able to show that payments were made between the period 2004 and 2006.

It is hard to conceive why the Defendant would indicate indebtedness under the contract in February 2009 after making payments. Exhibit P4 supersedes the earlier payments made. Indeed PW1 was cross examined about these payments made prior to the acknowledgement of February 2009. PW1 is the attorney of the Plaintiff and also happens to be an officer with the UPDF. The several exhibits such as exhibit P5, exhibit P6, exhibit P7, exhibit P8 and bank statements on which he was examined referred to payments made between 2004 and 2006. I have also examined exhibit D1 which consists of the record of payments. None of the payments reflected in exhibit D1 were made after exhibit P4 which was executed in February 2009. Exhibit P4 contains the amount claimed in paragraph 5 of the plaint where it is alleged that the Defendant acknowledged the sums stated therein.

I do not agree that a sum of **Uganda shillings 5,568,400/=** was imported. The fact that it is contained in the Plaintiffs written submissions at page 3 cannot be said to depart from the pleadings. The entire liquidated sum claimed by the Plaintiff is based on the acknowledgement of indebtedness pleaded in paragraph 5 of the plaint and it is the document exhibit P3 (which is the original) or exhibit P4 which is the photocopy in the trial bundle. Consequently submissions on the basis that a sum of **Uganda shillings 5,568,400/=** is caught by the law of limitation is misplaced. The Plaintiffs claim can only arise from the pleadings and paragraph 5 thereof indicates expressly that the sum of **Uganda shillings 78,568,400/=** pleaded as special damages was acknowledged by the Defendant on 3 February 2009. I further agree with the submissions of the Plaintiff's Counsel that an acknowledgement generates or leads to the accrual of a fresh cause of action.

Section 22 (4) of the Limitation Act Cap 80 laws of Uganda provides that where any right of action has accrued to recover any debt or other liquidated pecuniary claim and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of the claim, the right shall be deemed to have accrued on and not before the date of the acknowledgement or the last payment. Section 23 of the Limitation Act provides that every such acknowledgement has to be in writing and signed by the person making the acknowledgement. In this case exhibit P4 or exhibit P3 is endorsed on every page under the seal of the Defendant company. Exhibit P4 has not been denied by the Managing Director of the Defendant DW1.

In the Court of Appeal Case of **Jones v Bellegrove Properties Ltd [1949] 2 All ER 198**, Goddard CJ considered section 23(4) of the Limitation Act, 1939 of the UK reproduced in the judgment of the Court of Appeal as follows:

> "Where any right of action has accrued to recovery any debt or … pecuniary claim … and the person liable or accountable therefor acknowledges the claim … the right shall be deemed to have accrued on and not before the date of the acknowledgment… "

Furthermore section 24(1) requires an acknowledgment to be in writing and signed. The sections considered by Goddard CJ are in *pari materia* with sections 22 (4) and section 23 (1) of the Ugandan Limitation Act. Lord Goddard CJ held at page 201 that:

> "Whether or not the document is an acknowledgment must depend on what the document states, and a balance sheet presented to a creditor at a meeting of the company, as happened in this case, fulfils all the requirements of s 24. The signed accounts show that the company admits that it owes a certain sum, and parole evidence was admitted, and rightly so, which showed that part of that sum was owed to the Plaintiff. The statute does not extinguish a debt. It only bars the right of action."

The decision in **Bellegrove** was followed in **Dungate v. Dungate [1965] 3 ALL ER 393** where a letter written by the deceased stated: "keep a check of totals and amounts I owe, and we will have an account now and then" Edmund Davis J held that the words were quite unqualified and amounted to a totally unqualified admission of indebtedness. The cause of action was held to have accrued from the time of acknowledgment of the indebtedness.

From the authorities the court does not have to go beyond the acknowledgement to establish what the actual indebtedness of the Defendant is unless the Defendant contests the acknowledgement document, which is not the case here.

The question is therefore whether the alleged breach to pay has to be ascertained after lost invoices are located. The Defendants Counsel agrees that the parties had acknowledged the sum of **Uganda shillings 39,000,000/=** to be due and payable to the Plaintiff by the Permanent Secretary Ministry of Defence. However I have already concluded that that agreement is not binding on the Permanent Secretary Ministry of Defence. As far as the lost invoices are concerned, I have already concluded that the obligations to provide invoices is that of the Defendant based on the relationship is between the Defendant and the Ministry of Defence. Exhibits P1 and P2 govern the relationship between the Plaintiff and the Defendant. The argument therefore that liability should await tracing the invoices is untenable. It is further untenable because the vehicle was hired to the Defendant and charges accrued on a daily basis and was calculated on the basis of the number of days the vehicle was hired for. Invoices are generated by the Defendant on the basis of work and the amount acknowledged. Missing invoices are only relevant for purposes of processing payment by the Ministry of Defence.

Further arguments were presented by the Defendants Counsel to the effect that acknowledgements of cheques and cash for the period 2004 and 2005 were made by the Plaintiff. This included cheque payments of **Uganda shillings 21,000,000/=** and that it ought to be deducted from the acknowledged sum of **Uganda shillings 39,000,000/=.** I have already established that the acknowledgement of indebtedness came after the payment of **Uganda shillings 21,000,000/=** had been made and therefore ought to have been taken into account when the acknowledgement of February 2009 was made.

As far as lost invoices are concerned, they cannot be deducted or affect the question of liability. The only possible effect that the lost invoices may have is to postpone payment on the ground of hardship to the Defendant. However the question of liability is established on the basis of the hire charges and failure to pay. I agree with the Defendants Counsel that the reconciliation of accounts by the official referee is superfluous. However the grounds upon which I agree is that the period covered by the reconciliation of accounts fall between 2004 and 2006. This was way before the acknowledgement exhibit P4 or P3 which ought to have taken the payments into account. In other words exhibit P4 or exhibit P3 and unequivocally represented to the Permanent Secretary Ministry of Defence under the hand of the Plaintiff and the Defendant the amount of money which the Plaintiff was to claim by the purported assignment of the right of the Defendant to receive payment from the Ministry of Defence.

Last but not least there was the question of withholding tax and VAT. VAT payment is complex under the arrangement between the Plaintiff and the Defendant. This is because the Plaintiff hired the suit vehicle to the Defendant. By definition the service provider under that arrangement is the Plaintiff. On the other hand the Defendant further hired the vehicle to the Ministry of Defence/UPDF. Under that arrangement and with no evidence of the contractual undertaking, the Defendant is the service provider to the Ministry of defence. The third aspect is that VAT is payable by a service provider to Uganda Revenue Authority and Uganda Revenue Authority is not a party to the suit. VAT is chargeable on every taxable supply made by a taxable person under section 4 of the Value Added Tax Act. Under section 5 (a) of the Value Added Tax Act, in the case of a taxable supply, the tax payable shall be paid by the taxable person making the supply. VAT is a percentage of the amount charged and ought to arise from the payment for services consumed. Furthermore clause 2 (b) of exhibit P1 and P2 provides that all monies payable under the agreement are inclusive of VAT. In other words the entire amount of money is payable and includes VAT within. In the Plaintiffs case, I agree with the Plaintiff's submission that the Plaintiff can pay VAT out of any amounts paid by the Defendant for the services of hire of motor vehicle. The argument of the Defendant therefore does not affect its liability to pay the total amount charged. VAT cannot be deducted by the Defendant. Furthermore the obligation to pay VAT is on the supplier of services and that obligation does not reduce the liability of the consumer of the services. The consumer under exhibits P1 and P2 is the Defendant.

As between the Defendant and the Ministry of defence, the Defendant would be obliged to pay VAT on any margin of the supply of services because it subcontracted and hired the vehicle of the Plaintiff to a third party. On the other hand the practice of retaining withholding tax at the source implies an obligation to remit withholding tax to Uganda Revenue Authority. The Defendant is not a Department of government and does not have to withhold any taxes. However if it wants to do so it may go ahead to do so when paying the Plaintiff and whatever the implications, it would not affect liability to pay for the hire of the Plaintiffs vehicle. In ascertaining the money payable, the whole amount is chargeable and withholding of any taxes only arises when payment is being made.

In the premises issue number one is answered in the affirmative to the extent that there was breach of contract by the Defendant. This is irrespective of any grounds by which the Defendant may say that it has not been paid by the Ministry of defence. The express contracts exhibits P1 and P2 are contracts for the hire of a vehicle for particular durations of time.

Remedies

On the question of remedies the Plaintiff's Counsel prayed that the honourable court finds the Defendant liable to pay the Plaintiff **Uganda shillings 78,568,400/=** as special damages. The Plaintiff's Counsel further prayed for general damages on the ground that the Defendant refused to pay the Plaintiff for a period of more than eight years. He submitted that the evidence of PW2 Mr Robert Kato shows that the Defendant was paid about **Uganda shillings 580,392,064/=** by the Ministry of defence but never remitted the monies to the Plaintiff.

On the authority of **Dr G.W. Otim – Nape vs. All Port Freight Ltd HCCS 1111 of 1996** where the court awarded **Uganda shillings 25,000,000/=** as general damages for failure of the Defendant to reimburse or repair the Plaintiff's car after the vehicle was damaged and the Defendant found liable. The Defendant had acted with cold indifference towards the Plaintiff after the accident. Counsel prayed that the court awards **Uganda shillings 25,000,000/=** as damages. Counsel further prayed for interest at 25% per annum on the special damages from the date of breach until payment in full and of 8% per annum on the general damages from the date of judgment till payment in full. Finally costs should be awarded to the Plaintiff.

In reply the Defendants Counsel prayed that the court refrains from awarding special damages of **Uganda shillings 78,568,400**/= or any part thereof. As far as general damages are concerned Counsel reiterated submissions in reply to the Plaintiff's submissions and prayed that the court declines the prayer for general damages. For the same reason the court should not award interest of 25% on special damages and 8% on general damages. Counsel agreed that according to section 27 (1) of the Civil Procedure Act, costs follow the event and prayed that the Plaintiff's suit is dismissed with costs.

I have carefully considered the question of special damages. As I have indicated above, the claim for special damages is made under paragraph 5 of the plaint and essentially relies on a written acknowledgement of indebtedness to the Plaintiff dated 3rd of February 2009. This was admitted as exhibit P3 which is the original or exhibit P4 which is a photocopy of the said acknowledgement of indebtedness. The Defendants Counsel sought interpretation of the document and suggested that only Uganda shillings 39,000,000/= was the money which had been reconciled and agreed upon while the sum of Uganda shillings 39,568,400/= was to await tracing of invoices which were missing or lost. Upon the finding that the liability of the Defendant springs from the contract of hire namely exhibit P1 and P2, what exhibit P4 does is to acknowledge the amount of money that is due and owing under exhibits P1 and P2. Tracing of invoices cannot be a defence to liability. I agree with the Plaintiff's Counsel that under exhibit

P1 and P2 paragraph 2 thereof the terms of payment were that the Defendant would pay the Plaintiff the agreed consideration in full upon request and delivery of the work set out in the agreement. The Plaintiff indeed delivered the work set out in the agreement and demanded for payment whereupon the Defendant did not honour its part of the bargain. The further question was whether exhibit P4 waived the right of the Plaintiff to receive payment from the Defendant. On the finding that exhibit P4 is not binding on the Ministry of Defence to which it is directed and from the evidence that the Ministry of Defence could not pay the Plaintiff, the parties are still bound by the terms of payment in exhibit P2 and P1. Lastly the fact that the Ministry of defence has delayed payment is not a defence to the Plaintiffs claim against the Defendant. This is because the terms of exhibit P1 and P2 is clearly to hire the vehicle in question of the Defendant. It does not specify that the Defendant further hire the vehicle to the Ministry of defence. Consequently the contract between the Defendant and the Ministry of defence is a matter between the Defendant and the Ministry of Defence. The Defendant may claim indemnity from the Ministry of defence but never did so in the proceedings. In the premises the sum of **Uganda shillings 78,568,400/=** has been proved on the basis of services rendered and not paid for which services and consideration were expressly agreed upon and the amount owing acknowledged in exhibit P4. In the premises the Plaintiff is awarded **Uganda shillings 78,568,400/=** as special damages.

As far as general damages are concerned I agree with the submissions of the Plaintiff's Counsel that the Plaintiff has been kept out of her money for an uncommonly long period of time being over seven years. Were it not for acknowledgement in exhibit P4, part of the claim could have been caught by the law of limitation which prescribes a period of six years within which an action for breach of contract may be commenced.

The East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41** held that the basic principle to be applied in a claim for general damages is the common law doctrine of *restitutio in integrum* that Plaintiff has to be restored as nearly as possible to a position she would have been had the injury complained of not occurred. In **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 1063 at page 484, it is a common law principle that upon breach of a 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. On the other hand in paragraph 812 general damages are defined as those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are those damages 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.

Because the period of delay to pay the amounts admitted are unreasonably long, it is sufficient for the Plaintiff to assert that it has suffered general damages in addition to the claim for interest

on the special damages. In the premises the Plaintiff is awarded general damages of **Uganda shillings 15,000,000/=.**

As far as the claim for interest is concerned, section 26 (2) of the Civil Procedure Act permits the court to order interest as it deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit with further interest at such rates as the court deems reasonable from the date of the decree to the date of payment. Exhibit P1 and exhibit P2 read together with exhibit P4 do not provide for the rate of interest and the court will award a reasonable rate of interest. Interest is awarded from March 2009 up to the filing of the suit on 26th of July 2010 at the rate of 18% per annum on the special damages. Furthermore interest is awarded at the rate of 18% per annum on special damages together with the interest from the date of filing the suit up to the date of judgment. Finally interest is awarded on the aggregate sum of special damages, general damages, and interest at the date of judgment, from the date of judgment till payment in full at the rate of 14% per annum until payment in full.

Costs follow the event and costs of the suit are awarded to the Plaintiff.

Judgment duly signed by me for delivery by the registrar on 25 April 2014

Christopher Madrama Izama

Judge

Judgment delivered by the registrar as directed by the judge in the presence of:

Counsel Jogo Tabu for the plaintiff

Counsel John Peter Nagemi for the Defendant absent

Kackson Rwakiseta MD of Defendant present

Charles Okuni: Court Clerk

Thadeus Opesen

DEPUTY REGISTRAR

COMMERCIAL COURT DIVISION

25 APRIL 2014