THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCT - 00 - CC - CS - 103 - 2009

HIMA CEMENT LTD :: PLAINTIF

VERSUS

RUKIA ISANGA & ANOTHER :::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HON. JUSTICE DAVID WANGUTUSI

J U D G M E N T:

Hima Cement Limited, referred to in these proceedings as the Plaintiff filed a suit against Rukia Isanga Nakadama & Dauda Isanga, the 1st and 2nd Defendants respectively. The plaintiff claims against the Defendant jointly and severally for recovery of Shs. 79,897,932.57/=. It also claims interest accruing from the sum to the tune of Shs. 49,535,478/= and costs of the suit.

The Plaintiff is a manufacturer and supplier of cement and the 2nd Defendants were traders in cement manufactured by the Plaintiff.

The Plaintiff claims that by an arrangement reduced into writing, it agreed with the 1st Defendant to supply her with cement on credit from time to time which she would pay for later. It is also the Plaintiff's claim that the 2nd Defendant guaranteed this repayment. That he guaranteed is well established by the undisputed Directors Personal Guarantee dated 30 July 2003. Following this understanding, the Plaintiff supplied

cement, making entries in an account they opened and operated for the 1st Defendant which electronically recorded all the transactions between the two parties.

The Plaintiff claims that later on and on several occasions the Defendant received the cement as under the arrangement aforesaid but he did not pay.

Furthermore, in an attempt to pay, the Defendants issued several cheques which cheques were dishonoured.

In defence, the Defendants denied being liable of any money to the Plaintiff and stated that at no time had they received supplies on credit since their payment was prompt on receiving the supplies of cement. They further stated that the electronic recordings and consequent statement of account were fraudulent and false in as much as the account seemed to be created before they entered into any understanding.

The Defendants therefore prayed that the suit be dismissed. The Plaintiff and the Defendant filed a joint scheduling memorandum.

They agreed to two issues;

1. Whether the Defendants severally or jointly owe the Plaintiff the amount claimed.

2. What remedies are available to the parties?

Credit agreement

It should first be said that the Plaintiff and Defendant transacted in cement right from 2002. On the 30 July 2003, the Plaintiff entered into a credit agreement (Exh. P.1A)

with the 1st Defendant. The Plaintiff was to extend credit to the 1st Defendant by supplying cement and the Defendant would pay after receiving the cement. The Defendant contended that this agreement was never performed in as much as no credit was ever extended to them. It is important at this stage to consider the validity of this agreement.

On the 3rd May 2005, the Plaintiff wrote to the 1st Defendant complaining that the cheques that the 1st Defendant had issued had bounced. They gave the Defendant an ultimatum in these words;

> *"We therefore need to inform you that should we receive any more dishonoured cheques from your company, we shall be forced to disallow the receipt of cheques from your company and cancel all credit facilities prior to instigating stop supply measures."*

In reply, the 1st Defendant wrote back on 20th May 2005 asking for forgiveness in the following words;

> *"Forgive me this time and maintain my limit at its current level"*.

The question that arises is, what were these credit facilities being referred to in the Plaintiff's letter and what was the "limit at its current level" that the Defendant meant in her reply?

The answer to the foregoing can only be found in the credit agreement. Clause 1 of the Credit Agreement provided that the agreement would come into force on the day it was executed.
Perhaps the more relevant clause was 2(a) which provided

> *"During the term of this agreement, the company shall extend credit to the credit customer not exceeding* Shs. *50,000,000."*

In 3(d) it provided,

> "The company may accept post dated cheques with guarantee cover letter from the credit customer confirming honour of such post dated cheques."

On how the agreement would be terminated, Clause 7 provided that,
"either party hereto shall have the right to determine this agreement by giving 3 months notice in writing which notice would suffice to terminate the agreement."

The foregoing notwithstanding, the Plaintiff could terminate the agreement under the following situations:-

a) Where the credit customer commits a breach of any of the terms or conditions of this agreement,

b) The guarantee provided to the company in accordance with provisions herein is withdrawn or cancelled by the credit customer or by its financial institution in accordance with the provisions of the guarantee among others.

From the foregoing provisions, there is no doubt that when the Plaintiff wrote on 3rd May 2005 to the Defendant threatening to cancel all credit facilities if the Plaintiff's cheques continued to be dishonoured, it was acting under the agreement specifically threatening to invoke Clause 8(a).

It also becomes clear that when the 1st Defendant wrote back and said she was sorry that the cheque had bounced, and would not allow it to happen again, pleading that the Plaintiff relaxes the punitive measures imposed on her for the mutual benefit of their business with the words,

> *"… forgive me this time and maintain my limit at its current level …"*

there is no doubt that she was doing so in reference to Clause 2(a) which provided her credit as a credit customer up to the tune of Shs. 50,000,000/=.

Furthermore, by a letter dated 16th June 2006 written to the Plaintiff Credit Manager, the Defendant wrote seeking reactivation of their credit facility "in order to resume normal operations". This can only mean the reactivation of the terms of the agreement commonly known as the Credit Agreement entered into by the parties on the 30th July 2003.

The foregoing is proof that the agreement that was entered into on the 30th July 2003 was executed, put in force and business transacted under it as provided.

Fraud

The Plaintiff claims that following that agreement it supplied cement but the Defendant failed to pay for cement worth Shs. 79,895,932.54/=. In this, it relied on Exh. P.1B a statement of account of Rukia Isanga.

In reply to this claim, the Defendant contended that the statement of account was fraudulent because it was in existence before the 30th July 2003 when the credit agreement was put in place. It is not in doubt that the electronic statement of account was in place before the credit agreement but neither is it in doubt that by the time they entered into the credit agreement, the Plaintiff and the 1st Defendant were already transacting in cement business and that the arrangement simply continued.

Furthermore, PW2 told court that the Defendant used to receive a monthly statement of account and at no time did they exhibit doubt of its accuracy. And on 2nd May 2006, the 2nd Defendant wrote to the Credit Controller of the Plaintiff acknowledging a similar statement on account and agreeing with its content save for one on transport.

In civil proceedings, a person who alleges fraud must specifically plead and strictly prove it. Although the standard of proof in civil cases is on a balance of probabilities where fraud is pleaded, the standard of proof is higher **E. Kanyange V E. Bwana** (1994)2 KALR 29, **Urmilla V Barclays Bank International Ltd & Anor** (1979) KLR 76 where their Lordships held that allegations of fraud must be strictly proved although the standard of proof may not be so heavy as to require proof beyond reasonable doubt. A higher standard of proof is required to establish such findings proportionate to the gravity of the offence concerned.

In reaching this position, their Lordships relied on **Ratilal Gordhanbhi Patel V Lalji Makanji** (1957) EA 314. In the instance case, the Defendant did not in any form show that these returns were fabrications, they did not show when or how the alleged fraud was committed as required of them.

The use of electronic statements of account had been put in place earlier and passed on into the new credit transactions of the Plaintiff and the Defendant without any complaint from the Defendants who regularly received a monthly return. The Defendants can therefore not say that the electronically generated statement of account is fraudulent because it existed before the credit agreement.

Back to the issue of whether the Defendants severally or jointly owe the Plaintiff the amount claimed.

The Plaintiff alleged that the Defendant received cement paid for some of it but remained with a debt of Shs. 79,895,932.54/=. The Defendant has denied owing anything to the Plaintiff and DW1 stated that they had never gotten any credit facilities in as much as they always paid for whatever was supplied to them. PW2 on the other hand told court that the cheques that were given to them by the Defendant to settle these debts bounced because the Defendant had insufficient funds on the account.

The 2nd Defendant admitted that the cheques had bounced but that he had cleared the outstanding sums by January 2006. He claimed that he did not receive some of the cement that resulted into these unpaid balances.

It is not in doubt that the Defendant on several occasions issued cheques that were dishonoured. Attached to the plaint were cheques that were stopped and or not arranged for. The cheques of Shs. 13,380,000/= dated 30th December 2005, 9th December 2005 cheque of Shs. 19,750,000/= the cheque dated 31st December 2005 of Shs. 17,129,000/= and the cheque dated 16th December 2005 of Shs. 543,600,000/= were all dishonoured. These cheques must have been issued to the Plaintiff because he had supplied consideration. These cheques were not denied by the Defendant. While the issuance of the cheques meant that the Defendant had received goods from the Plaintiff, there is nowhere in the evidence of the Defendant which shows that he made good these cheques. The issuance of cheques was also proof that cement had been delivered and the absence of delivery notes would not affect the Plaintiff's case. While it is good for a claimant in a transaction such as the one that existed between the Plaintiff and the Defendant to have produced the delivery notes, this court is satisfied that the Plaintiff delivered and the Defendants received its supplies thereof.

The other thing that shows that the Defendant is indebted to the Plaintiff is found in the communication between the parties on the 3rd March 2009 **Sebalu & Lule Advocates** wrote to the 1st Defendant a demand notice intention to sue which letter in part reads;

> *"As you are aware you have been receiving cement on credit from our client and distributing the same as our client's credit customer. You have however, neglected, ignored, failed or refused to pay our client the balance due on your account with them. You also issued to our client various cheques which were all returned dishonoured. Todate your outstanding balance with our client stands at Shs. 79,895,932.54/=*

(Seventy nine million, eight hundred ninety five thousand nine hundred thirty two Uganda shillings fifty four cents)"

The letter categorically stated that the Defendant was a credit customer, that the cheques he had issued had been dishonoured and that the money owed was Shs. 79,895,032.54/=. The letter was not replied by the 1st Defendant but by the guarantor, the 2nd Defendant who wrote back 10th March 2009 in these words:-

"I have not ignored nor refused but failed due to cause of the new changed management that without studying the business transaction, they abruptly blocked the supply henceforth my distribution ceased whereas the company started supplying cement directly to our debtors, there realizing that I run out of business, they defaulted to rebut the money and when I informed the management the error being done by the sales representatives it was ignored not knowing and forgetting that we were partners in creating these customers."

He does not dispute the figure Shs. 79,895,932.54/=. He in fact explained why he had not paid when he said *"the problem was caused by the new changed management."*
From the foregoing, it is court's finding that the Defendant is indebted to the Plaintiff in the sum of Shs. 79,895,932.54/=.

In the Written Statement of Defence, the 2nd Defendant contended that since he had never been served with a written demand as required by the Guarantee Deed, he would not be required to fulfill his guarantee. With all due respect, this demand was made on 3rd March 2009 when Counsel for the Plaintiff wrote to the 1st Defendant and the reply was made by the 2nd Defendant who referred to himself as a party to the proceeding and was therefore notified of the demand.
The two defendants are therefore liable jointly and severally.

The Plaintiff prayed for interest of Shs. 49,535,478/=. He based this on Clause 2(c) of the Credit Agreement which provides as hereunder;

> *"For any payments not made when due, the company reserves the right to charge interest at the rate of 2% per month above the lending interest rates charged by a first class bank on the overdue account until payment in full and the credit customer acknowledges that this constitutes a fee for the special handling of late payments by the company."*

However, he did not state the lending interest rate of a first class bank which he had relied on to come up with this figure. A check with the trading interest rate of a high class bank like Standard Chartered Bank revealed 19.5% as of last year. Going by this figure, the accrued interest would be in hundreds of millions. This conclusion leaves Shs.49,535,478/= as a reasonable amount and the Plaintiff is awarded this sum as accrued interest.

Interest is awarded so as to bring a person to the position he would have been if the wrong complained of had not taken place. When awarding such interest, consideration must be given to the type of business the Plaintiff does, to the length of period he has been deprived of the use of his money. In the instant case, the Defendant kept the Plaintiff's money for 10 years. It is just fair to conclude that being a business body it would have multiplied these resources. The court finds an award of what reflects a commercial interest appropriate.

Taking into account however, that the Plaintiff has been given accrued interest as prayed in (b), court finds that 20% per annum would be punitive and accordingly award interest at 8% per annum on both the decretal sum and accrued interest.

In the sum total, judgment is entered in favour of the Plaintiff against the Defendant as follows:-

a) Shs. 79,895,932.54/=

b) Shs. 49,535,478/=

c) Interest on both (a) and (b) of 8% per annum from date of filing till payment in full.

d) Cost of the suit.

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David K. Wangutusi

JUDGE

Date: 29 – 04 – 2014