THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA

AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 503 OF 2012

MTN UGANDA LIMITED}.....PLAINTIFF

VERSUS

THREEWAYS SHIIPING GROUP LTD}.....DEFENDANT

COUNTER CLAIM

THREEWAYS SHIIPING GROUP LTD}.....COUNTERCLAIMANT

VERSUS

MTN UGANDA LIMITED}.....DEFENDANT TO COUNTERCLAIM

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

RULING

This ruling arises from a point of law agreed to in a joint scheduling memorandum endorsed by Counsel for all the parties. The point of law is whether the memorandum of understanding is illegal/an illegality and unenforceable in law? The Plaintiff is represented by Messrs Kampala Associated Advocates while the Defendant is jointly defended by three firms namely: Messrs A.F. Mpanga and Company Advocates, Messrs Birungi and Company Advocates and Messrs Kiwanuka and Karugire Advocates. Counsels addressed the court in written submissions.

Defendant's Submissions in support of the point of law

According to the Defendant the issue can be determined preliminarily without adducing further evidence and has the effect of disposing of the entire suit. The submission is that the Plaintiff's cause of action against the Defendant is founded on breach of contract namely breach of a memorandum of understanding by failing or refusing to pay sums amounting to US$3,827,820.71 contracted in the memorandum of understanding, general damages, interests and costs of the suit. The Defendant's maintained that the entire cause of action is founded on the memorandum of understanding and therefore a finding that it is illegal or unenforceable would determine the entire suit.

The facts relied upon to argue the issue of whether the memorandum of understanding is illegal/an illegality and unenforceable in law are as follows: on 10 September 2012 a memorandum of understanding was executed between the Plaintiff and the Defendant. It is clear from the memorandum of understanding which was admitted in evidence by consent of the parties that the Plaintiff filed a criminal complaint against the Defendant with the Uganda police criminal intelligence and investigations Department headquarters and the file is E/242/2012 also recited clause B of the memorandum of understanding (MOU).

Clause B of the MoU provides that:

> "MTN (The Plaintiff) made a complaint of theft, embezzlement and causing financial loss against some of its staff at the Directorate of Criminal Investigations and Intelligence of the Uganda police, which opened a file no. E/242/2012."

The recitals in the clauses B, C and D in the MoU are not in dispute that the Plaintiff registered a complaint of theft, embezzlement and causing financial loss. In clause C it is provided that on 30 August 2012, pursuant to the filing of the complaint, the Uganda Police/DPP applied to the court and on the same date, the Anticorruption Division of the High Court issued an order freezing all the Defendant's bank accounts for six months to allow criminal investigations in the matter. Clause E provided that the parties are desirous of seeking and obtaining an amicable and confidential resolution to the matters between them, that protect their respective legal and business interests. Counsel emphasised that the Plaintiff contended that the Defendant and its directors must have colluded with the Plaintiff's staff, while the Defendant and its director's at all material times maintained their innocence but where under pressure owing to the freezing of their accounts to enter into the impugned MoU. Counsel further relies on clauses 8, 9 and 10 of the MoU which summarised the situation in that it was to facilitate reconciliation as well as striking of an amicable resolution in the consideration for which MTN would immediately upon execution of the MoU persuade the Uganda police force and DPP to cause the unfreezing of the Defendants account with a recommendation that the Uganda police and DPP would treat the Defendants directors as witnesses only in the case against the employees of MTN. The respondent would concede to Miscellaneous Application No. 64 of 2012 between the Defendant and the DPP pending before the Anticorruption Division of the High Court with no order as to costs on the question of unfreezing of the Defendants account. It is further provided in clause 10 that so long as the Defendant adheres to and complies with the terms of the MoU, MTN releases the Defendant, its shareholders, director and CEO from all and any liability, whether civil or criminal relating to or arising out of the questioned invoices. Counsel contends that the MoU is illegal and unenforceable and can found no cause of action against the Defendant.

The Defendant's Counsel maintain that if the Plaintiff's contention and allegations that the Defendant and its directors are complicit in the unlawful siphoning of the Plaintiffs funds is correct, something which is denied, then clauses 8, 9 and 10 have the effect of concealing, compromising or compounding an offence in consideration for the corporation of the Defendant

as set out in the MoU. The Defendant's Counsel further submitted that the purpose of the MoU was to cause unfreezing of the Defendant's bank account by conceding to Miscellaneous Application Number 64 of 2012 currently at the Anticorruption Division of the High Court with no order as to costs; cause MTN to withdraw its criminal complaint against the shareholders, directors and CEO of the Defendant; recommend to Uganda police force and the DPP that the shareholders, directors and CEO of the Defendant be treated as witnesses only in any cases against the employees of MTN; to cause the Plaintiff to release the Defendant, its shareholders, director and CEO from all and any liability, whether civil or criminal relating to or arising out on the questioned invoices. The Defendant relies on section 104 of the Penal Code Act which provides that:

> "Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or herself or any other person upon any agreement or understanding that he or she will compound or conceal a felony, or will abstain from, discontinue or delay a prosecution for a felony, or withhold any evidence thereof, commits a misdemeanour."

The offences involved are theft contrary to section 253 of the Penal Code Act, embezzlement contrary to section 269 of the Penal Code Act and causing financial loss contrary to section 268 of the Penal Code Act. Embezzlement and causing financial loss are offences falling under the divisional jurisdiction of the Anticorruption Division of the High Court. Relying on the definition of a felony, Counsel submitted that all the offences involved are felonies. Counsel further relies on section 103 (a) of the Penal Code Act and submitted that the acts mentioned in the MoU are contrary to it. Consequently the MoU is both against the law and public policy. The object for which the MoU was formed constitutes an offence under section 103 and 104 of the Penal Code Act and the Plaintiff cannot rely on it to found a cause of action against the Defendant.

The Defendants Counsel relied on several authorities. In the case of **Hughes versus Kingston Upon' Hull CC [1999] QB 1193** it was held that a contract is illegal if the mere making of it is a legal wrong. The agreement to stifle the prosecution is illegal because it amounts to compounding a felony. Secondly it is an offence to accept consideration to prevent the prosecution. The making of the contract has been criminalised by statute. Compounding a felony means accepting anything of value under an agreement not to prosecute or to hamper the prosecution of a felony.

In the case of **Smith and another versus Selwyn [1914 – 15] All ER 229 at page 232** it was held that the rule that a felony cannot be made the foundation of the civil claim is founded on the principle of public policy that offenders against the law shall be brought to justice and for that reason a man is not permitted to abstain from prosecuting an offender, by receiving back stolen property or any equivalent or compensation for a felony. Relying on the Law of Contract in Uganda by Prof DJ Bakibinga, an illegal contract is void. Illegality is manifested in four main

ways. Firstly in the formation of the contract. Secondly in the performance of the contract. Thirdly if the consideration for the contract and finally in the purpose for which the contract is made. The contract is illegal if it is contrary to public policy forbidden by statute. In the case of **Bostel Bros versus Hurlock [1948] 2 All ER 312** Somervell LJ held that the principle of law is that what is done in contravention of the provisions of an Act of Parliament, cannot be made the subject matter of an action. In the case of **Phoenix General Insurance Co of Greece SA versus Administratia De Stat [1987] 2 All ER 152** the Court of Appeal of the United Kingdom considered the effect of an illegality. It was held that a contract prohibited by statute either expressly or by implication is illegal and void. No court will lend its assistance to give the contract effect. The question to be considered is whether the statute means to prohibit the contract?

On the basis of the various authorities the Defendant's Counsel submitted that the MoU is contrary to public policy and consequently void in that sense. The public policy is to the effect that criminal suspects must be prosecuted without any interference and compromise. Offences are to be prosecuted to their logical conclusion and parties or anyone else should not defeat the ends of justice by receiving inducements to prevent prosecution. It is a common law rule that prohibits a person from entering a compromise with an offender intended to affect or settle a criminal liability before his prosecution.

The Defendants Counsel also argues that clauses 8, 9 and 10 of the MoU interferes with the independence of the Directorate of Public Prosecutions and the conduct of criminal prosecutions and investigations. Counsel further relied on the case of **Makula International versus Cardinal Nsubuga [1982] HCB** that an illegality once brought to the attention of court overrides all questions of admissions and pleadings. A court of law cannot sanction what is illegal and illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon. In the case of **Nipun Norattam Bhatia versus Crane Bank Ltd CA No 35 of 2006,** Justice Kakuru JA agreed with the law that an agreement entered into in contravention of the law is a nullity and it is unenforceable.

Because the MoU was meant to stifle the prosecution of the threatened action against the Defendants which object is unlawful, the contract is void.

Counsels for the defence further emphasised clause 10 of the MoU where the Plaintiff agreed to release the Defendant's directors from any liability whether criminal or civil so long as they adhere to the terms of the MoU. The Defendants Counsel submitted that the Plaintiff has no authority to release anyone from criminal liability and it was an illegal promise. The Defendant's directors have been charged and are now on court bail. The defence Counsel prayed that the court is pleased to find that the MoU was made for an illegal purpose that it was against public policy and the letter of the law and as such is illegal, void and unenforceable. The Plaintiff's claim which is based on the MoU ought to be dismissed with costs to the Defendant.

Plaintiffs reply to the point of law

The Plaintiff's Counsel submitted that the preliminary point of objection to this suit is misconceived as there is no evidence that the purpose and effect of the memorandum of understanding was illegal, or against public policy or made under duress or undue influence. Furthermore the Plaintiff's Counsel contends that the preliminary point cannot be decided preliminarily without hearing evidence.

The Plaintiff's Counsel maintains that the preliminary point of law cannot be decided without evidence of the circumstances under which the parties executed the MoU, for the court to assess the facts surrounding its negotiation and eventual execution and implementation. Only then can the court be able to decide whether or not the purpose and effect of the MoU was to obstruct criminal Justice or to breach the Penal Code Act, or interfere with the independence of the DPP. The court cannot properly determine the intention of the parties, how they sought to achieve it, and their purpose and the desired effect of the MoU without assessing evidence relating to how the MoU was negotiated, what informed its terms and conditions and the circumstances under which the terms were negotiated and agreed. Whether in light of all the circumstances, the purpose and effect was to perpetrate an illegality or to act against public policy.

For the court to decide as pleaded in the WSD that the MoU was meant to interfere with the due cause of public justice, it has to inquire into the alleged interference and what form it took if at all and determine the particulars thereof (if any). For the court to decide whether the Penal Code Act was contravened it also has to examine evidence and make findings of fact or draw inferences from facts. The Plaintiff's Counsel with reference to the submissions of the Defendant’s Counsel concluded that evidence was required for the court to determine the intention for executing the MoU, the purpose of the MoU and whether it was meant to stifle prosecution, was contrary to public policy and interferes with the independence of the DPP etc.

Counsel relied on the Supreme Court decision in **Mohammed Hamid versus ROKO Construction Ltd SCCA No. 1 of 2013** where holds that it is wrong for the court to determine the question of illegality without first hearing the parties.

The Plaintiff's Counsel contends that the court will have to hear the party’s evidence of the factors and circumstances leading to the execution of the MoU and their respective intentions. A question of illegality cannot be resolved by the court as a preliminary point. The question that requires evidence cannot be resolved by way of the preliminary objection. Counsel for the Plaintiff relies on the decision in **Mukisa Biscuit Manufacturing Company Ltd versus West End Distributors Ltd [1969] EA 696** where Sir Charles Newbold of the Court of Appeal held that a preliminary objection which raises a pure point of law that can be argued is argued on the assumption that all the facts pleaded by either side are correct. It cannot be raised if any fact has to be ascertained and what is sought is the exercise of judicial discretion. A preliminary objection consisting of a point of law which has been pleaded and arising by the clear implication out of

the pleadings and which if argued may dispose of the suit can be entertained. Examples are objection to the jurisdiction of the court, a plea in limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.

The Defendant's preliminary point of law about illegality or breach of public policy cannot be decided without hearing the parties. On that basis the court ought to dismiss the point of law as being premature and ought to hold that evidence should first be adduced and tested before the court can come to a conclusion that the MoU was entered into on the circumstances of illegality or in contravention of public policy.

Without prejudice the Defendant's Counsel submitted on the point of law. The Defendant argues that the MoU entered into by the Plaintiff and the Defendant is a legal and enforceable contract and the objection of the Defendant on the ground of illegality ought to be overruled and dismissed.

Counsel maintains that the submission that the MoU was to conceal, compromise or compound a felony in consideration for the corporation of the Defendant as set out in the MoU is misconceived and ought to be rejected. Section 104 of the Penal Code Act was not contravened. On the face of the MoU, it does not in any way breach the provisions of section 104 of the Penal Code Act. This is because under the MoU the Plaintiff did not ask for, receive, obtain nor agree to receive or obtain any property or benefit of any kind. The purpose of the MoU is clearly stipulated in paragraph A of the recitals. It provides that: "There are issues between the Plaintiff and the Defendant relating to or arising out of the raising of invoices by the Defendant and payment thereof by the Plaintiff between 2009 and 2012." Clause 2 of the MoU provides that "the parties, immediately upon the execution of this memorandum, shall commence a reconciliation of the invoices issued by the Defendant with the Plaintiff over the period 2009 through 2012 with a view to determining the quantum paid over by the Plaintiff to the Defendant under the questioned invoices (Hereinafter referred to as the "questioned invoices")."

On the other clauses 3 and 3.1 of the MoU provides that the Defendant commits itself to the payment of an amount of US$4 million and all costs incurred investigating the loss in a no-fault gesture towards assisting the Plaintiff recoup its losses as a result of the payment of the questioned of the invoices. In 3.1 it is stipulated that the amounts stated in clause 3 may be adjusted by the parties following full and final reconciliation of monies paid to the Defendant's accounts on the basis of the questioned invoices. The effect of the stipulations in the MoU is that it was a vehicle through which the Plaintiff was to recover its money wrongfully paid to the Defendant after due reconciliation. It did not bestow upon the Plaintiff any benefit or gain or property of any kind. The intention of the parties was to enable them carry out reconciliation and to enable the Plaintiff to recover its money in the "questioned invoices". In the case of **Flower and Others versus Sadler (1882) QBD 83** on the question of what amounts to a benefit. It is not enough to show that the Plaintiff even came to a determination to abstain from proceedings and treat the Defendant as his debtor. In that case there was a positive denial of the Plaintiff that they

need any such agreement as suggested. Circumstances ought to be shown leading to the irresistible inference that such a pact was in fact made. Black's law dictionary defines what amounts to a benefit to mean an advantage or privilege. The MoU does not accord to the Plaintiffs any benefit or privilege. On the contrary the MoU imposes obligations on the Defendant to the amounts wrongfully invoiced and paid through the Defendant by the officers of the Plaintiff. The money rightfully belonged to the Plaintiff. The reconciliation exercise was duly carried out and a reconciliation statement was made and signed by the representatives of the Plaintiff and attached as annexure "B" to the plaint. It was further agreed at the scheduling conference as exhibit P2. Consequently the terms of the MoU does not constitute conduct prohibited by the provisions of section 104 of the Penal Code Act.

The express intention of the MoU was never to compound or conceal any felony or to stifle the prosecution of the Defendant. At the time of the execution of the MoU, no charges for felony had been levied against the Defendant or its officers or employees. It is only the employees of the Plaintiff who had been charged for theft, embezzlement and causing financial loss. It is clear from the memorandum of understanding that the Plaintiff made a complaint of theft, embezzlement and causing financial loss against some of its staff to the Directorate of Criminal Investigations and intelligence of the Uganda Police Force. Consequently the freezing order and the statements made at the police by the officers of the Defendant were made pursuant to the said complaint and pursuant to charges instituted against the Plaintiff's employees. This is apparent from paragraph C and D of the recitals to the MoU. Clause 6 provided that the principal officers and staff of the Defendant shall avail themselves to work with the Plaintiff in the pursuit of any legal actions, whether criminal or civil, that the Plaintiff may opt to take against any of its present or former employees in connection or arising out of the misappropriation of the Plaintiffs funds using questioned invoices. The assistance would include the recording of full and frank statements for the Directorate of Criminal Investigations and Intelligence Directorate of the Uganda police force; provision of any supporting documentary evidence that may be in the power of the Defendant and co-operation with the Plaintiffs Forensic Investigation Team; provision of witness statements in any civil suit that the Plaintiff may choose to bring. The sum total of the MoU was that the Defendant's officers were supposed to support the prosecution of the employees of the Plaintiff who had already been charged by giving full and frank statements and documentary evidence to the police. In other words the purpose of the MoU was to assist and promote the prosecution of the culprits who were already charged.

At the time of execution of the MoU, no charges for a felony of any kind had been preferred against the Defendant or its officers or employees. It does not mention that criminal charges had been instituted against the Defendant or its officers or that charges were to be compounded or concealed in any way or that the Plaintiff would obtain or discontinue or delay prosecution of any person or withhold evidence, within the meaning of section 104 of the Penal Code Act. In the premises there was no felony that was concealed/compounded by the terms of the MoU.

The Plaintiff's Counsel further contends that the MoU could not compound or conceal a felony when no proceedings had been instituted against the Defendant or its directors. According to Black's Law Dictionary, the words "compounding a crime" mean "the offence of either agreeing not to prosecute a crime that one knows has been committed or agreeing to hamper the prosecution". There is no evidence that the parties agreed not to prosecute the crime or that they agreed to hamper any prosecution for a crime. The MoU clearly reveals that the parties were not intending to avoid prosecution for the offence. It reveals the contrary that it was meant to facilitate the prosecution case and that they use the Defendant's directors as witnesses against the Plaintiff's staff.

On clauses 8, 9 and 10 of the MoU the submissions of the Defendant's Counsel are misconceived because there was nothing in the clauses which renders the MoU illegal. The clauses clearly have the effect and stipulate that the Defendant would persuade the Uganda Police and DPP to cause the unfreezing of the Defendant's bank account by conceding to Miscellaneous Application No 64 of 2012. The purpose was facilitation of the reconciliation process and not to conceal any crime. The Plaintiff undertook to withdraw its criminal complaint against the shareholders, directors and CEO of the Defendant and to endeavour to recommend to the Uganda police force and the DPP that they be treated as witnesses only. Thirdly the Plaintiff releases the Defendant and its officers of any criminal or civil liability arising out of questioned invoices. None of the provisions of clauses 8, 9 and 10 of the MoU either expressly or by implication can be taken to mean that the Plaintiff agreed to compound or conceal a felony contrary to the provisions of section 104 of the Penal Code Act. Counsel reiterated submissions that at this stage of signing the MoU there were no criminal charges against the Defendant or its officers and all that existed was a complaint by the Plaintiff to the Uganda police. The complaint may or may not result in criminal charges. A complainant is free to withdraw the complaint as long as the intention is not to conceal a felony. The MoU stipulates the intention of the parties was to facilitate reconciliation and solicit the Defendant’s officials as witnesses in the case. It does not provide that if the DPP from the evidence wants to institute criminal proceedings against the Defendant’s officials that the Plaintiff would either withhold evidence or compound or conceal any offence.

It is up to the DPP and the Uganda Police to investigate the complaint raised by the Plaintiff and institute charges or decline where appropriate in accordance with the provisions of article 120 (3) of the Constitution the Republic of Uganda. An agreement to withdraw a complaint cannot be taken as to amount to an agreement to compound or conceal a felony or an agreement to abstain from, discontinue or delay prosecution for a felony as envisaged by section 104 of the Penal Code Act. There were no charges of a felonious nature and no prosecution had been commenced or instituted. Since no charges were pending against the officers of the Defendant company, any statement in the MoU that the Plaintiff "hereby releases" the Defendant's officials from criminal liability are redundant. Furthermore the Plaintiff has no capacity in law or in fact to release anyone from criminal liability. That was the preserve of the courts. The statement does not amount to breach of section 104 of the Penal Code Act.

Though the Plaintiff's Counsel agrees with the authorities cited by the Defendant's Counsel on the question of illegality, he emphasises that the agreement by implication does not breach or violate the provisions of section 104 of the Penal Code Act and was meant for a lawful purpose and is not illegal and against public policy. Consequently the authorities cited by the Defendant's Counsel are inapplicable.

The officials of the Defendant were subsequently charged with criminal offences relating to the questioned invoices and the Plaintiff did not interfere with the prosecution with a view to compound or conceal any felony.

The Defendant in its amended written statement of defence and counterclaim against the Plaintiff and seeks to recover damages for breach of contract, interest and costs. The Defendant cannot sue upon the MoU and seek to the benefit from it while at the same time trying to have it rejected as being a void document. According to the case of **Seruwagi Kavuma versus Barclays bank (U) Ltd HCMA 634 of 2010** it is a principle of equity that one cannot approbate and reprobate at the same time. The principle is based on the doctrine of election which postulates that nobody can accept and reject the same instrument and that a person cannot say at one time that a transaction is valid and thereby obtain some advantage in which he could only be entitled on the footing that it is valid and then turn around and say that it is void for purposes of securing some other advantage. The Defendant's having sued on the basis of the Memorandum of Understanding cannot be allowed to challenge it is a nullity.

The Plaintiff's Counsel further submitted that in the event that any of the three clauses of the memorandum of understanding are found to be unenforceable for illegality or contravention of public policy, the court can enforce the legal covenants and sever those that may be illegal. The doctrine of severance of contracts is discussed by **Treitel in the textbook "The Law of Contract" 10th edition, Sweet and Maxwell, 1999 page 467**. Where the promises of one party to a contract are partly lawful and partly illegal, the court may cut out the illegal promises and enforce the lawful ones alone. The promise must be such as can be severed. Secondly the court will only sever whatever can be severed by cutting words out of the contract. Thirdly severance would not alter the whole nature of the contract. Even in cases of a criminal or immoral promise, the criminal promise would be severed if it was made without a guilty intent.

If any of the clauses of the memorandum of understanding are found to be illegal, the court has power to sever the illegal part by deleting them wholly. It will not alter the nature of the memorandum of understanding which is primarily an agreement to enable the Plaintiff recover its money which the Defendant admits (through the reconciliation document exhibited in court by consent) as wrongly paid to it. An illegality is capable of severance because there is no criminal promise. Had there been any criminal intention on the part of the Plaintiff, it would have blocked the prosecution of the officials of the Defendant. There is no evidence of any guilty mind.

In rejoinder the Defendant's Counsel submitted as follows:

On the question of whether the preliminary point can be raised preliminarily, Counsel submitted that the Plaintiff is estopped from arguing otherwise because in the joint scheduling conference memorandum endorsed by both parties, it was agreed that the point of law would be determined without calling evidence. Order 12 rule 1 of the Civil Procedure Rules enjoins the court to hold a scheduling conference to sort out points of agreement and disagreement. Furthermore Order 15 rule 2 provides for determination of the suit on issues of law. Order 15 rule 6 provides that the parties can agree on an issue of law and present it for determination by the court. The essence and rationale for a preliminary point of law is to decide a matter of law capable of disposing of the suit without taking evidence.

On the timing of the preliminary point of law, it is useful where the point of law decisively disposes of the suit to be tried first to avoid going through a lengthy trial. Counsel relied on the case of **Re: ABDULKARIM SENTAMU and ANOTHER Constitutional Reference No. 7 of 1998** and the speech of Roma LJ in the case of **Everett Vs Ribbands and Another [1952] 2 QB 198 at 206** that where a point of law decided in one way or another is to be decisive of litigation, then advantage ought to be taken of facilities afforded by the rules of court to have it disposed of at the close of pleadings.

On the nature of a preliminary point which ought to be capable of disposing the matter preliminarily, without the court having to resort to ascertaining the facts from elsewhere apart from looking at the pleadings alone, illegality of the MoU can be determined by looking at the pleadings alone together with the Memorandum of Understanding. The terms of the memorandum of understanding cannot be changed by oral evidence and there is no need to ascertain the parties intention where the matters are in the written agreement endorsed by both parties.

Counsel reiterated submissions on the basis of clause 10 of the memorandum of understanding that the Plaintiff releases the Defendant, its shareholders, directors and CEO from all and any liability, whether civil or criminal relating to or arising out of the questioned invoices. Section 104 of the Penal Code Act does not require in anyway proof of intent but only the existence of an agreement to discontinue or in any way interfere with the prosecution for any kind of benefit. The offence does not require knowledge of the law as an included therein but only an agreement or attempt to obtain, agree or to conceal. On the face of it the memorandum of understanding is an illegal agreement.

The submission of the Plaintiff's Counsel that the purpose of the memorandum of understanding was to facilitate the prosecution of its employees when there is no complaint having been raised against the Defendant or its employees contradicts clauses 9 and 10 thereof wherein the Plaintiff undertook in writing to withdraw its criminal complaint against the shareholders, directors and CEO of the Defendant and release them from any criminal liability.

On the question of the Defendant relying on the memorandum of understanding for its counterclaim, the Defendant is not in pari delicto with the Plaintiff and can base its claim in the counterclaim on the very memorandum of understanding it is challenging. Counsel relied on the case of **Taylor versus Chester (4) (1869 (L.R QB 340** cited East Africa in the case of **Mistry Amar Singh versus Kulubya [1963] EA** where it was held that the true test of determining whether or not the Plaintiff and the Defendant were in pari delicto is by considering whether the Plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party. The purpose of the memorandum of understanding is contained in the recitals to the memorandum of understanding.

At the time the memorandum of understanding was executed, the Plaintiff argues that there were no charges pending against the Defendant's directors and therefore no felony was compounded. A felony materialises at the time of committing the offence and not at the time of the charge. Section 104 of the penal code act envisages the commission of the felony and not a charge.

On the question of whether the agreement was void, the Defendant's Counsel submitted that under clause 10 of the memorandum of understanding, the Plaintiff agreed to release the Defendant and its directors from any liability whether criminal or civil, so long as they adhere to the terms of the memorandum of understanding. The submission of the Plaintiff's Counsel is that the Plaintiff has no capacity to release the Defendant or its officials from any prosecution. In rejoinder the Defendant's Counsel submitted that it would follow that the memorandum of understanding would be void for impossibility of performance of the promises made therein or the unlawfulness of the promises.

As far as the argument of severance of provisions of the memorandum of understanding is concerned, the authorities cited indicate that the question is still an open one. The parts with the Plaintiff wants to be severed have not been specified. The severance cannot apply because this is a special contract to which the doctrine does not apply. Treitel wrote that the doctrine is inapplicable where the consideration is criminal or immoral. In any case severance would alter the nature of the memorandum of understanding and there would be no consideration flowing from the Plaintiff to the Defendant. It is not material to establish whether the Plaintiff knew that what it promised was unlawful for an offence or agreement to conceal a felony. Ignorance of law is not a defence under section 6 of the Penal Code Act. Severance of the offending parts would render the agreement void for lack of consideration flowing from the Defendant.

On the question of whether the court ought to hear the parties before deciding the point of law so as to ascertain whether the intention in the memorandum of understanding was to conceal or compound a felony, the case quoted by the Plaintiff's Counsel is distinguishable. In the case of **Mohammed Hamid versus ROKO Construction Ltd SCCA No 01 of 2013** the Supreme Court was dealing with an illegality which was discovered by the Court of Appeal and only alluded to by the Court of Appeal when delivering its ruling without giving Counsel an

opportunity to address the court on the said illegality. The court was of the view that the parties should be heard on the point.

Defendant's Counsel reiterated submissions that it was agreed in the scheduling memorandum that the point of law would be tried first without adducing further evidence. Secondly the court does not have to call evidence to establish intention because no amount of oral evidence can be used to alter the contract or to explain the clear terms of the memorandum of understanding. In the premises the Plaintiff's suit ought to be dismissed with costs.

Judgment

I have carefully considered the written submissions together with the authorities cited which have been reproduced above. I have also considered the scheduling memorandum endorsed by Counsel on every page and dated 28th of February 2014.

The scheduling memorandum complies with **Order 12 rule 1 of the Civil Procedure Rules** which provide that the court shall hold a scheduling conference to sort out points of agreement and disagreement, the possibility of mediation, arbitration and any other form of settlement. Additionally the parties were issued with scheduling directions under the **Constitution (Commercial Court) (Practice) Directions** rules 5 and 6 thereof which permit a judge to determine the procedure and progress of a commercial action by having direct control thereof. Accordingly the parties were required to file a joint scheduling memorandum in which they would agree on the facts disclosed by the pleadings which are not in dispute. In the facts which are not in dispute the following facts are admitted:

1. On 10 September 2012, the Plaintiff and the Defendant entered into a memorandum of understanding ("MOU") wherein the Defendant agreed on a "no-fault gesture" to pay the Plaintiff a sum of USD $4,000,000.00 (United States dollars four million only) which was to be paid following a reconciliation of amounts by the parties.
2. On 18 September, 2012 the Plaintiff and the Defendant carried out a reconciliation and agreed that the sum owing totalled to USD $4,027,820.71 (in words...).
3. Under clause 4.1 of the MOU, it was agreed and stipulated that the Defendant would pay a sum of USD $1,000,000 (in words...) within seven days of lifting the freezing order in HCT-00-ACD-00- CM – 0062/2012, and the balance in equal instalments over a period of six months.
4. The freezing orders were lifted on 28 September, 2012 by the Chief Magistrates Court.
5. The Defendant has up-to-date paid only USD $330,000 since the lifting of the freezing orders."

The memorandum of understanding was listed as the Plaintiff's document and agreed to as exhibit P1. The reconciliation statement signed by the Plaintiff and the Defendant dated 18th of September 2012 is agreed as exhibit P2. The order of the High Court of Uganda Anticorruption

Division dated 28th of September 2012 is agreed as exhibit P3. Other documents are also agreed. For the Plaintiff 11 exhibits are agreed to as the admitted documents while for the Defendant 15 exhibits are agreed to and marked as defence exhibits. On the agreed issues for trial the first issue is whether the Memorandum of Understanding is illegal/an illegality and unenforceable in law. In the direction item (ix) the parties were required to indicate in the joint scheduling memorandum whether there are any points of law or matters to be resolved or agreed upon. The parties indicated that the point of law arises from issue number one. They indicated in the additional answer to the questionnaire contained in the direction at page 9 of the joint scheduling memorandum and on the question whether any points of law or matters could be resolved without adducing evidence, that issue number one is a preliminary point of law.

I have duly considered the submission of the Plaintiff's Counsel that the point of law could not be resolved without adducing evidence. The counter argument was that the Plaintiff is estopped from submitting that resolution of the point of law requires the adducing of evidence about several other matters such as the intention of the parties and the circumstances leading to the execution of the memorandum of understanding. Secondly to argue the matter as a point of law preliminarily was an agreement contained in the scheduling memorandum. Furthermore the Defendant’s Counsel rejoined that the agreement speaks for itself and cannot be amended or varied by any oral evidence.

I agree with the submission that under **Order 15 Rule 1 of the Civil Procedure Rules** there are issues of law and issues of fact. Under order 15 rule 2 where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined.

By trying issues of law first the court saves the parties the expense of adducing evidence by way of witness testimonies and documentary evidence. I agree with the Plaintiff's submission that a point of law has to be of the nature which one way or the other would dispose of a substantial part of the suit. Order 15 rules 2 only requires that the case or any part of it may be disposed off on the issues of law only for the court to set it for hearing and try those issues first. There is no need to refer to the authorities cited by the parties on this matter as the rule is explicit and unambiguous. It provides as follows:

> "Where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part of it may be disposed off on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

The operating words deal with whether the case or any part of it may be disposed off on the issues of law only. In this particular case without going into the merits of the controversy, the plaint admittedly depends on the legality and enforceability of the memorandum of

understanding. It is not in dispute that if the memorandum of understanding is illegal, that is if it violates a statutory provision which prohibits it, it would be a nullity. What I need to consider is whether the question of whether it is an illegal agreement or not can be determined by a perusal of the memorandum itself and not by extraneous evidence. The Defendant's Counsel submitted that in interpreting a contract, only the document itself shall be perused. This is known as the best evidence rule and is a statutory rule under section 91 of the Evidence Act cap 6 laws of Uganda which provides as follows:

> "When the terms of a contract or of a grant, or of any other disposition of property, have been reduced into the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such other matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Clearly the memorandum of understanding contains the terms of a contract between the parties reduced in the form of a document. The document under section 91 of the Evidence Act speaks for itself and no other evidence is admissible in proof of the terms of the contract, or of such matter except the document itself. In this case the admissible evidence about the terms of the memorandum of understanding is exhibit P1 which is the document itself. It is the terms of the contract which need to be considered for illegality and no other evidence is required. Particularly the question of whether the memorandum of understanding is unenforceable can be determined on whether its terms violate the provisions of statute or whether the terms which can be discerned by perusal of the document itself contain an illegality. The issue as framed deals with the terms of the Memorandum of Understanding and is meant to resolve the question of whether it is illegal or an illegality and therefore unenforceable. By determining it as a preliminary point of law, the court does not at the beginning deal with the merits of the point of law but with the effect it is likely to have and whether there is any need to adduce evidence before the issue can be resolved. The issue as framed in the scheduling memorandum by agreement of the Parties deals with the document itself or the contract itself and for emphasis I will quote it:

> "Whether the Memorandum of Understanding is illegal/an illegality and unenforceable in law"

The issue as framed requires the court to make a pronouncement on whether the Memorandum of Understanding is illegal or an illegality and is unenforceable in law. In the premises issue number one can be determined on the basis of the document and reference to law of which the court can take judicial notice.

I have tried as far as possible to follow the heads of argument submitted by Counsel. In considering the facts and arguments I have found it unnecessary to adhere to the heads of

argument that was followed by Counsel in their written submissions. I would therefore start with an analysis of the memorandum of understanding and deal with the interpretation thereof on the question of the intention of the parties and whether it would violate section 104 of the Penal Code Act. In doing so I have also found it necessary in the analysis of the memorandum of understanding to consider the question of whether one part of it may be severed from the other before concluding on the question of whether the memorandum of understanding is an illegality or unenforceable.

The memorandum of understanding is dated 10th of September 2012 between MTN Uganda Limited and Three Ways Shipping Services (Group) Ltd. The preamble or recitals to the agreement provides in paragraph A thereof that there are issues between the Plaintiff and the Defendant relating to or arising out of raising of invoices by the Defendant and payment thereof by the Plaintiff between 2009 and 2012. In paragraph "B" it is stipulated that the Plaintiff made a complaint of theft, embezzlement and causing financial loss against some of its staff at the Directorate of Criminal Investigations and Intelligence of Uganda Police, which opened a file number E/242/2012. Thirdly in paragraph "C" the memorandum provides that pursuant to investigations under the said complaint on 30 August 2012 the Directorate of Criminal Investigations and Intelligence sought and obtained an order from the Anticorruption Division of the High Court freezing the Defendant's accounts with Standard Chartered Bank Uganda Limited and Stanbic Bank Uganda Limited. In paragraph "D" it is provided that pursuant to the said investigations, the Chairman, the Managing Director, the Group Financial Controller and the Head Forwarding of the Defendant were summoned to the Directorate of Criminal Investigations and Intelligence of the Uganda Police Force and recorded police statements. Lastly the preamble or recitals provides in paragraph "E" that the parties are desirous of seeking and obtaining an amicable and confidential resolution to the matters between them, that protects their respective legal and business interests.

The agreement provided inter alia that the parties committed themselves to a swift, amicable and confidential resolution of the matters between them. Secondly upon execution of the memorandum shall commence a reconciliation of the invoices issued by the Defendant with the Plaintiff over the period 2009 through to 2012 with a view to determining the quantum paid over by the Plaintiff to the Defendant under the questioned invoices. Secondly that the Defendant commits itself to the payment of an amount of US$4 million and all costs incurred in investigating the loss in a no-fault gesture towards assisting the Plaintiff recoup its losses as a result, the payment of questioned invoices. The amounts agreed upon is supposed to be adjusted following full and final reconciliation of monies paid into the account of the Defendant on the basis of questioned invoices.

Paragraph 6 of the memorandum of understanding provides that the principal officers and staff of the Defendant shall avail themselves to work with the Plaintiff in the pursuit of legal actions whether criminal or civil that the Plaintiff may opt to take against any of its present or former

employees in connection to or arising out of the misappropriation of the Plaintiff's funds using the questioned invoices. The assistance would include the recording of full and frank statements to the Directorate of Criminal Investigations and Intelligence, provision of any supporting documentary evidence that may be in the power of the Defendant to control and co-operation with the Plaintiff's forensic investigation team, provision of witness statements in any civil suit that the Plaintiff may choose to bring. The principal officers in paragraph 7 of the memorandum of understanding undertook to persuade the employees of the Defendant to cooperate with the Plaintiffs by way of surrendering any illicitly obtained funds or assets to the Plaintiff to put towards recovery of its losses and to accept criminal culpability at the earliest possible opportunity.

The Defendant objected to clauses 8, 9 and 10 which I shall quote verbatim and are as follows:

> "8.To facilitate reconciliation process as well as the striking of an amicable resolution and in consideration of TSSGL co-operation undertaken above, MTN shall, immediately upon execution of this Memorandum, work with TSSGL to persuade the Uganda Police Force and Directorate of Public Prosecutions to cause the unfreezing of TSSGL's bank accounts by conceding to *Miscellaneous Application Number* 64 of 2012, *Three Ways Shipping (Group) Ltd* versus *Uganda*, presently pending before the Anticorruption Division of the High Court, with no order as to costs."

Under clause 8 the Defendant was to persuade the Uganda Police Force and Directorate of Public Prosecution to cause the unfreezing of its accounts. The agreement provided that the Defendant was to persuade the DPP or the police force to concede to their application to unfreeze their account. The matter was pending before the Anticorruption Division of the High Court. On the face of it clause 8 merely requests the Defendant to talk to the police or to the DPP to concede to the application which was before an independent tribunal or court. The decision whether to unfreeze the account would be that of the court. Read alone there seems to be nothing wrong with clause 8. I will next consider clause 9 of the Memorandum of Understanding which provides as follows:

> "Further to facilitate the reconciliation process as well as the striking of an amicable resolution and in consideration of TSSGL' co-operation undertaken above, MTN undertakes to withdraw its criminal complaint against the Shareholders, Directors and Chief Executive Officer of TSSGL and to endeavour to recommend to Uganda Police Force and the Directorate of Public Prosecutions that they may be treated as witnesses only in any case(s) against the Employees."

The elements which run through clause 9 are as follows. For the purposes of facilitating the reconciliation process as well as the striking of an amicable resolution and in consideration of the co-operation of the Defendant which is mentioned in the previous clauses, the Plaintiff undertook to withdraw its criminal complaint against the Shareholders, Directors and Chief Executive

Officer of the Defendant and to recommend to Uganda Police Force and the Directorate of Public Prosecutions that they should instead be treated as witnesses in any cases against the Employees. The term "Employees" is defined in clause 6 of the memorandum of understanding to mean the present or former employees of the Plaintiff. In other words the Plaintiff would pursue its complaint against its present or former employees and drop its complaint against the Shareholders, Directors and Chief Executive Officer of the Defendant. The consideration for dropping the complaint against them is the co-operation of the Defendant's principal officers and employees.

It is the Defendant's submission that clause 9 amounted to compounding a felony contrary to section 104 of the Penal Code Act. I must emphasise that what the Plaintiff agreed to do in relation to any criminal proceedings or investigations is to drop its complaint and secondly to recommend to the police force or the Directorate of Public Prosecution that the Defendant's officials and employees be treated as witnesses only.

Before considering the issue on the merits I will also quote clause 10 of the Memorandum of Understanding which provides as follows:

> "For so long as TSSGL adheres to and is compliant with the terms of the Memorandum of Understanding MTN hereby releases TSSGL, its Shareholders, Director and Chief Executive Officer from all and any liability, whether civil or criminal, relating to or arising out of the Questioned Invoices."

The clause makes it conditional for the Defendant officials to comply with the terms of the Memorandum of Understanding for the Plaintiff to release the Shareholders, Director and Chief Executive Officer of the Defendant from any civil or criminal liability relating to or arising out of certain questioned invoices. Adherence to the terms of the Memorandum of Understanding brings into play all the terms of the memorandum of understanding. In other words failure to comply with any of the terms was sufficient for the Plaintiff not to absolve the Shareholders, Directors and Chief Executive Officer of the Defendant from all or any liability whether civil or criminal relating to or arising out of the questioned invoices.

The Defendant took objection to the memorandum of understanding on the basis of clauses 8, 9 and 10 thereof. Section **104 of the Penal Code Act** quoted by the parties defines the offence of compounding felonies and provides that:

> "Any person who asks, receives or obtains, or agrees or attempts to receive or obtain, any property or benefit of any kind for himself or herself or any other person upon any agreement or understanding that he or she will compound or conceal a felony, or will abstain from, discontinue or delay the prosecution for a felony, or will withhold any evidence thereof, commits a misdemeanour."

The highlights of the Defendant's interpretation of the provision is that there was an agreement to receive property or benefit upon an agreement or understanding to compound or conceal a felony or obtain from, discontinue or withhold evidence in relation to a felony. Secondly that the complaint of the Plaintiff against the shareholders, director and chief executive officer of the Defendant concerns embezzlement, causing financial loss and theft which offences are felonies as defined by **section 2 of the Penal Code Act cap 120** laws of Uganda. A felony under section 2 (e) means an offence punishable with death or with imprisonment for three years or more.

The terminology used by the parties in the memorandum of understanding gives rise to some interesting observations. It is agreed that the Plaintiff would drop its complaint against the shareholders, directors and chief executive officer of the Defendant for consideration mentioned in the agreement. However it is also specified in the agreement that the Plaintiff had lodged a complaint against the aforementioned persons for theft, embezzlement and causing financial loss against its staff. In other words recital "B" of the MoU talks about the complaint of theft, embezzlement and causing financial loss against the staff of the Plaintiff. Secondly in paragraph B of the recitals, it is provided that pursuant to investigations, the Chairman, the Managing Director, the Group Financial Controller and the Head Forwarding of the Defendant were summoned to the Directorate of Criminal Investigations and Intelligence of the Uganda Police Force and recorded statements. It is interesting that in the body of the agreement the parties to the memorandum of understanding agree that the Plaintiff would drop its complaint. The MoU assumes that the Plaintiff had made such a complaint which may be dropped. Clause 9 of the MoU gives a hint that there was a complaint against the Shareholders, Directors and Chief Executive Officer of the Defendant. So the question is how a complaint which has already been made to the police can be dropped. It suggests that the parties intended that the Plaintiff would express its interest that it would not pursue the complaint. What comes to mind is whether the Plaintiff has any power to discontinue investigations. It is logical to conclude as a matter of inference that the Plaintiff could only request the police not to continue investigations. Secondly the agreement provides that the Plaintiff would recommend discontinuance of any criminal proceedings begun or contemplated by the DPP and the police.

As a matter of fact it was submitted that the directors of the Defendant have indeed been charged. The charging of the directors is not contemplated by the agreement. One interesting point raised by the Plaintiff's Counsel is that it has no control over the DPP. This is against another points raised by the Defendants Counsel that the agreement purported to interfere with the powers of the DPP under Article 120 (6) of the Constitution which provides that in the exercise of the functions conferred on him or her by the article, the Director of Public Prosecutions shall not be subject to the direction or control of any person or authority. Obviously the agreement provides for recommendations. Recommendations cannot be illegal. A recommendation to discontinue any criminal proceedings may be acceptable. Consequently the only submission that raises concern is whether the agreement itself violates the Penal Code Act.

Before considering the provisions of the Penal Code Act and the case law, I have duly considered Article 126 (2) (d) of the Constitution of the Republic of Uganda which deals with the exercise of judicial power. It provides that in adjudicating cases of both a criminal and civil nature, the court shall, subject to the law, apply certain principles specified under clause 2. Principle (d) provides that the reconciliation between parties is to be promoted. Whereas it is possible to argue that reconciliation between the Plaintiff and the Defendant may be promoted even in the form of an agreement, it is clear from the provisions of article 126 that the provision deals with the exercise of judicial power and not an agreement between the parties. It is up to the courts of law to promote reconciliation between the parties. It assumes that the matter is already before the court.

On the basis that only matters before the court may be negotiated between the parties for purposes of reconciliation, recommendations to the DPP for purposes of unfreezing the Defendant's account are not illegal per se because it is a matter before the court and recommending to the DPP leaves the DPP with the discretion under Article 120 whether to concede to the application or not.

The analysis therefore narrows down to the four corners of section 104 of the Penal Code Act and the agreement between the parties. The agreement itself makes it conditional for the Defendant to cooperate and adhere to the terms of the memorandum of understanding in order to gain the favour of the Plaintiff to drop any complaint and recommend to the DPP that the Defendant's officials and shareholders ought to be treated as witnesses and not accused persons. In other words the Plaintiff would not actively pursue anything that would violate the understanding not to pursue any criminal charges against the Defendant's on the basis of the agreement.

A deeper analysis of the situation before the court raises some pertinent issues. It was submitted without evidence being adduced that the Defendant's officials have been charged. In other words if that is taken to be the truth, then the agreement has fallen apart because clause 10 specifically provides that the shareholders, director and chief executive officer shall be absolved from all or any liability whether civil or criminal relating to or arising out of the questioned invoices. If the agreement has not fallen apart, then the DPP has exercised its mandate to continue with prosecutions. I will however not make any conclusion because there is no agreed fact that the Defendant's officials or shareholders have been charged with any criminal offences.

Finally the undercurrent in the agreement is to make it conditional to dropping charges or recommending to DPP to adhere to the terms of the memorandum of understanding. Coming back to the agreement itself, it does charge the Plaintiff not to disclose or not to actively pursue anything which would promote prosecution of the Defendant's officials. This was in return for co-operation in the pursuit of the Plaintiff's employees as far as any criminal proceedings are concerned and specifically for the Defendant's servants not to withhold any information that was necessary for such prosecution.

I have additionally considered the submission that certain parts of the agreement can be severed from others. This argument was made in the alternative to the submission that the Memorandum of Understanding itself is not illegal/or an illegality and unenforceable. However before considering the question of whether the document is illegal/or an illegality and unenforceable I have found it necessary to consider whether certain parts of the agreement can be severed from others so as to save the document. This submission was made on the basis that should the court find that clauses 8, 9 and 10 of the Memorandum of Understanding are illegal and unenforceable, other parts of the memorandum of understanding can be enforced. It is necessary to consider the argument on the basis of the facts which have been set up above on the contents of the memorandum of understanding.

The common thread in the memorandum of understanding is the allegation that certain questioned invoices were utilised to defraud the Plaintiff of funds. The basis of the prosecution, investigations, civil liability or criminal liability hinges on the questioned invoices. Reconciliation of accounts in clause 2 of the memorandum of understanding is based on determining the quantum paid over by the Plaintiff to the Defendant under certain questioned invoices collectively referred to as "Questioned invoices". In paragraph 6 of the memorandum of understanding it is provided that the principal officers and staff of the Defendant shall avail themselves to work with the Plaintiff in the pursuit of any legal actions, whether criminal or civil that the Plaintiff may opt to take against any of its present or former employees in connection with or arising out of the misappropriation of the Plaintiffs funds using the questioned invoices. The question of reconciliation directly assumes that certain invoices were used to defraud the Plaintiff and it is the basis of the agreement to refund some monies. Consequently the forbearance of the Plaintiff not to pursue any civil or criminal claims against the Defendant or its servants or shareholders is directly connected to or arises out of the said "questioned invoices". The questioned invoices would directly form the basis of any prosecution for misappropriation of funds belonging to the Plaintiff. Soliciting the co-operation of the Defendant's servants or shareholders is directly linked to the misappropriation of funds belonging to the Plaintiff founded on certain questioned invoices. Paragraph 8 of the memorandum of understanding specifically provides for the facilitation of reconciliation process as well as the striking of an amicable resolution in consideration for the co-operation undertaken by the Defendant in the previous paragraphs. In other words the previous paragraphs cannot be severed from paragraphs 8 or 9 or 10. Paragraph 9 deals with facilitation of reconciliation process as well as striking of an amicable resolution in consideration for the same co-operation undertaken by both parties. On the basis of that the Plaintiff undertook to withdraw its criminal complaint against the shareholders, directors and chief executive officer of the Defendant and recommend to the Uganda police force and the directorate of public prosecutions that the said parties be treated as witnesses only in any cases against the employees of the Plaintiff. Finally paragraph 10 make the co-operation of the Defendant a conditional requirement for the release of the Defendant, its shareholders, directors and chief executive officer from all or any liability, whether civil or criminal, relating to or arising out of the "Questioned Invoices". On the basis of a perusal of the Memorandum of

Understanding, all the clauses from the preamble up to paragraph 15 are interlinked. Specifically the gist of the matter arises from co-operation on "questioned invoices". Paragraphs 8, 9 and 10 of the Memorandum of Understanding only exist to deal with the previous clauses of the memorandum of understanding.

On the basis of the analysis of the memorandum of understanding clauses, my conclusion is that it violates section 104 of the Penal Code Act. The basis of the violation is that the abstinence or forbearance of the Plaintiff to pursue its complaint against the Defendant, its Shareholders, Directors or Chief Executive Officer is the co-operation of the Defendants servants or shareholders mentioned above. There is an agreement to receive a benefit by way of co-operation from the Defendant to abstain from or discontinue prosecution for felonies of embezzlement, theft and causing financial loss. All the ingredients of section 104 of the Penal Code Act are evident in the forbearance or abstinence of the Plaintiff to pursue its complaint as far as criminal proceedings are concerned against the Defendant, its Shareholders, Directors or Chief Executive Officer. The conclusion is that the memorandum of understanding was executed in violation of section 104 of the Penal Code Act.

I have carefully considered the authorities cited by the Defendants Counsel. In the case of **Smith and another versus Selwyn [1914 – 15] All ER Rep at page 229**, the principle is that an action for damages based upon a felonious act committed against the Plaintiff by the Defendant is not maintainable unless he has been prosecuted or a reasonable excuse has been given. The principle is not directly applicable since it does not forbid an action for damages based upon a felonious act committed against the Plaintiff by the Defendant. It is a matter of procedure that criminal proceedings have to be determined before the civil action can be commenced. The case does not apply to a submission that the memorandum of understanding is an illegality. In the case of **Bostel Brothers, Ltd versus Hurlock [1948] 2 All ER 312,** work was done under a licence in contravention of a statutory provision and the Defendant succeeded in avoiding the contract. The applicable law is that a contract executed in violation of a statutory provision is void. In the words of Somervell L.J 312:

> "The principle of law relied on was stated concisely and in a form appropriate to the present issue by Ellenborough CJ in Langton v Hughes (1 M & S 593, 596): "*What is done in contravention of the provisions of an Act or Parliament, cannot be made the subject-matter of an action*."

The process of court cannot be used to enforce an illegal contract as held in the case of **Phoenix General Insurance Co of Greece SA v Administratia Asigurarilor de Stat [1987] 2 All ER 152** and judgment of the Court of Appeal of the United Kingdom on the effect of illegality. Kerr LJ held that it is settled law that any contract prohibited by statute, either expressly or by implication is illegal and void. He reviewed several authorities on the matter and which I quoted extensively in **Soroti Joint Medical Services Ltd versus Sino Africa Medicines and Services Ltd Arbitration Cause Number 452 of 2011:** Kerr LJ quotes Parke B:

"Parke B said (2 M & W 149 at 157, 150 ER 707 at 710):

> 'It is perfectly settled, that where the contract which the Plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition … And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that if the contract be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute means to prohibit the contract?'

D.J Bakibinga writes in his book "**Law of Contract in Uganda, Fountain Publishers 2001** at page 93 where he discusses the subject at page 93 discusses and states that:

> "A contract which is illegal is void. Illegality may manifest itself in four main ways. First, in the formation of the contract e.g. where an unlicensed moneylender makes a loan. Second, in the performance of the contract e.g. a contract to commit a crime. Third, in the consideration for the contract. Finally, illegality may be evident in the purpose for which the contract is made; for instance where a vehicle is hired for the purpose of smuggling items into the country. The contract is illegal if it is (i) contrary to public policy and (ii) forbidden by statute."

Section 104 of the Penal Code Act prohibits certain kinds of the agreement. It prohibits getting consideration to abstain from pursuing criminal proceedings or action against a suspect of a felonious offence.

Finally the Plaintiff's Counsel relies on the doctrine of estoppels on the ground that the Defendant by making a counterclaim on the basis of the memorandum of understanding is estopped from raising the illegality of the memorandum of understanding. My short answer to that argument is that the doctrine of estoppels cannot be raised as a bar to the operation of a statutory provision. Under section 14 (2) (b) of the Judicature Act cap 13 laws of Uganda, subject to the Constitution and the Judicature Act, the jurisdiction of the High Court shall be exercised in conformity with the written law and in so far as the written law does not extend or apply with the common law and doctrines of equity. Where there is an express statutory provision, estoppels which is an equitable doctrine recognised by section 114 of the Evidence Act cannot be used to overcome the effect of the statutory provision.

Notwithstanding the extent of the application of the doctrine of estoppels on the effect of the statutory provision namely section 104 of the Penal Code Act, the same statutory provision prohibits the entire memorandum of understanding and no cause of action can be founded on it.

Neither the suit nor the counterclaim can be based on the memorandum of understanding. It is clearly the effect of saying that the memorandum of understanding was executed in contravention of section 104 of the Penal Code Act.

A court of law cannot sanction that which is illegal and an illegality once brought to the attention of court would be dealt with by the court irrespective of the pleadings or admissions made therein. This proposition of law is found in the case of **Belvoir Finance Co. Ltd vs. Harold and G Cole & Co. Ltd [1969] 2 ALL ER 904.** In that case Donaldson J at page 908 held that:

> "I think illegality, once brought to the attention of court, overrides all questions of pleadings, and therefore this is, and remains a real and indeed insuperable difficulty in the way of the Defendant so far as the mercantile agency defence is concerned."

In that case the Defendant asserted that the hire purchase agreements in question were illegal but that one Belgravia was in possession of the vehicles in question with the consent of the Plaintiff and the consent was admitted in the pleadings. The proposition was cited with approved by the Court of Appeal in the case of **Makula International vs. His Eminence Cardinal Nsubuga and another reported in [1982] HCB 11**. It is also cited as Civil Appeal Number 4 of 1981 and the court held that it could interfere with a taxing officer's order even where the appeal from the order was incompetent. They held "a court of law cannot sanction that which is illegal...illegality once brought to the attention of court overrides all questions of pleadings, including any admissions made thereon (see page 20 – 21 of the Court of Appeal judgment). The court cited with approval the case of **Phillips versus Copping [1935] 1 KB 15** per Scrutton LJ at page 21:

> "But it is the duty of the Court when asked to give a judgment which is contrary to a statute to take the point although the litigants may not take it."

In the premises the issue as framed which is whether the memorandum of understanding is illegal/an illegality and unenforceable in law is answered in the affirmative.

Before taking leave of the matter, an illegality has the effect of making the action a nullity and unenforceable. The court cannot lend its process to the enforcement of an illegality. Anything founded on the memorandum of understanding whether in the plaint or counterclaim cannot stand. However the counterclaim is not before the court for consideration on the basis of issue number one which is whether the memorandum of understanding is illegal/an illegality and unenforceable in law. The correct remedy is not a dismissal of the action of the Plaintiff which act would deal with the merits of the claim. The correct remedy is to dispose of the action by striking it off the record. The Plaintiff's action is accordingly struck out with costs.

Ruling delivered on the 23rd of May 2014 in open court

Christopher Madrama Izama

Judge

Ruling delivered in the presence of:

Wycliffe Birungi appearing with Kiwanuka Kiryowa and holding brief for Fred Mpanga for the Defendant

Kuteesa Paul for the Plaintiff

Chairman of Defendant company Oscar Baitwa in court and

The Legal Manager Mr. John Bosco Sempijja of the Plaintiff in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

23/05/2014