THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 129 OF 2012

1. **AJAY INDUSTRIAL CORPORATION LTD}**
2. **RELIEF LINE [U] LTD}.....PLAINTIFFS**

VS

1. **JESEY TECHNICAL SERVICES LTD}**
2. **JOSEPH LUKYAMUZI}.....DEFENDANTS**

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

This judgment arises from a suit by the Plaintiff against the Defendants jointly and severally for recovery of Uganda shillings 166,578,920/=, general damages, interest and costs of the suit arising from alleged failure to pay for goods supplied.

Judgment in default of a defence for **Uganda shillings 166,578,940/=,** interest at 24% per month from 21st of November 2011 till payment in full and costs of this suit was entered on 9 August 2012 by the Asst Registrar. Subsequently the Defendants applied to set aside the judgment and execution of the decree against the second Defendant. The applicants were allowed to file a defence and the decree and execution of the decree were set aside. The Defendants filed a joint written statement of defence denying liability. The Plaintiffs are represented by Messieurs Muwema and Mugerwa Advocates while the Defendants are represented by Messieurs Kyazze and Company Advocates. Counsels filed points of agreement and disagreement in the form of a joint scheduling memorandum under Order 12 of the Civil Procedure Rules.

In the facts of the Plaintiffs case in the scheduling memorandum are that the Plaintiffs sued the Defendants jointly and severally on the ground that in September 2011, the first Plaintiff on the instructions, directions and representations of the second Defendant supplied goods to the first Defendant company worth Uganda shillings 166,578,980/=. The first Plaintiff instructed the Defendants to make payments for the goods to the second Plaintiff who happens to be the first Plaintiff's agent in Uganda. The payment for the goods was secured by cheque number 005057 of Uganda shillings 166,578,980/= issued in favour of the first Plaintiffs agent. The cheque was dishonoured and the Defendants were duly informed. The Defendants made several undertakings to the first Plaintiff regarding payment of the said goods but all have been breached and the amount claimed is still outstanding hence the suit.

On the other hand the summary of the first Defendant's case is that the first Plaintiffs claim, is limited to a sum of **Uganda shillings 73,009,320/=** as the outstanding sum in respect of the first consignment, having set off **Uganda shillings 20,000,000/=** paid to the first Plaintiff through its original manager to help secure the second consignment and the is premature. This is because the first Defendant alleges that it is only entitled to pay the same upon delivery of the second consignment by the Plaintiffs which to date has not been delivered. Consequently the purported outstanding sum of **Uganda shillings 166,578,940/=** for which the Defendants were not served with notice of dishonour of cheque number 005057 for the said sum was in any case prematurely banked without the first Defendant delivering the consignment of the goods as agreed. Lastly the materials supplied in the first Defendant's container do not match the description and the mismatch has not been rectified by the Plaintiffs despite being notified.

On behalf of the second Defendant it is contended that he is not in any way personally indebted to the Plaintiffs and no such liability has been pleaded against him by the Plaintiffs. He is not personally a party to the contract/transactions alleged in the plaint to have been breached by the first Defendant, which gave rise to the claim in the suit. In the premises the second Defendant maintains that the Plaintiff's suit/plaint discloses no cause of action against him.

The agreed facts are that the second Defendant is the managing director of the first Defendant, a limited liability company duly incorporated under the laws of Uganda. Secondly the first Defendant contracted the first Plaintiff to supply two containers/consignments of borehole material. Thirdly the payment of the goods was secured by a cheque number 005057 of Uganda shillings 166,578,980/= issued in favour of the first Plaintiff's agent, the second Plaintiff. Lastly the first Defendant deposited Uganda shillings 20,000,000/= with the first Plaintiff through its original manager.

The agreed factual controversies are whether the Plaintiffs are not indebted to the first Defendant in the amount of Uganda shillings 166,478,980/= but only Uganda shillings 73,009,320/= which is payable or subject to remedying the defective mismatching goods. It is also in dispute whether the Plaintiffs are not indebted to the second Defendant at all. Thirdly it is in dispute as to whether the payment of the outstanding sum is supposed to be made after delivery of the second Defendant's container by the Plaintiff to the Defendant. Fourthly it is in dispute whether no notice of dishonour was served upon the first Defendant. Fifthly it is in dispute whether the Plaintiffs transacted directly with the second Defendant and as an agent of the first Defendant. Lastly it is in dispute whether the goods supplied were of merchantable quality and the Plaintiff never received any complaint regarding the goods from the Defendants.

Agreed issues:

1. Whether there was breach of contract by the Defendants?
2. Whether the Defendants are indebted to the Plaintiffs to the tune of Uganda shillings 166,578,980/=?

3. Whether the Plaintiffs are entitled to the remedies sought?

Subsequently witness statements were filed for all the witnesses and the suit proceeded for hearing on the merits whereupon the court was addressed in written submissions.

Plaintiff's submissions

Issue 1: Whether the Plaintiff supplied goods to the Defendants?

The Plaintiff relies on a bill of lading as a document of title. Counsel submitted that possession of the Bill of lading is deemed to be possession of goods. Transfer of a Bill of lading is a symbolic delivery of goods according to the case of **Sanders Bros versus McLean and Company (1883) 11 QBD 327** that the documents represent the goods and the buyer must accept a good tender of documents and pay for the goods upon the tender of documents. Under **section 27 of the Sale of Goods Act**, the duty of the seller is to deliver the goods and for the buyer to accept the goods and pay for them in accordance with the terms of the contract of sale. Under **article 30 of the United Nations Convention on Contracts for International Sale of Goods (1980) (CI SG),** which governs sale of goods between the parties whose purposes of business are in different states, the seller must deliver the goods, hand over any documents relating to them and transfer the property in the goods as required by the contract and the Convention.

The Plaintiffs supplied the goods as ordered for by the Defendants and as evidenced by the Bill of lading and the commercial invoice. Prior to the delivery of the goods at Mombasa port, the Plaintiffs had sent an e-mail with the photocopies of the shipping documents. The second Defendant indeed acknowledged receipt of the goods at the Mombasa port and was later handed the original document wherein the Defendants were able to collect the goods which is still in their possession. In the premises the Plaintiff's fulfilled the obligations and delivered the goods/or supplied the goods to the Defendants and issue number 1 should be answered in the affirmative.

Whether or not the Defendants paid for the goods supplied?

On this issue the Plaintiff's Counsel submits that **section 28 of the Sale of Goods Act** provides that unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions. In other words the seller must be ready and willing to give possession of the goods to the buyer in exchange for the price and the buyer must be ready and willing to pay the price in exchange for possession of the goods. With reference to **article 53 of the United Nations Convention on Contracts for International Sale of Goods (1980)** the buyer must pay the price of the goods and delivered them as required by the contract and the convention.

With reference to the decision of Honourable Lady Justice Irene Mulyagonja in **Sembule Investments Ltd versus Uganda Baati HCMA 0664/2009**, it is implied from the definition of a

Bill of Exchange and therefore a cheque that it is by its nature unconditional. One cannot issue a cheque on any considerations except if those conditions are notified to the banker. This is because the cheque/bill is addressed to the drawee in this case the banker, not the bearer of it. Counsel further referred to the case of **Dembe Trading Enterprises versus BIDCO (U) Ltd HCMA 26 of 2008** where it was held that it was the duty of the court to protect the integrity of cheques. The purposes of issuing cheques as security with instructions that they should not be banked or negotiated should be strongly discouraged because it goes against the very nature of such negotiable instruments. A person who draws a cheque is presumed to build the implications of his or her actions and should be held to it. The person who accepts the cheque becomes a holder in due course.

Counsel submitted that in the instant case and upon failure by the Defendants to pay the monies for the goods, the first Defendant issued a cheque to the second Plaintiff for the sum of **Uganda shillings 166,578,940/=** dated 21st of November 2011 and signed by the second Defendant further made an undertaking on behalf of the first Defendant company saying that they had issued the cheque for the said amount and that in case of default in paying, the second Plaintiff would go ahead to cash the cheque according to exhibits P1 and exhibit P2. The Plaintiff therefore had a right to present a cheque for payment and the assertions of DW1 during cross examination that the cheque was not supposed to be banked are baseless as they go against the rules and the purpose of the cheque.

Under **section 46 (2) of the Bills of Exchange Act,** when a Bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder. Furthermore **section 54 (1) (a) of the Bills of Exchange** Act provides that the drawer of a bill by drawing it, engages that on the due presentation it shall be accepted and paid according to its tenor and that if it is dishonoured he or she will compensate the holder provided the requisite proceedings on dishonour are duly taken. The Plaintiff's Counsel further relies on the case of **Kotecha versus Mohammed [2002] 1 EA 1012** at page 118 where it was held that a bill of exchange is normally to be treated as cash. The holder is entitled in the ordinary way to judgment if it is a seller who has taken bills for payment; he is still entitled to judgment no matter that the Defendant has a cross claim for damages under other contracts. Thirdly in the case of **Naris Byarugaba versus Shivam MKD [1997] HCB 71** the court took the view that the bill of exchange constitutes prima facie evidence of the sum of money printed on it as being due to the person in whose favour the Bill is drawn. In law the debt is only discharged when the bill of exchange is honoured. As far as the evidence is concerned, upon presentation of the cheque by the second Plaintiff, it was dishonoured and the Plaintiffs informed the Defendants on 7 February 2012 of the dishonour and PW1 confirmed that position during cross-examination. The Plaintiff has clearly shown that the cheque was issued by the Defendant and was not honoured and hence it is a proper case for judgment on the basis of the cheque.

Counsel further addressed the issue of whether the consideration for the cheque was sufficient by relying on the case of **Abid El Hinnaway V. Yacoub Fahmi Abu El Huda [1936] 1 All ER 639** where it was held that inadequacy of consideration affords no relevant answer to a demand upon a promissory note. The burden of proof is on the Defendant to show that there was no consideration and not that there was insufficient consideration.

In the case of **Dembe Trading Enterprises Ltd versus BIDCO (U) Ltd** (supra) Honourable Lady Justice Irene Mulyagonja held that once the Defendant admitted that there was some consideration for the cheques, it ceased to matter whether the consideration was sufficient to cover the value of the cheques or not. On the basis of the law, the Defendants are obliged to pay the entire sum on the cheque issued to the Plaintiff.

Whether the parties are entitled to the remedies sought?

According to the Plaintiff's Counsel the purpose of an award of damages is to put the Plaintiff in a position he or she would have been had the breach never occurred. Under section 46 (2) of the Bills of Exchange Act cap 68, where a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorser accrues to the holder and the Plaintiff in this case has an immediate right to recover Uganda shillings 166,578,980/= which constitutes the amount drawn on the cheque. Under section 56 of the Bills of Exchange Act, the measure of damages recoverable by the holder from the drawer include inter alia the amount on the bill, interest on it from the time of presentment for payment if the bill is payable on demand and from maturity of the bill in any other case.

Before the issuance of the cheque by the Defendants as security, the parties had agreed that the Defendant would pay for the goods before the original documents were delivered, in this case the documents being the Bill of lading which represents the goods and the Defendants breached the contract/agreement when they did not pay for the goods upon delivery by the Plaintiffs. The rule on award of damages can be found in the case of Hadley and another versus Baxendale… "That the amount which would have been received if the contract had been kept is the measure of damages if the contract is broken."

In this case the Defendants breached the contract when they did not pay for goods delivered to them yet the Plaintiffs fulfilled the purpose and hence the Plaintiffs should be awarded damages for the breach. Furthermore the Plaintiffs were deprived of the money for a long time since November 2011 up to date with the Defendant acting on promising to pay the monies to no avail. The monies would have been used for the business and for which the Plaintiffs have been greatly inconvenienced. The Plaintiffs incurred costs in flights for its representative from India to represent the first Plaintiff at court hearings and for all the above the Plaintiffs should be awarded general damages.

Submissions in Reply by the Defendant's Counsel

In reply the Defendants Counsel submitted that the issues agreed upon in the scheduling memorandum were: whether there was breach of contract by the Defendants? Secondly whether the Defendants are indebted to the Plaintiff to the tune of Uganda shillings 166,478,980/=. Thirdly whether the Plaintiffs are entitled to the remedies sought. Without the leave of court the Plaintiff's Counsel substantially departed from the issues as framed at the scheduling and created other issues prejudicially to the Defendant and in abuse of the scheduling memorandum. The Plaintiff's Counsel submitted on the issue of whether the Plaintiff supplied goods to the Defendants; whether the Defendants paid for the goods supplied and whether the Defendants are liable for the cheque that was issued to the second Plaintiff. Counsel opted to address the court on the issues as framed in the joint scheduling memorandum.

On the question of whether there was breach of contract by the Defendants? The Defendants Counsel submitted that in resolving this issue the court must first ascertain the existence of a valid contract between the parties and to determine who is in breach thereof. The contract is formed by an offer made by one person and accepted by another.

As far as the evidence is concerned Counsel relied on the testimony of PW1 and DW1 who conceded that the offer was in the form of the original and revised orders for goods as described to be procured and delivered by the first Plaintiff to the first Defendant according to exhibits D1 and D2. The second Defendant, is not a party to the contract and cannot be sued or sue upon it. A non-party to a contract cannot be made liable for breach of contract according to the case of **Wakiso Cargo Transporters Company Ltd versus Wakiso District Local Government Council HCCS 0070/2004**.

Correspondences executed by the second Defendant on behalf of the first Defendant described the first Defendant as a limited liability company. Similarly PW1 executed correspondences on behalf of the first Plaintiff such as exhibit P2 which is the undertaking, shipping documents exhibited D3, D4, D5, D6 and D7 in the names of the first Defendant. The second Defendant only appears as a director/agent, a fact conceded to by PW1 and he cannot be held liable for breach of contract not executed by him in his personal capacity. Counsel relied on the case of **Nanam Aviation Ltd versus Captain George Mike Mukula and another HCCS 309/2008.** The Defendant's Counsel further submitted that DW1 conceded in cross examination that the contract was between the first Plaintiff and the first Defendant. The first Plaintiff knew it was dealing with the first Defendant as a limited liability company and the second Defendant is a mere agent. PW1 conceded in cross examination that the first Plaintiff had dealt with the first Defendant in a similar manner before. The unchallenged evidence of DW 2 is that it never dealt with the matter in his personal capacity or for his personal benefit. No grounds for lifting the veil of incorporation, such as fraud or improper conduct have been advanced. There is no evidence that the second Defendant was using the first Defendant as a mask for any fraud or illegality. Counsel relied on the case of Lukyamuzi James versus Akright projects Ltd and another HCCS No. T19/2002 and Lubega Matovu versus Mikwano Investments Limited HCMA No. 156/2012.

In the premises the Defendants Counsel submitted that the second Defendant was wrongly sued in the suit against him ought to be dismissed with costs.

The only other question for determination by the court is whether the first Defendant breached the contract in the circumstances of the case. Breach of contract occurs where there is an obligation undertaken by or in the contract. The second Defendant's obligation complained of as giving rise to breach of contract is failure to pay a sum of Uganda shillings 166,578,940/= for goods allegedly supplied by the first Plaintiff or when the security cheque issued by the first Defendant was presented by the second Plaintiff for payment and bounced. The court has to consider whether the Plaintiff had itself performed its part of the contract to deserve payment as claimed in the plaint.

The first Defendant ordered for goods in the revised order exhibit D1 and D2. DW1 in evidence in chief and cross examination and re-examination explained the quantities and specifications and description and the importance of the description of the goods. It was conceded by PW1 that the first Plaintiff had delivered similar goods to the Plaintiff before and knew the purpose thereof. PW1 conceded to the revised order but never proved that all the materials as ordered for in the revised order were ever delivered.

The goods were to be delivered in two consignments. PW1 conceded during cross-examination that the subject matter of the contract comprised of two consignments ordered to be delivered to the first Defendant. PW1 confirmed that only one consignment was delivered and not other consignment has ever been delivered. The testimony of DW1 is that payment was agreed to be made upon delivery of goods ordered for. Two consignments were ordered. Materials in the first consignment could only work if used together with the materials in the second consignment had been delivered. There was no provision for payment on partial delivery.

Upon delivery of the first consignment, shipping documents were delivered to the first Defendant. This included bill of lading, commercial invoice, packing lists and forwarding letter. DW1 emphasised that the price payable for goods delivered is indicated in the commercial invoice and a forwarding letter as US$39,114.00. The price payable is that in the invoice and the buyer as is the practice only pays the sums indicated in the invoice as consideration for the goods. If the price payable is that indicated in the invoice, the only invoice served on the first Defendant was for US$39,114 according to exhibits D4 and D7. No evidence of any invoice of Uganda shillings 166,478,940/= was adduced in evidence. There is therefore no basis for the Plaintiffs claim in the current suit and there is no explanation whatsoever from the Plaintiffs.

Documents the Plaintiff relied upon Exhibit D3 – D7 show that only one consignment was delivered. It is not proof that the one consignment delivered contained all the goods ordered for or that it corresponds with the revised order exhibit D2. According to the testimony of DW1 documents were received for purposes of creating and verifying goods but upon verification the

borehole materials were not matching and the Plaintiff was duly informed. The evidence is corroborated by the testimony of DW 2 and DW 3 who participated in the inspection.

On the question of delivery of goods by delivery of the bill of lading, the principle is not of general application and depends on the peculiar facts of a given case. Not every delivery of a bill of lading means the contractual delivery of goods. The Defendants Counsel submitted that the principle only applies where the bill of lading indicates that all the goods as ordered and described in terms of quantity and quality and specifications were the ones shipped. Where no goods were shipped or where the ones shipped do not correspond with what was ordered, the bill of lading is a mere piece of paper and does not represent the goods ordered. Counsel relied on the case of **Hindley and Company versus East India Produce Company (1973) 2 Lloyds Reports 515** where buyers had paid for Jute against the bills of lading but upon arrival there were no goods of that description. On the other hand the case of **Sanders Bros versus McLean and Company (1883) 11 QBD 327** dealt with the contractual description of goods and the delivery of the bill of lading was effectual to pass property in the cargo to the purchaser. In that case there was an express term of the contract that payment was going to be made upon receipt of the bills of lading. The buyer was obliged to pay for the goods according to the contract. That case does not apply in the circumstances of the Defendant.

In the matter before court the Defendants Counsel maintains that PW1 never referred to any express term that payment for the goods would be upon tender of the bills of lading. This is also not disclosed in the plaint and amounts to testimony from the bar. Counsel invited the court to examine the nature of the transaction and correspondence between the first Plaintiff and the first Defendant. DW1 in paragraph 13 of his witness statements testified that payment for the goods was supposed to be made after confirming that the materials supplied conformed to what the Defendant ordered. Upon looking at the shipping documents the Defendants officials realised that there were discrepancies which the awaited to confirm through an examination of the materials. In the testimony of DW1, DW2, and DW3 upon the inspection and examination of the materials supplied to the first Defendant on arrival at Nakawa, the materials did not match. The question therefore is whether the delivery of the bill of lading for one of the two consignments of goods ordered by the first Defendant together with goods not conforming to the description of the goods in the orders constitutes delivery of goods for which the Plaintiffs are entitled to payment.

The Defendants Counsel submitted that a bill of lading or endorsement of the same is simply a direction of the delivery of goods and is not a confirmation that the goods being shipped are the goods specified in the contract. Secondly the existence of a bill of lading does not mean that contracts entered before its issuance is not admissible about the terms of the contract according to the case of **Rahima Nagitta and two others versus Richard Bukenya**. Delivery of the bill of lading cannot substitute the original contract description of the goods ordered.

A bill of lading that indicates materials that are of a different description from those in the contract signed between the seller and the buyer, is not a bill of lading within the meaning of the contract in respect of which the buyer is under obligation to pay. It would only apply where the agreement expressly provides that it should.

On the facts before the court, the bill of lading and other delivery documents including exhibit D4, D5 and D6 were supposed to reflect the goods according to the order exhibit D2 which was the offer document that specified the materials that the first Defendant wanted. In the circumstances the first Defendant could not make payments for the goods that did not match and were not fit for the intended purpose. Where the bill of lading delivered does not answer the contractual description of the goods, it is not a bill of lading envisaged under the United Nations Convention of Contracts of International Sale of Goods for purposes of passing possession and title in the goods to the purchaser.

Section 27 of the Sale of Goods Act and article 1 of the United Nations Convention of Contracts of International Sale of Goods are brought to the effect that the seller's duty is to deliver the goods and once that is done, the seller is entitled to payment. The Defendants Counsel further relies on the provisions of section 34 (1) of the Sale of Goods Act which should be read together with section 27 thereof. This is in the sense that whereas the seller has the right to deliver the goods, the buyer has a right to examine the delivered goods to confirm whether the same are in conformity with the contract and where the buyer discovers that the goods ordered are mixed with other goods which were not ordered, the buyer has the right to reject the goods not ordered for (see section 30 (3) of the **Sale of Goods Act** and article 35 (1) (2) (a) and (b) of the **United Nations Convention of Contracts of International Sale of Goods)**. Counsel also relied on the case of **Kwei Tek Chao versus British Traders and Shippers Ltd (1923) 2 KB 490**.

The supplies referred to by the Plaintiff's Counsel are supplies according to the contract with the first Defendant as the materials supplied do not match the materials agreed upon to be supplied to the first Defendant and the honourable court should find that the Plaintiff did not fulfil their obligation of supply to the first Defendant according to the contract so as to be entitled to payment.

On the issue as framed by the Plaintiff's Counsel as to whether or not the Defendants paid for the goods supplied, the answer of the Defendant on the basis of previous submissions is that the goods supplied did not match with the goods ordered. Secondly it was agreed that the Plaintiff rectifies the anomaly in the second consignment and the first Defendant would be in a position to pay the full consideration of the first and second consignment.

The first Defendant concedes that it deposited Uganda shillings 20,000,000/= with the first Plaintiff through its Regional Manager upon the request of the Managing Director of the first Plaintiff to enable the Plaintiff's ship the second consignment. The Plaintiffs did not adduce any evidence to prove that the shipping documents for the second consignment of the goods

themselves were ever delivered to the Defendants. In the premises the Defendants Counsel contends that payment for the goods was not due by the time the Plaintiffs filed this suit. Payment was preconditioned upon the delivery of the second consignment which has not been done up to date.

On the issue raised by the Plaintiff's Counsel as to whether the Defendants are liable for the cheque that was issued to the second Plaintiff, Counsel for the Defendants submitted that the court should stick to the issue as properly framed during the scheduling conference. Furthermore the Plaintiff's cause of action is not founded on the cheque but on the contract for alleged supply of goods. Had that been the case, the first Plaintiff which is not a party to the cheque would have no cause of action at all and the suit would be liable to be struck out on that ground. The cheque is only being used as part of evidence for the price of the goods allegedly delivered and that it was not paid for. The authorities relied upon by the Plaintiff's Counsel on the liability on the basis of the cheque were applied out of context. The authorities would only be applicable where the cause of action is solely founded on the dishonour of a cheque.

Secondly the Defendants Counsel submitted that PW1 conceded in cross examination that upon delivery of goods, the buyer pays cash and does not issue a security cheque. This was not the ordinary security cheque alluded to in the authorities cited by the Plaintiff's Counsel. It was security for delivery of the second container, otherwise if it was for payment of the price of goods delivered, why would it not be the sum of US$39,114? PW1 conceded that the said amount was for the prize of the first consignment of goods delivered. No evidence of any invoices of Uganda shillings 166,578,940/= was tendered in evidence. That should have been the basis for the issuance of a cheque. According to DW 2 the cheque was issued as security for delivery of the second consignment by the first Plaintiff and the sum would constitute both payments for the first and second consignment upon delivery. It was inconceivable for the first Defendant who ordered for consignments of borehole materials whereupon only one consignment was delivered and of mismatching materials would opt to pay Uganda shillings 166,478,940/=.

The Defendants Counsel also submitted that the cheque relied upon is illegal and cannot form the basis for any legal action neither can a court of law enforce an action founded on it. The cheque was rejected by the bank on account of illegality, because the sum indicated therein offended the legal limit by Bank of Uganda. The cheque offended the policy and regulations of Bank of Uganda and is contrary to public policy. The Plaintiff accepted to be party to the legality and cannot found a cause of action upon it.

Where the transaction was illegal, the cause of action is deemed to have arisen out of an illegality and the Plaintiff has no right to be assisted. The illegality extended to the cheques as well on which the Plaintiff bases his claim. An illegality drawn to the attention of the court cannot be condoned by the court according to the case of **Jamba Soit Ali vs. David Salaam HCCS No. 400 of 2005**.

Furthermore the defence case is that no action can be funded on the dishonoured cheques where no notice of dishonour has been served on the drawer. The cheque was drawn in the name of the second Plaintiff. PW1 is not a director of the second Plaintiff, neither is it his evidence that he conducts business on behalf of the second Plaintiff. The second Plaintiff, which may rely on the cheque as payee thereof did not bring any witnesses to testify and prove that the second Plaintiff never served any notice of dishonour upon the Defendant. No evidence has been led of any transaction between the second Plaintiff and the second Defendant upon which a cheque of such an amount was issued. The cheque was banked without due notice to the first Defendant and even after it had bounced; the Plaintiffs did not inform the Defendants accordingly.

The Plaintiffs presented the cheque before and without the condition precedent falling due. The first Defendant should therefore not be held liable for the cheque.

Remedies

On the question of whether the parties are entitled to the remedies sought, one may maintain an action for the price of the goods where the buyer refuses to pay for the goods according to the terms of the contract. Counsel relied on the case of **Hans Andersen Paper and Another versus Crown Contractors Ltd HCCS No 11/2010.** The Plaintiffs delivered no goods according to the order and the first Defendant is under no obligation to pay for the price. If the court where to found that the first Defendant is liable, it should only be liable for the price of the first consignment of US$39,114 quoted in the invoice less the deposit of Uganda shillings 20,000,000/= admitted by the Plaintiff.

The Defendants are not in breach of contract because the Plaintiffs only fulfil part of their obligations by delivering mismatching materials under the first consignment and failing to deliver the second consignment which would entitle them to full payment of the consideration for both consignments.

On the claim for general damages, the duty is on the Plaintiff to prove that the loss suffered for which it would be entitled to compensation by way of an award of special damages, must be specifically pleaded and proved. It is not sufficient to write on particulars of damages for the court to consider without proof. Counsel relied on the case of **Diary Development Authority versus David Ngarambe HCCS No 10/2010** and also **Wakiso Cargo Transporters Company Ltd versus Wakiso District Local Government Council HCCS No. 0070/2004.** No evidence was led to prove either special or general damages. It was only in the submissions of the Plaintiff's Counsel that the Plaintiffs were deprived of the money and incurred costs of flights and have lost business. Counsel invited the court to make a finding that the Plaintiff’s case fell short of the requisite evidence to justify an award of general or special damages.

On the question of costs, the Defendants Counsel submitted that having filed the suit prematurely when the first Defendants failure to pay resulted from the Plaintiffs own fault in complying with

its contractual obligations, the Defendants have been dragged to court wrongly and prematurely and ought to be paid costs of the suit. In the premises the Plaintiff's suit ought to be dismissed with costs.

Submissions of the Plaintiff's Counsel in Rejoinder

In rejoinder the Plaintiff's submitted that the so called new issues framed were mere subtopics/subheadings of the issues raised during the scheduling conference and are interrelated. The first issue was whether there was breach of contract by the Defendants which issue is answered in the Plaintiff's issues number one and two namely whether the Plaintiffs supplied the goods to the Defendants and whether the Defendants paid for the goods supplied. If the two issues are answered in the affirmative, it will be clearly shown that the Defendant breached the contract.

On issue number three which is whether the Defendants are liable for the cheque that was issued to the second Plaintiff, it still answers the issue as framed during the scheduling which is whether the Defendants are indebted to the Plaintiff to the tune of Uganda shillings 166,578,980/=. According to the Plaintiff's Counsel issues are framed in accordance with Order 15 rule 3 of the Civil Procedure Rules which permits issues to be framed from the pleadings, pleadings or answers to interrogatories delivered in the suit, contents of documents produced by either party. The new issues are all based on the pleadings, allegations made in or by the parties and the contents of documents produced in court and therefore they are not new issues and are not in any way prejudicial to the Defendants but only framed for easier and necessary determination of matters in controversy. Furthermore Order 15 rule 5 of the Civil Procedure Rules permits the court at any time before passing the decree to amend the issues and frame additional issues on such terms as it thinks fit as may be necessary for determining the matters in controversy between the parties. In the event that the court finds that the issues framed by the Plaintiff are too different from the original issues, then the court should use its discretion.

In rejoinder to the Defendants reply to issue number one, the submissions are that the second Defendant cannot be sued because he is only a director. The first and second Defendants are sued jointly and severally. The second Defendant is sued as an agent of the company and had to be added as a party since the company has no mind of its own and the directors are the controlling mind/authority.

DW1 during cross examination testified that there are about three other directors in the company but he was the only one involved in the transaction single-handedly and in almost all correspondences between the Plaintiffs and the Defendants. Counsel relies on exhibits P1, D1, D3, D4, D5, D6, D4 (1 –4).

As to whether the Defendant breached the contract or not, a breach of contract occurs where that which is complained of is a breach of duty arising out of obligations undertaken by or in the

contract. Counsel relied on the case of **Thunderbolt Technical Services Ltd versus Apedu Joseph and another HCCS No/340/2009**.

The obligations of the Plaintiff was to deliver the goods as ordered, and the Plaintiff fulfilled it by handing over the original documents, despite the original arrangement between the parties, the fact that the original documents were only to be handed over upon payment of the full purchase price, and the fact that the goods are still in the custody of the Defendants, there is no evidence on record that shows that there was any revised order nor was there any communication to the Plaintiff saying that the goods were not supplied according to the order.

Upon receipt of the duplicate photocopies of the Bill of lading the Defendant, could have recognised that the goods were not according to the order as claimed and at that point the Defendants would have informed the Plaintiffs that the order was incorrect so that the Plaintiff could have changed the order. The Plaintiffs fulfilled their obligations when they delivered the goods but the Defendant did not honour its part of the contract which was to pay for the goods but only kept on promising to pay for the goods.

Moreover the contract had always complied with the order according to the consignment with each consignment of goods having a different arrangement or contract and payments were supposed to be made for each consignment separately, a fact which was well known and admitted by DW1. The second Defendant kept on promising to pay for the goods according to exhibit P4 [1-4]. There is no documentary evidence adduced by the Defendants to show that the two consignments had the same payment terms.

On the question of whether the goods supplied were not fit for the purpose, the goods ordered can be read from the commercial invoice, showing details of the goods ordered, at that point the Defendants could have communicated to the Plaintiffs and the order would have been changed but the Defendant kept on demanding for the original documents so that they could take the goods. The Defendants were very eager to take the goods according to the correspondences referred to above. In those circumstances the Plaintiff fulfilled its obligations and delivered the goods and the Defendants do not want to pay for the goods.

On the question of the cheque exceeding the 20 million Uganda shillings according to the Bank of Uganda Regulations. It is the Defendants who drew the cheque exceeding Uganda shillings 20,000,000/= in total disregard of the bank of Uganda guidelines. The Defendants were aware of this policy and went ahead to issue a cheque in favour of the Plaintiffs who are foreigners and not conversant with the policies in the Ugandan banking system. The Plaintiff accepted the cheque in good faith and if it is any illegality the defenders are the perpetrators of the legality and cannot therefore escape from liability.

The case of **Jamba Soita Ali vs. David Salaam HCCS 0400 of 2005** is distinguishable from the Plaintiff's case. In that case the Plaintiff was a moneylender was operating without a licence and

was charging interest that was illegal. He sued the Defendant to recover his money when his business was illegal. Being the perpetrator of the illegality he could not benefit from his own wrong doing. In this case the Defendants are the perpetrators of the illegality. They are the ones who issued the cheque knowingly exceeding the limit set by the bank of Uganda. In those circumstances the cheque can be properly relied on by the Plaintiff.

On the question of whether there was a notice of dishonour of the cheque, a notice of dishonour was properly issued as the second Plaintiff is an agent of the first Plaintiff in Uganda and this was clearly brought out in the Plaintiffs pleading and as a fact well known by the Defendant at the time of issuing the cheque. The second Defendant in exhibit P2 made an undertaking on behalf of the first Defendant. He is also a party to this suit and put the principal on notice about the dishonour of the cheque. In those circumstances proper notice of dishonour was given to the Defendants.

Judgment

I have carefully considered the pleadings of the Plaintiff and the defence coupled with the evidence, the submissions of Counsel and authorities cited. The submissions of Counsel have been set up above and I do not need to again refer to those submissions in detail.

The first controversy relates to the framing of issues. The first issue framed in the joint scheduling memorandum endorsed by both Counsels is whether there was breach of contract by the Defendants. Secondly whether the Defendants are indebted to the Plaintiffs to the tune of **Uganda shillings 166,578,980/=** and lastly whether the Plaintiffs are entitled to the remedies sought.

The Plaintiff's Counsel submitted on whether the Plaintiff supplied the goods to the Defendants and whether the Defendant paid for the goods or whether the Defendant is liable to pay for the cheque issued. In my judgment the substance of the dispute has been addressed irrespective of the framing of issues. This is because when considering whether there was any breach of contract, breach may be established by evidence of failure to pay for goods supplied and therefore the question of whether the Plaintiff supplied the goods only asserts a right as to whether the Plaintiff is entitled to payment. Secondly breach can be considered by dealing with the issue of whether there was failure to pay for goods supplied. The corollary issues like when the goods were supplied, whether the supply was by delivery of documents and whether the issuing of a cheque constitutes a separate contract founding a separate cause of action are matters that can be tackled when dealing with the first two issues of whether there was breach of contract and whether the Defendants are indebted to the Plaintiffs to the tune of **Uganda shillings 166,578,980/=.** In my judgment the issues framed by the Plaintiff may as well be considered as sub-issues of the first and second issues agreed to in the joint scheduling memorandum. No prejudice has been occasioned to the defence by the Plaintiff’s submissions under the different subheadings of issues since the substance of the dispute have been addressed. I also agree with

the Plaintiff's Counsel that the substance of every controversy in a suit arises from the pleadings. What is to be established as an issue is that any relevant factual or legal proposition is affirmed by one party and denied by another. There are overarching issues from which several sub issues would arise. It is generally necessary to deal with every proposition of fact affirmed by one party and denied by the other under the umbrella of the overarching issue. Since no prejudice has been occasioned, I will deal with the issues as framed in the joint scheduling memorandum and thereby will answer the question of whether there was supply of the goods, whether there was delivery by documents, whether the goods match the description and finally the question of liability or remedies.

Whether there was breach of contract by the Defendants?

I agree that breach of contract occurs where there are contractual duties and obligations/rights. Such duties may include the duty to supply goods and the duty to make payment for supplies of goods. Save for specific contractual provisions executed between the buyer and seller, the rights and duties of a buyer and seller are set out in the Sale of Goods Act Cap 82 laws of Uganda. The rights and duties of the parties depend on the existence of a valid and enforceable contract. In this case the existence of a contractual relationship between the first Plaintiff and the first Defendant (the principals) is not in dispute. What is necessary is to examine the terms of the contractual relationship. The Plaintiff alleges that it supplied goods ordered for by the Defendant while the Defendant alleges that the goods were not delivered. Secondly the Defendant alleges that the goods which were delivered do not conform to the specification contained in the order for the goods and it is not liable to pay. The Defendant further alleges that the suit for payment was premature because the contracted goods had not been delivered. On the other hand another issue to consider is the issuance of a cheque by the Defendant and whether the Defendant is liable to make good the amount written on the cheque to the Plaintiff.

The contractual relationship between the Plaintiff and the Defendant is reflected in several correspondences and documents. PW1 Mr Ajay Kumar Jain testified on behalf of the first Plaintiff and the Plaintiffs generally. He is the Manager International Marketing of the first Plaintiff Company based in India and testified that the second Plaintiff is the first Plaintiff's agent in Uganda. His testimony is that the first Plaintiff on the instructions, directions and representations of the second Defendant supplied goods to the first Defendant company worth **Uganda shillings 166,578,780/=**. The first Plaintiff instructed the Defendant's to pay for the goods to the second Plaintiff who is their agent in Uganda. Payment for the goods was secured by cheque number 005057 for **Uganda shillings 166,578,980/= i**ssued in favour of the Plaintiff's agent who is also the second Plaintiff. The second Defendant made an undertaking on behalf of the first Defendant by cheque which was to act as security and in the event of default on their part; the first Plaintiff's agent who is the second Plaintiff was to cash the cheque. He notified the Defendant's about the dishonour of the cheque on 7 April 2012 after the Defendants made several promises to pay in vain and the cheque was banked. Exhibit P1 is a copy of a cheque

issued in the names of the second Plaintiff. It is stated to be the amount owing to the first Plaintiff who is the principal of the second Plaintiff.

In cross examination PW1 testified that they ordinarily send photocopies of the bills of lading or shipping documents and when payment is made, they send the originals. The testimony of PW1 generally stood up to cross examination. In cross examination PW1 admitted that the amount on the cheque exceeded the amount limited by the bank of Uganda for the issuance of cheques. Cheques beyond **Uganda shillings 20,000,000/=** cannot be cashed. Secondly PW1 admitted that the amount outstanding is **US$64,338.** The Plaintiff dealt with a limited liability company whereas the second Defendant is the managing director of the first Defendant. The Plaintiff would procure goods in compliance with the orders of the Defendant and they sent to the Defendants shipping documents such as the bill of lading, packing lists, the copy of the invoice and the copy of the certificate of origin of goods. The Plaintiff would send an invoice to the Defendant which would indicate the price to be paid. After payment has been made for the goods, the Plaintiff would surrender the original shipping documents to the Defendant. The current transaction relates to an order from the Defendant received in August 2011. The orders were subsequently revised to change the quantities. Exhibit D2 is the offer that was sent to the Defendant by the Plaintiff and containing specifications of the goods ordered and the quantity. The first consignment was shipped in October 2011. Other shipping documents are dated 8th of November 2011 for **US$39,114.** PW1 admitted that the Plaintiff received a sum of **20,000,000/= Uganda shillings** which was part payment for the bill. The sum was received after October 2011 and was part payment for the bill of **US$39,114** indicated in the commercial invoice. On the other hand the date on the questioned cheque of **Uganda shillings166, 578,940/=** is 21st of November 2011. An undertaking was given by the second Defendant on the behalf of the first Defendant in exhibit P2 promising to pay **US$64,338** upon which they would withdraw the security cheque of **Uganda shillings 166,578,940/=**.

DW1 Mr Lukyamuzi Joseph testified about the transaction, the subject matter of the suit. On his own behalf he testified that he had never transacted with the first and second Plaintiff in his personal capacity and is not personally a party to any transaction. In September 2011 while acting on behalf of the first Defendant DW 1 contacted the first Plaintiff for the supply of borehole materials. He did explain to the representative of the first Plaintiff other parts for the materials and the need to ensure that the materials on delivery would fit each other in order to serve the desired purpose. He contracted the first Plaintiff to supply two consignments of borehole materials. There were previous transactions which went without any problems. The practice was that when a consignment is shipped for delivery the first Plaintiff sends it with a forwarding letter to the Defendant enclosing a bill of lading, commercial invoice, packing lists and certificate of origin indicating the description of the goods and price payable by the first Plaintiff. Upon shipment of the first consignment of the agreed two consignments, the first Plaintiff wrote a letter dated 8th of November 2011 with documents evidencing the giving evidence of the shipment of goods and the price. These included a letter from the first Plaintiff

confirming shipment of goods, bill of lading, the commercial invoice, packing lists and certificate of origin indicating the description of the goods and the consignment was valued at **US$39,114** equivalent to **Uganda shillings 93,009,320/=** at an agreed exchange rate of 2380 shillings to 1 US dollar. Upon delivery of the documents DW1 discovered some discrepancies in the materials quoted but waited for the goods to be delivered at Nakawa ICD so that they could inspect them for compliance with the order. He testified that payment for the goods was supposed to be made upon confirmation that the materials delivered were those ordered by the Defendant. As far as the first shipment is concerned they established that the Plaintiff had delivered materials that did not match or fit with each other and were incapable of being used for making boreholes. Upon informing the first Plaintiff, the first Plaintiff through its directors committed itself to send a second consignment valued at **US$30,911** equivalent to **Uganda shillings 73,568,180/=**. It was thereafter agreed as a precondition that the first Defendant would secure the whole outstanding monies including the costs of the second consignment to be delivered by a cheque in the names of the second Plaintiff whereupon the first Defendant issued a cheque for the sum of **Uganda shillings 166,570,914/=**. It was further agreed that the post dated cheque would be banked upon delivery of the second consignment of borehole materials but the Plaintiffs without any notice to the first Defendant proceeded to bank it notwithstanding failure to deliver the second container. The first Defendant upon the request of the director of the first Plaintiff made available **Uganda shillings 20,000,000/=** to help the Plaintiff process the second consignment. He testified that the second consignment has never been delivered and he was subsequently arrested on the instructions of the Plaintiff's Counsel for default in payment. He was only released from civil prison upon depositing in court a sum of **Uganda shillings 30,000,000/=** as security.

The sum of **Uganda shillings 166,478,940/=** is meant for the two consignments one which was delivered and pending the delivery of the matching materials and the second consignment which has never been delivered. He testified that until the second consignment is delivered the claim of the Plaintiff is limited to **Uganda shillings 73,009,320/=** which is the outstanding sum in respect of the first consignment valued at **Uganda shillings 93,009,320/=** and upon subtracting **20,000,000/= Uganda shillings** which had been paid to secure the second consignment. According to DW1 the first Defendant cannot pay for the undelivered second consignment and has always been willing to pay for the first consignment but is unable to do so because the Plaintiff has failed to deliver the matching materials which would be fitted to the first consignment in breach of contract. In any case the first Defendant or the second Defendant has never been served with a notice of dishonour of the cheque from the Plaintiffs. The correspondence the Plaintiff relies on relates to the first consignment of goods were the original documents sent on 8 November 2011. Since that time no other consignment has been delivered to the Defendant. Upon cross-examination PW1 confirmed that the arrangement between the first Plaintiff and the first Defendant was that the original documents (shipping documents) would be delivered to the first Defendant upon payment of the price of the goods. He was supposed to pay for the goods before delivery. The Plaintiff however released the original documents of title

when the Defendant issued a security cheque, the subject matter of the suit for **Uganda shillings 166,478,940/=**. Regarding the various emails and correspondence acknowledging failure to pay, DW1 testified that the failure to pay was because of failure to deliver the goods. In re-examination DW1 testified that payments in issue were for the consignment on transit amounting to **US$39,114.** The second consignment contained items which have not been delivered in the first consignment. As far as the cheque is concerned DW1 insisted that it was meant to be security for payment. Secondly he never received documents of title for the second consignment.

The Defendant additionally called Justin Nabukenya DW2, the sales manager of the first Defendant Company. She confirms that there were two consignments. The first consignment came with a letter dated 8th of November 2011 confirming shipment of the goods, bill of lading, commercial invoice, packing lists and certificate of origin indicating the description of the goods and valued at **US$39,114** or equivalent to **Uganda shillings 93,009,320/=**. Upon receipt of the delivery documents the Defendant Company's officials discovered some discrepancies in the materials and waited for delivery of the goods at Nakawa ICD to inspect the goods. Payment was supposed to be made upon confirmation that the goods supplied were the actual goods ordered by the Defendant. She confirmed that the goods did not match and therefore could not be fitted for the purpose. Secondly unless the second container is delivered, the Plaintiffs claim should be limited and **73,009,320/=** because **Uganda shillings 20,000,000/=** had been paid to secure the second consignment.

Lastly the clearing agent of the first Defendant testified as DW3. Mr Opua Yafesi confirmed the delivery of the first consignment and that the goods had parts which were not matching and were not fit to be used for the purpose. He advised the first Defendant to contact the suppliers to remedy the defect and so far no delivery of matching materials has been made.

I have duly considered the documentary evidence adduced by both parties. I shall try to consider them in a chronological order. Starting with e-mail exhibits particularly exhibit P4. There is evidence that the first Defendant wrote to the first Plaintiff for 240 sets of deep well without pipes, 5000 additional GI rods, 2000 pieces of pump buckets, 500 pair's reducer caps U2 and 200 water tanks U2. This was on 13 August 2011. Several e-mails suggested that there were goods in Mombasa and the first Defendant requested for the bill of lading so that he would not pay much more in terms of demurrage charges and would be able to clear the goods sooner. In exhibit D2 the first Plaintiff Corporation communicated a revised order for the supply of certain products. Exhibit D3 is the bill of lading where the consignor is the first Plaintiff and the consignee is the first Defendant. It makes reference to certain invoices namely invoice number 3104/3105 dated 26th of September 2011. The goods were shipped on on-board Julie Delmas on 8th of October, 2011. The bill of lading was issued in Delhi on 8 October 2011. Exhibit D4 is a commercial invoice dated 26th of September 2011 and the total sum billed in the commercial invoice is US$39,114. The packing list exhibit D5 relates to an invoice number 3104/3105 dated 26th of September 2011. Finally the certificate of origin exhibited D6 reference number 104

8829 is dated 11 October 2011. Exhibit D7 is a letter dated 8th of November 2011 from the first Plaintiff and addressed to the first Defendant enclosing the shipping documents referred to above.

The documents are evidence of a consignment of goods consigned to the first Defendant by the first Plaintiff. The question therefore is what became of the consignment? The fact that the consignment was sent to Mombasa is proven by the testimonies of PW1 and DW1. Secondly the fact that no payment has been completed for the consignment is also proven. The shipment had however been made and certainly pursuant to the orders of the first Defendant. As to whether the goods conformed to the order specifications is another matter.

I have carefully considered the oral testimonies and documentary evidence. The issues as framed by the parties do not specifically touch the most crucial point which depends on an appreciation of the chronology of events. The Plaintiff's Counsels emphasised the primacy of the issued cheque and undertaking of the first Defendant as the foundation of the Plaintiff's claim while the Defendant's Counsel submitted on the orders and specifications for the goods with the conclusion that the Plaintiff did not supply what was ordered and the cheque was not supposed to be banked. Furthermore that the suit is premature and in any case the last consignment was not delivered and the Plaintiff is not entitled to payment.

The cause of action of the Plaintiff as disclosed by paragraph 5 of the plaint is for recovery of **Uganda shillings 166,578,980/**=, general damages, interests and costs of the suit arising from the Defendant's failure to pay for goods supplied. From this paragraph is evident from the evidence which has been adduced that the foundation of the Plaintiffs claim is exhibit P2 which is a letter of undertaking, undertaking to pay the said sum and exhibit P1 which is the cheque for the same amount. The additional facts disclosed in the plaint are as follows:

In the month of September 2011 the first Plaintiff on the instructions and representations of the second Defendant supplied goods to the first Defendant company worth **Uganda shillings 166,578,980/=**. The first Plaintiff instructed the first Defendant to make payments for the goods to the second Plaintiff who is the first Plaintiff's agent in Uganda. Furthermore it is averred that the payment for the goods was secured by a cheque for the sum of **Uganda shillings 166,578,980/=** which was presented by the Plaintiffs agent and dishonoured and furthermore that the Defendant was duly informed of the dishonour. Lastly it is averred that the Defendants made several undertakings to the first Plaintiff regarding payment for the said goods but have breached those undertakings.

In the joint written statement of defence the first line of defence is that the second Defendant is not personally liable for any alleged contract between the first Plaintiff and the first Defendant. As far as the first Defendant is concerned it is admitted in paragraph 7 of the written statement of defence that the first Defendant contracted the first Plaintiff to supply four containers/consignments of borehole materials whereof the first Plaintiff only made and

delivered one container valued at **US$39,114** equivalent to **93,009,320/= Uganda shillings**. The first Defendant through the second Defendant notified the first Plaintiff about the purpose of the materials and that they should fit with each other to serve their desired purpose. The case is that the payment for the consignment was to be made on confirmation that the materials supplied were supplied according to the order/specification and suitable for the purpose. The first Defendant through the second Defendant discovered that the consignment had materials which did not match and were incapable of being used for making boreholes. Upon communication of the defect, the first Plaintiff undertook to supply another consignment of goods valued at **US$30,911** that could be used to make the initial consignment work. The Defendant's defence in the written statement of defence is further that it was a precondition for the supply that the first Defendant would secure the supply by a cheque in the names of the second Plaintiff. It was an understanding between the parties that the cheque would be banked upon delivery of the second consignment but the second Plaintiff went ahead to bank the cheque without notice to the Defendants and without the second container having been delivered. Additionally the first Defendant had paid a deposit of **Uganda shillings 20,000,000/=**. On the basis of those averments the Defendant's case is that the suit is premature because the second container had not been delivered. Secondly failure to deliver the second consignment gravely affected the Defendant's operations rendering the first consignment useless. On the basis of failure to deliver the second consignment, the first Defendant had no obligation to pay for the goods. Lastly as far as the cheque is concerned, there was no notice of dishonour of the cheque given to the first Defendant.

The evidence adduced by the Defendants is principally in line with the averments in the joint written statement of defence. I have duly considered the acknowledgement of indebtedness which is also an undertaking made by the second Defendant on behalf of the first Defendant.

The first acknowledgement is written by DW1 in the headed letter of the first Defendant and is dated 7th of November 2011 and provides as follows:

> I Joseph L on behalf of Jesy Technical Services Ltd, I issued a security cheque for Uganda shillings 166,578,942 to Messieurs Relief Line Uganda Limited, agents for Messieurs Ajay Industrial Corporation Ltd India in Uganda. We will make the payment of USD 64,338, to Messieurs Ajay Industrial Corporation on 21st of November and will get back the security cheque.
>
> In case of our default of making payments, Relief Line (U) Ltd can present the cheque to Bank on behalf of Ajay Industrial Corporation Ltd and cash the same.
>
> Yours truly,
>
> Joseph L"

The document is signed by the second Defendant/DW1 and also the managing director of the first Defendant on behalf of the first Defendant.

The second document that is relevant to the Plaintiff's case is the cheque which is also admitted as exhibit D9. The cheque is also exhibit P1 and is dated 21st of November 2011. From the chronology of facts it is evident that the cheque was a post-dated cheque and was supposed to be banked by 21 November 2011. This is evident from exhibit P2 which is dated 7th November 2011 and is the acknowledgement of the sum owing/undertaking of the second Defendant made on behalf of the first Defendant. In that undertaking it is clearly written by the first Defendant that it would make payment to the first Plaintiff on 21 November 2011 whereupon the first Defendant would get back the security cheque. The first Defendant was supposed to pay USD 64,338 by 21 November 2011. In that undertaking it is agreed or undertaken by the first Defendant that in default of payment, the Plaintiff would go ahead to present the cheque to the bank and cash it. The undertaking to make the payment in exhibit P2 is unconditional. In other words it would not matter whether payment was a precondition to supply of contractual goods or not.

Exhibit P4 is an e-mail dated 3rd of November 2011 on the subject of the container. The situation arose in the words in the e-mail and from the director/manager of the first Plaintiff as follows:

> "Referring to the captioned subject line and container at Mombasa port, I have discussed with my management again and they are ready to release you original shipping documents, upon receipt of an undertaking from you to pay the full amount (USD 63,000) on 21st November and a security cheque for the same amount in favour of "Relief Line (U) Ltd".
>
> I hope this time it is ok. Please try to do the needful ASAP, so that I can send you the documents by Courier tomorrow.
>
> Looking forward to read from you soon
>
> Thanks and regards
>
> Ajay Jain."

The e-mails revealed that there was a container at Mombasa port. This was by 3 November 2011. Prior to the e-mail there were other e-mails referring to the latest shipment of casing and hand pumps. I further need to refer to the e-mails between the two managers dated 31st of October 2011. Initially the second Defendant communicated to the first Defendant's manager that he did big contracts and they expected to be paid but due to some changes they expected to send money on 21 November 2011 to the Plaintiff. He requested Mr Jain to discuss with his finance Department to simplify and also consider the first Defendant as a customer because if they do not release the container the first Defendant would be charged demurrage which they would not be able to manage. The first Plaintiff's representative wrote back saying he understood the problem of “funds blockage” of the first Defendant. He indicated that he could not ask his finance Department of release the shipping documents/documents of title against 100% credit. He

requested the second Defendant to find a way out of the problem. Subsequently the second Defendant wrote that the Plaintiff did not trust the first Defendant Company. Secondly they were unable to use the plain casing 5 inches without the screen which means that the plain casing would be idle until the screen comes. It is subsequently on 3 November 2011 that the manager of the first Plaintiff suggested the making of an undertaking to pay the full amount of US$63,000 on 21 November 2011 and a cheque for the same amount.

The documents demonstrate that the goods had arrived in Mombasa and there was a problem of how the goods could be cleared so that they do not accumulate demurrage charges. The first Defendant had a problem which needed to be sorted out. From the evidence it had been the practice to make payment for the goods before they could be released to the Defendant. In this particular instance the first Defendant requested for release of the goods before payment. The goods would be released by tendering to the first Defendant the original shipping documents. It is therefore evident that there was a stalemate which could only be resolved through another procedure. The procedure adopted by the parties was for the first Defendant Company to make an undertaking to pay the full amount and to sign a cheque for a similar amount upon which the shipping documents would be released. The terms of the relationship between the parties had changed. This is evidenced by exhibit P2 which is the letter of undertaking and the cheque leaf exhibit P1 or exhibit D9. The two documents were executed by the first Defendant Company in fulfilment of the new terms of relationship. The question that remains is whether the goods or the documents of title were released to the Defendant. Previously the Defendant would receive copies of shipping documents and upon payment of the Plaintiffs dues would get the original documents. This is in line with the practice in the commercial sale of goods with an international element. The buyer receives the documents of title which is often considered as a receipt of the goods.

It is therefore my finding that the terms of the relationship between the first Plaintiff and the first Defendant had been varied to the extent that shipping documents of title were supposed to be released before payment. Under the new terms, the first Defendant executed a letter of undertaking as well as issuing a cheque which would be banked for encashment if payment was not made by 21 November 2011.

It is also established from the evidence that at this time the goods were in Mombasa. I do not agree with the testimonies of DW1, DW2 and DW3 to the extent that they were waiting for the goods in order to receive certain items which would match with previous goods that had been delivered. Secondly the testimony that the goods were supposed to be delivered in Kampala by the supplier/first Plaintiff is not supported by the first Defendants undertaking. The evidence is inconsistent with the documentary evidence in which the parties agreed that the goods would be released upon receipt of an undertaking and issuance of a cheque by the first Plaintiff. The undertaking was that payment would be made by 21 November 2011. Subsequent events

demonstrate that no payment had been received by the first Plaintiff by the 21st of November 2011.

The witness statement of PW1 the Manager International Marketing of the first Plaintiff Company stopped short of informing the court whether documents of title for the goods had been delivered to the first Defendant. His testimony simply is that the sum of **Uganda shillings 166,578,980/=** was for goods supplied to the first Defendant company. The evidence I have managed to glean from the correspondence is that at the time of making the undertaking, some goods were in Mombasa and were attracting demurrage charges. It was the entreaties of the second Defendant for the goods to be released before payment that changed the status quo. There is also evidence that there were certain parts which the first Defendant expected in order to be able to use parts which had been received in the first consignment.

DW3 the clearing agent of the first Plaintiff testified that he received shipping documents for clearance of goods in November 2011. These were exhibits D7, D3, D4, and D6 and revised offer D2. He referred to these documents as the first consignment whereupon he advised the first Defendant to ask the first Plaintiff to rectify certain anomalies because of parts which did not fit each other in the second consignment. However he was informed that the second consignment was never delivered. I have consistently been addressed on an order for two consignments. In exhibit P4 the first Plaintiff's manager wrote to the second Defendant in his capacity as director of the first Defendant that they would release the original shipping documents upon receipt of an undertaking to pay US$63,000 on 21 November and security cheque for the same amount in favour of the Plaintiff's agent in Uganda. The testimony of DW3 rhymes with the release of shipping documents for purposes of clearance in November 2011. On the other hand the revised offer for the supply of goods is dated 19 September 2011 CIF Mombasa exhibit D2 is relied upon by the Defendants as evidence. The bill of lading in respect thereof is dated 8th of October 2011 exhibited D3. The commercial invoice exhibit D4 is dated 11th of October 2011 and is for US$39,114. Finally there is a letter dated 8th of November 2011 from the first Plaintiff addressed to the first Defendant indicating that the first Plaintiff had shipped the materials to Mombasa including the above-mentioned shipping documents. The quoted amount of US$39,114 is full cost of freight to Mombasa according to the commercial invoice exhibit D4. One conclusion that can be made from the documentary evidence is that the goods were to be shipped up to Mombasa. Secondly the undertaking exhibit P2 relates to these goods and possibly others whose particulars are not in evidence. The total amount in the undertaking exhibit P2 goes beyond the cost of the price of the goods shipped in November 2011. According to DW1 Mr Joseph Lukyamuzi, he discovered at Nakawa ICD verification of the consignment that the Plaintiff supplied 950 casing pipes instead of 1000 according to the revised order; 50 pieces of casing pipes were supposed to be 8 inch by the Plaintiff delivered 10 inch and none of the 150 screen casing pipes were delivered and so on 250 installation pipes. The casing pipes and screen casing had threads which were fitted into each for installation of a borehole and if they are not matched, can hardly be fitted. As lead to the discovery DW1 informed that Mr Ajay whereupon

he undertook on behalf of the first Plaintiff sent a second consignment at US$30,911 equivalent to Uganda shillings 73,568,180/= from which matching materials could be used to make the initial consignment serve its purpose. On that basis the first Defendant secured the second consignment by a cheque in the names of the second Plaintiff and a letter of undertaking. The sum of US$30,911 plus US$39,114 amounts to US$70,025. This amount represents two consignments according to the testimony of DW1.

The undertaking is dated 7th of November 2011. Payment was supposed to be made by 21 November 2011. By undertaking to pay US$64,338, there were other consignment amounts incorporated into the above sum. From the e-mail correspondence the inference of fact is that the first Defendant could not access the goods before 8 November 2011. However subsequent to the letter of undertaking dated 7th of November 2011 the goods were cleared and came up to Nakawa ICD. The testimony of DW2 Justine Nabukenya is that this was the first shipment. Furthermore she testified that the goods came to Nakawa ICD for inspection and they inspected the goods and found that some goods were not fitting with others which defeated the purpose. Furthermore she testified that until the Plaintiff delivers the second consignment the claim of the Plaintiff should be limited to Uganda shillings 73,009,320/=, the first Defendant having paid Uganda shillings 20,000,000/= to secure the second consignment. In other words the first Defendant received the goods described by the Defendant's witnesses as the first consignment. The letter of the Plaintiff forwarding original shipping documents is dated 8th of November 2011 one day after the undertaking of the first Plaintiff to pay a certain amount of money indicated in the undertaking exhibit P2. In other words it is impossible for the undertaking to have arisen after inspection of the goods at Nakawa ICD unless there are some facts which have not been availed to the court. In any case the shipping documents are clearly for conveying the goods up to Mombasa. This strong inference of fact is that the undertaking of the first Defendant can only relate possibly to the consignment with a covering letter of 8th of November 2011. This is irrespective of the characterisation of the payment undertaken whether for the first consignment or as well as for a second consignment. The second consignment from the evidence was ordered after inspection of the first consignment (after the undertaking of 7th of November 2011). Lastly the undertaking of the first Defendant operates on its own and introduces new terms in the relationship between the parties.

I make reference to the e-mail of Mr Joseph dated 5th of February 2012. In that e-mail he writes to the first Plaintiff's manager that he had been camping in Juba after he had completed his contract but no payment had been made. He had been promised payment between 15th and 30th of March 2012 and regretted why he got involved in that contract. The e-mail is specifically replied to by an e-mail dated 7 February 2012 from the first Plaintiff. In the e-mail Mr Jain addressed Mr Joseph that they had been trying to contact him for a long time but he never responded. In the e-mail the second Defendant was reminded that they were supposed to pay the Plaintiff by 21st of November 2011 which they failed to do and the second Defendant made many promises thereafter. The first Plaintiff's manager advised the second Defendant that upon

advice of the accountants and legal advisers they banked the cheque which was dishonoured. The Plaintiff's Counsel relied on this document as evidence of the notice of dishonour of the cheque issued for the benefit of the first Plaintiff and in the names of the second Plaintiff by court on behalf of the first Defendant.

Exhibit P2 contains an acknowledgement that the first Defendant would make payment of US$64,338 by 21 November 2011. Secondly it is a fact that the first Defendant issued a cheque for the equivalent in Uganda shillings amounting to 166,578,940/= in the names of the first Plaintiff's agent. It is a specific term of the undertaking that in case of default, the cheque would be presented for payment/encashment. It is established by the e-mail correspondence adduced in evidence that the first Defendant defaulted in the payment undertaken in exhibit P2. The acknowledgement that the first Defendant is owed US$64,338 would operate irrespective of the underlying transaction or undertaking of the first Plaintiff to deliver additional items. If the court takes the route of the underlying transaction, it would have to ignore the subsequent acknowledgements, to arrive at the current obligations, liabilities and rights of the parties at the time of filing the action. However the relationship between the parties had been altered by the undertaking which constitutes fresh terms and a fresh contract irrespective of the status quo as far as the supplies of goods are concerned. The only concern is that it is apparent from the testimony that some goods were not delivered to the first Defendant. In my opinion the remedy of the first Defendant could have been to repudiate the contract. However as I will demonstrate DW1 made it apparent that the first Defendant accepted to have the goods on the condition that fitting parts would be supplied to the first Defendant by the Plaintiff. In other words the first Defendant accepted the goods.

As far as exhibit P2 is concerned, it amounts to an acknowledgement of indebtedness to the first Plaintiff which admitted amount was supposed to be paid by 21 November 2011. The acknowledgement on its own operates to generate a fresh cause of action. By determining the effect of the partial acknowledgement, the court would determine the rights of the parties without the need to understand the underlying transactions. Section 22 (4) of the Limitation Act cap 80 laws of Uganda is the applicable law. It provides as follows:

> "22. Fresh accrual of action on acknowledgement or part payment.
>
> (4) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, or any claim to the personal estate of a deceased person or to any share or interest in it, 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 acknowledgement or the last payment; but a payment of the part of the rent or interest due at any time shall not extend the period for claiming the remainder then due, but any payment of interest should be treated as a payment in respect of the principal debt."

The provision makes it clear that the right of action accrues from the date of acknowledgement. This implies that the acknowledgement itself leads to the accrual of a fresh cause of action and there is no need to examine the underlying liability upon which the acknowledgement is founded. Limitation period runs from the date when the cause of action accrues. In other words the cause of action accrues from the acknowledgement itself. Furthermore under section 23 of the Limitation Act, every such acknowledgement shall be in writing and signed by the person making the acknowledgement. An acknowledgement may also be made by the agent of the principal who is liable and may be made to the agent or principal or the person whose claim is being acknowledged. Exhibit P2 has all the elements laid out in section 23 of the Limitation Act cap 80 and therefore has generated a fresh cause of action.

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… "

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."

In **Dungate v. Dungate [1965] 3 ALL ER 393** a letter written by a deceased person reads as follows: "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 question of how much was owed would be established by other evidence. 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 first Defendant's case is that it is not obliged to pay for non-delivery of certain items in a second consignment. I will deal with the case of non-delivery in due course.

It is further unnecessary to decide the effect of the limitation of cheques to an amount of Uganda shillings 20,000,000/= by the Bank of Uganda. I have not been given any instrument which bars

the issuance of a cheque for sums beyond 20,000,000/=. The cheque is evidence of the amount agreed upon in the letter of undertaking. Whether the cheque was issued in contravention of Central Bank regulations does not operate to bar the Plaintiff from making a claim for the face value of the cheque as an amount agreed upon in exhibit P2.

The undertaking exhibit P2 is sufficient to establish the liability of the first Defendant. As far as the second Defendant is concerned, it is established that they acted as the manager/director of the first Defendant and there are no grounds to lift the veil so as to proceed directly against him. In the premises issue number one is resolved in favour of the Plaintiff to the effect that there was breach of contract by the first Defendant for failure to pay by 21 November 2011 a sum of US$64,338 or its equivalent in Uganda shillings.

Before taking leave of the matter the first Defendant never exercised a right to reject the goods. Where the goods do not comply with the specifications ordered, the buyer has the right to reject the goods or exercise any other remedies prescribed by the Sale of Goods Act. Secondly it was up to the Defendant to treat the contract as repudiated. However the breach had occurred when the Defendant failed to pay by 21st of November 2011. It is also apparent from the evidence that the supply of additional goods alleged to be in the second consignment was not a precondition for the payment of a sum of US$64,338 or its equivalent in Uganda shillings.

Where goods have been delivered, the buyer may accept and pay for them in accordance with the terms of the contract under section 27 of the Sale of Goods Act Cap 82. Section 30 (3) of the Sale of Goods Act provides that where the seller delivers to the buyer what he or she contracted to sell mixed with goods of a different descriptions, the buyer may accept the goods in accordance with the contract and reject the rest or reject the whole consignment. Furthermore section 34 of the Sale of Goods Act provides that where goods are delivered to the buyer which he or she has not previously examined, the buyer is not deemed to have accepted them until he or she has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Under section 36 of the Sale of Goods Act the buyer is not bound to return rejected goods to the seller and it is sufficient to intimate to the seller that he or she refuses to accept them. The buyer has a right of action for non-delivery. Secondly the buyer has the right to specific performance of the part of the contract that remains unperformed i.e. by non-delivery (see sections 50 and 51 of the Sale of Goods Act). Where some components have not been delivered, the buyer is entitled to treat the delivery as part of delivery and sue for delivery of the remainder. In the absence of any evidence as to what happened to the goods, it would appear that the Defendant accepted the goods on the understanding that the first Plaintiff would supply additional goods.

The testimony of DW 2 and DW3 is that the first Plaintiff delivered 950 casing pipes instead of 1000 according to the revised order. 50 pieces of casing pipes which were supposed to be 8 inches by the first Plaintiff delivered 10 inches. The first Plaintiff delivered none of the ordered

150 screen casing pipes. 250 installation pipes were not delivered. There were problems with casing pipes and screen casings whose threads were not fitting.

In this case the first Defendant who is the buyer did not do exercise the option of rejecting the goods but claims that they requested the first Defendant to rectify the mismatch in goods. The rectification proposed by the Defendants was by delivery of additional matching parts. There indication is that other parts would be delivered to make the parts match. Paragraph 15 of the witness statement of DW1 Mr Joseph Lukyamuzi is as follows:

> "That upon discovering the above, I informed that the first Plaintiff through its Mr Arjay Jain, that the consignment that had been delivered and had un-matching materials, and some missing materials, contrary to the order, whereof the first Plaintiff through Mr Arjay Jain, undertook/committed itself to send the second consignment valued at US $30,911, equivalent to U. Shs 73,568,150/= (…) From which matching material would be used to make the initial consignment serve the purpose."

The testimony is unequivocal and demonstrates that the first Defendant through DW1 accepted the goods. Acceptance of goods is catered for by section 35 of the Sale of Goods Act which provides as follows:

> "35. Acceptance.
>
> "The buyer is deemed to have accepted the goods when he or she intimates to the seller that he or she has accepted them or when the goods have been delivered to him or her, and he or she does any act in relation to them which is inconsistent with the ownership of the seller, or when, after the lapse of a reasonable time, the buyer retains the goods without intimating to the seller that he or she has rejected them."

In this case the first Defendant which is the buyer intimated to the first Plaintiff that it accepted the goods and what was left was for additional components to be supplied to make the accepted components work.

The undertaking for payment by 21 November 2011 was not varied by the parties. What happened is that **Uganda shillings 20,000,000/=** was paid to the first Plaintiff according to the payment voucher exhibit D8 on 29 December 2011. That payment reduces the liability of the first Defendant by an amount of Uganda shillings 20,000,000/=. As far as the undertaking exhibit P2 is concerned, the question of non-delivery of goods is not relevant. The action was originally and in view of the evidence commenced by way of a summary plaint because the terms of the undertaking were considered unenforceable without reference to any other document. Whether the goods are to be delivered subsequent to the undertaking is in my opinion irrelevant on the question of efficacy of the undertaking in making the first Defendant liable according to its terms. Furthermore it is up to the Defendant to insist that the Plaintiff fulfils its part of the

bargain by bringing the requisite parts subsequent to the payment through appropriate action. This does not affect their liability to fulfil the terms of the undertaking.

The Defendants never counterclaimed in this suit either for specific performance or other remedies provided for under the sale of Goods Act cap 82 but only submitted that they are not liable to pay until after the first Plaintiff has rectified the mismatch in some goods. There are no details about how many pieces of equipment need to have other matching components imported or substituted. Because there is no counterclaim, that is not the subject matter of this suit and in the premises issue number one is resolved in favour of the Plaintiff.

2. Whether the Defendants are indebted to the Plaintiffs to the tune of Uganda shillings 166,578,980/=?

Issue number two has already been resolved in considering issue number one. The first Defendant is indebted to the first Plaintiff for US$64,338 or its equivalent in Uganda shillings less Uganda shillings 20,000,000/= according to exhibit P2. The second Defendant as a director and manager of the first Defendant is not personally liable.

Remedies

As far as remedies are concerned the first Defendant acknowledges that the claim of the Plaintiff should be limited to Uganda shillings 73,009,320/= on the ground that out of Uganda shillings 93,009,320/= representing the invoice to sum of US$39,114 in Uganda shillings, the first Defendant had deposited Uganda shillings 20,000,000/= with the Plaintiffs already.

Without much ado, the Plaintiff is entitled to Uganda shillings 93,009,320/= representing the invoice sum of US$39,114 and Uganda shillings 73,009,320/=, acknowledged by the first Defendant as owing is awarded to the first Plaintiff upon deducting Uganda shillings 20,000,000/= there from. This would leave a balance out of US$64,338 by subtracting US$39,114 of US$25,224.

The first Defendant having conceded that it was liable for the sum of US$39,114 less Uganda shillings 20,000,000/=, the question remains whether the balance out of US$64,338 amounting to US$25,224 should be paid. This balance represents goods that have not been adduced in evidence as far as either the orders or commercial invoice or bill of lading are concerned. It is simply the balance on the undertaking exhibit P2. Because the Defendant did not rely on frustration and did not prove repudiation of the contract, the first Plaintiff is awarded additional US$25,224 as the balance owing on the first Defendant's undertaking exhibit P2.

As far as the claim for general damages is concerned **Halsbury's laws of England fourth edition reissue volume 12** defines general damages as 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. In the case of **Dharamshi**

vs. Karsan [1974] 1 EA 41 East African Court of Appeal in laid out the general consideration for award of damages as *restitutio in integrum.* It means that the Plaintiff should be restored as nearly as possible to a position he or she would have been had the injury or breach complained of not occurred.

The Plaintiff did not adduce any evidence about the consequences of the breach of the undertaking by the first Defendant. On the other hand the first Defendant demonstrated that it has not received some of the supplies. In those circumstances the Plaintiff would be awarded only US$4000 as general damages.

Under section 26 of the Civil Procedure Act, the High Court has jurisdiction to award interest that is reasonable. The Plaintiff is awarded interest on the principal sum claimed/awarded by the court from the date of filing the suit at 14% per annum up to the date of judgment. Additional interest is awarded at 14% per annum from the date of judgment till payment in full.

The suit is dismissed with costs as against the second Defendant.

The Plaintiff is awarded costs as against the first Defendant.

Judgment delivered in open court this 11th day of June 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Namuswe Veronica holding brief for Counsel Joseph Kyazze Counsel for the Defendant

David Wesley Tusingwire holding brief for Carol Kintu Counsel for the plaintiff

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

11th June 2014