THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

HCCS NO 120 OF 2010

MARS TOURS AND TRAVEL LTD}.....PLAINTIFF

VS

STANBIC BANK LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed this action against the Defendant for declaratory orders that the freezing of its account number 0140028289101 with the Defendant was unlawful, an order to allow the Plaintiff operate its account, damages for inconvenience, interest on all pecuniary awards and costs of the suit.

The relationship between the parties is governed by a Merchant Agreement for the acceptance of MasterCard, visa and debit cards as a form of payment by customers for services and goods consumed while in Uganda. All transactions of payments were to be routed through the Defendant bank as the clearing medium and the Defendant is entitled under the merchant agreement to an agreed commission on all credit and debit card transactions. To carry out the transactions the Defendant provided a point of sale machine and the Plaintiff's account was used for purposes of the transaction. The grievance of the Plaintiff arose in May 2009 when the Defendant blocked all operations on its account and the Magistrate's Court froze the Plaintiffs account for six months but even after the expiry of the six months, the Plaintiff's account remained frozen. The Plaintiff alleges that at the time of freezing its account it had Uganda shillings 92,930,000/= standing on its credit.

In its defence the Defendant denied the claims but admitted the existence of the Merchant Agreement between the Plaintiff and the Defendant and the provision of the point of sale devise installed at the Plaintiff's premises to record credit and debit card transactions. Furthermore the Defendant contends that the freezing of the Plaintiff's account was justified. The Defendant further admitted that there was a court order extracted freezing the Plaintiff's account. The Defendant's defence is that the Plaintiff was using the point of sale devise (POS) to make fictitious claims to the Defendant for payment and perpetuating fraud against various credit card holders. The court order had been obtained to prevent further fraud. Several particulars of fraud are pleaded against the Plaintiffs as well as particulars for breach of contract. The Defendant

counterclaimed against the Plaintiff for Uganda shillings 100,000,000/= being its exposure due to charge backs occasioned due to alleged fraudulent transactions using credit cards, general damages, punitive and exemplary damages and costs of the suit and interest on the principal claims.

The Plaintiff denied the fraud and reiterated that the blockage of its account was not justified and therefore the claim of the Defendant ought to be disallowed.

The Plaintiff is represented by Messieurs Balyejjusa and Company Advocates while the Defendant is represented by Messieurs Sebalu and Lule Advocates. Proceedings in this suit were stayed pending determination of a test suit namely **HCCS 116 of 2010 between Konark Investments (U) Ltd versus Stanbic Bank (U) Ltd.** The test suit was determined and the decision therein is supposed to apply to two other suits namely: **Mars Tours and Travel Ltd versus Stanbic Bank (U) Ltd,** the current suit and **Best Connect Tours and Services Limited versus Stanbic Bank (U) Ltd.**

As a result of the judgment in the test suit, no evidence was adduced for the trial of the current suit and the parties relied on the decision in Konark Investments Ltd versus Stanbic Bank (U) Ltd HCCS 116 of 2010 and agreed that what was to be resolved could be resolved by a reconciliation of accounts on the question of the amount of charge backs that Messieurs Stanbic bank (U) Ltd suffered as a consequence of the use of the POS device in the Plaintiff's business against deposits on the Plaintiff's own account. It was agreed that the charge backs had to be offset from the Plaintiff's account. Consequently the parties agreed to appoint an independent auditor to examine the charge backs arising from the use of the point-of-sale machine in the Plaintiff's premises for transactions carried out by the Plaintiff against deposits made on the Plaintiff's account on the basis of transactions involving the point-of-sale machine. Reconciliation of accounts was carried out by **Messieurs KAL Associates Certified Public Accountants.** The said firm of auditors were jointly instructed by Messieurs Balyejjusa and Company Advocates for the Plaintiff and the Messieurs Sebalu and Lule Advocates for the Defendant. The instructions are contained in a joint letter on the subject of: "Instructions for Reconciliation of Transactions". The letter reads in part as follows:

> "Upon the directive of court, you are recommended for purposes of carrying out a reconciliation exercise to determine the following:
>
> a) Whether the transaction amounts on bundles of documents marked as "A" were credited on the bank account marked "B" by matching the transaction amounts on "A" and the credits on "B".
> b) How much of such transaction amounts on "A" were credited on the bank account "B" if any.
>
> NB the said documents are herewith forwarded.
>
> SUMMARY OF THE CASE:

The Plaintiff and the Defendant executed a merchant agreement for the acceptance of MasterCard, Visa and debit cards as a form of payment by customers for services and goods consumed. All transactions for card payments were to be routed through the Defendant as the clearing medium. Accordingly, the Plaintiff was provided by the Defendant with a machine.

GENESIS

It is the allegation of the Defendant that the transactions in "A" are charge backs. It is also the allegation of the Plaintiff's that they did not carry out the transactions in "A" and the same were never credited on their account "B". Please note that you are not required to determine and/or state any opinion with regard to the above allegations but simply reconcile and match the respective transactions on "A" and the credits on "B". The exercise is supposed to be completed by 2 December 2013 and your costs shall be paid equally by the Defendant and the Plaintiff upon receipt of your invoice."

The letter was jointly signed by the Plaintiff's advocates and the Defendant's advocates and copied to the parties. The audit report was received on the court record on 15 April 2014 whereupon Counsels addressed the court in written submissions on the implications of the audit report.

Plaintiff's Written Address

The Plaintiff's Counsel submitted that the basis of the audit report was the determination of whether the transaction amounts contained in the chargeback requests of the Defendant were received by the Plaintiff. The Plaintiff denied having carried out the transactions contained in the chargeback or any liability. It was agreed that the determination of whether the Plaintiff was liable in charge backs is dependent on the question of whether the respective amounts contained in the chargeback records reached the Plaintiffs bank account. Consequently the parties agreed on the scope of instructions to the auditors in the correspondence annexure "B", "C" and "D".

If the respective transaction amounts on the chargeback records were traceable to the Plaintiff's bank statement, then the Plaintiff would be liable in charge backs to the extent of the respective amount found in the bank statement. The rationale is that the Plaintiff could only access money credited with its bank account and therefore cannot be penalised in charge backs for sums of money or transactions amounts it did not receive. Such money would be in the possession of the Defendant bank and/or "stuck" in the system where the Plaintiff cannot access it. The Plaintiff's Counsel contended that in **HCCS 116 of 2010 Konark Investments Ltd versus Stanbic Bank (U) Ltd** this fact was never investigated.

The summary of the audit report at page 19 thereof is that none of the transaction amounts on the chargeback record was ever credited on the Plaintiff's bank account. The implication of the finding is that the sums of money that were lying on the Plaintiffs bank account at the time of blocking/freezing the same cannot be subjected to charge backs. The Defendant bank was

unjustified to deny the Plaintiff access and the use of the funds on its account as the Plaintiff's bank account was never credited with any money arising from charge backs. Counsel submitted that if at all the sums of money contained in the chargeback records do exist it would still be with the Defendant bank. However the same was never credited on the Plaintiff's bank account. At the time of the freezing operations on the Plaintiff's account, a sum of **Uganda shillings 92,930,000/=** was credited on the Plaintiff's account.

Remedies

On the question of remedies, the Plaintiff's Counsel submitted that the Plaintiff is entitled to access funds that were on its account at the time of freezing of operations on its bank account, interest on the said sum of money at the Defendant's lending rate, damages and costs.

As far as the liquidated sum is concerned, the Plaintiff is entitled to recover a sum of **Uganda shillings 92,930,000/=** which was credited on its account at the time of freezing of its account as it was not connected to any transactions that became the subject of charge backs. Counsel submitted that the Plaintiff is entitled to recover the sum from the Defendant unconditionally.

Counsel further prayed for interest on the said sum at the rate of 28% per annum from the 19th of May 2009 when the account was blocked until the date of judgment. He contended that it was logical that the Plaintiff would have made profits by putting the money to use but was denied access to the money by the Defendant.

As far as the claim for general damages is concerned, Counsel contended that in the case of **Konark versus Stanbic Bank (U) Ltd, a sum of Uganda shillings 60,000,000/=** was awarded as damages for the freezing/blocking of the account for a period of three years. He submitted that a similar breach happened in the instant case. The Plaintiffs account was blocked/frozen in May 2009 which is now period of five years and the Plaintiff has been exposed to untold suffering, loss of business prospects and inconvenience. He prayed that the sum of **Uganda shillings 120,000,000/**= be awarded to the Plaintiff as general damages. Furthermore the Plaintiff equally incurred a **sum of 2,950,000/=** in fees for the auditors and prayed that the same is awarded to the Plaintiff as special damages. Furthermore the costs of the suit ought to be awarded to the Plaintiff.

Defendants Written Address in reply

The Defendants Counsel submitted that Messieurs KAL Associates (the auditors) were appointed under section 27 of the Judicature Act and their findings should be interpreted in light of the decision of the court in HCCS 116 of 2010 namely **Konark Investments Ltd versus Stanbic Bank (U) Ltd**. Proceedings in the current suit were stayed pending determination in the case of **Konark Investments (U) Ltd versus Stanbic Bank (U) Ltd** (supra). Proceedings were stayed under Order 39 rule 1 of the Civil Procedure Rules by consent of the parties for trial of the KONARK case as a test suit.

In principle, the judgment in the test suit will apply to and bind the suits which have been stayed where there has been a bona fide trial on the merits in the test suit according to the observation of Malins V.C in **Amos versus Chadwick (1876**) Vol IX Ch. D 459 at page 462 where Cotton LJ held at page 465 that a test suit is trying upon evidence there from, the evidence in the other stayed actions. Consequently the findings in the Konark case, having followed a bona fide trial of the merits of the claim, must apply with binding effect to civil suit number 120 of 2010. This is because common points of law, facts and evidence apply to both suits. The Defendants Counsel submitted that the evidence in the test suit is also evidence in the suits which have been stayed. The admitted evidence in the Konark case included a court order freezing six merchant accounts exhibit P4, a standard merchant agreement (exhibit D1), the forensic investigation report exhibit D2, the merchant account statement exhibit D5, the chargeback record from the Prime System exhibited D6 and D7 which formed the related evidence in civil suit number 120 of 2010. In the current suit, the merchant specific documents relating to account statements and charge backs have been provided and examined by the auditors.

The auditors findings are that the charge backs in respect of the Plaintiff on the prime system record bundle "A" were not credited on the merchants account statement "B". Secondly no amount of the charge backs in the prime system according to the record "A" were credited by the merchants account statement "B".

The finding that the record of charge backs for the Plaintiff extracted from the prime system is not reflected in the merchant account is not contested by the Defendant. However the Defendant submits that this finding must be placed in context in view of the evidence adduced and decided upon in the Konark case (referred to as the test suit).

Under the system, the sum of money that is deposited with the merchant account under the merchant agreement is payment for goods and services provided to the cardholder by the merchant as a result of the operation of the point of sale (POS) device. The framework for charge backs is provided for under clause 6.6 of the merchant agreement which provides that the authorisation granted by the Defendant for a transaction does not warrant the validity or authenticity of the card, that the person presenting the card is authorised to do so or that the payment by the issuer of the value of the authorised transaction will not be subject to a chargeback by the Defendant to the merchant. A chargeback is an autonomous transaction reversal process through which charge backs are requested and effected in the prime system. The record of charge backs and chargeback activity would, therefore not reflect on the merchant account. This appears in the evidence of DW 4 Mr Victor Okot Othieno in the test suit. The prime system extracts were held to be admissible under the **Electronic Transactions Act 2011** in the test suit. Another critical issue was whether the amounts deposited with the merchant account can be in harmony with the judgment records that not all transactions which are performed by the merchant were honoured by the Defendant as a consequence, payments were not made to the merchant account.

The reason for the Defendant's refusal to honour a great number of the Plaintiff's transactions on the POS device, requires brief evidential analysis. Clause 7.4 of the merchant agreement provides that the merchant is to provide information regarding the transactions as the Defendant may reasonably require from time to time. Clauses 8.8 and 8.9 further stipulated the merchant's obligation in regard to the retention and supply of transaction slips. In the test suit, it was the Defendant's testimony that the merchants (including the Plaintiff) named in the forensic investigation report adduced as exhibit D2 failed to make available all the transaction slips and details of the goods/services the merchants had provided to the respective cardholders and where they were provided, the Defendant questioned the integrity of the slips due to suspected fraud.

Consequently the conclusion of the Plaintiff's Counsel on the point is not correct. Failure to trace chargeback's on the merchant account does not bar the account the merchant/Plaintiff from chargeback liability. A determination of the effect of the statistical finding by the auditors must also take into account the evidential findings in the test suit which tried common questions of fact. It is incorrect for the Plaintiff's Counsel to submit that the entire process was never investigated in the test suit as the testimony of DW 4 exhaustively addressed the chargeback process and it was submitted upon by Counsels on issue number 1, 2 and 3 in the test suit.

The findings in the test suit are as follows:

- Within the context of the merchant agreement, the Defendant had reasonable grounds to suspect the Plaintiff's involvement in alleged fraudulent acts in as far as charge backs resulted from the use of the POS device.
- Under the merchant agreement, the Plaintiff warranted not to present transaction slips that would incur charge backs and is liable for the breach of this warranty, which the Defendant proved. The fault principle for chargeback liability is therefore inapplicable.
- The occurrence of charge back through a transaction carried out on a POS device, is prima facie evidence of breach of the merchant agreement for which the Plaintiff is liable. This breach does not rely on the fault principle but the contractual clause in the merchant agreement that classifies it as such (a breach).
- Chargeback liability is based on the allocation of contractual risk or liability and the bank is entitled to the total sum of charge backs contained in the prime extracts.
- Proof of contractual fraud under the merchant agreement is discharged where it shows that the transaction under the Plaintiffs POS device resulted in a chargeback.
- While the merchant agreement permitted the Defendant to debit the Plaintiffs account, it was not necessary to block the Plaintiff's account. The freezing of the Plaintiff's account amounted to breach of the banker/customer relationship.

As far as remedies are concerned, the remedies in the current suit must be consonant with the remedies or orders in the test suit. Consequently the Defendant is entitled to the amount of the charge backs disclosed by the prime system extracts as a contractual right. In the present case,

the sum is **Uganda shillings 359,079,764/=** according to pages 10 – 17 of the auditor's report for the Plaintiff. In view of the contractual breaches committed by the merchant/Plaintiff, the Defendant is entitled to an award of general damages. In the test suit **Uganda shillings 10,000,000/=** was awarded. Counsel prayed that general damages of **Uganda shillings 10,000,000/=** is awarded to the Defendant. On the other hand the merchant/Plaintiff is entitled to an award of general damages for the wrongful blocking of account number 0140028289101 under the court order dated 10th of July 2009. In the test suit the merchant was awarded **Uganda shillings 50,000,000/=** and Counsel prayed that award is also made in the current suit. As far as interest is concerned, the Plaintiff is entitled to an award of interest at commercial rate of 25% per annum. As far as costs are concerned each party should bear its own costs as held in the test suit. Both parties should exercise the right of set-off arising from the decree.

The Plaintiff's Written Address in Rejoinder

In rejoinder the Plaintiff's Counsel submitted that the purpose of the investigation by the auditors was to establish the question of fact as to whether the Plaintiff/merchant did or did not receive the sums of money alleged to be charge backs. The finding of the auditors was that the Plaintiff/merchant did not receive this money. This money was with the Defendant bank and/or still in the system where the Plaintiff/the merchant cannot access it. This fact is not challenged or contested by the Defendant. The findings were not academic but should be considered in determining liability with regard to charge backs. The Defendant bank cannot assert that the Plaintiff is liable in charge backs to the extent of the total sums contained in the prime system extracts where the Plaintiff did not receive the money or any of it. To do so would amount to unjust enrichment. The sum of **Uganda shillings 359,071,764/=** was never received on the Plaintiffs account. In the test suit the principle held was that the bank is entitled to debit the merchant account with the amount of chargeback it is liable to. On the basis of the audit report, it is apparent that the Plaintiff is not liable to any chargeback liability.

Under section 98 of the Civil Procedure Act cap 71, the court has inherent powers to make orders for the attainment of justice. It would be a miscarriage of justice to condemn the Plaintiff to liability for chargeback amounts it did not receive as the Defendant appears to contend. In the test suit, the award was made without investigating whether the merchant had received the sums that were ruled to be chargeback. In the instant case questions of fact were investigated by auditors who found that the Plaintiff never received any of the amounts contained in the chargeback record. In the circumstances the test suit findings is not a bar to make orders for the attainment of justice. In the case of **Rawal vs. Mombasa Hardware Ltd [1968] EA 392** it was held that the court has control of its orders until it is perfected. Even if the order is made in the presence of the parties and after argument, it is open to the court before it is perfected to recall the order. The use of the inherent powers of the court to correct any injustice can also be found in the case of **Dr James Akampumuza and another versus Makerere University Business School and two others Miscellaneous Application Number 514 of 2012**. It is not sufficient for

the Defendant's Counsel to submit that the Defendant is entitled to all monies in the prime system extracts of charge backs. To hold so would occasion an injustice considering the fact that the money alleged to be chargeback is with the Defendant bank. There is also a fact of great importance that there was in totality no charge back in respect of the Plaintiff. At page 6 of the auditor's report, it is indicated that the ID number of the Plaintiff on the bank statement is 1000 0776. This ID number is supposed to be the same on the prime system extracts (chargeback record). The identification number does not in fact match with the one on the bank statement. Therefore the claim for charge backs by the Defendant against the Plaintiff is with all due respect misconceived. What is reflected is not applicable to the Plaintiff and the court should come to this conclusion.

On the question of liability with regard to chargeback requests, it should be based on uncontested questions of fact that the Plaintiff did not receive any of the amounts in the chargeback reports/prime system extracts. The provisions of the merchant agreement set up by the Defendant's Counsel namely clause 7.4 that the merchant is required to provide information regarding the transactions as the Defendant may reasonably require is inapplicable because there was no request for any information by the Defendant. What the Defendant's agents did was to impound the point-of-sale machine and related documentation according to the testimony of DW2 Mr Manina Tony. The actions of the Defendant were not bona fide. In the premises Counsel reiterated submissions that judgment be entered for the Plaintiff in the sum of **Uganda shillings 92,930,000/=** credited on the account of the Plaintiff and not the subject of any chargeback transaction, general damages in the sum of **Uganda shillings 120,000,000/=**, special damages, interest at 28% per annum and costs of the suit.

Judgment

I have carefully considered the Plaintiff's pleadings, the Defendant's pleadings, and counterclaim together with the submissions of Counsel and authorities cited and the audit report.

Proceedings in this suit were stayed by consent of Counsel in **HCCS 116 of 2010, Konark Investments (U) Ltd versus Stanbic Bank Uganda Limited**. On 7 April 2011 it was agreed by Counsel that the above suit would be tried as a test suit under the provisions of Order 39 rule 1 of the Civil Procedure Rules and proceedings in the case of **Mars Tours and Travel Limited versus Stanbic Bank Uganda Limited** would be stayed pending the outcome of that suit. It was further agreed that the stay order is extended to the case of **Best Connect Tours and Travel Limited vs. Stanbic Bank (U) Limited HCCS No. 172 of 2010**. Judgment in **HCCS 116 of 2012** was delivered on 17 February 2012. Subsequently Counsel in this suit agreed to have some questions referred to auditors under the provisions of section 27 of the Judicature Act for determination.

Starting with the provisions on test suits Order 39 rule 1 of the Civil Procedure Rules provides that:

"Where two or more persons have instituted suits against the same Defendant and those persons under the provisions of Rule 1 of Order 1 of these rules could have been joined as co-Plaintiffs in one suit, upon the application of any of the parties the court may, if satisfied that the issues to be tried in each suit are precisely similar, make an order directing that one of the suits be tried as a test case, and staying all steps in the other suits until the selected suit shall have been determined, or shall have failed to be a real trial of the issues."

Order 1 rule 1 deals with who may be joined as a co-Plaintiff. All persons may be joined as Plaintiffs in whom any right to relief in respect of or arising out of the same act or transactions or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where if those persons brought separate suits, any common questions of law or fact would arise. The common question of fact in HCCS 116 of 2010 and the current suit is that the Plaintiff's account had been frozen for the same reasons that it was alleged by the Defendant that the point-of-sale machine installed for use in the Plaintiffs business made the Defendant bank liable to charge backs. All the Plaintiffs are alleging that the freezing of their account was unjustified. However even if a test suit has been tried under the provisions of Order 39 rule 1 of the Civil Procedure Rules, it is not automatic that the outcome of the test suit would apply to the suits which have been stayed. The completed suit should qualify to be a trial of the real issues in the suit which has been stayed before its application therein.

Secondly and again by consent of the parties, no evidence was adduced in the current suit and instead Counsels decided that the matter could be resolved on the basis of a reconciliation of accounts by establishing whether certain entries referred to as chargeback records were ever credited on the Plaintiffs account. Messieurs KAL Associates and Certified Public Accountants indicated that their instructions which were jointly given by Counsel for the Plaintiff and the Defendant was to try the following two questions namely:

1. Whether transaction amounts on bundles of documents marked as "A" (chargeback records) were credited on the bank account marked "B" (bank statement) by matching the transaction amounts on "A" and the credits on "B".
2. How much of such transaction amounts on "A" were credited on the bank account "B" if any.

They went on further to indicate that they were not engaged to and did not conduct an audit, the objective of which would be the expression of an opinion on the cases of the parties. Consequently they never expressed any opinion. Furthermore they indicated that the report is intended solely for the information and use of Messieurs Sebalu and Lule Advocates and Legal Consultants as well as Messieurs Balyejjusa and Company Advocates and is not intended to be used by anyone other than the specified parties.

When the matter was mentioned for holding a scheduling conference the Plaintiff's Counsel as well as the Defendant's Counsel agreed that the Defendant bank would avail detailed bank statements, batch forms or transaction slips that the Defendant claimed in relation to charge backs by 1 March 2013. On 30 April 2013 the court advised that the question of transactions was best handled by auditors and that Counsels will attempt to work out the terms of reference. Subsequently and after several adjournments the parties agreed to appoint auditors. On 2 October 2013 the court order reads that the auditors Messieurs KAL Associates Certified Public Accountants are appointed under section 27 (c) of the Judicature Act to reconcile the accounts of the Plaintiff and the Defendants for the period when they were in possession of the Defendant's point of sale machine. The terms of reference are as discussed on the 10th of May 2013. The Plaintiff's was to make a written undertaking that they are not in any way associated with the appointed auditors. The audit shall be conducted within the timeframe of 60 days from the date of the order and Counsels were to write a joint instruction letter to this effect.

I have carefully checked the record for proceedings of the 10th of May 2013 but I was unable to retrieve the same. Correspondence on record however shows that on the 7th of May 2013 the Plaintiff's Counsel wrote to the Defendants Counsel a letter a copy of which was filed on court record on the 7th of May 2013. In the letter the Plaintiff's advocates make reference to court proceedings of 30th of April 2013 and therefore proposed to the Defendant's Counsel the following terms:

> "… We propose a reconciliation of the following:
>
> a) Determination of the respective chargeback transaction amounts that were credited into the merchant bank account (if any).
> b) Determination of the credit transactions onto the merchant bank account that did not arise from the alleged chargeback transactions (if any).
> c) Determination of the status of the alleged chargeback transaction amounts that were never credited onto the merchant bank account i.e. as an answer to the question: "Could the merchant bank access such funds?"

Subsequently the Plaintiff wrote several letters to the Defendants Counsels on the question of reconciliation of accounts. On 16 December 2013 the court was informed that the parties had jointly instructed auditors giving them the terms of reference for the reconciliation of accounts. The letter of instructions is undated however the question for determination by the auditors has been reproduced above.

Section 27 (c) of the Judicature Act provides as follows:

> "27. Trial by referee or arbitrator.
>
> Where in any cause or matter, other than a criminal proceeding –

(a) all the parties interested who are not under disability consent;
(b) the cause or matter requires any prolonged examination of documents or any scientific or legal investigation which cannot, in the opinion of the High Court, conveniently be conducted by the High Court through its ordinary officers; or
(c) The question in dispute consists wholly or partly of accounts, the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties or before an official referee or an officer of the High Court."

In this particular case, the parties agreed that certain questions of fact arising in the suit be tried before a special referee or arbitrator agreed to by the parties. However the special referee or arbitrator agreed to by the parties to produce the reconciliation report was restricted to trial of particular questions of fact and were instructed not to express any opinion but to produce their findings upon reconciliation of accounts in answer only to the formulated questions to be tried.

The questions for trial could not answer whether there were charge backs which arose from the point of sale machine as was the case in the **Konark Investments Ltd versus Stanbic Bank Uganda Limited HCCS 116 of 2010** (the test suit). The question of whether the charge backs arose from transactions on the point of sale machine operated by the Plaintiffs can only be implied. Secondly the question was how much of the transaction amounts on "A" which are the chargeback transactions were credited on the bank account "B" (being the account of the Plaintiffs) if any.

The auditors established from the joint instruction letter that the Plaintiff and the Defendant executed a merchant agreement for the acceptance of MasterCard, Visa and debit cards as a form of payment by customers for services and goods consumed. All transactions for, payments were to be routed through the Defendant (Stanbic Bank (U) Ltd as the clearing medium.) Pursuant to the arrangement, the Plaintiff was provided by the Defendant with a point-of-sale machine. The scope of instructions are repeated in the report and is whether the transaction amounts on bundles of document marked as "A" were credited on the bank account marked "B" by matching the transaction amounts on "A" and the credits on "B". Secondly how much of amounts on "A" were credited on the bank account "B" if any. The period of reconciliation cover transactions that took place between 3 April 2009 up to 16 June 2009 and 11th of March 2009 to 23rd of February 2010 respectively.

Observations of the auditors:

The chargeback records in bundle "A" provided for the company Mars Tours and Travel Limited had identification number 10000778 while the Stanbic bank Uganda Ltd City Branch bank statement in the bundle marked "B" had identification number 10000776. There were totally no chargeback transactions to form a basis for matching the bank statement records of Mars Tours and Travel Limited (i.e. the identification number 10000776 on the bank statement could not be

traced on the chargeback records). The auditors proceeded to match the amounts on the bank statement and the amounts on the chargeback records for the identification numbers provided by tracing the respective credits on the bank statement with amounts in the chargeback record provided irrespective of the dates of the transactions to ascertain whether such an amount appears on both the chargeback record and the bank statement.

The auditors observed that most of the transactions on the chargeback records were in foreign currency. They were all however converted to the South African Rand and later converted into Uganda Shillings at an exchange rate of 250/= Uganda shillings to 1 South African Rand. The chargeback record transactions are for a period ranging from 3 April 2009 to 16 to June 2009. On the other hand the bank statement is for a period ranging from 11th of March 2009 to 23rd of February 2010.

The auditors found that there were 112 number of transactions on the bundle "A" (chargeback records) and 15 number of transactions in the bundle "B" (bank statement) for the period in range in respect of the identification numbers on the statement.

The methodology used by the auditors is worthy of consideration. The auditors listed all transactions under a schedule in a tabular format and developed columns and rows to provide for the respective dates of transactions within range; the transaction amounts in foreign currency; the exchange rate; the amounts converted to South African Rand; the amounts converted to Uganda shillings; the amount of the chargeback record on the corresponding date; and finally the amount of Uganda shillings on the bank statement on the corresponding date.

As far as the methodology is concerned, the auditors tried to match corresponding amounts and corresponding dates. As far as dates are concerned, a chargeback only comes about after the owner of the account discovers the fraud and informs his or her bankers that an unauthorised transaction had taken place. From the decision in the test the suit, this may happen from between a few days to several weeks. It is only thereafter (that is after the complaint that an unauthorised transaction had taken place) that the bank which issued the credit card would issue the chargeback which is a reversal of the payment it would have sent to the bank of the merchant i.e. the Defendant. It follows therefore that matching of dates may not necessarily and without further elucidation of facts indicate whether the transaction in question is the transaction in issue. The auditors also checked the transaction amounts into two categories used for reconciliation.

On issue number one of whether transaction amounts on bundles of documents marked as "A" were credited on the bank account marked "B" by matching the transaction amounts on "A" and the credits on "B", the auditors observed that there was no matching transaction between bundle "A" and the credit bundle "B". By necessary implication, the transaction amounts on bundle "A" were all never credited on bundle "B" (the bank statement).

On issue number two as to how much of such transaction amounts on "A" were credited on the bank account "B" if any, the observation was that none of the amounts on bundle "A" were credited on the bank account (bundle "B").

I have carefully considered the written submissions of the Plaintiff's Counsel as well as the written submissions of the Defendants Counsel on the implications of the findings of the auditors.

I agree that the appointment of the auditors was made by consent of the parties under section 27 (c) of the Judicature Act. The effect of the provision is that reference was made to a special referee for trial of questions of fact narrowed down to the two issues on which the auditors made their findings. The findings do not address the question of liability and contained no opinion of the auditors as requested by the parties. The principal finding is that the chargeback record produced by the Defendant bank and which is not disputed is not related to the money credited on the Plaintiffs account with the Defendant bank.

The implications are that even if the transaction arose out of the use of the POS devise given to the Plaintiff under the merchant agreement, no money for the transaction was credited to the Plaintiff's account. However transaction slips were presented or the transactions reflected in the transaction slips generated from the POS device were further forwarded to the relevant bank of the customer's who allegedly used the services of the Plaintiffs. As a consequence the Defendant bank was credited with the amounts of the relevant transactions generated by the POS device in the form of transactional slips. However the relevant banks who issued the credit cards reversed the transaction making it obligatory for the Defendant bank to refund whatever monies they had remitted to the Defendant bank and which was for onward transmission to the Plaintiff merchant through its account. I considered the meaning of a chargeback as defined by the standard clause 3.4 of the merchant agreement in the test suit. At page 37 it is written that clause 3.4 defines a "chargeback" as "a transaction which is returned by the issuing bank and which Stanbic bank may debit to the merchant account". Furthermore a chargeback meant that the money is taken out of the merchant bank namely the Defendant and remitted to the account of the issuing bank and to the credit of the genuine cardholder. The merchant bank is liable to the issuing bank up to the amount of the transaction transferred to the Merchant bank or originating from the POS device operated by the Plaintiff. The POS device is a means of payment of the Plaintiff for goods or services consumed by the person making the payment or the cardholder.

It follows that where there is a chargeback, it must be established that the basis of the chargeback is the transaction entered via the POS device and uploaded to the merchant bank for processing of the payment and for purposes of crediting the Plaintiffs account. Where a transaction is generated by the POS device in the possession of the Plaintiff but not credited on the merchants account in the merchant bank/Defendant, the money which is processed is supposed to be held in a suspense account pending action. In the test suit and according to DW 3 exhibit D6 which is the prime system entries record gives an account of various chargeback's related to transactions

on the Plaintiffs POS device in that case. What is relevant for purposes of this suit is that the Plaintiff uploads information from the credit card and the POS device on any transaction by a cardholder and the information is captured under the prime system and reflected into a suspense account. The system captures all transactions coming from merchant and cardholders and reflects charge backs and normal transactions. Charge backs as earlier noted are reversals of debits from the cardholder's account in whichever bank the money from the cardholders account has been remitted from. The merchant agreement allows liability for chargeback to be passed onto the merchant. In such cases it is immaterial that skimmed cards, cloned cards or stolen credit cards are used to access goods and services provided by the merchant/in this case the Plaintiff. It is expected that the merchant is fully equipped to detect fake cards and to follow the procedure for identifying the cardholder who buys goods and services from the merchant. In the test suit after checking the relevant transactions it was concluded that the Defendant proved that it became liable to chargeback through the use of the POS device installed at the premises of the Plaintiff.

The auditors dealt with the question of identity of the Plaintiff company and particularly identity of the bank statement. In the chargeback record bundle "A" for the Plaintiff, the identity number is 10000778 where the Stanbic bank Uganda city branch bank statement in bundle marked "B" had an ID number of 1000 0776. However there was no evidence either from the Plaintiff or the Defendant about the chargeback. The documents presented to the auditors were agreed documents and a bundle "A" is supposed to be the chargeback records for the operation of the POS machine by the Plaintiff. In rejoinder the Plaintiff's Counsel submitted that the identity related to a different person and not the Plaintiff (the identity of the chargeback records). This could not be established by the auditors and it cannot be concluded on the basis of the identity numbers for the chargeback record compared to the bank statement identity number. Positive evidence has to be led to prove that the charge backs considered by the auditors do not relate to the operation of the POS device given to the Plaintiff to manage payments through the use of credit cards from credit cardholders who are its customer's. None of the parties prayed that this issue should be tried. All the proceedings and the basis of the reconciliation is that the documents related to the operation of the POS device which had been given to the Plaintiff to aid payment using credit cards. I would therefore not as yet dwell on the findings as to the identity number reflected in the chargeback record.

The question of fact that has been established is that the chargeback amounts had not been credited on the Plaintiffs account. I agree with the Plaintiff’s Counsel that where the chargeback amounts were not credited to the merchants account, they remained under the control of the merchant bank. The periods in the charge backs are also not part of the findings. The most crucial evidence to be established was whether transactions using the POS device in the Plaintiff’s premises resulted in credits on the Plaintiffs account with the Defendant bank as a result of the processing of the POS devise transactions and getting money from the card user’s account in whichever country the account is held and remitting the relevant amount to the merchant bank. From the merchant bank the money from the cardholder's account is to be

credited to the merchant's account. It follows that if the transactional amounts in the chargeback record relevant to the operation of the POS device on the Plaintiff's premises do not match credits on the Plaintiffs bank account with the Defendant bank, the conclusion of the auditors is that no money was credited on the Plaintiffs account from the card user's account in the first place. The conclusion of the Plaintiff's Counsel with which I am in agreement is that if money was credited from the card user's account, it remained with the Defendant bank and had not been credited to the merchant's account.

The auditors were supposed to reach this conclusion by comparing transactional amounts reflected in the chargeback record, relevant dates, and matching them with credits from the Defendant bank to the Plaintiffs account. To do this they had to use the Plaintiff's bank statement generated by the Defendant bank in the document marked annexure "B". As noted earlier there is no factual data put before the court about the duration between the transaction between the Plaintiff and the cardholder and the time of the chargeback. A chargeback is a reversal that is made after the fraud is discovered which may be after a period of between a few days to several months. However the auditors were content to comparing transactional amounts in the charge back record generated by the Defendant's prime system. The transactional amounts went through a complicated series of currency change first of all to the South African Rand from the currency presumably of the cardholder to and from the South African Rand to Uganda shillings at an exchange rate of 250 shillings to 1 Rand. Presumably the exchange rates were provided by the Defendant bank for the auditors use.

Whatever the case may be, equivalent amounts reflected in the chargeback record could not be traced as a credit on the Plaintiff's bank statement for the relevant period. Both parties accepted the conclusion of the auditors. I take it as a question of fact that the chargeback records are not related to transactions for which the Plaintiff's bank account had been credited. It also follows that the money that is credited on the Plaintiff's account did not arise as a result of a transaction which led to chargeback liability for whatever amounts. In other words not all transactions led to charge backs. Even the number of transactions examined by the auditors is clearly disproportionate to the number of charge backs that arose as a consequence of operation of the POS device. There are 112 chargeback transactions compared to 15 credits in the bank statement of the Plaintiff. There is no suggestion that each of the credited amounts do not relate to a single transaction. In other words if the 15 credited amounts were aggregated amounts, then there would be a problem because they would have no equivalent in the chargeback record. Each chargeback is presumably based on each separate transaction and possibly arising from different cardholders. The problem of the factual vacuum is aggravated by the finding of the auditors that the identification number of the chargeback printout is different from that of the Plaintiff's statement of account. However without evidence as to why the identification number is different since they deal with different records, I find it difficult to reach a conclusion so as to answer the question as to whether the chargeback record annexure "A" considered by the auditors does not

arise from transactions entered through the POS devise installed at the Plaintiffs premises. There is simply no evidence either way.

In the test suit, the Defendant admitted that the chargeback amounted to only Uganda shillings 27,732,355/=. The Defendant also admitted that it had not debited the Plaintiffs account with that amount and that the account had been frozen since May 2009. In the instant case chargeback records reflect transactions that took place between 3rd of April 2009 to 16th of June 2009. The bank statements are for the period 11th of March 2009 and to 23 February 2010. The implication of the period is that the charge back record covers the period when the POS device was in the possession of the Plaintiff. The Plaintiff's account was frozen and the POS devise taken away around the same time. The account was frozen in May 2009. Since that time the Plaintiff was unable presumably to use the account. The bank statement considered by the auditors started from 11th of March 2009 running up to July 2010. There are several entries which have the number 10000776. The entries are for relatively large sums of money each time. On 14 April 2009 there is an entry for Uganda shillings 6,127,500/=. On 16 April 2009 there is another entry for Uganda shillings 7,983,515/= on 15 April 2009 there is an entry for Uganda shillings 10,541,200/=. On 20 April 2009 there is an entry for Uganda shillings 11,311,175/=. On the 20th of May 2009 there is an entry for Uganda shillings 32,290,500/=. On the same day that is another entry for Uganda shillings 9,918,850/=. There are other entries but suffice it to say that subsequently on 16 June 2009 there is an entry for Uganda shillings 88,258,500/= being balance brought forward. Thereafter there were no other transactions for the identification number referred to above. This prima facie demonstrates that the account was dormant after 16th of June 2009. In the circumstances the conclusion of the auditors is the only fact that is available and proves the Plaintiff's case on the balance of probabilities.

Secondly the investigation of the auditors never considered whether the 112 transactions were generated from the POS device installed at the Plaintiff's premises. That notwithstanding the audit was conducted on the basis of documents submitted by both parties. The Defendant submitted chargeback records relating to transactions carried out on the POS devise installed at the Plaintiff's premises. If the transactions did not relate to the POS devise when it was operated in the Plaintiff's business, the Plaintiff's Counsel ought to have made the auditors aware of this fact and also notified the Defendant's Counsel so as to get the appropriate response for consideration by the auditors. Section 27 of the Judicature Act provides for trial by a referee or arbitrator. Particularly section 27 (c) of the Judicature Act and the last part thereof provides that "the High Court may, at any time, order the whole cause or matter or any question of fact arising in it to be tried before a special referee or arbitrator agreed to by the parties.…". The provision deals with trial by a special referee or arbitrator agreed to by the parties. Secondly under section 28 of the Judicature Act it is provided that and I quote:

"In all cases of reference to a referee or arbitrator under this Act, the referee or arbitrator shall be deemed to be an officer of the High Court and, subject to the rules of court, shall have such powers to conduct the reference in such manner as the High Court may direct."

The question referred to the auditors could only be tried on the basis that the chargeback record related to the POS device which had previously been used by the Plaintiff before it was impounded by the Defendant. It is too late to question the identity of the transactional slips or data on the ground that it does not relate to the Plaintiffs business. The fact that the transactions were not credited on the Plaintiffs account according to the bank statement only means that the Plaintiffs account cannot be debited with the chargeback. In HCCS 116 of 2010 Konark Investments (U) Ltd versus Stanbic Bank (U) Ltd (the test suit) it was the finding of the court that fraudulent transactions do not have to be within the knowledge of the merchant since they can be based on skimmed cards. Where there are skimmed cards by necessary implication, the merchant may not be aware that the customer is using a skimmed card or a stolen card. However under the customer/bank relationship in the merchant agreement, the Defendant bank is allowed to debit the Plaintiff's account in the event of a chargeback. Liability for chargeback is passed onto the merchant. Obviously where the merchant's account has not yet been credited with the amount in the transaction which eventually ended up in chargeback liability, the money for the chargeback cannot be charged on the merchant's account since the money would still be with the merchant bank somehow. In the test suit it was my finding that it was unnecessary to freeze the Plaintiff's account because there was a contractual remedy of debiting the Plaintiff's account with the chargeback liability arising from operation of the POS devise by the Plaintiff. The duty is on the Plaintiff to vet all kinds of customers so as to ensure that stolen cards, skimmed cards etc are not used to defraud the genuine cardholder. In any case the merchant does not have to be at fault to be liable. The merchant is obliged to indemnify the bank for chargeback liability and the bank has the right to debit the merchant account with the chargeback liability amount.

Remedies

I wholly agree with the Plaintiff's Counsel that the Plaintiff is entitled to the money credited on its account because the auditors were unable to show that the chargeback's related to any of the amounts credited on various dates on the Plaintiffs account. The Plaintiff's Counsel prays for refund of the money. However in the pleadings it is clear that the Plaintiff seeks declarations that the blocking or freezing of operations on its account number 0140028289101 is unlawful. The freezing of operations on the Plaintiffs account was made under an order of the court and was therefore not unlawful. It was unwarranted since the Defendant had a contractual remedy of debiting the Plaintiff's account with chargeback liability. Consequently the second order prayed for in the plaint for unfreezing the Plaintiffs is account is granted. The Plaintiff would be permitted to use its account in the ordinary course.

General damages

In the test suit I found that the Plaintiffs account was frozen for a period of two years. During that period, the value of the money had been devalued by inflation. Secondly the Plaintiff was not able to use this money. Consequently in that case the Plaintiff was entitled to pecuniary damages. In that suit the Plaintiff was awarded Uganda shillings 50,000,000/= for the blockage of its account. In that suit the Plaintiff was unable to use Uganda shillings 15,000,000/= due to the blockage of its account. The facts of this suit are however different. In this particular case the Plaintiff has **Uganda shillings 88,258,500/=** which it has not been unable to use. This amount of money is more than six times the money the Plaintiff was entitled to in the test suit. In the test suit the Defendant had failed to exercise its contractual right to debit the Plaintiff's account. In this suit, that is no basis for debiting the Plaintiff's account since all the transactions in the chargeback record are not related to the credits amounting to **Uganda shillings 88,258,500/=**. Any chargeback liability money is a reversal of credit, credited with the Defendant's system and not in the control of the Plaintiff through its account in this case. The chargeback would only be reversed from where the Defendant had kept the money. There can be no chargeback unless there has been a credit to the merchant bank from the account of the cardholder. However where the chargeback amount never reached the merchant's account, it is only the Defendant bank/merchant bank which can account for the money. The best the Defendant can do is to establish where the money was kept i.e. on which account. The money was not kept on the Plaintiffs account and therefore the Plaintiff cannot be debited with the chargeback liability. However as far as justification is concerned, it is the merchants liability where chargeback liability arises from the use of the POS device. Since the money is within the system of the bank, there is no need to consider how much in chargeback liability was generated. The problem is further a consequence of the very narrow terms of reference in terms of questions to be investigated in the audit.

General damages are awarded on the common law doctrine of *restitutio in integrum* which means that Plaintiff has to be restored as nearly as possible to a position he would have been in had the injury complained of not occurred according to the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41.** Secondly according to **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 1063 at page 484, it is a common law principle that upon breach of a contract to pay money due, the amount recoverable is normally limited to the amount of the debt together with such interests from the time when it became payable under the contract or as the court may allow. On the other hand in paragraph 812 general damages are defined as those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are those damages which will be presumed to be the natural or probable consequence of the wrong complained of; with the result that the Plaintiff is required only to assert that such damage has been suffered. The Plaintiff is entitled to the money on its account as well as interest on it from the date the account was frozen up to the date of judgment at the rate of 21% per annum. For the avoidance of doubt the Plaintiff's account was frozen in May 2009 and interest shall run from 1st of June 2009 till the date of judgment. The

Plaintiff is additionally entitled to an award of **10,000,000/= Uganda shillings** which together with the interest constitute general damages.

As far as the counterclaim is concerned, the Defendant is entitled to pay all the money in the chargeback record to the relevant banks which remitted it as reverse of the credit. Since the money is with the Defendant, the Defendant will recover it from which ever account it has been banked in. The liability cannot be passed onto the Plaintiff. In the test suit the Defendant was awarded Uganda shillings 10 million general damages for inconveniences caused by operation of the POS device in such a manner that it generated chargeback liability. The Defendant is obliged to reverse the payment and remit it to the banks which remitted payments from the genuine cardholders account and therefore suffered inconvenience and costs as well as loss of commission. A similar award shall be made in this case. I must however emphasise that chargeback liability is part of the risk for the use of POS devises in business. Therefore where it arises, it is passed over to the merchant. The merchant in theory by deliberately or negligently incurring it is the loser. Consequently it is not a case of common law or statutory fraud but one of risk allocation and indemnity. A merchant who suffers chargeback liability may still make profit and therefore they cannot be treated like persons who have generated liability for the bank. Nonetheless they must be careful how to conduct transactions using credit or debit cards as a means of payment. **Uganda shillings 10,000,000/=** is awarded for inconvenience caused to the Defendant bank.

As far as the costs of the auditors are concerned they are costs which ordinarily are taxable by the taxing master.

The Plaintiff is awarded interest on all pecuniary awards at 21% per annum from the date of judgment till payment in full. Similarly the Defendant is awarded interest on the general damages at 21% per annum from the date of judgment till payment in full.

Each party will bear its own costs of the suit.

Judgment delivered in open court this 14th day of July 2014

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Balyejjusa Ivan Counsel for the Plaintiff

Mugaga Musa, Director of Plaintiff in court

Paul Mbuga Counsel for the Defendant absent.

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge