

THE REPUBLIC OF UGANDA

IN THE HIGH OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

HCT-OO-CC-CS-295-2008

MAATSCHAPPIJ VONCK. B.V.B.A.:.....:PLAINTIFF

VERSUS

1. ANDREAS LYBAERT}

2. KARL WIPFLER}:.....:DEFENDANTS

BEFORE HON. LADY JUSTICE HELLEN OBURA

JUDGMENT

By an agreement dated 10th October 2003, Mr. Eric Vonck, a director in the plaintiff company, Mr. Andreas Lybaert (the 1st defendant) and Mr. Karl Wipfler agreed to form a company which would take over an earlier agreement between Wamiko Construction Company Ltd (herein after called Wamiko) and MY.Vonck. B.V.B.A. to produce sandwich panels in Uganda. The total investment from the new company was stated in the agreement to be 628,000 Euros which was to be financed as follows; 247,250 Euros was said to have been contributed by the Belgium Government by way of a grant, while Mr. Eric Vonck and the defendants were to contribute the balance of 380,250 Euros in equal amount of 127,000 Euros a representation of 33.33% of the shares in the new company.

The new company was incorporated under the name of Lyvopan (U) Ltd on the 21st day of November 2003 and on the 20th day of July 2004 (Exhibit P21), the defendants wrote to Mr. Vonck of MY.Vonck. B.V.B.A. confirming that the total investment was to be 495,000 Euros of which the signatories to the letter including Mr. Erick Vonck himself undertook to participate in the investment and pay 247,500 Euros representing 50% of the total investment and the remaining part would be provided by the Flemish Community through the intermediation of Mr. Vonck.

According to the agreement of 10th October 2003 (Exhibit P1) it was provided that if any of the persons involved in the agreement failed to meet the full agreed amount, the other persons involved would come to his aid. To that end, by an agreement dated 19th May 2004 between the plaintiff and the 1st defendant on the one part as lenders and the 2nd defendant on the other part as the borrower, the 1st party agreed to lend the 2nd party 127,000 Euros to cover his entire equity contribution in Lyvopan (U) Ltd.”

According to the bill of lading dated 7th May 2004, the following items were consigned by the plaintiff to Lyvopan (U) Ltd (ExhP5); 1 unit used Truck Head Scania Chassis No. XLER4x20004394759, 1 unit used Trailer Trabosa Chasis No. VSUSAK383KMT16124 and loaded with a used steel press. Freight was payable at destination. On the 5th day of April 2004, (almost one year after the date of the bill of lading) two invoices (Exhibits P6 & P7) and on 31st July 2014 another invoice (Exhibit P9) and Exhibit 10 respectively) were raised by the plaintiff against Lyvopan (U) Ltd indicating the amount to be paid and a demand was sent on the 11th day of July 2006 showing that an outstanding amount of 477,494 Euros in favor of the plaintiff was due. No payment was made hence this suit.

The plaintiff’s claim against the defendant according to the plaint is jointly and severally for the recovery of 320,898 Euros (three hundred twenty thousand eight hundred ninety eight only Euros) and USD 14,462 (united states dollars fourteen thousand, four hundred forty two only) being the value of a press line production line for sandwich panel supplied to M/s Lyvopan (U) Ltd and freight charges from Belgium to Kampala, general damages, interest and costs of the suit.

From the joint case scheduling memorandum, the agreed facts of this case were that the parties entered into an agreement. The issues that agreed upon are;

- 1) Whether or not the parties had a contract and if so what were its terms.
- 2) Whether or not there was failure of consideration as pleaded in paragraph 6 of the defence.
- 3) Whether or not the defendant or any of them undertook to pay for the machinery.
- 4) Whether or not the defendant or any of them paid money toward purchase of the machinery.

- 5) Whether or not the defendants are liable to pay the sums claimed by the plaintiff.
- 6) Whether the plaintiff is entitled to the remedies sought.

At the hearing, the plaintiff was represented by Mr. Fred Muwema from Muwema and Mugerwa Advocates. The 1st defendant was represented by Mr. Peter Mulira of M/S Mulira & Co Advocates while the 2nd defendant was represented by Dr. Joseph Byamugisha of J.B. Byamugisha Advocates. The plaintiff and the 1st defendant each produced one witness while the 2nd defendant filed a deposition by the 2nd defendant himself which was conceded to by all the parties and was not subjected to cross examination. Following closure of hearing evidence, the parties filed written submissions which I have duly considered in this judgment.

I will now proceed to consider the issues in the same order in which they were framed and argued by counsels for the parties.

ISSUE NO. 1:

Whether or not the parties had a contract and if so, what were its terms.

The plaintiff submitted that Exhibit P1 was a pre-incorporation agreement and a binding contract on the three parties who signed it with intention of being legally bound to perform the contract. It was argued that the plaintiff had interest in the contract because it stated that; “*the new company would take over the contract Exhibit D7 between Wamiko Construction Company (owned by the defendant) and MY VONCK B.V.B.A (short abbreviation for the plaintiff). In Exhibit D7 Wamiko had agreed to invest in plant and machinery for the production of sandwich panels at a total cost of 628,000 euros, (the same amount cited in Exhibit P1).*” [Emphasis added]. It was contended that the role of the plaintiff was to help source for the machinery and provide technical support.

It was from this submission that the plaintiff reached a conclusion that whereas Exhibit P1 provided that the new company would take over the contract in Exhibit D7 (i.e. invest 628,000

Euros in the machinery), the responsibility of raising that money rested with the parties and therefore it became a personal debt on the parties and not the unincorporated company which had no corporate status and it could not contract any debts.

The plaintiff submitted further that it matters not that parties contracted to make the investment in the sandwich panel machinery for the benefit of the company business as this benefit would not introduce any liability on the company. The parties intended that they would be personally liable that is why the last paragraph of Exhibit P1 provided that; “***if any of the persons involved in this agreement fail to meet the full agreed amount, the other persons involved will consider to come to his aid.***” [Emphasis added]. The case of **The New Vision Printing & Publishing Co. Ltd v Peter Kaggwa HCT-OO-CC-MA- 0127of 2006** was relied upon to support the argument that a limited liability company is not liable for the personal debts of its individual members.

The plaintiff further submitted that it was on the strength of the parties’ commitment to invest in the new company that the plaintiff through the instruction of PW1 procured and shipped the machinery to Uganda because when the plaintiffs had worries about payment, PW1 together with the defendants executed Exhibit P21 (which was not disputed at the trial) where they undertook to participate in the investment for a revised amount of 247,500 Euros. A reading of Exhibit P21 together with Exhibit P1, counsel argued, clarifies that it was the same parties to Exhibit P1 who were renewing their earlier commitment to the plaintiff to pay for the machinery. The language of Exhibit P21 betrays any claims that it was Lyvopan (U) Ltd which was undertaking to pay for the machinery.

The plaintiff therefore concluded that there was a contract between the plaintiff and PW1 together with the defendants for the purchase of machinery premised on Exhibit D7, Exhibit P1 and Exhibit P21 and the plaintiff performed its part of the contract by procuring the machinery and delivering it to Uganda and prayed that court finds this issue in favor of the plaintiff.

On the other hand, the first defendant submitted that there is no dispute as to the existence of the two contracts between the defendants and PW1 but emphasized that there was no contract between the plaintiff and the 1st defendant.

The 2nd defendant also submitted that by reading Exhibit P1 it is clear that the plaintiff is not a party to the agreement, just as Lyvopan (U) Ltd and Wamiko whose contract with MY VONCK

B.V.B.A the new company was supposed to be taking over are also not party to the agreement. Furthermore, that the taking over, or more specifically, the assignment of the agreement and the terms of the assignment were not produced in court.

The 2nd defendant relied on **Exhibit D2**, an agreement in which Erick Vonck and the 1st defendant agreed to advance the sum of US\$ 127,000 to the 2nd defendant to cover his entire equity contribution in Lyvopan (U) Ltd which indicates that the 127,000 Euros each of the parties agreed to contribute was not to pay the plaintiff for the goods it supplied. He argued that it was purely for equity in the company to be formed. It was also contended for the 2nd defendant that all the bills of lading and invoices for the goods were sent to Lyvopan (U) Ltd showing that there was no contract between the plaintiff and the defendant as no machinery was procured for or delivered to the defendants.

The 2nd defendant submitted further that while Exhibit P1 is irrelevant for contract purposes here, Exhibit D7 is a contract between Wamiko and the plaintiff and is dated 10/10/2003 just like Exhibit P1 but nothing connects them together by an assignment or otherwise. It was stated that Exhibit P21 was written on the letter head of Lyvopan (U) Ltd after its incorporation and signed by the directors/shareholders Eric Vonck and the defendants and stamped at the bottom with Lyvopan (U) Ltd stamp. The investment is 495,000 Euros which Lyvopan (U) Ltd would participate to the tune of 247,500 Euros and not that each shareholder would pay 247,500 Euros as contended by the plaintiff. The defendants therefore prayed to court to decide this issue in the negative.

Section 10 (1) of the Contracts Act, 2010 defines a contract as an agreement made with the free consent of the parties with capacity to contract, for a lawful consideration and with a lawful object, with intention to be legally bound. This definition lays out the essential elements of the formation of a contract in Uganda.

According to the plaintiff's submissions, there was a contract between the plaintiff and the defendants but the defendants dispute this. The parties in their submissions on this issue basically relied on Exhibits P1, P21 and D7. I have reproduced these exhibits herebelow for purposes of comparing them with a view of showing in what capacity the parties signed them and also establishing whether or not there was privity of contract as relates to the plaintiff.

Exhibit P1,

“Agreement made between ERIC VONCK of GROTE BAAN 99 B 9920 LOVENDEGEM, BELGIUM and ANDREAS LYBAERT of WHITE HOUSE CLOSE, PLOT 2640 MUYENGA, KAMPALA, P.O.BOX 23855 and KARL WIPFLER of PLOT 8 HILL LANE, KOLOLO, KAMPALA, P.O. BOX 11273, KAMPALA.

*It was agreed that the ERIC VONCK, ANDREAS LYBAERT and KARL WIPFLER form a company which would take over the agreement between Wamiko Construction Company and MY. VONCK. B.V.B.A. The investment from the new company will be financed by **Eric Vonck, Andreas Lybaert and Karl Wipfler.***

*The Total investment is approximately 628,000 Euros. The Belgium Government has paid 247,250 Euros (Two hundred Fourty Seven Thousand Two Hundred Fifty Euros) as support which is not refundable. The balance from 628,000 Euros minus 247,250 Euros is 380,250 Euros. This 380,250 Euros will be paid equally by **Andreas Lybaert 127,000 Euros, Karl Wipfler 127,000 Euros and Eric Vonck 127,000 Euros.** Each person named above will receive 33.33% of the shares in the new company, namely: **Andreas Lybaert 33.33%, Karl Wipfler 33.33% and Eric Vonck 33.33%.***

If any of the persons involved in this agreement fail to meet the full agreed amount, the other persons involved will consider to come to his aid.

Agreed on this 10-10 day of 2003 between:

.....

.....

.....

ERIC VONCK

ANDREAS LYBAERT

KARL WIPFLER”

In the above agreement, the parties agreed that a new company to be formed by them would take over the agreement between Wamiko and MY VONCK B.V.B.A (Exhibit D7).

Exhibit D7,

**“AGREEMENT MADE ON THE TENTH DAY OF OCTOBER 2003
BETWEEN**

WAMIKO CONSTRUCTION COMPANY (U) LTD

P.O.BOX 11104, Kampala/Uganda

AND

MY. VONCK. B.V.B.A.

GROTE BAAN 99

B 9920 LOVENDEGEM.

*WAMIKO CONSTRUCTION COMPANY (U) LTD is represented by its
Chairman Mr. Andreas Lybaert and director Karl Wipfler.*

*MY VONCK B.V.B.A GROTE BAAN 99 B 9920 LOVENDEGEM is represented
by its Chairman Mr. Eric Vonck.*

*It has been agreed that WAMIKO CONSTRUCTION COMPANY (U) LTD will
invest in plant and machinery from Belgium for the production of sandwich
panels.*

WAMIKO CONSTRUCTION COMPANY (U) LTD will on one part provide the buildings, infrastructure like electricity, water, telephone, security, local man power etc and finance to the tune of 628,000 Euros (six hundred twenty eight thousand Euros only) for all the machinery delivered on site in Kampala.

MY VONCK B.V.B.A GROTE BAAN 99 B 9920 LOVENDEGEM has undertaken to purchase on behalf of WAMIKO CONSTRUCTION (U) LTD the best machinery for the successful running of the proposed sandwich panel factory.”

MY VONCK B.V.B.A GROTE BAAN 99 B 9920 LOVENDEGEM has also undertaken to provide technical and managerial know-how with man power from Belgium, to set up the production line and to provide if necessary skilled man power from Belgium for at least 3 years.

After setting up the production line and running it for at least 2 years, if any additional skilled man power from Belgium is required in Uganda, WAMIKO CONSTRUCTION (U) LTD will have to pay all the costs involved.

Delivery time of the machinery will be approximately May, 2004.

Agreed in Kampala, on this 10-10 day of 2003 between:

1. WAMIKO CONSTRUCTION CO (U) LTD

P.O.BOX 11104,

KAMPALA/UGANDA

3. VONCK.B.V.B.A.

GROTE BAAN 99B 9920

LOVENDEGEM, BELGIUM

*.....
ANDREAS LYBAERT (Chairman)*

*.....
ERIC VONCK (Chairman)*

2. WAMIKO CONSTRUCTION CO (U) LTD

P.O.BOX 11104,

KAMPALA/UGANDA

.....
KARL WIPFLER (Director)

ExhP21

“

LYVOPAN

20th July, 2004

Mij Vonck bvba

Grote Baan 99

9920 Lovengegem

Belgium

*Dear **Mr. Vonck,***

With regard to the investment of a new press line for the production of sandwich elements in Kampala Uganda, we would like to confirm to you the following.

The total investment concerned amount to 495,000 Euros. We undersigned, will participate in this investment for 247,500 Euros, the remaining part will be provided by the Flemish community through your intermediation.

This means that we can indeed confirm to you that we commit ourselves to take 50% of the total investment cost at our charge.”

.....
.....

Mr. Erick Vonck **Mr. Andreas Lybaert** **Mr. Karl Wipfler**
Chairman/Director **Director/Shareholder** **Director/Shareholder**
Shareholder

It's important to note the difference between the construction of Exhibit P1 and Exhibit D7 as reproduced above. It is also noteworthy that they were signed on the same day with the same signatories although in Exhibit P1 there was no mention that they were signing for and on behalf of the companies they represented in Exhibit D7. Curiously, Exhibit P21 was addressed to Mr. Vonck who also happened to be a signatory to the same. In effect he was writing to himself. To my mind there was an obvious case of conflict of interest especially by Mr. Vonck. Nevertheless, by that letter the three of them as directors of Lyvopan (U) Ltd confirmed the investment sum and their participation in the investment as well their commitment to take 50% of the total investment but they signed as directors and shareholders of Lyvopan (U) Ltd.

It was the plaintiff's submission that Exhibit P1 is a pre-incorporation contract made by Eric Vonck, Andreas Lybaert and Karl Wipfler (as promoters) on behalf of the new company agreeing to form Lyvopan (U) Ltd) which was by the same agreement supposed to take over the agreement (Exh.D7) between the plaintiff and Wamiko and Exhibit P21 was a confirmation of the commitment of the parties to the contract. However, this was not agreed to by the defendants who submitted that there was no contract whatsoever between them and the plaintiff.

The law governing pre-incorporation contracts is clear and precise and I shall lay it hereunder so as to give this issue a thorough discussion and resolution. It must be noted that in the course of formation/incorporation of a company, the individuals behind it do enter into transactions and incur expenses. Since the transactions are essentially meant for the company, these individuals behind the company (technically referred to as promoters) may not wish to be held personally liable on the transaction(s). A promoter was defined in **Twycross v Grant (1877)2 C.P.D 469,541 C.A.** as, “ *a person who undertakes to form a company with reference to a given project, and to set it going and takes the necessary steps to accomplish that purpose.*” The facts of this case reveal to me that the defendants and PW1 fall perfectly within this category.

In **Salmon v Salmon & Co. Ltd [1897]AC 22** Lord Macnaghten explained that a company is regarded in law as a person separate and distinct from its members, however, a company comes

into existence on registration and upon issuance of a certificate of registration. Prior to this, one definitely has no independent entity to enter into transactions, other than a promoter or a group of promoters. In practice, the process of incorporation and that of setting the business involves entering into arrangements among others including purchase of equipment. The problem that arises is that these contracts are concluded in the names of a person not yet born (i.e. the company) or on its behalf without its participation since it is non-existent.

Given that a pre-incorporation contract involves a situation in which the company has not yet been formed (incorporated) a person who purports to act on behalf of the company cannot have any authority to bind the company. This was discussed in the case of **Kelner v Baxter (1866)** LR 2 CP 174 where Erle CJ held that:

“If the company had been an existing company at the time, the persons who signed the agreement would have signed as agents of the company. But as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that where a contract is signed by one who professes to be signing as agent, but who has no principal existing at the time and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby; and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time but no rights or obligations by reason of anything which might have been done before, it was once indeed thought that an inchoate liability might be incurred on behalf of a proposed company which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contracts is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain: but

the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named ... I come therefore, to the conclusion that the defendants, having no principal who was bound and that the oral evidence offered is not admissible to contradict the written contract."

It was the 2nd defendant's case that the intention of the parties must be put into consideration and that the construction of the contracts should guide court to show that the contracts in question were those of the company to be formed and not the parties that signed it on its behalf. However, in **Phonogram Ltd v Lane [1982] QB 938** Lord Denning MR emphatically stated that

"... unless otherwise agreed' if there was an express agreement that the man who was signing was not to be liable, the section would not apply. But unless there is a clear exclusion of personal liability... (the law) should be given its full effect. It means that in all cases such as the present, where a person purports to contract on behalf of a company not yet formed, then however he expresses his signature he himself is personally liable on the contract."

Basing on the above discussion, Exhibit P1 can be said to be a pre-incorporation contract which is not binding on the company to be formed save for the personal liability of the parties to the contract themselves, notwithstanding the fact that it was signed for the benefit of the company to be formed at a later stage.

The defendants relied on Exhibit P21 which was signed and written on the new company's letter head after its incorporation and Exhibit D8 which they wrote to Mr. Vonck and signed as directors/shareholders stating that, "*Hereby would like to inform you about the foundation of a new company Lyvopan (U) Ltd by the company Wamiko (U) Ltd*". These letters were adduced in evidence to show that indeed the agreement was between Lyvopan (U) Ltd (the newly incorporated company) and the plaintiff.

However, as earlier pointed out, company law emphasizes that pre-incorporation contracts cannot be ratified by the company upon its incorporation. This was stated in **Natal Land Co & Colonization Ltd v Pauline Colliery and Development Syndicate Ltd [1904] A.C 120** (Privy council) where court held that;

“...it is clear that a company cannot by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before the company came into existence”.

Turning to the agreement in issue, indeed I agree with the plaintiff that Exhibit P1 was a pre-incorporation agreement that would not be binding on Lyvopan (U) Ltd which had not yet been formed at the time of signing it but would under normal circumstances be binding on the defendants and Mr. Vonck as the promoters. However, I find difficulty in agreeing that the plaintiff was party to that contract. It is indeed an agreed fact that the parties entered into an agreement (Exhibit P1). However, it is pertinent to point out that by that agreement three individuals namely; Mr. Eric Vonck, Mr. Andreas Lybaert (the 1st defendant) and Mr. Karl Wipfler agreed to form a new company to be called Lyvopan (U) Ltd that would take over an investment contract for production of sandwich panels between Wamiko and MY.Vonck. B.V.B.A. (the plaintiff company). They agreed to finance the investment from the new company by each of them contributing 127,000 Euros and in turn they would receive 33.3 % of the shares. It should be noted that neither the plaintiff company nor Wamiko were party to this agreement to form the new company that would take over the contract between them.

Although Mr. Andreas Lybaert and Mr. Karl Wipfler were directors of Wamiko they did not indicate that they were entering into this new arrangement on behalf of Wamiko whose contract the new company intended to take over. Neither did Mr. Vonck state in the agreement that he was signing for and on behalf of the plaintiff. I did compare the construction of Exhibit D7, the contract between Wamiko and the plaintiff which they signed on behalf their respective companies and Exhibit P1 and it is clear that in the latter they were acting for themselves and not on behalf of those companies. The pertinent question that comes to my mind then is, whether the three individuals could competently agree to form a company to take over a contract that they were not party to. The 2nd defendant's counsel raised this in passing in his submission. He submitted that nothing connects together by assignment or otherwise Exhibit D7 and Exhibit P1. I consider it a very fundamental point which was overlooked by the other parties yet it has a serious bearing on this case.

I am in complete agreement with counsel for the 2nd defendant's submission. As stated in **Salmon (supra)** a company is regarded in law as a person separate and distinct from its

members. This principle was elaborated in **Omondi vs National Bank of Kenya Ltd & Others [2001] EA 177** where **Ringer A.J** stated thus:

“It is a basic principle of Company Law that the Company has a distinct and separate personality from its shareholders (see SALMON VS SALMON & CO. LTD (1987) AC 22). The property of the Company is distinct from that of its shareholders and the shareholders have no proprietary rights to the Company’s property apart from the shares they own.... Only the Company has capacity to take action to enforce its legal rights.” (Emphasis mine).

There is a distinction between a contract signed on behalf of a company by its directors and a contract signed by the directors in their individual capacity as clearly seen in Exhibits P1 and D7.

I must point out that if the contract was to be validly transferred to Lyvopan (U) Ltd, the consent of the plaintiff and Wamiko which signed that contract would be required as was held in **National Social Security Fund & Anor v Alcon International Limited Supreme Court Civil Appeal No 15 of 2009**. In that case the respondent was not the company that signed the contract with the 1st appellant but ended up performing it and even took the 1st appellant to court when it terminated the contract. Odoki, CJ (as he then was) who wrote the judgment which the other Justices concurred with quoted a passage from **Halsburv’s Laws of England.4th Edition, Vol. 9**, which states:

“As a rule, a party to a contract cannot transfer his liability under that contract without the consent of the other party.....There is however, no objection to the substituted performance by a third person of the duties of a party to the contract where those duties are not connected with the skill, character, or other personal qualifications of that party.....by the consent of all parties, liability under a contract may be transferred so as to discharge the original contract. Such a transfer is not an assignment of a liability but a novation of the contract.”

His Lordship then stated:

“What is clear from this quotation is that while assignment or indeed novation is permitted by law, there still has to be a fulfillment of the elements

*necessary for a valid contract. There must be offer and acceptance between the parties, and there must be an intention to create legal relations. All these require both parties to be aware of whom they are contracting with. **The principle upholds the doctrine of the privity of contract which states that ‘a contract cannot confer rights, or impose obligations on strangers to it.’** It is also clear that there has to be consent from both parties, which makes the arrangement within the Hanspal Family, without the knowledge of NSSF an invalid assignment.”*

It is not stated whether Wamiko as a company also agreed to the arrangement its directors in their own individual capacities committed to do by Exhibit P1. In **LS Sealy, Cases and Materials in Company Law 7th edition at page 177** some insights on how a company makes decision has been given as follows:

“...The members (or shareholders) and the directors collectively are the two organs which share between them the most important corporate functions, and (except in the cases of a single member company, the wholly owned subsidiary and the company with only one director) each organ normally acts by decisions (resolutions) taken at meetings. Very commonly, the organ constituted by the shareholders is termed ‘the company in general meeting’ and that of the directors ‘the board of directors’ or ‘the board’. The meeting is thus seen as the focus of corporate decision making.....The general meetings and the board of directors are often referred to as ‘organs’ of the company, a term which signifies their constitutional authority to act as the company rather than merely to represent the company as its agent under an authority derived from some superior corporate source.”

In an effort to search for evidence on Wamiko’s consent/authority, I have thoroughly perused the records in this case and failed to trace any resolution by Wamiko or minutes of a meeting of its directors/shareholders where they agreed to form another company to take over its contract. I only managed to see one Board Resolution to rent out the company premises to Lyvopan (U) Ltd. In the absence of that evidence, it follows that Wamiko being a limited liability company distinct from its directors Mr. Andreas Lybaert and Mr. Karl Wipfler did not authorize the

forming of a new company to take over its contract. Based on the above principle of distinct corporate personality, it is my considered opinion, that the directors could not in their individual capacities agree to form a company in which they are directors moreover with a third party and purport to transfer a contract that was signed by Wamiko to it without the latter's authority.

Similarly, the defendants and Mr. Vonck could not validly agree to transfer the contract between Wamiko and the plaintiff to the company they were to form (a third party) without the knowledge and consent of the plaintiff. I am alive to the fact that Mr. Vonck had signed Exhibit D7 in his capacity as chairman of the plaintiff company but this was not the case when he signed Exhibit P1 as reproduced above. He did not also furnish any proof that when he signed Exhibit P1 he had the consent of the plaintiff.

In the circumstances, it is my firm view that the purported agreement between Mr. Eric Vonck, Mr. Andreas Lybaert and Mr. Karl Wipfler to form a new company to take over the contract between Wamiko and the plaintiff company was a nullity just as the purported takeover by Lyvopan (U) Ltd was. Consequently, any transaction between the Plaintiff Company and Lyvopan (U) Ltd would have no contractual basis just as the plaintiff's claim against the defendants would have none. In the premises, I find no cause of action by the plaintiff against the defendants under that contract (Exhibit P1) which the plaintiff was not even party to.

In the result, it is my finding that the alleged takeover of the contract by Lyvopan (U) Ltd from Wamiko was invalid. Therefore, in specific answer to the 1st issue, apart from the agreement between the three individuals whose effect is discussed above, there was no contract between the plaintiff and the defendants. In the result, the issue is answered in the negative.

In light of this finding and conclusion, it would not be necessary to consider the other issues but in the unlikely event that I have misdirected myself on the first issue, I will proceed to consider the remaining issues based on the assumption that there was a contract between the plaintiff and the defendants.

Issue No.2

Whether or not there was failure of consideration as pleaded in paragraph 6 of the second defendant's defense.

It was the 2nd defendant's pleadings that there was failure of consideration based on a number of grounds. However, it is the plaintiff's case that there was no failure of consideration in the contract or at all because there was a benefit/value in the machinery which the receiving party (the defendants) took and a forbearance, detriment suffered by the plaintiff when it procured and shipped the machinery at considerable cost upon the defendants' promise to pay. The plaintiff further submitted that a failure of consideration will not arise just because the machinery was 2nd hand or because the defendant failed to pay for it. The plaintiff relied on the case of **Peter Bibangamba v Fulgence Mungereza (Receiver Nile Mining Ltd- In Receivership Misc. Appln. No. 103 of 2012)** where the applicant had failed to pay for used stone quarry equipment and this court held that the applicant's subsequent failure to pay the purchase price which indeed amounted to a breach of contract could not negate the consideration that was already agreed upon at the time of executing the contract.

Consideration is defined in **S.2 of the Contracts Act 2010** as, "*a right, interest, profit or benefit accruing to one party or forbearance, detriment loss or responsibility given, suffered or undertaken by the other party.*" With that definition in mind, I will now proceed to examine each of the grounds for the alleged failed consideration.

Breach of the implied term of the contract of description

The defendant illustrated that the machinery was by description which was not complied with by the plaintiff. This was supported by Exhibit D7 which, so far as the relevant part is concerned, stated thus;

"MY. VONCK B.V.B.A... has undertaken to purchase on behalf of Wamiko construction (U) Ltd the best machinery necessary for the successful running of the proposed sandwich panel factory."

It was argued that no new press line was delivered and neither was the machinery delivered the best as required by the contract. To support this submission, the 2nd defendant relied on his deposition which was admitted on the record as his evidence without cross examination where he stated that;

“Unfortunately in the meantime I found the following out: Mr. Vonck for 630,00 Euros was going to send us partly new but mostly second hand machinery which belonged to him and he had long time ago taken out of his Belgium factory (because already at that time it was too old or faulty) and stored somewhere. In this way he wanted to sell us his old machinery through other company names and defraud us (Lybeart and me) of the rest of the money. I talked to European contacts and they told me the whole consignment plus transport is not worth even 200,000 Euros most likely these old machines would sit in his store unless he sold them for metal scrap. He would get rid of his old machinery, get from us 300,000 Euros and 250,000 Euros from the Belgium government (subsidy) and be a shareholder of Lyvopan and Wamiko and if there were any profits he would be entitled to them”.

This piece of evidence was uncontested by the plaintiff so I take it that the assertions are not disputed. Furthermore, Exhibit P21 which the defendant wrote as directors/shareholders of Lyvopan (U) Ltd to Mr. Vonck clearly stated that it was “with regard to the investment of a new press line for production of sandwich elements”. However, Erick Vonck stated in Exhibit D10 that;

“...all the machinery shipped to Uganda was new save for the press which was used but in excellent working conditions and in fact the first respondent inspected the machinery in Belgium before it was shipped.”

He also testified on cross examination that, *“Company was to start from Wamiko’s premises at Ntinda. Defendant told me that the new production line was to be set up at Wamiko. We need for the new line a building about 100 meters x 22 meters. Lyvopan (U) Ltd rented the building from Wamiko”.* However, he later said, *“I have an invoice from (sic)” the press, I got it about 13 or 15 years ago. I used the press before I brought it here.....”*

On the other hand, the plaintiff submitted that none of the defendants raised the issue of obsolete machinery or failed consideration at any time from the time the machinery was delivered in November 2004 until this suit was filed in 2008 nor did the defendants reject the machinery. And yet in the 4 years before the suit was filed, the plaintiff made several demands for payment and

the only reason advanced for non-payment was financial difficulties owing to the placement of Wamiko under receivership. (See Exhibit D dated 27/ 9 2005 written by the 1st defendant to the plaintiff).

The 2nd defendant contends that there was a sale of goods (machinery) by description when the parties stated that new press line for production of sandwich elements and “the best machinery necessary for the successful running of the proposed sandwich panel factory”. To my mind a “new press line” can be said to be condition implied description as provided under section 14 of the Sale of Goods Act because it is very specific as the word “new” according to **Cambridge International Dictionary of English, 1996 Edition** means something “*recently created or having started to exist recently; not previously used or owned.*” In this case the parties wanted a press line machine which was created recently and not previously used or owned.

I also find that what the parties agreed to as “the best machinery necessary for the successful running of the proposed sandwich panel factory” is an implied condition as to quality or fitness as stipulated under section 15 of the Sale of Goods Act. The word “best” refers to “the most excellent in a group of things” (See **Cambridge International Dictionary of English (supra)**). I would hasten to add that an expert’s opinion would be required to determine whether what was supplied was actually the best or not. However, it is conceded by PW1 that the press line which was supplied was not new and the 2nd defendant’s unchallenged evidence on the state of those machines even without getting an expert opinion at least show that they were not the best. This therefore implies that the description of the goods as well as the specified quality were not strictly complied with and from the above discussion, the defendants were entitled to reject the goods.

Be that as it may, the right to reject goods may be lost basing on the circumstances of the case as provided by the law. Section 30 of the Sale of Goods Act provides for delivery of wrong quantity or description of goods. Sub-section (3) thereof states; “*Where the seller delivers to the buyer the goods he or she contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or he or she may reject the whole.*”

Under section 35 of the Sale of Goods Act it is provided inter-alia that the buyer is deemed to have accepted the goods when after the lapse of reasonable time he or she retains the goods without intimating to the seller that he or she has rejected them. In **Sale of Goods by P.S Atiyah, John N. Adams, Hector Macqeen 10th Edition at page 501** the authors pointed out that,

“Even though the seller may be guilty of a breach of condition and the buyer may prima facie be entitled to repudiate the contract and reject the goods, he may in certain circumstances lose his right and have to accept the goods and be content with the claim for damages. Among such circumstances is where there has been acceptance. There are a number of ways in which the buyer can accept the goods within the meaning of the Sale of Goods Act and one of these ways is retaining them for more than a reasonable time before he informs the seller that he wants to reject them. The law now provides that the question that are material in determining for the purpose of the above provision whether a reasonable time has elapsed include whether the buyer has had a reasonable opportunity of examining the goods for the purpose mentioned .i.e. of ascertaining whether they are in conformity with the contract.”

In **Bernstein v Pamson Motors (Golders Green) Ltd (1987)2 ALL ER 220** the court made efforts of laying out a test case on this question in relation to the rejection of motor vehicle. Here the buyer sought to reject a new car for serious defects causing a major break down on a motor way after he had had the car for three weeks but only done some 140 miles. While holding that the buyer was undoubtedly entitled to damages, **Rougier J** held that he had lost the right to reject as a reasonable time for rejection had elapsed. A reasonable time, the learned Iudge held, meant a sufficient time to give the car a general trial, not a sufficient time for hidden defects to be discovered- obviously if that were the case, the right to reject might survive for months. He further stated thus:

“[is] directed solely to what is a reasonable practical interval in commercial terms between a buyer receiving the goods and his ability to send them back, taking into consideration from this point of view the nature of the goods and their function, and from the point of view of the seller, the commercial

desirability of being able to close his ledge reasonably soon after the transaction is complete. The complexity of the intended function is clearly of prime consideration here. What is a reasonable time in relation to a bicycle would hardly suffice for a nuclear submarine.”

Based on the above authorities, I find that in the instant case the defendants attempt to reject the goods after four years was way beyond reasonable time and an afterthought because the goods were delivered in November 2004 and the first time the issue of non compliance with the description of the goods was raised in December 2008 when the defence was filed. The defendants therefore lost the right to reject the goods under those circumstances.

Withdrawal of the subsidy

Annexure N3 to Exhibit D10 states in the fifth paragraph that;

“The administration economy judges the fact that you deliver machinery, subsidized by the Flemish government; to a company of which you are president; director and shareholder as an improper use of the subsidy and as a sufficient element to refuse the payment of this subsidy. Moreover, we cannot deny the fact that you are not a producer of production lines for sandwich panels. We seriously doubt that you had the intention with this operation to obtain a multiplier effect with regard to the sale of production lines in Uganda.”

The 2nd defendant submitted that from this evidence, it is clear the Belgium government withdrew the subsidy because of Eric Vonck’s misconduct, including his not being a producer of the production lines. It was therefore contended that Eric Vonck was the entire cause of the withdrawal of the subsidy, without which the price for his shipments to Lyvopan (U) Ltd could not be paid for. That was again failure of consideration on his part and his company’s part because the subsidy was part and parcel of the money that would be paid for the supply of the production line.

I have failed to see how withdrawal of the subsidy by a government which is not a director or shareholder of a company would amount to failed consideration under the agreement the

defendants had made together with PW1. The logical way of dealing with the situation would have been for the directors/shareholders of Lyvopan (U) Ltd to look for alternative funding or review the investment or even formally withdraw from the agreement other than keeping quiet and alleging failed consideration after the suit is filed as it is being done now. I therefore find no merit in the alleged failed consideration on this ground.

Misrepresentation

Lastly, on (c), it was submitted that the failure of consideration was caused by Eric Vonck's misrepresentation to the defendant that the Belgium contribution had been paid as per Exhibit P1 in the second paragraph where it was asserted that the Belgium government has paid 247,250 Euros as support which is not refundable when in fact no money had been received from that government. Counsel for the 2nd defendant argued that this rendered Lyvopan (U) Ltd solely responsible for the payment of the purchase price, something it had not undertaken to, and was not able to do. I agree that the statement in Exhibit P1 that the subsidy had been paid whereas it was not was a misrepresentation which could have induced the defendants to enter the agreement, but as stated above it cannot be said to have failed the consideration. The argument is misconceived and it is rejected.

On the whole, I find all the grounds for alleging failed consideration as discussed above without merit and if there had been a contract between the plaintiff and the defendants I would have resolved this issue in the negative.

Issue No.3

Whether or not the defendant undertook to pay for the machinery.

Counsel for the plaintiff stated that this issue was settled by the resolution of the 1st issue and urged this court to find that the defendants undertook to pay for the machinery in the amounts of 247,500 Euros.

On the other hand, counsel for the 1st defendant argued that the defendants did not undertake to pay for the machinery as Exhibit P1 relied upon by the plaintiff was in respect of their contribution to capitalize the new company. Counsel for the 2nd defendant on his part argued that there was no contract between the plaintiff and the defendants which required them to pay for the

machinery. He argued that all the monies the defendants undertook to pay were for financing Lyvopan (U) Ltd and much as it would be invested in the machinery by the company it was never to be paid directly by the defendants to the plaintiff. Rather, it was to be paid to Lyvopan (U) Ltd and in consideration thereof the contracting parties would be issued with shares in it.

I have considered the above arguments in light of the documentary and oral evidence on record and following my finding in the first issue that there was no contract between the plaintiff and the defendants, I do find any undertaking by the defendants to pay for the machinery directly to the plaintiff. My understanding of Exhibits P1, D7 and P21 read together is that the sums of money the defendants undertook to pay was to finance the investment but through Lyvopan (U) Ltd which would in turn issue shares to them.

In the premises, it is my finding that the defendants did not undertake to pay the plaintiff any money thus answering the 3rd issue in the negative.

Issue No. 4

Whether or not the defendant or any of them paid money towards the purchase of the machinery.

It was the plaintiff's pleading in the plaint that the defendants were supposed to make a contribution to the payment for the machinery but that they did not make any payment. This, counsel for the plaintiff submitted, was supported by PW1's testimony that the plaintiff did not receive any money from the defendants or any of them despite their undertaking to pay pursuant to Exhibit P21. Furthermore, that the invoices for the machinery Exhibits P6, P7, P9, P11(i), P22, P23, P24 and P25 in the amounts of 325,00 Euros remain unpaid to date yet evidence that the machinery was supplied was adduced and was not contradicted at the trial. The plaintiff's counsel submitted that the burden of proof of the 1st defendant's alleged payment to PW1 shifted to him when PW1 denied receipt of the money.

Although the 1st defendant in his written statement of defence stated that he paid 180,000 Euros to Mr. Vonck representing 120,000 Euros of his contribution and 50% of the 2nd defendant's contribution, in cross examination, he stated that he did not have a receipt to prove that he paid the money to PW1. However, that position was abandoned in the submission where instead it

was emphatically stated that, “*In conclusion it can be said that the defendants did not pay for the machinery because it was not their duty to do so.*” Similarly, it was conceded by the 2nd defendant that he did not pay money for the purchase of the machinery because he had no obligation to do so as between himself and the plaintiff.

As already discussed in the previous issues, there was no contract between the plaintiff and the defendants which required the latter to pay money to the former. Therefore, I agree with the defendants that they did not pay money to the plaintiff because they were under no obligation to do so. Even if the purported takeover of the contract by Lyvopan (U) Ltd was found to be valid by this court, it would have been Lyvopan (U) Ltd itself to pay money to the plaintiff under the original contract between the plaintiff and Wamiko upon taking over the same. The plaintiff cannot directly claim payment from the defendants under Exhibit P1 because of the operation of the doctrine of the privity of contract as highlighted above.

Issue No.5: Whether or not the defendants are liable to pay the sums claimed by the plaintiff.

This issue, in my view, has already been covered by my findings on the previous issues so there is no need to repeat them again but it suffices to say for reasons stated in my discussions under those issues, the defendants are not liable to pay the sums claimed by the plaintiff.

Issue No.6: Whether the plaintiff is entitled to the remedies sought.

The plaintiff claimed against the defendants jointly and severally for recovery of 320,898 Euros and USD 14,462 “being the value of a press line production line for sandwich panel supplied to Lyvopan (U) Ltd and freight charges from Belgium to Kampala plus general damages, interest and cost of the suit”. The plaintiff relied on the testimony and documents adduced by PW1, which shows that the plaintiff spent money in the excess of 500,000 Euros to purchase plant and machinery, trucks and shipping. The plaintiff’s counsel submitted that the special damages had been proved and prayed that this court awards it to the plaintiff plus interest at the commercial rate of 21%, general damages of UGX 200,000,000/= and costs of the suit.

Conversely, the defendants’ counsels submitted that in view of what they argued in the other issues the plaintiff is not entitled to any remedies. I am in agreement with that submission

following my above findings on issues 1-5. Even if I were to agree with the plaintiff that it is entitled to the remedies sought, I would have still found difficulty in determining the amount of special damages to award because it was not strictly proved as required by the law. I find the documents submitted by the plaintiff and the evidence of PW1 quite contradictory on the actual purchase price of the goods shipped to Uganda.

It is also noteworthy that not a single invoice from the seller of those plants & machinery and trucks were tendered in evidence. What is on record are the shipping documents and the invoices that were generated by the plaintiff and sent to Lyvopan (U) Ltd. This court cannot rely on what was generated by the plaintiff to award costs of those items because naturally they would be suspect. There is need for an independent invoice from the suppliers/sellers for proof of authenticity. Similarly, the shipping documents do not show the price of those items. In the absence of materials upon which this court can base its award the claim for special damages would fail.

In any event, the sum claimed by the plaintiff does not even tally with what the directors/shareholders of Lyvopan (U) Ltd committed to contribute for the investment as contained in Exhibit P21. Even this court was to find for the plaintiff the award of special damages, if proved, would be confined to the 247,500 Euros the three directors/shareholders including Mr. Vonck undertook to pay each contributing 82,500 Euros and not what is claimed as the total sum spent on purchase of the items.

As regards the claim for general damages, for reason that there is no contract between the plaintiff and the defendants, I would not award any as no contract was breached.

In the result, I find no merit in the plaintiff's suit and it is accordingly dismissed with costs to the defendants.

I so order.

Dated this 13th day of November 2015.

Hellen Obura

JUDGE