

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
HIGH COURT CIVIL SUIT NO. 234 OF 2010**

**CLOTHLINK (U) LTD:.....:PLAINTIFF
VERSUS
AFRICAN TRADE INVESTMENTS
FUND LTD & ANOTHER:.....: DEFENDANTS**

BEFORE THE HON. MR. JUSTICE HENRY PETER ADONYO:

JUDGMENT:

1. Facts:

The original suit brought by the Plaintiffs called Cloth Link (U) Ltd and a one Juliet Nassuna was against African Trade and Investment Fund Ltd, Dr. Emurugu Musonge Moses and a one Joy Jemba. It was for the recovery of Uganda Shillings Ninety Eight Million Four Hundred Thirty Only (Ug. Shs 98, 430,000/=), general damages, punitive damages, interest at court rate until payment in full. Later on the plaint was amended with only Cloth Link (U) Ltd remaining as the plaintiff with a claim against African Trade and Investment Fund Ltd and Dr. Emurugu Musonge Moses with a claim for the sum of Uganda Shillings Seventy Million One Hundred seventy five Only (Ug. Shs. 70,175,000/=) plus United States Dollars Two Thousand Five Hundred Only (US\$2,500) being money had and received by the Defendant for processing a loan, general damages, interests at commercial rates until payment in full and the costs of this suit.

The background of the suit is that the Plaintiff applied for a project loan of United States Dollars Eight Hundred Thousand Dollars (US\$ 800,000) to enhance its business from the 1st Defendant Company which had presented itself as a loan provider. To consummate the process the Plaintiff and the 1st Defendant on 14th day of February 2009 signed an **Indicative Term Sheet** for the provision of loan. At the same time the Plaintiff paid to the 1st Defendant United States Dollars

Two Thousand Five Hundred Only (US\$ 2,500) as project appraisal fees. All these actions were in fulfillment of an earlier resolution passed on the 2nd day of April 2008 by the Plaintiff which was done to enable it to acquire a loan from the First Defendant to enhance its business.

The sum of United States Dollars Two Thousand Five Hundred Only (US\$ 2,500) being a loan appraisal processing fees was paid to the Second Defendant who was owner and director of the First Defendant. The Second Defendant further received Uganda Shillings Seventy Million One Hundred Seventy Five Thousand Only (Ug. Shs 70,175,000/=) from the Plaintiff as additional loan processing fees, a fact which was disputed by the defendants.

upon the fulfillment of all these requirements, the Second Defendant was to provide an express offer letter for the loan to the Plaintiff but did not do so though he was continuously reminded continuously to do so with his response to the plaintiff being that the already signed Term Sheet amounted to an offer letter and therefore there was no need for other documents.

The Second Defendant did not also provide the Plaintiff receipts acknowledging the money had and received for processing the loan.

The Plaintiff never received the loan it had applied and thus was aggrieved by the action of the defendants and so it decided to sue the defendants jointly and severally. As a matter of procedure, when the defendants were served with court process only the First Defendant filed its defence within the stipulated time. The 2nd Defendant did not do so and therefore the Plaintiff subsequently applied and did receive from this Honorable Court a judgment against him on the 13th day of September 2010 with the suit proceeding against the First Defendant and to formal proof against the 2nd Defendant.

2. Issues:

On the 19th day of December, 2014, a joint trial bundle dated the 2nd of April, 2013 was adopted with amendments and in it were contained the agreed facts and the disagreed facts.

The issues framed for resolution of the dispute between the parties in this suit as below.

- a. Whether the parties breached the terms specified in the Indicative Term Sheet for the proposed AT bank loan.
- b. Whether the actions of the 2nd Defendant are binding on the 1st Defendant.
- c. Whether the Plaintiff is entitled to any remedies.

3. Evidence:

The Plaintiff produced three witnesses to support of its case namely Dr. Deo Betungura (PW1), Mrs. Joy Jemba (PW2) and Mr. Charles Muhwezi (PW3). The First Defendant adduced the evidence of one witness a Mr. Oscar Mugume (DW1). Both parties adduced documents and these are on record.

4. Whether the parties breached the terms specified in the indicative term sheet for the proposed AT Bank loan:

This issue forms the crux of dispute between the parties. It is the contention of the Plaintiff that it applied for a loan from the First Defendant to support its business through the Second Defendant who processed all the documents and even received all the funds and even assisted the Plaintiff prepare proper audited books of accounts services for which the First defendant was handsomely paid. The defendant on the other hand, especially the First Defendant, contends that they were merely facilitators whose major role was to assist the Plaintiff acquire a loan from an entity known as ATI Bank. In proof of its position, the plaintiff through its witness, a one Dr. Deo Betungura (PW1) told court that it applied for a loan facility from the First Defendant company way back in 2008 by directly dealing at all times with the Second Defendant Dr. Emurugu Musonge Moses who acted and was the Chief Executive Officer of the First Defendant Company. That this Musonge Moses even received United States Dollars Eight Hundred Thousand Only (US\$ 800,000) as a loan processing fees in addition to Uganda Shillings Seventy Million One Hundred Seventy Five Thousand Only (Ug Shs 70,175,000/=) with all the money received for and on behalf of the First Defendant but that all these efforts proved nil for in the long run it did not get the loan sought inspite of having met all the criteria which included supplying land collateral and proper audited books of accounts as well paying monies to the defendants. The Plaintiff produced Exhibit P1 to show payment the payment of United States Dollars Two Thousand Five Hundred Only (US\$ 2,500) to the First Defendant. This document is on the letterhead of Africa Trade Investment Bank which is a document of the First Defendant in which it acknowledges receipt of monies from the Plaintiff. This document was issued on the 7th day of February 2009 prior to the First Defendant changing its names to African Trade and Investment Bank that it had received monies from the Plaintiff for processing a loan facility worth United States Dollars Eight Hundred Thousand Only (US\$ 800,000) a fact that is proven by a certificate of change of names issued by the Registrar of Companies which is on record which shows change of names on the 4th of March, 2009. This piece of evidence speaks for itself

for it does not indicate that it was issued by the First defendant in a representative capacity. It is also not rebutted thus this court would find that indeed the First defendant received the money in question.

In regards to Uganda Shillings Seventy Million One Hundred Seventy Five Thousand Only (Ug Shs 70,175,000) the Plaintiff states that the First Defendant's representative declined to issue a receipt in that respect though it confirms that indeed the Second Defendant received the same. The fact that Exhibit P1 was not disputed in court as having been issued by the First defendant and the fact that no contrary evidence was received to rebut that indeed monies were taken from the Plaintiff towards processing of the loan would make this court to believe that there is more of a likelihood of this money also having been received by the First defendant for the facts adduced show that this was an additional requirement for the processing of the loan.

As this amount together with a 2% commission were all meant to enable the loan processing. This conclusion was not in any way controverted by the First Defendant during cross examination of the witnesses of the Plaintiff especially Dr. Betungura (PW1) and since it was on oath I would conclude that it was a truthful account of what took place which this court finds admissible.

This fact is corroborated by the fact that before the First Defendant could avail the loan previously requested by the Plaintiff the Second Defendant proposed to the Plaintiff that the First defendant could assist the Plaintiff secure an Interim loan of Uganda Shillings Two Hundred Million Only (**Ug Shs 200, 000**) from Diamond Trust Bank to enable import some goods from while awaiting the main loan from the First Defendant. This process was agreed to and was started as confirmed by both PW1 and Pw2.

Unfortunately the Plaintiff never also received this new amount of money inspite incurring addition costs in terms of new audit fees and other costs to the First Defendant and to the shock of the Plaintiff investigations of the Defendants through the auspices of Bank of Uganda soon disclosed that the First Defendant was never actually a registered bank but a fund which was not mandated to operate as a bank yet all the First Defendant's documents included the word "Bank" on them as seen from the headed papers of the First Defendant in addition to the Term Sheet which had similar nomenclatures of African Trade Investment Bank. In addition to this there was also the Memorandum and Articles of Association of the First Defendant (Exh. D2) which showed registration of an entity known as African Trade and Investment Bank (ATB) Ltd which

was with a Certificate of Incorporation (Exhibit P4) signifying that indeed the First Defendant is indeed the one which dealt with the Plaintiff. From all these pieces of evidence it is the finding of this court as a matter of fact that the First Defendant presented itself as a bank to the Plaintiff and by doing so did clearly contravened **Section 7(1) (a) (b) of the Financial Institutions Act 2004** which provides as follows;

“No person other than a person licensed as a commercial bank, merchant bank, mortgage bank or post Bank under this act shall except with the consult of the Central bank.

(a) Use the word “Bank” or any other expression, name, title or symbol indicating or likely to create the impression that the person is conducting or is authorized to conduct business as a commercial bank, merchants bank or post office savings bank under this Act;

(b) Make or continue to make any representation indicating the transaction of business specified in paragraph (a) of this subsection in nay bill head, letter paper, notice, advertising or nay other manners”.

The above legal requirements prohibits the use of the word **“bank”** by any company as it states under **Section 7(3)** that no company shall carry a business as a commercial bank, merchant bank or mortgage bank or post office savings bank unless it uses as part of its name the word “Bank” or one of its derivatives with said law defining a “Bank” to mean any company licensed to carry on financial institution business as its principal business as specified in the second schedule of that law.

Based on the above provisions of the law it was indeed illegal for the First Defendant to present itself and operate a bank even if it was argued unsatisfactorily that it was not taking any deposits for the fact remained that had no license or authority or clearance from Bank of Uganda to use the word “bank” within its names thus the assertion by the First Defendant that at all material times it operated as a fund when its own documents letters and letter heads show that it used the word “bank” including a term sheet which it admits is evidence of not only trying to dupe the public but was an actual illegal act. In my view that was a dishonest act by the First Defendant to make unsuspecting members of the public to believe that it was a bank capable of providing the necessary banking services including the offering of loans yet it was not so.

This court therefore cannot believe the First Defendants' assertion that it was acting merely as representative of financial institutions in Europe for the East and Central African market to source for lines of credit/loans, bridge funds, financial instruments like bank guarantees, bonds and promissory notes yet at the same time presented itself as a bank more so when it concedes to the fact that indeed whereas in 2008 the Plaintiff did apply to it to obtain a loan for United States Eight Hundred Thousand Dollars Only (US\$800,000) from it and it did give the Plaintiff documents usually issued by banks such as the indicative term sheet (Exhibit D) and also required the Plaintiff to pay certain amounts of monies as a loan processing fee thus this was a clear manifestation that it was the one who will grant the loan with the wordings of the Term Sheet that was signed between it and the Plaintiff showing in no uncertain terms that;

“With reference to you loan application, we are pleased to inform you that the bank is in principal prepared to proceed with a detailed appraisal of your project on the following terms and conditions.

The details of this term sheet and position sheet have both been prepared for the sole purpose of serving as a basis of discussion of the principal ATI Bank Investment conditions, if the bank were to make a loan investment to cloth link Uganda Limited.

These conditions are not therefore an offer and do not represent a commitment on the part of the bank to offer a loan from the bank or to offer a loan on the terms and do not loan precedence over an eventual loan agreement. ATI Bank's decision to invest in the project is subject to the approval of ATI Bank's management and its Board of Directors, as well as the entry into force of all project documents and fulfillment of all conditions technical or legal.”

From the wordings above, it is crystal clear that the term Sheet (**Exhibit D1**) which was signed by the Plaintiff by PW1 and the Defendants in their behalf was one document which showed that the First Defendant was indeed acting on its own right and not as an agent since no any other contradicting piece of evidence such as powers of attorney or an agency agreement was adduced produced to show in any other contrary position. Thus the Defendant can safely be seen to have undertaken to honour the loan requirement of the Plaintiff for it did present itself that it had such capacities for even Clause 22 the Term Sheet (Exhibit D1) indicating that in no uncertain words the following narration **“... if after the appraisal and approval of your project you accept the**

loan offer...". Therefore the fact that an appraisal did take place with the Plaintiff thereafter being required to pay a processing fees in order to secure a loan then that was conclusive evidence of the fact that the First Defendant did make an offer and thus was liable legally bound for any such manifestations where the Plaintiff took steps to for realise the terms of the offer. Arising from these very clear outward manifestations by the First Defendant the conclusion to be had is that the First Defendant through its agents like the Second Defendant did dupe and make the Plaintiff believe that it was a an entity capable of providing the required loans upon sio long as the Plaintiff could conclude certain processes thus when it did not fulfill its part of the bargain, then it did breach a clear contract entered between it and the Plaintiff and thus is liable and since no contradicting evidence was adduced to controvert the fact that at all times Mr. Embuga Banaaba Musonge whose card was tendered in evidence as not only being owner but the Executive Director Technical of the First Defendant then the conclusion would be that his actions was binding on the first Defendant for he was properly identified by the Plaintiff's witnesses as the one whom they related with on behalf of the First defendant at all times. This conclusion therefore answers the first and second issues.

5. Remedies:

The Plaintiff claim is on Money had and received with the remedy it seeks being an equitable one meant to prevent unjust enrichment as was the holding in the case of **Moses v Macfarlane (1760)2 Burr at page 10** it was held that;

"The principle of unjust enrichment requires; first that the Defendant has been enriched by the receipt of a benefit; secondly that this enrichment is at the expense of the Plaintiff and thirdly, that the retention of the enrichment is unjust. This qualifies restitution."

Arising from the finding above , it is clear from documents such as Exhibits P1 that the First Defendant through the Second Defendant did receive money from the Plaintiff for purposes of processing a loan and when the loan never materialized then the retention of the Plaintiff's money without providing the services required would tantamount to an act of unjust enrichment. This very principle has been well expounded upon for in the case of **Shenol & Another v Maximov [2005] EA 280** the court was of the view that;

“... the principle is that where one person has received money from another under circumstances such as in this case he is regarded in law as having received it to the use of that other. The law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled. In default the right full owner may maintain an action for money had and received to his use.”

Relying on this very principle, Kainamura J of this court while considering such similar situation in the case of **Kensheka v Uganda Development Bank HCCS No. 469 of 2011** was of the view that where it was proven that money was received for no services delivered then it was obligatory that the person who received it to refund it. I would concur completely with this view as it would be daylight theft for a person who purports to render a service to another but does not do so yet the outward presentation is such that such a person makes the other party to believe that the fulfillment of certain conditions would guarantee certain results. This similar view was also that of the court in the case of **Jamba Soita Ali v David Salaam HCCS No. 400 of 2005** where the court went on to elaborate in details what would be considered illicit earnings the below quoted showing the court’s view of such manifestations thus ;

“Money which is paid to one person which rightly belongs to the other, as where money is paid by A to B on a consideration which has wholly failed or by mistake is said to be money had and received by B to the use of A. The paying of A to B, accordingly to the learned author of A Concise Law Dictionary by PG Osborn, 5th Edition at page 212, becomes a quasi contract, an obligation not created by law, but similar to that created by contract and is independent of the contract on the footing of an implied promise to re-pay. Besides, liability is based on unjust enrichment that is the action is applicable where the Defendant has received money which, in justice and equity, belongs to the Plaintiff under circumstances which render the receipt of it by the Defendant a receipt to use of the Plaintiff. For the Plaintiff to succeed there must be evidence of the payment sought to be recovered.”

Arising from the above, therefore, I would find that the First Defendant’s action through the Second Defendant of making the Plaintiff act as it did purportedly to grant it a loan and then failing to do so was a fraudulent scheme hatched to fleece unsuspecting members of the public who were made to believe that not only was the First Defendant capable of granting them the loan facilities they sought to secure but were made to pay huge amounts of money purportedly in

processing fees and other expenses such as preparation of audited accounts and so forth yet the so called loan facilities were never to be with even the grandiose titles such as “banks” used to further make the public believe as to the genuineness of the intention of the First Defendant’s actions including the Plaintiff yet all these was a grand scheme to fleece the public of their hard earned monies with the Plaintiff being one such victim and thus it is the duty of this court to stop this hemorrhage of the Ugandan economy by entities such as the First Defendant.

From the conclusion above, I would hold the First Defendant through its agent the Second Defendant liable for the claim of the Plaintiff and since it has been shown that the Second Defendant was not only an employee of the First Defendant but its owner and shareholder , I would find him jointly and severally liable with the First Defendant thus find both responsible to refund the monies which was illicitly taken from the Plaintiff.

6. Orders:

Arising from the conclusions above this court thus enter judgment in the favour of the Plaintiff for the amounts claimed in the plaint as follows;

- a. The Two Defendants are jointly and severally ordered to refund to the Plaintiff Uganda Shillings Seventy Million One Hundred Seventy Five Thousand Only (Ug. Shs 70,175,000/=) and United States Dollars Two Thousand Five Hundred Only (US\$ 2, 500) with interest at 21% and 8 per cent per annum respectively from the date of filing this suit till payment in full being monies receive and had for a loan processing activity which never materialized.
- b. The First Defendant is found vicariously liable for the actions of the Second Defendant and thus is ordered to pay to the Plaintiff general damages amounting to Uganda Shillings Fifty Million Only (Ug. Shs. 50,000,000/=) at the court interest rate of 6% per annum from the date of this judgment till payment in full.
- c. The Plaintiff is also awarded the costs of this suit against both Defendants.

I do so order accordingly.

HENRY PETER ADONYO

JUDGE

2ND NOVEMBER, 2015