

THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 280 OF 2012

MULINDE CHURCHILL}.....PLAINTIFF

VS

CENTENARY RURAL DEVELOPMENT BANK LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

PARTIAL JUDGMENT

This judgment arises from a point of law agreed to by the parties as preliminary issues for trial. The point of law has the potential of disposing of the suit substantially. The points of law are based on agreed facts contained in a joint scheduling memorandum executed by the Plaintiff and Defendant's Counsels. The agreed points of law based on the agreed facts are:

- a. Whether the Defendant breached the guarantee dated 18th March 2011 issued in favour of Century Bottling Company Ltd by dishonouring the cheques issued in by the Plaintiff?
- b. Whether the Defendant was entitled to recall the loan and overdraft facilities made to the Plaintiff?
- c. Whether the Defendant was justified in fulfilling the call made upon the guarantee by the beneficiary, Century Bottling Company Ltd?

At the trial the Plaintiff was represented by Counsel Muhammad Mbabazi and Diana Nassimbwa of Messieurs Mbabazi, Kiboneka and Nyanzi Advocates while the Defendant was represented by Counsels Michael Mafabi and Paul Mbuga of Messieurs Sebalu and Lule Advocates.

In brief the Plaintiffs claim against the Defendant in the plaint is for a declaration that the Defendant breached a bank guarantee issued by the Defendant on 9 March 2012 in favour of the Plaintiff. Secondly it is for an order that a declaration issues that the intended sale of the Plaintiff's property by the Defendant as advertised is illegal. Thirdly it is for an order that a permanent injunction issues restraining the Defendant from disposing of the Plaintiff's securities advertised. The Plaintiff further seeks consequential orders of special damages, general damages, compensatory damages, and interest at 30% per annum on general damages, loss of business and costs of and incidental to the action. The Defendant denied the claim and counterclaimed for all sums alleged to be due and owing to the Defendant from the Plaintiff amounting to Uganda shillings 175,116,014/= by 31 July 2012.

The court was addressed in written submissions on the agreed preliminary points of law.

Submissions of the Plaintiff's Counsel

The Plaintiff's Counsel submitted that the main question in controversy is: **whether the Defendant bank breached the bank payment guarantee dated 18th of March 2011 issued in favour of Century Bottling Company Ltd by dishonouring the cheques drawn by the Plaintiff?**

The Plaintiff's Counsel submitted that a major component of this issue relates to the Defendants breach of a clause of the bank payment guarantee facility dated 18th of March 2011 for

honouring cheques drawn by the Plaintiff. The terms of the guarantee facility applicable to the Defendant bank is dated 18 March 2011.

The Plaintiff's Counsel relies on the parole evidence rule under sections 91 and 92 of the Evidence Act Cap 6 Laws of Uganda. Under those provisions, he submitted that where a contract has been reduced to writing, neither party can rely on evidence of the terms alleged to have been agreed to but not contained in the document itself. With reference to the rule, it is the terms of the guarantee facility agreement dated 18th of March 2011 that shall be used to determine the liability of the parties herein. In determining liability under the guarantee facility, the court should use the rules of interpretation of contract as contained in **Chitty on Contracts: General Principles 27th edition paragraph 12.039** which deals with general construction of written agreements.

He submitted that under the above quoted provision the object of all construction is to discover the intention of the parties. The cardinal presumption is that the parties have intended what they have in fact said so in their own words. One must consider the meaning of the words used and not what may be guessed to be the intention of the parties. Courts may resolve an ambiguity by looking at the commercial purpose and the factual background against which the contract was made. He submitted that **Chitty on Contracts** gives the general rule that words are given their plain, ordinary and natural meaning as a reasonable person would understand them.

Consequently the meaning of a document or a clause in a document is found in the document itself. With reference to the guarantee facility agreement, the first paragraph thereof provides that in the consideration of Century Bottling Company Ltd agreed to supply various Coca-Cola products to the Plaintiff, on credit for his agency business.

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The clause is clear on the fact that the Plaintiff under the contract with Century Bottling Company Ltd was to get goods on credit for his agency business and which was sufficient consideration for the Plaintiff to supply goods on credit in Hoima. It is against this background that the Defendant bank guaranteed the Plaintiff up to an aggregate amount of Uganda shillings 100,000,000/=.

In the case of **A.S. Folkes & Company vs. Karsandas Purshottam Thakrar and Another [1959] EA LR 36**, the court while giving the literal meaning of the guarantee between the parties, quoted the case of **Morrell vs. Cowan (1877) 7 Ch. D. page 151** where a clause: "... In consideration of you... having at my request agreed to supply and furnish goods to M.C.C., I do hereby guarantee..." meant that if you will supply goods, I will guarantee payment. Forbes VP of the East African Court of Appeal agreed with the interpretation.

The Plaintiff's Counsel contended that in applying the rule to the clause above when the Defendant bank committed to guaranteeing payment to Century Bottling Company Ltd, this was sufficient consideration for the Plaintiff to continue getting goods from the same company on credit so long as such payment did not exceed Uganda shillings 100,000,000/=.

The second clause to be considered is:

"We centenary bank rural development bank Ltd having its registered office... as instructed by the supplier's agent, agree to unconditionally and irrevocably to guarantee as primary obligor and not merely as surety the payment..."

He submitted that the undertaking was given irrevocably, absolutely and unconditionally to guarantee payment to Century Bottling Company Ltd upon demand in writing. The clause is

clear in as far as the Defendant's guarantee is a self standing agreement making the Defendant a primary obligor, with the obligation to pay the principal money to become due under the facility and whenever the principal defaults. He relied on **Black's Law Dictionary** for the definition of the term "obligation" as a formal, binding agreement or acknowledgement of a liability to pay a certain amount or to do a certain thing to a particular person or set of persons especially a duty arising by a contract.

Furthermore it defines a primary obligation to mean an obligation that arises from the essential purpose of the transaction between the parties. Secondly as a fundamental contractual term imposing a requirement from the contracting party from which other obligations may arise. The Plaintiff's Counsel further submitted that a primary obligor is thus a party directly responsible for making interest and principal payments for an outstanding obligation. This party has an unconditional liability to pay upon a certified demand being made. He relied on the explanation in the case of **Carey Value-Added SL versus Grupo URAVASCO SA (2011) 2 All ER 140**. Counsel further relied on the case of **IIG CAPITAL LLC vs. Van DER MERWE and ANOTHER [2008] 2 All ER 1173** on a guarantee which imposes a primary obligation on the Defendants.

The Plaintiff's Counsel submitted that the court should follow the above decisions and find that the bank was bound to pay the Plaintiff upon demand.

The third clause that the Plaintiff relies on is worded as follows:

"Our obligation shall also include payment of cheques drawn upon the bank in your favour by the agent provided that the cheques are properly drawn and are within the aggregate maximum amount of Uganda shillings 100,000,000/=..."

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He submitted that the clause is very clear that the Defendant was required to honour cheques drawn by the Plaintiff in favour of Century Bottling Company Ltd as long as they are properly drawn. In the bank payment guarantee it was made clear that the cheques have to be properly drawn and are within the aggregate maximum amounts. Copies of the cheques drawn upon the bank of Uganda shillings 20,000,000/= each as attached to the amended plaint as annexure "C". The Plaintiff also made daily deposits of the sales made from Monday to Saturday to the Defendant bank so that there were funds available on the account.

However in July 2011, the Defendant unjustly dishonoured three cheques each of Uganda shillings 20,000,000/= that were drawn by the Plaintiff in favour of the supplier (Century Bottling Company Ltd). The Plaintiff's Counsel contends that the event of default by the Plaintiff on the contract with Century Bottling Company Ltd, meant to be covered by the guarantee facility occurred when the Plaintiff did not pay the amount due to the supplier and the Defendant bank failed to pay the amount due resulting in the supplier cancelling the distribution agreement, loss of franchise and business with the supplier.

Counsel prays that the court finds that the Defendant bank is liable for breach of the guarantee, due to the act of dishonouring the cheques drawn by the Plaintiff contrary to the clauses of the guarantee despite the Plaintiff having drawn them properly. It is due to the reasons/analysis of the situation discussed above that the Plaintiff suffered and continues to suffer economic and business loss, inconvenience and damages for which he holds the Defendant bank liable. In those circumstances the Plaintiff seeks redress against the Defendant bank for the orders sought in the plaint.

Submissions of the Defendant's Counsel in reply and on the counterclaim.

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The Defendant's Counsel submitted on the three issues agreed upon namely:

1. Whether the Defendant breached the guarantee by dishonouring the cheques issued in favour of Century Bottling Company Ltd by the Plaintiff?
2. Whether the Defendant was justified in fulfilling the court made upon the guarantee by the beneficiary, Century Bottling Company Ltd?
3. Whether the Defendant was entitled to recall the guarantee made to the Plaintiff?

The Defendant's Counsel addressed the three issues under three heads namely the nature of guarantees and applicable principles of interpretation; the effect, application and fulfilment of the guarantee dated 8th of March 2011 and the Defendant's lawful action in dishonouring three cheques drawn by the Plaintiff.

Based on the agreed facts and documents in the joint scheduling memorandum the Defendant's Counsel addressed the nature of guarantee and principles of interpretation. He submitted that the Defendant issued an on demand guarantee to Century Bottling Company Ltd and acted lawfully in dishonouring the cheques drawn by the Plaintiff and honouring the call made upon the guarantee by the beneficiary namely Century Bottling Company Ltd. He agreed that the document at the heart of the dispute is the bank payment guarantee dated 18th of March 2011 issued by the Defendant in favour of Century Bottling Company. The guarantee was issued pursuant to a bank payment guarantee facility dated 9th of March 2011 for the sum of Uganda shillings 100,000,000/= entered into between the Plaintiff and the Defendant.

On the character of a guarantee obligation assumed by the Defendant, the Defendant's Counsel submitted that the essential feature of the guarantee is that it is a contract where one person the guarantor or surety agreed to be answerable for a liability of another (the principal debtor) to a

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third person. Secondly unconditional guarantee is often given by banks in favour of a beneficiary to secure the obligations under a contract. The beneficiary is entitled to demand that the sums without proving any default by the other party to the underlying transaction and the bank must pay unless it knows that the claim is fraudulent. Thirdly a bank that issues the performance guarantee provides an irrevocable undertaking to pay and must honour the guarantee according to its terms. The bank is not concerned in the least with the terms of the underlying contract and the relations between the supplier and the customer. It is not concerned with the question whether the supplier has performed his contractual obligations or not or with the question whether the supplier is in default or not.) See **Edward Owen Engineering versus Barclays Bank International [1978] 1 QB 156 (CA)**).

On the rules for interpretation of guarantee agreements, the Defendants Counsel submitted that the guarantees are treated like any other mercantile document or commercial contract having regard to the surrounding circumstances and factual matrix. The guarantee agreement should be giving a reasonable business meaning and should not be construed so as to render the guarantee ineffective and illusory. With reference to the decision of the House of Lords in **Investors Compensation Scheme Ltd versus West Bromwich Building Society [1998] 1 WLR** are 896 Lord Hoffman observed that the law does not require judges to attribute to the parties an intention which the Plaintiff could not have had. Further reference was made in that case to the statement of Lord Diplock in **Antaois Campania Naviera S.A. vs. Salen Rederierna [1985] AC 121** and to the same effect.

On the effect, application and fulfilment of the guarantee: the Defendant's Counsel submitted that the guarantee constituted an irrevocable and on demand undertaking to Century Bottling Company to pay on demand a sum not exceeding Uganda shillings 100,000,000/= following any *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~?+:

default of the Plaintiff in its contract with Century Bottling Company and a resulting demand by the company. The obligation as a matter of law is an autonomous contract between the guarantor [Centenary Bank] and the beneficiary [Century Bottling Company) and is expressed as follows:

"... agree unconditionally and irrevocably to guarantee as primary obligor and not merely as surety the payment to Century Bottling Company upon demand in writing to the duly authorised officer declaring their agent (Churchill Mulinde) to be in default without right or objection whatsoever on our part and without their first claim to the agent, in any amount within the aggregate maximum limit of Uganda shillings 100,000,000/= without need to prove the grounds for the amount demanded."

It was submitted on behalf of the Plaintiff that in the introductory recitals the guarantee facility agreement provided that the Plaintiff has a credit supply arrangement with Century Bottling Company. It is further submitted for the Plaintiff that on account of this recital, the Defendant bank guaranteed the Plaintiff to pay an aggregate amount of Uganda shillings 100,000,000/=. Counsel prays that the Court rejects this interpretation as incongruous because there are two autonomous contractual relationships to be considered. The guarantee is unquestionably issued to Century Bottling Company and not the Plaintiff. Secondly the Defendant undertook to fulfil the guarantee in favour of Century Bottling Company in the event of the Plaintiffs default in its contract with the supplier company. The contractual relationship between the guarantor and beneficiary is separate and autonomous from the contractual relationship between the beneficiary and its customer. The relationship between the Defendant and Century Bottling Company is one of guarantor and beneficiary/creditor. The relationship between the Plaintiff and Century Bottling Company is one of customer/supplier debtor/creditor under a credit supply agreement.

The Defendant's Counsel contended that the Plaintiff's submission attempted to intertwine the obligations arising under these relationships and is misconceived in law.

The Defendant's Counsel further submitted that a recital is only a description of the underlying contract. The opening recital to the guarantee is merely the recognition of the underlying contractual relationship between the Plaintiff and Century Bottling Company and the basis upon which the guarantee is issued. The recital simply records the Plaintiff and the company have a creditor supplier relationship, and the following paragraphs provide the Defendants unconditional undertaking in the event that the company makes a call upon the guarantee. The recital constitutes the formation of the guarantee. The authors **Ellinger's Modern Banking Law** writes that the guarantors promise must be supported by consideration, which is often constituted by the creditor's action in entering into the principal transaction. The description of the credit relationship between the Plaintiff and Century Bottling Company is what constituted the consideration for the guarantee. The court must reject the Plaintiff's submission that the recital means that the Plaintiff will obtain goods on credit and request the bank to settle those obligations through the guarantee instrument. The guarantee is for the benefit of Century Bottling Company and not the Plaintiff.

The Defendants Counsel further submitted that there was a misconstruction of the guarantee function. The Plaintiff misconstrued the purpose and function of a bank payment guarantee. He contended that a bank payment guarantee is not a revolving credit facility as the Plaintiff submitted. The Plaintiff has an independent obligation to fulfil his contractual obligations with Century Bottling Company.

The legal and common sense and business interpretation is that financial institutions are not in the business of paying suppliers for goods obtained by their customers on credit through banking facilities. Financial institutions are expressly barred from engaging in such commercial activities by section 37 (a) of the Financial Institutions Act 2004. Secondly guarantees are a form of security to the supplier that in the event the customer defaults, the supplier can call upon the guarantee. It is fundamentally a security instrument issued in favour of the beneficiary and is supposed to remain intact until it is called upon or lapses due to time.

The Defendants Counsel submitted in conclusion that the guarantee was issued in favour of a Century Bottling Company Ltd as security for the performance of the Plaintiff's obligations and not as an instrument for the Plaintiff to obtain goods on credit and pay using the sums covered under the guarantee. The Plaintiff's interpretation flouts the legal status and principles that underpin the operation of a demand guarantee issued by a financial institution and must be rejected. It followed that the Defendant was justified in honouring the call made upon the guarantee by the beneficiary on the 23rd of August, 2011.

The Defendants Counsel further submitted that it was maintained for the Plaintiff that the Defendant unlawfully dishonoured cheques issued by the Plaintiff. The Defendant's Counsel submitted that the payment guarantee secured an undertaking on the part of the Defendant to pay cheques drawn in favour of Century Bottling Company by the Plaintiff provided that the cheques are properly drawn and within the aggregate maximum amount of Uganda shillings 100,000,000/= . The obligation of the Defendant to honour cheques must be construed in light of the entire guarantee and within the legal framework that governs the acceptance and order of cheques as bills of exchange.

The Defendant's Counsel further submitted that there were reasons for the dishonour of the cheques. The guarantee was issued in favour of the beneficiary, Century Bottling Company which is the party with the legal entitlement to make a claim and retrieve the sum of money covered by the guarantee. The credit supply agreement between the Plaintiff and Century Bottling Company is separate and autonomous from the on demand guarantee relationship between the Defendant and Century Bottling Company.

The Defendant's obligation to honour cheques meant cheques drawn by the Plaintiff in satisfaction of its separate contractual relationship with the company. The Plaintiff issued cheques in favour of the company to pay for supplies of goods without ensuring that there were sufficient funds in this account to meet the mandate. On the other hand the Plaintiff's pleadings and submissions indicate that the cheques were drawn by the Plaintiff under the mistaken impression that the amount of money covered under the guarantee would be used to accept and honour the cheques. The Defendants Counsel contended that this was an erroneous interpretation and must be rejected. The sum of money provided under the guarantee was only available to the named beneficiary in the event that a call was made. The sum of money was not available to honour unconditional mandates drawn by the Plaintiff when his account had no funds to meet the mandates in question. In other words it was not the accepted and legal banking mechanism within which upon demand guarantees and cheques work.

As a matter of law the banks duty to pay cheques depended on the availability of adequate funds on which the customer is entitled to draw. The banks duty to honour the customer's cheques depends on the actual state of the account at the time of presentment of the cheque and the bank is at liberty to dishonour cheques that are not covered by adequate funds. This is supported by the case of **Bank of New South Wales versus Laing [1954] AC 135**, a decision of the Privy Decision of Hon. Mr. Justice Christopher Madrama Izama *^*~?+:

Council. Secondly the case of **Sierra Leone Telecommunications Company Ltd vs. Barclays Bank PLC [1998] 2 All ER 821** also applies. Both decisions are to the effect that the duty to honour a cheque is dependent upon the sufficiency of funds on the customer's account. Secondly the absence of an existing overdraft arrangement meant that the Defendant acted lawfully in dishonouring the three cheques for lack of funds on the Plaintiffs account.

In conclusion the Defendant's Counsel submitted that the Defendant's obligation to honour cheques referred to cheques drawn by the Plaintiff on its current account and in satisfaction of its separate contractual relationship with the company. The cheques were not to be drawn against the guarantee sum pledged to Century Bottling Company. Secondly the Plaintiff cannot conceivably be permitted to submit that the cheques were properly drawn where no funds were arranged in the Plaintiffs account for the acceptance and honour. To accept such a submission would violate the legal principles that govern the operation of cheques and general commercial and business sense. Finally the Defendant cannot be held liable for the Plaintiff's breach of its own autonomous contract with Century Bottling Company and any consequential loss that it suffered. The Plaintiff failed to appreciate the autonomy of contracts in the guarantee matrix.

Furthermore Counsel submitted that the Defendant committed no breach of its obligations and the Plaintiff's claim for breach of contract and consequential loss must fail. Secondly the Plaintiff's prayer for a declaration that the intended sale of his property is illegal must fail. On the other hand the Defendant's counterclaim against the Plaintiff is based on breach of contract and the Defendant only seeks pecuniary remedies. The Defendant has not sought to enforce a right of sale in its pleadings and prayers. In view of the submissions the Defendant prays for the following remedies:

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1. A declaration issues that the Defendant did not breach the guarantee dated 18 March, 2011 issued in favour of a Century Bottling Company.
2. A declaration issues that the Defendant acted lawfully in fulfilling the call made upon the guarantee by the beneficiary, Century Bottling Company Ltd.
3. The consequential declaration that the Defendant acted in accordance with the guarantee facility dated 9 March, 2011 between the Plaintiff and the Defendant by converting the payment of Uganda shillings 91,718,772/= from Century Bottling Company under the guarantee into a loan payable at an interest rate of 23% per annum.
4. Declaration issues that the Plaintiff is obliged to pay the outstanding balance and interest on the loan facility dated 1st of April, 2010 and the overdraft facility dated 8th of December, 2010 which remains uncontested.
5. Costs of the suit and counterclaim ought to be awarded to the Defendant.

In rejoinder the Plaintiff's Counsel submitted on the question of whether there was a misconstruction of the guarantee facility and obligations arising under the relationships. He maintained that the guarantee facility required the Defendant to pay the money upon demand.

The Plaintiff's Counsel further submitted that it is very clear that the Defendant agreed to unconditionally and irrevocably guarantee as primary Obligor and not merely as a surety the payments to Century Bottling Company Ltd. The Defendant bank committed and undertook to pay the money as soon as a demand for it arose. Furthermore the underlying essence of the guarantee facility was to create a confirmed source of payment that would ensure that the Plaintiff received goods from Century Bottling Company Ltd at any time whenever there was a need (whenever he had to take stock). In other words, the guarantee would act as the mode of payment between the Plaintiff and Century Bottling Company Ltd. The Defendant agreed

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knowing that the goods that the Plaintiff was to be supplied by Century Bottling Company Ltd were supplied and should there be a demand for payment which the Plaintiff could not meet or honour, the burden became that of the Defendant bank as per the agreement. By virtue of the Defendant being a primary obligor, and not merely as a surety, the Defendant took on something more than a secondary obligation upon the request for payment for the goods to Century Bottling Company Ltd is done, meaning they were to pay the money as soon as demand was made.

In reply to the Defendant's notion that the Plaintiff considered the guarantee to be credit revolving facility, Counsel submitted that the Defendant guaranteed payment to Century Bottling Company and not to offer a credit facility to the same.

The Plaintiff's Counsel further submitted that the argument that the cheques drawn by the Plaintiff could not be honoured because of lack of funds on the Plaintiffs account is not tenable. When the Defendant's argument is put in context, it means that the Plaintiff would have to deposit money on his account before the Defendant honours payment to Century Bottling Company Ltd. If the Plaintiff had such money, then why have the guarantee? It is because the Plaintiff did not have the money on account of knew that at one time, it would not have money on account that is sought for a guarantee that was secured as a loan whereby at any time the money is paid out, then the loan would have been disbursed. Similarly if the arrangement was that the Plaintiff had to have money on the account, then why did the Defendant pay the money after the cheques bounced? It was that the Defendant as primary obligor has an obligation to pay under the guarantee and thereafter a loan would be considered as having been disbursed and the Plaintiff would become indebted. It was this amount of money that was due to convert into a loan upon default by the Plaintiff on the contract with the supplier. This default came about when the Defendant bank failed to honour the cheques that had been drawn by the Plaintiff in a bid to keep

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making payments to the supplier, resulting into the supplier terminating the contract with the Plaintiff.

The Plaintiff's Counsel further submitted that in a bid to give the particular clause in question meaning and effect, the clause is not ambiguous and thus should be given its plain and ordinary meaning to relay the intention of the parties. The clause is clear that once the cheques were properly drawn upon the Defendant by the agent, the same shall be honoured.

The Plaintiff issued cheques of Uganda shillings 20,000,000/= of which two were honoured and three dishonoured over time. The argument that the Plaintiff did not have enough money on the account cannot stand firstly because it was not expressed in the guarantee but rather an instruction not to draw cheques exceeding Uganda shillings 100,000,000/=. The Defendant also acted upon this statement as two cheques drawn upon it by the Plaintiff were honoured. The Defendant is caught by the doctrine of estoppels from going back to its words/terms of the contract just because the same does not favour it. Counsel further noted that the Plaintiff made daily deposits of the sales made throughout the week in its account with the Defendant bank.

In the premises the Plaintiff's Counsel submitted that the Defendant ought to be held liable for breach of the guarantee and thereby causing economic and business loss, inconvenience and damages to the Plaintiff. The Plaintiff maintains his prayers in the plaint.

Partial judgment

I have carefully considered the points of law agreed to by the parties for disposal before any other matter can be considered depending on the outcome of the determination. The points of law were agreed upon during the scheduling conference prescribed by Order 12 rules 1 of the Civil

Procedure Rules to sort out points of agreement and the agreement among other things. Order 15 rule 2 of the Civil Procedure Rules provides that where issues both of law and fact arise in the same suit and the court is of the opinion that the case or any part of it may be disposed of on issues of law only, it shall try those issues first and for that purpose, may if it thinks fit postpone the settlement of the issues of fact until after the issues of law have been determined.

In this case the issues of law depend on questions of fact which were agreed upon by Counsels of the parties during the scheduling conference and were expressed in the scheduling memorandum endorsed by them. Furthermore the matter falls under Order 6 rule 28 of the Civil Procedure Rules which provides that:

"Any party shall be entitled to raise by his or her pleading any point of law, and any point so raised shall be disposed of by the court at or after the hearing; except that by consent of the parties, or by order of the court on the application of either party, a point of law may be set down for hearing and disposed off at any time before the hearing." (Emphasis mine)

The parties proceeded by consent to set a point of law for hearing based on agreed facts set out in the joint scheduling memorandum.

The material facts are set out in the joint scheduling memorandum executed by Counsels on 8 September 2014 wherein the following facts are agreed:

- a. On 9 March 2011, the Plaintiff was granted a bank payment guarantee facility of Uganda shillings 100,000,000/= to enable him meet his contractual obligations as a distributor with Century Bottling Company Ltd.

- b. The Plaintiff had also earlier secured from the Defendant a loan facility of Uganda shillings 50,000,000/= by a loan facility agreement dated 1st of April 2010 and an overdraft facility of Uganda shillings 47,000,000/= by an overdraft facility agreement dated 8th of December 2010.
- c. The Defendant on 18 March 2011, issued a bank payment guarantee in favour of Century Bottling Company on behalf of the Plaintiff, and had an obligation under this facility, to pay cheques drawn upon the bank in favour of Century Bottling Company by the agent (Plaintiff) provided that the cheques are properly drawn and are within the aggregate maximum amount of Uganda shillings 100,000,000/=.
- d. In 2011 the Defendant dishonoured three cheques dated 16th of July 2011, 20th of July 2011 and 21st of July 2011 drawn by the Plaintiff in favour of Centenary Bottling Company Ltd.
- e. On 23rd of August 2011, Century Bottling Company made a call upon the guarantee referred to in (a) above following the Plaintiff's failure to settle outstanding payment obligations amounting to Uganda shillings 91,118,772/=.
- f. The Defendant remitted this sum of money (Uganda shillings 91,718,772) to Century Bottling Company.

Counsels also relied on agreed documents to argue the points of law. The documents will be considered together with the submissions. The documents are common to both parties and referred to in the joint memorandum quoted above.

It is clear from the joint scheduling memorandum read together with the pleadings that the basic grievance of the Plaintiff arises from the dishonour of three cheques issued by the Plaintiff in favour of Century Bottling Company Ltd by the Defendant and subsequently the recalling of the *Decision of Hon. Mr. Justice Christopher Madrama Izama* *^*~?+:

loan by the Defendant. Consequently the major issue which requires interpretation of the relevant contracts and documents forming part of the agreement as to matters of fact is **whether the bank breached the bank payment guarantee dated 18th of March 2011 issued in favour of Century Bottling Company Ltd by dishonouring the cheques drawn by the Plaintiff?** This is the only main issue that can be tried on the basis of uncontested facts. The rest of the issues will be stayed for reasons which will be given at the end of this partial judgment.

I have carefully considered the arguments of the parties which have been set out above. The beginning of determination of the major issue revolves on interpretation of the relevant documents expressing the relationship between the parties. The Plaintiff relies on a guarantee dated 18th of March 2011 issued in favour of Century Bottling Company Ltd. The document in question was listed by both parties in the joint scheduling memorandum.

The first document is a guarantee facility agreement dated 9th of March 2011 and signed on 9 March 2011 referenced by both Counsels as annexure "A".

The second document is the bank payment guarantee CRDB/No. A8/3/2011 issued in favour of Century Bottling Company Ltd referenced by both Counsel as annexure "B". This is the document relied upon by the Plaintiff to argue the point of interpretation. Secondly copies of the dishonoured cheques drawn by the Plaintiff in favour of Century Bottling Company will be referred to as annexure "C"

The other documents which are common to both parties is the call upon the guarantee by Century Bottling Company dated 23rd of August 2011 and will be referred to as annexure "D".

The Defendant further relies on loan facility agreement dated first of April 2010 and signed on 9 December 2010 which will be referred to as annexure "E". Secondly the overdraft facility letter dated 8th of December 2010 and signed on 9 December 2010 annexure "F". Furthermore the Defendant recalled the loan in a demand and recall of loan facilities letter dated 21st of October 2011 annexure "D". Last but not least the Defendant relies on the Plaintiffs account statement.

I will consider the first issue as framed by the Plaintiff's Counsel. **Whether the Defendant bank breached the bank payment agreement dated 18th of March 2011 issued in favour of Century Bottling Company Ltd by dishonouring the cheques drawn by the Plaintiff?**

I have carefully considered the evidence. There must have been an error in the dates because the bank payment agreement referred to as dated 18th of March 2011 is a bank payment guarantee issued to Century Bottling Company Ltd and issued by the Defendant. The Plaintiff is not a party and the document is in the nature of a performance bond. On the other hand the Plaintiff's written submissions refer to the guarantee facility agreement dated 9th of March 2011. The guarantee facility agreement dated 9th of March 2011 is annexure "A" while the bank payment guarantee dated 18th of March 2011 is annexure "B". Both documents will be considered in resolving this issue.

The Plaintiff relies on the terms of the payment guarantee annexure "B" dated 18th of March 2011 and specifically the undertaking by the Defendant to honour cheques drawn upon the bank in favour of Century Bottling Company Ltd by the agent namely the Plaintiff. The two documents however have to be read together. The Genesis of annexure "B" is the guarantee facility agreement dated 9th of March 2011 executed between the Plaintiff and the Defendant.

In annexure "A" it is provided that the Plaintiff who is referred thereto as a debtor in an application dated 16th of February 2011, requested the Defendant bank for a payment guarantee of Uganda shillings 100,000,000/= and the bank agreed to issue the same effective from the date of issue at a commission of 1% per quarter payable upfront on the amount guaranteed under the guarantee facility and a processing fee of Uganda shillings 20,000/= payable upfront, subject to completion of security documentation required by the bank acceptable by the debtor. Secondly the debtor acknowledged the liability of the bank up to but not Ltd to the amount of Uganda shillings 100,000,000/= only and consented in the event of default by the debtor in a contract with the supplier to convert the liability into a loan on terms and conditions set out in the agreement.

The nature of the facility agreed upon between the Plaintiff and the Defendant is actually stipulated in annexure "A" dated 9th of March 2011 and paragraph "A" thereof. It clearly provides that the Plaintiff is a borrower and that the guaranteed amount is Uganda shillings 100,000,000/=. Lastly the facility type is a loan upon default on the contract with the supplier guaranteed by the bank. The duration of the agreement was 12 months from the date of default under the contract with the supplier. The repayment terms were 12 months in 12 monthly instalments. The default interest was agreed at 0.5% per month or as the Defendant may stipulate from time to time. Last but not least clause 10 provided for securities based on a legal mortgage on the Plaintiff's property and the letter of standing orders. There are some standard clauses which were reproduced in the agreement for instance I have noted under paragraph C that the borrower is presented as a Ltd liability company whereas he is a natural person.

Paragraph 4 on the "facility type" stipulates that it is: "a loan upon default on the contract with the supplier guaranteed by the bank". In other words it supports the contention that so long as

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there is no default on the part of the Plaintiff in the payments of the supplier, the presumption that there is a loan to the Plaintiff can be rebutted. The loan only arises when the bank incurs obligations on account of the Plaintiff's default.

It is apparent from the recitals in annexure "A" that the Plaintiff on 16 February 2011 by application requested the bank to issue a bank payment guarantee of Uganda shillings 100,000,000/= for a period of 12 calendar months and the bank agreed to issue the same effective from the date of issue and the commission payable there under to the bank was 1% per quarter payable upfront on the amount guaranteed under the guarantee facility agreement together with the processing fee of Uganda shillings 20,000/=. The Plaintiff was required to provide security documentation required by the bank. On the basis of that undertaking the second recital is very important and writes as follows:

"AND WHEREAS the debtor acknowledges the liability of the bank up to but not Ltd to the sum of shillings 100,000,000/= only and have agreed and consented that in the event of default by the debtor on the contract with the supplier the bank shall convert the liability into a loan on terms and conditions set out in this agreement, and as shall be modified by the bank from time to time PROVIDED ALWAYS THAT the total liability ultimately enforceable against the debtor only payable by it under this agreement shall extend to cover any sum or sums of money which shall from time to time constitute the balance due or paid on the guarantee by the bank, any loss, damage, costs, expenses or liability suffered by the bank arising out of or under the guarantee resulting from breach of the contract with the employer, including any act, neglect or default of the debtors, its servants or agents."

It is an agreed fact that the Defendant dishonoured three cheques marked as annexure "C". These cheques are dated 16th of July 2011, 20th of July 2011, and 21st of July 2011 all of which were presented for encashment in July 2011. Each of the cheques was for an amount of Uganda shillings 20,000,000/=. The total amount in the cheques is Uganda shillings 60,000,000/=. The cheques were referred back to the drawer and in other words had bounced. The Defendant's argument is that there were insufficient funds on the Plaintiffs account to honour the cheques.

The Plaintiff on the other hand advanced the argument that the Defendant was under obligation by virtue of the payment guarantee issued to Century Bottling Company Ltd to honour the cheques and convert the amount owing to the Defendant into a loan under the terms of the guarantee facility agreement annexure "A" dated 9th of March 2011.

The Defendant's Counsel attempted to divorce the relationship between the Plaintiff and the Defendant with regard to the obligations to honour cheques arising under the guarantee facilities agreement and the payment guarantee issued to Century Bottling Company Ltd. In other words he submitted that the Plaintiff was under obligation to ensure that there were sufficient funds on his account, whatever cheques he issued and that should not be mixed with the obligations of the bank under the payment guarantee.

I have carefully considered this argument and it resembles the old dilemma of whether the chicken came before the egg or the egg came before the chicken.

Before I conclude the issue of whether the Defendant's argument should be upheld, I will briefly consider the Plaintiff's argument which seems not to be in dispute about the nature of a payment guarantee or a performance bond in the nature of a payment guarantee. According to the textbook on the **Law of Guarantees** by Geraldine May Andrews and Richard Millet Second

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Edition 1995 at page 445 on the nature of performance bonds, performance bonds or performance guarantees are:

"... essentially unconditional undertakings to pay a specified amount to a named beneficiary, usually on demand and sometimes on the presentation of specified documents..."

The Plaintiff's Counsel interpreted the payment guarantee itself issued to Century Bottling Company Ltd. On the other hand the Defendant's Counsel submitted that the Plaintiff had mixed up or misconstrued the relationship of the parties because in the performance guarantee itself, its enforcement is without regard to the underlying contract between the Plaintiff and the Defendant and is enforceable by the beneficiary only. Both contracts were autonomous.

Briefly the nature of a performance bond which includes a payment guarantee is explained in the case of **Edward Owen Engineering Ltd versus Barclays Bank International Ltd [1978] 1 All ER page 976** holding of **Lord Denning** at page 918 paragraph C that:

"...the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour the guarantee according to its terms. It is not concerned in the least with the relations between the supplier and customer; nor with the question whether the supplier has performed his contractual obligation or not; nor with the question whether the supplier is in default or not. *The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. ...* "
(Emphasis added).

According to Lord Diplock the obligations of the bank to pay arises upon presentation of documents which appear on the face of it to be in order (See **United City Merchants versus Royal Bank of Canada [1982] 2 All ER 720** at pages 727 and 728). In such case it is apparent that the rights of the beneficiary are considered without regard to the relationship between the beneficiary and borrower or between the borrower and the bank.

Coming back to the facts of this case, annexure "B" which the bank payment guarantee dated 18th of March 2011 is clearly issued by the bank unilaterally to Century Bottling Company Ltd. However what is in issue is between the borrower and the bank and the right of the beneficiary to the payment of guaranteed amount is not in issue on the face of it. In fact the Plaintiff's case is not that the supplier which is the beneficiary should not be paid but that the bank breached an obligation to honour three cheques issued in favour of the beneficiary. The Plaintiff relies on the undertaking in annexure "B" of the bank that:

"Our obligation shall also include payment of cheques drawn upon the bank in your favour by the agent provided that the cheques are properly drawn and are within the aggregate maximum amount of Uganda shillings 100,000,000/=..."

Emphasis was put by the Defendant's Counsel on the words "*provided the cheques are properly drawn and within the aggregate maximum amount*".

Whereas the Defendant suggests that the wording of the bank payment guarantee should not be taken into account as it is issued to a third party, the intention of the parties can be discerned by reading this document because the bank payment guarantee is issued pursuant to a relationship between the Plaintiff and the Defendant. The second paragraph of the bank payment guarantee clearly stipulates that it was a guarantee to pay upon demand in writing. Consequently the

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obligation to honour cheques drawn upon the bank is an additional obligation that operates irrespective of whether there is a demand for payment by the beneficiary namely Century Bottling Company Ltd or not. In fact it was meant to prevent any anticipated default in payment by the Plaintiff by issuance of cheques which could bounce through dishonour by the Defendant bank.

The question of the chicken or the egg coming earlier can be answered by considering the two obligations set out in annexure "B" which is the outcome of the undertaking of the parties in the guarantee facility agreement dated 9th of March 2011. As far as the demand requirement is concerned, it was the obligation of the Defendant to pay on demand made by the beneficiary. With the above authorities cited in mind and specifically the cases of **Edward Owen Engineering Ltd versus Barclays Bank International Ltd [1978] 1 All ER page 976** and **United City Merchants versus Royal Bank of Canada [1982] 2 All ER 720** the obligation to pay arises upon the written demand of the beneficiary and upon the occurrence of the factor entitling the beneficiary to make a demand for payment.

The obligation of the bank to pay in the first category of obligation in this case only arises upon default of the Plaintiff to pay Century Bottling Company Ltd and upon Century Bottling Company Ltd making a written demand for payment under the bank payment guarantee on the Defendant bank. For emphasis the wording of the bank payment guarantee in the first category of obligation of the Defendant bank is repeated as follows:

"the payment to CENTURY BOTTLING COMPANY LTD upon demand in writing through their duly authorised officer declaring the agent to be in default without right of objection whatsoever on our part..."

This first category of obligation of the Defendant bank is not concerned with the honouring of cheques by the bank. On the other hand the wording of the bank payment guarantee includes a second obligation on the part of the Defendant bank in the following words which are repeated for emphasis:

"Our obligation shall also include payment of cheques drawn upon the bank in your favour by the agent provided that the cheques are properly drawn and are within the aggregate maximum amount of Uganda shillings 100,000,000/=..."

The second obligation includes the obligation to pay cheques drawn upon the bank by the Plaintiff in favour of Century Bottling Company Ltd. The controversy narrows down to whether the cheques in question and which form the subject of the Plaintiff's grievance were "properly drawn".

It is the Plaintiff's contention that failure by the Defendant bank to honour three cheques annexure "C" in the total amount of Uganda shillings 60,000,000/= led to the Plaintiffs default in obligation towards Century Bottling Company Ltd and thereby led to the cancellation or termination of the Plaintiffs contract with Century Bottling Company Ltd. It is admitted by the Defendant in paragraph D of the admitted facts that the Defendant in 2011 dishonoured three cheques dated 16th of July 2011, 20th of July 2011 and 21st of July 2011 drawn by the Plaintiff in favour of Century Bottling Company Ltd. It is further admitted in paragraph E of the admitted facts by the Defendant that on 23 August 2011, Century Bottling Company Ltd made a call upon the guarantee following the Plaintiffs failure to settle outstanding payment obligations amounting to Uganda shillings 91,718,772/=. Secondly in paragraph F of the admitted facts, the Defendant agrees that it remitted the sum of Uganda shillings 91,718,772/= to Century Bottling Company

Ltd. By examining the chronology of events the letter of 23rd of August 2011 by which Century Bottling Company made a call upon the guarantee following the Plaintiff's failure to settle outstanding payment obligations in the amount settled by the Defendant quoted immediately above came after the cheques were dishonoured. It is only by inference that the sum of Uganda shillings 60,000,000/= out of the total outstanding amount due to Century Bottling Company Ltd can be said to arise from the dishonoured cheques.

A demand was made on the Defendant according to the letter of 23 August, 2011 wherein Century Bottling Company Ltd demanded Uganda shillings 91,718,772/= immediately upon receipt of the demand letter.

Notwithstanding what appears to be a factual gap on whether the Uganda shillings 60,000,000/= being the total amount on the face of the dishonoured cheques actually is a constituent of the demand made upon the Defendant by Century Bottling Company Ltd, the pleadings provide sufficient guidelines on the matter. Furthermore admitted facts and documents fill the factual void. In paragraph 4 (f) on the facts in support of the Plaintiffs claim it is averred that in July 2011 the Defendant unjustly dishonoured three cheques drawn by the Plaintiff in favour of the supplier (Century Bottling Company Ltd). Secondly it is averred in paragraph 4 (g) that the Plaintiff could no longer obtain supplies from the supplier and his business was stifled as a result. The subsequent averment in the pleadings make a case of the dishonour of the cheques being the reason for the Plaintiff's business grinding to a halt by reason of default in payment of the supplier. The Plaintiff's case is that the dishonour of the cheques by the Defendant was unjustified. I have juxtaposed these pleadings against the amended written statement of defence and counterclaim of the Defendant. In paragraph 4 (c) the Defendant averred against the background of previous averments that the Plaintiff issued cheques in excess of the stated limit

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of Uganda shillings 100,000,000/= in the bank payment guarantee agreement. In other words this is the Defendant's pleadings with regard to the reason for the dishonour of the cheques.

Secondly the Defendant's defence is that the cheques were not drawn within the terms of the guarantee. Last but not least on the same point the submission of the Defendant is that there were no funds on the Plaintiffs account to warrant the issuance of the three cheques which were dishonoured. More so the Defendant's contention is that the cheques were not duly issued. The submissions are that the Plaintiff had to ensure that there were funds on the account before issuing the cheques which were dishonoured.

From the above averments it can be concluded that one of the grounds for the Plaintiffs failure to pay Uganda shillings 91,718,772/= to Century Bottling Company was the lack of sufficient funds on his account leading to the dishonour of the cheques issued in the amount of Uganda shillings 60,000,000/=. To my mind the question is whether this question of fact ought to be tried on the merits. It is an admitted fact that the Defendant paid Uganda shillings 91,718,772/= to Century Bottling Company Ltd under the payment guarantee upon demand by the said supplier. It is therefore a case not in dispute that the total obligations of the Plaintiff to Century Bottling Company Ltd arose out of, and included, cheques which were dishonoured by the Defendant. For purposes of submissions on the point of law, this inference of fact may safely be made as it is the common position of both parties. It is implied in the counterclaim made by the Defendant claiming the sum of Uganda shillings 91,118,772/= was for failure of the Plaintiff to fulfil his repayment obligations as and when they arose to that amount. This sum was converted into a loan.

It is a matter of fact that part of the failure of the Plaintiff to honour its obligations to Century Bottling Company Ltd arose from the dishonour of the cheques immediately after July 2011. On 23 August 2011 Century Bottling Company Ltd made a demand upon the guarantee against the Defendant bank.

My conclusion is that the principal obligation of the bank was to loan money to the Plaintiff upon the Plaintiffs default in meeting his payment obligations. Secondly annexure "B" included an obligation to honour cheques issued by the Plaintiff. This obligation was to the supplier but made on the Plaintiff's request and agreement with the Defendant under annexure "A" dated 9th March 2011. The payment of cheques whether there was money on the account or not would have the same result as a default of the Plaintiff to meet his obligations under the guarantee facility arrangement annexure "A". The parties only provided a ceiling of Uganda shillings 100,000,000/= for purposes of default. The fact that the Plaintiff is not a party to annexure "B" which is the bank payment guarantee is a mere technicality because the actions of the Defendant bank were consistently to honour cheques even when there were no funds standing to the Plaintiffs credit as can be demonstrated from the account statement listed by the Defendant and agreed to. It was the Defendant's obligation under annexure "A" to issue the bank payment guarantee for the benefit of the Plaintiffs business and on the application of the Plaintiff as expressly cited in annexure "A". The Plaintiff's application for the payment guarantee is quoted in annexure "A" dated 16th of February 2011. Finally the controversy is resolved by the clause in the agreement dated 9th of March 2011 and the recitals thereof where it is expressly stipulated that the guarantee was to cover any sum or sums of money which would from time to time constitute the balance due or paid on the guarantee by the bank, any loss, damage, costs, expenses or liability suffered by the bank arising out of or under the guarantee resulting from

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breach of the contract with the employer. The fact that demand made against the payment guarantee was made upon a written demand does not absolve the Defendant bank from its own undertaking in the payment guarantee to honour cheques issued to the supplier by the Plaintiff.

The undertaking is written in the following terms:

"PROVIDED ALWAYS THAT the total liability ultimately enforceable against the debtor or repayable by it under this agreement shall extend to cover any sums or sums of money which from time to time constitute the balance due or paid on the guarantee by the bank, any loss, damage, costs, expenses or liability suffered by the bank arising out of or under the guarantee resulting from the breach of the contract with the employer, including any act, neglect or default of the debtor, its servants or agents."

The technicality is that the payments made by the bank should arise after a default and demand is made by the beneficiary. That technical argument is surmounted by the argument that the parties envisaged liability to arise from time to time up to a total of Uganda shillings 100,000,000/= irrespective of any demand made by the beneficiary to the payment guarantee. In fact the agreement covers any sums of money "due or paid". The cheque without funds on the Plaintiffs account was money that was due to the supplier. That liability for money *due* as envisaged in annexure "A" arose when the supplier namely Century Bottling Company Ltd presented the cheque for payment drawn in its favour by the Plaintiff in the total sum of Uganda shillings 60,000,000/=. This was money due under the guarantee. The presentation of a cheque for payment tantamount to a demand for money due to the supplier after execution of the guarantee facility agreement and in terms of the second recital quote above and it was undertaken to be honoured by the Defendant. The guarantee was for a sum of money up to and Ltd to a maximum of Uganda shillings 100,000,000/=.

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Last but not least on this point this was an undertaking or contractual obligation between the parties and included any money owed to the bank which constitute money paid or due to the supplier independently of whether the supplier made a demand for it or not. The money earned interest immediately it was paid to the supplier. It became a loan to the borrower/Plaintiff. It cannot therefore be argued that the liability of the Plaintiff to the Defendant only arose after a demand was made by Century Bottling Co Ltd or when there was a default in payment. Interest payable to the bank by the Plaintiff only arose after the bank paid money to the Supplier whether that money had been demanded or not. Lastly the Defendant relies on the bank statement of the Plaintiff. The bank statement demonstrates most powerfully that the Plaintiff issued several cheques in the amount of Uganda shillings 20,000,000/= each. In most of the instances where cheques were issued by the Plaintiff there were no sufficient funds to cover the amount but the Defendant bank honoured the cheques. The bank statement of the Plaintiff is an admitted document in the joint scheduling memorandum.

I have considered the effective dates of the cheques in the Plaintiff's bank statement between 4th of April 2011 and 1st of August 2011. On the 4th of April 2011 cheques numbers 753 and 752 were due or effective. There was a credit balance of Uganda shillings 8,478,585/-. After honour of the two cheques each in the amount of Uganda shillings 20,000,000/= and therefore totalling to Uganda shillings 40,000,000/= the Plaintiff's account went into negative of Uganda shillings - 31,521,135/=. It remained negative until 8th of April 2011 when it had a credit of 4,206,765/=. Subsequently further cheques were deposited all of Uganda shillings 20,000,000/= which seems to be customary while the Plaintiffs account had no or insufficient funds. BY 31st of July 2011 which is a date after the dishonour of three cheques the Plaintiffs account which lacked funds was negative by -57,329,975/= which had been drawn. Cheques numbers 00791, 00796 and

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00797 which are the numbers of the dishonoured cheques dated 16th , 20th and 21st July 2011 respectively do not appear in the bank statement. Strangely on the 1st of August 2011 when the Plaintiff account showed a debit balance of Uganda shillings -55,856,475 cheque number 799 for Uganda shillings 20,000,000/= was cleared and the debit balance of the Plaintiff went to Uganda shillings -75,206,475/=. The conclusion is that the Plaintiff's cheques were honoured even when there were insufficient or no funds during the duration of the guarantee facility agreement dated 9th March 2011 annexure "A". That being the case I agree that the Defendant is barred by the doctrine of estoppels that is incorporated by section 114 of the Evidence Act cap 6 through its own actions from asserting that it could only honour cheques when there were sufficient funds on the Plaintiffs account. I also do not agree that the honouring of cheques meant that the Defendant would be doing business contrary to section 37 (a) of the Financial Institutions Act 2004. Section 37 (a) provides as follows:

"A financial institution shall not—

(a) engage directly or indirectly for its own account, alone or with others in trade, commerce, industry, insurance or agriculture, except in the course of the satisfaction of debts due to it in which case all such activities and interests shall be disposed of at the earliest reasonable opportunity; "

It cannot be said the by honouring cheques which became a loan payable by the Plaintiff the Defendant was engaging directly or indirectly for its own account, or with others in trade, commercial, industry, insurance or agriculture. There was simply a facility agreement which prescribed how the Plaintiff became a borrower indebted to the Defendant bank which was the

business in issue and the loan arising from the envisaged matters attracted interest which is the only consideration the Defendant was entitled to.

Coupled with the fact that in the payment guarantee the bank undertook to honour those cheques, it was in the contemplation of the parties that any cheques issued up to a total maximum of Uganda shillings 100,000,000/= would be honoured under the payment guarantee which was envisaged under the guarantee facility agreement annexure "A" dated 9th of March 2011. The illustrations above also demonstrate that this was the practice of the parties to honour cheques issued by the Plaintiff when there was no money on the account.

Before taking leave of the matter the other obligations of the Plaintiff in the counterclaim cannot arise from the specific guarantee facility agreement which has specific limits of liability of the bank. The guarantee facility agreement did not expressly incorporate the Plaintiffs other obligations when giving the Plaintiff a default ceiling of shillings 100,000,000/=. In any case even after the dishonour of the three cheques when there was a less debit balance, the Defendant bank honoured another cheque of Uganda shillings 20,000,000/=. How then can it be contended that the previous dishonoured cheques not duly drawn by the Plaintiff?

Moreover the loan facility and overdraft facilities became a matter in issue after the contract of the Plaintiff with Century Bottling Company was terminated and after the dishonour of the cheques. This is evident from recall of the loan letter dated 21st of October 2011. It writes that the total indebtedness of the Plaintiff by the date of the recall letter was 145,600,000/=. This outstanding sums included according to the amended written statement of defence and counterclaim paragraph 13 (a) thereof the accrued liability of Uganda shillings 91,718,772/= that arose as a result of the payment by the Defendant under the payment guarantee to Century

Bottling Company Ltd upon the default of the Plaintiff. The sum included Uganda shillings 60,000,000/= which had been dishonoured contrary to the custom of the parties under the guarantee facility agreement.

In any case the amount of money that became due and owing to the Defendant bank periodically, as shown by the debit balances between April 2011 and 1st Augusts 2011 on the account statement of the Plaintiff were secured by the Plaintiffs real property provided for under paragraph 10 of Part “A” of the guarantee facility agreement. Moreover interest was chargeable on those debit balances under annexure “A”. In the premises there arguments that the obligations of the Defendant to Century Bottling Co. Ltd were separate and autonomous and authorities cited by the defence Counsel are inapplicable. Secondly the submissions that cheques are duly drawn when there are sufficient funds and authorities to support this contention are also inapplicable in the circumstances of the Plaintiff.

In the premises a declaration issues that the Defendant breached the bank guarantee agreement dated 9th of March 2011 by the dishonour of three cheques number 00791 dated 16th July 2011, number 00796 dated 20th July 2011 and number 00797 dated 21st of July 2011 for a total of Uganda shillings 60,000,000/=.

However the rest of the prayers which are consequential to the declaration will be tried on the basis of evidence. This is because even after dishonour of cheques the bank paid up on the demand made by the beneficiary. Under order 2 rule 9 of the Civil Procedure Rules a declaration may be made whether consequential relief is sought or not. In **Guaranty Trust Company of New York versus Hannay and Company Ltd.** [1915] 2 KB 536 Bankes L.J. held at page 574 that: “... claim for a declaration is not in itself a claim for relief ...” It is therefore clear that under

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order 2 rules 9 of the Civil Procedure Rules a declaration of right may give rise to a separate action for consequential relief if not claimed in the same suit. In this case it is claimed in the same suit but requires evidence for its resolution. It further requires consideration of the counterclaim. Though consequential relief is sought, issues of compensation and damages are intertwined with the issues of the counterclaim of the Defendant which include other facilities which issues are not resolved merely by this partial judgment and have to be tried as they require facts not in dispute or proof by adducing evidence.

This partial judgment on the one specific declaration issued is delivered with costs against the Defendant.

Partial judgment delivered in open court on the 21st of May 2015.

Christopher Madrama Izama

Judge

Partial judgment delivered in the presence of:

Counsel Michael Mafabi for the defendant

The plaintiff is represented by Counsel Muhammad Mbabazi who absent.

Charles Okuni: Court Clerk

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Judge

21 May 2015