THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 74 OF 2013

GENTEX ENTERPRISES LTD}.....PLAINTIFF

VS

M & B ENGINEERS LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff filed a summary suit claiming Uganda shillings 50,758,000/= plus costs of the suit from the Defendant. The basis of the claim is that the Plaintiff supplied the Defendant with materials for water supply on credit to the tune of **Uganda shillings 109,758,000/=** according to copies of invoices attached. The Defendant partly paid a sum of **Uganda shillings 59,000,000/=** but refused to pay the balance of **Uganda shillings 50,758,000/=** which remained unpaid.

In Miscellaneous Application Number 140 of 2013 the Defendant applied for unconditional leave to defend the summary suit. The application was filed on 4 March 2013 and on the 22nd of May 2013 Counsels for the parties filed a consent order allowing the application and for the Defendant to put in a written statement of defence within a period of seven days from the date of signing of the consent order by the registrar. The consent order was endorsed on 17 June 2013. Subsequently on 18 June 2013 the Defendant filed a written statement of defence denying the claim.

The Plaintiff filed an amended plaint on 3 July 2013 in which it added a claim for interest and general damages for breach of contract to the original claim.

The Plaintiff is represented by Shwekyerera, Kalera and Co. Advocates while the Defendant is represented by Balondemu, Candia & Wandera Advocates. The Plaintiff's action was not prosecuted first enough on account of absence of the Defendant. Subsequently it became difficult

to serve the Defendants on account of the fact that the Plaintiffs sales executive Mr Soni Ashishi could not proceed with the suit because his Counsel was unable to come. Subsequently his lawyer fell sick and he informed court that the recovery of the lawyer was in doubt. He subsequently got another Counsel Messrs Kafeero and Co Advocates on the 14th of May 2015 whereupon Counsel was directed to serve the Defendants. Service was made on the Defendant's lawyers who acknowledged receipt but on the 27th of May 2015 the lawyers did not turn up. That notwithstanding the matter proceeded ex parte under Order 9 rule 20 (1) (a) of the Civil Procedure Rules but the Plaintiff sought adjournment of the hearing whereupon the court directed that service on the Defendant be made again. At the next date the Defendants Counsel were served and the court noted that the Defendant's Counsel wrote that he had lost contact with his client on the hearing notice. There was therefore no evidence that the particular Defendant had been served. Consequently the Plaintiff was advised to apply for substituted service only upon failure to trace and serve the Defendants. The Plaintiff indeed applied in Miscellaneous Application Number 962 of 2015 for substituted service to be effected on the Defendants and the order was granted. On 12 January 2016 by affidavit of Rashid Kamulegeya it was proven that the Defendants had been served in the Daily Monitor newspaper of 4 December 2015 according to paragraph 5 of the affidavit. The matter proceeded ex parte and the Plaintiff produced one witness namely the sales representative of the Plaintiff Mr Soni Ashishi. His witness statement was also received on the court record and he was led for purposes of proving the documents attached to the witness statement. The Plaintiff subsequently addressed the court in written submissions. Secondly the Defendant did not participate in the proceedings and the suit which was originally a summary suit was not defended.

The facts which have been proved on the balance of probabilities are that on 21 July 2009 the Defendant Company through Mr. Moses Bitagase, its Technical Director approached the Plaintiff Company for the supply of water pipes on credit. In exhibit P1 the Defendant wrote to the Plaintiff's managing director in a letter dated 21st of July 2009 requesting for the supply of materials according to an attached list of items. The terms of payment were for payment 30 days after supply. The items supplied were adduced in evidence as exhibit P2 amounting to Uganda shillings 22,550,000. Secondly exhibit P3 amounting to Uganda shillings 36,260,000/=. Thirdly exhibit P4 amounting to Uganda shillings 1,179,000/=. Exhibit P5 amounts to Uganda shillings

5,503,500. Exhibit P6 amounts to Uganda shillings 8,556,000/=. Exhibit P7 amounts to Uganda shillings 4,237,500/=. Exhibit PE eight amounts to Uganda shillings 10,660,000/=. Exhibit P9 amounts to Uganda shillings 312,000/=. Exhibit P10 amounts to Uganda shillings 20,500,000/=.

Furthermore on 22 July 2009, National Water and Sewerage Corporation recommended the Defendant Company in writing to the Plaintiff Company and the Plaintiff's management believed that the Defendant Company could pay. PW1 advised the Plaintiff Company to transact business with the Defendant Company and the Plaintiff Company went ahead and supplied the Defendant Company with water supply materials worth Uganda shillings 109,758,000/= according to the exhibited copies of tax invoices described above. The Defendant Company paid Uganda shillings 59,000,000/= leaving a balance of Uganda shillings 50,758,000/=. Thereafter the Defendant refused or neglected to pay and the statement of account reflecting the transactions between the parties was admitted as exhibit P11 showing the state of affairs.

In addition the PW1 testified that the Defendant Company had issued several cheques to the Plaintiff Company some of which bounced and copies of the cheques were adduced in evidence. Copies of six cheques which had bounced where adduced in evidence. The copies were attached to one sheet exhibit P12 comprising of cheques dated 5 September 2009 for Uganda shillings 5,503,500/= in favour of the Plaintiff. Another cheque dated 12th of February 2010 is for Uganda shillings 15,708,000/= in favour of the Plaintiff and issued by the Defendant. The third cheque is dated 23rd of January 2010 for Uganda shillings 11,000,000/= in favour of the Plaintiff and issued by the Defendant. All cheques were drawn on Tropical bank and the first two cheques bounced while the third cheque for Uganda shillings 11,000,000/= was not presented for the same reason.

Another set of copies of cheques are exhibit P13. It shows that the Defendant issued the cheque on 23rd of January 2010 for Uganda shillings 18,000,000/=. Secondly another cheque is of 23rd of January 2010 and is also for a sum of Uganda shillings 18,000,000/=. Lastly another cheque for the same date of 23rd of January 2010 is for a sum of Uganda shillings 18,000,000/=. All cheques were issued by the Defendant in favour of the Plaintiff. The last three cheques were not presented to the bank for cashing.

PW1 further testified that the Plaintiff Company made several demands on the Defendant Company for payment and the Defendant Company totally refused or neglected to pay. The Plaintiff has been greatly inconvenienced by the Defendant's actions and prayed for general damages against the Defendant as well as interest.

The Plaintiff's Counsel addressed the court in written submissions. The issues for resolution on which the Plaintiff's Counsel addressed the court are:

1. Whether the Defendant is liable for breach of contract?
2. Whether the Plaintiff is entitled to recover Uganda shillings 50,758,000/= from the Defendant?
3. The remedies available.

Plaintiff's Counsel relied on the evidence which are summarised above and he submitted on the basis of the authorities that there was a breach of contract by failure to pay for goods supplied. He relied on **Black's Law Dictionary** 8th Edition page 200 for the definition of breach of contract as a violation of contractual obligations by failure to perform one's own promise by repudiating it or by interfering with another party's performance. Furthermore relying on the case of **Ronald Kasibante versus Shell Uganda Limited HCCS 542 of 2006 [HCB] 2008** at 162, breach of contract is the breaking of obligations which the contract imposes and which confers a right of action for damages on the injured party. He further took note of the cheques which had been issued and bounced and relied on the case of **Kotecha versus Mohammed [2002] 1 EA 112**. Furthermore he relied on the decision of this court in **Kiberu Joseph Mukasa versus Butebi Investment Enterprises Ltd** for the same proposition that a person who issues a cheque in favour of another is bound to pay the face value of the cheque if the cheque is dishonoured.

I have carefully considered the evidence and the authorities. I agree with the authorities cited by the Plaintiff's Counsel. In **Kotecha v Mohammed [2002] 1 EA 112** the Respondent had issued post dated cheque for Uganda shillings 35,000,000/= in favour of the appellant. When the date on the cheque matured, the appellant upon failure to pay by the principal borrower presented the cheque and the cheque was dishonoured by the bank. The Court of Appeal held that:

> "The law in that regard; as stated by the learned authors of Chalmers and Guest on Bills of Exchange, Cheques and Promissory Notes; is:

> "Order 14 Proceedings: where an application is made for a summary judgment in respect of a claim on bill of exchange, cheque, or promissory note the general Rule is that leave to defend will not be given save in exceptional circumstance".
>
> The English authorities, particularly James Lamont and Company Limited v Hyland Limited [1950] 1 KB 585; Brown, Shipley and Company Limited v Alicia Hosiery Limited [1966] Rep 668, establish that a Bill of Exchange is normally to be treated as cash. The holder is entitled in the ordinary way to judgment. If he is a seller who has taken bills for payment, he is still entitled to judgment: no matter that the Defendant has a cross claim for damages under the contract of sale or under other contracts. The buyer must raise those in a separate action."

The proposition that a bill of exchange is normally to be treated as cash is supported by several other authorities and is consistent with and has been applied in this court. Where there is a seller who has taken cheques as payment for goods or services and the cheques are not cashed or bounce on being banked, the seller is entitled to judgment on the amounts on the cheques issued in his favour. That is what happened in this case and the Plaintiff is entitled to judgment. PW1 proved and adduced in evidence copies of cheques amounting to Uganda shillings 86,211,500/=. The Plaintiff does not claim the whole amount on the face of the cheques adduced in evidence as PW1 testified that a sum of Uganda shillings 59,000,000/= had already been paid out of the total amount for the goods supplied. These payments are summarised in exhibit P11 showing the state of accounts between the parties to this suit. The state of accounts shows the invoice details for goods supplied by the Plaintiff to the Defendant as well the amount for the supply and payments made by the Defendant for the supplies. I believe the testimony of PW1 and the account statement is consistent with the tax invoices issued by the Plaintiff which show who authorised the release of the goods mentioned in the tax invoices, who loaded it on the vehicle which transported it, on which number of vehicle it was loaded and the signature of the person who received it. These tax invoices were received in evidence as exhibits P2 – P10.

In the premises judgment is entered for the Plaintiff in the sum of **Uganda shillings 50,758,000/=** as claimed and the remaining questions are whether the Plaintiff should be awarded general damages and whether the Plaintiff be awarded interest as prayed.

The Plaintiff's Counsel prayed for an award of 15,000,000/= as general damages for inconveniences suffered by the Plaintiff. He relies on the presumption of law that the damages are those deemed to have occurred pursuant to the breach. Damages are awarded on the basis of *restitutio in integrum*. Secondly he submitted that the Defendant had denied the Plaintiff an opportunity to reinvest its money. Had the Defendant paid his monies, the Plaintiff would have re-invested the money in the same business profitably since 2009. In the premises he contended that an award of Uganda shillings 50,000,000/= would be sufficient as general damages on this footing.

I have carefully considered the submissions and I make reference to a recent judgment of this court on the question general damages in a suit for refund of money without evidence of loss of income adduced at the trial. Before doing so I have carefully considered the testimony of PW1. His testimony is in writing and the remedies of the Plaintiff are sought for in paragraphs 9, 10 and 11 of the written testimony which are reproduced for ease of reference:

"9. That I thus advised the Plaintiff Company to take the matter before the courts of law to seek legal redress for payment of the remaining balance that the Defendant Company owes the Plaintiff Company.

10. That the Plaintiff has been greatly inconvenienced by the Defendant's actions and prays for general damages against the Defendant.

11. That we would like this honourable court to order the Defendant to pay all the monies due to the Plaintiff together with interest thereon and costs of the suit."

When the suit came for hearing, the Plaintiff only produced one witness whose written testimony was admitted as his testimony in chief. The only other evidence adduced was by way of admitting and marking documents as exhibits which documents were referred to the written testimony of PW1. No additional evidence was adduced to prove how much the Plaintiff suffered as a result of deprivation of its money by way of loss of income. Furthermore the amended plaint claims interest at 25% per annum from the date of default in April 2010 till payment in full. Secondly it seeks general damages for breach of contract and general damages for inconvenience and disturbance as well as costs of this suit. In the final analysis the court primarily depends on the evidence adduced in court and cannot assume the quantum of loss of income.

The law on general damages and interest is well settled. I agree with the Plaintiff's Counsel that the law is that the Plaintiff is entitled to be restored to a position he would have been in had the injury complained of not occurred under the common law Maxim of *restitutio in integrum*. This doctrine was quoted with approval by the East African Court of Appeal in **Dharamshi vs. Karsan [1974] 1 EA 41** and is that general damages are awarded to fulfil the common law remedy of *restitutio in integrum.* It means that the Plaintiff has to be restored as nearly as possible and as money can do to a position he or she would have been in had the breach complained of not occurred. This principle is also spelt out in **Halsbury's laws of England Fourth Edition Reissue Volume 12** (1) Paragraph 812 and is that general damages are those losses, usually but not exclusively non-pecuniary, which are not capable of precise quantification in monetary terms. They are presumed to be the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that such damage has been suffered. In other words the court considers what the natural consequences of the wrong would be on the Plaintiff's business. In **Johnson and another v Agnew [1979] 1 All ER 883** Lord Wilberforce held an award of general damages is compensatory and:

> "... the innocent party is to be placed, so far as money can do so, in the same position as if the contract had been performed."

The principles however do not operate in a void. Evidence has to be adduced as to the possible losses which the Plaintiff suffered due to deprivation of the money if a higher amount is to be claimed than that presumed to be the natural and probable consequence of the breach. This is what the court can assume on the basis of the evidence. The evidence is that money was due to the Plaintiff by April 2010 which the Defendant neglected or refused to pay hence the suit. The suit was originally commenced by way of summary procedure. Leave was granted for the Defendant to file a defence by consent of Counsel. The Plaintiff amended the plaint to claim for general damages as well as interest. I have in the recent past held that an award of interest is also compensatory unless it is a claim for contractual interest (See **HCCS No 345 of 2014, Adjumani Service Station vs. Frederick Batte)**.

The court proceeds on the premises that the Plaintiff has been kept out of his money and reasonable interest ought to be paid for his or her deprivation. What is reasonable interest takes

into account the effect the deprivation of money had on the Plaintiff whether in terms of doing business with it or for purposes of lending it. Where there is no evidence whatsoever of how much the Plaintiff would have earned had he or she been paid in time, the court has to proceed on presumptions. The presumptions are that the award should represent the amount of money or profit the Plaintiff would have made had he or she had the use of the money. The same presumption is used for the award of interest. Because the award of interest is also compensatory there is no need to claim interest and general damages for deprivation of money. If the Plaintiff needed additional awards, it ought to have adduced evidence of loss of income and also it ought to have pleaded the same specifically. These principles are found in the following judicial precedents which I followed in **HCCS No 345 of 2014, Adjumani Service Station vs. Frederick Batte** namely; In **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** Forbes J in held at page 722 that an award of interest is part of an attempt to achieve *restitutio in integrum*. The court therefore applies the rate at which the Plaintiff would have had to borrow money to supply that which it was deprived of. *Restitutio in integrum* is the same basis for the award of general damages.

Secondly there is the holding of Lord Wright in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** that interest may be regarded either as representing the profit the Plaintiff might have made if he had had use of the money or conversely, the loss he suffered because he had not that use.

On both accounts what profit the Plaintiff would have made should be based on the evidence. It is the same as considering what the Plaintiff had lost due to deprivation. Where there is no evidence then the rate at which the Plaintiff would have had to borrow the money is a safe presumption and is based on commercial lending practices enforceable in courts. The Commercial Court is always applying prevalent rates of interest in lending transactions and this is what may be safely applied.

Finally according to **Halsbury's laws of England Furth Edition Reissue Volume 12** (1) Para 850:

> "it is assumed that the Plaintiff would have borrowed to replace the assets of which he has been deprived...”

In other words an award of interest is compensatory and serves the same purpose as that of an award of general damages. It should be sufficient if a reasonable rate of interest is awarded for the Plaintiff to be sufficiently restored to a position he would have been as if the money had been paid in time. It is assumed that the Plaintiff lent the money and is to be paid back with interest. For that reason the statutory basis for an award of reasonable interest is that under section 26 (2) of the Civil Procedure Act cap 71 laws of Uganda which suffices. Section 26 (2) provides that:

> "Where the decree is for the payment of money, the court may in the decree, order interest at *such rate as the court deems reasonable to be paid on the principal sum adjudged* from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit." (Emphasis added).

What is a reasonable rate of interest must be compensatory in cases of deprivation of the Plaintiff's money by the Defendant. In this case there was a commercial transaction in which the Defendant paid part of the money and did not pay the remainder. The Plaintiff seeks payment of the balance for goods supplied to the Defendant. The money was due in April 2010. The Plaintiff has been deprived of the sum awarded of Uganda shillings 50,758,000/= since April 2010. So what the court deems reasonable in commercial transactions must be consistent with the principle of *restitutio in integrum*. Where it is consistent, then an award of interest is sufficient to compensate the Plaintiff for the deprivation of money and there is no need in the absence of evidence of loss of higher income of awarding general damages as well.

Reasonable interest is awarded at the discretion of the court. In the case of **ECTA (U) Ltd vs. Geraldine and Josephine Namukasa S.C.C.A No 29 OF 1994**, it was held by ODOKI Ag DC.J as he then was held that:

> "... the Court has discretion to award reasonable interest on the decretal amount. But it appears that a distinction must be made between awards arising out of Commercial or business transactions which would normally attract a higher interest, and awards of general damages which are mainly compensatory."

The above Supreme Court decision arose from a personal injury case and claim for damages. The Supreme Court held that what is reasonable can be assessed by the court and noted that interest awarded in commercial transactions are normally higher than in personal injury cases. The Supreme Court did not go as far as laying down the principles for assessment of interest in commercial transactions since it was not in issue and left the question open.

In the premises considering that the Defendant was supplied goods from a commercial enterprise; the Plaintiff is awarded interest at 23% per annum on the principal sum awarded from 1st of April 2010 until the filing of the suit on the 20th of February 2013.

Secondly the Plaintiff is awarded interest on the principal sum at 21% per annum from the date of filing this suit till the date of judgment.

Thirdly the Plaintiff is awarded further interest on the aggregate sum at the date of judgment at the rate of 21% per annum from the date of judgment till payment in full.

Costs ordinarily follow the event under section 27 of the Civil Procedure Act and costs are awarded to the Plaintiff.

Judgment delivered in open court on the 23rd of February 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Ampeirwe Tumwebaze Counsel for the Plaintiff

Ashishi Soni Plaintiff's Sales representative also in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

23rd February 2016