

**THE REPUBLIC OF UGANDA,
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 44 OF 2012**

FAITH ASIIMWE T/A FAITH FASHIONS SOLUTION ENTERPRISE}PLAINTIFF

VERSUS

- 1. MERIDIANA AFRICA AIRLINES (U) LIMITED T/A AIR UGANDA}**
 - 2. AIR MALI }**
 - 3. AIR BURKINA}**
- (MEMBERS OF GROUP CELESTAIR}DEFENDANTS
BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

JUDGMENT

The Plaintiff is described in the plaint as a sole proprietor, trading under the name and style of Faith Fashions Solution Enterprise, mainly dealing in the manufacturing and tailoring of garments. The first Defendant is a limited liability company incorporated under the laws of Uganda and owner of the business trading as Air Uganda. The second and third Defendants are business names. The Defendants are a partnership trading as group Celestair.

The Plaintiff commenced this action for payment of outstanding contractual sum of US\$9133; special damages of US\$107,340; general damages for losses, inconvenience, anguish and distress occasioned to the Plaintiff as a result of the Defendants breach of contract; interest on the claimed sums at 30% per annum from the date of filing the suit until payment in full; and for costs of the suit.

The foundation of the Plaintiff's claim is a contract with the Defendants under the partnership Group Celestair to manufacture uniforms for the Defendant Cabin staff and ground staff for a period of four years commencing on 28th July, 2009. Fabrics used for making the consignment uniforms were obtained from suppliers in Italy and all consigned to Meridiana Africa Airlines (U) Ltd. Invoices in respect of the fabrics were issued to and paid by the first Defendant. The import duty and clearing agent's fees were invoiced to and paid by the first Defendant through its own appointed clearing agent. The Plaintiff claimed that the uniforms were at all times delivered by her or her staff to the first Defendant. In order to perform Part of the contractual bargain, the Plaintiff acquired a loan of US\$ 48,073 as working capital. She alleged that the Defendants breached the contract by failing to pay an outstanding sum of US\$ 9,133 being the cost of uniforms tailored by the Plaintiff for the Defendants. Secondly, the Defendants purported to

terminate the contract with the Plaintiff on 10th October, 2011 without any basis. The Plaintiff claimed to have suffered financial loss, inconvenience psychological anguish and distress for which she claims general damages. She also suffered special damages of US\$107,340.

The Defendant in their joint written statement of defence denied the claims. The Defendants admit that the Plaintiff was contracted by them to tailor and supply uniforms for their staff and it was the obligation of the Plaintiff to deliver the uniforms on time and take measurements of the staff in need of the uniforms prior to commencement of any work. The Defendants were disappointed with the workmanship of the Plaintiff and through the first Defendant informed the Plaintiff of this position in a meeting. The Defendant's crew complained that the uniforms were not fitting. Following the ill-fitting uniforms of many employees of the Defendants, some uniforms were returned for readjustment and the adjustments could not get done at all and often was done very late. The Plaintiff was supposed to get new tailors and was required to update the Defendants. On the basis of the poor workmanship, the Defendants were under no obligation to continue with the contract and terminated the Plaintiff's services. The Defendants accordingly contest the heads of damages claimed by the Plaintiff such as damages flowing from obtaining of a loan and expenditures by the Plaintiff.

By a counterclaim, the Defendants counterclaim for a declaration that the holding of the fabric of the Defendants by the Plaintiff is unlawful and an order for the return of the fabrics or payment of the value thereof, punitive damages for high-handed conduct of the Plaintiff, general damages and costs. Generally the facts are that according to the contract terms the Defendant supplied the Plaintiff with fabric to be utilised in the tailoring of uniforms belonging to the counterclaimants. The fabrics supplied by the counterclaimants remained at all material times with the Plaintiff/Respondent to the counterclaim and was to be returned upon completion of the contract between the parties. When the contract was terminated by the counterclaimant, the Plaintiff/Respondent to the counterclaim remained in possession of the fabrics and refused to hand over. The fabrics are worth US\$66,240. The counterclaimant seeks declaration that the Plaintiff/Respondent to the counterclaimant's continuous possession of the fabric is unlawful and for an order for return of the fabric or the value thereof. The counterclaimants pray for an order for punitive damages for the high-handed nature of the Plaintiff's actions and an order for general damages and costs of the suit.

The Plaintiff is represented by Messieurs Kasirye Byaruhanga and Company Advocates while the Defendants are represented by Messieurs Shonubi, Musoke and Company Advocates. The Plaintiff called two witnesses and the Defendant called two witnesses. The court was subsequently addressed in written submissions. The facts and the controversies are disclosed in the written submissions and I will refer to such facts and issues as revealed in the submissions. Apparently there are few factual controversies which I will deal with in the judgment.

Brief facts of the Plaintiff

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In the written submissions of the Plaintiff, the Plaintiff's case is that in the year 2000 she was contracted by the Defendants to manufacture uniforms for the Defendant's cabin crew and ground staff. The contract was for four years with effect from 28th July, 2009. In order to service the contract the Plaintiff acquired a loan of US\$48,073 in October 2009 to facilitate her as working capital. The Plaintiff performed her work diligently and professionally and on that basis the Defendants recommended her to prospective clients. She subsequently delivered the uniforms which were well fitting and in good condition in accordance with the terms of the contract. However, when she submitted her final invoices for payment, the Defendants refused to pay her. On 10th of October 2011, the Defendants terminated the contract whereupon the Plaintiff filed this action seeking payment of the outstanding amount of US\$9133, special damages of US\$107,340, general damages, interest on the claims at the rate of 30% from the date of filing the suit until payment in full and costs of the suit.

Brief facts of the Defendant

On the other hand the Defendants jointly and severally agree that in 2009 the Plaintiff executed a contract with the Defendants jointly and severally for the manufacture of cabin crew and ground staff uniforms for their respective employees. The contract was indeed for a term of four years. The contract was specific to the obligations of the Plaintiff which included organising for measurements to be taken for all the staff before manufacturing uniforms and delivery of the uniforms within 90 days from the date of the order by the respective Defendants. Time was therefore of essence and the uniforms to be delivered were expected to be fit for the purpose. The contract further provided that the Plaintiff was not in charge of storage of the remainder of the fabric after the manufacture of the uniforms. The Plaintiff was therefore expected to return the fabrics to the Defendants who remained the owners of the fabric. Contrary to the Plaintiff's contentions, it was never a term of the contract that the Plaintiff would obtain a loan; rather the Plaintiff represented herself as a financially viable person carrying out her duties as envisaged under the contract. It was on that basis that she was awarded the contract. It was a further term of the contract that the Plaintiff was entitled to receive a payment of 60% of the invoices to the three Defendants with the balance of 40% payable upon delivery of the uniforms. The intention of the 60% prepayment deposit was to provide cash flow assistance, if necessary, to the Plaintiff.

The Defendants further maintained that while it may be correctly stated that the Plaintiff was previously issued with two recommendation letters commending her good services, but the timestamp on these recommendations coupled with the signatories to the very same are instructive. Not only were the recommendations issued a year before the contract was terminated by the Defendants but also one of the signatories to the recommendations Mr Antonello Deoila had an affair with the Plaintiff at the time of performance of the contract. Following a year after the recommendation letters were issued, the Plaintiff's performance declined substantially. Her performance was unprofessional and on many occasions the uniforms would be delivered out of time, would be ill fitting and were being manufactured at a cost higher than that prevailing in the

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market compared to other suppliers in the industry. Owing to various breaches which were not remedied by the Plaintiff, the Defendant was inevitably compelled to terminate the contract. The Plaintiff was advised to submit any pending invoices for payment but the Plaintiff never complied with the request and the Defendants maintained that this was evidence that there was nothing owing to the Plaintiff. In the premises, the Defendants maintained that the termination of the contract by the Defendants was lawful and the suit is without any legal merit and ought to be dismissed with costs.

Finally in rejoinder and on the facts, the Plaintiff's Counsel submitted that the contract did not expressly state that the Plaintiff would return any remaining fabric to the Defendants. On the contrary the relevant clause in the contract was to the effect that any chargeable risk with regard to remaining fabric would not be the responsibility of the supplier. The Defendants therefore could not reasonably expect the Plaintiff to return any remaining fabric to them while her invoices issued to them remained unpaid. With regard to the loan, the representation of the Plaintiff that she was capable of financially performing the contract was not false. The contract was signed on 28th July, 2009 and the Plaintiff acquired the loan in October 2009 after the Defendant's failure to meet their part of the bargain by paying the initial 60% deposit which was due in September 2009. Secondly it was not uncommon or irregular for the Plaintiff as a business person to secure a loan for the performance of the contract. It was a reasonable thing to do. The Plaintiff could not have been expected by the Defendants to wait until the initial 60% deposit was paid before she prepared herself for the performance of the contract. This is in light of the fact that the delivery of the uniforms was expected within 90 days from the date of order. In the premises, the Defendants cannot be exonerated from ancillary or secondary contracts executed in anticipation of performance of the major contract with the Defendant. Such contracts include employment contracts, a tenancy agreement and the loan contract.

Concerning the recommendations that the Plaintiff received from the Defendants, it is evidence of her proficiency and professionalism and the Defendants could not have addressed to the fact unless and until she had worked for them. The recommendations were testimonials of the experience of the service provider. They recommend the Plaintiff for her general skills based on the experience of the referee at that time. Regarding the romantic involvement of the Plaintiff, that cannot on its own render the recommendations she received from the Defendants false or untrue. Furthermore there is no rule to bar a person who is romantically involved to conduct business with such a partner. So the involvement of the Plaintiff with one of the Defendant's officials is inconsequential. PW1 did not make the decision to hire the Plaintiff. It was a company decision based on the Plaintiff's professionalism and excellent quality of work. Lastly the Defendants are estopped from denying the contents of the recommendation letter, recommending the Plaintiff through PW1 who was an authorised officer.

Issues

1. Whether there was a contract for supply of uniforms between the Plaintiff and the Defendants?
2. If so, whether the Defendants jointly and severally breached their respective obligations under the uniform contracts?
3. What remedies are available to the parties in the suit and counterclaim?

Issue number 1

Whether there was a contract for supply of uniforms between the Plaintiff and the Defendants?

The Plaintiff's Counsel submitted that the parties are in agreement that the contract for the supply of uniforms was executed between the parties and this would automatically dispose of the first issue. The contract was admitted as exhibit P1.

In reply the Defendant's Counsel agrees that there was contract exhibit P1 executed between the parties. The only disagreement is on its terms. According to the Defendants each order for uniforms constituted a separate contract because it covered a period for instance for the years 2009/2010 or the year 2010/2011. The satisfactory performance of each separate contract was subject to all parties performing their obligations therein according to the agreed terms.

In rejoinder the Plaintiff's Counsel disagreed that each order constituted a separate contract. He submitted that the contract does not indicate in any way that the parties had such an intention. With reference to the authority of **Lulume vs. Coffee Marketing Board (1970) EA 133**, no terms should be implied in a contract unless the same was intended. It is expressly provided in the contract that the contract was valid for a period of four years (2009, 2010, 2011 and 2012) starting from the date of contract signing. Furthermore the Plaintiff's Counsel submitted that it defeats any business sense for anybody to bind themselves for four years in a single contract if their intention was to execute separate contracts for each period. He prayed that the submission of the Defendant's Counsel is rejected by the court.

Resolution of issue number one

I do not need to deal with the question of whether the contractual relationship between the parties consisted of a series of contracts or whether there was one contract because that is not material for the resolution of the first issue which is whether there was a contract for the supply of uniforms between the Plaintiff and the Defendant. Whether it was a series of contracts or one single contract will be material in considering the terms of the contract and the obligations of the parties. However, the fact that there was a contract between the parties is not contentious and I agree that issue number one is not contentious and there is no need to dwell on it. There was indeed a contract between the Plaintiff and the Defendants which speaks for itself and it was admitted as exhibit P1.

Issue number 2

If so, whether the Defendants jointly and severally breached their respective obligations under the uniform contracts?

Submissions of the Plaintiff's Counsel on issue number 2

The Plaintiff's Counsel submitted that in resolving whether the Defendants jointly and severally breached their obligations under the contract, it was imperative to set out the relevant obligations of the Defendants which are in issue.

The Plaintiff's Counsel submitted that the first obligation relates to terms of payment under paragraph 4 of the contract. The three Defendants were obliged to pay a 60% deposit of the total invoice on 10th September, 2009 and the final 40% upon delivery of the goods in December 2009. The Defendants jointly and severally breached the obligation to pay the Plaintiff upon delivery of the uniforms. The Plaintiff delivered the uniforms according to the delivery notes admitted in evidence namely exhibit P7, P8, P9, P10 and exhibits PE 11 – 28 respectively. PW2 who is the Plaintiff testified that she received US\$11,069 which was paid by the first Defendant in March 2010. This was contrary to the terms of the contract which provided that the initial 60% would be paid on 10th September 2009. The Defendants did not furnish any payments to the Plaintiff when she subsequently delivered the uniforms and presented her invoices. The Defendants may not attempt to offer any such evidence because they had none. Consequently the Defendants breached the contract by failure or neglect to pay 40% of the invoice when she delivered the uniforms.

The Plaintiff's Counsel further submitted that the second limb of the Defendants breach is the decision to terminate the contract without any plausible cause. The relevant clause paragraph 2 which deals with the duration of contract stipulates that the duration of the contract was four years namely 2009, 2010, 2011 and 2012. The contract had a fixed duration and did not have an exit clause.

The Plaintiff's Counsel further contended that the Defendants argued that the right to terminate the contract was on grounds of poor workmanship and delayed delivery of uniforms. DW2 testified that whereas the Plaintiff was doing a good job initially, as the contract continued her performance deteriorated and she started to produce ill fitting uniforms. The contention was that the continuation of the contract was subject to satisfactory performance by the Plaintiff and therefore the Defendants had no choice but to terminate the contract. The Plaintiff's Counsel submitted that the terms of any contract are based ascertained by reviewing the contract itself. No terms are to be implied in the contract unless this was what was intended according to the case of **Lulume vs. Coffee Marketing Board (1970) EA 133**. The contract exhibited by the parties did not make reference to satisfactory performance as a condition and DW2 rightly admitted this in cross examination. The Plaintiff nevertheless performed the contract

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satisfactorily. The Defendants cannot therefore seek to rely on this ground as a justification for terminating the contract.

Without prejudice regarding the alleged and satisfactory performance, the allegation of the Defendants is that the Plaintiff's performance deteriorated as she started to produce ill fitting uniforms which had to be re-tailored and re-adjusted several times.

Furthermore Counsel submitted that the delivery notes relied on previously show that all the uniforms delivered were fitting and in good condition. They were neither produced nor were complaints registered by the recipient DW1 on the said ill fitting uniforms or those in poor condition and this fact was admitted by DW2 during cross examination. The Defendants cannot in the circumstances rely on this ground for termination of the contract. Secondly, PW1 Antonello Deiola explained that he was in charge of procurement and the Plaintiff fulfilled her obligation and he was fully aware that all the uniforms delivered were well fitting. The problem arose due to the nature of the fabric used for the uniforms. He testified that they should not be blamed on the Plaintiff as the choice of fabric was made by the Defendants. Whereas the fabric used was natural and meant to be dry-cleaned only, the Defendants' staff were not informed of the same and many resorted to hand washing leading to shrinking. This was in spite of the fact that the uniforms were clearly labelled 'dry clean only'. Poor maintenance of the uniforms by the Defendants' staff led to the complaints about ill – fitting uniforms. The poor workmanship was not a valid ground for termination of the contract as the same was not substantiated by the Defendants.

Regarding delay to deliver uniforms on the part of the Plaintiff, the Plaintiff admitted during her testimony in cross examination that she did not deliver the uniforms in accordance with the delivery schedule in the contract. The simple explanation for the delayed delivery was that the fabric was delivered late by the Defendant in total breach of the terms of the contract. DW2 in paragraph 20 of her written testimony testified that it may be true that there was a delay in the delivery of fabric. They admitted that they delivered fabric to the Plaintiff late. The Plaintiff who testified as PW2 testified that due to the delay in delivery of fabric, the Defendants requested her to clear the fabric on their behalf which she graciously agreed to do. In that respect exhibit P6 was admitted in evidence and it is an e-mail requesting one Elijah to have ownership of the Defendant's fabric transferred to the Plaintiff in order to facilitate the clearance with customs and the Plaintiff was copied on. The Plaintiff's Counsel submitted that it was absurd for the Defendants and one hand to admit the default in delivery of the fabric and in the same breath blame the Plaintiff for delayed delivery of uniforms. He concluded that the delay on the part of the Plaintiff was occasioned by their own breach in the first place and her delay cannot therefore be in breach.

The Plaintiff's Counsel further submitted that it was important to explain how the Plaintiff performed her obligations. Paragraph 3 of the contract entitled "Group Celestair Expectations

from the Supplier" provided that the Plaintiff was to deliver the uniforms within 90 days from the order by the company if the fabrics are in stock. Clearly the Plaintiff was under no obligation to deliver within 90 days from the date of order if the fabrics were not in stock. It followed that the delay on the part of the Defendants exonerated the Plaintiff from performing her obligation to deliver within 90 days of the order. Furthermore paragraph 8 of the contract emphasises that the schedule applies if the fabric is already in stock. Because the fabric was not in stock, the question of late delivery does not arise.

Concerning return of the remaining fabric, the Plaintiff's Counsel submitted that it was the testimony of DW2 that the fabric was returnable upon completion of the contract. He further contended that the contract did not contain a clause on the return of fabric. The Defendants made no attempt to point out the relevant provision in the contract addressing this matter. Secondly, during cross-examination DW 2 admitted that the contract did not provide for the return of unused fabric.

The Plaintiff's Counsel further submitted that notwithstanding the fact that there was no clause in the return of fabric; the Plaintiff would be within her rights to hold onto the unused fabric until the outstanding dues are paid. He submitted that the Plaintiff has a lien over the remaining fabric and relied on the decision in the Kenyan case of **UNIBILT Kenya Ltd (Under Receivership) vs. Mukhi and Sons Ltd (2004) 2 EA 340** for the proposition that because the Plaintiff is owed money, she can hold onto the fabric until she is paid.

The Plaintiff's Counsel submitted that where the Plaintiff delivered the uniforms in accordance with the terms of the contract, the Defendants failed to pay her in accordance with the invoices presented. Consequently, she acquired the right to hold onto the remaining fabric until she is paid. The Defendants' counterclaim must therefore be dismissed with costs. In light of the foregoing, the Plaintiff concluded that the Plaintiff on her part delivered the uniforms in accordance with the contract and the Defendants jointly and severally breached the contract by refusing or failing to pay the Plaintiffs outstanding fees upon presentation of invoice. Secondly, there was breach by purporting to terminate the contract without any just cause. The Plaintiff prayed that this court is pleased to find that the Defendants are in breach of contract.

Submission of the Defendants Counsel in reply to issue number two

The Defendants Counsel submitted that it was a term of the contract that the Defendants were jointly and severally to pay 60% of the individual invoices on 10th September 2009. However the Defendants deny having breached the above obligation. The performance of obligations under the contract was subject to the availability of fabric which was to be supplied by the Defendants. The uniform delivery schedules were always subject to having the fabric in stock. It is admitted by the Plaintiff that the fabric was only cleared by Uganda Revenue Authority after 15th December 2009. As such there was no production before the arrival of the fabric and payment of

60% deposit under the contract was therefore postponed to a reasonable time following the delivery of the fabric to the Plaintiff in this case on 25th January 2010. The payment of 60% by the first Defendant was therefore made in a timely manner and there was no breach. Furthermore the delivery of uniforms by the Plaintiff to the first Defendant prior to the clearing of the fabric with customs was a spill over from the previous contract between the first Defendant and the Plaintiff and was independent of the contract which is the subject matter of the suit.

The Defendants were at all material times severally responsible for their individual payments upon being invoiced. Exhibit P1 provides for the requirement for the invoice to be sent with all supporting documents in respect of goods and services provided. All the information is missing from the invoice relied on by the Plaintiff. None of the invoices is indicated as having been received by the respective Defendants for payment. The invoices also lack any supporting information. In the premises, receipt of the invoice coupled with the supporting documents was a precondition to payment. In the absence of evidence of this, it would not be corrected in law and in fact to hold the Defendants liable in breach for non-payment.

Without prejudice, the Defendants submitted that the Plaintiff failed to prove performance of any work in respect of the second and third Defendants. The delivery notes referred to are specific to the first Defendant. In the absence of any delivery notes to substantiate performance of similar works for the second and third Defendants, the court ought to disregard the invoices.

Without prejudice, the Defendants Counsel submitted that the invoices raised are very suspicious and should not be relied upon by this court as evidence of indebtedness by the Defendants. The Defendant submitted that on the Plaintiffs own admission 60% of the invoice number 24 was paid on 25th February, 2010 yet again on 30th April, 2010 the Plaintiff raised an invoice 24 in respect of the same delivery and conspicuously refused to acknowledge the advance payment of 60% previously made. The Defendant contends that this is outright dishonesty that cannot be ignored and shrouds the rest of the invoices in suspicion.

Additionally and without prejudice the Defendants contend that it is evident from the delivery notes that the uniforms would be delivered to and received at a focal point by Ms Julie Otago in her capacity as the Cabin Crew Manager. Upon receipt of uniforms, the same would be distributed to the individual employees for fitting. Because she was not the intended beneficiary of the uniforms, she could not possibly confirm the condition of the uniforms at the time of delivery. It was therefore common for the workmanship to be poor with ill fitting uniforms and delay in the delivery to the point that some employees left the employment of the first Defendant before receiving their uniforms. Owing to the glaring fundamental breaches of the terms of the contract, it would be improper to hold the first Defendant liable to make payments for poor workmanship and lack of professionalism which had been brought to the attention of the Plaintiff and no remedial action was taken.

Furthermore the Defendant's Counsel submitted that in the letter of termination the Plaintiff was requested to deliver to the first Defendant the invoices for which payment was pending for reconciliation and payment. This was never done up to date and until the time of closure of both the first and third Defendants and it is evidence that there was no payment due to the Plaintiff. To now hold the Defendants liable for payment of the invoices in the absence of reconciliation after the Plaintiff had the opportunity to do this, should be rejected as it would occasion a miscarriage of justice and would lead to unjust enrichment of the Plaintiff.

Regarding termination without any plausible cause

Counsel for the Defendants submitted that it is true that the contract was for a period of four years however it was also specific as to the uniforms being fit for the purpose and on the time of delivery of the uniforms which were terms of essence. The Plaintiff undertook to perform her tasks with professionalism. To submit that satisfactory performance is merely been imported into the contract and was not required is a blatant falsehood and defeats all commercial sense and logic as it would imply that for as long as the contract is for a fixed duration of time, the parties were prisoners even when the commercial object and intent and purpose of the contract was not achieved. It is a recognised principle of common law that where a contract has been breached by one party the other party is entitled to rescind the contract or to treat it as discharged and the contract would terminate as from that moment. The Defendants Counsel relies on the principle in **Halsbury's laws of England Volume 9 (1) Reissue Paragraph 989**. In the premises Counsel submitted that there was a fundamental breach of condition as to time and fitness for purpose which was the benchmark for satisfactory performance and as such the termination was lawful.

The Defendants Counsel further relied on the *contra proferentem* rule that where contract language is capable of two alternative interpretations, it must be construed against the party which drafted the contract. The contract appears on the letterhead of the Plaintiff and therefore was drawn up by the Plaintiff. If there is any ambiguity in the obligations of either party then the same must be interpreted against the Plaintiff. The Plaintiff undertook to perform high quality work corresponding with the expectations of the Defendants. The expectations of the Defendants on the other hand were clear and specific. These included measurements of employees, delivery within 90 days and return of fabric following completion of the work. It followed that any ambiguity arising from the agreed terms must be resolved against the Plaintiff who drafted the contract. Finally the termination of the contract by the Defendant was at all material times justified.

Poor workmanship/ill fitting uniforms

The Defendant's Counsel submitted that uniforms were as a matter of company policy delivered to the Cabin Crew Manager Mrs Julie Otaga as the focal point or her sister Ms Catherine Kiconco. It was confirmed by the Plaintiff that Ms Julie was not the immediate beneficiary of the

uniforms that will be delivered to her as such could not rightly confirm the conditions in which they had been delivered and should only be receiving them on behalf of other staff. The Plaintiff's goods delivery note was ambiguous in as far as it required confirmation that the goods were in good condition prior to the goods having been examined by their respective beneficiaries. The ambiguity ought to be interpreted against the Plaintiff. The testimony of DW2 is that on only a few occasions would individual employees receive their uniforms directly from the Plaintiff following incessant demands. Owing to the demands of the work of cabin crew and ground staff, many did not have the luxury to follow up with the Plaintiff and only drivers owing to the nature of their work were able to do this.

With regard to the evidence of Mr Antonello Deoila, the Plaintiff admitted having been romantically involved with the witness whom she referred to as her fiancé at the material time of execution of her obligations under the contract. This goes to the credibility if any to be given to one who had such a relationship with the Plaintiff. The role played by the said witness in the alleged verification and procurement of uniforms remains unsubstantiated by any evidence. All delivery notes bear the recurring signature of the cabin crew manager Ms Julie rather than that of Antonello whose testimony is irrelevant and lacks any foundation.

DW1 testified that it was not only that the uniforms would be ill fitting even prior to subjecting them to any form of cleaning process but also the uniforms did not bear the mark that they were to be dry cleaned only. The Plaintiff had the responsibility to label the cleaning requirements of the uniforms which she did not do. The testimony of Mr. Antonello cannot be correct as his role did not necessitate him to wear a uniform. The Plaintiff failed to adduce in evidence a sample uniform bearing special cleaning directions of dry-cleaning only. The onus was on the Plaintiff to prove well fitting uniforms and good workmanship according to section 103 of the Evidence Act which she failed to do.

Delay in delivery

As far as the delay is concerned the Defendants Counsel submitted that they did not contest that on account of no one's fault a delay in the delivery of fabric occurred. The fabric was only cleared sometime after 15th of December 2009. According to the terms of the contract delivery of the manufactured uniforms was expected within 90 days from the placing of orders. Delivery was therefore expected sometime in April 2010. The bulk of the uniforms were delivered during the July/August 2010 period of more than two months after the delivery was expected. In the premises, all allegations of perfect compliance with the terms of the contract by the Plaintiff are lacking in merit as the evidence of non-compliance is overwhelming. In the premises the Plaintiff did not prove timely delivery according to statutory requirements.

Return of remaining fabric

Defendants Counsel submitted that contrary to the Plaintiff's submissions on the issue, the contract was specific as far as the fate of the fabric following manufacture of the garments is concerned. It provides that after manufacture of the garments, the supplier will not be in charge of storage for the remaining fabric. The supplier was the Plaintiff. The only logical conclusion is that the Plaintiff was expected to return the fabric to the Defendants who are the owners thereof. The Defendants Counsel relied on the common law doctrine of bailment in **Sylvan Kakugu Tumwesigye vs. Trans Sahara International Trading LLC** as defined by Hon Justice Kiryabwire as a transaction under which goods are delivered by one party (the bailor) to another (the bailee) on terms which normally require the bailee to hold the good ultimately to redeliver them to the bailor or in accordance with his directions. The relationship between the Defendant and the Plaintiff was clearly that of payment as fabric was delivered to the Plaintiff for the specific purpose of the manufacture of garments with a direction that the fabric was to be returned to the Defendants immediately upon completion of the exercise.

Counsel for the Defendants submitted that the terms of the contract were clear as to what would happen to the fabric following the manufacture of the garments. The Plaintiff was expressly prohibited from being in charge of storage of the remaining fabrics following the manufacture of the garments. Upon termination of the contract a demand for the fabric was made which to date the Plaintiff has refused to comply with. In light of the above the right of lien as explained in **UNIBILT Kenya Ltd (under receivership) vs. Mukhi and sons Ltd (2004) EA 340** is not applicable as the directions to the Plaintiff regarding the fabric had already been previously agreed upon in the contract. In the premises the Plaintiff had no right in fact or in law to remain in possession of the fabric and her actions are unlawful. Lastly in support of the counterclaim the Plaintiff remains in possession of fabric worth US\$66,240 and the Defendants demand for the return of the fabric or the value of the fabric.

Rejoinder of the Plaintiff's Counsel on issue number two

The Plaintiff's Counsel submitted that the performance of obligations under the contract was not subject to the availability of fabric as suggested by the Defendants. Furthermore performance of the contract obligations were not suspended nor was the delivery of uniforms a spill over from the previous contract. Contrary to what was advanced by the Defendant, the contract was not suspended because of the absence of fabric. This is not stipulated in the contract and had it been the intention of the parties it would have been expressly provided in the agreement. Counsel reiterated submissions that no terms could be implied in the contract unless it was intended according to the case of **Lulume vs. Coffee Marketing Board (1970) EA 133**. The contract was valid for a period of four years starting from the time of signing the contract in July 2009. Consequently any failure to perform obligations under the contract constituted breaches by the Defendants, which they should not explain away by conjuring up false notions which were clearly not within the view of the parties.

It is an admitted fact in cross examination of the Plaintiff that all invoices that were accepted by the Defendant's official stamp and further that the invoices with respect to the second and third Defendants were forwarded to them by e-mail. The submission that none of the invoices submitted by the Plaintiff indicate that they were received by the Defendants is false. The invoices had a reasonable amount of detail for any reader to understand the nature of the transaction with respect to which they were being issued. The invoices did not lack supporting information and the Defendants cannot use that as a defence for failing to honour their duty to pay the Plaintiff.

The Plaintiff proved performance of work with respect to the second and third Defendants. Airway bills were issued when the Plaintiff issued tailored uniforms to the second and third Defendants. Because they were located outside Uganda, it was not possible to have the usual delivery notes which were used in the case of the first Defendant. The Defendant's submission that the Plaintiff failed to prove performance must therefore be dismissed. The Plaintiff's Counsel further rejected the Defendant's argument that receipts which were issued are incorrect. The receipts were accepted by the Defendants when issued and so they cannot attempt to challenge them as being fictitious. The Defendants should have raised the matter at an earlier time.

Furthermore the Plaintiff's Counsel agrees that uniforms were often received by Julie Otago who testified as DW1. The submissions that the uniforms were characterised by poor workmanship, were ill fitting and badly sewn should be rejected. It was inconceivable for the Cabin Crew Manager Ms Julie to receive uniforms well knowing that they were poorly made, ill fitting and badly sewn. It amounts to admitting incompetence in her work as a Cabin Crew Manager and was a serious indictment on her. As a professional she ought to have rejected the goods or noted upon the delivery note the concerns of the Defendant. In the absence of these the Plaintiff's Counsel submitted that the uniforms were delivered in good condition. He further argued that poor workmanship involving tailored goods cannot be concealed. When the cloth is poorly tailored, it is obvious to the naked eye and could easily have been noticed by DW1.

Concerning delay in deliveries, there were no delays on the part of the Plaintiff. Had there been any delays, they ought to have been noted on the delivery notes by the person who received the uniforms. Lastly the Plaintiff's Counsel submitted that the evidence of the Plaintiff was that she was never asked by the Defendants to furnish invoices for amounts due to her and this would explain why the Defendants do not provide such evidence. On the contrary when the Plaintiff wrote a notice of intention to sue, she was advised by the Defendant's lawyers that the Defendants owed her nothing.

In rejoinder on the issue of termination without plausible cause

The Plaintiff's Counsel submitted that the contract was specific with respect to every clause including supply of fabric by the Defendants and payment of the initial deposit of 60% on specific dates, obligations which the Defendants breached. There was neither delay in the delivery of uniforms given the Defendants on delay in supplying fabric and making initial payment deposit nor were the uniforms delivered unfit for the purpose. If the contract was specific as to the time of delivery, thus making the time of essence, as might be expected, or other related obligations under the contract must be construed strictly. The Plaintiff consistently asserted that the Defendants were in breach for failure to deliver the fabric on time and subsequently failure to make the initial deposit of 60% according to the contract. It was erroneous for the Defendant purport to strictly enforce the requirement of time as against the Plaintiff simply and expect that the time was not of essence in performance of their own obligation. This would amount to an unfair terms of contracts.

Regarding the implied term of fitness for purpose, such an implication is demonstrably inapplicable in this case as the contract was not a sale contract in which the buyer sought to rely on the expertise of the seller to select and furnish suitable goods. On the contrary the Defendants were more knowledgeable about the quality of goods they wanted and hence the agreement to purchase and supply the fabric. PW1 in his testimony which was not contradicted explained at length the Defendant's choice of fabric over ordinary fabric. Additionally PW1 testified that the issue of ill – fitting uniforms arose because the Defendants having procured fabric that could only be maintained by dry-cleaning failed to warn their staff as such and provide the staff with facilitation for dry-cleaning. This caused some uniforms to shrink. In the premises there was breach on the part of the Defendants to honour the obligation to pay and terminating the contract without any justifiable cause. There was no ambiguity in the contract and therefore the *contra proferentem* rule cannot be applied. In the final analyses the termination of the contract by the Defendants was unlawful and unjustified.

Further to the testimony about poor workmanship and poor fitting uniforms, DW1 was not the immediate user of the uniforms when they were delivered by the cabin crew manager competent to receive uniforms and confirm whether there were in good condition. She never raised any issue as to the poor workmanship.

The matter is further answered by the testimony of PW1 Mr Antonello. The fact that he had a relationship with the Plaintiff does not mean that he lacked credibility. There are other factors which the court must take into account before impeaching the credibility of the witness. There was no question about his demeanour that was suggested to the effect that he was concealing the truth. Secondly, he stood nothing to gain from the affair with the Plaintiff which had ended. His testimony is consistent with other facts which are not contested. The testimony of PW1 about the quality of the fabric was uncontested. Thirdly, PW1 as the quality control manager played a role in the verification and procurement of uniforms. He did not require any further evidence other than his testimony and the failure of the Defendants' Counsel to subject it to cross examination

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means that the testimony was admitted. Furthermore PW1 was a competent witness because it was consistent with his responsibilities as quality control manager that he had something to do with the uniforms. The quality of the uniforms was within his preserve as an officer of the Defendant Company. On the other hand it is questionable whether DW2 had any role in quality control of uniforms for cabin crew. As head of marketing and sales, her responsibility did not directly or indirectly involve supervision of uniforms in order to ensure their quality. This was the responsibility of PW1 and as such the testimony of DW2 regarding reports being made to her about poorly made uniforms and testimony on the Defendant's staff following up their uniforms must be considered as a fruitless attempt to conceal the truth. Her testimony should be disregarded because she is not competent to testify on matters of quality of uniforms for the Defendant's staff. The argument that the Plaintiff ought to have delivered at least one uniform as evidence ought to be dismissed.

Regarding the delay in delivery Counsel reiterated submissions that late delivery does not arise because the Defendants breached the obligation to deliver the fabric on time and did not make the initial deposit in accordance with the contract.

On the question of return of the remaining fabric, it was within the Plaintiff's right to hold onto the remaining fabric and the counterclaim ought to be dismissed. The contract did not include a clause on the return of used fabric. Most importantly though the Plaintiff acquired rights to retain this fabric and the right to retain as claimed by the Plaintiff is consistent with the authorities earlier on submitted. Contrary to the view presented by the Defendants, the relationship between the parties was not one of bailor and bailee. The Defendants did not at any time deliver the goods to the Plaintiff on terms that there were to be returned and as such authorities submitted on by the Defendants Counsel are irrelevant and distinguishable.

Resolution of Issue No 2

If so, whether the Defendants jointly and severally breached their respective obligations under the uniform contracts?

I have carefully considered the question of whether any of the parties were in breach of their respective obligations under the uniform contracts. The question of whether there was a contract at all was answered in the affirmative. The next question then is what were the terms of the contract?

The contract was admitted in evidence as exhibit P1 and by consent of the parties. Furthermore, in the joint scheduling memorandum executed by both Counsels on the 17th of June 2015 for the Plaintiff and the Defendants and filed in court on 17th June 2015 the points of agreement and disagreement are set out. In the scheduling memorandum it is an agreed fact that by an agreement dated 28th of July 2009, signed between the Plaintiff on the one hand and Air Uganda, Air Burkina and Air Mali (Group Celestair) on the other hand, the Plaintiff was contracted to

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supply uniforms for flight and ground staff of the three Defendants. The contract was admitted by consent of the parties.

Before delving into the issue of whether there was any breach of the contract, I have considered the written contract exhibit P1 which is an agreed document. The object of the contract is stated to be the uniforms manufacture for cabin crew and ground staff of the three Defendants. Secondly, it is provided that the contract was valid for a period of four years starting from 2009, 2010, 2011 and 2012 commencing on the date of contract signing. The date of contract signing is the 28th of July 2009. The contract was written on the letterhead of the Plaintiff who is described as Faith Fashion Solution Enterprise. From the contract itself it is not clear who drafted the terms though it is on the letterhead of the Plaintiff. The Defendants trading as Group Celestair gave their expectations in seven points namely: "...

1. The supplier should account for the fabric necessities 2009 (considering the full set for each person with a report attaching the list).
2. The supplier should organise for measurement to be taken for all the staff in the three companies.
3. The supplier must deliver the uniforms within 90 days from the order by the company (if fabric is in stock).
4. The supplier should not make any changes in the basic design of the uniforms without notifying or consulting with the Group Celestair.
5. The supplier must only use the fabrics and accessories supplied by Celestair Group; in case of any changes must be approved by Group Celestair delegate.
6. After the manufacture of the garments, the supplier will not be in charge of storage for the remaining fabrics.
7. The supplier must take full responsibility of the fabric in terms of the security handed over from Group Celestair.
8. The delivery schedules would be as follows (if the fabric (it will) already in stock)..."

The schedule for delivery followed and it is stipulated in the written contract that for the year 2009/2010 (full set) for Air Mali delivery was set for the period November/December 2009 for the full set. For Air Uganda, delivery was set for the period December 2009/January 2010 for the full set. For Air Burkina the period for delivery was written as January 2010 for the full set.

Secondly, another schedule was provided for the year 2010 (refill). The schedules were as follows: for Air Mali December 2010; Air Uganda December 2010 and finally for Air Burkina December 2010. This was for what was termed as the 'refill set'. The composition of the refill set was also set out. It gives the details for the female flight crew in terms of the assortment of uniforms that were required. It gives a different set for the male flight crew. There is another set of uniforms for the ground female staff and another set for the male ground staff.

The terms of payment are set out and payment was set in US dollars. The 'caterer' or the supplier was required to render to the customer invoice with all supporting documents in respect of goods and services provided under the agreement. For all the three Defendants it was agreed that they would each provide a 60% deposit of the total invoice on 10th September, 2009. The remaining balance of 40% was to be paid upon delivery of the goods i.e. in December 2009.

There was therefore an express stipulation for provision of a 60% deposit of the total invoice on 10th September, 2009 for each of the Defendants.

I must say that the contract was poorly drafted because there could not be a controversy as to whether the Plaintiff provided invoices after the supply of the uniforms. It is clearly envisaged that the Plaintiff would take measurements of the Defendant's staff prior to the undertaking and present her invoices whereupon the Defendants were obliged to provide 60% deposit thereof on 10th September 2009. There would be no need to provide another invoice for the balance of 40% of the goods upon delivery because if a 60% deposit is made, it would be of a known figure or cost price for the services and which had been invoiced prior in time. Specifically I need to quote the first part of the terms of payment where it is written as follows:

"The caterer shall render to the customer invoice with all supporting documents in respect of goods and services provided for (in) this agreement."

The invoice envisaged which was supposed to be accompanied by all supporting documents in respect of goods and services provided for under the agreement can only be an invoice after taking the necessary measurements for the staff, and subsequently given to the Defendants whereupon a 60% deposit of the total invoice will be paid on 10th September, 2009. This is the meaning that emerges from a literal reading and reasonable construction of the contract. It was also the intention of the parties to supply to the Defendant staff specified uniforms consisting of jackets, shirts, trousers, skirts, service blouses, trousers, and raincoats. Secondly it was provided that certain accessories such as hats, bags, earrings, foulards and ties etc were not included. For the Plaintiff to be able to manufacture or tailor, the Defendants had to supply the fabrics. Secondly, the Plaintiff had to take the necessary measurements of the flight and ground staff of the Defendants. It is not clear from the contract whether the measurements were to be made before the supply of the fabric or thereafter. What is clear is that the supplier was required to use the fabrics and accessories supplied by Celestair Group. Secondly, it is provided that after the manufacture of the garments, the supplier will not be in charge of the storage of the remaining fabrics.

The Plaintiffs claim is for unpaid deliveries in the sum of US\$ 9,133. The Plaintiff also claims special damages of US\$107,340. The Plaintiff is aggrieved by termination of the contract which she claims was terminated by the Defendants without any plausible or reasonable ground. The

Defendants on the other hand asserted that there was breach of the terms of the contract by the Plaintiff for making ill fitting uniforms for the Defendant's staff and not delivering on time.

I have carefully considered the evidence. There is a dispute as to whether there was timely delivery of the uniforms and whether the uniforms were fit for the purpose. On those premises, the fact that the Plaintiff delivered some uniforms is not in dispute. There are several delivery notes which were signed by DW1 who received the uniforms. The Plaintiff admits she received only US\$11,069 which was paid by the first Defendant in March 2010. Her case is that this was contrary to the terms of payment wherein she was entitled to 60% deposit and 40% payment upon delivery.

A matter of fact that I must resolve is the effect of the evidence showing that several delivery notes were signed by DW1 Ms Julie Otago which delivery notes show that the uniforms were well fitting though the Defendant submitted that the uniforms were not fit for the purpose.

It is not easy to sever individual transactions for each of the Defendants. Apparently the Plaintiff dealt through the first Defendant and hence even the officials who testified for the defence are from the first Defendant. I must note that each individual Defendant was required to pay a 60% deposit of the price to manufacture uniforms for their own staff.

Some of the delivery notes relate to an earlier period namely 8th January, 2009. These include exhibit P7, exhibit PE 8 and exhibit P9.

The relevant period to this suit concerns deliveries meant to be made in November/December 2009 and thereafter. Exhibit P10 relates to deliveries of cabin crew foulard 102 pieces, ground staff Foulard 100 pieces and Epauettes (male cabin crew) 100 pieces as well as crew ties. The delivery note shows that it was received on behalf of Air Uganda on 22nd April, 2010. Exhibit P 11 was received on 5th July, 2010 by one Stephen a driver of Air Uganda. Exhibit P 12 was received on 19th July, 2010 by one David. Exhibit P13 was received on 19th of July, 2010 by one Stephen Ssenkungu. Exhibit P 14 is dated 20th of July, 2010. Exhibit P 15 is also 22nd of July, 2010. Exhibit P 16 was received by one Eric on the same day. Exhibit P17 was received in August 2010 by Ms Julie Otago. The exhibits PE 18 up to P 28 were received by Julie Otago between August 2010 and the December 2010. All the delivery notes have notice indicating that the uniforms were received in good condition and are well fitting. On the other hand the evidence of DW2 adduced schedules made by the Plaintiff for utilisation of fabric in the manufacture of uniforms showing the quantity used to manufacture uniforms. This is in paragraph 23 of the written testimony of DW2 Ms Jenifer Bamaturaki Musiime. They are documents attached to prove the counterclaim of the Defendants for return of fabric or their price. The pieces of uniforms produced per person were attached. The number of uniforms produced for each of the Defendants was attached bearing the stamp of the Plaintiff. While this evidence was adduced to prove that the Plaintiff still had fabric left over it gives another fact of

manufacture of uniforms and the quantities for each of the Defendants. The witness DW2 was cross examined about paragraph 24 of her testimony where she testified about return of the fabric mentioned in paragraph 23. No one applied to tender in evidence the manufacture of uniforms and the balance of fabrics attached to paragraph 23 and which had been attached in a batch as DID12. DID12 has a summary made by the Plaintiff as well as schedules giving numbers of different categories of staff namely the Female Crew, the Male Crew, the Female Ground and Ticketing Staff as well as the Male Ground and Ticketing Staff. The pieces of each kind of uniforms are also given. However, the document was indirectly the subject of cross examination in the next paragraph 24 of the witness statement of DW2. Furthermore, the Plaintiff's Counsel submitted that the Plaintiff would be willing to return the fabrics and had kept them because she had lien for payment of her services. In the premises I have considered the documents attached as DID12 as admitted documents which do not require further proof under section 57 of the Evidence Act Cap 6 Laws of Uganda and as at the discretion of Court. DID12 is admitted in evidence as Court exhibit 1. Court exhibit 1 proves that the Plaintiff manufactured certain quantities of uniforms. For Air Uganda, the Plaintiff manufactured uniforms for 68 staff. It gives the number of uniforms as well as the metres of fabric used. A different list concerned brown lining which were made for the same staff. For Air Mali the fabrics accountability shows that uniforms were made for 98 staff plus 12 drivers and caterers. The number of metres used is given. The contract year like that of Air Uganda is 2009. The brown linen for Air Mali was made for the same number of staff. The accountability was made on the 16th of November 2011. For Air Burkina for the contract year 2009 there are uniforms made for 94 staff. The fabric used in metres is given. The brown linen accountability for the same staff is also given.

I have carefully considered the evidence and submissions of Counsel. The Plaintiff's case is that payment of 60% of the invoiced amount was paid in March 2010 and not 10th September 2009. Payment schedules are provided for in the contract exhibit P1. Secondly payment was supposed to be made before delivery and the dates of delivery are provided for in the contract. According to the contract there were two kinds of deliveries. The first kind of delivery was for the 'full set' of uniforms. This was supposed to be delivered as follows:

- o For Air Mali the full set of uniforms was to be delivered between November and December 2009.
- o For Air Uganda the full set of uniforms was supposed to be delivered in December 2009.
- o For Air Burkina the full set of uniforms were supposed to be delivered in January 2010.

Thereafter there was supposed to be delivery of the "refill". The refill for Air Mali was supposed to be delivered in December 2010, for Air Uganda in December 2010 and for Air Burkina in December 2010.

As far as the express wording of the contract is concerned, the Defendants did not pay the Plaintiff the 60% deposit as contracted and this is admitted. The Defendant's Counsel submitted

that payment was supposed to follow the supply of fabrics and because the supply of fabrics delayed until February 2010, the Defendants could not pay earlier. I have carefully considered exhibit P1 and there is no provision for saying that payment would be made upon the supply of the fabrics. There is no such stipulation and moreover there is an express provision giving the time of payment. I therefore agree that on the face of it, the Defendants breached the term to pay by 10th September, 2009 the 60% of the invoiced amount.

I have also considered the submissions that the Plaintiff never invoiced the Defendants so as to be paid. This submission has no basis. As I have noted above the contract was poorly drafted and therefore there are many provisions which are not perfect. For instance the payment of 60% deposit envisages that the Plaintiff would have invoiced for the full amount. Logically the Plaintiff would invoice for the full amount only after having taken measurements for the crew though there is no stipulation for this. I note this because DW2 testified that they even facilitated the Plaintiff to travel abroad to take measurement of staff of other Defendants. There is no provision on when to take measurements in the contract. The only provision in the contract is that the Plaintiff would take measurements of the crew. It is reasonable and logical to take the measurements before invoicing for the costs though it does not have to be so. There can be an approximation of costs using a model. For purposes of this suit there is no evidence as to this. However, the contract was executed on 28th July, 2009 and the 60% was supposed to be paid by 10th September, 2009. There is however no controversy about measurements prior to the payment of the 60% deposit. Whatever the case may be, the contract is clear about the terms of payment and I do not agree that the contract should be construed against the Plaintiff on whose letter head it is written. The Defendants are corporation engaged in air travel business and the Plaintiff is a lay person who cannot dictate terms to the corporations. The *contra proferentem* rule is inapplicable and I will not consider the authorities cited by both Counsels.

The contract is clear and all the Defendants contracted to pay a deposit of 60% of the total invoice on 10th September, 2009. They also contracted to pay 40% on the goods "ready to delivery". While the wording is wanting by providing as follows: "the remaining balance of 40% on goods ready to delivery (December 2009)." It was assumed that the goods would be delivered on the dates of delivery provided for. One may argue that from the wording of the contract the goods are to be ready for delivery when the 40% is paid. What is material for the moment is that the 40% did not require any further documentation which ought to have been included with the invoice prior to the payment of a 60% deposit. The 60% deposit was for the entire consignment price for the requisite delivery or deliveries. The Plaintiff admitted that she was paid 60% deposit. The Defendants do not dispute this. For that reason the submission that the Plaintiff was supposed to be paid upon provision of invoices and supporting documents is not tenable. To conclude the first limb of the Plaintiff's case, the Plaintiff must prove that it was not paid according to the express provisions of the contract. Secondly there was a provision for the Plaintiff to deliver the uniforms within 90 days from the order by the company if the fabrics were

in stock. I would conclude the question of delivery of uniforms later. As far as delivery of the full set of uniforms is concerned, the Plaintiff was not paid by 10th September, 2009 as contracted.

The Plaintiff's case generally is that it was not paid after delivery of the uniforms. The Defendant's case is that the delivered uniforms were not fit for the purpose. Uniforms cannot be described as unfit except on individual basis. Were all uniforms for instance unfit? I have carefully considered the testimonies of DW1 and DW2. It is quite clear from the testimonies that the Plaintiff initially performed her duties well. This is contained in the written testimony of DW1 Julie Otago, the cabin crew manager of the first Defendant. In paragraph 4 of her written testimony she wrote as follows:

"That the Plaintiff initially performed her tasks as contracted and on that note when she approached the Defendants requesting for a recommendation having expressed interest in participating in a bid to perform similar services for Uganda Revenue Authority sometime in 2010, the Defendant issued the Plaintiff with the recommendations. This recommendation however was specific to her performance as at the date of its issue."

This testimony is replicated by DW2 Jennifer Bamuturaki Musiime the Head of Sales and Marketing of the first Defendant. She repeats paragraph 4 of the testimony of DW1 using the same words. Secondly, in paragraph 5 of her written testimony she said that in the course of the performance of the obligations under the contract, the Plaintiff's performance underwent a dramatic decline which ultimately caused the contract to cease to be commercially viable for the Defendants.

The question then is when did this alleged deterioration or decline in the services occur? Going back to the admitted documentation I have considered exhibit P 30 written by Mr Antonello Deiola described as "Quality of the Product Group Celestair". The letter is not dated and writes as follows:

"This is to confirm that Faith Fashion Solution Enterprises has supplied our corporate uniforms for Group Celestair (AIR BURKINA, AIR MALI and AIR UGANDA) in 2008/2009, 2010 in the consignment involved in supplying uniforms for ground staff, cabin crew, drivers, office aid and maternity uniforms for our staff and all accessories needed (bags, shoes, belts, scarves etc). We wish to confirm that Faith Fashion House carried out the consignment with professional proficiency and skills. The results of these consignments have made tremendous impact in terms of quality which has contributed a great impact on our services. Please do not hesitate to contact for more information."

The letter seems to have been written after the performance of the contract of 2009. It further confirms delivery of the uniforms. Even though the letter is undated exhibit P 31 is another recommendation from Air Mali and is dated. Exhibit P 31 is a recommendation by the Director-

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General of Air Mali to Uganda Revenue Authority dated 27th of July, 2010. The letter writes as follows:

"This is to confirm that Faith Fashion Solution Enterprises located in Entebbe Uganda has manufactured and supplied the uniforms and accessories of Air Mali (member of Group Celestair) ground staff, cabin crew staff, drivers on (in) 2010. The service performed was done with professionalism. Please do not hesitate to contact us for more information and details."

The document admits to the supply of uniforms to Air Mali. The above recommendations coupled with the testimonies of DW1 and DW2 lead to the only logical conclusion that there was satisfactory performance at least of the contract for the period 2009 when the contract was signed up to a certain point in 2010. In the worst-case scenario there was satisfactory performance by 27th of July, 2010 when the above letter exhibit P 31 was written and according to the testimonies of DW1 and DW2. However, both recommendations admit that the contracted supplies were made. In both their written testimonies of DW1 and DW2 wrote that later in the course of performance of the obligations under the contract, the Plaintiff's performance underwent a dramatic decline which ultimately caused the contract to cease to be commercially viable for the Defendants. However there are no timelines that are clear in paragraphs 5 of the testimonies of DW1 and DW2. From the words "later in the course of performance of the obligations under the contract", one cannot know at what point after 27th July, 2010 this happened. Secondly, the question is whether it related to the consignment of December 2010. By use of the word "later" my conclusion is that it is not immediately after July 2010. Further allegations were made about the Plaintiff's performance around May 2011 according to paragraph 7 of the testimony of DW1.

The further question from the above analysis is which contract or orders are we talking about? The Plaintiff could only have performed satisfactorily in the manufacture of uniforms and her performance could be assessed after delivery of the goods which, in the very least, would be the delivery for the period contracted for the year 2009.

There is no controversy about the fact that the fabrics were delivered late because they were cleared late in January 2010. It followed that the Plaintiff could only have manufactured the uniforms and accessories after delivery of the fabric under the express terms of the contract. As far as the contract is concerned, paragraph 3 thereof provided as follows:

"The supplier must deliver the uniforms within 90 days from the order by the company (if fabric are in stock)."

The 90 days are reckoned first of all after fabric is available or is in stock and most importantly 90 days from the order of the Defendant. In order to prove related delivery, there has to be evidence of the order by the company. As far as the 2009 contract is concerned, the time of delivery could not be fulfilled because it ranged from November 2009 up to January 2010 as far

as the full set is concerned. Secondly, for the refill set it was supposed to be delivered in December 2010 more than one year after the signing of the contract. These timelines were specified in the contract. There is no evidence from either the Plaintiff or the Defendants about this consignment (of December 2010 refill). Why then should there be another order by the company from which to reckon the 90 days within which the uniforms would be delivered? What can be concluded is that the timelines provided for in the written contract were frustrated by the Defendant's failure to provide the fabric within a reasonable time prior to the manufacture and delivery of uniforms for the period November 2009 and December 2009 as well as January 2010. The fabrics were cleared at the end of January 2010 and possibly given to the Plaintiff by February 2010. There was no express extension of time for delivery. Furthermore considering the period 10th of September, 2009 up to December 2009 is approximately 3 months or 90 days. If the Plaintiff had 90 days, when would the time start running? There has to be evidence of the order of the company under the express terms of the contract in paragraph 3. To conclude the suit is clearly about what happened to the consignment of uniforms under the period 2009 (November 2009 – January 2010). Secondly, it is clearly envisaged that a deposit of 60% would be made prior to the manufacture of the goods. Where the deposit has not been made, the Plaintiff was under no obligation to commence the works. In the written submissions of the Defendants Counsel it is further submitted that the payment of a 60% deposit had to be made after the fabrics had been delivered to the supplier. This is found in page 2 of the written submissions. The Defendants Counsel submitted that payment of the 60% deposit under the contract was therefore postponed to a reasonable time following delivery of the fabric to the Plaintiff in this case by 25th of January 2010 and the payment was done in a timely manner by the first Defendant.

The question of whether there was delay in the delivery of fabric cannot be visited on the Plaintiff. The first Defendant which is the focal point for delivery on behalf of all Defendants delayed the delivery of the fabric as contracted. It is immaterial that the fabrics were cleared sometime in January 2010. It was the obligation of the Defendant under the contract to make available the requisite fabrics for the Plaintiff to commence the works and for 90 days within which to do the same. Furthermore the testimonies of DW1 and DW2 concern delays in modification or repairs of uniforms found not to fit a particular individual or individuals.

Again following from the above the Defendants frustrated the contract by failure to deliver the fabric within the time stipulated for the Plaintiff to commence manufacture and make deliveries between November 2009 and January 2010.

From the above evidence, the question of whether the Plaintiff delivered the goods can also be considered. It is evident that the Plaintiff delivered the goods though it is not clear how the delivery was made in all cases and to all Defendants. Air Mali acknowledged delivery in the written recommendation of the Plaintiff for her professional services. The same applied to the first Defendant. No one testified for Air Burkina. PW1 testified on behalf of the Plaintiff from

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his knowledge at the time as an official of the first Defendant. He admitted that the Plaintiff supplied the uniforms to all Defendants and they were in order. What is the weight of evidence?

I have further considered the submission that the Plaintiff had an affair with PW1 who wrote one of the recommendations. I have to reject the submission on the ground that DW1 and DW2 agreed with the recommendations in paragraphs 4 of their written testimonies and therefore gave weight and credence to the testimony of PW1. As far as the recommendations of the Plaintiff are concerned, the Defendants agreed that the Plaintiff provided satisfactory and professional work. The Defendants are barred by the doctrine of estoppels from submitting otherwise especially given the fact that it is admitted by the Defendant's only witnesses namely DW1 and DW2. Last but not least this deals with the problem of inconsistencies in the delivery notes. Some were delivered and received by DW1. Others were received by other persons. It is not specified whether this was for the full set or the refill.

Secondly, the question of late delivery by the Plaintiff cannot be raised by the Defendants because it is the Defendants who were supposed to supply the fabrics and to pay the 60% within time. Thirdly, the burden is on the Defendants to prove that the Plaintiff failed to deliver the uniforms within 90 days after the order of the Defendant.

I have carefully considered the testimony of DW1 and DW2. DW1 has not adduced in evidence any orders made to the Plaintiff in a written form so as to be able to testify that the Plaintiff failed to deliver the goods within 90 days of the order. I have further considered the testimony of DW2 and it is about the quality of work of the Plaintiff and failure of the Plaintiff to rectify ill fitting uniforms within time. There is no evidence of what reasonable time was provided for modifying uniforms which do not fit a staff member. There is no evidence of how many staff members were affected. Lastly the recommendations of the Plaintiff prove that the uniforms were initially well fitting. The testimony of PW1 is that the uniforms would shrink because they were hand washed instead of dry – cleaned. Following the admitted recommendations of the Plaintiff for the good work, I do not doubt this testimony. It was a requirement for the Defendants not to supply fabrics made of synthetic fibres. The fabrics were to be made of approved materials and that is why the Defendant took up the responsibility of supplying the fabrics. The fabrics would shrink if they were not handled according to the requirements of the materials. There is controversy as to whether the Plaintiff labelled the fabrics to the extent of providing that they should be dry-cleaned. The Plaintiff's evidence is that the fabrics were labelled while the Defendants' evidence is that the fabrics were not labelled and therefore the employees could not tell the procedure for cleaning the uniforms. The Defendants case is not that the uniforms shrank due to poor maintenance issues, i.e. by washing instead of dry – cleaning. Their case is that there was poor workmanship in the manufacture of uniforms.

The question of whether the Plaintiff made the uniforms according to the measurements of staff is subsumed by the evidence that the uniforms would shrink if they were not dry-cleaned but

hand washed with water. The responsibility of notifying the staff was not provided for in the contract though it is a manufacturer's responsibility to label a product. Because it is the Defendant who provided the materials for their staff, they equally had the responsibility to notify them. For the moment the evidence is inconclusive as to whether the Defendants or the Plaintiff should be blamed for failure to notify the Defendant's employees. None of the employees of the Defendants who received these uniforms were called to testify. The burden shifted to the Defendant to prove that the Plaintiff did not label the uniforms to notify the users that they were to be dry-cleaned. In the premises, the issue cannot be resolved against the Plaintiff because the Plaintiff asserted that they were labelled shifting the burden to the Defendant. PW1 testified as the Quality Control Manager that the uniforms delivered had the tag "dry-clean only". Secondly, he testified that he personally notified all cabin crew staff to only dry clean their uniforms. At the trial he demonstrated why the uniforms had to be of materials that did not catch fire easily and burn. All that the Defendant needed to do to rebut the evidence was to adduce in evidence one of the uniforms showing that they were not labelled. The burden was not on the Plaintiff because the counterclaim is based on the assertion that the contract was lawfully terminated for breach of contract for failure to provide uniforms which were fit for the purpose.

Alleged breach by termination

As far as this issue is concerned, I do not agree with the submissions of the Plaintiff's Counsel that the contract was for a definite period of four years and could not be terminated. Even if it was for a definite period of time, any contract can be terminated by a party who is dissatisfied with the performance upon giving the opposite side reasonable notice. If there are no reasonable grounds for rescinding the contract the aggrieved party would be entitled to compensation or damages.

Having admitted that the Plaintiff performed satisfactorily the question that remains is for which consignment? The consignment for 2009 was delivered after February 2010. The Defendant acknowledged the professionalism of the Plaintiff. The next consignment was the refill for December 2010. Thirdly when it came to modification of uniforms due to shrinkage, there was no express stipulation in the contract to deal with it. There is also not clear evidence as to what consignment the Defendant is complaining about. The testimony of DW2 is general about staff complaining. The explanation of PW1 resolves that complaint. They did not use the uniforms as required by the materials leading to shrinkage. I do not believe the testimony of DW1 and DW2 because they are unclear as to when the Plaintiff's professional services suddenly declined. It is also not clear which part of any consignment was poorly made and which of the Defendants was affected. To make matters worse DW1 endorsed on all the deliveries which were adduced in evidence and which contained the remarks that the goods were fit. The submission of the Defendant that it was not up to the first Defendant witness DW1 to assess whether the uniforms were fitting or not is double edged. This is because it was incumbent on the Defendants to produce at least one user rather than submit that DW1 was not a user. PW1 and DW1 all worked

for the same establishment. PW1 was responsible for quality control and was able to demonstrate in court why the materials were purchased by the Defendant. In other words the Defendant knew why they chose the materials. Can they say that it is the Plaintiff who ought to have known the qualities of the materials and warned the staff to only dry clean the uniforms? I think not. In the premises the ground for termination due to shrinkage or ill fitting uniforms is not available to the Defendants. Secondly, the grounds for termination due to delay of delivery is also not available to the Defendants. It follows that any undertaking by the Plaintiff to modify uniforms is outside the purview of the contract and the terms of such repairs which arose on individual basis is not in evidence. The names of the staff that allegedly left without receiving their uniforms were not even provided. The testimony of DW1 and DW2 was general and not specific to these matters. In the premises the Plaintiff has proved her case on the balance of probabilities and on the evidence of the documentary proof as well as the credibility of PW1. The contract was therefore terminated at the peril of the Defendants to pay any reasonable damages that the Plaintiff has suffered.

Return of fabric counterclaimed for by the Defendants

As far as the return of the fabric is concerned, the fabrics were to be returned upon the manufacture of the fabric. It was envisaged that the contract will run for four years. In other words so long as the fabric was available the Plaintiff would continue making uniforms for the year 2011 and 2012. The Plaintiff does not deny being in possession of the fabrics and that the same were to be returned after the manufacture of uniforms, if some were left over. There has been a dispute pending in this court since the suit was filed in 2012. The question therefore is what kind of order should be made in light of the fact that the Plaintiff admits being in possession of the fabric and having held onto the same.

The contract does not specifically provide that the Plaintiff was required to return the fabric after manufacture to the Defendants as such and there is also no provision as to what happens upon termination of contract. I agree that if there is no manufacture, the Defendants would be entitled to retain possession of the fabric and the Plaintiff does not contest this fact. The parties made no exit clause and are governed by the general law of contract. The express wording of the contract provided for one simple thing. That simple thing is called *storage*. The Plaintiff was not required to return the Defendants fabric after manufacture. With specific reference to the contract it is provided that the supplier will not be in charge of storage for the remaining fabric after the manufacture of the garments. The parties envisaged four years duration of contract and the storage remained for purposes of the contract. I must emphasise that storage and return of fabric are not the same thing. Storage has something to do with security for keeping the goods.

In the premises, I agree that the Plaintiff was not supposed to remain in charge of storage for the remaining fabrics during the subsistence of the contract. However this was supposed to be after the manufacture of the fabrics. Before the manufacture of the fabrics, it would be unknown what

will remain of the fabrics. In other words the Plaintiff was entitled to have possession of the fabric only for purposes of manufacturing uniforms when the contract is subsisting and when she needs them pursuant to an order for more. Whatever would be left over would be handed over for storage by the Defendant. If more orders are made the first Defendant would hand over the fabrics to the Plaintiff for more work. The Plaintiff is therefore in breach for not having handed over the fabric for storage by the Defendant. Interestingly and to emphasise the point, clause 7 of the contract provides that the supplier took full responsibility of the fabrics in terms of the security handed over from the Group Celestair. The only question was therefore whether the Defendant became entitled to the fabrics before the contract run its course. This is not the intention for storage. The storage of materials may still be the responsibility of the Defendant if the contract was subsisting provided no materials were required for making more uniforms at a material period of time. Having terminated the contract, the fabrics were no longer needed for manufacture and could be returned to the Defendants and not merely stored by the Defendant. What remains is for the assessment of what order to make on the issue of remedies.

Remedies

On the issue of **remedies available to the parties**, Counsel for the Plaintiff submitted that the Plaintiff sought for an order for payment of the outstanding contractual amount of USD 9,133 due to her for delivery of uniforms which was not paid by the Defendants, special damages of USD 107,340 which were broken down as follows:

- USD 48,073 being the loan amount obtained by the Plaintiff and attached to the Plaintiff's trial; bundle at pages 62-65 and page 110.
- USD 11,700 being rent incurred for a period of 13 months from May 2011 to 2012.
- USD 56,700 being payment of salaries for 21 tailors for a period of 9 months at the rate of USD 300 and evidence was annexed in pages 100-109 of the Plaintiff's trial bundle.

The Plaintiff prayed for an award of special damages as pleaded and proved as held in **Lake Turkana El Molo Lodges (2000) 2 EA 521**. With regard to the claim for general damages, Counsel submitted that general damages are payable for breach of contract and it is proven that the Defendants are in breach for failing or neglecting to pay the Plaintiff upon her delivering tailored uniforms and purporting to end a fixed contract that had no termination clause. He prayed for interest on the amounts claimed at 30% per annum from the date of filing the suit until full payment. He argued that the Defendants denied the Plaintiff monies that she was entitled to having performed her obligations under the contract. The Plaintiff had to incur extra expenses in repaying a loan that she acquired specifically to service this contract. Counsel also relied on **Section 26 (2) of Civil Procedure Act** and the case of **ECTA (U) Ltd vs. Geraldine and Josephine Namukasa, Civil appeal No. 29 of 1994 (SCU)** where Odoki Ag DCJ (as he then was) held that the court has discretion to award reasonable interest on the decretal amount and

since the claim arose from a business transaction, the rate of interest sought should be a commercial rate.

As far as costs are concerned the Plaintiff's Counsel submitted that under **Section 27 of the Civil Procedure Act, Cap. 71** costs follow the event and are awarded at the discretion of the court which discretion should be exercised judiciously according to the holding in **Uganda Development Bank vs. Muganga Construction Company (1981) HCB 35**.

In reply, the Defendant's Counsel opposed the claim for refund of the loan amount and liability there under in its entirety on the ground that the Plaintiff got the loan in October 2009 yet the fabric was cleared in December 2009 yet it was a term of the contract that manufacture of the uniforms was subject to the availability of fabric and procuring a loan under the contract where performance had not even started was a hasty and bad decision.

As far as the claim for refund of rent expended is concerned, Counsel for the Defendant submitted that the tenancy agreement was for residential purposes and the Plaintiff illegally used them for commercial purposes and ought not to be allowed to benefit from her illegality as was held in **Makula International Ltd vs. His Eminence Cardinal Nsubuga & Anor (1982) HCB 11**. Furthermore, the Plaintiff ought to have mitigated her losses by terminating the tenancy agreement upon giving a one month notice after the termination of the contract and as held in **African Highland Produce Ltd vs. Kisoro (2001) EA 1**. He contended that it would be unlawful for the Plaintiff to benefit from her own negligence. Furthermore, it was not a term of the contract for the Defendants to take responsibility for renting premises for the Plaintiff's premises. In the premises the Plaintiff's Counsel contended that it would occasion a grave miscarriage of justice to hold the Defendants liable for such costs. Lastly no rent receipts for payment of rent were presented and the claim for special damages ought to be dismissed.

In regard to salaries of the 21 tailors for 9 months, Counsel submitted that the Plaintiff had an option of terminating the contracts of employment upon termination of her contract with the Defendant but she did not.

With regard to the claim for general damages, Counsel for the Defendants submitted that the claim was without merit as the Plaintiff failed to prove that the termination was unlawful as the Defendants did not breach any of their obligations but rather it is the Plaintiff who acted in breach by refusing to release the fabric to the Defendants despite the terms of the contract and demands made for return thereof.

Defendants further opposed the claim for interest on the amount of US\$ 9,133 on the ground that it has not been proved.

Lastly as far as costs of the suit are concerned, Counsel for the Defendant submitted that none should be awarded as it is the Defendants who have jointly and severally been put to undue

expense defending a frivolous and vexatious suit. On the other hand she prayed that costs be awarded for the counterclaim and Plaintiff's suit be dismissed with costs.

In rejoinder, Counsel for the Plaintiff submitted that the Plaintiff acquired the loan to facilitate implementation of the contract which is usual business and foreseeable within the contract and it was acquired in October 2009 after Defendants had failed to meet their 60% obligation. That the Defendants do not dispute the tenancy and thus should admit the rent amount stated therein agreement. That the usage of the premises for residential purposes was not illegal as the landlord was aware of that fact and the prayer for special damages should not be dismissed.

Counsel maintained that as long as the Defendants did not settle her claim she was entitled to hold on to the unused fabric by virtue of having a lien and prayed for general damages. He further submitted that the Defendants were not entitled to costs as the counterclaim against the Plaintiff lacks merit. Furthermore, he submitted that the Plaintiff spent time and money prosecuting this case from 2012 to date which the Defendants persistently refused to settle her suit knowing that they owe the Plaintiff.

Resolution of the issue on remedies

The Counterclaim of the Defendants/Counterclaimants

I have carefully considered the submissions. I will start with the counterclaim. The counterclaim is for a return of the fabric or its value. The counterclaimant proved that the Plaintiff had fabric left over after manufacture of uniforms and upon termination of the contract. The Plaintiff's Counsel in submissions asserted that the Plaintiff had a lien on the goods. I do not agree with this submission because the Plaintiff could only keep the fabrics so long as she had ongoing work based on orders to manufacture uniforms. After termination what was to happen required reconciliation of accounts between the parties, The Plaintiff had been expressly directed in the contract that she shall not be responsible for storing the fabric left over after manufacture and reconciliation could take place when the first Defendant had custody of the remaining fabrics.

It has been admitted by the Plaintiff/Respondent to the counterclaim that the Plaintiff is still in possession of some fabric left over. In the premises, the counterclaim succeeds. The counterclaimant sought for the fabrics or their equivalent in value. It is accordingly and hereby ordered that the Plaintiff shall return the Defendants fabrics to the Defendants. I will deal with the issue of costs last.

Secondly, concerning the claim for special damages for the outstanding contractual amount of US \$ 9,133 due to Plaintiff for delivery of uniforms, the Plaintiff has proved that she was not paid that amount upon delivery of uniforms. In the premises she is entitled to the sum of US\$ 9,133 being the 40% after delivery of the uniforms. Since the first Defendant was the focal point for making deliveries the question of which Defendant did not pay the deposit of 60% or whether

the 60% was for all the Defendants need not be considered. The Plaintiff is therefore entitled to 40% as it was through the first Defendant.

With regard to the claim for special damages of US\$ 107,340 comprising of or broken down into the following components:

1. US \$ 48,073 being the loan amount obtained by the Plaintiff for the business;
2. US \$ 11,700 being workshop rent incurred for a period of 13 months from May 2011 to 2012 (Translates to rent at 900 US\$ per month);
3. US \$ 56,700 being payment of salaries for 21 tailors for a period of 9 months at the rate of USD 300 per month

The claim comprises of capital investments into a business and are costs envisaged for investing in a business. The business was signed for a period of 4 years. The Plaintiff was entitled to invest for purposes of fulfilling her part of the bargain and was expected to recoup her investments during that period. Having held that there was no justification which had been proved in evidence for termination of the contract, the remedies sought by the Plaintiff against the Defendants will be resolved as follows:

As far as the loan is concerned the Plaintiff was entitled to capitalise her business as a prudent business person and in anticipation of a contract running for 4 years. She fulfilled part of the contract and was paid. I further agree that when she was not paid a deposit of 60% by 10th of September 2009 and she was entitled as she did to raise money to kick start the business rather than treat the contract as frustrated for want of a 60% deposit on 10th of September 2009. She was paid 60% eventually and this was admittedly a sum of US\$ 11,069 as evidenced by email from the first Defendant admitted in evidence as exhibit P2 and P3 dated 25th January, 2010. In other words the Plaintiff would not be entitled to the entire loan amount as the Defendant paid this amount. Out of 48,073 US\$ the balance would be 37,004 US\$. What was this amount for? The balance claimed in evidence is about 9,133 US\$ being 40%. Of course this was for the contract of 2009 for uniforms to be delivered between November/December 2009 and January 2010. Another consignment had been undertaken for December 2010.

One cannot claim capital expended in business when work has been done and income earned from the activity. Secondly, either the claim should be for loss of profit or loss of capital and not both. In this case however, if the Plaintiff's capital is returned or compensated for adequately, the Plaintiff cannot claim in the same breath loss of prospective earnings as she would be able to do another business. I distil this principle from the authority of **Cullinane vs. British Rema Manufacturing Company Ltd [1953] 2 All E.R. 1257**. In that case the Defendants sold to the Plaintiff equipment for £6,578 but it did not have the output warranted by the Defendant. The output was far less. The Plaintiff claimed damages for loss of capital, being the difference between the cost of the plant, buildings to house it, and ancillary plant, and their estimated break-

up value. Secondly, the Plaintiff claimed interest on gross capital expenditure, and thirdly, they claimed loss of profit for three years. The Defendants counterclaimed for £1,078, being the balance of the purchase price. The High Court awarded the Plaintiff on the first claim £7,370 for the capital expended. For the second claim the High Court gave judgment for £1,608 and for the third claim judgment for £8,913. The amount of the Defendants counterclaim was offset from this amount. The Plaintiff retained the machinery. On appeal by the Defendants the Court of Appeal held per Sir Raymond Evershed MR at page 1261 with the concurrence of Jenkins L.J. that the Plaintiff has to elect either to claim the capital asset or loss of profit. He held that the claim was not sustainable because the Plaintiff sought to recover both the whole of his original capital loss and also the whole of the profit which he would have made. He held:

“As a matter of principle again, it seems to me that a person who has obtained a machine such as the Plaintiff here obtained, which was mechanically in exact accordance with the order given, but was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. *He may, when he discovers its incapacity and that it is not what he wanted and is useless to him, claim to recover the capital cost he has incurred less anything he can obtain by disposing of the material that he got. A claim of that kind puts the Plaintiff in the same position as though he had never made the contract at all. He is, in other words, back where he started, and, if it were shown that the profit-earning capacity was, in fact, very small, the Plaintiff would probably elect so to base his claim. Alternatively, he may, where the warranty in question relates to performance, make his claim on the basis of the profit he has lost, because the machine as delivered fell short in its performance of that which it was warranted to do. If he chooses to base his claim on that footing, depreciation has nothing whatever to do with it.*” (Emphasis added)

The clear and underlying principle is the doctrine of *restitutio in integrum*. Whether it is general damages or special damages the rationale for the award of damages remains the same and proceeds from the footing of compensating the Plaintiff for loss occasioned by breach of the Defendant. In the East African Court of Appeal decision in **Dharamshi vs. Karsan [1974] 1 EA 41** it was held that general damages are awarded to achieve *restitutio in integrum*. It is a principle that the Plaintiff has to be restored as nearly as possible to a position he or she would have been had the injury complained of not occurred.

The Plaintiff borrowed money for the business, used it and paid it back. There is no other evidence except from the Plaintiff who testified as PW2 that she used the money to perform her contractual obligations. No further details are given. The amount claimed by the Plaintiff is proportionately less than the capital she invested in. What did she invest in and how can the court assess her loss in that respect? In the premises, because the Plaintiff has not claimed loss of income for termination and has not led evidence on what she lost from this capital that she needed for the business compensation cannot proceed under the head of special damages and the

*Decision of Hon. Mr. Justice Christopher Madrama Izama *~*~?+: maXimum728securityx 2016 style*

matter may be considered under the heading of general damages. For that reason special damages of US\$ 48,073 cannot be awarded.

Secondly, the Plaintiff's testimony is that her services were terminated on the 10th of October, 2011. I must observe that the Plaintiff was not paid a monthly income. She was paid for the manufacture and supply of materials. She accordingly ought to have mitigated losses upon termination of contract and after the 10th of October 2011. For instance she ought to have stopped paying salaries with a reasonable notice to staff under the Employment Act and given the Landlord notice of vacation. What is a reasonable notice to staff upon loss of the business for which they were employed? Secondly, the question of rent depends on the terms of the tenancy. The tenancy had to be terminated with notice. The Plaintiff signed a tenancy agreement on the 14th of April 2011. The tenancy commenced on the 1st of May 2011 and rent was payable three months in advance. The tenancy agreement also provides that the first six months were payable in advance and was a sum of US\$ 5,400. Paragraph 4 (d) of the tenancy agreement provides that the tenancy could be terminated with one months notice. Rent was US\$ 900 for the first year. Six months from 1st of May 2011 ended in November 2011. The Plaintiff had to give reasonable notice to staff employed. I have considered the fact that the Plaintiff was required to manufacture items and work on targets. There was to be further supply in the years 2011 and 2012 according to the contract exhibit P1.

I have carefully considered the issue. The question of termination of the employment of staff is tied up with employment law. The employment Act 2006 and section 58 (3) (1) (b) provides that where the employee has been employed for more than twelve months and less than five years a notice of not less than one month of termination of services shall be given. There is no ground or basis for keeping staff if the Defendants had ceased to make orders for uniforms and had terminated the contract rightly or wrongly. What would the employees be doing with the Defendant's orders except to work for other clients? There would be redundancy in the absence of work for other clients, if any, of the Plaintiff and the Plaintiff was required to mitigate her losses in the wake of termination of the contract with the Defendants. In the premises, the Plaintiff will only be given a reasonable compensation for disbanding the staff after termination on the 10th of Oct 2011. Because the Plaintiff was required to notify the labour office under section 81 of the Employment Act because she was expected to terminate their services of more than 10 people (in fact 21 people) within three months, she could not act immediately after the 10th of Oct 2011 when her services were terminated. She was required to notify the labour office of the redundancy and the impending laying off of her workers. In the premises, the period of Oct, November and December 2011 would have given reasonable time for the Plaintiff to put her house in order. Secondly, a period of three one months notice could have been given to end the tenancy in November 2011 and tenancy brought to an end by December 2011. For that reason the Plaintiff will be entitled to compensation for a period of three month's rent as stipulated in the contract.

In the premises, the Plaintiff is awarded the equivalent of three month's salary for her employees namely for the months of October, November and December 2011 amounting to salary for 21 staff at US\$ 300 each per month. The Plaintiff is awarded US\$ 18,900.

Secondly, the Plaintiff is awarded compensation for rentals for the period December 2011 because the six months rent had expired by November 2011. Rent is awarded for a period of three months only being US\$ 2,600 only.

General damages:

According to Lord Wilberforce in **Johnson and another v Agnew [1979] 1 All ER 883** an award of general damages is compensatory and is intended to put the innocent party as far as money can do so in the same position as if the contract had been performed. The Plaintiff suffered loss up to the time immediately after the termination. She lost opportunity to earn income for the year 2011 and 2012. In the absence of specific evidence of the losses she suffered prospective damages which are defined by Halsbury's Laws of England 4th Edition Vol. 12 (1) paragraph 810, as damages awarded to a Plaintiff, not as compensation for the ascertained loss which he has sustained at the time of trial, but in respect of future damage or loss which is recoverable in law. In the case of pecuniary loss it is usual to quantify separately the past and prospective loss. Furthermore in cases of prospective loss, interest cannot be recovered from it. According to the case of **Jeffords and Jeffords vs. Gee [1970] 1 ALL E.R. 1202** pecuniary damages carry no interest because the Plaintiff will have received the money in advance.

Having considered the loss of expected income, no specific rate of profit for any period was proved the Plaintiff will be awarded prospective damages and the Plaintiff is accordingly awarded US\$ 20,000 as general damages.

Interest

The award of interest is also compensatory. Interest on money is awarded for deprivation of money which was due. According to Lord Wright in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL** and at page 472 that the "...the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It was held by Forbes J in **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** that the award of interest is should "reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld." The Plaintiffs 40% of US\$ 9,133 was withheld. The Plaintiff also incurred certain monies in terms of rent and salary which have been awarded by the court namely the US\$ 18,900 and rent of US\$ 2,600.

Under section 26 (2) of the Civil Procedure Act the court has discretion where a decree is for payment of money to 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.”

In the premises, the Plaintiff prayed for interest from the date of filing the suit and it is awarded at commercial rates on the said sums awarded at the rate of 20% per annum from the date of filing the suit till payment in full. For the avoidance of doubt there is no award of interest on general damages.

Costs

Costs follow the event and the Plaintiff is awarded costs of the suit while the counterclaimant is awarded costs for the order for return of the fabric in the counterclaim.

Judgment delivered in open court on the 3rd of October 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Joy Faida holding brief for Paul Rutisya Counsel for the Plaintiff

The Plaintiff Faith Asiimwe

Noah Mwesigwa Counsel for the Defendant

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

3rd October 2016