THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO. 185 OF 2010

5 **KENLLOYD LOGISTICS (U) LTD …….……………………. PLAINTIFF**

VS

KALSON AGROVET CONCERNS LTD …………………. DEFENDANT

BEFORE LADY JUSTICE FLAVIA SENOGA ANGLIN

10 **JUDGMENT**

The Plaintiff brought this suit against the Defendant under 0.7 r 1 and 2 C.P.R. for breach of contract and sought to recover special damages of US Dollars $356,475, general damages for breach of contract, interest on both sums at court rate and costs of the suit.

15 The Defendant filed a written statement of defence generally denying any breach of contract and contending that the dispute ought to have been referred to an Arbitrator. The Defendant also counterclaimed from the Plaintiff US Dollars $ 525,000 as loss of expected profits, and also sought general damages, interest and costs for breach of contract.

20 An amended plaint was filed and served on the Defendant but no amended written statement of defence was filed. By the time the amended plaint was served on Defendant's first Counsel, the Defendant had on 08.05.14 lodged in court notice of change of Advocates from Mwere & Co. Advocates, to Madibo Magalu Advocates & Solicitors.

25 The brief facts of the case are that, in September, 2009, the Defendant entered into a contract with BCEG (Rwanda) Ltd to import and supply 2000 metric tonnes of cement per month for three years. The Defendant through Investpro Holdings Ltd approached the Plaintiff Company to be given logistical and financial facilities to enable it carry out BCEG contract. The parties that is, Plaintiff and Defendant and Investpro then entered into a memorandum of 30 understanding, where it was agreed that the net profits after deduction of expenses were to be deposited on an escrow account to be shared in the following proportions. 50 % for the Defendant, 30% for the Plaintiff and 20% for Investpro Ltd.

In October, 2009, the Plaintiff ordered for 2000 metric tones of cement from H.Y 35 International, Karachni Pakistan and paid US Dollars $154,000, plus fees. Delivery was made to the port of Dar es Salaam, Tanzania, for transportation to Kigali, Rwanda. However, only 1988 metric tonnes of cement were delivered to BC EG, which then paid US Dollars 589,410.

40 On 17th and 24th February, 2010, the Defendant made a direct order of cement from Lucky Cement, Pakistan of 644 and 2353 metric tons respectively, at a cost of US Dollars 242,032.

Not having sufficient funds, the Defendant requested the Plaintiff to top up with US Dollars $19,000 which the Plaintiff did.

On 25.02.2010, the Plaintiff and the Defendant entered into a supply and service agreement, in which payment to the parties was to be made upon payment of invoices by BCEG. Payments were made to the Defendant, but the Defendant failed to pay the outstanding amount and expenses incurred by the Plaintiff, thus breaching the contract. The Plaintiff filed this suit.

It is the contention of the Plaintiff that for part performance of the contract, the Plaintiff was entitled to US Dollars $400,475.55 as per Annexture D. However that, the Defendant only paid US Dollars $35,000 and has since neglected, refused or failed to pay the balance of US Dollars $365,475.

In their defence, the Defendants contended that it is the Plaintiff who terminated the contract and deny any liability for the sum claimed stating that the Plaintiff would be put to strict proof.

Further that the claim is premature, misconceived, frivolous and vexatious and an abuse of court process. And that by virtue of clause 14 of the Memorandum of Agreement Annexture "B" to the plaint, the dispute ought to have been submitted for arbitration.

The Defendants also deny that the Plaintiff ever suffered any loss or inconvenience, and that the acts complained of and attributed to the Defendant are too remote.

The Defendant also filed a counter claim contending that the Plaintiff / Defendant supplied only 1988 metric tons of cement to BECG Rwanda and was duly paid for it.

Further that, the sum of $15,000 was paid to the Counter Claimant / Defendant, being the gross proceeds of the supply of 1988 metric tones of cement, in accordance with the memorandum of agreement.

And that, the Plaintiff/Defendant failed and or neglected to supply the cement as agreed and within the time schedule provided; supplied substandard cement to BECG which was rejected and subsequently failed to supply the cement, thus breaching the contract and leading to its termination. The Plaintiff /Defendant is therefore liable.

It is contended that, the subsequent failure to deliver cement to BCEG Rwanda as agreed, occasioned the Defendant /Counter Claimant loss and the Plaintiff/Defendant is liable in special damages.

The particulars of the special damages are set out in paragraph 12 (i) of the counter claim.

Also that, the Plaintiff/Defendant caused termination of the contract with BECG and is therefore liable for general damages.

The Defendant/Counter Claimant then prayed for dismissal of the Plaintiff's claim with costs and for judgment to be entered for the Defendant in the terms set out in the counterclaim.

The hearing of the suit proceeded exparte under 0.9 r 10 C.P.R, the court being satisfied that the Defendant had been duly notified of the hearing date but failed to appear in court.

The following issues are for determination:-

1) **Whether the matter ought to have been referred to Arbitration.**

2) **Whether the Defendant breached the contract**

3) **What remedies are available to the parties.**

In resolving the issues, the court bears in mind the principle that, ***"despite the exparte proceedings, the burden of proof still remains on the party who affirms, to prove its case on the balance of probabilities".*** Refer to S. 101 and 103 of the Evidence Act, and the case of **Joseph Constantine Steamship Line Ltd vs. Imperial Smelting Corporation [1942] AC 154, P.174**. It was held in that case that ***"in general, the rule which applies is that proof rests on he who affirms and not he who denies".***

Arbitration:
Whether the matter should have been referred to Arbitration.

Although the Defendant/Counter Claimant did not appear to give evidence, it is contended in their defence that the matter ought to have been referred to Arbitration as per the Memorandum of Agreement between the parties. – Annexture B to the plaint.

The Plaintiff's response was that the matter was rightly submitted to the courts. There was no further mention of the arbitration in the Plaintiff's submission.

Considering the provisions of the Arbitration and Conciliation Act, and the principled established by decided cases, it is apparent that the matter could only be referred to arbitration as per the parties agreement if any of the parties applied to court to do so.

S.5 (1) of the Arbitration and Conciliation Act provides that -***"(1) A Judge or Magistrate before whom proceedings are being brought in a matter which is the subject of an arbitrator agreement*** <u>shall</u> ***if a party so applies after the filing of a statement of defence and both parties having been given a hearing refer the matter back to arbitration unless he/she finds….".***

In the present case, while the Defendant referred to the arbitration clause in its defence, it never appeared for the hearing and no such application to refer the matter to arbitration was made. The court could not on its own invoke its inherent jurisdiction to refer the matter to arbitration without an application being made by any of the parties.

Without the Defendant having appeared to make the application to refer the matter to arbitration, and thereby not giving court a chance to hear the parties on the issue, I will rely

on decided cases to state that ***"there must have been good reason why the Plaintiff filed the suit instead of referring the matter to arbitration"- Refer*** to the case of **NSSF & Another vs. ALCON International Ltd SC CA 15/2009.** Parties agreement to refer matters to arbitration does not oust the jurisdiction of court.

This court accordingly proceeded to hear the matter. The first issue is answered in the negative.

Breach of Contract:

The issue to determine is whether the Defendant breached the contract.

To prove this issue, the Plaintiff relied upon the evidence of PW_1 whose witness statement was admitted as the evidence in chief. The evidence is well set out in the facts of the case.

It was then submitted for the Plaintiff that, the Defendant breached the contract when it refused and or neglected to deposit US Dollars $589,410 into the Escrow Account and to distribute the net profit in the agreed proportions.

Further that it was also breach of contract when the Defendant made two direct orders of 644 and 2352 metric tons of cement from Lucky Cement Pakistan, worth $242,302, contrary to the parties agreement.

Relying on the case of **Nile Bank Ltd vs. Thomas Katto HC MA 1190/99 from HCCS 685/99,** Counsel asserted that, the blanket denial by the Defendant does not exonerate it from liability of breach of contract.

As pointed out by Counsel for the Plaintiff, decided cases have laid down the principle that ***"breach of contract occurs when one or both parties fail to fulfill the obligations imposed by the terms of the contract".*** – Refer to the case of **United Building Services Ltd vs. Yafesi Muzira t/a Quick Set Builders & Co. HCCS 154/2005.**

It is not disputed that there was a contract between the parties. This can be discerned from their pleadings and from the memorandum of understanding and the supply and service agreement- Annextures "A", "B" and "C" respectively.

The first agreement – Annexture "A" was between the Defendant and BCEG (Rwanda). The Plaintiff not having been a party to the said agreement, the Defendant cannot be found to have breached the same as against the Plaintiff.

Both the Plaintiff and the Defendants were parties to the second agreement – Annexture "B" and the third agreement – Annexture "C".

In the second agreement, Annexture "B", there was a second party INVESPRO HOLDINGS LTD. While the Defendant was the first party and the Plaintiff was the third party thereto.

Parties to the agreement were defined to mean the first, second and third party collectively.

Under Clause 2 of the said agreement, it was agreed that the second and third parties would arrange finance and logistics for the supply of 2000 metric tons of cement per month, to BCEG (Rwanda) for a period of 36 months at the rate of US Dollars $285 per metric ton CIP Kigali, Rwanda- Annexture K_1

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The parties also agreed to assign certain rights under Annexture K1 with BCEG (Rwanda) in the following terms:-

i) The parties were to ensure that their Bankers secure an express written undertaking
10 from BCEG to deposit all net proceeds from the contract into an ESCROW Account.

ii) The ESCROW Account was to be opened and operated with a reputable financial institution to be mutually agreed upon by the parties.

15 iii) The net proceeds from the contract with BCEG were to be apportioned as follows:-
a. 50% was payable to the first part.
b. 20% to the second party Investpro Holdings Ltd , and
c. 30% to the third party- (Plaintiff).

20 The sharing in the said proportions was to be done after deductions of expenses and other charges of what had remained on the Escrow account.

Secondly, the Defendant was to order for cement through the services of the Plaintiff only. In October, 2008, the Plaintiff ordered for 2000 metric tons of cement from H.Y International,
25 Karachni, Pakistan and paid $154,000. The cement was to be cleared through the port of Dar es Salaam, Tanzania, for transportation to Kigali, Rwanda. The Plaintiff also paid for other fees and the supply was made to BCEG, (Rwanda) in December, 2008. Only 1988 metric tons of cement were supplied due to supplying concerns.

30 It was the Plaintiff's assertion that BCEG duly paid the Defendant $589,410 for the first delivery – Annexture "D", but that the Defendant refused and or neglected to deposit the said money on the escrow account, thereby depriving the Plaintiff of its share of the profits.

Further that in February, 2009, the Defendant ordered for 644 and 2352 metric tons of cement
35 respectively, from Lucky Cement Pakistan, all totaling to a value of $242,032. The Defendant failed to pay the amount in full and requested the Plaintiff to assist by topping up with US Dollars $19,000 which the Plaintiff did.

On 25.02.09, the parties entered into a supply and services agreement to formalize the
40 memorandum of understanding – Annexture "E".

The agreement provided for payment of invoices presented and paid by BCEG in Kigali. About 10th May, 2010, BCEG, paid for the invoices presented by the Defendant into the Defendants account with ECO Bank, - Annexture "D". However, that the Defendant has
45 failed and or refused to pay the balance in accordance with the contract, despite demands by the Plaintiff.

As already indicated in this judgment, the Defendant merely made blanket denials of the Plaintiff's claim without specifically traversing each of the allegations made in the plaint.

And while they filed a counter claim, the Defendant never appeared in court to give evidence contrary to that of the Plaintiff or to prove its counter claim.

Under 0.6 r 8 and 10 C.P.R – it is not sufficient for a defendant in his or her written statement to deny generally the grounds alleged by the statement of claim,….. each party must deal specifically with each allegation of fact which he or she does not admit the truth, except damages.

This court finds that in these circumstances, the Plaintiff proved on the balance of probabilities that, it is the Defendant who breached the contract.

What remedies are available to the Plaintiff:

The Plaintiff sought to be awarded special damages of US Dollars $365,475, general damages for breach of contract, costs and interest.

Special Damages:

It was the submission of Counsel for the Plaintiff that the Plaintiff is entitled to recovery of US Dollars $400,475.55 as per the invoice marked "D"- First Plaintiff's witness statement, as the contract was partly performed.

That out of the said amount, the Defendant paid US Dollars $35,000 – but has since refused to pay the balance of US Dollars $365,475.

The case of **Bernard Kyomukama vs. ENHAS Cooperative Savings & Credit Society C.S 35/12** where the case of **Hall Brothers SS. Co Ltd vs. Yong [1938] HB 756 (CA)** was relied upon for the definition of damages. According to those cases ***"Damages import sums which fail to be paid by reason of some breach of duty or obligation, whether that duty or obligation is imposed by contract, by general law or obligation".***

It is trite law that ***"Special damages and loss of profit must be specifically pleaded. They must also be proved exactly, that is, on the balance of probability".*** - Refer to the case of **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA No. 07/92.**

In the present case, the Plaintiff did plead the special damages in paragraph 6 of the amended plaint. To try and prove the special damages, the Plaintiff put in exhibits "A", "B", "C" and "D" the memorandum of understanding, supply and service agreement respective and "D" a document with no indication as to the author, no title, no address except that it shows a total sum of US Dollars $ 365,475. The copy on record is so faint that it would require a microscope to make out the words therein. The original was never produced to be compared with the copy. As it stands now, it is difficult to determine whether it is an invoice or receipt. It does not indicate that money was received.

This court finds that, no proper foundation was laid for the reception of the copy of Exhibit D. The failure to fulfill the conditions specified in S.64 of the Evidence Act, before Secondary evidence is admitted demands that the document be rejected.

In the circumstances, the Plaintiff failed to prove on the balance of probabilities that the Defendant is liable to pay $365,475.55 claimed by the Plaintiff as special damages. The claim cannot therefore be allowed.

5 The court notes that, Counsel for the Plaintiff relied upon the case of **Bernard Kyomukama vs. ENHAS Cooperative Savings & Credit Society (Supra)** but never availed a copy to court. Court could therefore not comment about it.

General Damages:

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In support of the claim for general damages, Counsel for the Plaintiff submitted that the Plaintiff suffered loss of business and was inconvenienced because of the delay of payment. He relied upon the case of **Superior Construction and Engineering Ltd vs. Natany Engineering Ltd HCCS 24/1994** - which is to the effect that ***"the award of general***
15 ***damages is an exercise of judicial discretion which should be exercised judiciously taking into account the circumstances of the case. And that general damages are compensatory in nature in that they should offer some satisfaction to the infringed Plaintiff for the injury suffered".***

20 Decided cases have established that ***"general damages are the direct probable consequence of the act complained of. Such consequences may be loss of use, loss of profit, or physical inconvenience".***

In the case of **Haji Asuman Mutekanga vs. Equator Growers (U) Ltd SCCA 07/1997**, the
25 Supreme Court stated that ***"in proof of general damages for breach of contract, damages are what the court may award when it cannot point out any measure by which damages are to be assessed except the opinion of and judgment of a reasonable man".*** *Under S.61 (1) of the Contract Act,* ***"where there is breach of contract, the party who suffers breach is entitled to receive compensation for any loss or damage suffered".***

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In the present case, while the Plaintiff failed to prove the special damages of $365,475.55 for the reasons already set out in this judgment, it proved that the Defendant purchased 644 and 2352 metric tonnes of cement outside the contract without the Plaintiff's acquiescence. For the loss of profit and inconvenience occasioned to the Plaintiff for the breach of contract, the
35 Plaintiff is entitled to general damages of Shs. 50,000,000/-

Interest:

40 Counsel for the Plaintiff submitted that the Plaintiff is entitled to interest on the sum of special damages, general damages and costs of the suit. He relied on the case of **Superior Construction and Engineering Ltd (Supra)** which is to the effect that ***"interest on costs is a matter of discretion of the court and must be exercised judiciously"***. Counsel then prayed for interest at the court rate.

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Under S.26 (2) of the Civil Procedure Act – court has powers to award interest if not agreed upon. This provision is fortified by the case of **Crescent Transportation Co. Ltd vs. B.M Technical Services Ltd CA CA 25/200** where it was held that ***"where no interest rate is provided, the rate is fixed at the discretion of the trial judge".***

The court will accordingly exercise its discretionary powers to award interest on the general damages at the court rate deemed to be reasonable in the circumstances. Interest on general damages is allowed at the rate of 12% per annum from the date of Institution of the suit until payment in full.

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While special damages were not proved, the issue of interest does not arise in this respect.

Costs:

10 Under S.27 (2) of the Civil Procedure Act, a successfully party is entitled to costs of the suit unless court for good reason decides otherwise. Refer also to the case of **James Mbabazi & Another vs. Matco Stores Ltd & Another CA. Civil Reference No. 15/2004.**

The Plaintiffs granted costs of the suit.

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Judgment is entered for the Plaintiff in those terms and the following orders are made. The Plaintiff is granted:-

1) General damages of Shs. 50,000,000/-/

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2) Interest on the general damages at the rate of 12% per annum from the date of filing the suit until payment in full.

3) Costs of the suit.

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4) The Defendant's counter claim is also hereby dismissed.

5) The Plaintiff/Counter Defendant is awarded costs of the counter claim.

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Flavia Senoga Anglin
JUDGE
28.09.17