

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO 453 OF 2016

AMAZIMA (U) LTD}.....PLAINTIFF

VERSUS

MAHDI BERAIR}RESPONDENT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff is a limited liability company incorporated in Uganda and filed this action against the Defendant for declaration that the Defendant is in breach of its contractual obligations, an order for specific performance, an order compelling the Defendant to pay special damages amounting to US\$51,065 owed to the Plaintiff, general damages, interest on both special and general damages and costs of the suit.

By 25th July, 2016 no written statement of defence had been filed and by letter dated 18th July, 2016 Messieurs Barenzi & Company Advocates wrote to the Deputy Registrar, High Court Commercial Division applying for interlocutory judgment under the provisions of Order 9 rules 5 and 8 of the Civil Procedure Rules. Judgment was entered accordingly on 25th July, 2016. The Plaintiff called one witness Mr. Yusuf Patanwala and thereafter the Plaintiff's Counsel addressed the court in written submissions.

Plaintiff's brief:

The Defendant approached the Plaintiff and requested the Plaintiff to supply goods to the Defendant for onwards transmission to the Defendant's client that is Panorama Company limited in Juba and Bahgat Investment and company limited. The Defendant had always transacted with the Plaintiff on that premise and considering the Defendant's previous dealings with the Plaintiff in the same manner, the Plaintiff was inclined to supply the said goods to the Defendant for onward transmission to the Defendant's clients. The Defendant asked the Plaintiff to draw the tax invoices in the names of Bahgat Investment and Company Limited and Panorama and Company Limited respectively. The Defendant undertook to personally pay and or be personally liable for payment of the same and on that premises the Plaintiff made tax invoices number 1503 dated the 29th September, 2015; worth US\$ 35112.08 (United States Dollar thirty five thousand one hundred twelve

point eight) and marked as PE 1. Invoice No. 1514 dated 10th February, 2016 worth US\$ 72,993 (United States Dollars seventy thousand one hundred fifty eight thousand) marked PE 2 in respect of Bahgat Investment and Company Limited and Invoice No 1507 dated 17th October, 2015 in respect of Panorama Company Limited worth US\$ 15,148.07 (United States Dollars fifteen thousand one hundred forty eight thousand point seven). The goods supplied total US\$ 120,000 (United States Dollar one hundred and twenty thousand). The Defendant personally paid US\$ 68,935 (United States Dollar sixty eight thousand nine hundred thirty five) out of this amount leaving outstanding a balance of US\$ 51,065 (United States Dollar fifty one thousand and sixty five) and the Defendant has since become elusive leaving the Plaintiff frustrated and suffering business loses.

Interlocutory judgment was entered and the suit went for formal proof. Issues for resolution of dispute:

1. Whether the Plaintiff has any cause of action against the Defendant?
2. Whether the Defendant breached and or failed to fully perform its part of the obligation under the contract?
3. Whether the Plaintiff is entitled to any remedies arising from such breach?

Issue 1: Whether the Plaintiff has any cause of action against the Defendant?

The Plaintiff's Counsel submitted that a Plaintiff must have a cause of action to enable him or her institute a case against a Defendant. The elements of a cause of action are that the Plaintiff enjoyed a legal right, and the right must have been infringed and that the Defendant is liable for the infringement (See **Auto Garage vs. Motokov [1971] EA 514**).

The Plaintiff and Defendant have moved a long way in transacting businesses together, the Defendant always represented himself as an agent of Panorama Company limited and Bahgat Investment and company limited. The Plaintiff had always even prior to the instant transaction supplied goods to the above two companies through the Defendant. The Defendant would always undertake to pay for the same and to be liable for the supplies made and he usually paid promptly. The Plaintiff had never dealt with the beneficiaries of the supplies directly and all transactions were done through the Defendant. The Defendant had always honored his undertakings and always personally paid for the goods. In the transaction in question in this suit, the Plaintiff supplied goods to Panorama Company limited and Bahgat Investment and company limited respectively through the Defendant amounting to US\$ 120,000. The Defendant personally paid to the Plaintiff US\$ 68,935 (United States Dollar sixty eight thousand nine hundred thirty five) out of this leaving unpaid a balance of US\$ 51,065 (United States Dollar fifty one thousand and sixty five).

The Defendant has since refused to pay this amount and has become elusive.

Counsel submitted that it is trite law that in considering whether or not a Plaintiff discloses a cause of action, the court only considers the pleadings and anything attached thereto (See **Tororo Cement Co. Ltd vs. Frokina International Ltd CA No. 2 of 2001**). Counsel urged court to find that the Plaintiff's plaint discloses a cause of action against the Defendant.

Issue 2: Whether the Defendant breached and or failed to fully perform its part of the obligation under the contract?

Counsel submitted that a contract is defined by **section 10 (1) of the Contract Act No 7 of 2010** to mean an agreement made with the free consent of parties with capacity to contract for lawful consideration, a lawful object/s and with an intention to be legally bound. A contract according to **Pollock - Principles of Contract 13th edition** connotes an agreement giving rise to an obligation recognized by law. Such obligations are to be discharged through performance failure of which amount to breach of contract. Furthermore, a contract is viewed as a promise or a set of promises which the law enforces. It is a cardinal principle that something of value must be attached to the parties' promises as consideration (See **Tweddle vs. Atkinson (1861) 121 ER 762** and **Combe (1951) 2 KB 215.**)

Counsel further submitted as on the evidence as follows: PW1 Mr. Yusuf Patanwala testified that the Defendant had always induced the Plaintiff to supply goods to Panorama Company limited and Bahgat Investment and Company Limited respectively through him. In the matter before court, goods worth US\$ 120,000 were supplied after the Defendant undertook to personally pay for those goods and to be liable to the Plaintiff for them. The Defendant personally paid to the Plaintiff US\$ 68,935 (United States Dollar sixty eight thousand nine hundred thirty five) leaving a balance of US\$ 51,065 (United States Dollar fifty one thousand and sixty five) outstanding. Thereafter the Defendant became elusive and refused to pay the balance and is in breach of his undertaking to pay. In the premises, issue number two should be answered in the affirmative.

Issue 3: Whether the Plaintiff is entitled to remedies.

Counsel relied on **section 6 of the Sale of Goods Act cap. 82** for the proposition that where in a contract of sale, the property has passed to the buyer and the buyer

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wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him or her for the price of the goods. Under **section 61 of the Contract Act No. 7 of 2010** provides that the party who suffers from the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage sustained by reason of the breach. The breaking of obligations which a contract imposes confers a right of action for damages on the injured party (See **Ronald Kasibante vs. Shell Uganda Ltd HCCS NO. 542 OF 2010**).

The Plaintiff's Counsel further submitted that it is trite law that special damages must be specially pleaded and proved. In **Nalwadda vs. Uganda AIDS Commission HCCS No. 67 of 2011**, Hon. Justice Musota held that a claim of special damage must specifically be pleaded and strictly proved by the Plaintiff. With reference to the suit in court, the plaint contains an averment specifically pleading special damages of US\$ 51,065 (United States Dollar fifty one thousand and sixty five). The Plaintiff proved the special damage by tendering all the required tax invoices marked PE 1, PE 2 and PE 3, PW1 supported by his written testimony.

The written testimony proves that on the 29th September, 2015 invoice for US\$ 35112.08 (United States Dollar thirty five thousand one hundred twelve point eight) exhibit P1 and invoice number 1514 dated 10th day of February 2016 for US\$ 72,993 (United States Dollars seventy thousand one hundred fifty eight thousand) exhibit P2 in respect of Bahgat Investment and company limited; and Invoice No. 1507 dated 17th October, 2015 in respect of Panorama Company limited for US\$ 15,148.07 (United States Dollars fifteen thousand one hundred forty eight thousand point seven) totaling to US\$ 120,000 (United States Dollar one hundred and twenty thousand) exhibit P3.

That the Defendant paid US\$ 68,935 (United States Dollar sixty eight thousand nine hundred thirty five) leaving a balance of US\$ 51,065 (United States Dollar fifty one thousand and sixty five) outstanding. The Defendant's refusal to pay for the goods is malicious and intended to cause grave business loss to the Plaintiff. Counsel prayed that the Court find that the Plaintiff has pleaded and proved the special damages.

With regard to general damages he submitted that it is also trite law that breach of contract entitles the injured party to an award of both special and general damages (See **Bank of Uganda vs. Fred William Masaba & 5 others SCCA No. 3 of 1998** where the Supreme Court relied on the case of **Esso Petroleum Co. Ltd vs. Mardon (1997) 2 All ER**). They held that damages for breach of contract are measured in a similar way as loss due to personal injury. Court looks into the future so assess the likely result if there had been no injury. In **Kibimba Rice Ltd vs. Umar Shim SCCA No. 17 of 1992**

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cited in **Kyoyeta vs. Mutebi HCMA No. 781 OF 2014** it was held that a Plaintiff who suffered damages due to the Defendant's wrongful act must be put to a position he or she would have been in had he or she not suffered the wrong.

The Plaintiff is entitled to general damages and the period the Defendant withheld Plaintiff's money being over two years should be taken into account.

Finally costs follow the event as prescribed by section 27 of the Civil Procedure Act and as held **Uganda Petroleum Co. Ltd vs. KCCA HCCS No. 250 of 2015**.

In the premises Counsel prayed that the Plaintiffs suit succeeds and it is awarded special damages, general damages, interest, costs and any other available remedy this Honorable court finds fit.

Judgment

This suit was filed on 29th June, 2016 and according to the affidavit of Kazibwe Achilles, court process server he received copies of summons for service upon the Defendant and proceeded to the Defendants known place of business located at plot 23 6th Street industrial area Kampala after he was directed by the Plaintiff's official. He went and served the Defendant in person and the Defendant acknowledged service of court process according to a copy of the acknowledgement of the summons attached to the affidavit of service. The acknowledgement indicates that it was received by the Defendant on 30th June, 2016 at 10:42 AM.

By 25th July, 2016 no written statement of defence had been filed and by letter dated 18th July, 2016 Messieurs Barenzi & Company Advocates wrote to the Deputy Registrar, High Court Commercial Division applying for interlocutory judgment under the provisions of Order 9 rules 5 and 8 of the Civil Procedure Rules. Interlocutory judgment was entered accordingly on 25th July, 2016.

The suit came for formal proof and the Plaintiff was represented by Counsel Daniel Munyaneza. The Plaintiff called one witness Mr Yusuf Patanwala, the managing director of the Plaintiff. His testimony is that the Plaintiff Company was approached by the Defendant to supply goods to him for onward transmission to his clients. The Defendant undertook to personally pay and be liable for the payment of the value of the goods so supplied. On 29th September, 2015 the Plaintiff on the basis of the undertaking of the Defendant supplied goods to Bahgat Investments resident in Juba, South Sudan worth US\$35,112.08. Subsequently the Plaintiff on 10th February, 2016 made further supply of varied goods to the same company based in Juba South Sudan on the undertaking of the Defendant to pay goods worth US\$72,993. Again based on the undertaking of

the Defendant the Plaintiff supplied Panorama Company Ltd based in Juba, South Sudan an assortment of goods worth US\$15,148.08.

Several efforts were made by the Plaintiff to ask the Defendant to make good his undertaking to pay for and be liable for the payment of the goods and the Defendant has never paid the Plaintiff any money for the goods supplied. The value of the goods is evidenced by several receipts issued by the Plaintiff amount to a total of US\$120,000 and the Defendant became elusive and refused to pay the balance of US\$51,065. As a consequence the Plaintiff suffered several economic losses due to the conduct of the Defendant. The Defendant deliberately refused to pay for the goods which he undertook to be liable for. Several tax invoices were admitted in evidence in support of the testimony of PW1. This include tax invoice dated 29th September, 2015 addressed to Bahgat for the amount of US\$25,112.08; Tax invoice No. 1514 dated 10th February, 2016 to the said firm in the Juba worth US\$72,973 admitted as exhibit P2. Lastly another tax invoice No. 1507 of 17th October, 2015 addressed to Panorama Investment Ltd exhibit P3 for US\$15,198 .07. The question posed by the court at the hearing was why the Plaintiff sued the Defendant and not the companies invoiced. PW1 testified that the Defendant is a partner of the two companies supplied. His testimony is in writing and to the effect that the Defendant made an undertaking to pay for the goods.

1. Whether the Plaintiff has any cause of action against the Defendant?
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Whether the Plaintiff has a cause of action against the Defendant?

I have duly considered the first issue and the unchallenged evidence of the Managing Director of the Plaintiff who testified that the Defendant is the one who ordered the goods from the Plaintiff and directed them to be delivered to third parties in Juba. The Plaintiff never dealt with Messieurs Panorama (U) Ltd or Bahgat Ltd which are the companies who received the supplies of the Plaintiff's goods. Issue number one is answered in the affirmative to the extent that the Plaintiff has a cause of action against the Defendant for failure to pay for the goods he ordered for and undertook to pay for which goods were supplied according to order.

The second issue is **whether the Defendant breached and or failed to perform his part of the bargain**. The unchallenged testimony of the Plaintiff is that the Defendant paid for some of the goods and did not pay for the balance of US\$51,065. Secondly, the Plaintiff proved that a supply of goods as specified in the tax invoices exhibit P1, P2 and P3 was made on the orders of the Defendant to Bahgat Ltd and Panorama Ltd. In the premises, issue number two is resolved in favour of the Plaintiff. The Defendant ordered for the goods, the goods were supplied to the beneficiaries in Juba and he failed to pay for the goods as he had undertaken to the Plaintiff. The Plaintiff did not deal with the third-party companies currently resident in Juba, South Sudan. The

Plaintiff dealt with the Defendant and it is the Defendant who ordered for the goods. Out of a total of US\$120,000 the Defendant did not pay for US\$51,065 which is the amount of money claimed in the suit.

Another material consideration is that the Plaintiff seeks payment of a liquidated sum as well as general damages. The suit proceeded in default of a written statement of defence by the Defendant after interlocutory judgment was entered by the registrar on 25th July, 2016 and the suit was set down for proof of pecuniary damages. The prayer of the Plaintiffs through Counsel was for judgment to be entered as prayed for in the plaint under Order 9 rules 5, 8 and 10 of the Civil Procedure Rules. Where there is a claim for a liquidated demand, judgment can be entered for the liquidated demand and the claim for pecuniary damages can be fixed for assessment of damages. There is no need to assess the liquidated demand where the matter proceeds in default of a defence.

Order 9 rule 8 of the Civil Procedure Rules deals with, inter alia, the assessment of pecuniary damages. The head note of Order 9 rule 8 of the Civil Procedure Rules reads "Assessment of damages." Rule 8 provides as follows:

"Where the plaint is drawn with a claim for pecuniary damages only or for detention of goods with or without a claim for pecuniary damages, and the Defendant fails or all Defendants, if more than one, fail to file a defence on or before the day fixed in the summons, the Plaintiff may, subject to rule 5 of this Order, enter an interlocutory judgment against the Defendant or Defendants and set down the suit for assessment by the court of the value of the goods and damages or the damages only, as the case may be, in respect of the amount found to be due in the course of the assessment."

A liquidated demand was distinguished from pecuniary damage by this court in **Uganda Baati vs. Patrick Kalema High Court, Commercial Division, Civil Suit Number 126 of 2010** and quoting from **Stroud's Judicial Dictionary** that a "liquidated demand" inter alia means and includes, the amount on a bill of exchange, definite interest on a contract or under a statute, a sum certain in money, a statutory demand for the payment of a total debt and an amount due on a judgment. This is the definition adopted for claims in summary suits under Order 36 rule 2 of the Civil Procedure Rules. Pecuniary damages are defined by **Halsbury's Laws of England 4th Edition Volume 12 (1) Paragraph 809** to mean any financial disadvantage past or future, whether precisely calculable or not. "Past loss of earnings and an assessment of loss of earnings, loss due to damage to a chattel, loss on breach of a contract for the sale of goods, and loss of profits constitute pecuniary damage". Non pecuniary damage refers claim for "pain, suffering, damage to reputation and interference with the enjoyment of property" etc. pecuniary damages can therefore be distinguished from a sum certain in money or a liquidated demand. Liquidated demands and pecuniary damages as distinct grounds of claim was considered in **Abbey Panel &**

Sheet Metal Co Ltd vs. Barson Products (a firm) [1947] 2 All ER 809 by Somervell LJ at page 809:

“...In the second place, where a Plaintiff is claiming pecuniary damages plus a liquidated demand and does not exercise his right to sign final judgment in respect of the latter, but signs an interlocutory judgment in respect of the whole claim, I do not think the Defendant can claim to have the final judgment which is subsequently given set aside as irregular. Under the rules, the Plaintiffs are entitled to final judgment against the Defendants in respect of the liquidated demand covered *ex hypothesi* by the final judgment. It may be that the court could itself take the objection when the inquiry takes place and make the Plaintiffs sign a separate final judgment in respect of the liquidated demand, but, if the court includes the liquidated demand in the final judgment, I can see no grounds for allowing the Defendants to challenge the judgment in respect of an amount included in it for which, under the rules, the Plaintiffs were clearly entitled to a final judgment against them.”

Furthermore Evershed LJ on the same issue held at page 810 that:

“The intended scope and purpose of (RSC, Order 13 rules 3 – 7 and 7) inclusive, appear to me to be reasonably plain. They provide that where a Plaintiff has in his writ made a claim against a Defendant for one or more of the following, viz, (a) a debt or liquidated demand, (b) detinue, and (c) pecuniary damages, *and such Defendant, though properly served, does not choose to appear to the writ, then the Plaintiff may, without having to take any further steps against that Defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment; in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover.*” (Emphasis added)

Following the above authority which I applied in **3WM Uganda Ltd vs. Loadwell Freight Logistics Ltd and 2 Others H.C.C.S. No. 299 of 2016**, the Plaintiff in the suit is entitled to judgment on the liquidated demand under the provisions of Order 9 rules 6 of the Civil Procedure Rules. The liquidated demand is US\$51,065 and judgment is entered for the Plaintiff against the Defendant for the said amount of **US\$51,065**.

With regard to the claim for general damages, the Plaintiff's Counsel submitted that the Plaintiff is entitled to general damages for having had the Plaintiffs money withheld for over two years and which money could have earned the Plaintiff some profit. No evidence however was led as to how much money the Plaintiff would have earned. In the plaint the Plaintiff claimed for interest on general damages as well as on the special damages.

The proper remedy in the absence of evidence of business the Plaintiff had where the money would earn profit is interest on the money withheld. The purpose of award of interest is also to achieve *restitutio in integrum*. This was held in **Tate & Lyle Food and Distribution Ltd vs. Greater London Council and another [1981] 3 All ER 716** by Forbes J at page 722 that interest is not awarded against a Defendant as a punitive measure for having kept the Plaintiff out of his money but as part of an attempt to achieve *restitutio in integrum*. Interest is intended in commercial cases to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld. In **Riches vs. Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright held that an award of interest is compensation may be *...regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation....* (Emphasis added)”

Finally section 26 (2) of the Civil Procedure Act permits interest to be awarded at a reasonable rate from the date the cause of action till date of judgment and further interest may be ordered to run from the date of judgment till payment in full. What is reasonable should reflect commercial prudence on what the Plaintiff could have earned if his or her money had not been withheld. Section 26 (2) of the CPA provides as follows:

“26. Interest.

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

In the premises the Plaintiff was kept out of **US\$51,065** for a period of over two years. This suit was filed on the 23rd of June 2016 but the cause of action arose between September 2015 and February 2016 according to exhibits, P1, P2 and P3. In the premises I award the Plaintiff interest on the sum of **US\$51,065** from March 2016 till the date of judgment at the rate of 10% per annum.

Secondly I award the Plaintiff interest at the rate of 10% per annum on the decreed aggregate amount at the date of judgment from the date of judgment till payment in full.

Costs

Costs follow the even unless the court for good reasons which have to be set out otherwise orders. I see no basis for denying the Plaintiff costs and the costs of this suit are awarded to the Plaintiff.

Judgment delivered in open court on the 5th of May 2017

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

Charles Okuni: Court Clerk

Munguriel James for the Plaintiff

Plaintiff is absent

Julian T. Nabaasa: Research Officer Legal

Christopher Madrama Izama

Judge

5th May, 2017