THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL COURT DIVISION)

CIVIL SUIT NO. 188/2018

1. **CHARLES HARRY TWAGIRA**
2. **SANCTUM INVESTMENTS LIMITED……PLAINTIFFS**

VERSUS

DFCU BANK LIMITED……DEFENDANT

BEFORE THE HON. MR. JUSTICE RICHARD WABWIRE WEJULI

JUDGEMENT

The Plaintiffs' claim against the Defendant is for damages, costs and interest arising from gross negligence, economic duress, and unconscionability, breach of statutory duty, fiduciary duty, Banker-Customer relationship, fraud and unjust enrichment.

The Defendant filed a written statement of defence in which they denied the Plaintiffs' claims.

The dispute between the parties arises out of a Banking relationship between the Plaintiffs and the defunct Crane Bank Limited whose assets were bought off by the Defendants.

Initially, in July 2014, the Plaintiffs took out a demand loan facility of Ugx 300,000,000 (three hundred million) from Crane Bank Limited whose business, including the relationship between Crane Bank and the Plaintiffs was then taken over by the Defendants. At the end of the tenor, in July 2015, the facility was renewed on 11th December 2015 for a period of 12 months which ended on 10th December 2016.

In 2017, the 2nd Plaintiffs were advanced a term loan facility of Ugx 360,000,000/=. A part of this amount was to offset an outstanding exposure of the 1st Plaintiff who was in default position with the Bank at the time of refinancing. Settlement of his outstanding arrears was a prerequisite for refinancing. There was no consensus as to what was outstanding.

The Term loan facility was guaranteed by the 1st Plaintiff.

During the joint Scheduling conference, the parties agreed to four issues as follows;

1. Whether the Defendant was fraudulent in its dealings with the Plaintiffs.
2. Whether the Defendant acted contrary to its mandate hence breaching the Banker Customer relationship between the parties.
3. Whether the Defendant exerted economic duress on the Plaintiffs to secure execution of the refinancing transaction by the Plaintiffs.
4. Whether the parties are entitled to the remedies as prayed for.

The Plaintiffs called two witnesses, namely, the 1st Plaintiff (PW1) and Mr. Hamiddu Tumuhimbise a Registrar at URSB (PW2), while the Defendant called one witness, namely, Ms. Lillian Namusisi a Senior Officer-Special Assets Management of the Defendant (DW1) who were accordingly cross examined before this court. The parties also addressed the court in written submissions.

The 1st Plaintiff represented himself while M/s Paul Byaruhanga Advocates represented the 2nd Plaintiff and M/s Sebalu and Lule Advocates represented the Defendant.

I have carefully considered the pleadings and the evidence on record and the written submissions of the 1st Plaintiff and the respective Counsel for the parties. I will first deal with Issues 2 and 3 and then handle 1 and 4.

ISSUE 2

Whether the Defendant acted contrary to its mandate hence breaching the Banker Customer relationship.

The Plaintiffs submitted that the Defendants were grossly negligent and acted in breach of their mandate in their Banker-Customer relationship with the Plaintiffs.

To resolve this issue, it is imperative to start by answering the question whether a Banker-Customer relationship existed between the 2nd Plaintiff and the Defendant Bank.

"The relationship between Bank and Customer is contractual and founded on one contract,(emphasis by Court) which normally includes the relationship of creditor and debtor with ……."- **Foley v Hill(1848) 2 HL Cas 28 at 36–37**.

Various transactions entered between the Plaintiffs, the Defendants' predecessors and the Defendants create the existence of a Banker-Customer relationship. This conclusion is evidenced in PEX1, PEX20 and DEX1 and PW1's testimony. It is common ground that the Defendants are successors of Crane Bank in these transactions. This is confirmed in his re-examination, when PW1 also confirmed that it was their understanding that at all times they were dealing with the same Bank.

Upon contracting as evidenced by PEX1, PEX20, DEX1 and PW1's testimony, the parties underpinned their Banker-Customer relationship.

What then could have been the duties, if any, that the Defendants owed the Plaintiffs as Bankers to Customers?

Part II of the Bank of Uganda Financial Consumer Protection Guidelines, 2011 which provides for the obligations of the financial services providers lays out

three principles that guide the Banker Customer relationship. These are fairness, reliability and transparency.

Guideline 6(1)b)i)iv)v)vi)vii)viii)and ix) enjoins the financial services provider not to engage in deceptive practices, not to take advantage of a consumer, not to include unconscionable terms in an agreement, not to exert undue influence or duress on a consumer to enter into a transaction, not to conceal material information or to mislead a Customer and not to lend recklessly.

That said, even in the absence of the codified duties, the terms of the contract between a Bank and its Customer regarding the duty of care are implied. However, a term will not be implied into a contract unless it satisfies the following conditions ;

- It must be reasonable and equitable
- It must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it.
- It must be so obvious that it goes without saying.
- It must be capable of clear expression.
- It must not contradict any express terms of the contract.

The 1st Plaintiff accused the Defendants for arbitrarily recovering from his account various sums of money on various dates between the 10th March, 2017 and 5th May, 2017 totaling to Ug. Shs. 45,000,000/= some of which the 1st Plaintiff alleged was debited to service a non-existent loan account 01984111000060, an act which they contended, was negligent and a breach of the Defendants duty to the Plaintiff.

That they did not follow the normal loan amortization schedule of recovery. The Plaintiffs submitted that the Defendants had denied them access to the amortization schedule of their loan and by doing so were able to make arbitrary debits from Plaintiffs' accounts, which amounted to a breach of duty and enabled a fraud to be perpetuated on the Plaintiffs. They argued that any unknown recovery was unfair.

The Plaintiff prayed that court finds that the Defendant breached its statutory duty and was negligent in its duty as the Plaintiff's Banker.

On their part, Counsel for the 2nd Plaintiff's submitted that the Defendant was culpable for willful and wanton breach of various Bankers duties to the 2nd Plaintiff, including breach of fiduciary duty, breach of duty not to effect undue influence or duress on the Plaintiff to take up a loan they neither applied for nor needed, breach of a duty not to mislead the, breach of duty to provide up to date information and advice to the client, breach of duty to provide statements of the loan account , breach of duty not to lend recklessly, breach of a duty of transparency and breach of a duty not to conceal material facts to the 2nd Plaintiffs.

In reply, Counsel for the Defendants contended that the Defendants had not acted in breach of its mandate under the Banker Customer relationship. That the submission by the Plaintiff that they did not require a loan was false. That in a letter dated 10th March 2017 Pex 10 which was supported by the 2nd Plaintiffs various project papers, the Plaintiffs applied for a loan. That it is this Application that culminated into the financing agreement between the 2nd Plaintiff and Defendants. That there was therefore no breach of any fiduciary duty to the Plaintiff by the Defendants, as they had none in the circumstances.

The Defendants contended that 1st Plaintiff still had repayment obligations arising from a facility entered with Crane Bank Limited – the predecessors of the Defendants. The liability under the facility **– Exhibit D1** also referred to as Facility 2, said to be the outstanding amount following a reconciliation is Shs 124,971,592/= and that there was no evidence adduced by the Plaintiff that this amount had been settled.

In their letter PEX10, the Plaintiffs submitted to the reconciliation exercise. A reconciliation of the accounts showed that the Plaintiff still owed Shs 124,917,592/=.

This is corroborated by the provisions of clause 3.2 of the Term Loan Agreement which stipulates how the money under the facility was to be applied, including Shs 124,971,592/= which was to be used to offset the 1st Plaintiff's (Charles Twagira) outstanding exposure. The 1st Plaintiff signed the term loan facility agreement as director of the 2nd Plaintiff. This transaction was uniquely characterized by a fusion of the 1st and 2nd Plaintiffs' affairs or and obligations with the Defendant. The fusion of issues was seemingly acceptable to all the parties until disagreement broke out over default and recovery.

The 1st Plaintiff confirmed having read, understood and accepted the terms and conditions of the Term Loan Facility Agreement, an attestation that the agreement had been read to the Plaintiffs is an integral part of the Agreement, included at its end.

Based on the reconciliation, the 1st Plaintiff was found to be indebted to the Defendant and the Bank would therefore have a right to recover. However, the recovery for which the 1st Plaintiff faults the Defendants for having improperly debited their account with up to Ug. Shs. 45,000,000/= and applied some of it to an allegedly non-existent loan account was not done in accordance with Clause 5 of the term Loan Agreement, which provides for the amount of money that as supposed to be paid by the 2nd Plaintiff in each monthly installment.

The omission to provide the Plaintiff, or even this court with the loan amortization schedule, it would appear, masked visibility of how much the Plaintiff was required to pay, the fact that it was provided for in the Loan Agreement notwithstanding.

On whether or not the 1st Plaintiff was indebted to the extent of Shs 124,971,592 /= mentioned at Clause 3.2(ii) of the Facility Agreement, the 1st Plaintiff contended that the facility had expired. He however did not adduce evidence that he had paid up all outstanding amounts due, prior to expiry of the facility.

Whereas I agree with the 1st Plaintiff that the loan facilities with Crane Bank Limited had a time limit after which they expired, I do not buy into the notion,

which he seems to want to put across, that such expiry would possibly also extinguish liability under the facility. While the tenor of a loan facility may expire, this does not extinguish the outstanding liabilities under the facility. The money, whose benefit the borrower has enjoyed remains due and payable to the lender, this entitlement to receive which accrued or is vested before expiry is not extinguished. What it only means is that the Plaintiff could not get any further financing under the particular terms of the expired agreement until they are renewed with or without amendment. The end of tenor of a loan facility does not extinguish the borrower's indebtedness incurred prior to the expiry.

The figure of Shs 124,971,592 /= mentioned at Clause 3.2(ii) of the term loan facility Agreement which the Plaintiffs signed up for was arrived at after a reconciliation exercise submitted to by the 1st Plaintiff as discerned from his letter Pex10 of 10th March 2017.

In the circumstances therefore, because the 1st Plaintiff remained indebted to the Defendants, the Defendants were entitled to recover the outstanding money albeit in accordance with the terms of the term Loan Agreement.

The allegation however, by the Plaintiffs, is that the Defendants credited a non-existent account and in doing so, were negligent and in breach of their duty of care to the Plaintiff.

The Plaintiff has proffered uncontroverted evidence that the seeming default which led to the alleged wrongful debits was attributable to the Defendants own system failures – which could not recognize credits to the Plaintiff's loan account at a certain period in time and so deposits/receipts were in a way suspended at a threshold.

The Bank is under a fiduciary duty to inform the client about the status of its loan account including insufficiency of funds or even adequacy of security. When the Bank fails to do so, that would constitute a continuing breach of the fiduciary duty,- **UBAF Ltd V European American Banking Corporation [1984]2 ALL ER 226.**

Having established that the Defendant owed a duty of care to avail the Plaintiffs with an amortization schedule which would also include a statement of their account, the question that remains is whether following the breach ,the 1st Plaintiff suffered any injury as a result. - see **Donoghue v Stevenson (1932) All ER 1** for the proposition that the three ingredients making up a case of negligence are; the Defendant owed a duty of care to the Plaintiff, there was a breach of that duty by the Defendant and the Plaintiff suffered injury as a result of the breach.

The Plaintiff's also submitted that by not following the normal loan amortization schedule or availing them with it, the Defendants were able to make arbitrary debits from the Plaintiff's accounts, which amounted to a breach of duty and enabled a fraud to be perpetuated on them.

In a Banker-Customer relationship, provision of a loan amortization schedule is in fulfilment of a fiduciary duty to inform the client about the loan repayment or status of the payment.

The omission by the Defendants to provide the Plaintiffs with loan amortization schedule details denied the Plaintiffs the benefit of having certainty about their loan account activities, this would have included the impugned debits, to have a proper feel of their progress towards clearing their liability.

Regarding the alleged arbitrary recoveries from his account of UShs. 45,000,000/=,in **Bank and Customer Law in Canada (2007), M H Ogilvie writes (p 284):**

"*Banks make payments by mistake for a variety of reasons, including simple error, either personal or by computer, in making a payment more than once, payment over an effective countermand, payment where there are insufficient funds, or payment of a forged or unauthorized cheque. Prima facie, in these situations, with the exception of insufficient funds which is treated as an overdraft, the Bank is liable to reimburse the Customer's account because it is in breach of contract with the Customer. But the Bank is also permitted to look to*

the recipient of the mistaken payment for restitution of the sum paid under a mistake of fact.'

That said, whereas therefore the wrong account was credited, no loss appears to have been occasioned to the Plaintiff.

In the instance, it would therefore be self-defeating to hold the Bank liable for loss, and for that matter to possibly require the Defendants to reimburse the 1st Plaintiff and then seek to recover loan repayment arrears from the 2nd Plaintiff.

Be that as it may, the Defendants breached their obligation to the Plaintiffs by failing to furnish them with loan amortization schedule by which the impugned deduction of Shs 45,000,000/= was informed.

It was the Plaintiffs case that because the Defendant promised to expeditiously process the 1st Plaintiff's refinancing, this created a legitimate expectation contract which led him to alter his pursuit of Standard Chartered Bank's offer to his detriment and yet the Defendant breached the legitimate expectation contract when it did not process the loan at all. That this was a dishonest act that caused the Plaintiff untold harm.

Counsel for the 2nd Plaintiffs submitted that the Defendant through their senior officers a one Agnes Mayanja and Thomas Kajoba dissuaded him from pursuing his refinancing needs from Standard Chartered Bank because the Defendant was in a superior position to expeditiously process the Plaintiffs refinancing.

That the Defendant promised to "expeditiously process the 1st Plaintiff's refinancing, which created a "legitimate expectation contract" which led him to alter his pursuit of Standard Chartered Banks' offer to his detriment as the Defendant did not process the loan at all. That this has caused him untold harm by barring any other potential lender to entertain an application from him up to this date.

Under paragraph 25 of the Plaintiffs' witness statement, PW1 stated that a meeting was held in which the Defendant's agent Ms. Agnes Mayanja promised to expeditiously process the 1st Plaintiff's refinancing.

To establish whether or not a legitimate expectation was impressed upon the Plaintiffs, it is of little importance that they were persuaded to abandon their other pursuits in preference for what the Defendants offered. What is critical in my opinion, is what the Defendants promised to deliver whether and how they impressed their promise upon the Plaintiff.

In a persuasive decision of the Court of Justice of the European Union, **Neutral Citation Number: C-119/19 P, C-126/19 P,** it was held that;

> "*The right to rely on the principle of the protection of legitimate expectations presupposes that precise, unconditional and consistent assurances originating from authorised, reliable sources have been given to the person concerned by the competent authorities*…."(***Marchiani* v *Parliament*, C-566/14 P, U:C:2016:437, paragraph 77).**

The Plaintiffs based their claim of a legitimate expectation on the ground that they had been given assurance that the money would be expeditiously processed. The 1st Plaintiff submitted that the Defendant had through their senior offices represented that they were in a superior position to expeditiously process the Plaintiffs refinancing.

They had several engagements with the Defendants officials, namely Agnes Mayanja and Thomas Kajoba, who they say undertook to expeditiously avail the loan. They filed Minutes of two Meetings and correspondences with the Defendants.

Two possible aspects of expectation arise, that money will be availed and secondly, that it will be availed expeditiously.

There is however no clear and unambiguous undertaking by the Defendants. The only legitimate expectation the petitioner could have of the first Defendants was that they would avail loan financing as negotiated, in accordance with the term loan financing agreement.

The 1st Plaintiff did not provide a basis for the contention that the Defendant was duty bound to provide the refinancing within a 1(one) week period.

In re-examination, DWI testified that the Defendant on receipt of a loan application follows certain processes prior to disbursement of the loan which may alter the duration within which different loans will be disbursed.

That the Defendant cannot flout these procedures merely because a Customer wants a loan in a short time frame as it exposes itself to regulatory penalties if it does so.

The Plaintiffs have not shown that the period within which the refinancing was processed was beyond that expected of reasonable Bankers carrying out Banking business in Uganda.

There is nothing that would justify a conclusion that the Defendant owed a duty of care to provide the facility in question to the 2nd Plaintiff within 1(one) week.

Whereas a legitimate expectation to avail money has a basis, the claim of legitimate expectation to process the loan expeditiously is unfounded, the Plaintiffs have not established that any clear unambiguous assurance was given to them by the Defendant's officials that the money will be processed outside the Banks standard processing times.

Under section 102 of the Evidence Act, the burden of proof lies in the person who would fail if no evidence at all were given on either side. The burden of proof is on the person who alleges. The Plaintiff failed to discharge its burden of proving its assertions.

It cannot therefore be concluded that the Defendant engaged in deceptive practice as it cannot be ascertained that such promises were made to the 1st Plaintif as alleged.

It follows from this that the plea of a legitimate expectation to have the money processed within one week must be rejected as being unfounded.

The 2nd Plaintiff's Counsel submitted that the refinancing transaction involving the 2nd Plaintiff was unauthorized and legally incompetent on account of the fact that no company resolution sanctioning the said loan was passed in a general meeting authorizing the company to borrow funds exceeding its nominal share capital nor to pay off loan obligations of the 1st Plaintiff. That the credit agreement between the 2nd Plaintiff and the Defendant is a falsehood, misrepresentation and a concoction.

They also submitted that there was gross negligence and reckless conduct of the Defendant in the refinancing transaction. That the 2nd Plaintiff did not seek a loan nor did it require refinancing from the Defendant as no application authored by the 2nd Plaintiff seeking refinancing from the Defendant exists.

It was the 2nd Plaintiff's submission that the Defendant misled them and unduly influenced them and exercised duress on the 2nd Plaintiff to take up a loan it neither applied for nor needed. That the loan transaction was not authorised by a company Resolution and that PEX20 is a falsehood, misrepresentation and concoction.

In reply, Counsel for the Defendants submitted that as indicated at paragraph 1.14 of DW1's witness statement, the Plaintiffs applied for refinancing from the Defendant through a letter dated 10 March 2017 (PEX10) which was written on the 2nd Plaintiff's headed paper and accompanied with supporting documentation pertaining to the 2nd Plaintiff's business and financials.

I have perused PEX10 and established that it was indeed written on the Plaintiff's headed paper and signed off by the 1st Plaintiff.

It is not in dispute that the letter, exhibit Pex10 was signed by the 1st Plaintiff. It is however imperative to determine whether the 1st Plaintiff, the 2nd Plaintiff's director who signed the alleged application for the loan had or could have had the requisite authority from the 2nd Plaintiff.

A company being an abstract entity, can only act, in relation to the outside world through its agents. A corporate entity cannot sign a document except by a human agency whose signature, once it is established that the person person who signed the document did so in their capacity as an official of the corporate entity acting in the cause if the company's business, is the signature of the company. Only then can it be arguably presumed that his signature was that of the entity.

The question in the instant case therefore is, whether the 1st Plaintiff was acting in the course of the 2nd Plaintiffs' business.

It is common ground that the 1st Plaintiff is a director of the 2nd Plaintiff and that he had represented, in his dealings with the Bank, that he was clothed with authority to act on behalf of and as a representative of the 2nd Plaintiff, which is a generally common preserve of directors in the day to day management of business. There would therefore have been no cause to question his signature as being that of the company.

However, given the nature of the transaction involved, it would be precarious to make that presumption and Court has therefore looked beyond this presumed authority to ascertain whether or not the 1st Plaintiff could have been acting on behalf of the 2nd Plaintiffs.

In **Pex10,** the letter signed by the 1st Plaintiff and relied upon by the Defendants as the Application for the facility by the 2nd Plaintiffs, it was also stated that the audited accounts for 2015 would be supplied and in addition, **their** other documents attached to the letter,which included a Services Agreement between the 2nd Plaintiff and one Arilia Sky LLP, a Bill of Quantities and the Audited Accounts of the 2nd Plaintiff (Exhibit P11) which formed the basis of the negotiations for the refinancing transaction which culminated into the term loan

financing Agreement between the 2nd Plaintiff and the Defendant. In light of this, it is practically incomprehensible that the 1st Plaintiff could have been pursuing his personal loan using the 2nd Plaintiffs' various business transaction documents and, in that letter, making reference to "**their"** other documents when he is just an individual. Such a proposition is devoid of merit. The letter was an expression of the common aspirations of both Plaintiffs.

Premised on the forgoing evidence and analysis, I can only conclude that in executing Pex10, the 1st Plaintiff was duly acting within his authority to sign on behalf of the 2nd Plaintiffs, as he did.

A representation signed on behalf of a limited company by a duly authorised officer acting within the scope of his authority, or an officer or employee of the company acting in the course of his duties in the business of the company constituted a representation made by the company and signed by it.- **UBAF Ltd V European American Banking Corporation [1984]2 ALL ER 226.**

From the foregoing analysis of evidence and authorities, it is my conclusion and finding that Pex10 is for all intents and purposes the 2nd Plaintiffs' application for the refinancing facility and that the 2nd Plaintiffs applied for the loan facility.

Contrary to the 2nd Plaintiff's submission that the 2nd Plaintiff did not require financing, the very same Pex10, Pex20 and Paragraph 27 of the 1st Plaintiff's witness statement states otherwise. It states that;

> *"That at all times it was clear to the Plaintiffs and the Defendant that time was of the essence in the execution of this refinancing transaction because the offseason window for the hotel business was between February and March. "*

This paragraph of the Witness Statement is consistent with paragraph 3.1 of PEX20 which states that the facilities were sanctioned solely for the purpose of expansion and modification of the hotel complex.

These documents underpin the fact that the Plaintiffs required financing to expand the 2nd Plaintiff's hotel facilities during the off-season.

Premised on this said application, the Defendants then proceeded to consider extending the financing facility to the Plaintiffs, which in my opinion was well within their mandate.

Save as indicated in this judgment, regarding the failure to avail amortization schedules and the erroneous debits made on the Plaintiffs accounts, the Defendants did not act without due care nor did they breach their duty of care/lent recklessly.

The question that this Court now has to resolve, and which is a case that the Plaintiffs have argued, is whether or not the 2nd Plaintiffs made the Application for financing under duress, undue influence, fraud, misrepresentation or concealment of information from them. This is Issue No. 3, which Counsel for the 2nd Plaintiffs argued jointly with Issue no. 2, while the Defendants argued the two separately. I will now proceed to resolve Issue No. 3.

Whether the Defendant exerted economic duress on the Plaintiffs to secure execution of the refinancing transaction by the Plaintiffs.

The context of this matter is that the Plaintiffs had a pending finance requirement under consideration by the Defendants – see Pex10. There was an earlier loan financing transaction by which, while the 1st Plaintiff avers that he had already settled, per Pex13, the Defendants do not agree and hence the Demand Notice – Pex 14 requiring the 1st Plaintiff to settle an outstanding loan which according to him he had resolved. Parallel to this transaction, the 2nd Plaintiffs were pursuing a term loan financing facility by the Defendants.

The only pending loan facility under consideration was therefore between the 2nd Plaintiff and the Defendants. The record does not show that the 2nd Plaintiff had any prior loan financing arrangement with the Defendants.

On the face of it, the Plaintiffs were in considerable financial difficulties, with the 1st Plaintiffs falling behind in meeting their loan obligation to the Defendants and the 2nd Plaintiffs seeking funding to progress with their projects within constraints of time.

The Plaintiffs who were out seeking for financing, say they had an offer from the standard chartered Bank to take up their loan and offer them financing. According to Pex 13, they had complied with all the Defendants requirements and had no pending obligations to the Defendants – In the said Pex13, they stated that they had complied with all the Bank requirements which in the context included Bills of quantities and further alternative security.

It would appear that the Defendants did not consider the transaction with the Plaintiffs particularly attractive unless the 2nd Plaintiff's director, now the 1st Plaintiff in this case, who also happened to be already indebted and in arrears rectified his default.

The Defendants offered to avail finance but required that the 1st Plaintiffs, who as it was known were related to the 2nd Plaintiffs, first rectify outstanding issues with them in respect of the earlier facility.

In the case of **Nilecom Limited v Kodjo Enterprises Limited H.C.C.S no. 0018 of 2014**, Justice Mubiru cited the case of **Pao On Ling v Yiu Ling [1980) AC 614** where court stated that the necessary ingredients for a successful economic duress claim are; pressure which is illegitimate, that the pressure was a significant cause that induced the Claimant to enter the contract and that the practical effect of the pressure is that there is compulsion on or lack of practical choice for the victim.

The Plaintiffs contended that the impugned loan transaction was procured by economic duress, (ii) was an unconscionable bargain, (iii) resulted from the Defendant's breach of a fiduciary and statutory duty and Banker-Customer relationship or (IV) fraud and unjust enrichment and that it should therefore be set aside.

That when, by letter PeX 13, the 1st Plaintiff complained about the delay to refinance, the Defendant with intention of silencing and intimidating the Plaintiff instead, issued a Notice of default, PeX14, alleging a nonexistent default.

It was the 2nd Plaintiff's submission that the transaction between the 2nd Plaintiff and the Defendant was brokered by coercion of the 2nd Plaintiffs by the Defendants and that therefore no true consent to the refinancing transaction was elicited from the 2nd Plaintiff but rather, the transaction thrust upon the 2nd Plaintiff given the fact that there was no other alternative but for the 2nd Plaintiff to accept the onerous debt burden given the illegitimate pressure upon it. That it is this pressure and the glaring lack of practical choice, which significantly induced the 2nd Plaintiff to enter the impugned contract.

That the Bank procured the 2nd Plaintiffs submission to the loan facility through coercion on her. That having had access to the 2nd Plaintiff's Bank statement which revealed the Plaintiffs sources of income and portrayed them as a more attractive client to the Defendants, the Defendants offered a term loan facility which they never disbursed.

The question that begs an answer therefore, is whether the Defendants' actions amount to duress or commercial pressure upon the Plaintiffs.

Commercial pressure may constitute duress and render a transaction voidable, provided that the pressure amounts to a coercion of the will which vitiates consent: see **Pao On v Lau Yiu [1979] 3 All ER 65, [1980] AC 614**.

A party who seeks to set aside a transaction on the grounds of economic duress must therefore establish that he entered into it unwillingly (not necessarily under protest, though the absence of protest will be highly relevant), that he had no realistic alternative but to submit to the Defendant's demands, that his apparent consent was exacted from him by improper pressure exerted by or on behalf of the Defendant, and that he repudiated the transaction as soon as the pressure was relaxed.

It is not necessary to consider to what extent, in order to constitute economic duress, the pressure must be improper, but it must consist of something more than a refusal to waive performance of an existing contractual obligation.

I have looked at the three exhibits, Pex10, Pex13 and Pex14, cited by the 1st Plaintiff, to ascertain whether any illegitimate pressure can be inferred from their content.

Pex10 is a letter dated 10th March 2017 in which the Plaintiffs bring it to the Defendant's attention that they had an offer by Standard Chartered Bank to buy of the Plaintiff's loan with the Defendants and to advance them $100,000. They however seek clarification from the Defendants if they are instead able to top up the loan and to process the loan structuring/request in a very short time. The Plaintiffs affirm their capacity to service the facility by enclosing a copy of a signed contract with one of their clients. The copy of the contract is however not included on PeX10. I however presume that it must have been a contract between the 2nd Plaintiff and that said client.

PeX13 is a letter dated 12th July 2017 from the Plaintiffs to the Defendants in which they make reference to various conversations they have had with Bank officials, presumably, in an effort to close the then pending loan facility transaction. The Plaintiff indicate that they had complied with all the Bank requirements which, in the context, included providing Bills of quantities and further alternative security. They expressed surprise at why one of the Bank Officials called Rashidah had stated that the Plaintiffs' application would not be dealt with unless they paid undisclosed outstanding arrears. That she told them that they were in arrears of 40 days and that this would affect their Credit Reference Bureau rating.

Pex14 is a Notice of Default from the Defendants dated 14th July 2017 addressed to the 1st Plaintiff, Mr Charles Twagira, notifying him of default on his obligations under a facility agreement executed on 11th December 2015 and requiring him to pay Shs 21,252,634 being the outstanding on the facility, within 45 days and that

if the default was not remedied as required, the Bank would proceed to advertise the property for sale.

Counsel for the 2nd Plaintiff submitted that because of the events as revealed in Pex 10, 13 and 14, the Plaintiffs were at the mercy of the Defendant who then offered them a loan of Ugx. 360,000,000/.

It is from the Defendant's alleged actions of getting the Plaintiffs to accept a loan facility, refraining from disbursing it and issuing default notice to the Plaintiffs, for a nonexistent loan that Counsel for the Plaintiff imputes duress upon them y the Defendants.

The specific act of duress by the Defendants has not been out rightly pointed out. It is however discerned that the alleged act of duress, is manifested in the issuance of a Notice of Default- Pex 14 to the 1st Plaintiff who is also a director in the 2nd Plaintiff, at a point when the 2nd Plaintiff had a loan facility application under process. It would appear to also be inferred from the words of the Defendants official in which she allegedly stated that the Plaintiffs' application would not be dealt with unless they paid undisclosed outstanding arrears and that this would affect their credit reference bureau rating.

The issuance of a Notice of default and the statements alleged to have been made by Rashida, to the effect that the loan would not be processed unless the outstanding are first settled are things as would ordinarily be done and said in the ordinary cause of a Banker–Customer engagement in circumstances of default while attempting to borrow at the same time, as is in the instant case.

In any case, it is also a long established position taken by Courts of law that, a party's refusal to waive performance by the other party of that party's existing contractual obligations under a previous transaction which had been freely entered into could not constitute economic pressure on the other party to enter into a fresh transaction.- see **Tate v Williamson (1866) LR 2 Ch App 55.**

In order to constitute economic duress the pressure must be improper, but it must consist of something more than a refusal to waive performance of an existing contractual obligation.

But even if, it is presumed that the Plaintiffs might have been under undue pressure to borrow from the Defendants, the position of the law is that a transaction cannot be set aside on grounds of undue influence unless it was shown that the transaction was to the manifest disadvantage of the person subjected to the dominating influence.-See **National Westminster Bank V Morgan [1985]1 All ER 821.**

If there was any pressure to conclude the deal it would appear to have come from the Plaintiffs who were anxious to have their hotel project completed within a certain window of time and therefore stood to benefit by getting new financing for their projects and having prior loans resolved. This is discerned form **Pex13**, and the minutes of the meetings held between the 1st Plaintiffs and the Defendants officials on two occasions together with letter from 1st Plaintiff to Defendants.

The principles that justify the court in setting aside a transaction for undue influence or duress as stated in **Allcard V Skinner [1886-90] All ER 90**, are also founded on the need to protect persons from being victimized by others, that the undue influence which courts of equity endeavor to defeat is undue influence of one person over another, not the influence of enthusiasm on the enthusiast who is carried away by it, unless indeed such enthusiasm is itself the result of external influence.

PEX13 reveals anticipation of loan financing from the Defendant on the part of the 2nd Plaintiff and not compulsion to acquire a loan that they did not need. On the 1st Plaintiffs part it is also evidence of acknowledgement that the 1st Plaintiff indeed had some outstanding financial obligation to the Defendants, even if the actual amount was in dispute.

In Pex10, the Plaintiff also indicate that Standard Chartered Bank had made an offer to them. They therefore were not short of a realistic alternative to revert to in the face of unfavorable circumstances and terms of the pending offer by the Defendants but they opted not to do so.

The Plaintiffs have not established that they entered into the transaction unwillingly with no real alternative but to submit to the Defendants' demand, or that their apparent consent to the transaction was exacted by the Defendants' coercive acts. There is even no indication that the Plaintiffs ever tried to repudiate the transaction, they instead engaged the Defendants in protracted negotiations to disburse money from the loan facility. These are critical factors in determining whether there was economic duress. The absence of which means that a case for economic duress collapses.

Additionally, the precise basis of the doctrine of undue influence is based on the impaired consent of the person subject to the undue influence and not on the wrongful exploitation of that person.

Looking at the **Independent Advisors Attestation** included to the facility letter, the Plaintiffs took the independent advice of Advocate Arinaitwe regarding the facility. They also attest to the fact that they read and agreed with the terms of the offer. This does not point to any possibility of impaired consent to the transaction.

In **Credit Lyonnais Bank Nederland NV v Burch, -[1997] 1 All ER 144 at 156–157** Millett LJ said It has been suggested that an oppressive transaction will only be saved by independent advice if the advisor explains fully to the complainant why the transaction is so disadvantageous and that she is under no obligation to agree to it, or to agree to the terms offered. As stated above, the Plaintiffs took independent advice.

The transaction was therefore not obtained by commercial pressure which coerced the Plaintiffs' will or vitiated their consent to the transaction,

I find no merit in the Plaintiffs submission that they were intimidated with a notice of default in any other way whatsoever.

As can be discerned from **PEX10,** the Plaintiffs were interested in obtaining refinancing from the Defendant before the Notice of default was issued. The notice of default was issued as a part of the process for rectification or recovery, it cannot be said that it induced the 1st Plaintiff to process a loan for the 2nd Plaintiff. The 2nd Plaintiff cannot also plead economic duress based on a notice of default issued to the 1st Plaintiff.

It cannot therefore be said that the notice of default issued on 14th July 2017 was the significant cause for the Plaintiffs entering the transaction which had already been commenced.

The Plaintiffs having admitted to having an outstanding balance were simply under an obligation to pay, with or without a Notice of default and in any case, it is not inherently objectionable for a Bank to recover money lent to a borrower.

Again I find no merit in this submission which in my view, while recognizing the 1st Plaintiffs default on their obligations to the Defendants, seeks to fault the Defendants legitimate measures to secure their own rights, as an affront on the part of the 2nd Plaintiffs. This line of augment s absurd not acceptable and without merit.

Additionally, scholars of the subject have also opined that a threat not to contract with another, except on certain terms does not of its own amount to economic duress- **Goff & Jones Law of Restitution, 3rd Edition, 1986 @ page 240.**

In my judgment, and premised on the foregoing analysis, the Plaintiffs have not established a case of duress. They certainly did not enter into the transaction under any compulsion upon them by the Defendants. The Plaintiffs were under no pressure from them to accept the Defendants' loan facility or terms but were under obligation to pay outstanding amounts, and yet also required finance. Unless barred by statute, which in this case is not the case, the law does not,

per se , illegitimise inequality of bargaining power in commercial dealings- see **National Westminster Bank v Morgan [1985]1 ALL ER 821.**

The transaction cannot therefore be impeached on grounds of economic duress.

However, the Plaintiffs also sought to impeach the legality of the transaction. They submitted that the refinancing transaction involving the 2nd Plaintiff was unauthorized and legally incompetent on account of the fact that no company resolution sanctioning the said loan was passed in a general meeting authorizing the company to borrow funds exceeding its nominal share capital nor pay off loan obligations of the 1st Plaintiff. That the Defendant had explicit notice of the limitations of the company's borrowing powers as indicated in the conditions precedent to disbursement of the impugned refinancing that necessitated the 2nd Plaintiff to avail its constitution, documents and resolutions to borrow, to the Defendant.

In reply Counsel for the Defendants submitted that the Defendant had no mandate to obtain a resolution to borrow from the Plaintiffs as there is no requirement under the 2nd Plaintiff's Memorandum and Articles Of Association or the Companies Act, 2012 requiring the Defendant to obtain a resolution from the 2nd Plaintiff before advancing a facility nor is there restriction prohibiting the Defendant from availing a facility without a registered written Resolution. That in any case, any obligation to provide a resolution would be imposed on the Plaintiffs and not on the Defendant given that the resolution is made by the company not the Bank. That lack of a resolution in this case is as a result of the Plaintiffs' own omission which cannot therefore be visited on the Defendant.

The requirement of having a company resolution as a pre-condition for borrowing was dealt with in the first issue where court relied on paragraph 9 of PEX20 which provides that the conditions precedent to disbursement were to be fulfilled in a manner satisfactory to the Bank. It was confirmed by DW1 in her cross – examination that the Bank was satisfied by how the 2nd Plaintiff had fulfilled the requirements and accordingly went ahead to issue the loan facility.

No evidence of the 2nd Plaintiffs Memorandum and Articles of Association was adduced by the 2nd Plaintiff to show that it was a requirement therein, nor was any specific provision of the law that stipulates the requirement for a resolution cited.

Counsel for the Defendants submitted that by law the Plaintiff cannot found a cause of action against the Defendant based on their own omission or illegality.

In his cross-examination, PW1 stated that th 2nd Plaintiff's borrowing was an illegal borrowing because PW1 who signed the offer letter term loan had no authority of the company to do that. He went ahead to admit having committed an illegality in that respect and that this suit is pursuant to that illegality.

In the case of **Candiru Asina Binna -v- Centenary Rural Development Bank Limited, CS No. 22/2016**, Justice Mubiru held that;

"No court will lend its aid to a person who founds his or her cause of action upon an immoral or an illegal act."

In the Banker-Customer relationship, the Plaintiffs/Customers are at all times under a duty to exercise reasonable care in executing their written orders to the Bank, so as not to mislead the Bank or to facilitate forgery. See- Atkin LJ, in **Joachimson v Swiss Bank Corpn, T**hey breached this duty.

In the instant case, whereas the evidence and submissions by the Plaintiffs point to no known illegality to have been committed, the Plaintiffs' actions amount to contravention of their own internal controls, policies and procedures. None adherence to their own processes may amount to an irregularity but not as would warrant the impeachment of the entire transaction, even if not remedied. After all, both parties would appear to have acquiesced to the irregularities and taken respective advantage of the benefits under the transaction.

My position is bolstered by the holding in **Swift V Jews bury LR 9 QB 301** at *page 312* where Lord Coleridge held that*:*

"where a corporation takes advantage of the fraud of their agent, they cannot afterwards repudiate the agency and say that the act which has been done by the agent is not an act for which they are liable. The doctrine of vicarious liability extends to the fraudulent act of the agent of the company committed in the cause of its business and for its benefit".

Be that as it may, basing on PW1's own testimony, this court cannot lend credence to his plea which is founded on an irregularity he knowingly committed.

The 1st Plaintiff also submitted that the Defendant went a step further to allot themselves a fiduciary duty by volunteering the role of financial advisor to the 1st Plaintiff when it persuaded him to abandon the Standard Chartered Bank offer in favor of the Defendant.

Factually, there is no evidence that the Defendants, provided any advice to the Plaintiffs but, even if it had, as a matter of law it would not have given rise to an advisory relationship or duty of care on the facts.

Part of the contractual documentation surrounding the facility is an Independent Advisors Attestation in which Advocate Timothy Arinaitwe, as independent advisor. He is presumed to have been the Plaintiffs' transaction advisor. This in effect estoppes the borrower against claims of undue influence, duress or misrepresentation against the Defendants.

The Defendants were never in a position of advisors to the Plaintiffs as clearly, the evidence on record is that they took independent counsel of Advocate Arinaitwe regarding the transaction/ facility. This debunks any insinuations that the Defendants were in a position of professional advisors to the Plaintiffs.

The 2nd Plaintiff's Counsel submitted that the Defendant breached their fiduciary duty to the 2nd Plaintiff, the duty not to effect undue influence or duress on the 2nd Plaintiff to take up a loan it had not applied for and did not need, breach of the Defendant's duty not to mislead the 2nd Plaintiff, breach of the Defendant's duty to provide up-to date- information and advise to a client, breach of a duty to

provide statements of the loan account showing what transpired since the last statement regarding the refinancing transaction, breach of the Defendant's duty not to lend recklessly, breach of a duty of transparency and Breach of the Defendant's duty not to conceal material facts to the 2nd Plaintiff.

In reply Counsel for the Defedants submitted that the Defendant had no fudiciary duty in the circumstances as the existence of a Banker Customer relationship does not in itself create a fudiciary duty. That the Plaintiffs must show that there was a voluntary assumption of duty by the Defendant to advise the Plaintiffs and that such duty was abused by the Defendant to gain an unconscionable advantage over the Plaintiffs.

The Plaintiffs also contended that the impugned loan transaction was an unconscionable bargain.

Case law has long recognized unconscionable conduct as a vitiating factor, however, a bargain will not be set aside on grounds of unconscionability unless the following three elements are present:

(1) The bargain must be oppressive to the complainant. 'The resulting transaction must not simply be hard or improvident but overreaching and oppressive' so that its terms, together with the conduct of the stronger party, 'shock the conscience of the court'. In **Credit Lyonnais Bank Nederland NV v Burch[1997] 1 All ER 144**., for example, a majority of the Court of Appeal would have been prepared to hold that the transaction could be set aside directly against the Bank on grounds of unconscionable bargain where a young employee entered into an unlimited guarantee charged on her modest flat as surety for her employer and got nothing in return. The Court of Appeal set aside the transaction on the ground that the Bank had notice of the employer's undue influence.

(2) The complainant had been suffering from certain types of bargaining weakness. The traditional requirement that the complainant be 'poor and ignorant' has been broadly interpreted in modern cases. In **Cresswell v Potter**,

Megarry J suggested that the modern equivalent of 'poor and ignorant' might be 'a member of the lower income group … less highly educated'.

In **Portman Building Society v Dusangh**, an elderly, and illiterate, father on a low income was held to be the modern equivalent of 'poor and ignorant'. By contrast, in **Irvani v Irvani**, an experienced businessman, although allegedly addicted to heroin, was held not to suffer from a bargaining weakness.

(3)The other party must have acted unconscionably in the sense of having knowingly taken advantage of the complainant. There must be unconscionable conduct or an unconscientious use of power. Relief will not be granted unless there has been equitable fraud, victimization, taking advantage, overreaching or other unconscionable conduct. **In Credit Lyonnais Bank Nederland NV v Burch (supra)**, Millett LJ stressed that it would be necessary to show that the Bank had imposed the objectionable terms in a morally objectionable manner, that is to say, in a way that affected his conscience, but added that the impropriety might be inferred from the terms of the transaction itself in the absence of an innocent explanation. Merely lending to a borrower who is known to be old, frail and of modest means, to enable him to fund his son's improvident business venture, is not morally reprehensible on the part of the Bank. However, it is possible now that the Bank in such circumstances might be subject to regulatory scrutiny, or scrutiny by the Financial Ombudsman Service, as to whether it had treated such a potentially vulnerable Customer fairly.

The older authorities state that the complainant must have acted without independent advice. However, 'it may be that the absence of legal advice is not so much an essential freestanding requirement, but rather a powerful factor confirming the suspicion of nefarious dealing which the presence of advice would serve to dispel'.- **Portman Building Society v Dusangh [2000] Lloyd's Rep Bank 197 at 206.**

In **Credit Lyonnais Bank Nederland NV v Burch, -[1997] 1 All ER 144 at 156–157** Millett LJ said It has been suggested that an oppressive transaction will only be saved by independent advice if the advisor explains fully to the

complainant why the transaction is so disadvantageous and that she is under no obligation to agree to it, or to agree to the terms offered.- **Chitty on Contracts (30th edn, 2008) vol 1, para 7-134**.

I have already concluded elsewhere in this judgment that the Defendants were never in a position of advisors to the Plaintiffs, the evidence on record is that they took independent counsel of Advocate Arinaitwe regarding the transaction, who confirms in an attestation to the contract that the terms and conditions of the facility letter had been read over and interpreted to the borrower.

In the event that there were some unconscionable terms therefore, which is not the case, this fact alone would save the transaction.

Although they alluded to the fact that the transaction was unconscionable, the Plaintiffs did not adduce evidence of the specific unconscionable terms of the transaction,

Regarding the Plaintiffs contention that the impugned loan transaction also resulted from the Defendant's fraud and that it should therefore be set aside, save for breach of their fiduciary duty, by concealment of material information when they did not timeously avail the Plaintiffs with information regarding their accounts, such as the system malfunction which disabled the Plaintiffs capacity to have their loan repayments accepted in time thus culminating into ostensible default, and omission to avail the loan amortization schedule which would have possibly clarified the circumstances under which certain objectionable credits were made when they did happen, the Plaintiffs have not proved that the Defendant acted with fraudulent intent when they breached these duties to the Plaintiffs, the Defendants acted within their mandate under the Banker Customer relationship with the Plaintiffs.

The 2nd Plaintiff's Counsel submitted that the Defendant filed false reports with CRB showing that the 1st Plaintiff applied for a US Dollar loan of 100,000 on the 24th May, 2017 whereas not.

The manner in which the issue of the loan currency types has been argued could easily lead one to believe that there were two loan applications, one for USD100, 000/= and the other for Ugx 360,000,000/=.

My understanding however is that, while the Plaintiffs request was for $100,000, the transaction was concluded in UGX and the Defendants disbursed the money in shillings (Ugx).

When the Defendants submitted their Report to the CRB, they reflected the loan as $100,000 by the 1st Plaintiff and have never rectified or ratified the transaction. The Report indicates that the loan was refused for reasons that it "contravened internal policies". Because the Defendants went ahead to advance money to the Plaintiffs, one wonders why this Report was made. The circumstances as they appear, in my view, give credence to the Plaintiffs submission that the Report is false. The falsehood is however not that the Plaintiff never applied for the loan, but that it was rejected.

Even if in her re-examination, DW1 contended that it was the 2nd Plaintiff who requested for the USD 100,000 not the 1st Plaintiff as alleged, the evidence on record is that the 1st Plaintiffs requested for the financing and in USD$. This is evidenced in his email, Pex16, to Agnes Mayanja and in Minutes of Meetings Pex 19 held on the 16/8/2017 between the Plaintiffs and the Defendants in which the Plaintiff alludes to a USD$ denominated request.

The veracity of the Application has been confirmed by the Court. It is established that by exhibits Pex10, Pex 16 and Pex19 and Pex20 the Plaintiff applied for the loan facility and that the money was disbursed.

The Credit Reference Bureau Report is therefore factually inaccurate in as far as it implies that the loan was rejected. Whereas the currency of disbursement may have changed, the loan was never rejected.

I am convinced that this state of affairs has occasioned embarrassment and anguish to the Plaintiffs whose business is inevitably, by its very nature in

constant interaction with consumers of Credit Reference Bureau reports. I am however not convinced that the Report was designed with the objective of denying the Plaintiffs access to finance by other potential funders.

Issue one

Whether the Defendant was fraudulent in its dealings with the Plaintiffs.

There was a consensual definition of "***fraud***" as set out in the case of **Fredrick J.K. Zaabwe v Orient Bank Limited S.C.C.A no. 4 of 2006**, where the Supreme Court, relying on **Black's Law Dictionary 6th edition at page 660** defined fraud as follows;

> *"The intentional perversion of truth for purposes of inducing another in reliance upon it to part with some valuable thing belonging to him or her or to surrender a legal right." A false representation of a matter of fact whether by word or by conduct, by false or misleading allegations, or by concealments of that which deceives and is intended to deceive and so that he shall act upon it to his legal injury, anything calculated to deceive, whether by a single act or culmination or suppression of truth or suggestion of what is false whether it is by direct falsehood or the innuendo by speech or silence, word of mouth, or look or gesture a generic term embracing all multifarious means which human ingenuity can devise and which are resorted to by one individual to get advantage over another by false suggestions by suppression of truth, includes all surprise, trick, cunning, dissembling, and any other unfair way by which another is cheated."*

In the case of **Muse AF Enterprises Co. Ltd -v- Billen General Trading Ltd & 2 Others, CS No. 102 & 271 of 2013,** "*fraudulent"* was defined as follows;

> *"to act with intent to defraud means to act willfully and with the specific intent to decieve or cheat; ordinarily for the purpose of either causing*

some financial loss to another or bringing about some financial gain to oneself."

The burden of proof for fraud was discussed in the case of **Ratilal Gordhandhai Patel v Laljimakanji (1957) EA 314 at page 317** where court stated that;

"Allegations of fraud must be strictly proved: although the standard of proof may not be so heavy as to require proof beyond reasonable doubt, something more than a mere balance of probabilities is required."

The burden of proving fraud is higher than in ordinary civil cases although not as high as in criminal cases.

The 1st Plaintiff submitted that the Defendants were clearly fraudulent in nature as evidenced under the 7 particulars of fraud listed in the 1st Plaintiff's witness statement which were neither denied nor controverted. The particulars referred to were that;

a. The Defendant's failure to effectively reconcile the Plaintiff's loan accounts prior to disbursement of loan capital to the Plaintiffs despite numerous requests by the Plaintiff.

b. The Defendant's unjustifiable deductions for loan account payments.

c. The Defendant's disbursement of loan capital to the Plaintiffs in Uganda shillings contrary to the Plaintiffs' desired refinance in USD at an interest rate of 10%.

d. The failure of the Defendant to take remedial action to stave the Plaintiff's alleged default on their preexisting loan obligations that was calculated to financially cripple the Plaintiffs.

e. The unreasonable 7 months loan refinance processing period that was ultimately designed to frustrate the Plaintiffs and leave them with no other option but to accept the Defendant's refinance on more erroneous terms.

f. The Defendant's failure to rectify the Plaintiff's credit rating at the Credit Reference Bureau that was designed to ensure that the Plaintiffs could access no credit from any other financial institutions.

g. The Defendant's disbursement of less money than represented in the loan facility agreement executed between the parties.

He further submitted that the Defendant's conduct was a deliberate perversion of truth for purposes of inducing him to abandon Standard Chartered Bank's offer for refinancing.

In his re-examination the 1st Plaintiff indicated that he begun dealing with the Defendant on 27th February 2017 after Standard Chartered Bank sought clarification about his arrears in the Defendant Bank. The inquiry, PEX8, is a letter dated 23rd February 2017 from Standard Chartered Bank to the 1st Plaintiff. The contents of the said letter indicate that it was seeking clarification on the 1st Plaintiff's running loan with the Defendant for purposes of the mortgage facility which was at that time being processed with Standard Chartered Bank to ascertain why there was a default of 120 days.

In a letter marked PEX9 is a letter from the Defendant to the 1st Plaintiff the Defendant clarified by stating that the loan account went into arrears of close to 120 days as a result of the system's inability to recover funds in a timely manner in the months of August, September, October and November 2016. The Defendants' letter was an address of the inquiry from Standard Chartered Bank which implies that the Defendant was aware of the fact that the 1st Plaintiff was processing a mortgage facility with Standard Chartered Bank.

S. 101(2) of the Evidence Act Cap. 6 places the burden of proof on the person who is bound to prove the existence of a fact.

The only instance that the 1st Plaintiff tried to prove that he had been induced by the Defendant to abandon his Standard Chartered offer was in PEX17, a letter from the 1st Plaintiff to the Defendant, in which the 1st Plaintiff stated under

paragraph 2 that the Defendant's officers suggested that he does not seek project financing from Standard Chartered Bank as the Defendant was willing to provide the financing that he needed.

However, in cross-examination of DW1, she intimated that she did not know whether the said letter was recieved thereby placing the burden on the 1st Plaintiff to prove that it was indeed received by the Defendant. Indeed a scrutiny of the said letter shows that it bears no acknowledgement by the Defendant.

In this particular instance, it is the 1st Plaintiff's submission that the Defendant's conduct was a deliberate perversion of truth for purposes of inducing him to abandon Standard Chartered Bank's offer for refinancing. I have however looked at the other correspondences between the parties, including Pex 10 upon which the Defendants rely as evidence of application, they all do not bear evidence of acknowledgement of receipt. Premised in that, I am inclined to disregard the contention that Pex17 be ignored because it does not bear acknowledgment of receipt. I will apply the same standard used on the other correspondences and therefore admit Pex17

However, much as the 1st Plaintiff has proved that the Defendant was aware of this offer. This letter which is only proof of existence of that awareness, does not amount to evidence that the Defendant's conduct was a perversion of the truth, which induced the Plaintiff to abandon Standard Chartered Bank's offer.

The 1st Plaintiff submitted that the Defendant's promise to reconcile his account was meant to falsify the actual position of the said loan account as the Defendant was aware that the loan contract had expired and they never carried out any reconciliation.

In reply Counsel for the Defedants referred to paragraph 11.3 of DW1's witness statement where DW1 testified that the Defendant reconciled the 1st Plaintiff's account at the Plaintiffs' request and confirmed that the 1st Plaintiff owed UGX 124,971,592 to the Defendant which amount was reproduced in PEX20 at paragraph 3.2 (ii). That the facility agreement was signed off by the 1st Plaintiff

who confirmed acceptance of the terms and conditions with full knowledge of the circumstances of the facility.

Reconciliation of accounts is a routine exercise usually carried out by Banks to harmonize account transactions between them and their Customers. *"in accounting, reconciliation is the process of ensuring that two sets of records(usually the balances of two accounts) are in agreement."* –see https://en.m.wikipedia.org. The allegation that it in the instant case it was driven by the motive to falsify the Plaintiffs loan account is not supported by any evidence. This submission is without merit and is therefore disregarded.

The allegation that the reconciliation was not done is therefore false and is disregarded as the evidence shows that the figure of Shs 124,971,592/= was arrived at after reconciliation.

In her cross-examination DW1 pointed out that in loan circumstances there are two accounts, namely the loan account and the current account. That reconciliation would entail balancing the two accounts to ensure that they are in agreement. She further testified that the practice is that the Customer deposits money on his current account and the Bank takes it from there to pay the installments on the loan account. However, because of system inability to recover funds in a timely manner, there were arrears on the loan account. This would mean that the system inability affected the current account from which the funds were to be taken from to satisfy the loan account.

Indeed in a letter from the Defendants to the Plaintiffs written on 27th February 2017 (DEX6/PEX9) it was stated as follows;

"Reference is made to mortgage facility 1022013020000001 with Crane Bank Ltd (now DFCU Bank).

It has been observed that your demand loan account number went into arrears of close to 120 days which came as a result of the system's inability to recover funds in a timely manner in the months of August, September, October and

November 2016. This has since been rectified and please proceed with payments of the outstanding arrears on your account."

The 1st Plaintiff submitted that PEX12 clearly shows that between the months of March and May 2017 the Defendant recovered money in various amounts from the 1st Plaintiff's account allegedly to service a non-existent loan on account No. 01984111000060.

That as evidenced in DEX3 the only loan account held by the 1st Plaintiff was account No. 1022013030000001 which was incapable of being transferred since its underlying contract had expired.

During the cross examination of DW1, she revealed that the 1st Plaintiff's current account was 1022011010000036 (DEX2) while his loan account was 1022013020000001 (DEX3).

In reply Counsel for the Defendants contended that under the facility agreement dated 11th December 2015 (Exhibit DI), the 1st Plaintiff undertook to repay the loan facility of UGX 212,900,000 from 31st December 2015 to 31st July 2016.

As at January 2017, the 1st Plaintiff still had repayment obligations to the Bank under Facility 2. From his own testimony in cross-examination, he owed over UGX 200,000,000 to CBL at the time the Defendant inherited the Banker-Customer arrangement from CBL.

Even if the figures differ, this is consistent with paragraph 1.10 of DW1's witness statement, that Facility 2 was non-performing as at the date of assignment, in the sum of UGX 282,676,037/=.

He further submitted that DW1 testified that subsequently, a reconciliation of the 1st Plaintiff's loan account showed that the 1st Plaintiff owed a total of UGX 124,971,592/ under Facility 2 (see paragraph 11.3 of DW1's witness statement).

That the 1st Plaintiff with full knowledge of his outstanding repayment obligations signed the refinancing agreement, which confirmed the sum of UGX 124,971,592/ as the sum due and owing to the Defendant. There is therefore no

merit in the submissions by the Plaintiffs that recovery of sums due by the Defendant was dishonest. That however is not to say that there were no irregularities.

PW1 confirmed that at the time the Defendant inherited from Crane Bank Ltd he had an outstanding balance with crane Bank Ltd. However, contrary to the Defendant's submission, the 1st Plaintiff was never sure of the outstanding sum. Indeed as rightly submitted by the 1st Plaintiff, PEX12 shows that the Defendant recovered various amounts of money from the 1st Plaintiff's Current Account 01983001002667 at different dates between the months of March and May 2017 some of which went to service a loan on account No. **01984111000060** which the Plaintiffs intimate that it is alien to them.

That said, the irregular debiting and crediting of accounts by the Defendants that has been alluded to by the Plaintiffs was a deliberate careless and erroneous act because the Defendants were aware of the fact that their systems had malfunctioned but did not mind about the possible adverse impact of their actions on the Plaintiffs.

He further submitted that the Defendant falsely represented that it had a running loan contract in DEX1 with the 1st Plaintiff yet they were fully aware that the loan facility DEX1 had expired.

Expiry of a loan period does not result into closure of the loan account from which it arises, if the said account is still in arrears. The 1st Plaintiff loan account in respect to this loan was therefore still operational, even if the loan account reference numbers might have changed.

The 2nd Plaintiff's Counsel submitted that the first connotation of fraud was the fact that prior to the impugned disbursement of funds to the 2nd Plaintiff, there was no Banking relationship in existence between the 2nd Plaintiff and the Defendant and that the 2nd Plaintiff never at anytime applied for a loan from the Defendant. He further submitted that the 2nd Plaintiff was legally incompetent to borrow, owing to the fact that the 2nd Plaintiff had authorized no approvals to

borrow over and above its nominal capital which is a necessity under law and The Memorandum and Articles f Association of the 2nd Plaintiff.

That the Defendant disbursed a loan to the 2nd Plaintiff referring to a non-existent application apparently dated the 10th day of March 2017.

In his re-examination PW1 stated that PEX10 which was addressed to the Defendant from the 1st Plaintiff is in respect of the 1st Plaintiff's account much as it is written on the 2nd Defendant's headed paper. He further submitted that the 2nd Plaintiffs never signed a resolution to borrow any money but were offered Ugx. 360,000,000/ which they accepted.

The last sentence of the 4th paragraph of Pex10 states as follows;

*"We are also in position to supply **our** audited accounts for 2015."*

In her cross examination DW1 referred to the last paragraph of PEX10 and stated that a request was made that the Defendant process the loan restructure/request in a very short period of time. It states as follows;

*"I hope you are able, as promised by officers, to process our loan **restructuring/request** in a very short period of time."*

The last paragraph of the letter urged the Defendants to have the loan restructure or request processed. The use of the word '***or***' connotes an alternative. The sentence presupposes the existence of a loan or request for a new loan. Whereas only a pre-existing loan can be restructured, the use of the word "***request"*** connotes application for a new loan. The 2nd Plaintiff had never had a loan with the Defendant, so in their respect, it was a request for a new loan.

At page 13 of PEX20 the 1st Plaintiff signed on the facility issued to the 2nd Plaintiff in the capacity of a director. Furthermore, in her re-examination, DW1 stated that the only officer of the 2nd Plaintiff corresponding with the Bank was the 1st Plaintiff. The facility agreement dated 31 August 2017 (Exhibit P20) was signed by the 1st Plaintiff and one Martha Ngabirano Twagira as directors of the

2nd Plaintiff. The Plaintiffs do not deny that the 2(two) individuals are the directors of the company nor do they contest their signatures in the agreement.

It is trite law that the acts of the directors of a corporate entity are the acts of the entity. This long established principle was stated by Lord Justice Denning in **H L Bolton (Engineering) Co Ltd -v- T J Graham & Sons Ltd 119561 3 All ER 624** where he held that directors and managers represent the directing mind and will of the company and therefore, the state of mind of the directors is regarded as the state of mind of the company.

Premised on the foregoing evidence and authorities, Court's conclusion is that the signatures of the 2(two) directors, in agreement to the terms of the facility, constituted consent by the 2nd Plaintiff on whose behalf the directors acted.

At the time of applying for the loan therefore, the 1st Plaintiff was applying on behalf of the 2nd Plaintiff in the capacity of a director who is the mind and hands of the company.

The 2nd Plaintiff acted through its director to obtain the refinancing from the Defendant. The Plaintiffs cannot therefore turn around and claim that the 2nd Plaintiff did not consent or authorise the borrowing of the sums advanced by the Defendant to the 2nd Plaintiff.

It was the 2nd Plaintiff's submission that a resolution is a pertinent requirement under law and the Memorandum and Articles of the 2nd Plaintiff for authorization of a borrowing transaction.

That owing to the representations by the Defendant expressed in the credit agreement regarding the need for a resolutions by the company prior to borrowing, the Defendant is estopped from alleging otherwise, as it thrust upon itself the obligation of ensuring that a duly executed resolution was essential for the legitimacy of the impugned financing transaction. that the lack of a resolution evidenced the gross incompetence and negligence of the Defendant, orchestrated in a bid to defraud the 2nd Plaintiff.

In reply Counsel for the Defendants submitted that the Plaintiffs did not adduce any evidence showing that a registered resolution of the company is a mandatory requirement for a refinancing transaction such as the one that is the subject of this claim.

The parole evidence rule provided for under **section 91 of the Evidence Act** states as follows;

" When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

The document being referred to in this particular case is PEX20, clause 9 (a) and (c) which provides for the conditions precedent to disbursements. Clause c thereof provides for receipt of a certified copy of the Resolution of the borrower and this is what the 2nd Plaintiff dwelt on.

To ascertain whether this was a mandatory requirement or not, I have considered the words used in that Clause. It states as follows ;

"The obligation of the Bank to disburse any amount under the facility, is subject to the fulfillment by the borrower, where applicable, depending on their legal status prior to every drawdown, in a manner satisfactory to the Bank, of the following conditions:..."

Giving the phrase '***in a manner satisfactory to the Bank'*** its literal meaning, those words would mean that it is the Bank to determine the sufficiency of the fulfillment of the conditions precedent before they disburse any money.

The 2nd Plaintiff indeed exhibited PEX24 which was also confirmed by PW2, a Registrar at Uganda Registration Services Bureau who confirmed its contents;

that there was no resolution authorising the 2nd Defendant to borrow Ugx. 360 million from DFCU.

While rebutting the claim that the Defendants were under obligation to have a borrower's Resolution, in her cross examination, DW1 also stated that the valuation report they relied on was not on record and the same was never presented as such, which would be contrary to clause k, but considering that the Bank was satisfied with what was presented, these conditions were dispensed.

Regarding the 2nd Plaintiff's submission that a Resolution is a necessity under their Articles and Memorandum of Association, the Plaintiffs did not exhibit the 2nd Plaintiff's Articles of Association to show the provision requiring such a resolution nor did they make reference to the provision of the law that specifically prohibits the Defendant from advancing money to a company without a resolution, in, to enable this Court ascertain that such prerequisites are indeed stipulated.

It is trite law that outsiders dealing with a company in "good faith" can assume that acts within the company's constitution (memorandum and articles of association) and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular (see **Royal British Bank v Turquand [18561] All ER 435** and **Arinaitwe v Africana Clays Limited H.C.C.S no. 376 of 2013**. This position has recently been adopted in Section 53 of the Companies Act no. 1 of 2012.

According to the inhouse management rule, outsiders are not obliged to know the internal affairs of the company when dealing with a company, it's believed that all conditions were complied with. Indeed as submitted by the Defendant, the obligation to provide a registered resolution was on the 2nd Plaintiff and its directors and not on the Defendant as the Defendant's obligation in this paragraph was to disburse the amount under the facility upon fulfillment of the conditions therein in a manner satisfactory to the Bank.

It was the 2nd Plaintiff's submission that the credit agreement in question provided for the offset of UGX 124,971,5921= but the Defendant offset more money to the tune of UGX 130, 031, 4721. This is validated by paragraph 4 of the statement of account, PEX23.

In my view, following the fact that this was never controverted by the Defendant in their evidence, and that the Plaintiffs discharged their burden of proof I am inclined to believe that this was an erroneously willful act by the Defendant which brought them financial gain at the expense of the Plaintiffs. I am however not convinced that it was motivated by fraudulent intent.

In his evidence PW1 stated that the 2nd Plaintiff's borrowing was an illegal borrowing because PW1 who signed the term Loan Agreement had no authority of the company to do that and that the 2nd Plaintiff did not require that loan.

In law, a party cannot rely on his own illegality to found a cause of action. This long established principle is based on the maxim; *ex turpi causa non oritur actio* which was expounded in the case of **Candiru Asina Binna -v- Centenary Rural Development Bank Limited (Civil Suit No. 22 of 2016)** where Justice Stephen Mubiru stated that; *"no court will lend its aid to a person who founds his or her cause of action upon an immoral or an illegal act. If from the Plaintiff's pleadings, evidence or otherwise, the cause of action appears to arise ex turpi causa, or is the transgression of a positive law of this country, then the court will find that such a person has no right to be assisted"*

Additionally, Counsel for the Defedants submitted that the Plaintiffs are estopped from denying the validity of the transactions in question having taken benefit of the transaction.

"A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".-See **Stephen Seruwagi Kavuma -v- Barclays Bank (U) Ltd,**

Miscellaneous Application No. 0634 of 2010 per Irene Mulyangonja J, as she then was.

The 2nd Plaintiff accepted and utilised the sums advanced by the Defendant under the facility in question. They therefore took benefit of the transaction and cannot now turn around and seek to have the same transaction declared void on the basis of an illegality they confess to have committed. The 2nd Plaintiff is precluded from claiming that the said transaction/dealing is invalid.

The other particulars of alleged fraud include alleged failure of the Defendant to take remedial action to stave the Plaintiff's alleged default on their preexisting loan obligations that was ostensibly calculated to financially cripple the Plaintiffs, that the 7 months loan refinance processing period that was deemed to be unreasonably long was ultimately designed to frustrate the Plaintiffs and leave them with no other option but to accept the Defendant's refinance on more erroneous terms. The other particulars of alleged fraud are the Defendant's failure to rectify the Plaintiff's credit rating at the Credit Reference Bureau allegedly designed to ensure that the Plaintiffs could access no credit from any other financial institutions;

These allegations were not effectively proved to warrant being categorised as fraudulent dealings as allegations of fraud must be strictly proved. The Plaintiffs ought to have shown that the Defendant acted dishonestly with the intention of defrauding and/or deceiving the Plaintiffs to their detriment. This burden has not been discharged by the Plaintiffs in this respect.

The irregularities by which the Defendants were found culpable, including wrongful debiting and crediting of accounts and disbursement of the loan amount in shillings instead of USD$, fall short of the standard of proof required to establish fraud on the Defendants' part.

Remedies

The 1st Plaintiff submitted that the Defendant's delay to avail financing caused him irreparable damage. That the 1st Plaintiff 's credit continues to suffer as the Defendant has failed/refused to rectify the adverse reporting to CRB which cast him in bad light and is unable to borrow from any other institution without ascertaining how "APPGENNO-0547841" was dealt with and the reasons for so dealing with it. He prayed that court award him compensation by way of refund of all monies recovered from him or any other party on his account amounting to UGX. 175,031,472/=, general damages, aggravated damages, costs and interest on the same at a commercial rate of 23%.

The 2nd Plaintiff's Counsel submitted that the borrowing transaction on account of lack of the attendant legal authorization in the form of a resolution secured through a general meeting for the 2nd Plaintiff to borrow above its nominal share capital holds the credit agreement between the 2nd Plaintiff and the Defendant as null and void and of no legal consequence and as such court is enjoined to set it aside. That the Defendant engaged in unfair, deceptive, aggressive, intimidating and humiliating antics in order to engineer a rogue transaction with the 2nd Plaintiff. That the Defendant employed economic duress, fraud, misrepresentation and unauthorized dealings with the 2nd Plaintiff so as to benefit its business at the expense of the 2nd Plaintiff. In reply Counsel for the Defendants submitted that the Plaintiffs are not entitled to the remedies sought given that the Plaintiffs have not proved their claims against the Defendant.

General damages

According to Halsbury's laws of England 4th Edition Reissue Volume 12(1) and paragraph 812 thereof, General damages are those losses which are presumed to be the natural and probable consequence of the wrong complained of. In the case of **Haji Asuman Mutekenga v Equator Growers (u) Limited S.C.C.A no. 7 of 1995**. Justice Oder JSC, as he then was, held that;

"With regard to proof, general damages in a breach of contract are what court (or jury) may award when the court cannot point out any measure by which they are to be assessed, except the opinion and judgement of a reasonable man."

It has further been reiterated in **Assist (U) Ltd versus Italian Asphalt and Haulage & Amt., HCCS No. 1291 of 1999** at 35 that; 'the consequences could be loss of profit, physical, inconvenience, mental distress, pain and suffering'

The compensation principle is known as restitution in integrum and its rationale was discussed by the East African Court of Appeal in Dharamshi v Karsan [1974] 1 EA 41 in which it was held that, general damages are awarded to fulfill the common law remedy of restitution in integrum. This means that the Plaintiff has to be restored as nearly as possible to the position he/she would have been had the injury complained of not occurred.

As observed by this honourable court **in Stanbic Bank Uganda Limited -v- Haji Yahaya Sekalega (Civil Suit No. 185 of 2009**), general damages are awarded within the discretion of the court which is mandated to exercise its discretion judicially taking into account factors such the value of the subject matter, the economic inconvenience that a party may have been put through and the nature and extent of the breach or injury suffered. Further in the case of Kamuntu Anthony -v- Hajat Zam Sendagire & Attorney General (Civil Suit No. 188 of 2019), this honourable court stated that the general damages awarded in a claim should not better the position of the Plaintiff but rather return him to the position he would have been if he had not suffered the wrong complained of.

The 1st Plaintiff submitted that the Defendant's delay to avail financing caused him unrepairable damage. That the 1st Plaintiff 's credit continues to suffer as the Defendant has failed/refused to rectify the adverse reporting to CRB which cast him in bad light and is unable to borrow from any other institution without ascertaining how "APPGENNO-0547841" was dealt with and the reasons for so dealing with it. He prayed that court award him compensation by way of refund of

all monies recovered from him or any other party on his account amounting to UGX. 175,031,472/=, general damages.

The 2nd Plaintiff prayed that the Defendant pay general damages amounting to USD 150,000 that translates to UGX 600,000,000/ that in essence covers the period of about four years that the 2nd Plaintiff has continued to service its impugned debt obligations to the Defendant.

In reply Counsel for the Defendants submitted that the 2nd Plaintiff's prayer for general damages of USD 150,000 (One Hundred Thousand Fifty United States Dollars) as opposed to the sum of USD 100,000 (One Hundred Thousand United States Dollars) which was the amount pleaded by the Plaintiffs under paragraph 31 of the plaint is a departure from the pleadings that should not be permitted without leave of court which the Plaintiffs have not obtained. That Considering the circumstances of this case, an award of general damages of USD 100,000 (One Hundred Thousand United States Dollars) as claimed by the Plaintiffs is unjustified and would put the Plaintiffs in a better position than they were before the alleged acts complained of in this matter.

In the instant case, the 1st Plaintiff did not show how the delay to avail financing to the 2nd Defendant affected him or caused him irreparable damage.

The 2nd Plaintiff's servicing of their debt obligations for about four years is not a cause that requires an award of general damages because it did not occassion them any loss of profit or physical inconvenience.

However, the Report at the Credit Reference Bureau is a misrepresentation of facts. The misrepresentation is as would cause inconvenience and distress to any business entity, human or juridical.

1. Considering the economic inconvenience, anxiety and anguish that the Plaintiffs must have possibly gone through as a result of the inexplicable rejection of the 1st Plaintiffs deposits to stem the possibility of falling in arrears in his loan repayment and the subsequent loan default situation he found

himself in, all occasioned by omissions of the Defendants including a failure of their systems and similarly, the anguish and embarrassment and economic inconvenience occasioned by the misrepresentative CRB Report, I grant the prayer for general damages.

a. I have addressed my mind to the established parameters that may guide court in arriving at an award that does not undermine the purpose for awarding general damages and in the event I find a sum of USD$35,000(thirty five thousand only) sufficient in general damages to atone for the foregoing circumstances that the Defendants led the Plaintiffs into.

Special damages

The Plaintiffs prayed for special damages. They stated that paragraph 29 of the Plaint essentially denotes the particulars of the special damages that ought to accrue to the Plaintiffs. That special damages as pleaded up to date accrue to UGX 620,963,051/(Six Hundred and Twenty Million Nine Hundred and Sixty Three Thousand Fifty one Shillings) that essentially is the wholesome figure that represents the quantum of special damages as pleaded by the 2nd Plaintiff (total cost of credit to date) which covers the foreign exchange loss suffered by the 2nd Plaintiff in conversion of the loan amount to United states dollars, it covers the unauthorized money taken by the Bank in an unauthorized payment to itself and essentially covers the interest paid by the 2nd Plaintiff thus far in settlement of the impugned loan obligations thrust upon it by the Defendant.

The Defendant submitted that no such damages are proved. That Regarding the damages sought for foreign exchange loss, we submit that the sum of UGX. 7,812,909 (Uganda Shillings Seven Million Eight Hundred Twelve Thousand, Nine Hundred Nine) was not a direct consequence of the actions of the Defendant. That in any event, no such amount of special damages was ever specifically pleaded.

Special damages must be specifically pleaded and proved.-see **Joseph Musoke -v- Departed Asian Property Custodian Board and Another (Supreme Court Civil Appeal No. 1 of 1992)**; and **Sarah Watsemwa Goseltine and Another -v- Attorney General (Civil Suit No. 675 of 2006)** where the court explained that "special damages must be explicitly claimed on the pleadings, and at the trial it must be proved by evidence that the loss was incurred and that it was the direct result of the Defendant's conduct ... "

As highlighted in the above case, the Plaintiffs duly claimed their special damages in their plaint where they claimed for the following;

"a) Loan repayments of UGX. 10,148,570/ per month paid to the Defendant so far.

b) Foreign exchange loss on conversion of disbursed loan capital to United States Dollars.

c) Total cost of credit for disbursed loan in Uganda Shillings.

d) Money paid over and above the actual and outstanding loan capital of previous loan.

e) Penalties and fees charged on previous loan capital.

f) Additional interest paid over and above the dollar interest rate during tenor of current loan."

The Plaintiffs did not explain why they wanted the loan repayments of UGX. 10,148,570/ per month paid to the Defendant awarded to them as special damages yet they had admitted to having an outstanding balance when the defendat inherited the relationship from Crane Bank Ltd.

1. In a letter marked PEX9 dated 27th February 2017, the Defendant notified the Plaintiffs that their loan account went into arrears of close to 120 days as a result of the system's inability to recover funds in a timely manner in the months of August, September, October and November 2016

The Bank is under a fiduciary duty to inform the client about the health of its loan account or status including insufficiency of funds or even even security. Failure to inform the client constitutes a continuing breach of the fiduciary duty, which would freeze time and hence interest from running, until the client discovered that the concealment or could with reasonable diligence have discovered it- **UBAF Ltd V European American Banking Corporation [1984]2 ALL ER 226.**

a. In accordance with the foregoing, interest that accrued from August 2016 to 27th February 2017, when the Plaintiffs were first notified about this anomaly shall be waived and reflected as such on the Plaintiffs' loan statement.

2. In line with paragraph 29 of the plaint, the Plaintiffs also claimed for special damages in respect of the Foreign exchange loss on conversion of disbursed loan from Ugx to United States Dollars.

   Whereas the Plaintiffs requested for a USD denominated loan, the money was disbursed in Ugx. The change of currency was unilateral decision of the Defendant Bank, whose justification was not made to the Plaintiffs nor explained to this court. When asked in cross-examination whether there was any doubt that the facility being processed was USD$100,000, DW1 answered in the affirmative, that there was no doubt. She reaffirmed her earlier statement that no denial was being made of the fact that the credit facility being processed was for $USD100, 000.00

   The Plaintiffs argued that by disbursing the loan to them in Ugx when their request was in USD$, they were disadvantaged by a 10% point marginal differential between borrowing in UGX and USD.

   a. In view of the forgoing, the Defendants are directed to make adjustments to rectify the prejudice in value that may have been occasioned to the Plaintiffs by the unilateral change of the loan denomination currency. For transparency, this exercise should be

conducted under the auspices of an independent financial or audit resource to be agreed upon by both parties and procured at the cost of the Defendants.

3. The Plaintiffs submitted that the 2nd Plaintiff ought to receive UGX 5,400,000/= that was paid to the Bank as fees pertaining to the loan on the 18/09/2017 and UGX 3, 885,600/= that was paid by the Bank as professional fees stamp duty on 18/09/2017.

   I have looked at paragraphs 2 and 3 of PEX23. Basing on the resolutions made in the previous issues, its been clarified that indeed the 2nd Plaintiff duly applied for the facility in question. This being the case, it is common place and knowledge and lawful, there are attendant and proffessional fees attached to processing of a loan or mortgage. For as long the mortgage is not disputed, I do not see the justification for the Plaintiffs to be awarded special damages in respect of fees that were rightly utilised by the Defendant.

4. The 2nd Plaintiff further submitted that they are entitled to be paid by the Defendant UGX 130, 031, 472/= that was apparently paid as a payoff to the Bank which was never authorized by the 2nd Plaintiff on account of lack of a valid Bank resolution for authority to make such pay off.

   The issue to do with the need for a Bank resolution as a condition precedent for the disbursement of the facility in question was etensively dealt with by this court in the earlier issues. It was established that basing on paragraph 9 of the facility letter, it was the Defendant to establish whether the conditions were fulfilled in a manner satisfactory to them.

   DW1 in her cross-examination indicated that the 2nd Plaintiff fulfilled the conditions in a manner satisfactory to them. This being the case, the issue of the Bank resolution was accordingly disregarded. Furthermore the facility in question (PEX20) was properly signed by the 2nd Plaintiff represented by its directors.

5. Under paragraph 3.2 (ii) of PEX20 it was agreed that the Defendant was to offset the outstanding loan of the 1st Plaintiff of approximately Ugx. 124,971,592/.

   Paragraph 4 of PEX23 indicates that a pay off of 130, 031, 472/= was made. Suffice to note that this was in excess of the amount agreed to be offset in PEX20 by Ugx. 5,059,880/.

   a. The 2nd Plaintiff is therefore entitled to special damages in a sum of Ugx. 5,059,880/ which is excess payoff retained by the Defendant without the 2nd Plaintiff's authorisation.

Aggravated damages

Aggravated damages to are awarded in relation to certain tortuous acts such as defamation, intimidation and trespass but not breach of contract- see **Osborn's `concise Law Dictionary**.

The Supreme Court of Uganda has ratified this position-see **Bank of Uganda v Betty Tinkamanyire S.C.C.A no. 12 of 2007** in which the learned Justices endorsed the award of aggravated damages in instances where the actions of the Defendant are unlawful, degrading and callous.

The Plaintiffs alleged being intimidated into entering the contract but did not successfully prove their allegations. In the case of **Transtel Limited and Another -v- Mahi Computers & Appliances Ltd and Another** on grounds that the Plaintiffs had failed to show evidence of arbitrary, malicious or highhanded behaviour by the Defendants towards the Plaintiffs.

I agree with the Defendant's submission that the Plaintiffs have not proved that the Defendant acted in a highhanded or in deliberate disregard of the Plaintiffs' rights to justify an award of aggravated damages.

The mere fact that an innocent but negligent misrepresentation causes a Plaintiff to enter into a contract which they would otherwise not have entered into does

not inevitably mean that it had suffered damages by merely entering into the contract.

The Plaintiffs are not entitled to the aggravated damages.

Interest

In the case of **Kayonza Distributors v Attorney General (Civil Suit No. 211 of 2008**), court held that;

"interest is not awarded to enrich the Plaintiff but rather on the principle that the successful litigant had been kept away from his money... which he would put in use."

a. Interest shall be payable on the award of general damages at the rate of 23% per annum from the date of judgment until payment in full.

b. Interest shall be payable on Ugx. 5,059,880/ which is excess payoff retained by the Defendant without the 2nd Plaintiff's authorisation at the rate of 23% per annum, from the date of draw down as stipulated in clause 3.2 of the facility letter dated 31st August 2017 until payment in full.

Costs

Each party shall bear its own Costs.

Final orders:

a. The Plaintiffs are collectively awarded USD$35,000 in general damages.

b. The 2nd Plaintiff is awarded special damages of 5,059,880/ which is excess payoff retained by the Defendant without the 2nd Plaintiff's authorisation

c. Interest shall be payable on (a) above the rate of 23% per annum from the date of judgment until payment in full.

d. Interest on (b) above at the rate of 23% per annum, from the date of draw down as stipulated in clause 3.2 of the facility letter dated 31st August 2017 until payment in full.

e. Interest that accrued against the 1st Plaintiff from August 2016 to 27th February 2017, is waived.

f. The Defendants are directed to make adjustments to rectify the prejudice in value that was occasioned to the Plaintiffs by the unilateral change of the loan denomination currency from USD to UGX.

   This exercise shall be conducted under the auspices of an independent audit entity agreed upon by both parties and procured at the cost of the Defendants.

g. Each party shall bear its own Costs.

Dated at Kampala, this 23rd day of October, 2020.

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RICHARD WEJULWABWIRE

JUDGE

Present in Court:

1. 2.

3. 4.

Richard Wejuli Wabwire

JUDGE