THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0126 OF 2019

PREMIER COMMODITIES (U) LIMITED …… PLAINTIFF

VERSUS

1. **KIIR FOR SERVICES & CONSTRUCTION CO. LIMITED }**
2. **KIIR GAI THIEP }**
3. **KUOL KUOL DAU }…DEFENDANTS**
4. **LOU TRADING AND INVESTMENT LIMITED }**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a. The plaintiff's claim;

The Plaintiffs' sued the defendants jointly and severally for recovery of a sum of US $ 5,000,000 being money owing for produce and groceries supplied on credit to the 1st defendant on divers days during the year 2015, interest thereon at a commercial rate and the costs of the suit. The plaintiff claim is that by a memorandum of understanding dated 22nd October, 2014, the plaintiff undertook to supply to the 1st defendant in Juba, an assortment of produce and groceries worth US $ 7,327,750. During the negotiation of that agreement, the 2nd and 3rd defendants made representations to the plaintiff, to the effect that together with the 4th defendant, they would ensure prompt payments for supplies delivered. Despite the plaintiff having made deliveries worth the agreed US $ 7,327,750, the defendant paid only US $ 2,327,750. Leaving the sum of US $ 5,000,750 outstanding, which sum has not been paid to-date, hence the suit.

b. The defence to the claim;

In their joint written statement of defence, the 1st and 2nd defendants denied the plaintiff's claim or having executed the memorandum of understanding upon which the plaintiff relies. The 2nd

defendant averred that the signature thereon attributed to him is a forgery. Both defendants denied ever having received the goods alleged to have been delivered by the plaintiff. In their joint written statement of defence, the 2nd and 3rd defendants denied the plaintiff's claim too. They denied having been party to the memorandum of understanding nor having made any representations to the plaintiff. The 4th defendant averred that the plaintiff was paid in full for all supplies made. On 11th January, 2019, the 4th defendant paid the plaintiff's Managing Director, Mr. Godfrey Kirumira a sum of US $ 2,434,550.

c. Reply to the defences.

The plaintiff avers that the sum of US $ 2,434,550 paid by the 4th defendant was in respect of a separate agreement of 29th April, 2015 with the 3rd and 4th defendants. The defendants have on multiple occasions since October, 2018 invited officials of the plaintiff to Juba for negotiations over the outstanding balance.

d. The issues to be decided;

In the parties' joint memorandum of scheduling, the following were framed as the issues to be decided by court.

1. Whether there was a breach of the contact for the supply of foodstuffs and if so, by who?
2. Whether the defendants are indebted to the plaintiff in the sum of US $ 5,000,000.
3. What remedies are available to the plaintiff?

e. The submissions of counsel for the plaintiff;

M/s Magna Advocates, counsel for the plaintiff submitted that failure to perform a contract without lawful excuse is what constitutes its breach. The plaintiff led evidence of the contact, the deliveries made and of the sum owing. None of the defendants turned up in court to present evidence to the contrary. The plaintiff's evidence not being controverted, judgment ought to be entered in its favour. The contract was executed based on the person representations of the 2nd and 3rd defendants. The two are therefore personally liable on the contract. During the hearing of the suit,

the defendants paid a sum of US $ 2,500,000, hence the balance outstanding is now in a similar amount. The 3rd and 4th defendants in their partial judgment undertook to negotiate a settlement of the claim for general damages and the balance outstanding, but have never done so. A commercial rate on interest should be awarded from 1st May, 2015 to 3rd February, 2020 when partial payment of US $ 1,000,000 was made; a commercial rate on interest from 3rd April, 2015 until September, 2020 when another partial payment of US $ 1,500,000 was made; and then US $ 2,500,000 and a commercial rate of interest thereon from 3rd February, 2020 until payment in full. The plaintiff is as well entitled to general damages or breach of contract, and the costs of the suit.

f. <u>The submissions of counsel for the defendants;</u>

Counsel for the defendant did not present any final submissions.

g. <u>The decision;</u>

1st issue; <u>whether there was a breach of the contact for the supply of foodstuffs and if so, by who</u>?

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. It is trite that subject to the provisions of any other law in force, no particular number of witnesses in any case may be required for the proof of any fact (see section 133 of *The Evidence Act*). The plaintiff relies on a memorandum of understanding dated 22nd October, 2014 (exhibit P. Ex.1). The first three

defendants deny having executed the said contract while the 4th defendant claims that it paid in full for all supplies made.

The burden rests on the party propounding a document to establish that it was validly executed and witnessed. A genuine document may prove itself by its own inherent and undeniable qualities of genuineness such as seals, stamps, witnesses and so on. A document is presumed to be genuine if the same is tendered in evidence by an attesting witness or a witness who testifies to its authorship from personal knowledge, unless such evidence is inherently incredible. Once an attesting witness has proved the execution of the document, the primary onus placed upon the plaintiff then shifts unto the defendant who claims that it is forged. The Court may find itself in position to determine that the contested signatures were forged if the purported genuine signatures and the purported forged signatures are obviously different. Where the Court finds that, while the signatures are not exactly similar, they are not so dissimilar as to make the purported forged signatures obvious forgeries, it may need the testimony of a lay witness or expert witness in order to consider the signatures in their full context. Either way, the court should be mindful of the fact that the standard of proof required is lower than that of beyond reasonable doubt but higher than it would be if the preponderance of the evidence rule applied ordinarily in civil trials.

Forgery is making, using, altering, or possessing a false document with the intent to commit fraud. Forgery can be the creation of a false document, or changing an authentic one. The onus to prove forgery then is on the party who alleges that a document was forged. Where a party challenges the date on which a document (or an entry in it) was created, or the author, or any other feature such as to require a witness to be called, that challenge must be raised in good time in advance of the trial (that is, in time for a witness to be called by the other party) and the grounds of challenge clearly spelled out in the pleadings. In the instant case, although in their respective written statement of defence the defendants denied signing the document and alleged that their signatures thereon were forged, they failed to adduce any evidence to prove that their signatures on the memorandum of understanding dated 22nd October, 2014 are forged. Inferences of fraud or forgery cannot be reached by conjecture, and without a reasonable foundation for an inference to be drawn, one cannot elevate the rejection of the plaintiff's evidence or the plaintiff's case or failure to dispel suspicious circumstances as proof of such serious allegations.

There being no evidence to prove that the 2nd and 3rd defendants' signatures on the memorandum of understanding dated 22nd October, 2014 are forged, the court finds that it constitutes the contract between the plaintiff and the defendants. Perusal of the memorandum shows that the parties thereto are the 1st and 4th defendants on the one hand, and the plaintiff on the other. The plaintiff undertook to supply; - cooking oil worth US $ 2,392,500; maize grain worth US $ 693,000; beans worth US $ 1,320,000; rice worth US $ 1,460,250; maize flour worth US $ 1,462,000 and to complete the deliveries by 31st March, 2015. The total value of goods supplied hence is US $ 7,327,000.

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages. Invoices between the parties can be offered as evidence of the existence of a contract between the parties. The breach is the defendant / debtor's failure to pay according to invoice terms.

It was the testimony of P.W.1 Mr. Godfrey Kirumira that the deliveries were made as per the said terms. To corroborate that assertion, he tendered in court a batch of delivery notes (exhibits P. Ex.2 to P. Ex.6). Collectively, they show that the plaintiff delivered cooking oil worth US $ 2,392,500; maize grain worth US $ 693,000; beans worth US $ 1,320,000; rice worth US $ 1,460,250; maize flour worth US $ 1,462,000 by 31st March, 2015 the deliveries had been completed. The total value of goods supplied hence is US $ 7,327,000.

Where the creditor introduces some evidence of the debt establishing a *prima facie* case, the burden of going forward with the evidence, as distinct from the general burden of proof, shifts to the debtor, who is then under a duty of producing some evidence to show payment. Although jurisprudence abounds that, in civil cases, one who claims has the burden of proving it; however the general rule is that a party is not called upon to prove his negative averments, even when they

may be necessary to his pleading. It is often impracticable to prove a negative with satisfactory evidence, hence a party should not be required to prove a negative.

Consequently, the evidential burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. When the existence of a debt is fully established by the evidence, the burden of proving that it has been extinguished by payment devolves upon the debtor who offers such defence to the claim of the creditor. The debtor has the evidential burden of showing with legal certainty that the obligation has been discharged by payment. Since no evidence of that nature was adduced, the issue is decided in favour of the plaintiff.

2nd issue; whether the defendants are indebted to the plaintiff in the sum of US $ 5,000,000.

The memorandum of understanding dated 22nd October, 2014 shows that the parties thereto are the 1st and 4th defendants on the one hand, and the plaintiff on the other. However, it is the plaintiff's case that not only are the 2nd and 3rd defendants personally liable on that contract but also that the two defendants are liable for a fraudulent misstatement made to the plaintiff.

It is not in doubt that in negotiating the memorandum of understanding, the 2nd and 3rd defendants acted as agents of the 1st and 4th defendants respectively. It is trite that if an agent does not disclose the nature of his agency (the fact that he acts on behalf of another) and thus does not disclose the name of the principal, the agent may be held personally liable for his or her actions. If, however, the agent disclosed his or her agency and the name of the principal (disclosed principal), the agent will normally not be held liable for commitments undertaken within his authorised agency. When the Principal is disclosed at the time of the agreement, the principal is the real party in interest and identified in the transaction with his agent, and it ought to be the third party's right to hold him as such. In this case both the 2nd and 3rd defendants disclosed that they were acting on behalf of the 1st and 4th defendants respectively. The latter two are indeed named as the parties to the contract.

Secondly, shareholders and directors are not usually liable for company debts that exceed the nominal value of their shares or the sum of any personal guarantees they have given. This is because companies limited by shares are incorporated as separate legal entities with their own

identity, so they are responsible for their own actions and debts (see *Salomon v. A. Salomon and Co Ltd [1897] AC 22*). Although section 20 of *The Companies Act, 1 of 2012* empowers courts to pierce the "corporate shield" or lift the "corporate veil," this will only be done when there is evidence to show that the corporate structure was used purposely to avoid or conceal liability (see *Merchandise Transport Ltd v. British Transport Commission [1962] 2 QB 173, at 206–207*; *Trustor v. Smallbone (No 2) [2001] WLR 1177*; *DHN Food Distributors Ltd v. Tower Hamlets London Borough Council [1976] 1 WLR 852* and *Antonio Gramsci Shipping Corp and others v. Stepanovs [2011] 1 Lloyd's Rep 647*). This may be done by showing that; (i) there was a fraudulent misuse of the company structure, and (ii) a wrongdoing was committed "dehors" the company.

The personal liability of shareholders and directors arises only when the corporate veil is pierced where the plaintiff pleads and proves that the company did not operate as legal entity separate and apart from the officers, directors and shareholders such that the company was actually the alter ego of the shareholders, officers and directors and not a separate legal entity; where the corporation is just a shell designed to shield liability, a mere instrumentality of the shareholders. No evidence was adduced in this case to show that either the 1st or the 4th defendants are is a sham used to perpetrate a fraud, neither is there evidence to show that the 2nd and 3rd defendants used the two corporations as their agent to conduct business in an individual capacity. There is no such a unity of interest and ownership that one is inseparable from the other.

It was stated further by P.W.1 that during the negotiation of the contract, the 2nd and 3rd defendants assured him that they would "ensure that prompt payment is made for the consignments of the deliveries to be made." Based on their word and assurance, the plaintiff agreed to enter into the contract, yet they have since failed to honour that representation. The plaintiff in essence seeks to hold the 2nd and 3rd defendants liable for what it claims to be fraudulent misstatements. First, allegations of fraud require a false representation to have been made knowingly, without belief in its truth or recklessly as to its truth. According to Order 6 rule 3 of *The Civil Procedure Rules*, in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, the particulars with dates have to be stated in the pleadings. This being a liability in relation to which fraud is a necessary averment, it was incumbent upon the plaintiff to plead the particulars thereof, but it never did.

Secondly, the standard of proof is beyond mere balance of probabilities required in ordinary civil cases though not beyond reasonable doubt as in criminal cases (see *Sebuliba v. Cooperative bank Limited [1987] HCB 130* and *M. Kibalya v. Kibalya [1994-95] HCB 80*). Accordingly, a party trying to prove fraud cannot simply cry fraud; they must be able to prove each element required for a successful claim of fraudulent misrepresentation. The elements are: (i) the defendant made a false representation of a past or existing material fact susceptible of knowledge; (ii) the defendant did so knowing the representation was false, or without knowing whether it was true or false; (iii) the defendant intended to induce the plaintiff to act in reliance on that representation; (iv) the plaintiff acted in reliance on the defendant's false representation; and (v) the plaintiff suffered pecuniary damage as a result of that reliance.

A defendant is dishonest when he or she makes a representation known to be false. It is axiomatic that fraud cannot be predicated on the truth. The 2nd and 3rd defendants claimed to be responsible for the finances of the 1st and 4th respondents respectively and this has not been proved to be false. A true representation is not actionable. Furthermore, prediction or projection does not support a claim of fraud just because the forecasted event does not occur. Expressions of confidence made in good faith that payments would be made were predictions of future results and cannot be actionable in the absence of proof that the promisors had no intention to perform at the time the promise was made. A subsequent intention to break the promise or failure to fulfil it does not constitute fraud. Affirmative evidence of the promisor's contemporaneous intent is required yet none was advanced by the plaintiff. For the foregoing reasons, I find that the 2nd and 3rd defendants di not incur personal liability on the contract and for that reason the suit against the two of them on their personal capacity I dismissed.

As against the 1st and 4th defendants, it is a settled rule that once the plaintiff makes out a *prima facie* case in his favour, the evidential burden shifts to the defendant to controvert the plaintiff's *prima facie* case; otherwise, judgment must be entered in favour of the plaintiff. The 1st and 4th defendants having failed to meet its burden of proving payment, this issue must be resolved in the plaintiff's favour.

However, it was the testimony of P.W.1 that following the filing of the suit, the 4th defendant paid a sum of US $ 2,500,000 in two instalments; US $ 1,000,000 was paid on 1st May, 2015 while US $ 1,500,000 was paid on 3rd September, 2020. No further payments have been made since then despite repeated promise to do so. The two defendants' indebtedness to the plaintiff in the sum of US $ 2,500,000 that remains outstanding has therefore been established on the balance of probabilities.

3rd issue; what remedies are available to the plaintiff?

As regards the claim for general damages, the primary remedy for breach of contract is damages. Damages for breach are assessed according to the principle that the innocent party is, as far as possible, put in the position in which it would have been if the contract had been properly performed, subject to the usual rules on causation, foreseeability and mitigation (see *British Westinghouse Electric Co. Ltd v. Underground Electric Railways [1912] AC 673*). A party cannot recover damages for any part of a loss which could reasonably have been avoided. The duty to mitigate requires a party to act reasonably, which will depend on the individual circumstances of each situation. However, the claimant need only take steps which are in the ordinary course of business and is not required to engage in commercially risky conduct.

However, the normal measure of damages in cases of belated repayments of money due is by way of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). Fie that reason, the plaintiff is entitled to interest on the partial payment of US $ 1,000,000 at the rate of 6% pa from 31st March, 2015 until 3rd February, 2020 when it was made, and at a similar rate on the partial payment of US $ 1,500,000 from 31st March, 2015 until 3rd September, 2020 when it was made. As regards the principal sum still owing, it too shall carry interest at the same rate from 31st March, 2015 when it feel due, until payment in full. Having awarded interest on the outstanding amounts, the defendant has no further compensatable loss.

It was though the testimony of P.W.1 that in the bid to recover the debt, he made about forty trips to South Sudan and back over a year and a half. Sometimes he would charter planes from Eagle

Air. Had they made a timely recovery of the money, they would have invested it. He prayed for a sum of US $ 500,000 which he considered to be reasonable profit in the range of 10 – 20% of the amount that would have been invested. At the time of the contract, the plaintiff's turnover was said to have been 500 trucks per annum. The average value of goods carried by each truck would be US $ 30,000 – US $ 50,000 depending on the item. The profit would depend on the value of the item. They would deduct loading expense, staff expense, fuel, supervisions and escorts along the road, leaving a net income of US $ 20,000 to US $ 30,000 per truck. Although **e**xpenses, costs or further loss incurred in taking steps to mitigate the loss can be recovered, the rules of procedure require such claims to be pleaded.

The law is that not only must special damages be specifically pleaded but they must also be strictly proved (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR*; *Masaka Municipal Council v. Semogerere [1998-2000] HCB 23* and *Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995* and *Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004*).

In the instant case, these costs were not pleaded by the plaintiff. The defendant therefore were denied the opportunity to traverse or admit them in their pleadings. Determining whether special damages are warranted requires that the court determines the nature and extent of the harm, which unquestionably requires an assessment of the facts and a fair opportunity given to the adverse party to challenge those facts. This not being the case here, this part of the plaintiff's claim is rejected.

In conclusion, judgment is entered for the plaintiff against the 1st and 4th defendants jointly and severally, as follows;

a) Interest on the partial payment of US $ 1,000,000 at the rate of 6% pa from 31st March, 2015 until 3rd February, 2020 when it was made;

b) Interest on the partial payment of US $ 1,500,000 at the rate of 6% pa from 31st March, 2015 until 3rd September, 2020 when it was made;

c) An award of US $ 2,500,000 being the outstanding balance on the contract price.

d) Interest thereon at the rate of 6% per annum from 31st March, 2015 until payment in full.

e) The costs of the suit.

Dated at Kampala this 20th day of May, 2021

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Stephen Mubiru
Judge,
20th May, 2021.