THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0556 OF 2019

SPRING FREIGHT LOGISTICS LIMITED …… PLAINTIFF

VERSUS

1. AMOO HOLDINGS INTERNATIONAL LTD }
2. EVANS LAJORE EMOIT } …… DEFENDANTS
3. JAMES OKWARAS }

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The Plaintiff's claim against the defendants jointly and severally is for recovery of shs. 74,740.356/= in addition to US $ 11,986, general damages for breach of contract, interest and costs. The plaintiff's claim is that it is a limited liability company engaged in the transport business. Being a consignee of an assortment of goods, the 1st defendant on diverse days contracted the plaintiff o transport its goods from Mombasa Port to Kampala. In their capacity as agents of the 1st defendant, the 2nd and 3rd defendants engaged the plaintiff to clear the goods as well, in return for payment to be made at a later date. Upon clearing and transporting the goods, the plaintiff issued several reminders to the defendants for payment. In a bid to settle the outstanding debt, the defendants issued sixteen post-dated cheques to the plaintiff all of which bounced on being presented for payment, hence this suit.

b) The defence to the claim;

In their joint written statement of defence, the defendants state that they contracted the plaintiff for clearing of their consignments but the contracted services were to be within the threshold of US $ 20,000 and UGX 100,000,000/= against which they issued post-dated cheques as security. Under

the terms of the contract, the plaintiff was entitled to payment within 120 days of its invoice but to-date it has never raised any invoice. Despite its failure to hit the thresholds due to its limited capacity, the plaintiff went ahead to bank the cheques without the defendant's approval, contrary to the terms of the contract, hence the suit ought to be dismissed with costs.

c) The issues to be decided;

The Plaintiff raised two issues for trial namely:

1. Whether the 1st Defendant is indebted to the plaintiff.
2. What remedies are available to the parties?

d) The submissions of counsel for the plaintiff;

Counsel for the Plaintiff M/S Kampala Tax Advisory Centre – Legal Department submitted that the defendants do not deny the existence of the contract, yet they did not plead having paid for the services rendered by the plaintiff, despite the several reminders. All the post-dated cheques they issued to the plaintiff were dishonoured on being presented to payment. This constitutes a breach of the contract. The plaintiff's claim is supported by the multiple cheques which were exhibited. Judgment therefore should be entered in its favour as prayed.

e) The submissions of counsel for the defendants;

When the suit was called for hearing, the defendant and his counsel was not in court. The plaintiff was granted leave too proceed ex-parte whereupon the plaintiff called only on witness and closed its case. Consequently, counsel for the defendant, M/S Nsubuga K.S and Co. Advocates, did not present any evidence or final submissions.

f) The decision;

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 an obligation imposed by the contract; and (ii) resultant damages.

1st issue; <u>whether the 1st Defendant is indebted to the plaintiff;</u>

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. The plaintiff did not adduce any written agreement as evidence of the contract between it and the defendants. However, the existence of the contract between the two parties and its major terms is admitted by the defendants in paragraphs 5 (a), (b), (c), (d) and (e) of their joint written statement of defence. According to section 57 of *The Evidence Act*, facts which are admitted need not be proved. Moreover Order 8 rule 3 of *The Civil Procedure Rules* provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, is to be taken to be admitted. I have not found it necessary to require proof by other means.

Although jurisprudence abounds that in civil suits, 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. The sixteen cheques (exhibits P. Ex.1 – P. Ex.16) corroborate the testimony of P.W.1 Mr. Edeete Paul and that of P.W.2 Ms. Achulang Mary Judith to the effect that the cheques are evidence of the credit arrangement between the parties, and I have not found any manifest error in any of them.

A cheque is defined under section 72 (1) of *The Bills of Exchange Act* as a bill of exchange drawn on a banker payable on demand. It is an "unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to bearer." A bill of exchange constitutes prima facie evidence of the sum of money printed on it and due to the person in whose favour it is drawn (see *Naris Byarugaba v.*

Shivam M.K.D Ltd [1997] HCB 71). It was held in that case that in law such a debt is only discharged when the bill of exchange is honoured. A cheque is said to be dishonoured under section 46 of *The Bills of Exchange Act* when it is duly presented for payment and payment is refused or cannot be obtained.

Furthermore, in *Sembule Investments Ltd v. Uganda Baati Ltd H.C. Misc. Application No. 0664 of 2009*, it was held that it is implied from the definition of a bill of exchange and therefore a cheque is by its nature unconditional. Where a cheque is dishonoured and returned with the words "refer to drawer" and upon giving to the drawer notice of dishonour, the only recourse for the plaintiff was to file a suit. As such, cheque constitutes a promise to pay and the defendant becomes liable to make good the amount written on the cheque (see also *Redfox Bureau De Change v. Anke Alemayehu and Another [1997 – 2001] UCLR 359*).

In his testimony, PW1 Mr. Edeete Paul, a Director of the Plaintiff Company, stated that there was a credit arrangement with the plaintiff by which the plaintiff would handle customs clearance and transport the 1st Defendant's goods in return for payment to be made at a later date. After performing its part of the bargain, the plaintiff issued several reminders to the 1st defendant through the 2nd and 3rd defendants who drew several cheques in favour of the plaintiff, all of which were dishonoured on being presented for payment. The documentary evidence adduced by the plaintiff in the instant case shows that the cheques were drawn by the 1st defendant company in favour of the plaintiff and that each of them was duly presented for payment but was dishonoured. The cheques exhibited by the plaintiff are as follows:

1. Centenary Bank Cheque No. 283444 dated 11/12/2018 for US $ 2,010
2. Centenary Bank Cheque No. 283445 dated 23/02/2019 for US $ 354
3. Centenary Bank Cheque No. 283446 dated 06/05/2019 for US $ 3,954
4. Centenary Bank Cheque No. 283447 dated 06/05/2019 for US $ 354
5. Centenary Bank Cheque No. 283448 dated 06/05/2019 for US $ 2,950
6. Centenary Bank Cheque No. 283449 dated 06/05/2019 for US $ 2,010
7. Centenary Bank Cheque No. 283451 dated 15/01/2019 for US $ 354
8. Centenary Bank Cheque No. 9250846 dated 11/12/2018 for shs. 6,684,450/=
9. Centenary Bank Cheque No. 9250847 dated 15/01/2019 for shs. 6,684,450/=

10. Centenary Bank Cheque No. 9250848 dated 23/02/2019 for shs. 6,684,550/=
11. Centenary Bank Cheque No. 9250849 dated 06/05/2019 for shs. 20,000,000/=
12. Centenary Bank Cheque No. 9250850 dated 06/05/2019 for shs. 17,584,250/=
13. Centenary Bank Cheque No. 9250851 dated 06/05/2019 for shs. 5,291,323/=
14. Centenary Bank Cheque No. 9250852 dated 06/05/2019 for shs. 6, 510,100/=
15. Centenary Bank Cheque No. 9250853 dated 06/05/2019 for shs. 5,291,323/=
16. Centenary Bank Cheque No. 9250854 dated 06/05/2019 for shs. 6,684,550/=

These cheques establish a *prima facie* case of indebtedness in favour of the plaintiff against the 1st defendant. The plaintiff has therefore established a *prima facie* case that the 1st defendant is indebted to it in the sum of shs. 74,730,356/= and US $ 11,986 respectively.

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. Consequently, the evidential burden rests on the defendants 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.

In their joint written statement of defence, the defendants contended that the contractual arrangement with the plaintiff's was that its services would be within the threshold of US $ 20,000 and shs.100,000,000 secured by of post-dated cheques that should not have been banked without approval of the defendants. The defendants did not adduce evidence of any payment having been made. The defendants having failed to meet their burden of proving payment, this issue must be resolved in the plaintiff's favour. The 1st defendant's indebtedness to the plaintiff in the sum of shs. 74,730,356/= and US $ 11,986 has been established on the balance of probabilities.

The plaint though does not disclose a cause of action against the 2nd and 3rd defendants. It appears that the contract was between the 1st defendant and the plaintiff. The 2nd and 3rd defendants seem

to be officers of the 1st defendant whose only role in the transaction was to issue the impugned cheques on its behalf. 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 the 1st defendant is a sham used to perpetrate a fraud, neither is there evidence to show that the 2nd and 3rd defendants used the corporation 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. I accordingly find that the 2nd and 3rd defendants did not incur personal liability on the contract and for that reason the suit against the two of them in their personal capacity is dismissed.

2nd issue; what remedies are available to the parties?

The plaintiff seeks special damages of US $ 11,986 and shs. 74,730,356/= being the amount due for the services rendered, interest on the principal sum at the rate of 24% per annum, general damages for breach of contract and the costs of the suit.

i. The principal sum.

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 infringement or passing off. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses and losses. 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*). General principles of contract law require that so far as possible there should be *restitutio in integrum*, with due regard to what was in the reasonable contemplation of the parties.

The currency that will most effectively compensate the plaintiff must be taken to be the one that was within the contemplation of the parties in entering into the contract. If the contracting parties have agreed on a particular currency as the currency of account and payment in respect of all transactions arising under the contract, including the payment of damages for breach, judgment should be given for damages in that currency. Once it is recognised that judgement can be given in a foreign currency, justice requires that it should be given in every case where the currency of the contract is a foreign currency; otherwise one side or the other will suffer unfairly by the fluctuation of the exchange (see *Federal Commerce and Navigation Co. Ltd. v. Tradax Export SA [1977] 2 All E.R. 41, at p. 51*).

In paragraph 7 (iv) of the plaint, the plaintiff specifically claimed a sum of US $ 11,986 and shs. 74,730,356/= which it has proved to be due and owing from the 1st defendant. I therefore find that the sum proved as special damages in both currencies was not only specifically pleaded but has been established as owing to the required standard. It is accordingly awarded.

ii. Interest.

Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C. Civil Suit No. 234 of 2011* and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The borrower typically pays interest on a loan at a rate equal to the base rate plus an agreed applicable margin.

The Ministry of Finance noted that foreign currency denominated loans decreased to an industry average of 4.7 per cent in December, 2020 from 5.6 per cent to November, 2020 (see the "*Daily Monitor*" Newspaper of Wednesday 24th March, 2021). The primary goal of an award of interest should be the realistic compensation, in commercial terms, of the plaintiff for loss of the use of money. Interest should not as a general rule be payable at a punitive rate. The general rule should be that entitlement to interest should be neutral as between the parties so that neither benefits from delayed payment. Considering that this rate may be significantly lower than the rates prevailing in the year 2019 when payment fell due, the plaintiff should not be prejudiced by averaging it at 6% per annum on the award of US $ 11,986 from the date of filing the suit, i.e. 4th July, 2019 until payment in full.

As regards the award of shs. 74,730,356/= the Ministry of Finance noted that foreign currency denominated loans decreased to an industry average of 17.5 per cent in December, 2020 from 19.6 per cent to November, 2020 (see the "*Daily Monitor*" Newspaper of Wednesday 24th March, 2021). Considering that this rate may be significantly lower than the rates prevailing in the year 2019 when payment fell due, the plaintiff should not be prejudiced by averaging it at 19% per annum from the date of filing the suit, i.e. 4th July, 2019 until payment in full.

iii. General damages.

The plaintiff claims general damages on account of the 1st defendant's delay in payment. Damages are said to be "at large," that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission (see James *Fredrick Nsubuga v. Attorney General, H.C. Civil Suit No. 13 of 1993* and *Erukana Kuwe v. Isaac Patrick Matovu and another, H.C. Civil Suit No. 177 of 2003*). A plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale (1894) 9 Exch 341*; *Charles Acire v. M. Engola, H. C. Civil Suit No. 143 of 1993* and *Kibimba Rice Ltd v. Umar Salim, S. C. Civil Appeal No. 17 of 1992*).

General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss (see *Storms v. Hutchinson [1905] AC 515; Kabona Brothers Agencies v. Uganda Metal Products & Enamelling Co Ltd [1981-1982] HCB 74* and *Kiwanuka Godfrey T/a Tasumi Auto Spares and Class mart v. Arua District Local Government H. C. Civil Suit No. 186 of 2006*). As a general rule, a person who has suffered loss as a result of another's breach of contract is entitled to be restored to the position that the person would have occupied had the breach not occurred.

Considering that the plaintiff has not proved any damage apart from the late payment of money due to it under the contract, an award of interest should compensate the plaintiff for loss of the use of money throughout the period during which that loss has subsisted. An award of interest in commercial disputes serves the same purposes as an award of general damages as compensation (see *Harriet Arinaitwe v. Africana Clays Ltd. H. C Civil Suit No. 376 of 2013***)**. In the circumstances, an additional award of general damages would be tantamount to overcompensation.

iv. Costs.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) Special damages of US $ 11,986
b) Interest thereon at the rate of 5% p.a. from the date of filing the suit, i.e. 4th July, 2019 until payment in full.
c) Special damages of shs. 74,730,356/=
d) Interest thereon at the rate of 19% p.a. from the date of filing the suit, i.e. 4th July, 2019 until payment in full.
e) The costs of the suit.

Delivered electronically this 12th day of July, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
12th July, 2021.