

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT No. 0800 OF 2018

5 **KATKAR HANUMANT S. PLAINTIFF**

VERSUS

1. **MIRACLE MOTORS CO. LIMITED }**
2. **VIJAY RAVINATH } DEFENDANTS**
10 3. **DINESH PATEL }**

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

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The 2nd and 3rd defendants are the directors of the 1st defendant company. The plaintiff sued the defendants jointly and severally for the recovery of shs. 70,266,000/= as money advanced on loan, interest thereon at the rate of 4.2% per annum, and costs. The plaintiff's claim is that he lent the defendants shs. 20,000,000/= on 30th August, 2017; shs. 20,000,000/= on 24th September, 2017;
20 and shs. 30,000,000/= on 7th October, 2017. On each occasion, the defendants undertook to pay the amount advanced within a month, with interest of 4.2% per month, which they failed to do. By 30th September, 2018 the defendants owed the plaintiff shs. 70,266,000/= as principal and accumulated interest, hence the suit.

25 b) The defence to the claim;

In its written statement of defence, the 1st defendant denied having borrowed any money from the plaintiff. It contended that under the terms of the loan agreements, the plaintiff was obliged to deposit the money on its account, which he never did. In any event, the interest claimed is harsh
30 and unconscionable. In their respective written statements of defence, the 2nd and 3rd defendants denied personal liability for the loans. The loans were never advanced to any of them nor did any of them guarantee the loans. The plaintiff was obliged to deposit the money on the 1st defendant's account, which he never did. In any event, the interest claimed is harsh and unconscionable. At the

commencement of the trial, the plaintiff sought leave to have the second and third defendants struck off, which was granted. The trial therefore proceeded only against the 1st defendant.

c) The issues to be decided;

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The issues raised for trial are as follows:

1. Whether the defendant owes the plaintiff the amount claimed.
2. If so, what remedies are available to the plaintiff?

10 d) The submissions of counsel for the plaintiff;

Counsel for the plaintiff M/s Verma Jivram and Associates submitted that the plaintiff's claim is premised on memoranda of understanding executed between himself and the directors of the defendant. Later the defendant issued cheques to the plaintiff which bounced on being presented
15 for payment. The plaintiff was not bound to inquire into the internal management of the defendant. The defendant was bound by the signature of its two directors. The plaintiff therefore is entitled to recover the money advanced plus interest from the date of default, 1st November, 2017.

e) The submissions of counsel for the defendant;

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Counsel for the defendant M/s MMAKS Advocates submitted that the defendant is not liable for the debt since it never passed any resolution authorising any of its directors to borrow on its behalf. In any event the plaintiff, not being an authorised money lender, the transactions were illegal. The plaintiff was using a standard form contract on all three occasions, spanning over a period of five
25 months from which it can be deduced that he was undertaking business as an un-licensed money lender. The interest claimed is harsh and unconscionable, especially the rate chargeable on default. The plaintiff seeks to rely on unattested documents which have no evidential value. Consequently the plaintiff is not entitled to any of the reliefs sought.

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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
5 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.

10 **1st issue;** whether the defendant owes the plaintiff the amount claimed;

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. This requirement is satisfied by any signed writing that; (i) reasonably identifies the subject matter of the contract; (ii) is
15 sufficient to indicate that a contract exists; and (iii) states with reasonable certainty the material terms of the contract. Writing all material terms is not required; what is required at a minimum is a sales of goods contract is an acknowledgment of agreement by the parties and a specification of the quantity of goods that are to be exchanged.

20 For a contract to come into existence, there must be an offer made by one party which is, in turn, is accepted by another party. An offer is a promise to provide something specific if the other party agrees to do something specific in return. The acceptance must be stated either by words spoken or written or by conduct. Either words or conduct constitute acceptance of an offer if it occurs in accordance with and in response to the specific terms of the offer. A contract may be partly in
25 writing and partly oral.

As proof of the existence of a contract with the defendant, the plaintiff relies on three memoranda of understanding; an agreement dated 30th August, 2017 where the subject matter is a sum of shs. 20,000,000/= lent (exhibit P. Ex.4); an agreement dated 24th September, 2017 where the subject
30 matter is a sum of shs. 20,000,000/= lent (exhibit P. Ex.5); and an agreement dated 7th October, 2017 where the subject matter is a sum of shs. 30,000,000/= lent (exhibit P. Ex.6).

This is corroborated by the oral testimony of the plaintiff. P.W.1 Mr. Katkar Hanumant Shivirm who adduced further cheques issued by the defendant from time to time as security for the borrowing; an un-dated cheque in the sum of shs. 10,000,000/= (exhibit P. Ex.3); two other un-dated cheques in the sum of shs. 10,000,000/= and shs. 20,840,000/= respectively (exhibits P. Ex.6 and P. Ex.7). The cheques bounced on being presented for payment (exhibits P. Ex.9A, P. Ex.9B and P. Ex.9C). He also produced evidence of correspondences between him and the directors of the defendant acknowledging that borrowing; an email dated 10th September, 2018 (exhibit P. Ex.8); and WhatsApp messages of 24th October, 2019 (exhibit P. Ex.10) and 7th December, 2019 (exhibit P. Ex.11). This evidence was not controverted by the defendant.

Therefore I find that there is sufficient evidence that proves, on a balance of probabilities, the existence of written contracts between the plaintiff and the defendant. The only two sub-issues left are whether that contract is binding on the defendant and as to whether it is enforceable. Counsel for the defendant argued it is not because it is not backed by a resolution of the company authorising its directors to borrow on its behalf and secondly that it is in violation of *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016*.

a. The defendant's liability on the contract.

Generally speaking, the principal officers of a company, who include its owners, officers, directors and/or managers, have authority to bind a company. However any other person in the company acting as its representative, regardless of their role in the company, who acts within the scope of his or her "actual" or "apparent" authority, may create a legally binding obligation on behalf of the company. Such authority can be established through direct evidence or can be implied through the actions of others at the company. This arises from conduct of the company, whose effect is to hold out that a person (agent) as having authority to deal with the company's affairs on its behalf.

Apparent or ostensible authority is proved by evidence showing that; (i) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (ii) that the representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of

the particular matter to which the contract relates; (iii) the third party was induced by the representation to enter into the contract; and (iv) under its memorandum or articles of association the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into a contract of that kind. The representation, if acted upon by the third party by entering into the contract, operates as an estoppel. That prevents the company from denying that it is not bound by the contract.

Persons contracting with a company and dealing in good faith may assume that acts within its constitution 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* (1856) 6 E&B 327 and *Kanssen [1946] AC 459*). The rule is designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he or she claims. The third party can assume that the affairs of company have been complied with, unless something has happened that would cause it to question that state of affairs. If the third party has actual or constructive notice that such steps had not been taken, he or she will not be able to rely on any ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company (see *Criterion Properties plc v. Stratford UK Properties LLC and others [2004] 1 WLR 1846*).

In the instant case I find that Mr. Vijay Ravinath was a person who had actual authority to manage the business of the defendant either generally or in respect of these series of transactions. The plaintiff was induced by the representation to enter into a contract with him, acting on behalf of the defendant. There is no evidence to show that under the defendant's memorandum or articles of association it was deprived of the capacity to enter into contracts of this nature. The content of each of the three contracts indicates this was not a personal transaction. Nothing has been shown that could have put the plaintiff on constructive notice that internal steps of the defendant with regard to borrowing had not been taken. The representation that Mr. Vijay Ravinath was acting on behalf of the defendant was acted upon by the plaintiff by entering into the three contracts. This operates as an estoppel that prevents the defendant from denying that it is not bound by the contracts. I therefore find that the contracts are binding on the defendant.

b. Enforceability of the contract.

A valid contract may, however, be unenforceable. A contract can be rendered unenforceable for numerous reasons related to circumstances of the signing, terms of the agreement itself, or events that occur after the contract has been signed. The most common issues that can render a contract unenforceable at the time it came into existence are; illegality of its object or being against public policy, lack of capacity of any of the parties, mistake, unconscionability, duress or undue influence, misrepresentation, and ambiguity of the terms, where they are too vague to be understood. Events that occur after it is signed that render a contract unenforceable include; illegality of performance and force majeure. Of these two have been advanced by counsel for the defendant, i.e. ambiguity or uncertainty of the terms and illegality of performance.

As regards violation of *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016*. Counsel for the defendant contends that the contract are illegal in so far as the plaintiff was carrying on business as a money lender yet he was no licenced to do so. This argument is misconceived on two grounds, firstly, section 4 of the Act defines “tier 4 microfinance institutions” whose business is regulated by the Act as comprising; - (a) SACCOs; (b) non deposit taking microfinance institutions; (c) self-help groups; and (d) community based microfinance institutions. The plaintiff does not fit any of those descriptions.

Secondly, the defendant seeks to classify the plaintiff as a person undertaking money lending business by inference, based only on the fact that the plaintiff used a standard form contract on all three occasions. It is trite that whether a person carries on business of a money lender depends on the facts of each case (see *Litchfield v. Dreyfus [1906] 1 KB 584*). The words “carries on business” implies a repetition of acts, and whether one isolated transaction carried amounts to carrying on business, within the meaning of the statute, must depend on the particulars or circumstances attending the transaction (see *Kirkwood v. Gadd [1910] AC 422*). Although the word “business” may often denote a degree of repetition and continuity, it need not always do so (see *Kenny v. Conroy and another [1999] 1 WLR 1340*). A court need only first see whether at the time of the loan, the party’s business was that of moneylender. If not, the court then investigates if the person held themselves out as carrying on such a business. A person who makes a business of lending

money is not any the less a money-lender because he carries on some other business as well on a much larger scale (see *North Central Wagon Finance Co. Ltd v. Brailsford* [1962] 1 All E.R. 502 at 508B).

The Act was intended to apply only to persons who are really carrying on the business of money-lending as a business, not to persons who lend money as an incident of another business or to a few old friends by the way of friendship, For example in *Litchfield v. Dreyfus* [1906] 1 KB 584 an art dealer occasionally advanced money to friends in the trade. Farwell J. said at 589; -

Not every man who lends money at interest carries on the business of money-lending. Speaking generally, a man who carries on a money-lending business is one who is ready and willing to lend to all and sundry, provided that they are from his point of view eligible. I do not of course mean that a money-lender can evade the Act by limiting his clientele to those whom he chooses to designate as “friends” or otherwise; it is a question of fact in each case.

It is therefore not enough merely to show that the plaintiff had on several occasions lent money at remunerative rates of interest, there must be a certain degree of system and continuity about the transactions (see *Newton v. Pyke* [1908] 25 TLR 127). There has to be some repetition and some regularity in the pattern to establish the carrying on of a business. To prove that the plaintiff carried on such a business at all, the defendant had to show that the plaintiff at the very least had made several transactions of loans at interest to others, over a relatively short period. The defendant invites court to infer the business of money lending based only on the use of standard form contracts.

An inference is an independent ultimate fact. In contrast, an implication is a fact that was meant to specified, even if it was no so expressly done. The difference between an *inference* and an *implication* is subtle and can cause confusion (*R v. Rigby* (1956) 100 CLR 146; *Merchant Service Guild of Australasia v. The Newcastle and Hunter River Steamship Co Ltd (No 1)* (1913) 16 CLR 591). Inferences are what one figures out based on an experience; an interpretation of facts that have been observed. There are valid and invalid inferences. An attempted proof that contains an invalid inference fails in justifying its final conclusion and is then not a proof.

An inference involves a transition from a number of assertions, the premisses, to another assertion, the conclusion. An inference is valid if, no matter what particular statements are substituted for the statement variables in its premises, the resulting premises are all true. In other words an inference is valid if, and only if, every possible state of affairs which renders all the premises true also renders the conclusion true. An inference is valid if, and only if, no counter-example of it exists. Therefore for the inference suggested by counsel for the defendant to be true, the assertion must first be made that standard form contracts are associated only with system, repetition and continuity necessary to constitute a business, and nothing else.

The fact remains that although standard forms of contracts usually set out the terms on which mercantile transactions of common occurrence are to be carried out, the standard clauses of which have been settled over the years by negotiation by representatives of the commercial interests involved and have been widely adopted because experience has shown that they facilitate the conduct of trade, that presumption, however, does not apply to all kinds of standard form contracts.

They are also used in an adhesion contract (also called a “boilerplate contract”) which is a contract drafted by one party (usually with stronger bargaining power) and signed by another party (usually one with weaker bargaining power, usually a consumer in need of goods or services), where the second party typically does not have the power to negotiate or modify the terms of the contract.

Adhesion contracts are drafted by one party and signed by another party rather than undergoing a negotiated drafting process. Considering that the standard form nature of the three contracts may only reflect the fact that the defendant did not have the power to negotiate or modify the terms of the contract, the fact that the parties adopted a standard form contract of itself does not conclusively support the inference that the plaintiff’s business was that of money-lending, or that the plaintiff advertised or announced himself or held himself out in any way as carrying on that business. The plaintiff described his business as that of a mechanical, electrical and plumbing contractor. The evidence does not show that these transactions were an integral part of the plaintiff’s business as money lender since they are also consistent with advances of “friendly loans.”

I find on the facts of this case, that the three isolated loan transactions did not import the necessary element of system, repetition and continuity necessary to constitute a money-lending business.

They are more or less a one-off adventure with the defendant which cannot by themselves constitute a trade or business. The Act is not intended to cast such a wide net as this. I thus find that the contracts did not offend *The Tier 4 Microfinance Institutions and Money Lenders Act, 18 of 2016* and therefore are enforceable.

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2nd issue; If so, what remedies are available to the plaintiff?

Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract.

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i. Special damages.

The plaintiff seeks recovery of the sum of shs. 70,000,000/= borrowed by the defendant, less shs. 19,000.000/= repaid. The law is that not only must such a claim be specifically pleaded but it must also be strictly proved since it is a claim of special damages (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*).

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This claim was specifically pleaded and it has been strictly proved. The plaintiff has provided the agreements executed by the defendant's director, cheques issued as security, and correspondences acknowledging the indebtedness. P.W.1 admitted that the defendant repaid only shs. 19,000,000/= leaving and outstanding balance of shs. 51,000,000/= When the existence of a debt is fully established by the evidence, the burden of proving that it has been extinguished by payment

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devolves upon the debtor who offers such defence to the claim of the creditor. Such evidence is lacking, the plaintiff has therefore established on a balance of probabilities the defendant's indebtedness. I therefore find that the plaintiff is entitled to this claim.

5 ii. General damages and interest.

Under section 26 (1) of *The Civil Procedure Act* where an agreement for the payment of interest is sought to be enforced, and the court is of opinion that the rate agreed to be paid is harsh and unconscionable and ought not to be enforced by legal process, the court may give judgment for
10 the payment of interest at such rate as it may think just. Generally, where an interest rate was negotiated with undue influence, such as where a lender preys upon the vulnerabilities of the borrower, or where an interest rate is beyond the statutory limit and is explicitly unlawful, or is so disproportionate as to offend a sense of reasonableness within the marketplace for similar lending risk, such an interest may be set aside or substituted. The rate of 2.4% per month translates into a
15 rate of 28.8% which is way above the average commercial bank lending rate. The one chargeable on default, at 84% per annum is even more outrageous as a penalty provision. A default rate is generally acceptable so long as it is not "unconscionable" or "extravagant." In the instant case, it has no bearing to the reasonably anticipated losses resulting from breach. It is not a genuine pre-estimate of loss or liquidated damages.

20 Courts have been open to considering a loan as unconscionable if the terms are so unfair, that it would be wrong to uphold them. Cases of severe unfairness, lopsided bargaining power, and lack of proper notice are some examples of contracts that "shock the conscience," in the eyes of the court, and could be grounds for unconscionability. A clause will be considered a penalty if its
25 primary purpose is to punish breach (i.e. it is *in terrorem*) rather than to compensate the other party for its losses (see *Robophone Facilities Ltd v. Bank* [1966] 3 All ER 128, [1966] 1 WLR 1428). Provisions in loan agreements for uplifting the interest rate for the future after a default should not be regarded as penalties, save where the uplift is evidently extravagant (see *Lordsvale Finance plc v. Bank of Zambia* [1996] QB 752). Authorities seem to suggest that an uplift of 1% - 3.5% is an
30 acceptable reflection of the increased credit risk presented by a borrower on default. Therefore the rate charged in the instant case, that uplifting the interest rate for the future after a default, is an

excessive interest and on the whole unconscionable, that it would be fundamentally unfair and unjust for the court to aid the plaintiff to exact further charges from the defendant.

5 In determining a just and reasonable rate in lieu thereof, 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).

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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
15 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
20 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*).

25 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
30 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 defendant undertook to pay shs. 70,000,000/= within a month i.e. latest 7th November, 2017 but shs. 51,000,000/= of it has remained unpaid to-date. The unpaid party to a contract is entitled as of substantive right to interest from the time when payment is contractually due. The plaintiff is accordingly awarded interest on the decretal sum at the rate of 20% per annum, from the date of default until payment in full.

The plaintiff is not entitled to any additional general damages. The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacion SA ('La Pintada')* [1985] AC 104). In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker* (1989) 171 CLR 125). The plaintiff not having proved such special circumstances beyond losses arising from the ordinary course of things when there is delay in payment of a debt beyond the date when it is contractually due, he is not entitled to the award of general damages.

iii. 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) The sum of shs. 51,000,000/= as outstanding under the contract.
- b) Interest thereon at the rate of 20% p.a. from 7th November, 2017 until payment in full.
- c) The costs of the suit.

Delivered electronically this 11th day of October, 2021

.....Stephen Mubiru.....
Stephen Mubiru
Judge,
11th October, 2021.