THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0961 OF 2019

VRUND GENERAL HARDWARE LIMITED …….…… PLAINTIFF

VERSUS

1. QUARTZ FOUNDATION LIMITED }
2. OPIO INNOCENT } …..…… DEFENDANTS

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The second defendant is a director of the 1st defendant. The plaintiff sued the defendants jointly and severally seeking recovery of shs. 578,813,000/= being the price of an assortment of hardware materials supplied by the plaintiff to the defendants on credit, interest thereon at the rate of 35% per annum from the date of default until payment in full, and the costs of the suit. The plaintiff's case is that during the month of January 2016, the Plaintiff executed a contract for the supply of various building materials to the defendants' shops. Clause 8 of the contract provided that invoices were payable within thirty (30) days from the date of delivery or fifteen (15) days upon receipt of the invoice. The plaintiff thereafter supplied the defendants' shops in Lira and Gulu with building materials worth shs. 1,054,074,000/= receipt of which was acknowledged and by the defendants. However, the defendant paid only shs. 475,261,000/= leaving a balance of shs. 578,813,000/= outstanding. The second defendant made a futile attempt to pay part of the debt when on 17th October, 2017 he issued a personal cheque in the sum of shs. 20,000,000/= which bounced on being presented for payment. Several demands since then made by the plaintiff for the defendants to clear the outstanding balance have been futile, hence this suit.

b) The defence to the claim;

In their joint written statement of defence, the defendants denied the plaintiff's claim. The second defendant contends that he has no contractual relations with the plaintiff and therefore the plaintiff has no cause of action against him. The first defendant avers that it had personal contractual relations with a one Patel V. Hardick and not the plaintiff, arising from a contract executed on 11th December, 2017. When the 1st defendant on 17th October, 2017 issued a cheque in the sum shs. 20,000,000/= it was in part payment of a debt owed to the said individual and not the plaintiff. The 1st defendant paid all monies owed to Patel V. Hardick under the contract dated 11th December, 2017 and therefore the suit is misconceived.

c) The issues to be decided;

The issues raised for trial are as follows:

1. Whether the court has jurisdiction to entertain this suit and if so, which law is applicable.
2. When was the contract executed?
3. Whether the Defendant breached the contract he entered into for the supply of materials with the Plaintiff.
4. What remedies are the parties entitled to?

d) The submissions of counsel for the plaintiff;

Counsel for the plaintiff M/s Okurut, Okalebo, Outeke and Co. Advocates submitted that the plaintiff produced evidence of unpaid tax invoices for goods supplied to the defendant's shops at Aroma Lane in Gulu town and Oyite Ojok Lane in Lira town. None of the defendants refuted the deliveries. From the testimony of both parties, it is clear that none of them contemplated Swedish law as the law governing the contract. The contract was executed and performed in Uganda. Both parties reside in Uganda and have no connection to Swede. Inclusion of that clause was an obvious error. By their respective pleadings, both parties submitted to the jurisdiction of this court. Whereas the plaintiff claimed to have executed the contract in January, 2017 the 2nd defendant claimed it was on 1st December, 2017. The contract itself was altered to read December, 2016. There are

invoices which pre-date the date asserted by the defendant which corroborate the plaintiff's version. On the facts of this case, the date of signing is inconsequential. The plaintiff has proved having made supplies under the agreement in respect of which the defendants have not produced proof of corresponding payments. The plaintiff is therefore entitled to the remedies sought.

e) The submissions of counsel for the defendant;

Counsel for the defendant M/s Barya, Byamugisha and Co. Advocates appearing together with M/s Abwang, Otim, Ojok and Co. Advocates submitted that they abandoned their argument concerning the jurisdiction of the court. Regarding the date of execution counsel submitted that the plaintiff's version was contradictory and unreliable. The defendant's version was more believable. The contract therefore was signed on 11th December, 2017. Although the 2nd defendant was unable to produce the counter-book in which records of payment were kept since it is irretrievably lost, his oral testimony ought to be believed; goods supplied by the plaintiff were paid for in full. Some of the delivery notes and invoices do not bear signatures of the defendants' employees authorised to receive goods. In the alternative therefore, upon deduction of the amounts reflected in such invoices what is left dues and owing is shs. 131,031,700/= and not the amount claimed by the plaintiff.

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 a duty imposed by the contract; and (iii) resultant damages.

1st issue; <u>when was the contract executed?</u>

Where a contract is typed but has handwritten insertions, the general principle is that except where the parties clearly manifest a contrary intent, handwritten contract provisions are favoured when they conflict with or alter typewritten or printed provisions (*Hardie Tynes Foundry & Machine Co. v. Glen Allen Oil Mill, 36 So. 262 (Miss. 1904)*; *Pruitt v. Dean 21 So. 2d 300 (Miss. 1945)*; *Travellers Ins. Co. v. General Refrigeration & Appliance Co., 218 So. 2d 724, 726 (Miss. 1969)*; and *Thornhill v. System Fuels, Inc., 523 So. 2d 983, 988 n.2 (Miss. 1988*). Handwritten changes or additions to a printed contract are considered to be part of the contract as long as the parties agreed to them at the time they were made. Normally, both parties would initial and date next to the contract terms modified by writing showing that they agreed to the terms at the time the contract was signed. Probably the best way, to demonstrate that all parties actually are aware of and agree to the changes / additions is by placing their initials next to the handwritten changes. Each party placing their initials is signifying they have read the handwritten portion and are agreeing to it as forming part of the contract, just like the parts which are printed. Not initialling next to a written change in a contract can lead to one party attempting to say they never agreed to those terms.

However, according to section 91 of *The Evidence Act*, when the terms of a contract have been reduced to the form of a document, no evidence, may be given in proof of the terms of that contract except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible. Therefore when two parties have made a contract and have expressed it in a writing to which they have both assented as the complete and accurate integration of that contract, evidence, whether parol or otherwise, of antecedent understandings and negotiations will not be admitted for the purpose of varying or contradicting the writing (see *Evans v. Roe (1872) LR 7 CP 138*; *Inglis v. Buttery (1878) 3 App Cas 552*; *Leggott v. Barrett (1880) 15 Ch D 306*; *Jacobs v. Batavia and General Plantations Trust [1924] 1 Ch 287*; *National Bank of Australasia v. Falkingham & Sons [1902] AC 585 at 591*; *Henderson v. Arthur [1907] 1 KB 10*; *Hitchings & Coulthurst Co v. Northern Leather Co of America [1914] 3 KB 907*; *O'Connor v. Hume [1954] 2 All ER 301, [1954] 1 WLR 824 at 830*; *Mercantile Bank of Sydney v. Taylor [1893] AC 317*; *Bank of Australasia v. Palmer [1897] AC 540 at 545*; *National Westminster Bank Ltd v. Halesowen*

Presswork and Assemblies Ltd [1972] AC 785 at 818–819; and *Mercantile Agency Co Ltd v. Flitwick Chalybeate Co (1897) 14 TLR 90*). Extrinsic evidence is inadmissible for the purpose of adding to varying, contradicting or subtracting from the terms of the document: the writing is conclusive. This is in substance what is called the "parol evidence rule."

There are some exceptions to the parol evidence rule. Evidence of the following is admissible: - (i) to prove defects in the formation of the contract (such as fraud, duress, mistake or illegality); (ii) to prove the parties' intent regarding ambiguous terms in the contract; (iii) regarding problems with the consideration (e.g., the consideration was never paid); (iv) to prove a prior valid agreement that is incorrectly reflected in the written instrument in question; (v) to prove a related agreement, if it does not contradict or change the main contract; (vi) to prove a condition that had to occur before contract performance was due; (vii) to prove subsequent modification of the contract. As one of the exceptions, oral evidence is admissible where the genuineness of a document produced is in question (see section 21 of *The Evidence Act*). Therefore, parol evidence is admissible to prove that a writing was altered, without mutual consent, after it was executed.

In general, a contract can typically be modified at any point during the arrangement, so long as all parties to the contract consent to the changes being made. Depending on the needs of the parties, a contract may be modified in whole or in part. Modifications can also be made after a contract is executed or even before a contract is signed. Whether a partial or entire modification takes place before or after a contract is signed, all parties must agree to any changes or else the modification will not be considered valid. If the changes to a contract are minor, the parties may simply handwrite them on the original document and sign or initial their names next to the new amendment. Handwritten modifications, if initialled or signed by all parties become part of the contract.

To be considered an alteration or modification, a change must be material, meaning it must impact the overall meaning of the language, revise the intent of an important section of the contract, or affect the rights of the parties to the agreement. Changing a contract without notice or modifying a contract without the consent of the other parties will render those changes null and void. If an important part of the contract is altered by the change, it must be made by mutual consent of both

parties. If only one party modifies the contract without the agreement of the other, then it is unlikely the changes will be enforceable.

The contract date is usually written onto the front cover and the first page of the contract (although there is no legal requirement to do so). Generally this is the date that the last party signed the contract. If there is a date at the beginning of the contract which is not the date of the last signature this can lead to confusion or be of no effect in interpreting when the contract actually began. According to P.W.1 Mr. Hadik Kumar Vinubhai Patel, although the contract is dated 11th December, 2016 it was not signed on that date. It was signed in January, 2017. The 7 in the year 2017 was altered to 6 to read 2016 but was not countersigned. They took the original to the defendant to sign in December, 2017 after which he kept it. This is corroborated by D.W.1 Mr. Opio Innocent who testified that it was signed on 1st December, 2017. It turns out therefore in the instant case that this modification of the date was not by mutual consent of both parties.

A contract should not be dated until all parties who need to execute it have done so. If a party has dated a contract prematurely then the date should be amended to a date no earlier than the date on which the last signatory actually signed. However, since both parties did not sign the contract on the same date, that alteration is immaterial in light of the fact that in law the contract becomes binding on the date of the last signature. In the instant case, the last person to sign was D.W.1 Mr. Opio Innocent and he having signed on 1st December, 2017 that became the date of the contract.

2nd issue; <u>whether the defendant breached the contract he entered into with the plaintiff for the supply of hardware materials</u>.

A breach of contract is a violation of any of the agreed-upon terms and conditions of a binding contract, and this includes when an obligation that is stated in the contract is not completed on time. It is a failure, without legal excuse, to perform any promise that forms all or part of the contract. This includes failure to perform in a manner that meets the standards of the industry.

According to clause 2 of the contract, the contract was supposed to commence on the day of signing, hence on 1st December, 2017, and to continue until 31st December, 2018. During that

period, the plaintiff upon order of the defendant, was to supply the defendant with hardware building material which included cement, paint, ceramics, steel products, iron sheets and so on, within ten (10) working days of the order. Clause 8 of the contract obliged the defendant to pay for the goods delivered, within a period of thirty (30) after delivery, or within fifteen (15) days of receipt of an invoice.

It was the testimony of P.W.1 Mr. Hadik Kumar Vinubhai Patel, that during the period of this contract, the plaintiff supplied the defendant with material worth shs. 1,054,074,000/= receipt of which was acknowledged by the defendant. However, the defendant paid only shs. 475,261,000/= leaving a balance of shs. 578,813,000/= outstanding. In proof of the amount outstanding, the plaintiff adduced evidence of the unpaid delivery notes for the period running from 4th October, 2017 to 20th October, 2018 (collectively marked as exhibit P. Ex.2). It was his testimony that supplies to the defendant pre-dated the contact (marked as exhibit P. Ex.1), which was executed on 1st December, 2017 mainly to formalise the credit arrangement between the parties. The fact of delivery is corroborated by the testimony of P.W.2 Mr. Were Robert while the amount outstanding is corroborated by the ledger maintained by the plaintiff (marked as exhibit P. Ex.3).

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. On his part, D.W.1 Mr. Opio Innocent testified that while all deliveries were supposed to be acknowledged by either himself or Pascal, the delivery notes at pages 11, 23 – 25 of the plaintiff's re-arranged trial bundle do not bear such acknowledgement. He did not acknowledge receipt of the goods. In the submissions of defence counsel,

However while under cross-examination, D.W.1 Mr. Opio Innocent testified that each delivery there would be accompanied with a delivery note and an invoice. Perusal of the documents at pages 11, 23 – 25 of the plaintiff's re-arranged trial bundle shows that for each of the impugned un-signed delivery note there is an accompanying signed tax invoice. The items listed in each of the signed tax invoice are identical to those listed in the corresponding delivery note. It is therefore my finding that the signature on the respective tax invoices suffices as acknowledgment of receipt

of the items listed in the corresponding un-signed delivery note since the two were delivered at the same time.

Although D.W.1 Mr. Opio Innocent testified that when he paid cash, the plaintiff would issue an invoice without a delivery note and that is why he did not sign the delivery notes at pages 11, 23 – 25 of the plaintiff's re-arranged trial bundle, he explained further that he did not have evidence to prove those cash payments because the book they were using to sign acknowledgement went missing. This court is mindful of the fact that in a system of litigation that depends on the parties marshalling witnesses, documents, and other things as evidence, there is a strong incentive for each party to collect information and to filter the information thus assembled so as to present to the court only evidence that supports that party's cause, while supressing that which is not, yet it is the court's expectation that the parties will present all reasonably available information relevant to the disputed issues of fact in the case.

Only when information is not reasonably available may the court rightly forgo efforts to gain access to its potential, and even then the court may have to take the absence into account in considering burdens of proof. Therefore whenever a party has reason to know that a suit may be filed, it has an obligation to preserve anything that could be used as evidence in the case. That goes for both parties. A party cannot conveniently lose adverse evidence. If evidence that is needed by the other side is damaged or destroyed, there could be a claim for what is known as spoliation of evidence. To demonstrate a claim for spoliation, a party must show: (a) that the party that possessed the evidence had a legal duty to preserve and protect the evidence, which can be, but doesn't have to be, required by a contract, and (b) that the evidence was lost, damaged, or destroyed, resulting in an inability to prove or defend against the allegations in the case. When there is spoliation, the penalty is usually for the court to assume that the damaged or lost evidence was unfavourable to the case of the party who lost it, because it said what the party who requested but didn't get it would like it to say.

It so happens in the instant suit that the defendant's reference to the record of cash payment made by the defendant as kept in the lost record renders it difficult for the plaintiff to respond to the allegation that payments were made in respect of the impugned invoices. The plaintiff's evidence

shows that the last delivery to the defendant was made on 20th October, 2018. It was the testimony of D.W.1 Mr. Opio Innocent that it was at the time of filing his defence to the suit that he realised the book was missing. The record indicates that the defence was filed on 24th September, 2020. Before that the defendant had on 6th December, 2019 applied for leave to appear and defend the suit, in which he never made reference to that book at all, as containing evidence refuting the claim. Failing to advert to that evidence, even when still available before leave to file the defence was granted, casts doubt on the claim that it was lost at the time of filing the defence. This then supports an inference of bad faith, wilful, deceitful, or malicious intent and not mere negligence in its loss. In the circumstances, an adverse inference is inevitable.

The onus is on a party to prove a positive assertion and not a negative assertion. It therefore means that, the burden of proof lies upon him who asserts the affirmative of an issue, and not upon him who denies, since from the nature of things he who denies a fact can hardly produce any proof (see *Jovelyn Bamgahare v. Attorney General S.C. C.A. No 28 of 1993* and *Maria Ciabaitaru M'mairanyi and Others v. Blue Shield Insurance Company Limited, 2000 [2005]1 EA 280*). For a debtor to succeed in asserting the defence of payment in full, he or she must introduce evidence which is sufficiently persuasive.

The defendant having failed to meet its burden of proving payment, this issue must be resolved in the plaintiff's favour. Considering that the last delivery to the defendant was made on 20th October, 2018, the defendant breached the contract when it failed to pay the plaintiff's invoices within a period of thirty (30) after delivery, or within fifteen (15) days of receipt of the invoices. Consequently I find that the defendant is indebted to the plaintiff in the sum of shs. 578,813,000/= as claimed by the plaintiff.

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

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. Section 60 (1) of *The Sale of Goods and Supply of Services Act, 10 of 2018,* provides further that where, under a contract of sale, the property in the goods has passed to

the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may bring an action against the buyer for the price of the goods, together with any incidental damages.

i. Action for the price.

The plaintiff seeks recovery of shs. 578,813,000/= as the amount outstanding. The law is that not only must such 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*).

The claim for shs. 578,813,000/= was specifically pleaded in paragraph 5 of the plaint. In terms of proof, the plaintiff relies on evidence of the unpaid delivery notes for the period running from 4th October, 2017 to 20th October, 2018 (collectively marked as exhibit P. Ex.2) corroborated by the testimony of P.W.2 Mr. Were Robert and the ledger maintained by the plaintiff (marked as exhibit P. Ex.3). The defendant has not discredited that evidence. I therefore find that the plaintiff has provided sufficient proof of its claim. The amount recoverable by the plaintiff accordingly is shs. 578,813,000/=

ii. General damages and interest.

In clause 8.2 of the contract, it was agreed that "if the customers fails to pay by the due date, the supplier shall be entitled to interest from the due date at the rate per annum of ten (10) per cent."

Under section 26 (2) of *The Civil Procedure Act* where and insofar as a decree is for the payment of money, the court may, in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit.

In the instant case, the parties agreed on the rate of ten (10) per cent, per annum, which appears to me to have bearing to the reasonably anticipated losses resulting from breach. It is a genuine pre-estimate of loss or liquidated damages for the period prior to the filing of the suit. The plaintiff is accordingly awarded interest on the outstanding amount of shs. 578,813,000/= at the rate of ten (10) per cent, per annum from the date of breach, 20th November, 2018 until 21st November, 2019 when the suit was filed.

As regards the rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment, 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 defendant undertook to pay the price of the goods within thirty (30) days from the date of delivery or fifteen (15) days upon receipt of the invoice. The last invoice was delivered on 20th October, 2018 but to-date shs. 578,813,000/= has remained unpaid. 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 aggregated decretal sum (inclusive of interest awarded from the date of breach until the date the suit was filed) at the rate of 20% per annum, from the date of filing the suit, i.e. 21st November, 2019 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 Navigacia 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.

i. 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. 578,813,000/= as outstanding under the contract.
b) Interest thereon at the rate of 10% p.a. from the date of breach, 20th November, 2018 until 21st November, 2019 when the suit was filed.
c) Interest on the aggregated amount in (b) above at the rate of 20% p.a. from the date of filing the suit, i.e. 21st November, 2019 until payment in full.
d) The costs of the suit.

Delivered electronically this 25th day of October, 2021

……Stephen Mubiru……..
Stephen Mubiru
Judge,
25th October, 2021.