THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO.371 OF 2020

ABSA BANK UGANDA LIMITED :: PLAINTIFF

VERSUS

MUBUUKE JUDE :: DEFENDANT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

JUDGEMENT

Introduction

Absa Bank Uganda Limited (hereinafter referred to as the "Plaintiff") instituted this suit against Mr Mubuuke Jude (hereinafter referred to as the "Defendant") claiming the Defendant breached a Loan Agreement/ contract ("the Agreement") seeking the following reliefs;

a) A declaration that the Defendant defaulted in the repayment of his loan obligation amounting to **UGX 94,619,370/= (Uganda Shillings Ninety Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only)** as per the loan statement.

b) An Order for the recovery of **UGX. 94,619,370/= (Uganda Shillings Ninety Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only)** being the outstanding loan balance as per the loan statement.

c) General damages.

d) Interest on the outstanding loan amount at a commercial rate.

e) Costs of the suit.

Background

The Parties entered into a Loan Agreement on 19th May 2017 where the Plaintiff loaned the Defendant **UGX 110,950,000/= (One Hundred and Ten Million Nine Hundred and Fifty Thousand Uganda Shillings)**. The money was disbursed on 29th May 2017 and was payable within a period of 72 months (6 years) from the date of disbursement. Per the terms of the Loan Agreement, the Defendant was to remit a monthly instalment of **UGX 2,715,746/= (Two Million Seven Hundred and Fifteen Thousand Seven Hundred and Forty-Six Uganda Shillings)**. The Plaintiff's claim is that the Defendant made monthly instalments up to 28th February 2019 but subsequently defaulted in making any payments thereafter.

The Defendant denies he is liable to the Plaintiff in the amounts claimed. The Defendant claimed firstly that in taking on the loan, he relied on representation by the Plaintiff's loan officer that the loan would be insured for the entire period of the loan. The Defendant claims that thus, his loan was insured against retrenchment amongst other things and that once his employment was terminated on 19th October 2018 and he informed the Plaintiff of his retrenchment the Insurer carried on executing payments on the Defendant's behalf. The Defendant avers that his loan was insured by UAP Insurance and that UAP Insurance paid against his salary loan from December 2018 until November 2019.

In its Reply to the Written Statement of Defence, the Plaintiff averred that UAP Insurance paid up a sum of **UGX 27,157,640/= (Twenty Seven Million One Hundred and Fifty-Seven Thousand Six Hundred and Forty Ugandan Shillings)** being the insured sum of the loan leaving a sum of **UGX 94,619,370/= (Ninety-Four Million Six Hundred and Nineteen Thousand Three Hundred and Seventy Uganda Shillings)** outstanding. The Plaintiff contends that UAP paid up the insured loan amount under a separate contract of insurance it has with the Plaintiff and the Defendant is not estopped from paying the outstanding balance merely because part of the loan was insured and that he still has an obligation to pay the outstanding balance.

Representation

At the hearing on 4th May 2021, the Plaintiff was represented by Najjuma Ellen and Afrah Mpungu while Lubega Willy appeared for the Defendant.

The Plaintiff and the Defendant presented one witness each that is PW1 (Sylvia Mugoya, the Plaintiff's Agency Manager) and DW1 (Mubuuke Jude, the Defendant).

Both parties filed written submissions as per the Court's directions. This Court has considered both sides' submissions in arriving at this Judgement.

Issues for Determination

The Parties' filed their Joint Scheduling Memorandum on 22nd December 2020 in which they agreed on the following issues for determination which have been adopted;

1. Whether there was breach of the Loan Agreement/ contract by the Defendant.
2. Whether the Plaintiff is entitled to recover the sums claimed in the Plaint from the Defendant.
3. What are the remedies available to the parties?

Resolution

Issue One: ***Whether there was breach of the Loan Agreement/ contract by the Defendant?***

From an evidential perspective, this being their case the Plaintiff has the burden of proving whatever allegations it brings against the Defendant and also justifying whatever amounts it is they seek. **Section 101(1)** of the **Evidence Act Cap 6** provides;

> ***101. Burden of proof***
>
> *(1) Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.*

Section 103 of the **Evidence Act Cap 6** further states;

> ***103. Burden of proof as to particular fact***
>
> *The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.*

Having said that, the crux of the Plaintiff's claim is that a Loan Agreement was executed with the Defendant which the Defendant subsequently breached by

failing to pay up on the outstanding sums. The Plaintiff's claim is that under **clause 8** of the Loan Agreement, the Defendant is required to pay the instalments required to repay his loan unless there is a mutual agreement to skip a payment. The Plaintiff further relied on **clause 12** of the Agreement which provides that the Defendant would be in default under the terms of the Agreement if he does not pay an instalment in full by the instalment date (unless the Plaintiff agreed that he can skip an instalment) or where he does not comply with his obligations under the Loan Agreement or the Personal Customer Agreement. The Personal Customer Agreement was not adduced in evidence but the Loan Agreement was adduced as **PEXH1**. **Clause 13** of the Agreement provided for the consequences of default stating;

> *"If you default, we may end this Agreement by written notification to you requiring you to pay the whole outstanding balance of your Loan within [10] business days after the delivery of the notification, with continuing interest, Fees and Costs. On the expiry of this notification we may take steps to enforce our security."*

The Plaintiff presented one witness **PW1** (Sylvia Mugoya, the Plaintiff's Agency Manager) who testified on oath that the Defendant stopped making his monthly instalments on 28th February 2019 and that this is confirmed by **PEX2**, the Defendant's Loan Statement. The Plaintiff, therefore, averred that as a consequence of his non-payment, the Defendant had defaulted on his obligations under the contract thus amounting to breach of the Agreement.

The Defendant does not deny that he stopped making his monthly payments, in fact, he confirmed during cross-examination that he has never deposited any money on the account after the termination of his job. Since it is not in dispute that the parties executed a Loan Agreement and that the Defendant defaulted on the repayment, the Plaintiff argued that the Defendant had breached the contract.

A contract is defined under **section 10** of the **Contracts Act, 2010** as an agreement made with the free consent of the parties with the capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

The Court in **JARVIS v Moy Davies Smith, Vanderrel & Co. [1936] 1KB 399 at 404** stated that *"a breach of contract occurs where that which is complained of is breach of duty arising out of the obligation undertaken under the contract."* The Plaintiff also relied on **Gagawala Nursery Bed v Busginye Properties Ltd HCT-**

00-CC-96-2011 where it was held that, the failure by the Defendant to make payments as provided under the contract constituted breach of the contract by non-performance of its part of the contract.

In my view this issue is simple to resolve, the Defendant breached the Loan Agreement he had with Barclays Bank U Ltd when he failed to pay up on his loan instalments as per the terms of the Agreement. The argument the Defendant's counsel sought to rely on concerning the fact that Barclays Bank was the party to the Loan Agreement and not the Plaintiff does not hold water in my view, considering it is now public knowledge that the business and banking operations of Barclays Bank were taken over by the Plaintiff which assumed control of its assets and took on its liabilities. This is something, being public knowledge that I have taken Judicial Notice of and therefore the relationship between the Plaintiff and Barclays Bank U Ltd did not need to be proven or justified in this case to establish the Plaintiff's locus in bringing this suit.

It was also not necessary, as the Defendant's counsel tries to argue, for the Plaintiff to prove that this particular Loan Agreement was amongst those the Plaintiff took on since it is general knowledge and common commercial practice that when a Bank transfers its business operations to another entity, outstanding loans which are due and owing to it are also transferred in that process, unless those assets and liabilities are expressly excluded, which has not been shown to be the case here. The loan, in this case, is an ordinary personal loan that was taken out by the Defendant, I have no reason to believe, nor have I been presented with evidence to this effect, that it was not among those existing outstanding loans that were transferred to the Plaintiff when it took over the business of Barclays Bank (U) Ltd.

I thus resolve this issue in the affirmative with a finding that, in failing to pay up on his outstanding loan demands, the Defendant breached the Loan Agreement in question and the Plaintiff, having taken on the business of Barclays Bank (U) Ltd has the right to claim against the Defendant under the Loan Agreement.

Issue Two: ***Whether the Plaintiff is entitled to recover the claimed in the Plaint from the Defendant?***

This issue hinges on the extent of the Defendant's liability in light of the fact that the Bank exercised its discretion and took out insurance against the Defendant's retrenchment, which retrenchment subsequently occurred. On this issue, the

Agreement he entered into with Barclays Bank (U) Ltd was insured against, death, disability, and retrenchment under **clause 10** of the Loan Agreement. The mentioned clause reads as follows;

> *10. Insurance*
>
> *We may at our own discretion take out insurance on your behalf (to insure against the possibility of your death, disability or retrenchment during the term of this Agreement). This amount will be deducted from your loan amount.*

The Defendant thus sought to argue that when Barclays Bank (U) Ltd exercised its discretion and took out insurance, it was incumbent on the bank to ensure that the money was deducted from the Defendant's account to pay for the insurance and that the risks which were agreed upon catered for the Defendant's retrenchment, among other things. Because the above clause provides that the bank would take out insurance to cover those risks which might ensue during the term of the Agreement, the Defendant sought to argue that the insurance was to cover the entire Agreement (and thereby cover the entire loan amount) and not any less or more. Hence the Defendant's claim is that he cannot be held liable when his failure to repay the loan was as a consequence of his retrenchment, since the loan was insured against this anyway and the Bank had exercised its discretion to take out insurance for the Defendant's retrenchment.

I have read the Loan Agreement. As a starting point, the security described in the loan agreement is the Defendant's salary, this means that the loan payments were to be paid out of the Defendant's salary directly but that does not necessarily mean, as the Defendant sought to argue, that when the Defendant was no longer employed, his obligation to pay up his loan instalments automatically disappeared. Security does not alleviate liability where that security is no longer available.

I have also noted that in Re-Examination, **PW1** explained that the Bank had a separate agreement with UAP Insurance and that the money paid for insurance came from the Bank's pocket and not the customer. She further stated that this is indicated from the fact that after the Bank disbursed the loan amounts the Loan Statement usually indicates the amount of money that has gone to insurance if any. Looking at the Loan Statement (**PEX2**) there are a number of transactions indicating UAP, specifically, the Defendants account was first credited on 27th December 2018 with a transaction that is indicated as "**UAP Dec18 Mubuuke Jude**" to the tune of **UGX 2,715,764/=**, a similar transaction

is indicated as having happened on 28th February 2019 as **"UAP Feb19 JUDE MUBUUKE"** for the same amount. The same UAP payments are indicated on 28th March 2019, 30th April 2019, 30th May 2019, 29th June 2019, 31st July 2019, 30th August 2019, 30th September 2019, with the final one on 20th November 2019 reflected as **"UAP Oct19 Mubuuke Jude"**. The final payment indicated on the statement which was made by the Defendant was on 4th February 2019 reflected as **"LN PYT 6005446897 JUDE MUBUUKE"**, no payments are indicated as having been made from the Defendant after that. It is also safe to presume, from reading the statement that no further payments were made by UAP after October 2019.

It is established law that parties to a contract are bound by the contents of that contract and evidence cannot be admitted (or even if it is admitted, it cannot be used) to add to, vary or contradict a written instrument. This is the parol evidence rule, it is a principle which is derived from **sections 91** and **92** of the **Evidence Act Cap 6** which provide as follows;

> ***91. Evidence of terms of contracts, grants and other dispositions of property reduced to form of document***
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> *When the terms of a contract or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence, except as mentioned in section 79, shall be given in proof of the terms of that contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained.*
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> ***92. Exclusion of evidence of oral agreement***
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> *When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to or subtracting from its terms; but—*
>
> *(a) any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto, such as fraud, intimidation, illegality, want of due execution, want of capacity in*

any contracting party, want or failure of consideration or mistake in fact or law;

(b) the existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering whether or not this paragraph applies, the court shall have regard to the degree of formality of the document;

(c) the existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved;

(d) the existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property may be proved, except in cases in which that contract, grant or disposition of property is by law required to be in writing or has been registered according to the law in force for the time being as to the registration of documents;

(e) any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description may be proved if the annexing of the incident would not be repugnant to, or inconsistent with, the express terms of the contract;

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.

In light of the above provisions, I am confined to what is contained in the Loan Agreement to determine exactly what was agreed upon between the parties unless and except one of the exceptions listed under **(a)** – **(f)** above apply. In ***Fenekasi Semakula v E SMS Mulondo [1985] HCB 29*** it was found that parties to a contract are bound by that contract and that no other evidence can be substituted for the written contract.

The key clause, in this case, is **Clause 10** which provides for insurance. On a simple reading of the clause, it states that the Bank may take out insurance at its own discretion on the Defendant's behalf, the clause provides that this amount **"will be deducted from your loan amount"**. In other words, the money paid for the insurance was taken from the **UGX 110,950,000/=** the Defendant borrowed from the Bank. The costs of covering insurance were not to be paid by any other external source other than the loan amount itself as per **clause 10** of the contract.

The contract, and more specifically **clause 10**, does **not** detail the extent to which this insurance would be taken out, only that the bank may exercise its discretion to do so. I disagree with the Defendant where he argues that, based on **clause**

10, the insurance was to cover the whole Agreement and therefore whole loan amount. There is nothing, in reading clause 10 that indicates this. Clause 10 provides that insurance may be taken out on the Defendant's behalf by the Bank **"to ensure against the possibility of your death, disability or retrenchment during the term of this Agreement"**. This means that the insurance was to cover against the possibility of the Defendant's death, disability, or retrenchment that may arise during the term of the Agreement (during the 6 years), not that the insurance itself was to cover the full loan amount for the full duration of the loan period. The extent of this coverage is not stipulated in the clause itself and is therefore left ambiguous. The fact that the insurance would be taken out is also not clear or guaranteed reading clause 10 because it states that the decision on whether or not to take out insurance was left to the Bank's discretion. Considering the ambiguity of clause 10, this is one of the instances in which extrinsic evidence could have been adduced to confirm/ clarify exactly what ensued in this case. **Section 93** of the Evidence Act provides for the use of evidence to explain or amend ambiguity in a document. It provides as follows;

> ***93. Exclusion of evidence to explain or amend ambiguous document***
>
> *When the language used in a document is, on its face, ambiguous or defective, evidence may not be given of facts which would show its meaning or supply its defects.*

The Plaintiff in this case did not provide the insurance contract that was entered into between itself and UAP which would have helped to elucidate on the extent of the insurance cover, however in Re-Examination **PW1** stated on oath that UAP's insurance covered 10 months instalment and that, to this effect, the Bank only received **UGX 27,157,640/=** (Twenty Seven Million One Hundred and Fifty Seen Thousand Six Hundred and Forty Uganda Shillings). The UAP payments listed in the Loan Statement constitute 10 instalments, thereby supporting the **PW1**'s claim that the insurance arrangement with UAP was only with respect to 10 months and not the full loan amount.

In the Plaintiff's Submissions in Rejoinder the Plaintiff's counsel sought to argue that this burden was not on the Plaintiff to present its contract with the insurance company and had the Defendant been interested in inspecting and using the insurance contract between the Bank and the insurance company, he should have applied to be availed with it but he did not. Counsel for the Plaintiff argued that the issue of insurance was raised by the Defendant in his defence and therefore that it was incumbent on him to prove his allegations.

I do not agree with the Plaintiff's counsel on this argument. At the end of the day, this is the Plaintiff's case and therefore they have the burden of proving their case to the applicable standard as highlighted earlier under **sections 101** and **103** of the Evidence Act. If the Plaintiff is claiming **UGX 94,619,370/=** it is incumbent on the Plaintiff to explain and justify the basis for every shilling they claim is due and owing to them by the Defendant. It is not the Defendant's obligation to prove or justify the extent to which the loan was insured considering it was not privy to the agreement between the Bank and the Insurance Company. The Defendant, in any event, can only rely on what he claims was represented to him at the time of entering into the Loan Agreement, which (he claims) is that the full loan amount was to be insured against, amongst other things retrenchment. If the Plaintiff is saying the insurance covered only a portion of the loan amount and not the full loan amount and the remaining amount ought to be paid by the Defendant then it ought to have clearly made out its case on this point.

In arguing against the Plaintiff's assertions, the Defendant stated in **paragraph 4(vi)** & **(ix)** of his Written Statement of Defence, **paragraph 10** of his Witness Statement and again during examination on oath that one of Barclays Bank's officers, Mr. Amukun Dennis confirmed and presented to him that the insurance was to cover the full loan amount before the Defendant signed the agreement in 2017. In **paragraph 10** of his witness statement he says;

> *"10. I inquired from the said Amukun Denis as to whether the said loan would be insured to cover death, disability, or retrenchment during the term of the loan period, and he represented and assured me that the said loan was to be fully insured to fully cover for all the three risks I had raised as my concerns."*

Because the extent of the insurance cover is not provided in **clause 10**, and in light of what I have highlighted concerning the parol evidence rule, I cannot rely on the Defendant's oral account to fill in the gaps on the terms of his agreement with the Plaintiff. I have to look within the contract itself and not further than this for what was actually agreed between the parties. What is clear to me, going off of the contract alone, is that the Bank exercised its discretion under **clause 10** to take out insurance against the Defendant's retrenchment when the retrenchment occurred. The extent to which they did so could have been more clearly confirmed had the Plaintiff adduced the agreement it had with UAP for coverage of this Loan, but in light of the fact that the Plaintiff chose not to, I am left to rely on the information provided in the Loan Statement which indicates

the 10 payments that were made by UAP Insurance between December 2018 and October 2019.

Unfortunately for the Defendant, the parol evidence rule requires that I consider only the contract itself and any other supporting documentary evidence that is adduced to clarify what is otherwise ambiguous in **clause 10**. I can not rely on an account of statements that were allegedly made by a bank official in 2017 who has not been presented as a witness, not only because this offends the parol evidence rule but also because it amounts to hearsay evidence which cannot be relied on. As I said earlier, there is nothing, on reading **clause 10** itself that states or implies that the insurance would be taken out to cover the full loan amount. If any extrinsic evidence was to be adduced to elucidate on the extent of this insurance by the Defendant, he ought to have gone beyond merely asserting what, he claims, was said to him. His account, therefore, does not hold up in light of the Loan Statement that was presented by the Plaintiff and in light of the fact that **clause 10** states that taking out this insurance was left to the Plaintiff's own discretion.

The mentioned Loan Statement reflects the assertions that were made by **PW1** is as far as the insurance only covered 10 months constituting a total payment of **UGX 27,157,640/=** by the insurance company. On this basis, on a balance of probabilities, I am inclined to find in favour of the Plaintiff that what they asserting is, in fact true. The Loan Statement indicates that because of the outstanding amounts on the loan and the accruing interest the Defendant's debt stood at **UGX 94,619,370/= (Uganda Shillings Ninety Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only)** on the 2nd of June 2020.

Having made out their case to a satisfactory standard on the balance of probabilities, I am inclined to find in favour of the Plaintiff and thus resolve this issue with a finding that the Plaintiff is entitled to recover the sums it claims from the Defendant including interest on the outstanding sum, general damages, and costs in this suit.

Issue Three: What are the remedies available to the Parties?

The Plaintiff sought the following remedies in the Plaint;

a) A declaration that the Defendant defaulted in the repayment of his loan obligation amounting to **UGX 94,619,370/= (Uganda Shillings Ninety**

Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only) as per the loan statement.

b) An Order for the recovery of **UGX. 94,619,370/= (Uganda Shillings Ninety Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only)** being the outstanding loan balance as per the loan statement.
c) General damages.
d) Interest on the outstanding loan amount at a commercial rate.
e) Costs of the suit.

Having resolved issues 1 and 2 as I have, I find that the Plaintiff's case succeeds as it has presented the basis for which it claims the amounts it seeks as due and owing from the Defendant. I thus make the following orders and declarations;

Conclusion:

1. The Defendant breached his contract with the Plaintiff and defaulted in the repayment of his loan obligation amounting to **UGX 94,619,370/= (Uganda Shillings Ninety Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only)** as per the loan statement.
2. The Defendant is hereby ordered to pay the outstanding amounts due **UGX 94,619,370/= (Uganda Shillings Ninety Four Million Six Hundred and Nineteen Thousand Three Hundred Seventy Only)** within 6 months from the date of this Judgement.
3. The Defendant will pay interest on the outstanding loan amount at the rate of 12% per annum from the 2nd of June 2020 until payment in full.
4. The Plaintiff is hereby awarded General Damages to the tune of **UGX 5,000,000/= (Five Million Uganda Shillings)**.
5. Costs are awarded to the Plaintiff.

I so order.

Jeanne Rwakakooko
JUDGE
12/04/2022

This Judgment was delivered on the 12th day of April, 2022