THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 435 OF 2019

1. **LINDA MUTESI SEKAZIGA**
2. **BOB MUGISHA** ..... **PLAINTIFFS**

VERSUS

1. **ELEMENTAL ENERGY LIMITED**
2. **ROLAND SEKAZIGA** ..... **DEFENDANTS**

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

Introduction

The Plaintiffs brought this suit against the 1st Defendant a limited liability company duly incorporated under the laws of Uganda, and the 2nd Defendant the Managing Director, and shareholder of the 1st Defendant, for breach of the Non-Disclosure Agreement seeking the following reliefs: declarations that the 1st Defendant is a corporate shield of the 2nd Defendant, and is a sham employed by the 2nd Defendant to defraud the Plaintiffs, and that the 2nd Defendant unjustly enriched himself to the detriment of the Plaintiffs; Orders that the veil of incorporation of the 1st Defendant be lifted to render the 2nd Defendant personally liable for money due to the Plaintiffs, and the recovery of USD 500,000(United States Dollars Five Hundred Thousand only) from the Defendants jointly and severally as money had and received from the Plaintiffs; aggravated and general damages, interest, and costs.

Facts

The facts agreed upon during the scheduling proceedings were that:

a) The 1st Defendant is a limited liability company duly incorporated under the laws of Uganda engaging in the business of developing, acquiring, owning and, or operating electricity and renewable energy projects.

b) On 15th September,2011, the Electricity Regulatory Authority(ERA) of Government of Uganda granted the 1st Defendant the permit, and exclusive rights to undertake the necessary studies, and activities in connection with the generation, and sale of electricity from the Nyamabuye Hydro Power Project site in Kisoro District (hereinafter referred to as "the project").

c) On 7th October, 2016, the ERA issued the 1st Defendant with a Generation, and Sale Licence No. ERA/LIC/GEN/016/146(hereinafter referred to as the "licence") to construct, own and operate a 7.0 MW Hydro Power Project along river Kaku in Busanza sub county in Kisoro District with a licence term of Twenty-Two (22) years, and Six (6) months.

d) As part of the process to mobilise some of the equity finance requirement for the project, sometime in the first half of 2016, the 1st Defendant held discussions with the Plaintiffs to discuss the prospect of them participating in the mobilisation of funding for the project.

e) On 3rd May, 2016, the Plaintiffs, and the 1st Defendant signed a Non-Disclosure Agreement to protect the confidentiality of information of the 1st Defendant and the project.

The Plaintiffs brief facts giving rise to the cause of action against the Defendants jointly, and severally, in which they seek reliefs mentioned above, are that the 1st Defendant is a corporate shield of the 2nd Defendant deployed as a sham to defraud the Plaintiffs. That the 2nd Defendant incorporated the 1st Defendant as a smoke screen to defraud the Plaintiffs of their money, and that in a bid to enrich himself, the 2nd Defendant created a scheme to defraud the Plaintiffs, and the other unsuspecting members of the public. That on 3rd May, 2016, the Plaintiffs signed a confidential and non- disclosure agreement with the 1st Defendant represented by the 2nd Defendant, and that on 17th May, 2016, the 2nd Defendant presented to the Plaintiffs what he called an "Investment proposal" to raise money, purportedly to finance the Hydro Power Project. That within the so - called investment proposal, the 2nd Defendant made several fraudulent misrepresentations which he knew were false, with the sole intention of defrauding the Plaintiffs of their money, and that the Defendants received cash equivalent to USD 500,000(United States Dollars Five Hundred Thousand only) from the Plaintiffs.

The Defendants in their defence contended that pursuant to the company objectives, the 1st Defendant through its officers, including the 2nd Defendant identified a site in Kisoro District for the purpose of developing a Hydro Power

Energy Project. That given the capital requirements of the project, the 1st Defendant reached out to several parties seeking equity and, or debt finance for the project. That after signing a non-disclosure agreement with the Plaintiffs to protect the 1st Defendant's proprietary and confidential information, the Defendants commenced discussions about the possibility of the Plaintiffs' investing in the project. That the Defendants presented an investment proposal with a funding requirement of USD 1,720,000(United States Dollars One Million Seven Hundred Twenty Thousand only) to the Plaintiffs, who agreed to invest the said amount in the project, and to be bound by the Non- Disclosure Agreement having been satisfied with the viability of the project, and deposited money on the 1st Defendant's account totalling to USD 500,000.

That this was far short of the promised USD 1,720,000, and that all the deposits were made to the 1st Defendant, and not to the 2nd defendant as alleged by the Plaintiffs. That despite the shortfall of further funding from the Plaintiffs, the Defendants kept their side of the bargain with the Plaintiffs by updating them on the progress, and activities of the project. That the 1st Defendant reached out to prospective equity partners, and kept the Plaintiffs abreast of these developments. That the 1st Defendant has suffered delays in the execution, and completion of the project as a result of several factors, including but not limited to the Plaintiffs failure to meet their end of the bargain when they refused to make their respective investment decisions.

The Counterclaimants claim against the Defendants by counterclaim, jointly and severally is for breach of the Non- Disclosure Agreement dated 6th May, 2016 between the Counterclaimants, and the Defendants by counterclaim; tortious and unlawful interference with the Counterclaimants' economic interests, and contractual relations to seek the following reliefs: declarations that the Defendants by Counterclaim breached the Non- Disclosure Agreement , and tortuously and unlawfully interfered with the economic interests of the Counterclaimants; a permanent injunction restraining the Defendants by Counterclaim, their agents, servants, representatives, or any person acting for, under or through them from interfering with the Counterclaimants' economic interests, and contractual relations; a permanent injunction restraining the Defendants by Counterclaim, their agents, servants, representatives, or any person acting for, under or through them from inducing third parties to interfere with the Counterclaimants' economic interests, and contractual relations; general damages, and costs of the counterclaim.

Representation

The Plaintiffs were represented by Counsel David Kaggwa of M/S Kaggwa & Kaggwa Advocates while Counsel Abaasa Fixson jointly with Counsel Asingwire Martin of M/S AF Mpanga & Co. Advocates appeared for the Defendants, and Counsel Shane Musanase jointly with Counsel Jamina Apio of M/S Apio, Byabazaire, Musanase & Co Advocates were co- Counsel.

Issues for determination

The issues agreed upon for the determination of Court are as follows: -

1. Whether the Defendants committed acts of fraud against the Plaintiffs? If so, whether there are grounds for lifting the 1st Defendant's veil of incorporation?
2. Whether the Defendants are indebted to the Plaintiffs in the sum of USD 500,000?
3. Whether the Plaintiffs are liable to the 1st Defendant for unlawful interference with their contractual relations?
4. Whether there are any remedies available to the parties.

Evidence

Counsel for the parties herein, were directed to file witness statements, which they complied with. During hearing, the witnesses identified their statements, and the same were adopted on record as their evidence in chief.

Linda Mutesi Sekaziga the 1st Plaintiff (hereinafter referred to as "PW1") an Advocate of the Courts of Judicature, and holder of Power of Attorney to act on behalf of the 2nd Plaintiff testified that the 2nd Defendant established and incorporated a company known as Elemental Energy Limited (EEL)as a special purpose vehicle (SPV) with a purported goal to plan, develop and operate a project known as the Nyamabuye Hydro Power Project (NHPP)on river Kaku in Kisoro District. That the 2nd Defendant in a bid to unjustly enrich himself under the mask of the project above, run under the 1st Defendant created a scheme to defraud the Plaintiffs.

PW1 further testified that on 5th May, 2016, the Plaintiffs, and the Defendants represented by the 2nd Defendant signed a confidential and non-disclosure agreement, and that pursuant to clause 9 of the non-disclosure agreement, it was to lapse after 24 months from the date of execution, and indeed it lapsed on 4th May, 2018. That on 17th May, 2016, the 2nd Defendant presented an investment

proposal to raise money purportedly to finance the Hydro Power Project, and that within the so called "investment proposal", the 2nd Defendant made several misrepresentations, which he knew were false, with the sole intention of defrauding the Plaintiffs of their money. A copy of the agreement is attached as Annexture "A", and marked PE1.

PW1 stated that the 2nd Defendant misrepresented within the impugned "investment proposal", that with their financial investment into the 1st Defendant, they would be entitled to 20% ownership of the 1st Defendant with an annual return on investment of 21.2 %, and a payback period of 7 years. That in an email dated 19th September, 2016, the 2nd Defendant further misrepresented to the Plaintiffs that Nyamabuye Hydro Power Project (NHPP)was in the final period of the development phase, and that this was and is an absolute falsehood. A copy of the investment proposal is attached as Annexture B, and marked PE2.

PW1 further stated that the 2nd Defendant made several fraudulent misrepresentations in the said investment proposal, and that in 2016, the Plaintiffs innocently acted on the 2nd Defendant's misrepresentations, and advanced a total sum of USD 500,000(United States Dollars Five Hundred Thousand only) to the Defendants as an investment. That all the contents of the "investor update" were false, and all the events as stated therein were never achieved by the 2nd Defendant who actively misused the 1st Defendant as vehicle to perpetuate his fraudulent scheme, and that the 1st Defendant has not made any significant progress on the project since 2016.

PW1 further testified that the Plaintiffs in the months of June, and October, 2018, wrote to the Defendants through their Lawyers, demanding for full disclosure of all financial, and legal information relating to the 1st Defendant but the 2nd Defendant ignored the said demand. That the 2nd Defendant has acted in a fraudulent and dishonest manner by using the 1st Defendant company as a shield to perpetuate his fraud, and unjustly enrich himself.

It was the evidence of Adam Kakande(PW2), a certified Public Accountant that he received instructions from the 1st Plaintiff through their lawyers Kaggwa & Kaggwa Advocates to carry out a verification of the financial statements of Elementary Energy Limited, and that he made a comprehensive report attached as Annexture "A" to the supplementary trial bundle, and marked PE33.

PW2 further stated that he applied the International Financial Reporting Standards of 2016, which was effective, and that he found there were errors in the audit report, in which the Board of Directors of Elemental Energy Limited are

responsible, based on Annex 2 (Audited Financial Statements of EEL) attached to the report.

The Defendants adduced the evidence of 4(Four) witnesses namely; Angella Shyaka the General Manager of the 1st Defendant(DW1), Rachael Kenganzi the Manager(Finance) to the 1st Defendant(DW2), Martin F. Sekaziga a Certified Public Accountant, and Consultant with the 1st Defendant(DW3), and Roland Sekaziga the 2nd Defendant(DW4).

DW1 testified that the main business of the company includes planning, developing, acquiring, owning, and, or operating electricity and renewable energy projects. That on 15th September, 2011, the 1st Defendant was granted a permit by the Electricity Regulatory Authority (ERA) to carry out studies, and development activities along the river Kaku in connection with the generation, and sale of electricity from the proposed Nyamabuye Hydropower Project site in Kisoro District. A copy of the permit by ERA is attached, and marked DE3.

DW1 further testified that on 7th October, 2016, the ERA approved the issuance of Licence No. ERA/LIC/GEN/016/146 to the 1st Defendant to generate and sell electricity from the proposed Project, and that it became necessary for the 1st Defendant to mobilise financing to implement the project. That the 1st Defendant engaged several prospective Equity, and Debt Partners, and Financiers including Individuals, Companies, Funds, Financial Institutions, Local and International Commercial Banks, Development Finance Institutions (DFIs), Export Credit Agencies(ECA), and Debt Finance Guarantee Institutions (DGIs).

DW1 further stated that the Plaintiffs were some of the prospective investors that the 1st Defendant engaged to invest in the project, and that sometime in October, 2016, she received USD 300,000 (United States Dollars Three Hundred Thousand only) from the 1st Plaintiff, and she sent an acknowledgement of the receipt of the USD 300,000 to the Plaintiffs on 11th October, 2016, and that as the General Manager of the 1st Defendant, she confirms that the 1st Defendant is a genuine business engaged in energy related services including the Nyamabuye Hydropower Project, and not a sham as alleged by the Plaintiffs.

DW2 stated that she was, and continues to be part of the 1st Defendant's team that engaged in the mobilisation of financing required for the planning, and development of the project, and that the 1st Defendant upon obtaining professional advice prepared specific criteria for prospective investors to establish their financial capability, and purpose for investment in the project. These included: Execution of a Non-Disclosure Agreement (NDA) with the 1st Defendant,

and each potential investor; provision of a statement, and proof of financial capability and purpose for investment in the project; provision of bankable and satisfactory Know Your Customer(KYC) information, and Anti Money Laundering (AML) information by each potential investor; and preparation of a non- binding investment proposal.

DW2 further stated that as the finance manager, she is certain that the Plaintiffs deposited USD100,000 (United States Dollars One Hundred Thousand only) on the 1st Defendant's account on 7th June, 2016, a further USD 100,000 (United States Dollars One Hundred Thousand only) on 26th August, 2016, and USD 300,000(United States Dollars Three Hundred Thousand only) in cash, which was deposited by DW1 onto the 1st Defendants account on 7th October, 2016, and that the said payments were only made to the 1st Defendant, and not the 2nd Defendant as alleged by the Plaintiffs. That these payments were utilised for the business of the 1st Defendant.

DW2 testified that due to the inconsistent communications from the Plaintiffs, and or failure to formalise their relationship with the 1st Defendant, the Plaintiffs investments have been recorded in the 1st Defendant's book of accounts as a convertible loan based on the 1st Defendant's internal processes and engagements with the Plaintiffs. That the 1st Defendant has maintained a clean record and book of accounts which have been audited by independent auditors and continues to maintain financial freedom from any of its Directors, and that as such, any allegations that the 1st Defendant is a sham or smokescreen are false, and completely unfounded. A copy of the receipt of audited financial statements of the 1st Defendant by the Plaintiffs is attached, and marked DE32.

DW3 stated that as a Certified Public Accountant, and part of the finance team of the 1st Defendant, he is aware that the 1st Defendant has engaged, and held discussions with a number of debt providers for the proposed 7MW Nyamabuye Hydropower Project, and that over the past six years, the 1st Defendant has kept independent audited financial statements which have been verified by external certified public accountants, and auditors to confirm that the financial information presented by management is in accordance with international financial reporting standards, and that these audited accounts have been provided to the Plaintiffs, and marked PE20 in their supplementary trial bundle.

DW4 testified that in June, 2015, the Uganda Electricity Transmission Company Limited (UETCL), and the 1st Defendant negotiated, agreed and initialled the hydropower power purchase Agreement that had been standardised by ERA

(hereinafter referred to as the "Standardised "PPA"), and that on 14th September, 2016, ERA approved the initialled Standardised PPA, and UETCL signed the approved Standardised PPA on 9th December, 2016. A copy of the Standardised PPA was marked as DE23.

DW4 further testified that the Government of Uganda represented by the Ministry of Energy and Mineral Development (MEMD) signed and executed the implementation Agreement of the 1st Defendant on 21st December, 2016. That in June, 2018, Frontier Energy II Beta, C/O Bech-Bruun Law firm, Langelinie Alle 35 100 Copenhagen Denmark, hereinafter referred to as "Frontier Energy", and the 1st Defendant reached an agreement that allows Frontier Energy to invest all the outstanding equity finance required to develop and implement the project.

DW4 stated that the activities of the 1st Defendant are within the goals and objectives of both the Energy Policy of Uganda, and the Renewable Energy Policy of Uganda that have been approved by cabinet and declared by the Government of Uganda. That upon execution of the Non- Disclosure Agreement, the Plaintiffs requested the 1st Defendant to provide them with an investment proposal, and the 1st Defendant in response forwarded the investment proposal dated 17th May, 2016 ("the non- binding proposal) to the Plaintiffs. That without communicating their comments or decisions on the non- binding investment proposal, the Plaintiffs deposited USD 100,000 on 7th June, 2016, USD 100,000 on 26th August, 2016, and USD 300,000 on 7th October, 2016 with the 1st Defendant, and that the 2nd Defendant has never received any money from the Plaintiffs.

DW4 further stated that following the payments above, to the account of the 1st Defendant, the Defendants persistently contacted the Plaintiffs to take reasonable, and necessary steps to disclose the source of funds and formalise their relationship with the 1st Defendant, but to date the Plaintiffs have failed and, or refused, and, or ignored, and, or neglected to provide the required information. That at all material times, during the investment phase and discussions with the Plaintiffs, the 1st Defendant has maintained communication with the Plaintiffs, and extended courtesy to the Plaintiffs by providing timely information, reports, and updates about the project.

DW4 further testified that on 12th November, 2018, the 1st Defendant shared a copy of the Investment Agreement with the Plaintiffs, and that at all material times, the 2nd Defendant has never presented information to the Plaintiffs as a smokescreen or created a scheme to defraud the Plaintiffs, and, or the public as claimed by the Plaintiffs. That the 2nd Defendant has always engaged with the

Plaintiffs not in his personal capacity but as the Director, and employee of the 1st Defendant, and for, and on behalf of the 1st Defendant only. That the 2nd Defendant has not made any fraudulent misrepresentations or put money to his personal use as alleged by the Plaintiffs or at all. That the Plaintiffs have failed to provide the cooperation that is required to formalise their relationship, and investment with the 1st Defendant.

Issue No. 1: Whether the Defendants committed acts of fraud against the Plaintiffs? If so, whether there are grounds for lifting the 1st Defendant's veil of incorporation?

It was submitted for the Plaintiffs that the Defendants obtained a sum of USD 500,000 through false misrepresentation. That the 2nd Defendant a qualified Civil Engineer with a speciality in energy, knew that the contents of the Investment proposal were false, and that he would never achieve financial close, and generate power by 2019. That at all material times, the 2nd Defendant knew that those statements were false, and yet the Plaintiffs relied on them to part with their money. That according to the investor update marked PE9, the Defendants had by 6th January, 2017 raised USD 1,536,000 from unsuspecting investors, and this money included the Plaintiffs investment.

Counsel further submitted that the falsehoods stated in the investor update presented by the 2nd Defendant were that: The Plaintiffs would earn a return on investment of 17% per annum on the money invested in the sum of USD 500,000; that the Plaintiffs investment would be USD 569,000 by financial close on 30th June 2017, and that the Plaintiffs' ownership in the project would be 7.02 % on 30th June, 2017; that the project would achieve equity financial close, and debt financial close by June, 2017; and that the 1st Defendant would finalise the Engineering, Procurement and construction contracts(EPC)by June 2017

The Plaintiffs' testimony was that they have never earned any benefit from their investment; the 2nd Defendant has never transferred any shares to the Plaintiffs in consideration of their investment; the so called financial close has never been achieved, and no EPC contractor has ever been engaged, and that the 2nd Defendant replied to the 1st Plaintiff's mail on 12th April, 2018 giving general information without specifically answering the queries raised. That the 1st Defendant has not made any progress on the project since 2016, and that the Electricity Regulatory Authority on 7th May, 2019, confirmed the fraud perpetuated by the 2nd Defendant through his sham company the 1st Defendant

when they rejected the 1st Defendant's application for modification of the licence for reasons stated therein, a copy of the letter was marked PE 14.

Counsel for the Defendants submitted that all future events stated in the proposal were not facts but expectations, assumptions, projections and, or estimates based on the Plaintiffs' providing the entire investment amount of USD 1,720,000, and not USD 500,000. That the Plaintiffs allegations are false, and made in bad faith because the information in the proposal was hinged on conditions to be met by the Plaintiffs to provide the entire USD 1,720,000, and that the facts presented by the Defendants to the Plaintiffs were honest, true, and transparent, and in the best interest of the project, as such the 1st Defendant is not a sham.

The Defendants evidence was that they provided the Plaintiffs with an investment proposal for their consideration, and that the Plaintiffs appointed Mr. Kenneth Legesi as their investment advisor to conduct independent due diligence on the 1st Defendant before they disbursed any monies to the 1st Defendant, and that the Plaintiffs made an informed decision to invest in a viable project, and not a sham as alleged. That the 1st Defendant provided numerous project documents, and updates including information memoranda as well as reminders to the Plaintiffs to make their preferred investment decision. That copies of updates to the Plaintiffs are marked DE25, and reminders are marked DE15, and DE17.

Decision

Fraud was defined in the Supreme Court authority of ***Fredrick J. K Zaabwe Vs Orient Bank & others, Civil Appeal No. 4 of 2006*** where Katureebe. JSC (as he then was) stated that the definition of fraud in Black's Law Dictionary 6th Edition at 660 is very illustrative;

> *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury. Anything calculated to deceive, whether by single act or combination, or by suppression of truth, or suggestion of what is false, whether it is by direct falsehood or innuendo a generic term embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual to get advantage over another by false suggestions or by suppression of truth ... and unfair*

way by which another is cheated, ... As distinguished from negligence, it is always positive, intentional. It involves all acts ... involving breach of legal duty or equitable duty resulting in damage to another."

It's a well-established principle that fraud must be proved strictly, the burden being heavier than on a balance of probabilities generally applied in civil matters. **(See the case of *Kampala Bottlers Vs Damanico (U) Ltd S.C.C.A No. 22 of 1992)***

I have looked at the Non- Disclosure Agreement relied upon by both the Plaintiffs and the Defendants in evidence, and marked PE 1, and DE4 respectively dated 5th May, 2016, executed between Elemental Energy Limited "the First Party", and Mr. Bob Mugisha and Linda Mutesi Sekaziga "the Second Party", and find that it was a working document for the parties therein to facilitate further discussions in relation to the 7.0 MW Mini Hydro project in Kisoro.

The investment proposal dated 17th May, 2016 marked PE2, and DE6 respectively, has been considered, and it indicates in the project status that the project definition phase was complete, and that the Elemental Energy Limited(EEL) had secured the requisite permits from the relevant statutory agencies, and the implementation phase was underway.

The project implementation schedule was described in 7 phases to include: Definition, with the commencement date of February, 2011, and completion in May, 2015; Finalisation of Studies, the commencement date was October, 2014, and completion in June, 2015; Project Management and Packaging, the commencement date was October, 2014, and completion in June, 2015; Financial Close, the commencement date was April, 2016, and completion in October, 2016; Mobilisation, the commencement date was November, 2016, and completion in December, 2016; Construction, the commencement date was January, 2017, and completion in October, 2018; and commissioning the commencement date was November, 2018, and completion in December, 2018.

The investment performance was based on the following assumptions; a proposed ownership of 20% of the ownership of the project company; a minimum direct equity investment amount of USD 1,720,000; the Weighted Average Cost of Capital (WACC) is the minimum required rate of return; and that this is a long-term investment for the period of the Power Purchase Agreement(PPA)

I have also looked at the copies of correspondences marked DE15, from the Defendants requesting the Plaintiffs to formalise their investment with the 1st Defendant, and the response by the 1st Plaintiff in a correspondence marked

DE16 dated 21st February, 2017, and find that the investment proposal was non-binding upon the Plaintiffs however, it would be binding, if they satisfied all the prerequisites for them to invest in the project, and invested in the project. The Plaintiffs chose to invest in the project without formalising their relationship with the Defendants, and therefore the investment proposal was binding upon them and the Defendants.

Section 20 of the Companies Act, 2012 provides that;

Lifting the corporate veil

"The High Court may, where a company or its directors are involved in acts including tax evasion, fraud or where, save for a single-member company, the membership of a company falls below the statutory minimum, lift the corporate veil." (Emphasis is mine)

In the case of *Uganda Revenue Authority Vs Cowi A/S Civil Appeal No. 034 of 2020,* cited by Counsel for the Plaintiffs, I am persuaded with the finding of the Court, where Mubiru. J held that;

> *"There are several circumstances under which the corporate veil can be lifted or pierced and shareholders or members may be directly held responsible. These include misrepresentation, fraud, misfeasance, or negligence by the members; failure to maintain clear and distinct division between assets of the company and personal assets of the members; siphoning of corporate funds; using the corporate shell for carrying out unlawful activities by the dominant shareholders; tax evasion etc... The whole concept of piercing the corporate veil is a device invented by the Courts to prevent abuse of corporate personality in a manner that adversely prejudices third parties or for the protection of public interest. However, the boundaries of the principle have not yet been defined and the areas where the principle may have to be applied may expand".*

It is my understanding that misrepresentation in general terms is a statement made prior to a contract which may either be false or misleading ***(See Avon Insurance Plc Vs Swire Fraser Ltd [2000] 1 ALLER (comm) 573***, and ***Nottingham Patent Brick & Tile Co. Vs Butler (1886) 16 QBD 778)***. The claimant has to show that he or she was induced by the misrepresentation to enter the contract. ***(see Smith vs Chadwick (1884) 9 App Case 187)***

In the circumstances of this case before me, I find that the presentation of the investment proposal by the Defendants to the Plaintiffs, was intended to enable the Plaintiffs to decide whether to invest on the project or not, or to make an informed decision on their level of investment. The moment the Plaintiffs decided to invest USD 500,000 without formalizing their relationship with the 1st Defendant, they impliedly accepted that the project was viable, and cannot allege that the Defendants fraudulent misrepresented to them, and as aresult, induced them to invest in the project.

For reasons above, I find that the Plaintiffs failed to adduce sufficient evidence to prove the allegation of fraud against the Defendants to the required standard.

This Court therefore, finds that no justifiable grounds have been adduced by the Plaintiffs to enable lifting of the corporation veil against the 1st Defendant, and to hold the 2nd Defendant liable to refund the Plaintiffs money.

In the result, this Court finds that the Plaintiffs have not proved that the Defendants committed acts of fraud against them.

With regard to the counterclaim, it was the evidence of the Counterclaimants that in a bid to mobilize the financing required to plan and develop the project, the 1st Defendant engaged several prospective equity and debt partners and financiers including individuals, companies, funds, financial institutions, local and international banks, and that generally acting on the advice of professional transaction and legal advisors, prospective investors were presented with similar investment procedures and requirements in order to establish their financial capability and purpose of investment in the project. That the procedures, and requirements included but were not limited to:

Execution of a Non- Disclosure Agreement (NDA) between the 1st Defendant, and each prospective investor; provision of a statement and proof of financial capacity by each prospective investor; provision of bankable and satisfactory Know Your Customer(KYC) information and Anti Money Laundering (AML) information by each prospective investor; provision of a non- binding investment proposal by the 1st Defendant to be presented to prospective investors, and that following receipt of the non- binding investment proposal, the prospective investor would either accept the terms of the non- binding investment proposal in writing , and, or provide written responses, and or present their own non - binding investment offer to the 1st Defendant. That the non- binding investment proposal

presented the Plaintiffs with up to date information about the project, and proposed some investment options that included to make a direct equity investment of USD 1,720,000 for ownership of 20% of the shareholding in the 1st Defendant at that time.

The counterclaimants further stated that if a prospective investor is not yet committed to becoming a shareholder in the 1st Defendant but would like the option to become a shareholder at a later stage, then the prospective investors' investment could be recognized as a convertible loan, and the terms of the loan agreement would be discussed, and agreed between the 1st Defendant and the prospective investor.

In reply to the counterclaim, it was the Counter Defendants' evidence that whereas as at December, 2016, they had invested a sum of USD 500,000 into the project, the 2nd Defendant did not disclose to them the so-called "equity partner", and that the 2nd Defendant has never procured the project Certificate of Title or compensated any of the project affected persons. That no construction has ever commenced, and yet the purpose of the investment was to be used towards financial close, construction, and commissioning, all of which have never started for now over four years.

Decision

The proposition of law is that, whoever alleges a given fact and wishes the Court to believe in the existence of any fact, has the burden to prove that fact unless, it is provided by law that the proof of that fact shall lie on another person. *(See sections 101-103 of the Evidence Act, Cap 6)*

In the instant case, the Counterclaimants' claim as above, against the Defendants by counterclaim is for breach of the Non- Disclosure Agreement dated 5th May, 2016. DW4 stated that the Counterclaimants executed a Non-Disclosure Agreement with the Defendants by counterclaim in line with the counterclaimants' investment procedural requirements, and that the Defendants by counterclaim have on several occasions disclosed various proprietary information regarding the Counterclaimants to third parties, however, these facts were not supported by cogent evidence to prove that the Defendants by counterclaim disclosed proprietary information to third parties, which actually affected the economic interests of the Counterclaimants in the project.

In the result, this Court finds that the Counterclaimants have not proved on a balance of probabilities the claim that the Defendants by counterclaim breached the Non- Disclosure Agreement.

Accordingly, the counterclaim is dismissed against the Counterclaimants with costs to the Defendants by counterclaim.

Issue No. 2: Whether the Defendants are indebted to the Plaintiffs in the sum of USD 500,000?

Counsel for the Plaintiffs submitted that it is not in dispute that the Plaintiffs paid USD 500,000 (United States Dollars Five Hundred Thousand only) to the Defendants, and that the Defendants are jointly and severally liable to the Plaintiffs in the sum of USD 500,000 as money had and received.

Counsel for the Defendants relied on the case of ***Hydro Engineering Services Co. Uganda Limited (HESCO) Vs Thorne International Boiler Services Ltd (TIBS) H.C.C.S No. 0818 of 2003,*** where Yorokamu Bamwine J. (as he then was), cited the renowned author on contracts: *Chitty on Contracts 25th Edition, Vol.1 para.1399* that:

"Entire and divisible contract. In an entire contract, complete performance by one party is a condition precedent to the liability of the other; in such a contract the consideration is usually a lump sum which is payable only upon complete performance by the other party. The opposite of an entire contract is a divisible contract, which is separable into parts, so that different parts of the consideration may be assigned to several parts of the performance, e.g. an agreement for payment pro rata. It is a question of construction of the contract whether it is entire or divisible, but in the reported cases... the Courts have tended to view that in every lump sum contract there is an implied term that no part of the price is to be recovered without complete performance. In most modern contracts of any size, however, payments by instalments are specified, so that the law on entire contracts is usually not relevant to them."

to submit that although the Plaintiffs contend that there was no formal acceptance of the proposal, and upon accepting to invest their money in the project, the proposal ceased to be non- binding, and became enforceable against the Defendants, which interpretation is disputed by the Defendants.

Counsel further submitted that the Plaintiffs have not provided the investment amount as per the proposal, and therefore not entitled to recover anything or such sum as it is not due under the terms of the proposal.

Decision

In the given circumstances of this case, I find that the Plaintiffs' choice to invest USD 500,000(United States Dollars Five Hundred Thousand only) without formalising their relationship with the Defendants, and the Defendants conduct upon receipt of the said money, made the investment proposal binding, and enforceable between the parties therein.

In construing the words in the investment proposal that:

"your investment will be directed towards the project implementation phase that covers activities of project packaging, financial close, construction and commissioning".

It is my considered view that the sum of USD 500,000(United States Dollars Five Hundred Thousand only) paid by the Plaintiffs to the Defendants, was meant to cater for the aforementioned project activities, and the total of USD 1,720,000(United States Dollars One Million Seven Hundred Twenty Thousand only) was the entire contract price to be invested by the Plaintiffs in the project. The nature of the contract price was therefore divisible, and the obligations by either party at each phase of the project was enforceable as such.

In the result, failure by the 1st Defendant to honour, and deliver their part of the bargain, amounts to breach of the terms of the investment proposal to the extent of the project activities above covered by the Plaintiffs investment of USD 500,000, (United States Dollars Five Hundred Thousand only), and for which the 1st Defendant is held liable.

Issue No. 3: Whether the Plaintiffs are liable to the 1st Defendant for unlawful interference with their contractual relations?

This Court having found the counterclaim above in the negative, this issue is answered in the negative.

Issue No.4: Whether there are any remedies available to the parties.

In view of the foregoing reasons, the remedies sought by the Defendants are not available to them.

The remedies sought by the Plaintiffs that declarations that the 1st Defendant is a corporate shield of the 2nd Defendant, and is a sham employed by the 2nd Defendant to defraud the Plaintiffs, and that the 2nd Defendant unjustly enriched himself to the detriment of the Plaintiffs; Orders that the veil of incorporation of the

1st Defendant be lifted to render the 2nd Defendant personally liable for money due to the Plaintiffs, are not available to the Plaintiffs for reasons stated above.

In regard to general damages, which are the direct natural or probable consequence of the wrongful act complained of, and includes damages for pain, suffering, inconvenience and anticipated future loss. ***(See Storms Vs Hutchinson [1905] A.C 515)***

It is settled law that general damages as an equitable remedy is granted at the discretion of the Court. (***See Crown Beverages Ltd Vs Sendu Edward S.C Civil Appeal No. 1 of 2005)***

In Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305, the factors to be considered by the Courts when assessing the quantum of general damages were discussed as follows: the value of the subject matter, the economic inconvenience that the Plaintiff may have been put through, and the nature and extent of the injury suffered.

In the given circumstances of this case, the Plaintiffs have adduced evidence to prove that the Defendants have not met their part of the bargain up to date and that the Defendants' failure has caused loss, and inconvenience to the Plaintiffs.

Following the decision in ***Uganda Commercial Bank Vs Kigozi(supra)***, this Court finds that the Plaintiffs have proved that they have suffered loss and inconvenience, for which the 1st Defendant is held liable for general damages.

I have taken into consideration the economic inconvenience which the Plaintiffs have been put through by the 1st Defendant's action, and find that the Plaintiffs are entitled to general damages.

I am inclined to award the sum of UGX 50,000,000(Uganda Shillings Fifty Million only) in general damages.

With regard to aggravated damages, in the Supreme Court authority of ***Basiima Kabonesa Vs The Attorney General & Coffee Marketing Board (In Liquidation), Civil Appeal No. 16 of 2021 at 21***, the Justices agreed that in the cited case of *Fredrick J. K Zaabwe Vs Orient Bank Ltd & 5 Others, SCCA No. 4 of 2006,* in which the Court cited the case of *Obongo Vs Kisumu Council [1971] E.A 91 at 96,* where Spry J, VP in explaining the thin difference between exemplary damages, and aggravated damages stated the nature of aggravated damages to be those damages where the Court may take into account factors such as malice or arrogance on the part of the Defendant, and the injury suffered by the Plaintiff ,

for example, causing him or her humiliation or distress; and that damages enhanced on account of such aggravation are recognized as still being essentially compensatory in nature.

Counsel for the Plaintiffs relied on the case of *Fredrick J. K Zaabwe Vs Orient Bank Ltd & 5 Others(supra)* to submit that the Defendants engaged in fraudulent misrepresentation to defraud the Plaintiffs of their money, and that all these point to the arrogance, and callousness of the Defendants, and that a sum of UGX 100,000 000 be awarded in enhanced damages.

This Court finds that the facts in the case of *Fredrick J. K Zaabwe Vs Orient Bank Ltd & 5 Others(supra)*, are distinguishable from the instant case. This Court found as above, that the Plaintiffs did not prove that the Defendants made fraudulent misrepresentations to induce them to invest in the project. It is my considered view therefore, that the submission of Counsel for the Plaintiffs as above is untenable.

In the result, I find that the remedy of aggravated damages is not available to the Plaintiffs.

As regards interest, it's settled law that interest is a warded at the discretion of the Court. In the absence of any agreement by the parties herein, on the interest rate payable, this Court has considered all the circumstances of this case, and finds that an award of interest at the rate of 8% per annum on the principal sum is sufficient, from the date of filing this suit till payment in full.

Section 27(1) of the Civil Procedure Act, Cap 71 provides on costs as follows:

"subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court or Judge, and the Court or Judge shall have full power to determine by whom and out of what property and to what extent those costs are to be paid, and to give all necessary directions for the purposes aforesaid."

Taking into consideration the above provision on costs, and that costs follow the event unless for justified reasons the Court otherwise orders *(See section 27(2) of the Civil Procedure Act, Cap 71)*, and the decision in ***Uganda Development Bank Vs Muganga Construction Co. Ltd (1981) H.C.B 35*** where Justice Manyindo (as he then was) held that:

"A successful party can only be denied costs if its proved, that, but for his or her conduct, the action would not have been brought, the costs will follow the event where the party succeeds in the main purpose of the suit."

In the given circumstances, this Court finds that the Plaintiffs were supposed to meet the expectations of the Defendants in the investment proposal for the entire contract price of USD 1,720,000, in which the assumptions of the investment performance as outlined above, were based on the project financial assumptions, and informed the financial projections over the 20-year projection period, for which the Plaintiffs failed to do.

In view of the above, this Court finds that the Plaintiffs are entitled to half of the costs of the suit, and accordingly the Plaintiffs are granted half of the costs of this suit. Costs of the counterclaim are granted to the Plaintiffs.

Judgment is hereby entered for the Plaintiffs against the 1st Defendant in the following terms: -

1. An order for recovery of USD 500,000(United States Dollars Five Hundred Thousand only).
2. Interest on the principal sum at the rate of 8% per annum from the date of filing this suit until payment in full.
3. General damages of UGX 50,000,000(Uganda Shillings Fifty Million only)
4. Interest on (3) above, at Court rate from the date of judgment until payment in full.
5. Half the costs of this suit, and costs of the counterclaim are granted to the Plaintiffs.

Dated, signed and delivered electronically this 16th day of August, 2022.

SUSAN ABINYO
JUDGE
16/08/2022