THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 112 OF 2019

DICKSON MUYAMBI ..... PLAINTIFF

VERSUS

VIVO ENERGY (U) LIMITED ..... DEFENDANT

BEFORE: HON. LADY JUSTICE SUSAN ABINYO

JUDGMENT

Introduction

The Plaintiff brought this suit against the Defendant, a Limited Liability Company duly incorporated under the Laws of Uganda, seeking the following reliefs; a declaration for breach of contract, a declaration that the termination of the Retail Business Agreement was against fair dealings and was not done in good faith, special and general damages, interest and costs of the suit.

Facts

The facts agreed upon during the scheduling proceedings are that:

a) On the 5th day of September, 2016, the Plaintiff entered into a Retail Business Agreement with the Defendant to run the Defendant's site of Shell Entebbe at Entebbe.
b) The said retail agreement was to run for a period of three years.
c) At the start of the business, the Plaintiff was required to, and he injected UGX 300.000.000(Three Hundred Million Shillings only) before the agreement was signed.
d) On 6th February, 2019, the Plaintiff received a notice of termination from the Defendant, wherein he was notified that the termination would take effect on 7th March, 2019.

e) The Defendant stated in the said termination notice that under clause 16.15 of the Retail Business Agreement, either party had the right to terminate the agreement by giving the other party written notice of thirty days, and with no obligation to assign any reason whatsoever for termination.
f) The Defendant demanded that the Plaintiff removes all the merchandise from the select shop, and that the Plaintiff handed over the station that same day on 14th June, 2019.

The Plaintiff's brief facts giving rise to the cause of action against the Defendant are that the Plaintiff lost all perishable products in the shop, and failed to recover a large portion of the costs of the unperishable goods. That the Defendant did not conduct a reconciliation of the assets and liabilities of the Plaintiff's business upon exit, and never paid the Plaintiff what was due to him.

The Defendant denied the allegations made by the Plaintiff, and contended that the Retail Business Agreement allowed either party to terminate the Agreement. That under clause 16.5 of the Agreement, the Defendant had the contractual right to terminate the Agreement without reason provided there is written notice.

Representation

The Plaintiff was represented by Counsel Dhatemwa Sophie of Nexus Solicitors and Advocates while the Defendant was represented by Counsel Waniala Allan of M/S Sebalu & Lule Advocates. Counsel for the parties herein filed submissions as directed by this Court.

Issues for determination

During the scheduling proceedings, the following issues were agreed upon for Court's determination;

1. Whether the suit is proper before this Court?
2. Whether the rejoinder is proper before Court?
3. Whether the Retail Business Agreement, and or clause 16.15 of the Retail Agreement was unconscionable against the Plaintiff?
4. Whether the Defendant's action of terminating the Retail Business Agreement amounted to breach of contract?
5. Whether the termination of the Retail Business Agreement was against fair dealings and was not done in good faith?
6. What remedies are available to the parties?

The sixth issue was amended by Court to read as above, in accordance with Order 15 Rule 5(1) of the Civil Procedure Rules SI 71-1.

Evidence

Counsel for the parties herein, complied with the Court's directive to file witness statements, which was adopted on record as the evidence in chief of the witnesses for the respective parties; the said evidence will be evaluated hereunder.

Resolution of issues

Counsel for the Defendant opted to argue issues No.1, 3, and 4 together, however, it is worth noting that issues No.1, and 2 were raised by Counsel for the Defendant as preliminary objections during the scheduling proceedings, and this Court preferred to handle the preliminary objections at this stage.

The above approach by Counsel for the Defendant in respect of issues No.1, 3, and 4 on the propriety of the suit, breach of contract, and unconscionability of the Agreement will not be comprehensible, considering the fact that issues No.1, and 2 have not been clearly articulated by Counsel for the Defendant in their written submissions.

In the given circumstances, this Court will consider the merits of issues No. 3, 5, 4, and 6 separately in that order, and issues No. 1, and 2, to have been abandoned by Counsel for the Defendant. The said preliminary objections are accordingly dismissed.

Issue No. 3: Whether the Retail Business Agreement, and or clause 16.15 of the Retail Agreement was unconscionable against the Plaintiff?

For avoidance of doubt, clause 16 of the Retail Agreement generally provides for breach, and termination. In particular, clause 16.15 of the Retail Agreement (hereinafter referred to as "PE1") in regard to termination provides that:

"Vivo may terminate this Agreement in its entirety on at least 30 days' prior written notice in Vivo's absolute discretion, and without being required to give any reason whatsoever, at any time. The termination of this Agreement under this clause shall be without prejudice to any rights or remedies either party may have against the other for any antecedent breach of this Agreement."

It was submitted for the Plaintiff that while the general rule is that the Courts will not interfere with commercial contracts signed by the parties out of respect for freedom of contract, the Courts in applying principles of equity will interfere with harsh, and unconscionable contracts. Counsel cited the case of *Charles Athembu Vs Commercial Microfinance Limited and Anor, HCMA No. 0001 of 2014* in support of their submissions.

In reply, Counsel for the Defendant submitted that the Plaintiff did not plead unconscionability of the contract in its amended plaint or plead any facts in support of the claim of unconscionability in the plaint as well. That the Plaintiff only introduced this new claim, and facts in paragraphs 5-9 of the reply to the amended Defence at the time that the Defendant had no right to reply in law.

Counsel further submitted that Order 6 Rule 7 of the Civil Procedure Rules, bars any party from pleading a new ground or fact that is inconsistent with the previous pleadings of that party, and that a subsequent pleading that is inconsistent with the prior pleading is a departure under the rules. Counsel relied on the case of *Interfreight Forwarders (U) Ltd Vs East African Development Bank, SCCA No. 33 of 1992,* in support of his submissions, on the proposition of the law that pleadings help to define, and deliver with clarity the real matters in controversy, and that a party cannot benefit from a case not set up by it.

Decision

Order 6 Rule 7 of the Civil Procedure Rules SI 71-1 provides that:

"No pleading shall, not being a petition or application, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading that pleading. "

I have looked at the amended plaint filed by the Plaintiff on 23rd June, 2020, and agree with the submission of Counsel for the Defendant that the Plaintiff did not either plead unconscionability of the contract in its amended plaint or plead any facts in support of the claim of unconscionability in the plaint.

It's trite law that a party is expected and is bound to prove the case as alleged by him and as covered in the issues framed. He will not be allowed to succeed on case not set up by him and be allowed at the trial to change his case or set up a case inconsistent with what he alleged in his pleadings except by way of amendment of the pleadings. ***(See Interfreight Forwarders (U) Ltd Vs East African Development Bank, SCCA No. 33 of 1992)***

Accordingly, this Court finds that failure by the Plaintiff to plead unconscionability of the contract in its amended plaint or plead any facts in support of the claim of unconscionability in the plaint, is a departure from the pleadings by the Plaintiff, which contravenes the rules of procedure.

The well-established principle is that issues are framed and or arise, when one party asserts material propositions of law or fact, and the other party denies. ***(See Order 15 Rule 1 of the Civil Procedure Rules SI 71-1,*** and the case of ***Interfreight Forwarders (U) Ltd Vs East African Development Bank(supra)***

The facts contained in paragraphs 5-9 of the reply to the amended Defence, which were not pleaded in the amended plaint but are material to the claim of unconscionability, offends the right of the Defendant to reply to the new facts introduced by the Plaintiff therein.

In the instant case, the Defendant would have responded to them in its written statement of defence, had they been raised in the amended plaint.

For reasons above, this Court finds that this issue is redundant; the reply to the amended defence, and any evidence that relates to the issue of unconscionability is therefore expunged.

Issue No.5: Whether the termination of the Retail Business Agreement was against fair dealings and was not done in good faith?

Counsel for the Plaintiff submitted that good faith and fair dealings are not only implied but were expressly incorporated in the Retail Business Agreement governing the parties.

Counsel contended that the Defendant's termination of the Agreement was not only a breach of Schedule 9 of the Agreement but was also done in bad faith and against fair dealings, as the real reason for terminating the Agreement was that the Defendant found another retailer, and that the Defendant used clause 16.15 as a legal cover up; that the Defendant rejected the Plaintiff's plea to be given time for a proper handover, refused to conduct a reconciliation of the Plaintiff's business, wilfully refused to pay the Plaintiff what was due to him upon termination, inconsiderate and humiliating eviction of the Plaintiff from the station, and loss occasioned to the Plaintiff that could have been avoided.

Counsel relied on the case of *John Sekaziga & Anor Vs Church Commissioners Holding Co. Ltd, HCMC No. 15 of 2013,* on the proposition that in a contract, there is an implied covenant on a party exercising its right to terminate under the termination for convenience clause to do so in good faith and in accordance with fair dealings.

In reply, Counsel for the Defendant submitted that the decision of *John Sekaziga & Anor Vs Church Commissioners Holding Co. Ltd,* cited by Counsel for the Plaintiff is distinguishable. In that case, the Learned Judge relied on the American case of *Questar Builders Inc Vs CB Flooring LLC*, for the proposition that there is an implied term of good faith in contracts with convenience clauses (as they are called in the USA)

Counsel argued that in John Sekaziga's case, the Court did not take into account that the implied term of good faith in convenience clauses is statutory, and that there is no statutory requirement either in Uganda or Commonwealth countries where good faith, and fair dealing are implied into termination clauses as was the case in Questar's case.

Counsel contended that in Anson's law of contract, 27th edition at pg. 143, the author opines that in the absence of statutory provisions, the cases in which the Courts will imply a term into a contract are strictly limited, for they rightly conceive that it is not their task to make contracts for the parties concerned but only to interpret contracts already made.

Counsel argued further that by virtue of section 14(2)(b) of the Judicature Act, which provides for exercise of judicial function in accordance with common law, this Court is bound to follow the English decisions, that are common law positions as opposed to American jurisprudence set out in the Questar case. Counsel relied on the decision of the Court of Appeal of England and Wales in *Msc Mediterranean Shipping Company S.A Vs Cottonex Anstalt [2016] EWCA Civ 789,* on the principle that the Courts are unwilling to imply terms into a contract where express terms exist; and the decision of the Supreme Court of England in *Marks and Spencer Plc Vs BNP Paribas Securities Services Trust Company Ltd & Anor[2015] UKSC 72,* where the Court stated that a term will not be implied if it satisfies the test of business efficacy or if without the term, the contract would lack commercial or practical coherence, to support his submission.

In the instant case, the Plaintiff's evidence was that at the time he met with the Defendant's officials, he was just looking for business opportunities. That he had no experience in petroleum business but had a training in petroleum business namely; venturing, exporting etcetera, and that he sought advice as a prudent businessman.

That when he met with the Defendant's Managing Director, and the team on 23rd August, 2016, he was briefed about the history of Entebbe station, and told that the Defendant was looking for a partner and not just a dealer.

That he was assured that the business relationship with the Defendant Company would be mutually beneficial to the Defendant, and himself as long as he worked hard, met the targets, and run the station well. That he was given an offer letter(PE16) and a recommendation letter by the Defendant to obtain an overdraft facility from the Bank. That he made payment of Ugx 300,000,000(Uganda Shillings Three Hundred Million only) to the Defendant on 29th August, 2016, and was given a target and offer letter(PE4). That on 26th September, 2016, the Defendant's employees brought to him a Retail Business Agreement (PE1) to sign, which he signed.

That he then took over the Shell Entebbe station, which he found had run down, and required a lot of repair, and facelift. That the Defendant undertook some of the repairs, but he met the significant cost of the repairs and facelift. That upon running the station, he discovered that the nature of the business relationship he expected from the Defendant was contrary to what the Managing Director and the team had made him to believe.

That the Defendant would regularly send customers to the station for fuel on credit, and yet the Defendant expected him to purchase its products with cash of about Ugx 300,000,000 on a weekly basis. That he requested for a meeting with the Defendant's Retail Manager, and Territory Manager, and when they met, he was informed that he actually needed Ugx 500,000,000 per week to run the station.

That despite the challenges he encountered while running the station, he endeavoured to meet his obligations under the Retail Business Agreement, and the set targets by the Defendant's employees. That in recognition of his performance, he was given several awards, copies of some of the awards are marked PE2 and PE3.

That on 6th February, 2019, out of the blue, he received a letter referenced "Termination of Retail Business Agreement at Shell Entebbe" from the Defendant's Retail Manager, giving him formal notice of the Defendant's intention to terminate the Agreement (PE 10), on 8th March, 2019 under clause 16.15 of the Agreement. The letter stated that under clause 16.15 of the Agreement, either party had the right to terminate the Agreement by giving the other party written notice of thirty days, and with no obligation to assign any reason whatsoever for the termination, and that the thirty days' notice period commenced on 7th February, 2019.

That he was shocked by the termination letter because on the 31st day of January, 2019, there was a site tools handover process with the new Territory Manager, which went well, and he was praised for doing a good job. That he pleaded with the Defendant's employees to allow him to run the station, and at the very least recover the sum of Ugx 200,000,000, which he had incurred as a debt from the customers pushed to the station by the Defendant for fuel on credit but the Defendant's position remained the same.

That on 14th June, 2019, he received an email (PE20), from the area Manager asking him to handover the station at 3:00pm. He was overwhelmed with what was going on but at the same time, was told to sign on a blank closure report given by the Defendant's team, which he signed in a traumatic handover that very day. That he was not treated well by the Defendant as a partner, and he suffered a lot of humiliation.

The Defendant on the other hand averred that on 2nd September, 2016, the Plaintiff entered into a Retail Business Agreement (PE1), with the Defendant to operate the Defendant's retail business at shell Entebbe in Kitoro for 3 years. That under the Defendant's business model, dealers like the Plaintiff are required to invest working capital on their account held with the Defendant for the purchase of fuel products supplied by the Defendant. That during the course of trading, the working capital is drawn down(debited) on account of supply orders delivered to the dealer, and the working capital fluctuates depending on how the dealer utilises it.

That when the business relationship between the dealer and the Defendant comes to an end through either expiry of the contract or termination, a reconciliation process is undertaken to establish whether there is any credit and or liability standing in credit to either party. If there is such credit, money is paid out to the creditor after reconciliation.

That the Plaintiff's credit and or capital of Ugx 300,000,000 run down, and he never reinvested in his dealership. That the Retail Business Agreement has a termination clause, which allows either party to terminate the Agreement without reason provided there is at least 30 days' written notice. That the Defendant exercised its right to terminate the Agreement when it wrote a letter to the Plaintiff, and served it on the Plaintiff on 6th February, 2019. The termination letter stated that the termination would take effect on 7th March, 2019.

That the termination letter was sufficient for the Plaintiff or indeed any dealer to make reconciliation of any credit, including any stock of goods that is due to him or her if at all. That the Defendant did not refuse the Plaintiff to remove any of his merchandise, and that the Plaintiff made no effort to collect his merchandise or undertake the reconciliation exercise during the notice period. That it was after the ruling by the Court, which dismissed the application for an order of an injunction sought by the Plaintiff, that the Defendant proceeded to evict the Plaintiff from the premises.

Decision

Following the Court of Appeal decision in ***MTN Uganda Ltd Vs GQ Saatchi & Anor Civil Appeal No. 0098 of 2017***, where Justice Elizabeth Musoke .JA(as she then was) stated that it's a well-established principle in common law with regard to contractual implications that there are two types of contractual implied terms namely; the first, a term which is implied into a particular contract, in light of the express terms, commercial common sense, and the facts known to both parties at the time the contract was made. The second implied term arises because, unless a term is expressly excluded, the law (sometimes by statute, sometimes by common law) effectively imposes certain terms into certain classes of relationship. ***(See the decision of the Supreme Court of England in Marks and Spencer Plc Vs BNP Paribas Securities Services Trust Company(Jersey) Ltd & Anor [2015] UKSC 72,*** in which Lord Neuberger cited with approval the observations of Lady Hale in the case of ***Geys Vs Societe Generale [2013] 1AC 523 at para 55***, on the two types of contractual implied terms discussed above in the *MTN case*.

The settled position of the law is that for a term to be implied, the following conditions (which may overlap) must be satisfied:

1. It must be reasonable and equitable;
2. It must be necessary to give business efficacy to the contract, so that no term is implied if the contract is effective without it;
3. It must be so obvious that 'it goes without saying';

4. It must be capable of clear expression, and
5. It must not contradict any express term of the contract. ***(See BP Refinery (Westernport) Pty Ltd Vs President, Councillors and Ratepayers of the Shire of Hastings (1977) 52 ALJR 20, 26 per Lord Simon***, cited with approval in the MTN case above.

It is noteworthy that the term "good faith" imposes an obligation on parties to act in good faith, and deal honestly in a given trade or business, while "fair dealing" involves the conduct of business with full disclosure. ***(See Black's Law Dictionary, 9th Edition, 2009)***

The Courts have adopted a more restrictive approach in the interpretation of the terms "good faith", and "fair dealing" in the performance, and enforcement of contracts. ***(See Chitty on Contracts: General Principles, 31st Edition (2012),1136 at para 15-049)***

I am in agreement with the submission of Counsel for the Defendant that the decision of *John Sekaziga & Anor Vs Church Commissioners Holding Co. Ltd,* cited by Counsel for the Plaintiff is distinguishable. In that case, the Learned Judge relied on the American case of *Questar Builders Inc Vs CB Flooring LLC*, for the proposition that there is an implied term of good faith in contracts with convenience clauses (as they are called in the USA), and with respect, the Court did not take into account that the implied term of good faith in convenience clauses is statutory in USA, which is not the case in either Uganda or Commonwealth countries.

The proposition of the law is that, whoever alleges a given fact, and desires the Court to give judgment on any legal right or liability dependent on 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 and 103 of the Evidence Act, Cap 6***, and the case of ***Jovelyn Barugahare Vs Attorney General SC Civil Appeal No. 28 of 1993[1994] KALR 190)***

In the instant case, it was the Plaintiff's evidence that he made payment of Ugx 300,000,000(Uganda Shillings Three Hundred Million only) to the Defendant on 29th August, 2016, and was given a target and offer letter(PE4). That on 26th September, 2016, the Defendant's employees brought to him a Retail Business Agreement (PE1) to sign, which he signed.

I have looked at Clause 16.11 of the Agreement and find that the Plaintiff had a right to terminate the Agreement provided at least two months' prior written notice is given to the Defendant, and clause 16.15 of the Agreement provides for the Defendant's right to terminate the Agreement in its entirety provided at least 30 days' prior written notice is given to the Plaintiff.

This Court further finds that the Plaintiff entered into this agreement in September, 2016, and the Defendant indicated that the Plaintiff's credit and or capital of Ugx 300,000,000 run down, and he never reinvested in his dealership, this evidence was not rebutted by the Plaintiff.

In addition, the termination of the Agreement was effective 8th March, 2019, from 6th February, 2019, when notice was served upon the Plaintiff, which was after the lapse of a period of two years, and 7 months, notwithstanding the awards by the Defendant on the Plaintiff's good performance.

I have taken into account the business relationship discussed above between the Defendant and the Plaintiff, and find that the Plaintiff failed to adduce evidence to prove that the Defendant acted with dishonesty or improper motive designed to destroy or injure the Plaintiff's right to receive the benefits or reasonable expectations of the Agreement.

For the foregoing reasons, this issue is answered in the negative.

Issue No.4: Whether the Defendant's action of terminating the Retail Business Agreement amounted to breach of contract?

Counsel for the Plaintiff submitted that it is not in contention that the Defendant did not terminate the Agreement because of breach or non-performance on the part of the Plaintiff.

Counsel argued that after 8th March, 2019, the Defendant's notice ceased to be valid, and that when the Defendant evicted the Plaintiff on 14th June, 2019, there was no valid 30 days' notice of termination or due notice of a future date of termination therefore, the Defendant's termination of the Agreement in the absence of a valid notice was in breach of the Defendant's obligations under clause 16.15, and the Defendant's eviction of the Plaintiff was in breach of the contract, in particular clause 2.3 on reconciliation at termination, and clause 16.6, which gives the options on how goods in the select shop should be treated upon termination of the Agreement; that forcing the retailer to remove the said goods is not one of the options, and was in breach of clauses 16.6.1, and 16.6.2 of the Agreement.

Counsel relied on the Court of Appeal decision in *MTN Uganda Ltd Vs GQ Saatchi & Anor, Civil Appeal No. 0098 of 2017*, which defined the term notice as a legal notification of a fact, necessitated by virtue of the agreement of the parties or by operation of law, to support her submission.

In reply, Counsel for the Defendant submitted that it is not in dispute that a notice of termination of the Agreement dated 6th February, 2019 was served on the Plaintiff in accordance with clause 16.15 of the Agreement.

Counsel argued that by law, Courts should not interfere with a party's exercise of its contractual right, and that the Courts are mandated to enforce the sanctity of contracts, which require that parties comply with their agreement; a principle known by the Latin maxim pacta sunt servanda.

Counsel contended that the Courts can only imply terms into a contract if it is satisfied that such a term is; part of the usage or custom, can be deduced from the parties' previous course of dealing, can be deduced from the intention of the parties, where such term is a necessary part of a particular type of contract and lastly, where such terms are implied by statute.

Counsel argued further that it was agreed between the parties that no reason needed to be given for the termination, provided a one month's written notice was served on the Plaintiff, which was done as per exhibit PE10. That it is evident that there was no implied term as suggested by the Plaintiff because the Plaintiff the retailer was also entitled to terminate the Agreement without the need to provide a reason under clause 16.11, provided written notice was given. That the Plaintiff has not led any evidence on how the implied term effects or gives efficacy to the contract.

In regard to the argument about the nature of eviction of the Plaintiff, it was submitted for the Defendant that this had nothing to do with breach of the contract because there was no contract at the time the Plaintiff left the station; that the Plaintiff's contract was terminated on 6th February, 2019, and he was given until 8th March, 2019 to leave the station, and his exit was concluded on 14th June, 2019.

Decision

The Courts have established that parties are bound by the terms of the contract that they execute; a breach occurs where that which is complained of, is breach of duty arising out of the obligation undertaken under the contract, and that the role of the Court is to simply enforce those terms. ***(See the Court of Appeal decision***

in Behange Vs School Outfitters(U) Ltd (2000)1 E.A 20; Barclays Bank of Uganda Limited Vs Howard Bakojja H.C.C.S No. 53 of 2011, and Nakawa Trading Co. Ltd Vs Coffee Marketing Board H.C.C.S No. 137 of 1991[1994] 11KALR 15)

The Court of Appeal decision in ***MTN Uganda Ltd Vs GQ Saatchi & Anor, (supra)***, Justice Elizabeth Musoke. JA (as she then was) in the lead judgment defined the term notice as above, and in view of that definition, expounded that notice of a fact is deemed to have been brought to the attention of a person, if he or she: (1) has knowledge of it; (2) has received the information about it; (3) has reason to know about it; (4) knows about a related fact; or (5) is considered as having been able to ascertain it by checking an official filing or recording, and added the sixth that the notice of a fact must be given within the time frame envisaged in the agreement or by law.

In the instant case, the Defendant was required to give one months' written notice prior to the termination of the Agreement.

Following the guidance in the MTN case above, on when a notice of fact is deemed to have been brought to the attention of a person, and in the absence of any contrary evidence by the Plaintiff on the above considerations, this Court finds that the notice of termination of the Agreement dated 6th February, 2019, which was served on the Plaintiff in accordance with clause 16.15 of the Agreement, was notice of the termination of the Agreement.

The argument of Counsel for the Plaintiff that after 8th March, 2019, the Defendant's notice ceased to be valid, and that when the Defendant evicted the Plaintiff on 14th June, 2019, there was no valid 30 days' notice of termination or due notice of a future date of termination therefore, the Defendant's termination of the Agreement in the absence of a valid notice was in breach of the Defendant's obligations under clause 16.15, is untenable.

In respect of clause 2.3 on reconciliation at termination, and clause 16.6, which gives the options on how goods in the select shop should be treated upon termination of the Agreement, it is my considered view that these clauses are express terms of the contract , I therefore, find that the Plaintiff has discharged the burden of proof to the required standard that he was unable in the circumstances to carry out the reconciliation on 14th June, 2019, when he was evicted from the premises by the Defendant in a high handed manner.

I have taken into further consideration the intention of the parties, which can be deduced from the language in the Agreement, and the circumstances of this case, to come to a conclusion that the Defendant was in breach of clauses 16.6.1, and 16.6.2 of the Agreement, on their obligation to carry out a reconciliation, and how the goods at the select shop were to be handled upon termination of the Agreement.

This is seen in the evidence adduced by the Plaintiff in the final handover report (PE23), and the Account closure report(PE24), which are not signed by the Defendant, and the Defendant's evidence by DW1 under paragraph 2.6 of the witness statement, that at termination of the contract, the Plaintiff's stock is also reconciled, and the Defendant is obligated to resale or purchase all merchantable stock and credit the Plaintiff.

It is notable that the termination of the Retail Business Agreement in itself, does not amount to breach of contract however, failure by the Defendant to perform its obligations in clauses 16.6.1, and 16.6.2 of the Agreement, which governed the relationship, and performance of the obligations therein by either party upon the termination of the Agreement, amounts to breach of the express terms in the Agreement.

Accordingly, this Court finds that the Defendant's breach in regard to clauses 16.6.1, and 16.6.2, of the Retail Business Agreement, amounts to breach of the contract.

For reasons above, this issue is partly answered in the affirmative.

Issue No.6: What remedies are available to the parties?

This Court having found issue (4) above partly in the affirmative, further finds as follows: -

Section 61(1) of the Contracts Act, 2010 provides that where there is breach of contract, the party who suffers the breach is entitled to secure compensation for any loss or damage caused to him or her.

It is trite law that special damages must be specifically pleaded and strictly proved. ***(See the cases of Kyambadde Vs Mpigi District Administration [1983] HCB 44; Bonham – Carter Vs Hyde Park Hotel [1948] 64 TLR 177, and Ronald Kasibante Vs Shell (U) Limited, H.C.C.S No. 542 of 2006)***

In the instant case, Counsel for the Plaintiff referred this Court to PE 19, in their submissions, which is an interim order dated 6th March, 2019.

It is my understanding that the Plaintiff failed to adduce evidence to prove the claim of Ugx 93,000,000(Uganda Shillings Ninety-Three Million only) in special damages on the basis of PE 19.

In addition, the claim by the Plaintiff under paragraph 39 of the witness statement in respect of Ugx 200,000,000, that was allegedly held in debt by the credit customers pushed onto the station by the Defendant is not supported by any evidence; PE 18, which the Plaintiff adduced in evidence, is a transaction report that relates to the period beginning 18th February, 2019, which time, notice of termination of the Agreement was already served upon the Plaintiff, therefore, the Plaintiff's dealings with the Defendant thereafter, were not binding on the Defendant.

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

It is settled law that an award of general damages is granted at the discretion of Court. (***See Crown Beverages Ltd Vs Sendu Edward S.C Civil Appeal No. 1 of 2005),*** and ***Uganda Commercial Bank Vs Kigozi [2002] 1 EA 305*** on the factors to be considered by the Courts when assessing the quantum of general damages.

Following the decision in ***Uganda Commercial Bank Vs Kigozi(supra)*** on the factors to be considered by the Courts when assessing the quantum of general damages which are 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 Plaintiff proved that the Defendant's failure to carry out reconciliation, caused him great loss, economic inconvenience, mental anguish, and emotional distress on account of the Defendant's actions on 14th June, 2019.

This Court therefore finds that the Plaintiff has proved that it suffered economic inconvenience, loss, and emotional distress for which the Defendant is held liable in general damages.

In the result, I find that the Plaintiff is entitled to general damages, and the sum of UGX 50,000,000(Uganda Shillings Fifty Million only), is awarded in general damages, considering the economic inconvenience, and emotional distress which the Plaintiff has been put through by the Defendant's action.

With regard to interest, this Court has considered all the circumstances of this case, and finds that an award of interest on general damages at the rate of 8% per annum is sufficient, from the date of judgment until payment in full.

In respect of costs, section 27(1) of the Civil Procedure Act, Cap 71 provides 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."*

I find no reason to deny the Plaintiff costs, and accordingly the Plaintiff is awarded costs of this suit.

Judgment is hereby entered for the Plaintiff against the Defendant in the following terms: -

1. A declaration that the Defendant breached the contract.
2. General damages of UGX 50,000,000(Uganda Shillings Fifty Million only).
3. Interest on (2) above at the rate of 8% per annum from the date of judgment until payment in full.
4. Costs of the suit.

Delivered electronically this 9th day of August, 2023.

SUSAN ABINYO
JUDGE
09/08/2023