IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

COMMERCIAL DIVISION

Reportable
Civil Suit No. 0011 OF 2019

In the matter between

BARORE COMPANY LIMITED **PLAINTIFF**

And

1.KATAMBA SAMUEL MUHOZI T/a **DEFENDANTS**
SAVANNA BUS SERVICES
2.RUNONI TRADERS LIMITED

Heard: 8 December, 2021
Delivered: 25 January, 2024

Law of Evidence — *Presumption of facts — the court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.*

Bills of Exchange — *Bounced cheque — it is unusual that a debtor will replace a bounced cheque with one of a smaller amount without the parties formally amending the terms of the underlying contract or alternatively the debtor demanding for the return of the replaced cheques.*

JUDGMENT

STEPHEN MUBIRU, J.

The Plaintiff's claim:

[1] The plaintiff is a private limited liability company dealing in petroleum products supplied by M/s Total Limited, among other businesses. The 1st defendant is a business person trading under that name and style, involved in the public transport business, among other businesses. The 2nd defendant is a private limited liability company providing a public bus transport service operated by the 1st defendant. On or about on 21st May, 2018 an agreement was executed between the plaintiff and the 1st defendant by which it was agreed that the plaintiff was from time to time at the 1st defendant's request and demand, to supply fuel products to the 2nd defendant. The 2nd defendant's buses would be fuelled from the plaintiff's filling station at Nateete and would be issued with cash sales receipts whenever cash was paid at the pumps, but sales would be recorded in a ledger whenever the fuel was supplied on credit. On basis of that agreement, the plaintiff sold on credit fuel worth shs, 226,147,000/= against which the defendant issued twenty (20) post-dated cheques worth that entire amount, meant to be paid within four months. Fourteen (14) of those cheques bounced on being presented for payment. The 1st defendant was notified in response to which from time to time he made some cash payment to the plaintiff, on account which reduced it to the amount now claimed. Since the institution of the suit the defendant had deposited some money and now the balance left is around shs. 94,000,000/=

The defendants' defence;

[2] By their joint written statement of defence, the 1st defendant admitted having executed the agreement and issued the cheques but denied liability in the amount claimed. The defendants contend that the full value of the cheques has since been paid in cash. Although the defendants were never notified of the dishonoured cheques, they nevertheless cleared the debt. The defendants have since established that they overpaid the plaintiff by a sum of shs. 134,955,371/= the defendants therefore counterclaim for the recovery of that amount.

The questions for determination;

[3] At the scheduling conference conducted in Court on 14th April, 2021 the parties agreed on the following issues for the Court's determination, namely;

1. Whether the defendants are indebted to the plaintiff in the sum claimed.
2. Whether the plaintiff is indebted to the defendants in the sum counterclaimed.
3. What remedies are available to the parties?

The decision;

[4] In all civil litigation, the burden of proof requires the plaintiff to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to prove to the court why the defendant is liable for the relief claimed. The defendants having admitted execution of the agreement and issuance of cheques covering shs, 226,147,000/= worth of fuel supplied to them, the burden rest on the defendant to prove liquidation of that amount as well as the claimed overpayment sought to be recovered by counterclaim.

First issue; whether the defendants are indebted to the plaintiff in the sum claimed.

[5] It is a settled rule that once the plaintiff makes out a *prima facie* case of an outstanding debt in his favour, the evidential burden shifts to the defendant to controvert the plaintiff's *prima facie* case; otherwise, judgment must be entered in favour of the plaintiff. The plaintiff set out the twenty cheques (exhibits P. Ex.1A - P. Ex.1C dated from 25th May, 2018 to 17th August, 2018), supporting the contractual sum of shs, 226,147,000/=. The plaintiff also presented in evidence the twelve (12) of the fourteen (14) cheques that were dishonoured, as exhibits P. Ex.3A - P. Ex.3L at pages 85 to 96 of the plaintiff's trial buddle), and the bank

statement in proof of the fact that they were dishonoured (exhibit P. Ex.7), all supporting the outstanding debt in the sum of shs, 158,673,500/= claimed at the commencement of the suit.

[6] The following are the cheques which bounced; (i) No. 009049 deposited on 18th June, 2018 in the sum of shs. 11,400,000/=; (ii) No. 009050 deposited on 6th June, 2018 in the sum of shs. 11,400,000/=; (iii) No. 008651 deposited on 6th July, 2018 in the sum of shs. 11,400,000/=; (iv) No. 008653 deposited on 13th July, 2018 in the sum of shs. 11,400,000/=; (v) No. 008654 deposited on 20th July, 2018 in the sum of shs. 11,400,000/=; (vi) No. 008656 deposited on 14th August, 2018 in the sum of shs. 11,400,000/=; (vii) No. 008658 deposited on 19th July, 2018 in the sum of shs. 11,400,000/=; (viii) No. 008659 deposited on 5th July, 2018 in the sum of shs. 11,400,000/=; (ix) No. 008662 deposited on 15th August, 2018 in the sum of shs. 11,400,000/=; (x) No. 008663 deposited on 20th August, 2018 in the sum of shs. 11,400,000/=; (xi) No. 008664 deposited on 20th August, 2018 in the sum of shs. 11,400,000/=; and (xii) No. 008666 deposited on 27th August, 2018 in the sum of shs. 10,473,500/=, hence a total of shs. 135,873,500/= All these cheques are reflected on the plaintiff's bank statement (exhibit P. Ex.7) as bounced cheques.

[7] P.W.1 Ms. Baziine Sarah testified that there are two other cheques not produced in Court, of shs. 11,400,000/= each, to make the total of fourteen (14) dishonoured cheques, which account for the shs. 22,800,000/= being the difference between the sum of the cheques in Court and the amount claimed. Since the commencement of the trial, the defendants had paid shs. 64,073,742/= thereby reducing the outstanding debt to shs. 94,599,758/= which is now the subject of the suit. She adduced in evidence the ledgers in which all the transactions between the plaintiff and the defendant were recorded (exhibits P. Ex.4, P. Ex.5 and P. Ex.6) to explain those amounts.

[8] By virtue of the provisions of section 57 of *The Evidence Act* which states that facts admitted need not be proved except that the court may, in its discretion, require

the facts admitted to be proved otherwise than by such admissions, and there being no reason to require proof by other means, I find that the defendants need not prove the sums admitted by P.W.1 in her testimony.

[9] In rebuttal of what is not admitted by the plaintiffs as per the evidence outlined above, the 1st defendant testified that cheque numbers 008665; 009048; 009047; 008652 and 008660 all cleared. However, these are not among the twelve cheques listed above and do not offer proof of payment of the stated outstanding balance. He also claimed to have issued replacement cheques which were eventually cashed, but he never provided details of amounts and dates. The 1st defendant instead produced a printout of cheques he issued to the plaintiff and were honoured for the period from 30th May, 2018 to 21st July, 2020 representing a total sum of shs. 279,706,989/= (exhibits D. Ex.3, D. Ex.4 and D. Ex.5). His explanation was that when he realised the cheques issued earlier would bounce, he would issue replacement cheques in smaller amounts as reflected in those exhibits.

[10] P.W.1 Ms. Baziine Sarah refuted that version when she testified that whenever any of the twenty cheques bounced, the 1st defendant would be notified to redeem them by making cash payments. He was able to redeem only six of them leaving the fourteen unpaid. She further testified that between 30th May, 2018 and 5th October, 2018 the defendants paid a total of shs. 191,271,750/= and indeed this is reflected in the ledgers (exhibits P. Ex.4, P. Ex.5 and P. Ex.6). They indicate the registration numbers of the buses fuelled and the amounts paid in cash, as well as the cheque numbers where payments were by cheque. The ledger tracked both credit and cash sales as well as payments on account. She further testified that the cheques presented by the defendants after 5th October, 2018 were all honoured and do not relate to the outstanding fourteen cheques; indeed that is reflected in exhibits D. Ex.3, D. Ex.4 and D. Ex.5.

[11] Having compared the two versions, I have found the plaintiff's version more credible. Under section 113 of *The Evidence Act,* the court may presume the

existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case. By this provision, the Court is entitled to make findings in respect of disputed facts based on its common experience having regard to the common course of human conduct in private business. From that perspective, it is most unusual that a debtor will replace a bounced cheque with one of a smaller amount without the parties formally amending the terms of the underlying contract or alternatively the debtor demanding for the return of the replaced cheques. Nowhere in his testimony or documentary evidence is that kind of expected behaviour exhibited or explained away. The 1st defendant has also sought to include in his rebuttal cheques that are clearly unrelated to the transaction, rendering the truthfulness or accuracy of his record doubtful.

[12] On the other hand, the plaintiff is relying on a ledger kept so meticulously and recorded in real time. It was never demonstrated as suffering from any inaccuracies during the cross-examination of P.W.1 who is the custodian of the record. P.W.1 testified in a very convincing and articulate manner. Even under intense cross-examination she never got mixed up about the figures in the ledger. There was nothing in her testimony nor the documents to suggest falsification. I find that the defendants have presented a very vague explanation of their payments, more of subterfuge and obscurantism than specific responses to each of the cheques that remain outstanding. The defendants have bundled together all transactions, cash and credit purchases, during the period after 20th May, 2018 without distinction, compared to the plaintiff whose ledgers make a very clear distinction. On that basis I find that the plaintiff has proved on the balance of probabilities that the defendants still owe it the sum of shs. 94,599,758/=.

Second issue; <u>whether the plaintiff is indebted to the defendants in the sum counterclaimed.</u>

[13] Having undertaken a meticulous analysis of the figures contained in documents presented by both parties alongside their oral testimony while resolving the first issue, I find that the defendants' counterclaim is based on the defendants' having bundled together all transactions, cash and credit purchases during the period after 20th May, 2018 without distinction. What they claim as overpayments is traceable in the plaintiff's ledgers as being cash payments made to the plaintiff whose ledgers make a very clear distinction. This is further evident in the receipts produced by the plaintiff (exhibit P. Ex.2 at pages 7 to 84 of the plaintiff's trial bundle) that all the defendant has done in support of the counterclaim, is to bundle up the cash payments over that time with the payments by cheque. It is for that reason that I have found the counterclaim misconceived. This issue therefore is answered in the negative; the plaintiff is not indebted to the defendants in the sum counterclaimed. The counterclaim is accordingly dismissed with cost to the plaintiff.

Third issue; <u>what remedies are available to the parties.</u>

i. <u>An award of special damages;</u>

[14] The plaintiff seeks recovery of the sum of shs. 94,599,758/= The law is that not only must such a claim be specifically pleaded but it must also be strictly proved since it is a claim of special damages (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR; Masaka Municipal Council v. Semogerere [1998-2000] HCB 23 and Musoke David v. Departed Asians Property Custodian Board [1990-1994] E.A. 219).* Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach. Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman*

Mutekanga v. Equator Growers (U) Ltd, S.C. Civil Appeal No.7 of 1995 and Gapco (U) Ltd v. A.S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004). This claim was specifically pleaded and it has been strictly proved. The plaintiff has on the balance of probabilities proved that the defendants are indebted in the sum claimed.

ii. An award of interest.

[15] This payment has been outskating since 27th August, 2018 as per the last cheque that bounced. The implication is that the plaintiff has been deprived of the use of that money for over five years now. Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm).* The unpaid party to a contract is entitled as of substantive right to interest from the time when payment is contractually due. The plaintiff is accordingly awarded interest on the decretal sum at the rate of 23% per annum, from 27th August, 2018 until payment in full.

iii. An award of general damages;

[16] The plaintiff is not entitled to any additional general damages. The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacia SA ('La Pintada') [1985] AC 104).* In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded

only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125).* The plaintiff not having proved such special circumstances beyond losses arising from the ordinary course of things when there is delay in payment of a debt beyond the date when it is contractually due, it is not entitled to the award of general damages.

iv. The costs of the suit.

[17] The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule.

Order:

[18] Therefore in conclusion, judgment is entered in favour of the plaintiff against the defendants jointly and severally, as follows;

a) Payment of the outstanding debt in the sum of shs. 94,599,758/=
b) Interest thereon at the rate of 23% per annum, from 7th August, 2018 until payment in full.
c) The costs of the suit and of the counterclaim.

Delivered electronically this 25th day of January, 2024 …Stephen Mubiru……

Stephen Mubiru
Judge,
25th January, 2024

Appearances

For the plaintiff : M/s Shonubi, Musoke & Co. Advocates.

For the defendant : M/s K & K Advocates