

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT NAKAWA
CIVIL SUIT NO. 144 OF 2004

MUGERWA COMMERCIAL AGENCY LTD::::::: PLAINTIFF

VERSUS

THE MANAGEMENT COMMITTEE
ST. SAVIO JUNIOR SCHOOL, KISUBI ::::::::::DEFENDANT

BEFORE: HON. JUSTICE GIDEON TINYINONDI

JUDGMENT:

The plaint (under summary suit) herein reads: -

“1. The Plaintiff is a Company incorporated and running business in Uganda whose address of service for the purposes of this Suit shall be care of **M/S MBOGO & CO. ADVOCATES, PLOT 29/35, KAMPALA ROAD, P. O. BOX 781, KAMPALA - UGANDA.**

2. The Defendant is the Managing Committee of St. Savio Junior School Kisubi and the Plaintiff's Advocates undertake to effect service of Court process on it.

3. The Plaintiff's claim against the Defendant is payment of Shs. 5,348,000/= being special damages for breach of contract, interest at the rate of 25% p.a. from date of judgment until payment in full and costs of the Suit.

4. The facts giving rise to this cause of action are as follows:

(a). That by an oral agreement made in April, 2000, the Defendant ordered for and the Plaintiff's supplied 897 pieces of coloured

T/Shirts valued at Ug. Shs. 5,382,000/= and 12 teacher T/Shirts and 18 white collar T/Shirts both valued at Shs. 216,000/=.

- (b). The goods were ordered and supplied according to the Defendant's specifications.
- (c). The 897 T/Shirts were supplied and delivered to the Defendant on the 12th April 2000. Copies of Invoice and delivery note are marked **"A"** and **"B"** respectively.
- (d). The second consignment was supplied and delivered on the 15th April, 2000. Copy of the Invoice is marked **"C"**.

5. That after two weeks the defendant paid Shs. 250,000/= to cover the 2nd consignment and part of the 1st consignment and there remained an outstanding sum of Shs. 5,348,000/=, which was payable on demand.

6. That since the delivery of the said goods, the Defendant has been promising to pay in vain.

7. That as a result of the matters aforesaid, the Plaintiff has suffered loss and damage.

PARTICULARS OF SPECIAL DAMAGES

Shs. 5,348,000/= being the outstanding unpaid balance.

8. Notice of intention to sue was duly communicated to the Defendant and the cause of action arose at Kisubi within the jurisdiction of this Honourable court.”

In their written statement of defence the Defendants stated:

“1. Save as is hereinafter expressly admitted the defendant denies each and every allegation of fact contained in the plaint as if the same were set forth and traversed seriatim.

2. The suit was improperly instituted under summary procedure and as such, the defendant shall pray at the commencement of the hearing that it be struck out with costs.

3. The Plaintiff has no cause of action against the defendant.

4. Paragraphs 3, 4, 5, 6, 7 and 8 are denied and the Plaintiff will be put to strict proof thereof.

IN THE ALTERNATIVE

5. The Defendant will aver that the Managing Director of the Plaintiff on behalf of the Plaintiff entered into an agreement with the Defendant whereby the parties agreed that the Plaintiff would supply uniforms to the defendant and the defendant, as an agent, would sell the same and remit the proceeds to the Plaintiff. A Photostat copy of the agreement is hereto annexed as annexure "A".

6. It was further agreed that such uniforms supplied would remain the property of the Plaintiff till sold.

7. The defendant will further aver that on realizing that there was no demand for the uniforms, it invited the respondent to collect the same but instead of doing so, the plaintiff instituted these proceedings.”

In the joint scheduling note both Counsel agreed that the issues were:

1. Whether the contract entered into on 23/05/1997 binds the Plaintiff and, if so, if it is applicable to the contracts entered into between the parties on 12/04/2000 and 15/04/2000.
2. Whether there was breach.

3. Remedies to the parties.

PW1, Paul Mugerwa, testified as hereafter. Through the Plaintiff Company he supplied scholastic materials to schools. Around May, 1995 he supplied the Defendants with stationery at the oral request of Father Kisitu, the headmaster of the Defendant. The oral request was subsequently reduced into writing. PW1 did not have that document.

PW1 further testified that on 23/05/1997, he and the Defendants signed a contract to supply to the Defendants goods of small value.

PW1, further testified that on 12/04/2000 his Company supplied 800 sports shirts to the Defendant at a cost of Shs. 5,382,000/=. A proforma invoice and delivery note were signed (exhibits "P2" and "P3"). The Defendants part paid with Shs. 34,000/= (Shillings thirty four thousand only) by cash.

On 15/04/2000 the Company and Defendants entered another contract. The Plaintiff would supply:

- a). 12 teachers" T/Shirts.
- b). 18 parents T/Shirts.

A proforma invoice was signed. The cost of Shs. 216,000/= (Shillings two hundred and sixteen thousand only) was paid by Defendants and received by PW1.

Referred to paragraph 4 (b) of the plaint, PW1 stated that the specifications of the goods were at the front and back of each T/Shirt.

PW1 was now claiming Shs. 5,430,000/= (Shillings Five millions, four hundred and thirty thousand only) general damages for breach of contract, interest at 25% p.a. from the date of delivery 12/04/2000 till payment, and costs of the suit.

In cross-examination PW1 testified as follows. He had been the Managing Director of the Plaintiff since its incorporation in 18/05/1988. By 23/05/1997 when he executed exhibit “P1”, he was supplying school uniforms and stationery to the Defendants as an individual but not through his company. He did not have any contract documents governing the deals between him and Defendants. When he wrote exhibits “D1” dated 16/9/2002 and “D2” dated 12/5/2004, he was acting as the Managing Director of the Company which position he had assumed since 2000. He had stopped dealing with the Defendants in October, 2001.

With this evidence, the proceedings terminated.

Both Counsel filed written submissions.

After due consideration of the pleadings, the evidence and both Counsel’s submission I now revert to the issues.

With regard to the first issue I find and hold as follows:

- a). the Plaintiff Company was incorporated on 18/05/1988.
- b). Paulo Mugerwa was one of the three subscribers.
- c). At this hearing Paulo Mugerwa's evidence was that, since 18/05/1988 to date he was the Managing Director of the Plaintiff's Company.
- d). Under Article 3 (c) of the Memorandum of Association the Company was:

“(c) To carry on by wholesale or retail or be interested in the business of distribution and importation of all types of textile materials.....”

[Emphasis supplied].

- (e). On 23/05/1997 exhibit “P1” was executed. I reproduce it ex tenso:

ST. SAVIO JUNIOR SCHOOL, KISUBI

Tel: 20017 Entebbe

P. O. Box 10
KISUBI (Uganda)

Your Ref:

Our Ref:

23/5/97

A CONTRACT

AS FROM 23/5/97 MR. PAUL MUGERWA WILL RECEIVE MONEY FOR UNIFORMS DIRECTLY FROM THE SOLD UNIFORMS TO THE PUPILS. WE SHALL ONLY KEEP THEM FOR HIM FOR SALE. WE NO LONGER CAN AFFORD PURCHASING THEM.

HEADMASTER (Signed)

MR. MUGERWA PAUL (Signed)

(f). In his evidence in cross-examination PW1 testified that where he signed exhibit “P1” he was supplying school uniforms and stationery to the Defendants in his individual capacity but not through the Plaintiff’s Company. He further testified that he did not have any contract documents governing his deals with the Defendants.

It is my holding that it was before, at, or immediately after executing exhibit “P1” that PW1 ought to have complied with Section 200 of the Company’s Act, No. 110/2000. It reads:

Disclosure by directors of interests in contracts.

1). Subject to this section, a director of a company who is in any way, whether directly or indirectly, interested in a contract or proposed contract with the company shall

declare the nature of his or her interest at a meeting of the directors of the company.

- 2). In the case of a proposed contract the declaration required by this section to be made by a director shall be made at the meeting of the directors at which the question of entering into the contract is first into consideration or if the director was not at the date of that meeting interested in the proposed contract, at the next meeting of the directors held after he or she became so interested, and in a case where the director becomes interested in a contract after it is made, the declaration shall be made at the first meeting of the directors held after the director becomes so interested.
- 3). For the purposes of this section, a general notice given to the directors of a company by a director to the effect that he or she is a member of a specified company or firm or acts for the company in a specified capacity and is to be regarded as interested in any contract which may, after the date of the notice, be made with that

company or firm or with himself or herself in such specified capacity shall be deemed to be a sufficient declaration of interest in relation to any contract so made; but no such notice shall be of effect unless either it is given at a meeting of the directors or the director takes reasonable steps to secure that it is brought up and read at the next meeting of the directors after it is given.

- 4). Any director who fails to comply with this section is liable to a fine not exceeding two thousand shilling.
- 5). Nothing in this section shall be taken to prejudice the operation of any rule of law restricting directors of a company from having any interest in contracts with the company.

The basis of this requirement is to be found, inter alia, in “Company Law” by K. M. Gosh & Dr. K. R Chandratres, (13th Ed.) p. 3876. There it is stated: -

1. Director's duty to disclose interest or concern

"Object and Scope

This section applies to all companies and all types of directors. Every director of a company is required to disclose the nature of his concern or interest at a meeting of the Board of directors in a contract or arrangement, or proposed contract or arrangement, entered into or to be entered into, by or on behalf of the company. If the director is in any way, whether directly or indirectly, concerned or interested in the contract or arrangement.

As noted earlier, the provisions enacted in section 299 (and also of sections 297 and 300) are founded on the principle that a director is precluded from dealing on behalf of the company with himself and from entering into engagements in which he has a personal interest conflicting, or which possibly may conflict, with the

interest of those whom he is bound by fiduciary duty to protect.

Section 299 casts upon directors of companies an onerous obligation. It is a statutory obligation violation of which results in serious consequences. Contravention of this section compels the director to vacate his office of directorship apart from making him liable for penal consequences. This provision is enacted in order to ensure that directors act fairly and reasonably when there is a conflict between their interests and their duty towards the company. On contravention of the section the director has to vacate his office *ipso facto* on the happening of that event. The section applies to all companies.

As noted before, a director owes fiduciary duty to the company. Disclosure of interest should be to the shareholders. However, that is impracticable and inconvenient in relation to the day-to-day running of a

business of a company. It has, therefore, been provided that the disclosure should be made to the Board of Directors. Gower comments on this point thus:

In marked contrast with the basic equitable principle the disclosure required is not to the general meeting but to the Board. It hardly seems over-cynical to suggest that disclosure to one's cronies is a less effective restraint of self-seeking than disclosure to those for whom one is fiduciary.

- (g). In his further evidence in cross-examination PW1 testified that on 12/04/2000 the Plaintiff Company supplied coloured T-Shirts valued at Shs. 5,382,000/= (Shillings Five millions three hundred and eighty two thousand only) per proforma invoice exhibit "P2" and delivery note (exhibit "P3") and that on 15/04/2000 the Plaintiff Company supplied to the Defendant T-Shirts worth Shs. 216,000/= (Shillings two hundred and sixteen thousand only) per exhibit "P4". Exhibits "P2"

and “P4” are on the headed papers of the Plaintiff and bear the signature of PW1. Exhibit “P3” bears the names of the Defendant and acknowledges the receipt of the T-Shirts in exhibit “P2”.

Fox L. J. *in Guinness Plc. V Saunders, supra*, stated:

“A director is in a fiduciary position. A person in a fiduciary position is not permitted to obtain profit from his position except with the consent of his beneficiaries or other persons to whom he owes the duty. In the case of a director, the consent required is that of the members in general meeting. That is inconvenient in relation to the day-to-day running of a business. It has, therefore, become the practice to relax the general rule by special provisions in the articles.”

- (h). It is my further holding that the circumstances of this case disclose that PW1 has failed to prove that when he executed exhibit “P1” he was acting in his individual capacity. He executed it when he was the Managing

Director of the Plaintiff. Exhibit "P1" concerned Article 3 (c) the objects of the Articles of the Plaintiff's Company. All the documented deals in this suit (exhibits "P2" and "P4") were in pursuit of the said Article. PW1 cannot eat his cake and have it. I hold that the agreement entered into on 23/05/1997 binds the Plaintiff and is applicable to the agreements entered into between the parties on 12/04/2000 and 15/04/2000.

- (i). Having held as above I go on to hold that there was no breach. Exhibit "P1" is very clear. The Defendant were to act as "a shop" for the goods sold and a 'warehouse' for the unsold good. Property in the unsold goods remained vested in the Plaintiffs. In paragraph 7 of the written statement of defence it was pleaded that the Defendants invited the Plaintiffs to collect the unsold good but the Plaintiffs failed (neglected) refused to do so.

(j). With regard to the third issue, I hereby dismiss the Plaintiff's suit with costs to the Defendants.

Gideon Tinyinondi

JUDGE

25/01/2008.

25/01/2008:

Rwanka Peter holding brief for Mr. Mbogo Charles for the Plaintiff.

Mr. Luboyera Joseph for the Defendant.

Mr. Ochen, Court Clerk.

Court:

The judgment is read.

Gadenya Paul Wolimbwa

DEPUTY REGISTRAR

25/01/2008.