IN THE HIGH COURT OF UGANDA AT JINJA

MISCELLANEOUS APPLICATION NO. 0152 OF 2008

(ARISING FROM H.C.C.S. NO. 0026 OF 2008)

DEMBE TRADING ENTERPRISES LTD.:::::::::::::::APPLICANT/DEFENDANT

VERSUS

BIDCO (U) LIMITED::RESPONDENT/PLAINTIFF

BEFORE: HON. LADY JUSTICE IRENE MULYAGONJA KAKOOZA

RULING

The applicant/defendant company brought this application under the provisions of Order 36 rules 3 and 4, and Order 52 rule 1 of the Civil Procedure Rules (CPR). She sought leave to appear and defend a suit wherein the respondent/plaintiff sued her for recovery of money by specially endorsed plaint.

The application was originally supported by the affidavit of Anil Damani dated the 25th September 2008 but the same was struck out for not distinguishing matters that were known to the deponent from those based on information and belief. Counsel for the defendant was however allowed to proceed in the application because the grounds thereof had been amply stated in the notice of motion.

The background to the application was that the plaintiff sued the defendant for recovery of shs 161,342,241/= being the price of goods supplied to the defendant at its request and instance. The defendant had a running account in its name with the plaintiff on which the plaintiff entered goods supplied on its account, as well as any monies paid to its credit. A copy of the statement of that account was attached to the plaint as Annexure "A" and it showed that by the date of closing the account (i.e. on 31/07/2008), the defendant owed the plaintiff shs 161,342,241/=. The plaintiff further stated that on the 28/06/2007, the defendant issued two cheques for shs

80,000,000/= and shs 81,342,241/=, which represented the sum of shs 161,342,241/= claimed by the plaintiff. The cheques were attached to the plaint as Annexure “B” and “C,” respectively. It was the plaintiff’s case that the two cheques were banked with its bankers, M/s Stanbic Bank (U) Ltd but the same were returned unpaid. The plaintiff gave notice of dishonour to the defendant and made several demands of the defendant to pay the debt but the defendant failed to do so. The plaintiff thus brought this suit on a specially endorsed plaint on the basis of the dishonoured cheques for recovery of shs 161,342,241/=, interest thereon at the rate of 27% p.a. from the date of filing suit till payment in full, and the costs of the suit. The defendant then brought this application for leave to appear and defend the suit.

The grounds that the defendant relied on in the application were first that the suit was misconceived, premature and vexatious because the parties were still trying to reconcile accounts. Further that the plaintiff did not inform the defendant that the arrangements to reconcile accounts had been terminated and as a result the plaintiff was estopped from taking legal action against the defendant. The defendant also stated that the suit as it stood raised triable issues as follows:

i) Upon reconciling their accounts, the defendant found that the goods the plaintiff claimed to have supplied exceeded the merchandise actually supplied to them;
ii) The plaintiff did not identify the invoices that remained unpaid;
iii) The plaintiff did not notify the defendant before she supplied goods to third parties;
iv) The defendant was entitled to credits, rebates and discounts from the plaintiff;
v) The defendant disputed claims in the statement of account that went back as far as 2004; and finally,
vi) That the plaintiff had violated the Kampala Distribution Agreement by supplying goods directly to customers and depriving the defendant of its profit margin for 18 months.

The plaintiff filed an affidavit in reply deposed by Chakravarthi S. Prava, the plaintiff company’s Finance Controller which was dated the 21/10/2008. In the affidavit Mr. Chakravarthi stated that the defendant had not challenged the account statement and the specific figures or amounts stated therein, thus leaving the whole amount unchallenged. That the amounts in the cheques that the

defendant issued tallied with the amount claimed by the plaintiff which was represented in the statement of account, Annexure "A" to the plaint. Further that the plaintiff did not stop payment of the cheques but they were dishonoured. In his view, the defendant's application for leave to file a defence was an effort to buy time.

At the hearing of the application, Mrs. Deepa Verma Jivram who represented the defendants repeated the grounds in the notice of motion and submitted that the grounds raised several triable issues. In her view, paragraphs 3, 4 and 5 of the affidavit in reply put together with the grounds stated in the notice of motion raised triable issues, including whether the cheques were stopped or dishonoured, and whether there was need for reconciliation of accounts between the parties. It was also contended that there was a triable issue as to whether the goods for which payment was claimed were supplied to the defendant. Mrs Jivram argued that the affidavit in reply did not address any of the grounds raised in the notice of motion, implying that a case had been made out that there were triable issues to be addressed in the suit. She relied on the decisions in the cases of **Abubaker Kato Kasule v. Tomson Muhwezi [1992-1993] HCB 212** and **Maluku Interglobal Trade Agency Ltd. v. Bank of Uganda [1983] HCB 63** for the submission that in an application for leave to appear and defend, it is sufficient to show court that there are triable issues. She proposed that entering judgment at this point in time would be prejudging the case. She concluded that the issue of the cheques could only be addressed if the defendant were allowed to file a defence in the suit because it involved calling evidence.

In reply, Mr. Robert Okalang submitted that the decision in the **Maluku Interglobal case** could be looked at in a different way. He contended that in that case, the court found that in an application for leave to defend a vague suggestion of fraud or misconduct on the part of the plaintiff will not suffice; meaning that if the defendant had wanted court to believe there was fraud, defendant ought to have stated it in their application. Mr. Okalang further argued that in such an application the defendant must show that there is a triable issue. He added that the plaint in this suit relied on two main documents: a statement of account that showed that the defendant owed the plaintiff a certain amount and two cheques paid for the same amount. Further, that the statement indicated dates of invoices, delivery vehicles with number plates, values of invoices and payments that had been made by the defendant during the course of the transaction, and finally an amount due which was shs 161,342,241/=. He contended that the application did not

identify which of the invoices in the statement was disputed but just made a sweeping statement that there had been arrangements to reconcile the accounts. In his view the defendant had acknowledged the debt when it issued the two cheques for the amount that was due according to the statement of account, and which the plaintiff claimed.

Mr. Okalang also pointed out that the statement of account showed that on various dates, the defendant had paid amounts of money towards settlement of the debt. Further that if the defendant contested the amount claimed then a question would arise why it made those payments. He referred to s.72 (1) of the Bills of Exchange Act for the definition of a cheque and submitted that having issued cheques the defendant had agreed to pay the amount stated therein. Relying on the decision in **Bidco (U) Ltd. v. Western Distributors Ltd. H.C.C.S No. 271 of 2008 (unreported)** in which this court dealt with a similar situation, he submitted that judgment ought to be entered for the plaintiff on the cheques because it is the duty of court to uphold the efficacy of cheques. Mr. Okalang also contended that there was nothing in the application to show that the defendant tried to contest the cheques before and after they were banked. He added that the allegations that were raised in the application in order to show that there were triable issues were vague and did not address the suit at all. Also that the defendant tried to adduce evidence contrary to the best evidence rule that where there is evidence in writing to prove a certain fact, then oral evidence cannot be brought to challenge the evidence in writing. In his view, when the defendant issued the two cheques to the plaintiff, it had judged its own case. He thus submitted that entering judgment against it would only be confirming its own judgment on itself. He then prayed that the application for leave to appear and defend be dismissed and judgment be entered for the plaintiff for the amount claimed with interest at 27%, from the date of filing suit till payment in full, and for the costs of the suit.

In rejoinder, Mrs. Verma Jivram contended that the running account stopped on 31/07/2007 but both cheques were dated 28/06/2007. In her view the defendant could not have issued cheques for shs 161,342,241/= before the closing of the account. She reiterated that a triable issue arose because the amount claimed exceeded the value of goods supplied to the defendant. That the filing of a WSD would bring out the particulars of fraud, including that the issuing of cheques equivalent to the amount claimed at the closing of the account on 31/07/2007 implied that blank cheques had been issued to the plaintiff, who filled in the amounts therein. That this was contrary

to the agreement that the blank cheques were only given as security for payment as is the practice in business. She reiterated that the plaintiff had supplied goods to third parties without the authority of the defendant such as Otieno Dembe named in the statement of account. She also argued that the case of **Bidco v. Western Distributors** cited by Mr. Okalang could be distinguished from the instant case in that in that case, the defendant had not filed an application for leave to defend the suit, while in this case the defendant had so applied. Also that the **Western Distributors** case dealt strictly with the Bills of Exchange Act which was not the issue in the instant case.

It is true as submitted by counsel for both parties that before leave to appear and defend is granted the defendant must show by affidavit or otherwise that there is a bona fide triable issue of fact or law. Where there is a reasonable ground of defence to the claim, the plaintiff is not entitled to summary judgment. The defendant is not bound to show a good defence on the merits but should satisfy court that there is an issue or question in dispute which ought to be tried and the court should not enter upon the trial of the issues disclosed at this stage (**Maluku Interglobal Trade Agency Ltd. v. Bank of Uganda, supra)**.

That being the general statement of the criteria for determination of such applications, I note that several issues arise from the pleadings and submissions of counsel that would go towards the resolution of the question, whether the application for leave to appear and defend should succeed, and they are as follows:

i) Whether the amount claimed by the plaintiffs was for more goods than the plaintiff had supplied.
ii) Whether the facts stated in the application vitiated the cheques, thus disentitling the plaintiffs from relying on them in a suit for recovery of the debt; and finally,
iii) Whether the application for leave to appear and defend raises triable issues.

i) Whether the amount claimed by the plaintiffs was for more goods than the plaintiff had supplied.

This first question actually goes to the sufficiency of consideration for the goods. To this end, some of the grounds of the application related to the reconciliation of accounts between the

parties. The defendant appeared to be saying that the consideration being demanded by the plaintiff was more than would be sufficient for the goods supplied. That would imply that though they issued the two cheques, and that fact was not denied; the amounts therein were contested as against the goods that were supplied. It is therefore also an undisputed fact that some goods were supplied to the defendant. The East Africa Court of Appeal was called upon to decide on almost similar facts in **Hassanali Issa & Co. v. Jeraj Produce Store [1967] E.A. 555**. Relying on the decision of the Privy Council in the case of **Adib El Hinnawi v. Yacoub Fahmi Abu El Huda [1936] 1 All E.R. at 639**, the court held:

> *"In other words once there is, in fact, consideration and once, in fact, a cheque has been given based on some consideration, then in a suit upon that cheque, the court cannot go into the question as to whether or not the consideration was sufficient. Let me make it clear that it can go into the question as to whether or not there was consideration; but if, as in this case, there was admittedly some consideration then the fact that the parties had agreed to a sum and that agreement manifested by signing a cheque shows that the plaintiff is entitled to recover that sum, unless, as I say, there is some special considerations of fraud or duress."*

In **Adib El Hinnawi v. Yacoub Fahmi** (supra) where in an action for the payment of a sum alleged to be due to the plaintiff upon a promissory note, the defendant pleaded that there was no consideration, their Lordships of the Privy Council expressed three broad principles relating to promissory notes (and impliedly to bills of exchange in general) as follows:

(a) Inadequacy of consideration affords no relevant answer to a demand upon a promissory note;
(b) It is not for the court to enquire into the adequacy of the consideration for the note, but to consider whether or not there had or had not been any consideration given, and finally that,
(c) The burden of proof that no consideration had been given was on the defendant.

The burden of proof in this case was therefore on the defendant to show that there was no consideration, not that there was insufficient consideration. In other words, once the defendant admitted that there was some consideration for the cheques, it ceased to matter whether that consideration was sufficient to cover the value of the cheques or not. It also became irrelevant whether or not there had been a reconciliation of accounts to ensure that the goods tallied with the amounts in the cheques. The points raised in grounds 1, 2, 3 and 4 of the notice of motion therefore could not amount to triable issues in an action brought on the basis of cheques that had admittedly been issued and subsequently dishonoured; and I find so.

ii) Whether the facts stated in the application vitiated the cheques, thus disentitling the plaintiffs from relying on them in a suit for recovery of the debt.

Ordinarily, the onus is on the plaintiff to prove his/her case. But there are certain circumstances in which by reason of the facts alleged or by reason of the facts pleaded in the defence, the case for the plaintiff is *prima facie* established and the onus passes to the defendant immediately, and the plaintiff does not have to prove anything unless and until the onus shifts back to him. In the instant case, inasmuch as the suit was about cheques and it was admitted that the cheques were given, the onus was then on the defendant to show some good reason why the plaintiff was not entitled to get judgment upon the cheques that were admittedly given to them. This position stems from s.29 (2) of the Bills of Exchange Act which provides:

> **"Every holder of a bill is prima facie deemed to be *a holder in due course*; but if in an action on a bill it is admitted or proved that the acceptance, issue or subsequent negotiation of the bill is affected with fraud, duress, or force and fear or illegality, the burden of proof is shifted, until the *holder proves that, subsequent to the alleged fraud or illegality,* value has in good faith been given for the bill."**

Therefore, if in an action on a bill it is admitted or proved that the issue of the bill is affected by fraud, duress, force and fear or illegality, then the burden of proof shifts unless certain events take place. (See **Hassanali Issa & Co. v. Jeraj Produce Store** supra).

In this case, Mrs. Jivram submitted that there was some fraud that would be pleaded when leave to appear and defend is granted to the defendant. She intimated that the particulars of the alleged fraud were that the cheques were dated 28/06/2007, while the closing date of the statement of account was 31/07/2007. Further that the defendant could not have issued those cheques for the exact amount stated in the statement of account before it was closed. This implied that the defendant must have issued blank cheques dated 28/06/2007 which the plaintiff then filled in with the amounts claimed at the close of the statement of account, and then banked them, yet the agreement or business practice was that the cheques were only given as security for payment.

Mrs Jivram's argument that the cheques were given only as security and were not to be banked defeats my understanding for the following reasons. If the defendant did not intend for the cheques to be used as security for payment, why then did it issue them? I am also of the view that if the cheques were issued as security, then that security could only have been security for payment of the account between the parties which later turned into a debt. It must have been envisaged that in the event that the defendant did not settle the account, then, the plaintiff would have recourse to the cheques. Moreover, according to s.72 (1) of the Bills of Exchange Act a *"cheque"* is a bill of exchange drawn on a banker payable on demand. S.72 (2) of the Bills of Exchange Act goes on to provide that except as otherwise provided in Part III of the Act, the provisions of the Act applicable to a bill of exchange payable on demand shall apply to cheques. Now, a bill of exchange is defined by s.2 (1) of the Bills of Exchange Act as follows:

> "A bill of exchange is ***an unconditional order in writing,*** addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time ***a sum certain in money*** to or to the order of a specified person or to bearer."
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> **{Emphasis supplied}**

The normal format and wording of a cheque is therefore as follows:

> ***"To: …….The (specified) Bank***
> ***Pay …….. ……or order***
> ***Uganda Shillings…….***

……Drawers Signature"

It is implied from the definition of a bill of exchange, and therefore a cheque, that it is by its very nature unconditional. One cannot issue a cheque on any conditions, except if those conditions are notified to the banker. This is because the cheque/bill is addressed to the drawee, in this case the banker, not to the bearer of it.

In the instant case, there were no facts pleaded by the defendant that it instructed its bankers not to pay the cheques. What seems to come out from the plaint is that the two Barclays Bank cheques were given to the plaintiff on or before the 28/06/2007. The plaintiff presented them to Barclays Bank through its bankers, M/s Stanbic Bank on 2/07/2007. They were received by Barclays Bank on 4/07/2007 but they were not paid. Instead, Barclays Bank returned them to Stanbic Bank on the same day, meaning that Barclays Bank had dishonoured them.

The plaintiff pleaded that notice of dishonour was given to the defendant, and the defendant did not deny that fact. Specific actions to recover the money due follow a notice of dishonour; that is what the plaintiff did to ensure that it gains possession of the money that had been promised it in the cheques. S.47 (2) of the Bills of Exchange Act provides that when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and endorsers accrues to the holder of the bill. There was therefore no further need for the plaintiff to prove the debt, because any disagreements that obtained between the parties about the amount owed for the goods were assumed to have been settled and had been replaced by the unconditional order that the defendant's bankers pay the sums contained in the cheques issued to satisfy the debt.

Going on then to the allegation that the defendant could not have issued the cheques for the amounts stated therein, and on the date stated therein, but issued blank ones which the plaintiff filled in, and the suggestion that this was fraudulent conduct, Mrs. Jivram did not substantiate what was and what was not included in the cheques. But even if she had, according to the notice of motion that was not the defendant's proposed defence. Even if it had been, the Bills of Exchange Act provides for such situations.

Section 2 (4) of the Bills of Exchange Act provides that a bill is not invalid by reason that it is not dated; neither is it invalid by reason that it does not specify the value given or that any value has been given therefore. In addition, s.19 (1) of the Bills of Exchange Act provides as follows:

> **19. Inchoate instruments**
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> **(1) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a prima facie authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an endorser; and, in like manner, *when a bill is wanting in any material particular, the person in possession of it has a prima facie authority to fill up the omission in any way he or she thinks fit.*"**
>
> **{My Emphasis}**

According to s. 19 (2), in order that any such instrument when completed may be enforceable against any person who became a party to it prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact; but if any such instrument after completion is negotiated to a holder in due course, it shall be valid and effectual for all purposes in his or her hands, and he or she may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given.

As a result, even if the plaintiff had been given blank but signed cheques, having a debt against the defendant, the plaintiff had *prima facie* authority to fill up the omission(s) as they thought fit. Consequently, if the plaintiff's representative or officer filled up the blanks with the amount they demanded from the defendant, they did so within the law. They could not be said to have been fraudulent.

As to whether they filled them up within a reasonable time, if the defendants issued the cheques on 28/06/2007, then the plaintiffs (if they did) filled them in before banking, i.e. on or around 2/07/2007. In the alternative the statement of account indicated that the two cheques were entered onto the statement on 29/06/2007. In any event, the space of time between delivery of the

cheques and filling in the blanks, and then banking them could have been only 3 or 4 days. In my view this was a reasonable time for purposes of s. 19 (2) of the Bills of Exchange Act to come into effect. If there was any want of authority to fill in the blank spaces in the cheques, once they were filed in and negotiated to the bank, they became valid instruments under the provisions of s.19 (2) of the Bills of Exchange Act. That being the law, the cheques could not fall under the special circumstances provided for by s.29 (2) of the Act. The cheques were valid and the plaintiffs had the right to negotiate them to recover the monies owed. Having failed to do so on negotiation, the plaintiffs automatically became entitled to recover the monies by suit.

As was observed by Mr. Okalang, the effect of my decision in the case of **Bidco (U) Ltd. v. Western Distributors Ltd.** (supra), was that it is the duty of this court to protect the integrity of cheques. This is so because increasingly cheques have become the grease that facilitates the efficient running of the world of commerce. The business practice in Uganda of issuing cheques as security for payment with the intention that they should not be banked or negotiated should be strongly discouraged, because it goes against the very nature of such instruments. I think that businessmen and women have come to take this as a valid practice/custom because they have not a clue about the legal implications and the gravity of issuing and accepting cheques. They therefore carelessly issue cheques in spite of the provisions of s.385 (1) (b) of the Penal Code Act which makes it an offence to issue a cheque, well knowing that one does not have the funds to meet the payment ordered in their account. But ignorance of the law is not a defence. The person who draws a cheque is presumed to know the implications of his/her action and should be held to it. The person who accepts the cheque becomes a holder in due course; he/she should hold the bill in good faith and for value, if he has no notice of any defect in the title of the person who drew or negotiated it. He/she should be able to negotiate it for value, or bank it, with no fear that it will not be honoured by the drawer or other person against whom it is drawn.

The above being the sum total of the arguments that were raised for the defendant to advance its application for leave to appear and defend, I find that the defendant did not show that there were any triable issues to be decided upon in this suit. The application therefore had no merit and it is hereby dismissed. As a result, judgment is entered for the plaintiff for the sum of shs 161,342,241/= with interest thereon at the rate of 15% p.a. from the date of filing the suit till payment in full. The defendant shall also pay the costs of the suit.

Irene Mulyagonja Kakooza

JUDGE

17/02/2010