

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA SITTING AT ARUA
CIVIL SUIT No. 0016 OF 2017

5 **WAIGLOBE (U) LIMITED** **PLAINTIFF**

VERSUS

10 **SAI BEVERAGES LIMITED** **DEFENDANT**

Before: Hon Justice Stephen Mubiru.

JUDGEMENT

15 The plaintiff sued the defendant for recovery of shs. 21,000,000/=, general damages for breach of contract, interest and costs. The plaintiff is a private limited liability company based in Arua Municipality, dealing in general merchandise. The defendant too is a private limited liability company based in Mukono, and the manufacturer of "Fizzy" soda.

20 The plaintiff's claim is that during or around September, 2016, through an exchange of e-mail between the plaintiff's Director, Mr. Tamale Teeeto Waigoson and the defendant's agents, including a one Mr. Ramesh Gupta, the two companies entered into a contract of distributorship by which the plaintiff was constituted the defendant's official agent and distributor of "Fizzy" soda in the districts of Arua, Adjumani and Moyo. Under that agreement, the defendant was to
25 supply the plaintiff with their products, undertake advertisement and sales promotion activities, provide a sales representative, among other obligations. The plaintiff was to purchase on partial credit terms, the defendant's products and endeavour to meet the defendant's sales targets. to be set after a stabilisation period of five to six months from the date of commencement of the distributorship. The plaintiff was to be paid 5% commission on each 10,000 units sold.

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The plaintiff in their e-mail dated 30th August, 2016 having accepted the terms offered by the defendant, by way of a bank transfer the plaintiff on 1st September, 2016 paid the defendant a sum of shs. 21,000,000/= receipt of which the defendant confirmed by an e-mail dated 9th September, 2016. Despite that acknowledgement, the defendant did not supply the plaintiff with

any product and failed to do so even after several subsequent reminders. The plaintiff then demanded for a refund of the money paid. The defendant on 24th September, 2016 issued the plaintiff with a cheque in the sum of shs. 11,000,000/= which was returned unpaid upon being presented to the bank. On 26th September, 2016 the defendant again issued the plaintiff with a
5 cheque in the sum of shs. 11,000,000/= which too was returned unpaid upon being presented to the bank. The defendant has since then failed to refund the money causing the plaintiff financial distress and loss in its business activities.

Although on 3rd April, 2017 the defendant was served with summons to file a defence with a
10 copy of the plaint attached, it did not file any defence to the suit. Satisfied with the return of service filed in court on 10th May 2017, the court on 23rd May 2017 entered an interlocutory judgment against the defendant and set down the suit for formal proof of general damages. At the hearing, the plaintiff's Director, Mr. Tamale Teeeto Waigason presented a witness statement whose contents reiteretae the facts as summarised above.

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Despite the fact that the defendant in this suit did not file a defence nor offer any evidence, the plaintiff still bears the burden of proving his case on the balance of probabilities even if the case was heard on formal proof only (see *Kirugi and another v. Kabiya and three others* [1987] KLR 347). The issue for determination is whether the plaintiff is entitled to an award of general
20 damages.

Section 61 (1) of *The Contracts Act*, 7 of 2010, provides that where there is a breach of contract, the party who suffers the breach is entitled to receive from the party who breaches the contract, compensation for any loss or damage caused to him or her. For a loss arising from a breach of
25 contract to be recoverable, it must be such as the party in breach should reasonably have contemplated as not unlikely to result. The precise nature of the loss does not have to be in his or her contemplation, it is sufficient that he or she should have contemplated loss of the same type or kind as that which in fact occurred. There is no need to contemplate the precise concatenation of circumstances which brought it about (see *The Rio Claro* [1987] 2 *Lloyd's Rep* 173).

The rule of the common law is that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed (see *Robinson v. Harman* (1848) 1 Exch 850 at 855, [1843-60] All ER Rep 383 at 385 and *Kibimba Rice Ltd v. Umar Salim, S.C. Civil Appeal* 5 No. 17 of 1992). Damages are designed to compensate for an established loss and not to provide a gratuitous benefit to the aggrieved party. There is no doubt therefore that wherever it is reasonable for the innocent party to insist upon re-instatement the courts will treat the cost of re-instatement as the measure of damage (see *East Ham BC v. Bernard Sunley & Sons Ltd* [1965] 3 All ER 619 at 630, [1966] AC 406 at 434-435). This does not mean that in every case of breach 10 of contract the plaintiff can obtain the monetary equivalent of specific performance. It is first necessary to ascertain the loss the plaintiff has in fact suffered by reason of the breach. If he has suffered no loss, as sometimes happens, he can recover no more than nominal damages. For the object of damages is always to compensate the plaintiff, not to punish the defendant.

15 The general principle underlying the award of damages in contract is that the plaintiff is entitled to full compensation for his losses; i.e. the principle of “*restitutio in integrum*.” Where a party has sustained a loss by reason of a breach of contract, he or she is, so far as money can do it, to be placed in the same situation with respect to damages, as if the contract had been performed. Damages are not awarded to enrich a plaintiff far beyond his actual losses nor should the plaintiff 20 get far less than his actual loss. Therefore, when a claim for damages is made, the plaintiff is required to provide evidence in support of the claim and to adduce facts upon which the damages could be assessed. Before assessment of damages can be made, the plaintiff must first furnish evidence to warrant the award of damages. The plaintiff must also provide facts that would form the basis of assessment of the damages he would be entitled to. Failure to do so 25 would be fatal to a claim for damages.

In a claim for damages for breach of contract, the *locus classicus* on this principle of remoteness is the case of *Hadley v. Baxendale* [1854] 9 Ex. 341. This case supplies two tests for determining which damages are proximate and recoverable and which are too remote and therefore 30 unrecoverable. These tests are:

- a. Do the damages arise naturally from the breach? Or

- b. Were the damages reasonably contemplated by both parties when they made the contract as being a probable result of the breach?

If the answer to any of these two questions is yes, then damages are proximate; i.e. not too remote and therefore recoverable. General damages are what the law presumes to be the direct, natural or probable consequence that will have resulted from the defendant's breach of contract. They are normally damages at large and can be nominal or substantial depending on the circumstances of each case. Nominal damages will be awarded where the court decides in the light of all the facts that no actual damage has been sustained.

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The function of nominal damages is to mark the vindication, where no real damage has been suffered, of a right which is held to be so important that its infringement attracts a remedy (see *Neville v. London Express Newspaper Ltd [1919] A.C. 368 at p.392*). Substantial damages will be awarded when actual damage is proved to have been caused. It was held in *Johnson v. Agnew [1979] 2 W.L.R. 487*, at p. 499 that in cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it is more logical and just rather than tie the plaintiff to the date of the original breach, to assess damages as at the date when (otherwise than by his or her default) the contract is lost.

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The plaintiff in this case, apart from his assertion that it remitted funds to the defendant for the supply of products, did not adduce any cogent evidence on basis of which a finding of fact can be made as to a wider impact on its business operations, of the defendant's failure to deliver the product in accordance with the terms of their agreement, other than the fact that it lost a commission that would have been earned. In a case such as this where general damages are claimed for failure to deliver products on the agreed date for money advanced for that purpose, the result is that the plaintiff has been denied use of its money and the defendant has more or less obtained unfair advantage of investing it in its business activities for over one year now.

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In the circumstances, I have adopted the normal measure of damages in cases of belated repayments of money borrowed in which cases damages are awarded by way of interest which the money would attract during the period of breach, taking the rates of interest and inflation into account (see *Sowah v. Bank for Housing & Construction [1982-83] 2 GLR, 1324*). I have

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therefore applied a rate of interest of 20% per annum, as the measure of profit which the money would have attracted during the period of breach, i.e. from 1st September, 2016 to-date (one year and three months), as general damages to be awarded to the plaintiff. I therefore award the plaintiff shs 5,250,000/= as general damages.

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Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account “the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd*, H. C. Civil Suit No. 234 of 2011 and *Kinyera v. The Management Committee of Laroo Boarding Primary School*, H. C. Civil Suit No. 099 of 2013). Consequently, the award of general and special damages shall carry interest at the rate of 8% per annum from the date of judgment until payment in full.

In the final result, Judgment is entered for the plaintiff against the defendant in the following terms:-

- a) Shs. 21,000,000/= special damages.
- b) Shs. 5,250,000/= as general damages.
- c) interest on the sum in (a) and (b) above at the rate of 8% from the date of this judgment until payment in full.
- d) The costs of the suit.

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Dated at Arua this 14th day of December, 2017

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Stephen Mubiru
Judge,
14th December, 2017.

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