

**THE REPUBLIC OF UGANDA**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(CIVIL DIVISION)**

**CIVIL SUIT NO. 457 OF 2019**

**UGANDA BAATI LIMITED ::: PLAINTIFF**

**VERSUS**

**DUNCAN MUGABI ::: DEFENDANT**

**BEFORE: HON. JUSTICE SSEKAANA MUSA**

**JUDGMENT**

The plaintiff is a limited liability company duly incorporated under the laws of Uganda, whose cause of action against the defendant is fraud, misrepresentation, economic loss, reputational damage and for the refund of special damages amounting to UGX. 168,285,661 (Uganda shillings One Hundred, Sixty Eight Million, Two Hundred Eighty Five Thousand Six Hundred Sixty One) obtained by the defendant without authorization of the plaintiff, was illegally taken, diverted, traded with and/or utilized by the defendant.

The defendant was employed by the plaintiff from 2003 up to 2019 in a position of Sales Manager in Western region. The plaintiff received a number of complaints from various customers claiming they had never received goods paid for or received less goods or never received discounts as requested for or that their accounts had been debited without their knowledge.

The plaintiff commenced investigations into the complaints and discovered a number of discrepancies relating to customers' accounts handled and managed by the defendant. The defendant during a disciplinary hearing made undertakings to refund some of the payments for the goods invoiced that he had erroneously obtained without consent/authorization.

That as a result of the defendant's fraudulent dealings, false representations to customers and illegal acts, the plaintiff has incurred substantial economic losses and reputational damage.

The defendant having been duly served with summons to file a defence together with the plaint attached, failed to file any reply. Parties were also directed by court to file a joint scheduling memorandum and respective trial bundles but all efforts to reach the defendant and/or his advocate were futile, thus the plaintiff's scheduling memorandum was filed separately.

The plaintiff was represented by *Ms Naome Byabazaire* and *Mr. Pitson Abaasa*

The following issues were raised by the plaintiff for determination;

1. *Whether the defendant defrauded the plaintiff and its customers?*
2. *Whether the plaintiff suffered economic loss as a result of the defendant's illegal and fraudulent actions?*
3. *What remedies are available to the parties?*

### ***Submissions***

Counsel for the applicant defined Fraud through the case of **Fredrick Zaabwe v. Orient & 5 Ors Civil Appeal No. 04/2006 while relying on the Black's Law Dictionary 6<sup>th</sup> Edition page 660** as *"An intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. A false representation of a matter of fact, whether by words or by conduct, by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another so that he shall act upon it to his legal injury?"*

Counsel submitted that according to the evidence in chief led by PW1 under paragraphs 5-8 of his witness statement, states that he was asked by the finance manager to confirm customer balance of the different customers in the south western region and that while doing the said task, he received several complaints from the customers namely;

- a) Mbigaya Richard whose complaint according to PEX 1 was that his account was debited as a result of invoice No. K0086126 worth UGX. 6,768,157 and invoice K00086699 worth 14, 885, 659 all totaling to UGX. 21, 653,816 which were unknown to him
- b) Gana Limited whose complaints according to PEX 2 were that;
- Its account was debited as a result of invoice No. K0074892 worth UGX. 10,042,400 which were unknown to it
  - The defendant personally took goods from it on the 6<sup>th</sup> July, 2018 worth UGX. 2,866,000 without paying
  - The defendant personally took goods from it on the 23<sup>rd</sup> day of March 2018 worth UGX. 26,240,000
- c) Javelin Limited whose complaint according to PEX 3 was that it received less goods than what it had ordered. According to its complaint in a letter dated 16<sup>th</sup> September, 2019. It ordered for 30 bundles of G30 ordinary brick red coloured iron sheets however each bundle was less 4 pieces to 120 pieces at the price of UGX. 35, 500 per piece in respect of invoice no. K0063383 totaling to UGX. 4,380,000 an invoice number K0063993 of the same colour and same gauge each was also 4 pieces totaling to 40 pieces at the price of UGX 38,100 per totaling to UGX. 1,524,000
- d) Kanaba general hardware whose complaint according to a letter dated 11<sup>th</sup> September, 2019 was that its account was debited as a result of two invoices that is invoice no. K0071747 worth UGX. 2,697,200 and invoice no. K0071746 worth UGX. 5,126,900 all totaling to UGX. 7,824,100 yet it had never received goods
- e) Saras enterprises Ltd as per letter dated 28<sup>th</sup> October, 2019 (PEX 5), its complaint was that its account was debited as a result of invoice no. K0073486 worth UGX. 5,305,200 and invoice K0073765 worth UGX. 11,314,100 all totaling to UGX. 16,619,300 yet they were unknown to him
- f) God's will general hardware according to its letter to the defendant marked PEX. 6 its complaints were that;
- Its accounts were debited as a result of invoice no. K0093729 worth UGX 9,493,999 which is unknown to it for did not receive any goods in respect of the said invoice.

- Good received in respect of invoice K0074116 were less than what were ordered for. The cost of the goods that were not delivered is UGX. 14,639,938
  - Goods received in respect of invoice K0076256 were less than what were ordered for. Th cost of the goods that were not delivered is UGX 1,063,999
- g) New Kashenyi general hardware, according to its letter to the defendant marked PEX. 7 of the plaintiff's pleadings, its complaint was that it paid fully UGX. 23,392,009 and that he did not have any outstanding with the plaintiff.
- h) Gamaria general traders, according to its statement marked PEX 8 of the plaintiff's pleadings, its complaint was that the account was debited as a result of invoice no. K0073597 worth 5,546,100 which was unknown to it and that it did not receive good in respect of the same
- i) Kabareebe general hardware, in PEX 9 a letter dated 21<sup>st</sup> August, 2019 its complaint was that it made an order deposited money but did not receive goods which were worth UGX. 23,000,000

Counsel submitted that from the above definition of fraud and the subsequate evidence stated that it is our submission that nothing can explain the actions of the defendant apart from amounting to fraud. The defendant occasioned loss of profit, as a result of his illegal and fraudulent actions with customers. Due to the defendant issuing nonexistent discounts abut authorization, the plaintiff suffered serious financial loss. The defendant's acts of misrepresentation put the plaintiff in disrepute there by causing the plaintiff financial loss.

Counsel further submitted that the plaintiff has lost existing and potential clients because of the defendant's actions. Customers with complaints started thinking that the plaintiff itself was involved in the fraudulent dealings since he was the employer of the defendant. The plaintiff had to re instate the customers with complaints to their original position by refunding them what they had lost which resulted into economic losses unplanned for funds had to be paid by the plaintiff.

Counsel submitted that the plaintiff prayed for; general damages, special damages, exemplary damages costs of the suit, interest on the damages at 25% from the date of filing the suit,

relying on the case of **Uganda Telecom Ltd v. Tanzanite Corporation SCCA17/2004** for special damages. According to the facts, the defendant incurred had received orders of UGX. 168,285,661 (Uganda shillings One Hundred Sixty Million, Two Hundred Eighty-Five thousand, Six Hundred Sixty One shillings) as was evidenced in the pleadings and the defendant did not dispute to it.

For the award of exemplary/punitive damages, counsel cited the case of **Rookes v. Barnard (1964) .C 1129, 1 ALL E.R 367, Lord Denning held** *“with regard to the claim for exemplary damages, also referred to as punitive damages, this represents a sum money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in the nature and aimed at curbing the repeat of the offending act. They are given entirely without reference to any proved actual loss suffered by the plaintiff (see WSO Davies v. Mohanlal Karamshi Shah [1957] 1 EA 352).*

### **Analysis**

The plaintiff in its submission argued that the acts of the defendant of fraud, misrepresentation, economic loss and reputational damage are all acts leading to special damages of UGX. 168,285,661 (Uganda shillings One Hundred, Sixty Eight Million, Two Hundred Eighty Five Thousand Six Hundred Sixty One) obtained by the defendant without authorization of the plaintiff, was illegally taken, diverted, traded with and/or utilized by the defendant. However to this court’s dismay the defendant, did not file any defence in court having been duly served by the summons and never attended court after he was served with hearing notices as well.

This court made an order to proceed ex-parte and relied on the case of **Fr. Narsensio Begumisa and others v. Eric Tibebanga SCCA 17 of 2000; [2004] KARL 236**, court held that *“according to Order 9 rule 20(1) (a) of the Civil Procedure Rules, where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, if the court is satisfied that the summons or notice of hearing was duly served, it may proceed exparte. In the instant case the court record shows that the defendant did not appear in court and neither his representative. And there was no explanation for his absence that day. Accordingly leave is properly granted to the applicant to proceed exparte. A party who wilfully and voluntarily absents himself from*

*proceedings cannot claim breach of fair hearing where he or she has wilfully absented himself from hearing or failed to give evidence when called upon to do so.”* As per the facts at hand, the defendant having been duly served with summons to file a defence together with the plaint attached, failed to file any reply. Parties were also directed by court to file a joint scheduling memorandum and respective trial bundles but all efforts to reach the defendant and/or his advocate were futile, thus the plaintiff’s scheduling memorandum was filed separately. I therefore proceed to determine the matter ex-parte.

The nature of the plaintiff’s claim lies in a tort of deceit, fraudulent misrepresentation and fiduciary breaches. The actions of the defendant are bordering on criminality of fraudulent false accounting since it involves an employee altering, destroying or defacing an account or presenting accounts from an individual so that they do not reflect the true value or the financial activities of that company.

The actions of the defendant were premised on falsification of documents or making false entries in clients’ accounts. Therefore, forgery and falsification of documents are mechanisms to commit fraud. Fraud essentially involves using deception to dishonestly make personal gain for oneself and or create a loss for another.

The act of making the false document does not constitute forgery until and unless the claimant or prosecution is able to prove the presence of fraudulent act. In the case of ***Yap Toon Choy v Hong Leong Bank Berhad & Another [2012] MLJU 288*** Court held, *the act of forgery is not established if it has been made out of negligence because there is no presence of intention.* Therefore, intention to commit fraudulent act is a key to establish an ingredient of fraud, forgery or falsification of a document.

The tort of deceit requires intention by the defendant that his false statement will be acted upon by the plaintiff and that the plaintiff does in fact act upon the statement. The elements of the tort deceit were stated in the case of ***Panatron Pte Ltd v Lee Cheow Lee [2001] 2 SLR (R) 435*** as follows;

- (a) There must be a representation of fact made by word, writing or conduct.

- (b) The representation must be made with knowledge that it is false; it must be willfully false, or at least made in absence of any genuine belief that it is true.
- (c) The representation must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which includes the plaintiff.
- (d) The plaintiff had acted upon the false statement.
- (e) The plaintiff suffered damage in doing so.

The tort of deceit seeks to protect the person from injury caused by another's deliberate lie. As such, the representor's dishonest or fraudulent intent is the tort's gravamen. Thus *Andrew Ang J* Observed in in ***Raiffeisen Zentralbank Osterreich AG v Archer Daniels Midland Co [2007] 1 SLR (R) 196:***

*"Dishonesty is the touchstone which distinguishes fraudulent misrepresentation from other forms of misrepresentation. This turns on the intention and belief of the representor. A party complaining of having been misled by a representation to his injury has no remedy in damages under the general law unless the representation was not only false, but fraudulent."*

The classic statement as to what constitutes fraud is found in Lord Herschell's judgment in ***Derry v Peek (1889) 14 App Cas 337*** viz, that fraud is proved when it is shown that a false representation has been made knowingly or without belief in its truth, or recklessly, not caring whether it be true or false.

It is well established that an allegation of fraud is, by reason of its gravity, subject to a relatively higher standard of proof Although this does not require departure from the usual standard of proof applicable in civil suits (i.e. balance of probabilities), it does mean that particularly cogent evidence is need to prove an allegation of fraud because "the more serious the allegation, the more the party, on whose shoulders the burden falls, may have to do if he hopes to establish his case. See ***Wee Chiaw Sek Anna v Ng Li-Ann Genevieve [2013] 3 SLR 801***

In ***Trans-World (Aluminium) Ltd v Cornelder China (Singapore) [2003] 3 SLR (R) 501*** it was stated that;

*In a civil case where fraud is alleged, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probabilities. The court does not adopt so high a degree as criminal court, but still does require a degree of probability which is commensurate with the gravity of the imputation.*

The plaintiff has proved the case against the defendant to the required standard of proof on all the ingredients of the tort of deceit, since the defendant opted not to defend himself against the fraud allegations presented in court.

The defendant defrauded the plaintiff and its customers through acts of deceit and fraudulent misrepresentations.

***Whether the plaintiff suffered economic loss as a result of the defendant's illegal and fraudulent actions?***

Deceit is not actionable per se. The gist of action is the injury to the plaintiff. The range of damage claims may cover physical injury, property damage and even mental distress, the more common type of damage is financial loss flowing from false representations. See ***Shelley v Paddock [1980] QB 348; Archer v Brown [1985] QB 401***

The damage must be shown to be a natural and probable result of the fraudulent misrepresentation by the defendant being acted upon by the plaintiff. Thus the loss suffered by the plaintiff must be connected to the alleged fraudulent representations of the defendant.

The plaintiff has shown and proved to this court that indeed they suffered loss of profits due to the fraudulent false accounting or misstatements in the books of accounts with the false entries and invoicing of the clients' accounts with false claims and wrongful discounts that the customer never received as a result.

***What remedies are available to the parties?***

The general purpose of damages is compensatory, i.e to put the victim in the position as if the tort (i.e deceit) had not been committed. This means that damages are assessed to place the victim in a position which he would have been.....if the misrepresentation had not been made,



and not to protect his expectations by putting him into a position in which he would have been, if the representation had been true. However, in the context of deceit, the purpose of deterrence is also relevant.

The damage for deceit includes all losses flowing directly from the plaintiff's reliance on the defendant's fraudulent misrepresentation, whether or not such loss was foreseeable. This means that the measure of damages for fraud is wider and may include consequential losses eg such as loss of profits which the plaintiff would have made but for the fraud. See ***East v Maurer* [1991] 1 WLR 461**.

### **Special damages**

As submitted by counsel that it is trite law that special damages must not only be specifically pleaded but they must also be proved (**see Uganda Telecom Ltd v. Tanzanite Corporation SCCA17/2004**) it was held that it is trite law that this form of damages cannot be recovered unless it has been specifically claimed and proved or unless the best available particulars or details have, been communicated to the party against whom it is claimed.

The plaintiff led evidence through PEX 1, PEX 2, PEX 3, PEX 4, PEX 5, PEX 6, PEX 7, PEX 8, and PEX 9 having perused all the records adduced by the plaintiff, I am satisfied that the plaintiff has proved special damages.

The plaintiff is awarded special damages to the tune of UGX 168,285,661/= as prayed for and proved.

### **General damages**

Counsel for the plaintiff submitted that as a result of the defendant's actions, the plaintiff had to audit the whole system and reconcile customer's accounts, investigate the said complaints, caused disciplinary hearings which was a great inconvenience to it and thus prayed for UGX. 50,000,000 (Uganda Shillings Fifty Million)

In the case of **Luzinda v. Ssekamate & 3 Ors (Civil suit -2017/366 [2020] UGHCCD 20 (13 March 2020)**, I held that as far as damages are concerned, it is trite law that general damages

be awarded in the discretion of court. Damages are awarded to compensate the aggrieved, fairly for the inconveniences accrued as a result of the actions of the defendant. It is the duty of the claimant to plead and prove that there were damages losses or injuries suffered as a result of the defendant's actions.

I find that the plaintiff has discharged her duty to prove damages and inconvenience caused as a result of the defendant's actions.

The plaintiff is awarded UGX 15,000,000/= as general damages.

### **Exemplary/punitive damages**

Counsel cited the case of **Rookes v. Barnard (1964) .C 1129, 1 ALL E.R 367, Lord Denning held** *"with regard to the claim for exemplary damages, also referred to as punitive damages, this represents a sum money of a penal nature in addition to the compensatory damages given for pecuniary loss and mental suffering. They are deterrent in the nature and aimed at curbing the repeat of the offending act. They are given entirely without reference to any proved actual loss suffered by the plaintiff"* (see **WSO Davies v. Mohanlal Karamshi Shah [1957] 1 EA 352**).

Counsel further submitted that, the defendant acted in a manner that had been calculated by him to make a profit for himself which may exceed the compensation made to the plaintiff. Further the defendant promised to refund back money however he did not fulfill his promise. Counsel for that matter prayed for UGX. 30,000,000 be awarded to the plaintiff

As cited in the case of **Luzinda v. Ssekamatte & 3 Ors (Supra)** I stated that the rationale behind the award of exemplary damages: exemplary damages should not be used to enrich the plaintiff, but to punish the defendant and deter him from repeating his conduct.

I further noted that an award of exemplary damages should not be excessive. The punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings, if the conduct were criminal per **Spry V.P. in Obongo v. Municipal Council of Kisumu [1971] EA 91**. All circumstances of the case must be taken into account, including the behavior of the plaintiff and whether the defendant had been provoked. See **O'Connor v. Hewston [1979] Crim. LR 46 CA; Archer Brown [1985] QB 401**

Bearing those principles in mind I find that an award of UGX 5,000,000/= is sufficient as exemplary/punitive damages.

The plaintiff is awarded interest at a rate of 10% on special from the date of filing the suit and 10% on general and exemplary damages from the date of this judgment.

The plaintiff is awarded costs of the suit.

I so order.

**SSEKAANA MUSA**

**JUDGE**

**30<sup>th</sup> June, 2021**