THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

(CIVIL DIVISION)

CIVIL SUIT NO. 153 OF 2019

FRESH CUTS (U) LIMITED :: PLAINTIFF

VERSUS

1. **STEPHAN DUYCK**
2. **SOKONI AFRICA LIMITED :: DEFENDANTS**

BEFORE: HON. JUSTICE SSEKAANA MUSA

JUDGMENT

The plaintiff brought this suit against the defendants for fraud, breach of fiduciary duty and duty of care, unjust enrichment, restitution, general, exemplary and aggravated damages, interest and costs of the suit.

The plaintiff alleges that the 1st defendant while managing director of the plaintiff placed an order for a host of items from Bocchini SRL, an Italian company under confirmation no. 37838 which on the face of it had some irregularities to wit; the order made purportedly for the plaintiff had the physical address of the 2nd defendant.

It is alleged that on the 4th December, 2012, the 1st defendant authorised a cheque payment from the plaintiff's USD account held in DFCU to the tune of EUR 95,480 (equivalent to USD 132,239.80) to Bocchini SRL. Prior to that, the 1st defendant had also authorised the payment of EUR 34,535 (equivalent to USD 44,843) to Bocchini SRL which payments were made by the plaintiff's bankers. The payments by the 1st defendant were made without approval from the shareholders of the plaintiff. As a result of the 1st defendant's actions, the plaintiff

has been put out of the use of its money as there is no reflection of the goods purportedly purchased anywhere in the business.

The plaintiff therefore alleged that the defendants' actions were fraudulent and that the 1st defendant acted in contravention of his duties as a managing director of the plaintiff when he failed to disclose his interest in the 2nd defendant to the Board before undertaking the said duties, acting contrary to the interests of the plaintiff and in breach of the statutory duties of a director by failing to uphold his fiduciary duty.

The 1st and 2nd defendants jointly filed their written statement of defence wherein they denied any liability as to the allegations made in the plaint and stated that they shall raise a preliminary objection that the plaintiff's suit is misconceived and barred by limitation, discloses no cause of action, an abuse of court process, frivolous and vexatious and prayed it be dismissed with costs.

The defendants contended that the 1st defendant was a shareholder in the plaintiff company and that the 2nd defendant is still a shareholder. Prior to the 1st defendant selling his shares, the two companies were trading in different products and supplied each other products that neither company were producing. The plaintiff dealt in beef and related products and supplied the same to the 2nd defendant, while the 2nd defendant dealt in the supply of high quality bakery products, a modern restaurant and also rented out shops at its premises situate on Ggaba road. The defendant provided the plaintiff with bakery products such as bread and pastries and rentable space for the butcher and a sales outlet for beef related products.

The defendants contend that in 2011 and 2012, the 1st defendant as the then managing director and shareholder of the plaintiff and as part of his business development and market share growth strategy in beef and hospitality industry conceived and commenced a plan of setting up a modern restaurant and butcher at forest mall. The 1st defendant contacted an Italian company known as Bocchini

to design the interior of the shop and advice on the necessary equipment and accessories for a modern restaurant, bakery and beef soup.

The 1st defendant further contended that as IBL Group which was interested in purchasing the plaintiff's business was informed about the equipment that was being imported for the new shop. The 1st defendant contended that the payment was authorised with the knowledge of the plaintiff's shareholders.

The defendants therefore contended that there was full disclosure of accounts and transactions and that the 1st defendant performed his duties diligently and as agreed by the parties.

The parties during a joint scheduling conference proposed the following agreed facts issues for determination by this court.

Agreed facts;

1. That the 1st defendant was a Managing Director and shareholder in the plaintiff's company and in the 2nd defendant company.
2. That the 1st defendant sold off all his shares in the plaintiff's company to IBL Holdings Limited but maintained his role as the Managing Director at the request of the new shareholders.
3. That the 1st defendant contracted Bochini SRL and placed orders for equipment for the benefit of the plaintiff.
4. That the 1st defendant authorized several payments to Bochini for USD. 132.239,80 an equivalent of Euro 95,480 which is equivalent to 34,843 and USD 44,843 which have all since been deducted from the plaintiff's account.

Agreed Issues;

1. ***Whether the plaintiff discloses a cause of action against the defendants and whether the suit is barred by the law on limitation.***

2. ***Whether the 1st defendant as managing director to the plaintiff's company misappropriated or irregularly used the plaintiff's money for the benefit of the 2nd defendant.***
3. ***Whether the plaintiff is entitled to a reimbursement of the money used to purchase the equipment by the defendants.***
4. ***Whether the 2nd defendant was unjustly enriched by the actions of the 1st defendant.***
5. ***Whether the 1st defendant breached his fiduciary to the plaintiff while conducting his duties as the director of the plaintiff's company.***
6. ***What remedies are available to the parties?***

Representation

The plaintiff was represented by *Mr. Ssebowa Solomon* whereas the defendants were represented by *Mr. Akampurira Kenneth* and *Mr. Ogwang Raymond*.

The parties were directed to file written submissions; all parties accordingly filed the same. All parties' submissions were considered by this court.

Before I delve into the merits of this case, I wish to note that the defendants raised two preliminary objections that I will dispose first.

Whether the plaintiff's suit discloses a cause of action against the defendants and whether the suit is barred by the law on limitation?

The plaintiff's counsel submitted that the suit discloses a cause of action against the defendants and is not barred by the law on limitation. He noted that the plaintiff's causes of action include; fraud, unjust enrichment and breach of fiduciary duty.

He stated that while the law of limitation expressly saves causes of action which; due to fraud on the part of the defendant are not disclosed to the plaintiff until the defrauded party discovers the fraud, there is no limitation prescribed by law for restitutionary claims such as unjust enrichment and as such this suit is properly before this Honourable Court.

He further submitted that the plaintiff was unable to discover the fraud because the 2nd defendant was in its control and as such the fraud was kept concealed from the officers it's until the 1st defendant ceased to control.

In regards to a cause of action, counsel relied on ***Auto Garage & others vs Motokov (No.3) [1971] EA 514*** where it was stated that in order to maintain a cause of action, the plaintiff must establish that; he or she enjoyed a right, the right was violated, and; that the defendant is liable. He further relied on the case of ***Attorney General vs Oluoch [1972] EA 392***, wherein it was held that the question of whether or not a plaint discloses a cause of action is determined upon perusal of the plaint and attachments thereto with an assumption that the facts pleaded or implied therein are true.

He noted that paragraphs 5, 6 and 7 of the plaint show that the Plaintiff enjoyed the right over the money which was authorized by the 1st defendant as a director for the benefit of his company; the 2nd Defendant, that right over the money and the machinery was violated by the 1st defendant and the defendants are liable. Counsel argued that since the funds used to purchase this impugned equipment were drawn from the plaintiff's bank accounts, a prima facie case was established since the plaintiff's property should have been utilised in the interests of the Plaintiff.

Counsel further relied on Section 198 of the Companies Act 2012 which provides for the duties of directors. He stated that the 1st defendant breached the said rights of the company by perpetrating an undisclosed conflict of interest and making a personal profit at the plaintiff's expense. He noted that it is the 1st defendant who authorised the use of the plaintiff's money for items not strategically aligned to its business.

He therefore submitted that upon perusal of the plaint and attachments thereto, the plaintiff had a right, the right was violated and by the defendants.

In respect of limitation, counsel relied on section 25 of the Limitation Act that the period of limitation shall not begin to run until the plaintiff has discovered the

fraud or the mistake, or could with reasonable diligence have discovered. He submitted that the plaintiff's director only got to know about the fraudulent and misappropriation by the 1st defendant to the unjust enrichment of the 2nd defendant company after he joined the plaintiff by virtual of the resolution dated 5th October, 2018 and as such, the particulars of fraud under paragraph 6 (i), (ii) and (iii) are an exception to limitation of time under an statute.

He therefore submitted that the plaint discloses causes of action that are not barred by limitation.

Defendants' submissions.

The defendants' counsel in regards to cause of action, he submitted that Order 7, Rule 11 (a) of Civil Procedure Act provides that the plaint shall be rejected where it does not disclose a cause of action. Like the plaintiff, counsel relied on ***Auto Garage vs Motokov (supra)*** for the essential ingredients to sustain a cause of action. He submitted that the plaint falls short of the test as it does not demonstrate the right it enjoyed on either defendant, which rights were violated and the defendants being liable.

Counsel stated that the 1st defendant was a shareholder and managing director in the plaintiff in 2012 who for the purpose of increasing market share took a strategic decision to purchase equipment for the plaintiff to achieve its expansion. He contended that the plaint does not disclose the plaintiff's right which the 1st defendant violated hence he is not liable for the claim.

In respect of breach of duty by the 1st defendant as a director under section 198 (c) of the Companies Act, counsel submitted that the plaint does not disclose any attribute to the failure to disclose conflict of interest, making personal profits at the plaintiff's expense nor any personal gain benefitted by the 1st defendant at the detriment of the plaintiff.

In respect of the 2nd defendant, counsel submitted that the plaint does not plead any right it enjoyed against it nor demonstrate that the plaintiff had any relationship with it. He stated that the plaint does not disclose any of the

plaintiff's rights which the 2nd defendant violated or breached and as such cannot claim to have a cause of action against it. He therefore submitted that the plaint does not disclose a cause of action against the 1st and 2nd defendants jointly and severally and as such, the suit should be dismissed with costs.

In respect of limitation, counsel relied on the case of ***Iga vs Makerere University [1972] EA 66*** where court held that a plaint which is barred by limitation is a plaint barred by law. He noted that the plaintiff's claim against the 1st defendant arises from his tenure as a managing director. He further relied on the case of ***Mugerwa Commercial Agency Ltd vs The Management Committee St. Savio Junior School, Kisubi Civil Suit No.144 of 2004*** wherein it held that a director owes a fiduciary duty to the company and such a duty arises from a contract.

He referred to section 3 (1) (a) of Limitation Act to the effect that an action founded on a contract shall not be brought after the expiration of six (6) years from the date when the cause of action arose. Counsel noted that the alleged misappropriation arose on the 28th September, 2012 and the suit was filed on 27th February, 2019; this being 7 years after the alleged cause of action beyond the limitation period required by the law.

Counsel thereby cited the case of ***Western Creamers Ltd & Anor vs Stanbic Bank Uganda Ltd & 2 Ors Civil Suit No. 462 of 2011*** where court held that statutory provisions imposing periods of limitations within which actions must be instituted seek to serve several aims. They protect defendants from being vexed by stale claims relating to long past incidents about which their records may no longer be in existence and as to which their witnesses. It was therefore submitted that the plaintiff's claim arises out of contract and it was filed outside the limitation period and thus ought to be dismissed with costs.

The defendants further submitted that the plaintiff seeks to hide underneath the exception of fraud to unravel the limitation period under section 25 (a) of the Limitation Act. As such, he defined fraud as stated in the case of ***Fredrick Zaabwe vs Orient Bank & Ors SCCA No. 4 of 2006*** and submitted that the

particulars of fraud pleaded by the plaintiff do not demonstrate the intentional perversion of the truth for the purpose of inducing it to surrender legal right. To the contrary, all transactions were disclosed to the shareholders and account reconciliations done by the plaintiff and the 2nd defendant arriving at an offset figure. The defendants noted that as per the emails DE7 and DE7 attached, the plaintiff and its shareholders were aware of the equipment purchases.

In respect of the plaintiff's allegation that the fraud was discovered on the 5th October, 2018, the defendant submitted that the plaintiff conducted audits by top tier audit firms each year and issues as to fraud or misappropriation of company funds were never raised. Counsel therefore submitted that the plaintiff did not lead any evidence to demonstrate that at the time the alleged fraud was discovered all reasonable due diligence was taken.

He therefore submitted that the plaintiff's suit does not fall within the exception of fraud; since reasonable diligence would have disclosed to the plaintiff that there was no fraud. He prayed that the court finds that the suit is barred by law and the same be dismissed with costs.

Analysis

The defendants raised two preliminary objections; that the plaint does not disclose a cause of action and that the suit is barred by limitation of time and as such pray that this suit be dismissed with costs.

In the circumstances, it is important to note that **Order 7, Rule 11 of the Civil Procedure Rules** provides for instances where a plaint shall be rejected and states as follows;

> ***11.*** *The plaint shall be rejected in the following cases—*
>
> *a) where it does not disclose a cause of action;*
>
> *b) ……..*
>
> *c) ……*

d) *where the suit appears from the statement in the plaint to be barred by any law;*

e) ……..

Cause of action

This court in the case of ***Okot Ayere Olwedo Justin –vs- Attorney General Civil Suit No. 381 of 2005*** while relying on ***Cooke -vs- Gull LR.8E.P. pg. 116*** *and* ***Read - Vs- Brown, 22 QBD p.31*** noted that a cause of action means every fact which is material to be proved to enable the plaintiff to succeed or every fact which, if denied, the plaintiff must prove in order to obtain judgment.

It is now well established in our jurisdiction that in considering whether or not the plaint discloses a cause of action, the court only considers the pleadings and anything attached thereto. A summary of what constitutes a cause of action and the guidelines courts follow in determining whether a plaint discloses a cause of action was discussed in the Supreme Court decision of ***Ismail Serugo vs Kampala City Council Const. Appeal No. 2 of 1998,*** where Hon. Justice Mulenga noted that a cause of action in a plaint is said to be disclosed if three essential elements are pleaded; namely, pleadings (i) of existence of the plaintiff's right, (ii) of violation of that right, and (iii) of the defendant's liability for that violation.

He further cited the case of ***Auto Garage vs Motokov (No. 3) (1971) EA 514 at p.519 D***, where Spry V.P. stated thus;

> *"I would summarise the position as I see (it) by saying that if a plaint shows that the plaintiff enjoyed a right, that the right has been violated and that the defendant is liable, then in my opinion, a cause of action has been disclosed and any omission or defect may be amended. If on the other hand, any of those essentials is missing, no cause of action has been shown and no amendment is permissible."*

The 1st defendant

The plaintiff under paragraphs 5, 6 and 7 of the plaint alleges that it enjoyed a right over money which was authorised by the 1st defendant for the benefit of 2nd defendant against its interests. The plaintiff further alleges that the 1st defendant

was under a fiduciary duty and a duty to act in good faith in the interest of the plaintiff by avoiding conflict of interest.

It is uncontested by both parties that the 1st defendant was indeed the managing director of the plaintiff in 2012 and that while in control of its affairs, he made authorisation for payment of money for equipment, the subject of this suit. It is indeed true that the plaintiff had an interest in the dealings and authorizations that were entered into by the 1st defendant as its managing director.

It is important to note that a director represents the directing mind and will of the company, and control what it does. In the case of ***HL Bolton Co Vs TJ Graham and Sons [1956] 3 All ER 624, Lord Denning held at page 630;***

> *"A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such". In the case of Lennard's Carrying Co Ltd v Asiatic Petroleum Co Ltd [1915], Viscount Haldane had the view that "A corporation is an abstraction. It has no mind of its own any more than it has a body of its own. Its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, the alter ego and centre of the personality of the corporation."*

As such, as the 1st defendant as the managing director was an agent of the plaintiff at the time and was charged with directing its mind and will. The plaintiff enjoyed a right over the monies in its accounts to which the 1st defendant was a signatory and made authorizations for payment for equipment. The plaintiff alleges that the said authorizations were made fraudulently and this

court is tasked to make determinations as to these allegations. This makes the 1st defendant accountable if the said rights as alleged by the plaintiff were violated.

Thus, from the reading of the plaint, I'm satisfied that the plaintiff has established a cause of action against the 1st defendant for his actions while a managing director.

The 2nd defendant

The plaintiff's cause of action against the 2nd defendant is one of unjust enrichment. It alleges that upon authorisation of funds by the 1st defendant, the 2nd defendant misappropriated or irregularly used a sum of EUR 130,015 for its benefit and as such, was unjustly enriched.

Upon perusal of the plaint and annextures thereto, it is clear that there is no nexus between the plaintiff and the 2nd defendant. As such, it is not possible to trace the allegations made by the plaintiff of unjust enrichment since the plaint does not disclose any relationship between the plaintiff and the 2nd defendant nor is there any obligation flowing from the plaintiff to the 2nd defendant.

The principle of unjust enrichment has been well expounded upon in the case of ***Shenol & Another v Maximov [2005] EA 280*** where the court was of the view that;

> *"… The principle is that where one person has received money from another under circumstances such as in this case he is regarded in law as having received it to the use of that other. The law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled. In default the right full owner may maintain an action for money had and received to his use."*

Thus as set out by the Supreme Court of India in the case of ***Mahabir Kishore & Madhya Paradesh 1990 AIR 313*** and ***Moses vs Macfarlane (1760)2 Burr at page 10,*** the requirements to establish unjust enrichment were stated to include: -

> *"First that the defendant has been enriched by the receipt of a benefit, secondly that this enrichment is at the expense of the plaintiff and thirdly that the retention of the enrichment is unjust. This qualifies restitution."*

Relying on this very principle, this court in the case *of* ***Kensheka vs Uganda Development Bank HCCS No. 469 of 2011*** was of the view that; where it was proven that money was received for no services delivered then it was obligatory that the person who received it to refund it.

In this case, there is no evidence whatsoever to support the said claim of unjust enrichment by the plaintiff as against the 2nd defendant or any dealings between the parties in the plaint or annextures attached thereto. The plaintiff does not claim that any money was received from it to the 2nd defendant and that certain services as had been agreed upon were not delivered. Its claim is against the 1st defendant who authorized payment for equipment and there's no such claim as against the 2nd defendant.

As stated above, for a cause of action to be established, the plaintiff must prove that it enjoyed a right. I am convinced that there is no such right enjoyed by the plaintiff in these circumstances that could have been violated by the 2nd defendant. I am inclined to agree with the defendants' counsel that the plaintiff has failed to establish a cause of action as against the 2nd defendant.

I therefore find that that a cause of action has been established against the 1st defendant. However, I find that the plaintiff has failed to establish one against the 2nd defendant and the claims as against it are dismissed with costs.

The law on Limitation.

As noted above, **Order 7, Rule 11 (d) of the Civil Procedure Rules** states that a plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law.

In the case of ***Departed Asian Property Custodian Board vs Dr. J.M Masambis Court of Appeal, Civil Appeal No. 04 of 2004,*** the court noted with emphasis that the enforcement of provision of a statute is mandatory. It was rightly submitted by counsel for the defendants as stated in the case of ***Iga –vs- Makerere University [1972] E.A 65*** that a plaint which is barred by limitation is a plaint barred by law. A litigant puts himself or herself within the limitation period by

showing grounds upon which he or she could claim exemption, failure of which the suit is time-barred and the court cannot grant the remedy or relief sought but must reject the claim.

This court in its decision in ***Dr. Arinaitwe Raphael & 37 others versus the Attorney General; HCCS No. 21/2012*** *quoting* ***Hilton versus Sultan Steam Laundry (1964) 161, 81 per Lord Greene*** noted that;

> *"The statute of limitation is not concerned with merits, once the axe falls, it falls and a Defendant who is fortunate enough to have acquired the benefit of the statute of limitation is entitled of course to insist on his strict rights".*

Once the time period limited by the Limitation Act expires, the plaintiff's right of action will be extinguished and becomes unenforceable against a defendant. It will be referred to as having become statute barred.

The defendants raised an objection that the plaintiff's suit is barred by limitation and in support of this, counsel submitted that the plaintiff's claim against the 1st defendant arises from his tenure as a managing director. While relying on the case of; ***Mugerwa Commercial Agency Ltd vs The Management Committee St. Savio Junior School, Kisubi Civil Suit No. 144 of 2004***, counsel stated that court held that a director owes a fiduciary duty to the company and such a duty arises from a contract. Basing on this decision, he noted that since the duties of a director arise from a contract, this means that the plaintiff's cause of action arises from the contract the 1st defendant had with the plaintiff.

I have had an opportunity of reading the said case and I find that it is distinguishable from the facts presented before this case since in that case, there was an oral agreement between the plaintiff and the defendant. Furthermore, I am unable to find any holding by the court in the cited case that the fiduciary duty of the director to the company arises from a contract and as such, I cannot infer that this means that the plaintiff's cause of action arises from the contract as argued by the defendants' counsel.

The plaintiff's cause of action as stated in its plaint is on fraud, breach of fiduciary duty, breach of duty, money had and received and unjust enrichment/ restitution. Fraud is provided for under **section 25 of the Limitation Act** which provides as follows;

> *Where, in the case of any action for which a period of limitation is prescribed by this Act, either—*
>
> *a) the action is based upon the fraud of the defendant or his or her agent or of any person through whom he or she claims or his or her agent;*
>
> *b) the right of action is concealed by the fraud of any such person as is mentioned in paragraph (a) of this section; or*
>
> *c) the action is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or could with reasonable diligence have discovered it; but nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—*
>
> *d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or*
>
> *e) …….*

The plaintiff contended that through the fraud perpetuated by the 1st defendant arose the breach of fiduciary duty and unjust enrichment hence this suit. I am inclined to agree with the plaintiff's counsel that the cause of action does not arise from a contract as submitted by the defendant but from fraud.

As noted above, the time limitation in cases of fraud starts to run upon discovery by the person upon whom the fraud is committed. I have looked at the plaint and annextures thereto and the plaintiff avers that the said fraud was only discovered in October, 2018 when the new appointed managing director joined

the plaintiff company which prompted an investigation culminating into this suit.

However, it is suffices to note that section 25 of the Limitation Act also provides a benchmark as to the limitation time upon exercise of reasonable diligence. It is under this provision that the defendant alleges that the plaintiff's evidence does not in any way demonstrate or speak to the fraud having been discovered in October, 2018. He notes that the plaintiff does not lead any evidence to demonstrate that at the time the alleged fraud was discovered; all reasonable diligence was taken and the alleged fraud discovered earlier. Counsel further noted that the reputable audit firms of the plaintiff and the PW1's predecessors after the 1st defendant would have raised the said allegations if at all such existed. As such, the matter does not fall under the exceptions of fraud.

It can be said that the plaintiff could not with reasonable diligence have discovered the alleged fraud for the time that the 1st defendant was the director. Up until he left that position in 2016, the plaintiff under the new management ought to have discovered it. Hence, I believe that the exception of fraud as to limitation started to run on that day until the suit was filed in 2019.

In the circumstances, I do consider **section 3 (1) (d) of the Limitations Act** as to a cause of action founded on breach of duty as in this case which provides;

> *1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action arose—*
>
> *a) …….*
>
> *b) ……..*
>
> *c) …….*
>
> *d) **actions to recover any sum recoverable by virtue of any enactment**, other than a penalty or forfeiture or sum by way of penalty or forfeiture,*
>
> *except that in the case of actions for damages for negligence, nuisance or breach of duty (whether the duty exists by virtue of a contract or of provision made by or*

under an enactment or independently of any such contract or any such provision) where the damages claimed by the plaintiff for the negligence, nuisance or breach of duty consist of or include damages in respect of personal injuries to any person, this subsection shall have effect as if for the reference to six years there were substituted a reference to three years.

The Limitation Act under **section 1 (1) (d)** defines an "enactment" to mean a legislative instrument having effect in Uganda. From the facts of this case, it is clear that the plaintiff's cause of action is premised on breach of duty under the Section 178 of the Company's Act by the 1st defendant. The period of limitation is hinged on the time when the Plaintiff discovers the fraud or mistake.

Thus, the limitation time for the plaintiff started running when the 1st defendant left the position of managing director since henceforth, it was impossible for him to have influenced any decisions or investigations in the company. The plaintiff from then on under new management with reasonable diligence was in the position to have discovered the alleged fraudulent actions.

Therefore, the time started to run in 2016 upon resignation of the 1st defendant from the position of managing director in the plaintiff for a period of six years. The law on limitation for cases based on fraud is that time begins to run from the moment the fraud is discovered. In ***David Mukasa Sendaula & anor vs Christine Nakalanzi [1992-930 HCB 179,*** Court held that cause of action arose when the plaintiff discovered the alleged fraud.

From the above, it is clear that the plaintiff's cause of action of breach of duty, which was filed on the 3rd April, 2019 before this court was well within time.
Accordingly, therefore, the 2nd preliminary objection, too, has no merit. It is found in the negative.

Issue 2: **Whether the 1st defendant as managing director to the plaintiff's company misappropriated or irregularly used the plaintiff's money for the benefit of the 2nd defendant.**

Issue 5: **Whether the 1st defendant breached his fiduciary to the plaintiff while conducting his duties as the director of the plaintiff's company.**

Plaintiff's submissions

The plaintiff's counsel submitted that it is not in dispute that the 1st defendant authorised the expenditure of the plaintiff's funds for the purchase of the equipment that was intended for and actually delivered to the 2nd defendant. The plaintiff contended that the 1st defendant acted irregularly when he acted in the absence of any resolution to authorise the said purchase and failed to declare conflict of interest between the plaintiff where he was a director and in the 2nd defendant where he was a shareholder.

Counsel relied on the case of ***Aberdeen Railway Co. vs Blaikie Bros (1854) 1Macq 461*** where it was held that as a rule of universal application, no one having duties to discharge shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which may possibly conflict with the interests of those whom he is bound to protect. He further cited the case of ***Boardman & Anor vs Phipps [1967] AC 46***, where it was stated that the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict.

From the above, it was submitted that the 1st defendant breached the conflict of interest rule when he used the plaintiff's money to purchase equipment for the benefit of the 2nd defendant which was never disclosed to the company.

Counsel stated that it was the plaintiff's evidence of PW1 in paragraph 9 of the witness statement that on the 8th October, 2012 by a special resolution in the shareholders extraordinary meeting, the 1st defendant and EMIS Ltd sold their

100 ordinary shares to IBL Uganda Holdings 2 Ltd but it was agreed that the 1st defendant would remain as a director and signatory to the plaintiff's bank account.

On 28th September, 2012, the 1st defendant placed an order for a host of items from an Italian company Bocchini SRL under confirmation no. 37838 which on the face of it had irregularities since the 1st defendant disguised and purported it to be for the plaintiff but the physical address was of the 2nd defendant. Counsel noted that DW2 in his evidence admitted that the goods were transported by Ken freight transporter which evidence corroborates with PE22, PE23, PE24 and PE25. Counsel further submitted that in his cross examination, DW2 relied on contracts which were signed after the equipment was cleared, transported which shows that he was lying on oath.

He also submitted that the 1st defendant was informed in an email dated 26th June, 2012 that the sandwich and bakery equipment was not strategically aligned with the current vision of the plaintiff but he went ahead to purchase the items. The 1st defendant ceased being shareholder of the plaintiff on the 8th October, 2012 and that all decisions made by him had to be sanctioned by the new shareholders of the company.

Counsel relied on the evidence of PW1 in para. 10 to show that the 1st defendant on the 4th December, 2012 authorised a cheque payment for USD 132,238.80 to Bocchini SRL in total disregard to the vision of the plaintiff. He submitted that the 1st defendant should have communicated to Bocchini that the bakery and sandwich items should be removed from the order list which would save the plaintiff a lot of money but this was not done. It was therefore submitted that the transaction was tainted with illegalities that were detrimental to the plaintiff company.

As to the disclosure of interest in another company, counsel relied on section 198 (c) of the Companies Act which provides for the duties of the directors to act in

good faith in the interest of the company as a whole. Counsel cited the case of ***Ms. Fang Min vs Uganda Hui Neng Mining Ltd & 5 Ors HCCS No. 318 of 2016*** where the court relying on this section found that one of the directors of the 1st defendant had breached his duties when he failed to declare his conflict of interest in a transaction where the 1st defendant's mining license was transferred to the 2nd defendant where he was also a shareholder.

He noted that section 218 of the Companies Act requires directors to disclose any interest on contracts with the company. He further cited ***Mugerwa Commercial Agency Ltd vs The Management Committee of St Savio Junior School, Kisubi (supra)*** where it was held that this section applies to all companies and all types of directors.

Counsel further submitted that being a shareholder in both companies led to the conflict of interest and it is the reason the 1st Defendant failed to act in the best interest of the Plaintiff. He therefore submitted that in the absence of a resolution or even minutes demonstrating that the 1st defendant's disclosure of his interest in the contract to spend colossal amounts of the Plaintiff's funds for his and his company's own enrichment.

While relying on the case of ***Coleman Taymar Ltd v Oakes [2001] 2 BCLC 749*** where it was held that a contract will become voidable on the basis of the actual conflict of interest that is; its ultimate validity will depend upon a resolution of the general meeting which in the case at hand is not availed on the record of court making the resultant contracts voidable. He therefore submitted that 1st defendant had a duty to disclose his interest in the 2nd defendant before dealing with it on behalf of the plaintiff.

On whether there a reconciliation of the machinery and a contribution by 2nd defendant, counsel submitted that the defendant did not adduce any evidence to support the same. He contended that while there may have been a relationship between the Plaintiff and 2nd Defendant for supply of meat in exchange for

bread, but that did not amount to a reconciliation of the funds owed for the purchase of equipment by the Plaintiff for the 2nd Defendant.

There was no payment or reconciliation done in respect of the machinery and the defendants' exhibits only showed reconciliation for meat and bread. Counsel further stated that the figures in the audit reports relied on by the defendants varied and thus, the evidence tainted with falsehoods and a concoction to fraudulently cheat the Plaintiff. He therefore noted that the only money which was paid to the plaintiff in respect to the alleged 50% cost sharing according to DE8 is only UGX 32,120,708,00 as confirmed by DW3 during cross examination.

Counsel relied on the case of ***Mohammed Kizito & 3 Ors vs Spidiqa Umma Foundation HCCS. No. 12 of 2012***, where it was held that although the affairs of a company are run by a board of directors, the ultimate power is with the Annual General meeting or Extra-ordinary meeting where members express their vote for or against resolutions. At these meetings the position of the majority prevails. He therefore submitted that there was no approval of the cross-selling model which allowed the Plaintiff and 2nd Defendant to reconcile and carry out a set off for the 50% contribution.

Counsel relied on section 50 of the Companies Act and submitted that there was no authority; express or implied granted by the shareholders and owners of the plaintiff to the 1st Defendant to purchase machinery on behalf and for the benefit of the 2nd Defendants using the Plaintiff's resources. He further submitted that it is trite law that decisions of companies are made through resolutions, either by the board at board meetings or by the members at the AGM or extra-ordinary general meetings (EOGM) and that the 1st Defendant did not have the express authority of the board of directors nor the members to buy and transfer the machines purchased using the Plaintiff's money for the benefit of the 2nd Defendant.

The defendants' counsel gave the background to the incorporation of the plaintiff, the 2nd defendant and their mutual practises. The plaintiff was

incorporated by the 1st defendant, his wife, EMIS Limited and Patrick Van Pee. The 2nd defendant was also incorporated by the 1st defendant who was equally a managing director in both companies.

He stated that because of the two companies' relationship, the plaintiff would supply the 2nd defendant with meat products and the 2nd defendant supplied the plaintiff with bakery products and pastries in its outlets and also rented premises to it. The 1st defendant as managing director and business head in both companies in March, 2012 with a view of harnessing each company's market share and growth, opted to import beef and bakery equipment under the 1st defendant. However, he was approached by the IBL1 Limited which sought to purchase the plaintiff.

The defendants lead evidence showing that the 1st defendant fully disclosed to IBL1 Limited and other shareholder of the plaintiff the strategic plan to expand its business and further informed the new shareholders that he had made arrangements with an Italian company to deliver equipment. He noted that even when the 1st defendant was managing director in both entities, he kept separate management teams with separate accounts departments.

Counsel relied on section 198 (a) and (b) of the Companies Act that provides that a director shall act in a manner that promotes the success of the business of the company and exercise a degree of skill and care as a reasonable person would do looking after their business. He submitted that from above, the 1st defendant's intentions and actions towards importation of the equipment were to grow the market share of the plaintiff. Counsel noted that if the defendant had any contrary objective or motive to the detriment of the plaintiff contrary to section 198, or to misappropriate its funds and thereby unjustly enriching the 2nd defendant, he would not have disclosed the full list of machinery being imported and sought approval of the new shareholders.

He stated that the 2nd defendant took up the bakery equipment and provided for the cost of the equipment which was recovered through the product cross selling and offsetting model of the plaintiff and the 2nd defendant. To support this, he relied on PEX 30, 31 and 32 to demonstrate the full closure in the audited books of account as presented by the plaintiff and email reconciliations of the finance departments of the two companies with a zero liability on the part of the defendants by 2016. He stated that PW1's cross examination admitted to the reporting of the financial reports as the true position of the plaintiff's financial affairs.

It was submitted that the auditors of the plaintiff in their observations did not state any discovery of fraud or misappropriation nor did they recommend a forensic audit for the plaintiff's financial statement or affairs in respect to the 1st defendant's conduct of business affairs. Counsel therefore submitted that the 1st defendant did not misappropriate any of the plaintiff's funds for the benefit of the 2nd defendant or himself and prayed that court finds so.

As to obtaining a board resolution to purchase machinery that was intended to promote the business, of the plaintiff and approve the cross selling model, counsel relied on Article 45 of the Articles of Association that vested the management and control of the company in the managing director. He noted that the 1st defendant fully notified the plaintiff and gave full accountability to the shareholders and putting systems of accountability.

Analysis.

This court has had an opportunity of reading and analysing both the parties' submissions and the evidence on the court record in respect of this matter. The plaintiff seeks court to determine whether the 1st defendant as managing director misappropriated or irregularly used the plaintiff's money for the benefit of the 2nd defendant.

I am alive to the rules of evidence under **section 101 of the Evidence Act** as to where the burden of proof lies this being on the person that desires any court to give judgment as to any legal right. In civil cases, the burden lies on the plaintiff to prove his or her case on the balance of probabilities. *(see: **Nsubuga vs Kavuma [1978] HCB 307, Dr. Julius Amupe vs Wilberforce Muhangi Civil Appeal No. 062 of 2019**)* As such, the plaintiff in this case is tasked with adducing evidence showing that the 1st defendant through fraud, misappropriated and/ or misused the plaintiff's monies for the benefit of the 2nd defendant while managing director.

It is crucial to understand the duties/ mandate of a director when acting for a company. The Companies Act under section 198 as ably stated by both counsel is very instructive. For better discussion, I will reproduce it hereunder;

The duties of the directors shall include the following—

(a) act in a manner that promotes the success of the business of the company;

(b) exercise a degree of skill and care as a reasonable person would do looking after their own business;

(c) act in good faith in the interests of the company as a whole, and this shall include—

i) treating all shareholders equally;

ii) avoiding conflicts of interest

iii) declaring any conflicts of interest;

iv) not making personal profits at the company's expense;

v) not accepting benefits that will compromise him or her from third parties; and

(d) Ensure compliance with this Act and any other law.

It is the plaintiff's submission that the 1st defendant acted in contravention of these duties when failed to act in good faith on behalf of the company. In a bid to prove this burden beyond a balance of probabilities as required in civil matters, the plaintiff through its managing director, Amos Tindyebwa; PW1 testified that

the 1st defendant placed an order for host items from Bocchini SRL which order had several irregularities. He testified that the 1st defendant made the said order disguising and purporting to make it for the plaintiff whereas not. This was because of the address that was attached to the order which belonged to the 2nd defendant. He further testified that the 1st defendant authorised payments without any authorization of the plaintiff.

PW1 testified that he joined the company in 2018 upon which he was briefed by Mr. Eric Tin to follow up on the missing items which were purchased by the 1st defendant for the plaintiff but only a few of the said items were available. He therefore testified that the 1st defendant acted in contravention of his duties as managing director of the plaintiff by failing to disclose his interest in the 2nd defendant to the plaintiff thereby acting contrary to its interests and in breach of statutory duties of the director.

I have looked at the plaintiff's memorandum and articles of association; PE3. This provides for the powers of directors under Article 43 which states that;

> *The business of the company shall be managed by the directors who may pay all expenses incurred in promoting and registering the company and may exercise all such powers of the company as are not by the Act or these Articles required to be exercised by the company in general meeting subject, nevertheless, to such regulations of or provisions as may be prescribed by the company in the general meeting. But no regulation made by the company in general meeting shall invalidate any prior act of directors, which would have been valid, if that regulation had not been made.*

Article 45 provides for the position of managing director which states that;

> *The directors may entrust to and confer upon a managing director any of the powers exercised by them upon such terms and conditions and with such restrictions as they may think fit and whether collaterally with or to the exclusions of their own powers and from time to time revoke, withdraw or vary all or any of such powers…..*

From the above, it is clear that the managing director has powers to manage the business of the company. The 1st defendant was the managing director of the plaintiff in 2012 and as such was charged with the mandate of managing its business. It is during his tenure that the allegations and claims on misappropriation of money for the equipment bought for the plaintiff arose. The plaintiff alleged that the 1st defendant breached the conflict of interest when he used money to purchase equipment allegedly for the benefit of the 2nd defendant.

Conflict of interest

One of the duties of the directors as provided for under Section 198 (c) of the Companies Act is to act in good faith in the interests of the company as a whole which includes among others; avoiding conflicts of interests and declaring any conflicts of interests. Avoiding conflicts of interest requires the director to inform company during a meeting the benefits he/ she is bound to get from the transaction

The law tries to strike a balance between the businessman's freedom to pursue his own interests and the strict nature of a director's fiduciary relationship with the company. In doing so, it allows for a director to obtain an advantage despite any conflict, but only in a very controlled and defined manner. A director may keep such an advantage if he fully discloses the conflict. A director should be conscious that because of the fiduciary nature of the duty involved, his disclosure should be sufficient to allow the decision-makers to be fully knowledgeable of the real state of things.

From the evidence on court record, it is clear that from the plaintiff's inception, it was aware of the 1st defendant's engagement and involvement in the 2nd defendant. It is because of this that the two companies enjoyed a special kind of relationship where they both fed into each other in terms of resources and then offset the amounts claimed by way of the products supplied. This fact is acknowledged from the audits and testimonies of all the parties' witnesses.

Furthermore, the email exhibits DE7 and 8 indicated that at the time of the purchase of this equipment, the plaintiff and its shareholders were aware and it from this transaction that the equipment is being used at its store in forest mall. It is quite absurd that the plaintiff did not make any objections at the time of purchase or delivery thereafter of the equipment or in respect of the authorised payments. Furthermore, the plaintiff through its books of accounts and audits did not in any way raise any queries as to the transactions made by the 1st defendant in respect of the equipment purchased.

The defendant led evidence to show that the said equipment that was handed over to the 2nd defendant was paid for through the cross cutting model that the companies used during their transactions. Indeed, the plaintiff's audited books represented that the said equipment had been paid for and did not show any misappropriated funds from the year 2012 to 2016 when the 1st defendant was the managing director.

From the plaintiff's evidence, it is quite interesting and inconceivable to note that the said investigations on the purchase of the equipment only came up upon the appointment of the PW1 as managing director for a company that had three managing directors after the 1st defendant left the position. PW1 testified that he was briefed by the outgoing managing director Mr. Eric Tin to follow up on the equipment. Unfortunately, the latter was never led as witness for the plaintiff to testify as to the discovery or allegations made under this transaction. PW1 also testified that he was not employed with the plaintiff and that he was the 3rd managing director to have managed the plaintiff after the 1st defendant. He further noted that the procurement of the said equipment happened in 2012 this being 7 years before the filing of this suit.

As stated above, the burden of proof lies on the plaintiff to prove its case and in the circumstances, it is clear from the evidence adduced that the plaintiff was aware of the transaction and rather benefitted from it. It still enjoys the use of the

said equipment at its stores. The plaintiff has never raised any queries into this transaction and neither did its auditors.

It is important to note the purpose of audits in a company. The **Black's Law Dictionary, 8th Edition** defines an audit as a formal examination of an individual's or organization's accounting records, financial situation, or compliance with some other set of standards. The purpose of the audit is to verify that the records are an accurate and fair representation of the company's transactions and involves obtaining evidence about the financial statements sufficient to give reasonable assurance that they are free from material misstatement whether caused by fraud or error.

The plaintiff adduced evidence of its audits from the year 2012 – 2016 and PW1 stated that there was no outstanding in respect of any monies owed to the 2nd defendant. It is therefore quite amusing that the plaintiff seeks to recover monies yet its books of records do not show any missing amounts queried from the transaction that took place between the parties.

Furthermore, from the time of the said transaction, neither plaintiff nor its auditors have imputed any fraud or error in regards to the authorization made by the 1st defendant. Indeed, the plaintiff did not lead any evidence to show any fraud or error in respect of its books of accounts from the year 2012- 2019 when the suit was filed. The plaintiff has never carried out any investigations into the said project nor has it led any audit report to explain or show any fraud by the defendants during the purchase of equipment.

The position of the law is settled that allegations of fraud must be strictly proved, the burden heavier than one on balance of probabilities generally applied in civil matters. (See: ***Kampala Bottlers Ltd vs Damanico (U) Ltd, SCCA No. 22 of 1992***) The plaintiff has not adduced any evidence in respect of its claims of fraud by the 1st defendant as required by the standards of law. It is therefore inconceivable for me to believe that there was any misappropriation of funds by the 1st defendant,

7 years after the said transaction without any evidence adduced by the plaintiff other than an email seeking clarification from the 1st defendant without any investigations carried out by the plaintiff of its auditors or any reports of fraud, error and or misappropriation made by the plaintiff's auditors.

In the circumstances, it find that the plaintiff has failed to prove that the 1st defendant misappropriated or irregularly misused the plaintiff's money for the benefit of the 2nd defendant.

This issue is therefore answered in the negative.

Issue 3: **Whether the plaintiff is entitled to a reimbursement of the money used to purchase the equipment by the defendants.**

The plaintiff's counsel submitted that section 291 and 222 of the Companies Act require a director involved in a transaction with a related party to disclose their interest in such transaction or make restitution to the company for the same. Counsel contended that this is a case for which restitution is required.

The plaintiff submitted that having demonstrated that the 1st defendant used his position in the plaintiff company to purchase equipment for the 2nd defendant a company that he owned, that prima facie, the defendants are required to reimburse the said funds. The plaintiff admitted that equipment worth Euros 31000 was found at forest mall branch during the mediation process and that this money should be deducted from the total claim of Euros 130,015. Counsel further submitted that a sum of UGX.32,120,708,000/= equivalent to Euros 8,030 which money had been transferred to the plaintiff as evidenced in the last attachment of DE9 should also be deducted from Euros 130,015 which means that the plaintiff is only entitled to a refund of Euros 90,985 after the above deductions.

The defendants' counsel submitted that the plaintiff through the evidence of PW1 admitted receipt of the beef processing and storage equipment and cannot therefore claim no knowledge of the equipment and seek reimbursement of the

purchase price for the equipment. The defendants also submitted that they met the costs of the equipment and thus the plaintiff is not entitled to any reimbursement under law nor in equity and passage of time to bring such a claim.

The defendants further relied on ***Gold View Inn (U) Ltd vs Barclays Bank (U) ltd Civil Suit No. 358 of 2009*** wherein court held that the equitable principle that one cannot approbate and reprobate at the same time. It was submitted that the plaintiff through PW1, its current managing partner admitted that that he had found the equipment at the forest mall shop of the plaintiff and conceded to having seen it being used to run the operations. Counsel therefore stated that the plaintiff has no right in law to claim for reimbursement when it's using the equipment.

He further noted that the equipment was installed 9 years ago and the company has had two managing directors after the 1st defendant who did not account for what they found and what they handed over to PW1. Further still, he audited books of account exempt the defendants from any kind of liability since they reflect a true picture of the financial company of the plaintiff.

Counsel for the defendant submitted that the plaintiff comes to court with very unclean hands in equity and that it is still using the same equipment to run its operations for now over 10 years. He therefore submitted that it cannot seek a reimbursement from the procurement of the equipment which it is using in its operations and which was duly procured to promote the business of the company.

In regards to section 222 of the Companies Act, the defendant noted that a transaction only qualifies as voidable thereunder if the director exceeds the limitation on their powers under the company's constitution. Counsel submitted that the plaintiff ought to have proved that the actions of the 1st defendant were voidable which it did not prove.

Counsel therefore submitted that the transaction of acquiring the equipment was not voidable and that the plaintiff was not entitled to any reimbursement. He therefore prayed that this issue be found in the favour of the defendants

Analysis.

Having found issue 2 and 5 in the negative, for reasons mentioned therein above, this ground also collapses. Precisely, the plaintiff failed to prove on a balance of probabilities that the 1st defendant misappropriated the plaintiff's funds since the evidence adduced in form of audit reports of the company showed no such misappropriation and neither were there any reports of this loss or fraud from the audit firms presented before this court from the year 2012 when the transaction happened to date.

The plaintiff did not raise any investigations or complaints whatsoever until the commenced of this suit in 2019 which is quite unbelievable especially where there is only proof by way of email that PW1 claims was full of falsehoods and lies as to the clarification of the transaction hence this suit.

PW1 testified that there was no outstanding in respect of any monies owed to the 2nd defendant. He testified that there is equipment at the stores that has been in use since 2012 till date and yet the plaintiff seeks for reimbursement of the money used to purchase the equipment by the 1st defendant. It would be absurd for this court to grant this order and yet the plaintiff has been in use of the said equipment.

In the circumstances, I find that the plaintiff has failed to prove that it is entitled to a reimbursement of the money used to purchase the equipment by the 1st defendant.

This issue is therefore answered in the negative.

Issue 4: Whether the 2nd defendant was unjustly enriched by the actions of the 1st defendant.

The plaintiff's counsel submitted that the 2nd defendant was unjustly enriched by the actions of the 1st defendant. Counsel defined unjust enrichment by citing the case of ***Nakate Halima vs Farming Consultant and Management Company Limited (Facom)*** where court held that money which is paid to person which rightfully belongs to another, as where money paid by A to B on a consideration which has wholly failed, is said to be money had and received by B to use of A. It is recoverable by action A.

Counsel further noted that liability is based on unjust enrichment that is, the action applicable whenever the defendant has received money which in justice and equity belongs to the plaintiff, under circumstances which render the receipt of it by the defendant a receipt to use of the plaintiff.

Counsel therefore submitted that the 1st defendant authorised the spending of the plaintiff's funds to purchase goods for the benefit of the 2nd defendant and that the 2nd defendant was unjustly enriched when it received the goods/ equipment purchased with the plaintiff's funds for absolutely no value to the plaintiff.

The defendant's counsel submitted while relying on the case of Nakate Halima (supra) as cited by the plaintiff which; adopted the reasoning in ***Mahabir Kishore & Madvani Paradesh 1990 AIR 313*** where it was held that, for a case to qualify as being one of unjust enrichment, the following prerequisites had to be established; first, the defendant has been enriched by receipt of a benefit, secondly, this enrichment is at the expense of the plaintiff and thirdly, that the retention of the enrichment is unjust. Counsel stated that the assertions of the plaintiff and evidence lead at trial did not support the claim for unjust enrichment as stated in the case.

Counsel submitted that the plaintiff did not demonstrate during trial whether the 2nd defendant received any benefit from it, if such benefit was obtained at the expense of the plaintiff and the retention of such benefit is unjust.

Counsel stated that the above submission is supported by the audited books of accounts of the plaintiff marked PE30, PE31 and PE32 and the witness statements of DW1 and DW3. It is therefore our submission that the 2nd defendant was not justly enriched by the actions of the 1st defendant.

Analysis

This court has discussed the principle of unjust enrichment at great length under issue 1 and basing on the evidence adduced before the court; found that the claim of as against the 2nd defendant was not proved. The plaintiff does not claim that any money was received from it to the 2nd defendant and that no services were delivered to it.

The evidence that was adduced to support its claim is against the 1st defendant who authorized payment for equipment and who in the circumstances need be the one against who this claim could stand.

In the circumstances, this claim fails.

Having found that the plaintiff has failed to prove its case, this suit is thereby dismissed with costs to the defendant.

I so Order.

SSEKAANA MUSA
JUDGE
6th April 2023