THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: ODOKI C.J.; ODER, MULENGA, KANYEIHAMBA, AND KATO,JJ.SC.)

CIVIL APPEAL NO.21 OF 2001

BETWEEN

ACTIVE AUTOMOBILE SPARES LTD: :::::::::::::::: APPELLANT

AND

1.CRANE BANK LTD)

2.RAJESH PAKEKH) : :::::::::::::::::::::: RESPONDENTS

(Appeal from the decision of the Court of Appeal at Kampala (G.M. Okello, A. Twinomujuni, and C . N . Kitumba JJ.A) DATED 18.9.2001 IN Civil Appeal No.63 of 2001)

JUDGMENT OF ODER JSC

This is a second appeal against the decision of the Court of Appeal dismissing the Appellant's appeal against the High Court judgment, which had dismissed the appellant's suit against the first respondent. The suit had been instituted against both the first and the second respondent jointly. It succeeded against the second respondent only. The suit against the first respondent was dismissed. The first appeal was also against both the respondents. The present appeal is, in fact, against the first respondent only although the second respondent appears as a party to the appeal.

In this judgment the first respondent and the second respondent are referred to as the Bank and Rajesh respectively.

The appellant's case in the courts below and in this Court is that on 18th June, 1988 an employee of the appellant, Dansukh Patel, P.W 2, took to the Bank a bank draft issued by Gold Trust Bank of Uganda for Shs. 120,764,562/= and left it with instructions to transfer the proceeds of the draft by Telegraphic Transfer (TT) pound sterling 60,382 to M/S Agric Link Company in London. The Bank accepted the instructions. The money was for purchase and importation into Uganda of spare parts from the United Kingdom. On 19th June 1998, Dansukh returned to the Bank and was informed that the Bank did not have sufficient pounds in sterling to comply with the appellant's instructions. The Bank suggested to Dansukh to take United States dollars instead. He agreed and received US $ 97,000 in cash, which he took to the appellant's premises on Plot 25, Nakivubo Road, Kampala. In the afternoon of the same day, Dansukh telephoned Rajesh and informed him that he had been instructed by his boss, the Managing Director of the appellant, Kimanbhai Ranchodbhai Patel,P.W.1,who was then in London, to transfer only pounds sterling, not U.S. dollars. Dansukh also asked Rajesh to collect the cash dollars from the appellant's premises and return the money to the Bank. Rajesh picked up the money and acknowledged receipt thereof in writing on a piece of paper bearing the Bank's letter heads. He also issued to Dansukh a personal cheque as an additional guarantee. Eventually the appellant learnt that no money was ever transferred to London. The dollars or their equivalent in Uganda shillings were never returned to the appellant, either.

It was the appellant's case that at all material times Rajesh was employed and acting as the Manager of the Bank's Forex International Division.

Rajesh accepted this version of what happened as true and added that after he collected the dollars, he sold the same to some currency dealers in Kikubo and deposited Uganda shs.120,764,562/= with the Bank in order to return the appellant's money to the Bank. He claimed that at all times during this transaction, he was acting as the Manager , Forex International Division of the Bank.

The Bank's case was that it received the Gold Trust Bank draft on 18 June 1998 from the appellant's employee, Dansukh, who wanted to purchase cash dollars. After being satisfied with the genuineness of the Gold Trust Bank draft, it gave Dansukh US dollars 97,000, which he took away. Thereafter, Dansukh did not return to the Bank until some days later, after Rajesh had been arrested by the police on charges of fraud.

The appellant subsequently sued the Bank and Rajesh jointly and severally for recovery of the US.$ 97,000 or its value in local currency, damages, interest and costs.

The trial court held that the Bank was not liable to refund the money to the appellant but held that Rajesh was. Dissatisfied with the trial court's decision, the Bank appealed to the Court of Appeal. Rajesh also cross-appealed against the trial court's judgment. I have already referred to the result of that appeal. Rajesh's cross appeal was also dismissed.

There are three grounds of appeal set out in the memorandum of appeal as follows:-

1. In view of the grounds of appeal and the submissions, the learned Justices of Appeal erred in law in holding that it was their duty ***"to re-appraise all the evidence on record and to come to its own conclusions as to whether the conclusion could be supported."***
2. The learned Justices of Appeal erred in law in holding that the learned trial Judge's conclusion could be supported.
3. The learned Justices of Appeal erred in law in failing to consider the appellant's submissions on the laws of banking, exchange control and regulations made there under, and which, if they had considered, they would have held that appellant's money should have been received in accordance with those laws and that, in failing to do so and instead paying cash in U.S. dollars, the 1st respondent was in breach of the appellant's instructions and must refund the appellant's money.

We note that grounds, 1 and 3 of this appeal offended against rule 81 of the Supreme Court Rules in that they are not precise and are argumentative, but in the interest of justice we decided to hear the parties.

Dr Joseph Byamugisha, learned counsel for the appellant, argued all the grounds of appeal together. He first attacked the Court of Appeal's finding which upheld the trial courts decision that when the appellant deposited the bank draft of Shs. 120,764,562/= it did not instruct the Bank to transfer the proceeds of the bank draft, impound sterling 60,382 to M/S Agric Link Company in London. Learned counsel submitted that such finding was contrary to the Bank's pleadings in its written statement of defence which admitted the appellant's allegations in its plaint that the appellant so instructed the Bank. The finding was also contrary to the evidence given at the trial by the appellant's official, Dansukh, PW.2, and the Bank's official, Rajesh, the second defendant, D.W.2. Evidence from Rajesh included a photocopy of the bank draft from Gold Trust Bank, exhibit P.4. The flip side of the document bears a note written by Rajesh, who had received it at the Bank, to the effect that the bank draft was received for the purpose of transfer of pound sterling 60.382.28.

Secondly, learned counsel criticized the Court of Appeal for accepting the denial by Rezakalan, D.W.I, in his testimony that any request for transfer of money abroad was made by the appellants's employee, Dansukh, because the legal procedure for doing so was not followed. The legal requirements included the filling up of Form E under the Bank of Uganda Foreign Exchange Regulation, which Danskh did not do.

Learned counsel's third attack of the court of Appeal's decision related to its finding that the conduct of Dansukh, P.W.2, was more consistent with that of a person who requested to purchase dollars and was indeed, sold dollars by the Bank, which he took to the appellant's premises. In the circumstances, learned counsel contended that the learned Justices of Appeal erred to have held that the Appellant never requested the Bank to transfer pound sterling to any London-based beneficiary and that the appellant received from the Bank US $ 97.000 as full consideration for the bank draft

of shs.120.764.562/= which Dansukh had deposited in the Bank. Learned counsel submitted that the appellant sued the Bank for the failure to follow its instructions to remit pound sterling to London, and for not following banking laws. Learned counsel contended that it was illegal for the Bank's employee to pay out foreign exchange to Dansukh in the manner he did. It was also illegal for the appellant's employee to receive the foreign currency. All this was in contravention of section 1 of the Exchange Control Act, (cap.158), as amended by the Exchange Control Act (Amendment)Act, 1965, and the Exchange Control Act (Amendment) Decree 1972. This law prohibits the Bank from issuing foreign money except to a foreign exchange dealer. The appellant's employee, Dansukh, was not such a dealer.

The learned counsel also referred to the Exchange Control (Foreign Bureaux) Order, 1991 and contended that both the Bank, as a foreign exchange bureau, and the appellant, as a firm which wanted to import goods into Uganda, were bound by Regulations 18,19,and 21 of the Order. Under these Regulations a firm may purchase foreign currency from a forex bureau for the purpose of importation of goods into Uganda. Where the goods to be imported with foreign currency so obtained are valued at 10000= U.S. dollars or more the goods shall be subject to pre-shipment inspection, in accordance with the Bank of Uganda (Pre-shipment Inspection of Imports) Regulation, 1982. In the instant case, it was contended by Dr. Byamugisha that as the goods to be imported were in excess of US $ 10000, the Bank acted illegally, contrary to these Regulations, in paying out U.S. $ 97.000= to the appellant's employee, Dansukh, P.W.2, in the manner the payment was made to him, purportedly for the importation of spare parts into Uganda. Learned counsel further submitted that the learned Justices of Appeal did not consider the appellant's submission before it that the Bank's payment of foreign currency to the appellant's employee, Dansukh, in the manner it was done was illegal, because the Bank contravened the statutory provisions the learned counsel has just cited. It was an error for the Court of Appeal not to have decided on the issue of illegality of the Bank's action.

Mr. Paul Kiapi, learned counsel for the Bank, opposed the appeal. He submitted that the appeal hinges on one question, which is whether in dealing with the appellant's U.S.$ 97,000,

Rajesh was acting in the course of his employment. Learned counsel contended that the learned Justices of Appeal considered this question and concluded that Rajesh was on a floric of his own. He was not acting in the course of his employment. Learned counsel contended that there was ample evidence to support the Court of Appeal's finding to that effect, evidence which had been accepted and acted upon by the learned trial judge. Such evidence came, for instance, from Ali Rezakalan, D.W.I who testified,inter alia, that the Bank's employees were never allowed to collect money from people's premises. As an employee, the duty of Rajesh was to sit in the Bank to serve customers. D.W.I also testified that it was not the Bank's practice to acknowledge receipt of money on its headed paper. Special pay-in slips were used by customers who wanted to do telegraphic transfers, in which details of the beneficiary, sender, amount of money and contact numbers are written. The pay-in slips are filled in at the Bank. The sender takes a copy thereof, duly signed by the cashier, and the chief cashier. After the transaction is completed, the customer is then given a copy of the message, which has been sent to the Bank's correspondent bank abroad, and which is known as T.T. The learned counsel further submitted that Rajesh's own admission that he went to the appellant's premises, collected the U.S. dollars and sold it in Kikubo justified the Court of It is noteworthy that the appellant did not raise this point about departure from pleadings during the trial of the suit or before the Court of Appeal. It has been raised for the first time in this Court. Be that as it may, it is my view that since it is a point of law, this Court should consider the matter.

In its plaint the appellant pleaded:

"4 *On or about 18/6/98, the plaintiff issued a Gold Trust Bank Draft No.GTB 867/98 (045277) for Ug.Shs. 120, 764,562/= to the 2nd Defendant who* was the *Forex Manager and employee of the first Defendant with instructions to transfer to UK f60,382 by Telegraphic Transfer or by draft to M/s Agric Link Company in London and the Defendants agreed to do so. A photocopy of the draft is annexed marked "A".*

5. *On or about 19/6/98 the Plaintiff's staff went to the first Defendant Bank to find if the Telegraphic Transfer have been effected and the second defendant advised the plaintiff's staff to take US $97,000 (equivalent of Shs.U.g. Shs.120,764,562 at the time) Since there was no sufficient pound sterling to be sent at the time and the Plaintiffs staff*

accepted and received the US. $97,000 and took it to the Plaintiff's business premises of Plot 25, Nakivubo Road, Kampala. Photocopy of the receipt is annexure "B, *"U."*

-In its written statement of defence the Bank averred in paragraph 4 thereof: "4 *This defendant admits the contents of paragraph 4 and 5."*

The Bank's evidence which was adduced to prove its case against the appellant's suit was clearly a departure from its pleadings in the written statement of defence. Whereas paragraph 4 of the written statement of defence admitted the appellant's cause of action as stated in paragraphs 4 and 5 of the plaint, the Bank's evidence at the trial was meant to prove the contrary, namely that when the Gold Trust Cheque of Uganda shillings was deposited at the Bank, no instructions were given by the appellant that the proceeds of the Bank draft should be transferred in sterling pounds to the appellant's suppliers in London. In my view, the Bank's departure from its pleadings was an irregularity which was not fatal to the trial court's judgment in favour of the Bank, and which was upheld by the Court of Appeal. Moreover, the irregularity was cured during the course of events which took place at the trial from the beginning. The appellant did not object to the irregularity at the commencement of, and during the trial or in the Court of Appeal. The trial proceeded on the basis of the issues Appeal's finding that he was on a frolic of his own. Regarding the departure by the Bank's evidence from its pleadings in the written statement of defence, Mr. Kiapi submitted first, that the appellant did not raise any objection about the departure during the trial of the suit and on the first appeal. It is, therefore, too late to raise an objection now. Secondly, in view of the Court of Appeal's finding that there was no instruction by the appellant to the Bank to remit money to London, the departure did not cause injustice to the appellant, because the bank had no sterling pounds, and in any event, it returned the money. Regarding the appellant's argument that the Bank acted contrary to the Bank of Uganda's foreign exchange regulations, Mr. Kiapi contended that the appellant also broke the law. Consequently it cannot benefit from the illegality.

I shall first deal with the appellant's submission that contrary to it's admission in the written statement of defence that the appellant instructed the Bank to transfer by T.T. Sterling pounds

£60,382 to M/s Agric Link Company in London, the Bank, instead, adduced evidence to prove the contrary; that the trial Judge erred to accept the Bank's evidence to that effect, and that the Court of Appeal erred to uphold the trial Court's finding in that regard, framed at the beginning, one of which was whether defendant No.1 (the Bank) received the shs.120,764,562/= draft with a request for a sterling pounds telegraphic transfer. The appellant supported its case with evidence from, inter alia, Dansukh Patel, PW2, that it delivered the Gold Trust Bank draft to Rajesh, the Banks Forex Manager to transfer pound sterling to London. The relevant part of PW2's evidence reads:

"This draft I took to the Crane Bank on 18/6/1998. I delivered it to Crane Forex Manager, Rajesh Parekh. I wanted him to make a T.T. of pounds sterling 60,382. It was to be transferred to Agric Link London. He did not accept the instructions,(witness changes answer). Yes he accepted to send the T.T. He did not send the T.T." In cross-examination, it was put to PW2 by the Bank's counsel, Mr.Rukutana that he acted contrary to his boss's (PWl's) instructions and conspired with Rajesh to embezzle the money. PW2 denied the suggestion.

The Bank resisted the appellant's claim that it was instructed by the appellant to transfer money to London by adducing evidence from Ali Rezakalam (DW1) to the effect that PW2 went with the bank draft to him (DW1). PW2 wanted to purchase cash U$ dollars and he was given US$ 97,000. When DW1 asked PW2 why he wanted dollars in cash, the latter told the former that it was none of his business and went away with the dollars. DW1 said that PW2 dealt with him on this matter not with Rajesh. In cross-examination, DW1 said that PW2 did not ask him to transfer money to London.

The appellant's counsel at the trial canvassed in his submission under issue No.2, that Rajesh, DW2 and first defendant on 18/**6**/98 received the bank draft, Exhibit P4 for transfer of sterling £60,382 by Telegraphic Transfer to London. It was contended that oral evidence of PW2 and DW2, Rajesh, was clear on the point. It was therefore not surprising that PWl, the Managing Director of the appellant company rejected the cash of US$ 97,000 and insisted on the original instructions for a Telegraphic Transfer in Sterling pounds.

Clearly, the appellant conducted its case as if the Bank had pleaded that it did not act in breach of instructions. In the circumstances, the Bank's departure from its pleadings, in my view, did not prejudice the appellant. With respect, therefore, I am not persuaded by the learned counsel's arguments in this regard.

I shall next deal with the appellant's criticism of the Learned Justices of Appeal that they wrongly upheld the trial court's finding that there were no instructions from the appellant to the Bank to transfer money to the appellant's supplier in London; and that the appellant's employee, Dansukh Patel, PW2, took the Gold Trust Bank draft to the Bank and only purchased US. dollars, contrary to the appellant's evidence. I shall then later deal with the appellant's contention that the Bank contravened the statutory provisions governing foreign exchange transactions by paying US$ 97,000 to Dansukh, a person who was not a foreign exchange dealer.

In his lead judgment, with which all the members of the Court agreed, Twinomujuni, J.A., referred to the duty of the Court of Appeal as the first appellate court in a case such as the present. That duty enjoins the court to reappraise all the evidence on record and make its own conclusion as to whether the decision arrived at by the learned trial judge can be supported or not. The duty is provided for in rule 29(1) (a) of the Court of Appeal Rules, 1996 as follows:

"29(1)(a) On any appeal from a decision of a High Court acting in the exercise of its original jurisdiction, the Court may-

(a) ***reappraise the evidence and draw inferences of fact;"***

This duty of a first appellate court has been stated and discussed in a number of decided cases, one of which was cited by Learned Justice, Twinomujuni, JA, namely, ***Peters vs. Sunday Post Ltd (1958) EA. 424. Selle and Another vs. Associated Motor Boat Co.Ltd (1968) EA 123 Pandya VS. R (1957) EA 32; Okeno VS. Republic (1972) EA, 32; Watt Or Thoma's VS. Thomas (1947), A.C, 484; Abdul Hameed Saif VS Alimohamed Sholan (1955) 22 EACA. 270; Kifamunte Henry vs Uganda, Criminal Appeal NO. 10/1997; (SCU) (unreported);*** Milly Masembe ***VS. Sugar Corporation of Uganda Ltd, Civil Appeal No.1/2000 (SCU)(unreported.***

In ***Selle and Another VS. Associated Motor Boat Company Ltd*** (supra), Sir Clement De Lestang, P. said this:

"An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955) 22 EACA) 270)"

In the instant case, the learned Justice of Appeal, Twinomujuni, J.A, re-evaluated the evidence in the case as a whole by reframing 5 issues brought out by the grounds of appeal. Issue No.1 was the most relevant to the point now under consideration. It was whether the Bank ever requested a transfer of money to a London beneficiary. The learned Justice of Appeal then said this:

"There is no dispute that the appellant deposited a draft of shs. 120,764,562/= with the 1st respondent and that the next day he collected US$ 97.000 the equivalent of the money on the draft. The appellant was issued with a document acknowledging the transaction. Evidence was led on behalf of the 1st respondent that the appellant requested for dollars and the transaction was treated as a request to purchase dollars. Rezakalan, DWl,who handled the transaction on the behalf of the Bank denied that any request was made to transfer money abroad. He contended that if such a request had been made, the law prescribed a procedure which included filling Form E of the Bank of Uganda Foreign Exchange Regulations. This Evidence was neither contradicted nor did the appellant prove in any other way that he ever requested for a transfer of any moneys to London. PW2, the main witness of the appellant, changed his story so many times in the witness box and it is ***clear why*** the ***learned trial Judge could not believe him. Neither would I.***

Another puzzle connected with this point is why if PW2 requested for transfer of money to London, he had to take US$ 97,000 at great security risk to the appellants premises in Nakivubo. I would have thought that after being told that the bank did not have enough pounds to transfer he would have first contacted his boss in London to see if dollars would be acceptable and either request the bank to transfer dollars, or collect the bank draft he had deposited or its Uganda shillings equivalent in order to try to obtain pound sterling elsewhere. Having opted to carry the dollars to his premises, did he hope to return them to the bank, if his boss in London had told him that dollars would be acceptable? In my judgment this behavior on the part of PW2 is not consistent with what a reasonable person would do if he had requested for money transfer. It is more consistent with that of a person who requested to purchase dollars and was indeed sold dollars, which he took to his premises. I would therefore hold that the appellant never requested the bank to transfer any money to a London beneficiary. I would answer this issue in the negative."

The appellant's learned counsel strongly argued that the hand written notes on the flip side of the photocopy of the bank draft (Exbt. P4) to the effect that the draft was received on 18th June 1998 for transfer of 160,328,was clear evidence that the appellant requested the Bank to transfer money to London. It is true that the learned Justices of Appeal did not specifically refer to Exhibit P.4, but it is my opinion that, this is one of the appellant's pieces of evidence which was a part of the evidence he re-evaluated in the case as a whole and came to the conclusion that there were no instructions from the appellant to transfer money to London. The handwritten note on the flip side of exhibit P4 would seem to suggest that the bank draft was intended to purchase British pounds for transfer to London, but it would appear that such intention was not translated into action by instructing the Bank.

Clearly, such instructions were never completed. If ever there was an intention on the part of the appellant to do so the Bank of Uganda Form E, which would have formed part of such instructions, would have been completed by the appellant which was under a duty to do so. I shall say more in

this judgment about the appellant's failure to comply with other statutory requirements, indicating that the alleged instructions to the Bank to transfer money to London apparently was not completed.

I am satisfied that the learned Justices of Appeal properly re-evaluated the evidence in the case as a whole and, in my view, reached the correct conclusion by upholding the trial court's findings, that there were no instructions from the appellant to the Bank to transmit by a telegraphic transfer the sterling pounds in the sum of £60,382 to their suppliers in London, M/S Agric Link Company.

The appellant's learned counsel submitted that this court should exercise its discretion under rule 29(1) of the Supreme Court Rules and overturn the concurrent findings of fact by the Court of Appeal and the trial Court in this regard. With respect, I am not persuaded by that argument. The Supreme Court, as a second appellate court, will only interfere with findings of fact by the Court of Appeal in exceptional cases, and only if the Court of Appeal has failed as a first appellate court to re evaluate evidence and reach its own conclusions as required by rule 29(1)(a) of the Court of Appeal Rules. This principle is explained in cases such as ***The Gannibantan (2) (1876). IPD; The Hontestroom ss*** **vs. Durham** ***Castle ss (1972) A.C; Watt*** **or** ***Thomas vs. Thomas (supra); Pandya VS. R (1958) E.A. 336; S.M Ruwala VS. R 1957) 570; Khatijab Jiwa Hashman VS Zenab d/o Chandu Nanju (1960)-E.A. 7 (privy council; and Kifamunte Henry VS. Uganda, (supra).***

It is my view that in this case the appellant has not satisfied this court that this is a case where we should interfere with the concurrent findings of fact by the trial Court and the Court of Appeal.

I shall finally, consider the appellant's criticism that the Justices of Appeal erred in law by failing to consider the appellant's submissions on the laws of banking, exchange control and regulations made thereunder, and the contention that if they had considered them, they would have held that the appellant's money was received in accordance with those laws and that, in paying cash in dollars,

the bank was in breach of the laws and must refund the appellant's money. I have already referred to the submissions of the appellant's learned counsel in this regard. In my view, the learned Justices of Appeal did not fail to consider the appellant's submissions under this criticism. Although they did not refer to the relevant statutory provisions by name and discussed their effects on the appellant's case they, nevertheless, upheld the trial court's acceptance of the evidence of Rezakalan, DW1 denying that any request was made to the Bank to transfer money abroad because if such a request had been made, the procedural requirements prescribed by law which included filling of Form E under the Bank of Uganda Foreign Exchange Regulations would have been complied with by the appellant. The appellant did not complete Form E.

The clauses 18, 19 and 21 of the Exchange Control (Foreign Bureaux) Orders, 1991 provide:

"18. Subject to the provisions of this Part, a person, firm or other organization may purchase foreign currency from a forex bureau for the purpose of importing goods into Uganda.

19. Where the goods to be imported with foreign currency obtained from a forex bureau under this order are valued at 10,000 United States Dollars or more, the goods shall be subject to pre-shipment inspection in accordance with the Bank of Uganda (Pre-shipment Inspection of Imports) Regulation, 1982.

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21 (1)

(2) An importer wishing to import under this paragraph shall do so by requesting his banker to issue him with a bank draft or by requesting a direct transfer by the bank of the money outside Uganda on his behalf; and shall complete Form E (for imports) and state what he intends to import."

The appellant wanted to import spare parts, the value of which was more than US$ 10, 000. Accordingly, the goods were subject to the Bank of Uganda (Pre-shipment Inspection of Imports) Regulations 1982. Secondly, as the appellant wanted to pay for the goods abroad by a direct transfer of the money, the appellant should have completed Form E and presented it to the Bank with its request for transfer of the money to London. It did not. Consequently, the appellant failed to

comply with a necessary legal requirement for a request to the Bank for payment of importation from abroad of goods valued at more than US$ dollars 10,0000. The appellants, therefore, cannot, in my view, be said to have made such a request to the Bank. In the circumstances, the concurrent findings of the trial court and the Court of Appeal in this regard were justified.

For the purposes of this appeal, the relevant provisions of The Bank of Uganda (Pre-ship Inspection of Imports) Regulations 1982 are 1,2 and 3, which provide:

"1(1) No payment shall be made in or outside Uganda by or on the authority of the Bank of Uganda, or any licensed bank in Uganda, to the credit of any person, in respect of goods subject to Pre-Shipment inspection under these Regulations, unless and until a Clean Report of Findings issued under regulation 5 of these Regulations in respect of such goods, is presented together with the relevant shipping documents to an authorized bank.

(2) In this regulation, "authorized bank" means a bank authorized by the Bank of Uganda to receive Clean Reports of Findings for purposes of this regulation.

2. For the purposes of regulation 1 of these Regulations, all goods other than goods specified in the Schedule to these Regulations, intended for importation into Uganda, shall be subject to pre-shipment inspection by the Inspection Authority.

3 (1) Any person intending to import goods into Uganda who wishes to have such goods inspected, for the purpose of these Regulations shall apply to the Bank of Uganda for issuance of an inspection order to have the goods so inspected.

(2) The Bank of Uganda, may on application made to it in such a manner as may be prescribed, issue an inspection order to the Inspecting Authority to inspect the goods"

The Regulations impose on the person intending to import goods into Uganda certain responsibilities to enable the Inspecting Authority abroad to carry out the inspection of the goods. Where after inspection of the goods, the Inspection Authority is satisfied that all the necessary requirements have been complied with, the Inspection Authority must issue to the seller of the

goods abroad a ***"Clean Report of Findings"*** which is a document certifying that the goods have passed all the necessary pre-shipment inspection requirements.

The Schedule to the Regulation exempts certain goods from pre-shipment inspection. In the instant case the goods intended to be imported were spare parts, which are not exempted from pre-shipment inspection requirements under the Regulations. In the circumstances, the alleged request by the appellant to the Bank for transmission of pound sterling to London for payment of the goods (if, indeed, such a request was made to the Bank) should have been accompanied by a "Clean Report of Findings" issued by the Inspecting Authority to the seller in London. The duty to submit the inspection report to the Bank before payment for the goods could be made under Regulation 1. of the Bank of Uganda (Pre-Shipment Inspection of Imports) Regulations, 1982, lay with appellant. There is no evidence that the appellant submitted a **"Clean Report *of Findings"*** when the alleged request for transfer of the money was made. Again, in my view, it cannot be said, that the alleged request for transfer of money to pay for import of spare parts was made by the appellant to the Bank, because the appellant did not fulfil the legal requirements which are a precondition before such transfer of money can be made.

I will next deal with issue of the legality of the transaction by which Dansukh bought from the Bank and the Bank sold to him US dollars 97,000, and in light of the provisions of the Exchange Control Act, (Cap 158) as amended, the appellant's learned counsel contended that the transaction was illegal and the Bank should be ordered to repay the money to the appellant.

Section 1 of The Exchange Control Act (Cap 158) as amended, provides that except with the permission of the Minister, no person other than an authorised dealer, shall, buy, borrow, or hold foreign currency from, or sell or lend any foreign currency to any person other than an authorised dealer. Under order 4 of the Exchange Control (Forex Bureau) Order 1991, a forex bureau is authorised to carry on the business of buying and selling foreign exchange subject to the provisions of that order and those of the Exchange Control Act (cap.158) as amended. Crane Bank Ltd is an authorised dealer in foreign currency under the Act and is a forex bureau authorised to carry on the

business of buying and selling foreign exchange. But the appellant is neither an authorised dealer in foreign currency under the Act, nor a forex bureau authorized to carry on the business of buying and selling foreign exchange. It is apparent, therefore, that the transaction between the Bank and the appellant was illegal, being an offence punishable on conviction by imprisonment for a term not exceeding two years or a fine not exceeding twenty thousand shillings or both such imprisonment and fine under part 11, paragraph 3 of the Fourth Schedule to the Act. Under Order 35(1) and (2) of The Exchange Control (Forex Bureaux) Order, 1991, the same punishment provided for under the Act, equally applies to contravention of the The Exchange Control (Foreign Bureaux) Order, 1991.

It is trite law that courts will not condone or enforce an illegality. This well established principle of the law was put this way by Lindley L.J, **in Scott vs Brown. Doering-MCN01> & Co (3) (1892) 2QD, 724** at P.728:

"Exturpi causa* non oritur *actio. This old and well-known legal maxim is founded in good sense, and expresses a clear and well recognized legal principle, which is not confined to indictable offences. No court ought to enforce an illegal contract or allow itself to be made the instrument of enforcing obligations alleged to arise out of a contract or transaction which is illegal if the illegality is duly brought to the notice of the court, and if the person invoking the aid of the court is himself implicated in the illegality. It matters not whether the defendant has pleaded the illegality or whether he has not. If the evidence by the plaintiff proves the illegality the court ought not to assist him."

In the same case, A.L. Smith, L.J. said: **"If a *plaintiff cannot maintain his cause of action without showing, as part of such cause of action, that he has been guilty of illegality, then the court will not assist him."***

In the earlier case of **Taylor vs. Chester (4) (1869) L.R.4 Q.B. 309,** it was said at P 314:

"The true test for ***determining whether or not the plaintinff and the defendant were in pari delicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by aid of the illegal transaction."***

In the present case, the appellant and the Bank were in pari delicto in the illegal transaction under consid erartion. The appellant cannot make out its case for refund of the U.S.dollars 97.000 without depending on the illegal transaction. In the circumstances the Court cannot order for the return of its money.

For the reasons I have given my view is that all the grounds of appeal should fail. In the result, I would dismiss this appeal with costs to First Respondent in this Court and in the Courts below.

JUDGMENT OF ODOKI CJ

I have had the benefit of reading in draft the judgment of my learned brother Oder JSC, and I agree with it and the order he has proposed.

As the other members of the Court also agree, this appeal is dismissed with costs to the first respondent in this Court and the Courts below.

JUDGMENT OF KANYEIHAMBA, J.S.C.

I have read in draft the judgment of my learned brother Oder, J.S.C and I agree that this appeal should be dismissed with costs. I also agree with the orders he has proposed.

***J*UDGMENT OF C.M. KATO, *J*SC.**

I have had the benefit of reading the judgment of my Lord Oder JSC, in draft. I agree with it that this appeal should be dismissed with costs. I would dismiss it in terms proposed by him.

Dated at Mengo this 22nd day of October 2003.