THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: *ODOKI, CJ., ODER, TSEKOOKO, KAROKORA, AND KANYEIHAMBA JJ.SC.)*

CIVIL APPEAL NO. 9 OF 2003

BETWEEN

1. **PREMCHANDRA SHENOI**
2. **SHIVAM M.K.P. LTD :::::::::::::::::::: APPELLANT**

AND

MAXIMOV OLEG PETROVICH ::::::::::::::::::::::::::: RESPONDENT

(Appeal from the decision of the Court of Appeal of Uganda at Kampala (Mukasa-

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Kikonyongo, D.C.J, Berko and Kitumba, JJ..AJ dated 30th June 2003, in Civil Appeal No. 24 of 2003)

JUDGMENT OF ODER, JSC

This is a second appeal by the appellants Premchandra Shenoi and Shivam M.K.P. Ltd. against the decision of Court of Appeal of Uganda, which confirmed the judgment of the High Court in favour of the respondent, Maximov Oleg Petrovich who was the plaintiff in the High Court suit.

The background to the appeal may be briefly stated as follows:

The respondent is a Russian businessman who deals in finance and investment. He is based in Moscow. Through one of his partners called Ponsov, he got in touch with another Russian called Kolganov who was working in Uganda as a journalist. Through Kolganov, the respondent established contact with Mr. Patel, living in Uganda. Sometime in May 1994, the respondent received e-mail from Mr. Patel. On receipt of the e-mail, the respondent came to Uganda with one Ponsov Nikoli, Andreevic hereinafter referred to simply as Ponsov, with whom the respondent had several business relationships in Russia. The intention of the respondent in coming to Uganda was to look into the possibility of investing in mining business in Uganda.

Mr. Patel introduced the 1st appellant to the respondent. The 1st appellant informed the respondent that he was the owner of a company called Shivam Ltd that deals in gold and diamond. The respondent discussed with the 1st appellant the possibility of doing business with him in minerals.

After the discussion, the respondent agreed to invest in the mining business of the 1st appellant, The 1st appellant was to secure permits, licences and certificates from the

relevant authorities for the establishment of the business. The 1 appellant took the respondent to several Ministries and authorities in this country connected with mining business to familiarize him with the rules and procedure for establishing business in the country.

The arrangements between the two formed what came to be known as **"The Participation Agreement",** which will hereafter be referred as **"Joint Venture."** It was executed on 9th of June 1994 and was made between "M/S Shivam Ltd **"as the 1st participant"** and the respondent plus his two associates, Ponsov Nikoli Andreevic and Kolganov Igor Nikolaevich, collectively referred to as the **"2nd participants."** The joint venture was to participate in mining, refining, smelting, trading, importing and exporting and commission business jointly in gold, silver, diamonds, precious and semi precious stones in Uganda, procuring and marketing of gold, silver, diamonds, precious and semi precious metals in

Uganda and worldwide. The venture was also to engage in importing, exporting, distributing jewellery, wholesale and the like metals.

It was stated in the Joint Venture that the 2nd participants were to provide Us$ 42,000 as a token deposit to the 1st participants on the signing of the agreement, which was refundable on termination of the agreement. It was also one of the terms of the **"joint venture"** that the 1st participant was to appoint the second participants as Directors of Shivam Ltd. It also contained a clause for automatic determination if US $42,000was not paid within the stipulated time.

The Joint Venture Agreement was admitted in evidence as Exh. PE1 at the trial. It is one of the documents on which the action was founded.

Though it was stated in Exh. PE1 that the "**2nd participants"** would provide the finance in actual fact, the respondent became the financier. The others were merely to represent his interest.

After the execution of Exh PEI, the names of Shivam Ltd. was changed to **"Shivam MKP Ltd"** and the respondents and his two partners were made directors.

The respondent was not able to remit the US$ 42,000 to the 1st participant as agreed. Instead, on 6th August, 1994 the respondent instructed the Midlantic National Bank, Moscow, to transfer by wire to Standard Chartered, Bank, Uganda to Shivam Ltd Account No. 320/90/11868/ 000, US$ 20,000. This was received and credited to the Account of Shivam Ltd on 14th July 1994, (see Exh. PE 4 and DE 11). Then sometime in July 1994, the respondent received a hand written Fax message (Exh. P. 8) in which he was informed of the prospects of the Joint venture, the possibility of starting a banking business, and the need to purchase land for the construction of a refinery plant. In addition whoever sent the fax, invited the respondent to invest US$ 200,000, stating that that kind of investment would fetch him 20 to 25 million US Dollars a

year. The respondent also received two certificate in connection with the business. These were a lincence from the Ministry of Commerce, Co-operatives and Marketing (Exh PE5), and one from the Ministry of Lands and Natural Resources (ExhPE7).

According to the respondent, Exh. PE 8 was sent by the 1st appellant, which the latter denied. At the trial, the authorship and authenticity of Exh. PE. 8 were contested strenuously by the appellants.

On receipt of Exh PE 8 and the documents mentioned above, the respondent became convinced that business prospects were good, and so he decided to send the US $200,000 asked for in Exh PE 8. In August, he instructed Deanbale Investment Co. Ltd. of Singapore to send US$ 200,000 to Shikam MPK.Ltd Account 320/90.1186/000 held with Standard Chartered Bank Ltd, Kampala Branch. Later the respondent received confirmation of the transfer from Deanbale Investment Co. Ltd. This is Exh. PE10. The value date of the T.T. was said to be 19th August 1994. The appellant did not acknowledge receipt of that money. It was, Ponsov who sent a Fax to the respondent that the money had been received. In his testimony, the respondent however insisted that the 1st appellant confirmed on telephone that he had received the money.

Thereafter, there was a complete breakdown in communication between the respondent and the 1st appellant. This state of affairs continued for sometime. The respondent became apprehensive and concluded that something fishy was happening in Uganda. He travelled to Uganda in October 1994 and met with the 1st appellant. When he failed to obtain satisfactory explanation concerning the business, another meeting in November 1994 was arranged between the respondent and his lawyers and the 1st appellant and his lawyers to negotiate amicable settlement. When that broke down, the respondent instructed his lawyers to take action, and went back to Moscow.

Later on the respondent received from M/S Shonubi Musoke and Co Advocates, the 1st appellant's advocates, Exh P12 informing him that the 1st appellant was prepared to pay to him US$ 161,623 in total satisfaction of his claim. This letter was marked **"Without Prejudice."** This amount of money was never received by the respondent. The only money the respondent received was $26,000, but he was not informed of the purpose for which it was sent to him. It was contended by the respondent that the appellant undertook to make him and his colleagues shareholders in the company Shivam MKP Ltd to reflect their business participation, but he did not do so. The company was registered in the names of the 1st appellant and his wife. The respondent contended that the failure of the 1st appellant to make him and his colleagues shareholders in Shivam M.K.P Ltd. constituted a breach of contract. He also contended that the appellants represented to him that the joint venture would fetch him a profit of 20 or 25 million US dollars per annum. It was on the strength of the above representation that he paid to them US$ 200,000. That representation turned out to be untrue.

The respondent therefore sued the appellants jointly and severally in the High Court, claiming:

(a) US$ 220,000 or its equivalent in Uganda currency being money had and received to the use of the respondent by the appellants, plus interest of 30%,

(b) General damages for misrepresentation

(c) General damages for breach of contract, and

(d) Costs of the suit.

The appellants denied the respondent's claim and, in particular averred that: -

(i) they never made any representations as alleged;

(ii) they admitted the joint venture agreement but denied that it was entered into as a result of any representation;

(iii) they never promised to make the respondent and his two colleagues shareholders in the Shivam MKP Ltd and consequently never breached any contract;

(iv) change of name of Shivam Ltd to Shivam MKP Ltd was not made to reflect the joint venture;

(v) they never received any monies from the respondent and put it to their own use as alleged and that the offer to pay any money was made ex gratia and not with intention of admitting liability.

At the trial of the suit, four issues were framed for determination: -

(a) whether 1st appellant made false representation to the respondent, on the strength of which he remitted US$ 200,000;

(b) whether the appellants received US$ 220,000;

(c) whether the appellants breached the contract entered into as result of the representation, and;

(d) Remedies, if any.

The learned trial judge answered all the issues in the positive and entered judgment against the appellants jointly and severally as follows:

a) The appellants to refund US$ 194000 to the respondent;

b) General damages assessed at US$ 275.000 for breach of contract and/or misrepresentation

c) Intrest of 6% on (a) from August 1994 to 2000 and on (b) from date of judgment till payment in full

d) Costs as taxed

The appellants' appeal to the Court of Appeal against the High Court decision was partially successful and that court held that:

i) there was no breach of contract and the award of general damages of US$275,000 and cost were set aside;

ii) judgment was entered for the respondent in the sum of US$184,000 as money had and received with interest at the rate of 20% from August 1994 till payment in full and;

iii) an award of half of the costs in both the Court of Appeal and those in the High Court.

The appellants were dissatisfied with that judgment, hence this appeal. Five grounds of appeal as set out in the memorandum of appeal are:

1. The learned Justices of the Court of Appeal erred in law and fact when they found that the learned trial judge had properly found the 1st appellant to be the author of exhibit PE.8.

1. The learned Justices of the Court of Appeal erred in law and fact when they found that the appellants had admitted receipt of US$ 200,000 and offered to pay USD161, 623.

2. The learned Justices of the Court of Appeal erred in law when they found that the USD 200,000 is refundable as money had and received.

3. The Learned Justices of the Court of Appeal erred both in law and fact when they found that the 1st appellant is jointly liable to refund the respondent's money.

4. The learned Justices of the Court of Appeal erred in law when they found that an interest rate of 20% per annum was payment to the respondent.

The parties filed written submissions under rule 93 of the Rules of the Court. The appellants' submissions were filed by M/S Kampala Associated Advocates; and those of the respondent were file by M/S Nangwala, Rezida & Co. Advocates.

The appellant's learned counsel argued ground one of the appeal separately and first, grounds two, three and four together, and ground five separately. Under ground one, the appellant's learned counsel criticized the trial court and the Court of Appeal for respectively finding that Exhibit PE.8 was authored by the 1st appellant. The learned counsel contended that the 1st appellant having denied writing the Fax letter, the procedure under section 66 of the Evidence Act, for proving that he had written the letter should have been followed. He also contended that sections 45 and 72 (1) of the same Act should have been invoked to compare the handwriting in Exhibit PE.8 with any other document known to have been written by the 1st appellant;

In opposition to the appeal, the respondent's learned counsel submitted under ground one of the appeal that the trial court and the Court of Appeal gave reasons for their findings that it was the 1st appellant who authored Exh PE.8. He contended that both courts found that he had lied as a witness that he did not send the Fax letter. The two courts were alive to the fact that there was no evidence from a handwriting expert in this regard. Berko, JA who wrote the lead judgment referred to certain factors which corroborated the hypothesis that EXPE. 8 came from 1st appellant and from nobody else. These included the 1st appellant's experience in jewellery that was mentioned in Exh PE.8 and in his testimony; the 1st appellants' experience of eight years in Uganda that was mentioned in the Fax letter and in his testimony; and the specific request for US dollars 200,000 made in the Fax letter from the respondent was the sum of money sent by the respondent. US dollars 200,000 was not not a magic figure, nor was it, baseless or accidental. It was the result of a specific demand for purposes specified in the Fax letter. The demand came from the 1st appellant. Regarding the provisions of sections 45,72 and 66 of the Evidence Act, the learned Counsel contended that they do not exclude other kind of evidence for proof of disputed handwriting or signature.

Finally, there was a departure from the 1st appellant's pleadings that he never received US dollars 200,000. Instead he testified that he had

received US dollars 200,000 from the respondent and he attempted to account for it. Departure by a party's evidence from his or her pleadings is a good ground for rejecting the evidence as was held in the cases of **A.W. Biteremo Vs. Damascus Munyanda, Civil Appeal No.15 of 1991 (SCU) (unreported)** and **Interfreight Forwarders (U) Ltd. Vs. East African Development Bank. Civil Appeal No. 33/92 (SCU) (unreported).**

In his lead judgment in the Court of Appeal, with which the other two members of the court agreed, Berko, JA upheld the findings of the learned trial judge that the 1st appellant authored the Fax letter Exh. PE.8. He said this:

" *I* ***now move to Exh PE.8. This was a hand written fax message that originated from Uganda. The owner of the fax machine has not been identified. According to the respondent, it was sent by the 1st appellant. The 1st appellant denies it. The identity of its author became a live issue at the trial though it was not specifically set down as one of the issues. The learned trial judge was aware of it and considered it. There was no hand writing expert opinion on it. The learned trial judge relied on evidence put before him to determine its author. He first considered the credibility of the parties. He found the respondent more credible, The 1st appellant never impressed him as a credible witness, and found him to be a liar. Was the judge right when he said the 1st appellant was a liar? I think he was right. I need only to refer to one instance to prove my point. On receipt of Exhibit PE.8 the respondent sent a telegraphic transfer of US $ 200,000 on 22/8/94 to Shivam M.K.P Ltd Account No.32/90/11868/000 held at Standard Chartered Bank Kampala. The 1st appellant was a signatory to that account. This money was received by the bank and credited to the above account on 23/8/94. The evidence of DW.3 Ndugwa Christopher Nathan, the auditor and accountant of the appellants, shows that the sum of US$200,000, which was a***

remittance from Russia, reflected on the account of 1st appellant.

On receipt of the amount of the US$2000,000, US$150,000 was withdrawn from the account on 23/8/94 and was used to purchase shillings from the Crane Bank and realized Shs: 138,450,000/=. The sum was paid into the shillings account of Shivam M.K.P Ltd. in which the 1st appellant was the sole signatory. Yet the 1st appellant never acknowledged the receipt of this money to the respondent. In the written statement of defence filed on 12/9/97, he denied the receipt of that money either by himself or Shivam M.K.P. Ltd. The judge was therefore right when he said 1st appellant was a liar. Mr. Rezida has submitted that the matters contained in Exhibit PE.8 are matters peculiarly within the knowledge of the 1st appellant. Mr. Kabatsi countered this argument and argued that Ponsov was also aware of those facts. The following excerpts appear in the Fax message: -

"As per Mr. Nikolais explanation to you, if 200,000 are available we can take off by exporting products straight away." The Nikolai here is Ponsov referred to by Kabatsi. If Ponsov was the author he could not have made that statement. This rules out Ponsov as the author. Again the language in Exhibit P.E 8 could not have come from Ponsov. His endorsement of Exhibit P.E 8 states " I can tell you all this is thru." The language and spelling of "True" as "Thru" show that he has no command of English language.

This also rules out Ponsov as the author.

The judge was right when he so found. I also agree with Mr. Rezida that matters contained in Exhibit P.E 8 are matters that also point conclusively to the fact that the 1st appellant was the author. I need to refer only to a few of them. The author talks about his 8 years experience in jewellery business. The 1st

appellant testified that he came to Uganda on 23/01/87. That was when he started business. He incorporated first company called Pickups- International. The second was Shivam Ltd, which was incorporated in 1989. This company dealt in precious stones.

He obtained the first license on 1/7/91 to do gold smith business. This company had a show room and office at the International Conference Centre and was dealing in gold and diamonds. I have no doubt that it was the 1st appellant who was talking about his 8 years experience in Jewelry business. In Court he confirmed it.

Next is the land that was purchased along Entebbe Road by the 1st appellant, and registered in the name of Shivam M.K.P. Ltd. This land was not mentioned in Exh. PE 1, but it was referred to in PE.8. This is what PE 3 talked about the land.

"I have completed location of the land ---The location of the land is so Prime and is on Entebbe Road." This was the very land that was bought.

As regards the location of the office at the Standard Bank, this is what appears in PE 8: -

"We were originally planning to move to Green Land Bank but we have planed to move to Standard chartered Bank. Please do not object to this because of so many good reasons." It continued to give those good reasons. This was not mentioned in PEL Standard Chartered Bank building was the place that was rented for the 2nd appellant company. These instances show that the 1st appellant and nobody else was the author of PE 8."

In my view, the Court of Appeal's findings, set out above cannot be faulted. As the first appellate court, it reevaluated the evidence in the case and up-held the trial court's finding that the 1st appellant authored PE.8. The first ground of appeal should therefore fail.

The appellant's counsel next argued grounds 2, 3, and 4 together. They submitted that the principle of money had and received is not applicable to the instant case. According to **Harlsbury's laws of England.** 3rd Edition, Volume 8 paragraph 408 page 235, 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 thereto. In default, the rightful owner may maintain an action for money had and received to his use. According to this authority the obligation to refund the money is imposed upon the person who received it. Before determing whether US D 200,000 was refundable as money had and received in this case, the Court of Appeal ought to have first established the person who received the money from the respondent: The learned Justices of the Court of Appeal found that there was overwhelming evidence that the appellants received the money. The appellants' learned counsel contended that the Justices of Appeal erred to have made that finding. There was no evidence whatsoever on record that the 1st appellant ever received any money from the respondent. Instead, there is overwhelming evidence that the 2nd appellant received the money. According to the respondent's evidence he sent the sum of US dollars 200,000 to the account of **"Shivam Ltd."** The money was sent by a Fax message from Singapore on 16/8/94 (Exh PE.9). Further, according to Exh. PE.12, it was the 2nd appellant, Shivam MKP. Ltd, which made the offer without prejudice, to refund the USD 161,623. The 1st appellant is not mentioned in the offer. Learned Counsel contended that according to the principle of independent legal personality in **Solomon Vs. Solomon & Co. (1897) A.C.22** the 1st appellant is separate from the 2nd appellant. In the instant case as it was MKP Ltd, an independent legal person which received the money, there was no basis

for the Court of Appeal's finding that it was the 1st appellant and the second appellant who jointly received the money from the respondent.

Learned counsel further submitted that the purpose for which the money was received was also relevant to the application of the principle of money had and received. In the instant case, it was necessary to ascertain the purpose for which the money was remitted. The learned Justices of Appeal relied on Exh PE. 8 to establish the purpose, for which the money was remitted, namely the business of the 2nd appellant under the Joint Venture scheme. Learned counsel submitted that the learned Justices of Appeal erred in doing so. Having found, as they did, that the Joint Venture had automatically terminated, the purpose for which the remission of the money was made could only be ascertained from the conduct of the parties. Exhibit DE.11 clearly summaries that purpose. The document indicated that the sum of USD 200.000 was remitted for trade and development of the 2nd appellant. As stated in Exhibit. PE. 8 the purpose was to generate money through weekly profits out of Jewellery to be able to open a bank. Learned counsel contended that the banking business was never the 2nd appellant's contemplated business. It was the 1st appellant's calculated misrepresentation.

In opposition to these grounds of appeal the respondent's learned counsel submitted that as could be gathered from the 1st appellant's representation to the respondent on how he used the money, the money was not intended for the business of the 2nd appellant. Learned counsel disagreed with the contention that the 2nd appellant's business merely turned out to be bad investments, which could not be blamed on any body.

There is no evidence to support such allegation. In his view, this was a mere scheme by the 1st appellant to unjustifiably enrich himself by using false pretences to do so. In his testimony the 1st appellant said that all the decisions of the company were made by himself and his wife. The learned counsel contended that he should therefore be held liable for refund the respondent's money.

The respondent's learned Counsel further submitted that the 1st appellant was estopped from denying responsibility for refund of the appellant's US dollars 200,000. It is trite law that where one party makes another to believe a set of facts and the other acts on such representation to his detriment, equitable estoppel arises in favour of the party to whom the misrepresentation was made. For this the respondents learned counsel relied on **Halsbury's Laws of England. Vol. 15** paragraphs 334 and 340, 3rd Edition; **Nurdin Bandali Vs Lambank Tanganyika Ltd (1963) EA 304 at 318 and319; and Century Automobiles Ltd Vs Hurchings Bienois Ltd (1965) EA. 304 at 313.**

On this point, Berko, JA held:

"*With regard to the US$200,000, there is overwhelming evidence that it was received by the appellants. They have even offered to pay US$ 161,623,000, to settle it. They are therefore liable to refund that amount as money had and received. This should, however be reduced by the US$ 26,000 that was sent to the respondent. That would leave a balance of US$184,000... The judge was right when he ordered the appellants to refund the US$ 184,000. It is not correct as stated in ground two that the order for refund was against the 1st appellant alone.*"

It is my considered opinion that in the circumstances of this case the learned Justices of Appeal were justified in upholding the findings of the trial court that the appellants had admitted receipt of US dollars 200,000 and offered to pay US dollars 161,623; that the said sum of money is refundable by the 1 and 2 appellants as money had and received; and that the 1st and 2nd appellants are jointly liable to refund the respondent's money. Grounds 2, 3 and 4 of the appeal should therefore fail.

On ground 5 of the appeal, the appellant's learned Counsel submitted that the learned Justices of Appeal erred when they substituted the rate of

interest of 20% for the rate of 6%, which the learned trial court had awarded. He contended that the principle to be applied is that an award of interest is discretionary. The basis of an award of interest is that the defendant had kept and used the plaintiff's money for his personal needs and therefore ought to compensate the plaintiff for it. See **Sietco Vs. Noble Builders (U) Ltd. SCCA No. 31 of 1995.** in which the principle in the case of **Hanbutts' Plasticine Ltd Wayne Tank and Pump (1970). IQB 447** was referred to with approval. In the instant case, the learned Justices of Appeal found that the respondent did not allow the business to operate for a period of at least one year for the profits to be realized.
Further, the money was remitted by the 1st respondent for a business in which he was a participant. Accordingly, the respondent was not deprived of his money to warrant the award of 20% interest per annum. In the circumstances, learned Counsel contended that the learned Justices of Appeal applied wrong principles in interfering with the trial court's award of 6% and awarded 20% without stating the basis of the interest rate, especially in view of the fact that the transaction was in dollars.

The respondents' learned counsel did not say anything about ground five of the appeal.

In considering what rate of interest the respondent should have been awarded in the instant case, I agree that the principle applied by this Court in **SIETCO Vs. NOBLE BULDERS (U) Ltd** (Supra) to the effect that it is a matter of the Court's discretion is applicable. The basis of awards of interest is that the defendant has taken and used the plaintiff's money and benefited. Consequently, the defendant ought to compensate the plaintiff for the money. In the instant case the learned Justices of Appeal, rightly in my opinion, said that the appellants had received the money for a commercial transaction. Hence the Court rate of 6% was not appropriate and I agree with them. The rate of interest of 20% awarded by the Court of Appeal was more appropriate. In the circumstances, ground five of the appeal should fail.

In the result, I would dismiss this appeal with costs to the respondent this Court and in the courts below.

JUDGEMENT OF ODOKI, C.J.

I have had the advantage of reading in draft the judgment prepared by my learned brother, Oder JSC, and I agree with him that this appeal should be dismissed with costs.

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

JUDGMENT OF TSEKOOKO, JSC

I have had the benefit of reading in advance the judgment prepared by my learned brother, Oder, JSC. which he has just delivered. I agree with the judgment as well as with the orders he has proposed.

JUDGMENT OF KAROKORA:

I have had the advantage of reading in draft the judgment prepared by my learned brother, Hon. Justice Oder, JSC, and I agree with him that the appeal must be dismissed with costs to the respondent here and in the courts below.

I have nothing useful to add.

JUDGMENT OF KANYEIHAMBA, JSC.

I have had the benefit of reading in draft the judgment of my brother, Oder, JSC and I agree with him that this appeal should be dismissed with the orders he has proposed.

Dated at Mengo, this 12th day of August 2005.