

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA

Coram: Hon Justice G. M Okello, JA.

Hon Justice A.Twinomujuni J.A

Hon Justice C.N.B Kitumba, JA

CIVIL APPEAL NO. 34 OF 2005.

NON -PERFORMING ASSETS RECOVERY TRUST:::::::::: APPELLANT

AND

S.R NKABULA& SONS LTD:::::::::: RESPONDENT

(An Appeal from the decision of the High Court (Ogoola, PJ) dated 17/1/2005 in High Court Commercial case NO. 0070 of 2002.)

JUDGMENT OF THE COURT.

This appeal arose from the decision of the High Court (Ogoola, PJ) dated 17th/1/2005 in High Court, Commercial case NO. 0070 of 2002.

The appellant is the successor in title to Uganda Development Bank (UDB) by an assignment in compliance with the Non-performing Assets Recovery Trust Act. The respondent was a beneficiary to a loan advanced to it by the Uganda Development Bank. The loan was in the form of a tractor. Massey Ferguson (MF) tractor had originally been offered but by the time the respondent took advantage of the loan, Massey Ferguson tractors were not available. Instead he took a Steyr tractor. These tractors allegedly belonged to Uganda Government that had imported them. The appellant was an agent of the Government for purposes of giving out the tractors and collecting debts from those who took the tractors.

The respondent partly paid the loan but later refused further repayment on the ground that the tractor with which he was supplied was defective. He also argued that he had been induced by

the officials of Uganda Development Bank to take this tractor by combination of non-disclosure of material information, combined with negligence, careless and reckless withholding of material information which was at the material time available to Uganda Development Bank concerning the non -suitability of the Steyr tractors.

At the trial, four issues were framed as follows for the determination of the court;

- (a) Whether the plaintiff's acceptance of the Steyr tractor was as a result of inducement.
- (b) Whether the inducement, if any, discharged the plaintiff from their loan obligation
- (c) Whether the plaintiff was entitled to the remedies sought and
- (d) The quantum of damages, if, any, to which the plaintiff is entitled.

Hon Justice James Ogoola, Principal Judge, heard the case and delivered his judgment thereon on 17-1-2005 in favor of the respondent. He answered the above issues in the affirmative hence this appeal. There is also a cross appeal;

The main appeal has six grounds as follows:

- (1) The learned Principal Judge erred in law and in fact in holding that the plaintiff's preference for a Massey Ferguson tractor was a crucial term of the loan transaction and that Uganda Development Bank failed to honour that contractual term.
- (2) The learned Principal Judge erred in law and in fact in holding that Uganda Development Bank officials induced the plaintiff into accepting the Steyr by a combination of nondisclosure of material facts; combined with negligent, careless and reckless withholding of material information which was at the time available to Uganda Development Bank concerning the non-suitability of the Steyr tractor.
- (3) The learned Principal Judge erred in law and in fact in holding that there were un rectified design defects in the Styer tractor which the plaintiff bought and that those defects contributed to the plaintiff's losses.
- (4) The learned Principal judge erred in law and in fact in holding that 30% of the plaintiff's losses were attributable to the tractor's design deficiencies.
- (5) The learned Principal Judge erred in law and in fact in awarding the plaintiff shs 30,000,000/ in general damages.

(6) The learned Principal Judge erred in law and in fact in not holding that the plaintiff's suit was barred by limitation.

The cross-appeal comprises five grounds as follows:

(1) The learned Principal judge erred in law and fact in not finding that the inducements by Uganda Development Bank to the plaintiff to accept the Steyr tractor which were done by a combination of non-disclosure of material facts, negligence, careless and reckless withholding of material information, which was available to Uganda Development Bank at the material time concerning the non suitability of the Steyr tractor amounted to fraudulent misrepresentations.

(2) The learned Principal Judge erred in law and fact in finding that the plaintiff was not discharged from its obligations under the contract and finding that it remained obliged to pay the Uganda Development Bank the outstanding balance of the loan.

(3) The learned Principal Judge erred in law and fact in finding that the un rectified defects of the suit Steyr tractor contributed to only 30% of the loss of the business to the plaintiff and awarding the plaintiff only 30 million general damages.

(4) The learned Principal Judge erred in law and in fact in finding that the plaintiff failed to mitigate its losses.

(5) The appellant to the cross-appeal proposed to ask this court to:

(a) Dismiss the main appeal.

(b) Allow the cross appeal and vary the finding of the High Court.

(i) That the inducement amounted to fraudulent 25 misrepresentations with consequence that the respondent was discharged of its obligations to repay the loan.

(ii) The un rectified errors of the suit Steyr tractor contributed to the largest extent of the plaintiff's business losses.

(iii) There was no evidence that the plaintiff failed to mitigate its loss.

(iv) Costs of this appeal and cross appeal and in the High Court be awarded to the respondent
At the hearing of this appeal, Dr. Joseph Byamugisha appeared for the appellant while Mr. Nester

Byamugisha represented the respondent.

Dr. Byamugisha argued all these grounds together. He pointed out that the trial judge held that the respondent's preference for Massey Ferguson tractor was a crucial term of the loan transaction and that Uganda Development Bank failed to honour that contractual term, To this counsel contended that the question of preference of the respondent was not one of the issues at the hearing. The trial judge therefore did not have to answer it.

He took exception to the trial judge's description of two letters (Exh p. 13 and p.16) as copious protest correspondence.

According to learned counsel two letters are not copious. He stated that Exh P. 16 was written in 1999 long after the respondent had accepted and taken possession of the Steyr tractor in 1992. He argued that none of these letters even supported the trial judge's finding since none of them indicated the respondent's unequivocal rejection of the Steyr tractor.

He pointed out that on the contrary, in Exh DI, a letter written three months after Exh P. 13, the MD of the respondent unequivocally withdrew its objection of the Steyr tractor thus varying the so-called crucial term of preference for the MF tractor. He concluded that the learned Principal Judge was, therefore, wrong to conclude that the plaintiff's preference for a Massey Ferguson tractor was a crucial term of the loan transaction.

To the above, Mr. Nester Byamugisha responded that the respondent had indicated its preference for a Massey Ferguson tractor in its application for a loan signed on 15/9/99 and insisted on the same. He submitted that the respondent's preference for Massey Ferguson tractor was, therefore, a crucial term of the contract. The trial judge was right in so holding.

The learned Principal Judge dealt with this matter as follows:

“Subsequent to the failure of Uganda Development's Bank's original offer of a Massey Ferguson tractor, the plaintiff and Uganda Development Bank appeared to have entered into and formalized a second phase of the loan transaction under Steyr tractor in lieu of the Massey Ferguson. The plaintiff promptly protested and objected to the Steyr offer as evidenced by the plaintiff's copious written protest correspondence (Exh P.13 and p.16) all of which insist on a Massey Ferguson... In this court's view, therefore, it is quite evident that the plaintiff's preference for a Massey Ferguson tractor was a crucial term of the loan transaction. The failure by the Uganda Development Bank to honour that contractual term became a very significant basis for the course of the evolution of subsequent events in this suit.”

The trial judge clearly relied on Exh p. 13 and p.16 to find that the respondent had copious written protest and objection to the Steyr tractor in preference for a Massey Ferguson tractor. We

have looked at Exn. P.13. It is a letter dated 7/6/91 in which the Managing Director of the respondent expressed the respondent's preference for a Massey Ferguson tractor unless there was no chance in the near future for it to be allocated a Massey Ferguson tractor. However, three months later, the same Managing Director wrote another letter, Exh DI dated 18/9/91 in which he said in part.

“After careful investigations concerning the technical reliability of Steyr tractor, we write to formerly (sic) withdraw the above referred letter and accept the allocation of one Steyr tractor with the following accessories...”

The letter referred to as being withdrawn is Exh p.13. At this point, the respondent changed his mind and no longer had any objection to the Steyr tractor. He accepted the tractor with some accessories and took possession of them. Exh p.16 was written on 12-3-99 long after the respondent had taken possession of the Steyr tractor after it had withdrawn its earlier objection. Exh p.16 therefore cannot be protest to the Steyr tractor.

In our view, there is no evidence of copious written protests and objections to support the learned trial Principal Judge's finding that the respondent's preference for a Massey Ferguson tractor was a crucial term of the loan transaction. We accept Dr. Byamugisha's submission that the respondent's preference for a Massey Ferguson tractor was not among the issue framed for consideration by the trial judge before trial.

Ground 2 complained about the trial judge's finding that Uganda Development Bank officials induced the respondent into accepting the Steyr tractor by a combination of non-disclosure of material facts, combined with negligent, careless and reckless withholding of material information, which was at the time available to Uganda Development Bank concerning the non-suitability of the Steyr tractor.

Dr. Byamugisha contended that there is no evidence of misrepresentation. He stated also that there is no evidence that Uganda Development Bank received a copy of the report Exh P.21. He pointed out that Thomas Ebong Ongom P,W.2 was no longer an employee of Uganda Development Bank at the time he gave evidence. He stated that there is evidence that Government did dispatch a team of technical experts to Australia to verify whether the recommended design defects were rectified. He stated that Exh p.19 showed that the decision to import the Steyr tractor took into account the test report and that the manufacturer accepted to effect the necessary modifications. He also stated that Exh P. 26 was about lack of storage for the Steyr tractors at Namalere not about the suitability of the tractors.

To the above, Mr. Nester Byamugisha responded that Exh P. 26 shows that the tractors were imported into the country without rectifying the recommended design defects. That the

Permanent Secretary Ministry of Agriculture requested in Exh p. 19 for a supplementary report on whether the design defects have been rectified. The Chief Agricultural Engineer declined that request in Exh P.20 on the ground that the tractors had already been imported into the country without a certificate showing that the recommended design defects had been rectified. No one went to Australia to verify the modifications. He denied that at the time the respondent bought the tractor the recommended design defects had been rectified. In counsel's view, these were facts known to Uganda Development Bank. He pointed out that DW.1 also conceded in cross-examination that he was not aware that any modification was made and that if Uganda development Bank was aware of the defects, it should have insisted on the modification first. Counsel stressed that Uganda Development Bank was aware of Exh P. 21. Therefore, he concluded, there was non-disclosure of material facts by negligent, careless or reckless withholding of material information which at the time was available to Uganda Development Bank concerning the suitability of the Steyr tractor. He supported the trial judge's finding.

The trial judge dealt with the issue as follows:

“The evidence of two top officials one (PW2: Thomas Ebong) from the Uganda Development Bank; and the other (P.W. 3 H.D Kakeeto) the Chief Agricultural Engineer from the Ministry of Agriculture (MOA) was gripping

Both witnesses were experts in their respective fields namely P.W 2 in banking (being the Uganda Development Bank desk officer who appraised the plaintiff's project and loan application; and P.W3 in engineering (being a fully trained and accomplished agricultural engineer; in fact the Chief Agricultural Engineer, in the Government's Ministry of Agriculture. It was him who personally supervised and carried out the Namalere field test of the Steyr tractor on behalf of Wavah Holdings. His report (Exh P. 21) on the technical suitability of the Steyr, documented three serious defects-namely

(i) Oil leak through the PTO propeller shaft.

(ii) Slow hydraulic equipment; and

(iii) Engine over heating.

The report eventually found its way into the hands of inter alia Uganda Development Bank's Mutonyi (The head of Uganda Development Bank's department of industry) who ultimately but falsely assured the plaintiff of the Steyr's technical suitability-fully well knowing his assurance to be false and misleading.

From all the above, this court is convinced that indeed the Uganda Development Bank officials did induce the plaintiff into accepting the Steyr. They did so by a combination of non-disclosure of material facts combined with negligent, careless and reckless withholding of material information which was at that time available to Uganda Development Bank concerning the suitability of the Steyr tractor.”

The learned-Principal Judge clearly relied on the evidence of P.W. 2 and P.W. 3 to make the impugned finding that the respondent was induced by officials of Uganda Development Bank in accepting the Steyr tractor. The law governing the power of the first appellate court is clear. It has a duty to review the evidence on record and to draw its own conclusions of facts making allowance for the fact that it did not have the advantage of the trial judge of hearing and seeing the witnesses testify. On a case turning credibility of a witness, the impression made by the trial judge should always be respected by the appellate court unless there are circumstances to justify departure. See Peter vs. Sunday Post (1958) E.A 424.

-
In the instant case, we reviewed the evidence of these top officials P,W2 and P.W3. P.W.2 stated in his evidence that they were literally coercing the respondent to accept the Steyr tractor well knowing the weaknesses of the tractor. He stated that their advice was based on the report Uganda Development Bank got from Namalere. He later stated however that the respondent did not take their advice but independently chose to accept the Steyr tractor.

Under cross-examination, the witness admitted that he had a case against Uganda Development Bank. He had given Uganda Development Bank a forged power of attorney to secure a loan from the bank for a company in which he had interest. He also conceded that at the time he gave evidence, he was no longer an employee of Uganda Development Bank.

It is clear to us from the above that P.W.2 is a person whose integrity is questionable. He is a dishonest person. He gave to the Uganda Development Bank a forged power of attorney to secure a loan for a company in which he had interest. Is such a person credible? He had an axe to grind with Uganda Development Bank. The trial judge should not have believed him. P.W. 3, the Acting Chief Agricultural Engineer, stated in his evidence that he copied his report Exh p.21 to Managing Director of Uganda Development Bank. He, however, later expressed doubt if the Managing Director of Uganda Development Bank received a copy of the report Exh p.21. He said,

“I think that through Wavah, Uganda Development Bank may have received the report. I am not sure if they received a copy or not.”

The issue here is whether at the material time the report Exh 21 containing information about the suitability of the Steyr tractor was available to Uganda Development Bank. Clearly, there is no cogent evidence that Uganda Development Bank was in possession of a copy of Exh p.21 at the material time. P. W. 3 stated that he copied the report to the Managing Director of Uganda Development Bank, yet the certified copy of the report which appears from pages 255 to 281 of the record of appeal does not show that it was copied to the Managing Director of Uganda Development Bank. In fact P.W.3 in his oral evidence expressed doubt if Uganda Development Bank ever received the report. He merely thought that through Wavah, Uganda Development Bank might have received the report. This is speculation to say the least.

P.W. 3's credibility as a witness is clearly questionable. He denied in his oral evidence that any expert ever traveled from Uganda to Austria to verify the modifications because nobody with whom he worked so traveled. This denial can not stand in the face of Exh D4, a letter dated. 2-10-91 from Wavah Holdings Ltd to Uganda Development Bank. The letter shows that a team of three experts: one from the Ministry of Agriculture Entebbe and two from the Engineering Division Namalere, where P.W. 3 was working, had visited Steyr Factory in Austria in 1990 for three weeks to confirm the specifications recommended for Uganda.

Messers F.M Ssozi and Muwanga (now deceased) were the two experts from Namalere that visited the Steyr Factory in Austria.

The letter, (Exh D4) dated 2.10.91 from Wavah Holdings Ltd informed Uganda Development Bank that the Ministry of Agriculture had authorized the importation of the Steyr tractors model 8075 after the visit of the team of experts from Uganda to the Steyr factory. The letter of authorization took note of the tractor manufacture's acceptance to effect the modifications recommended by Namalere. There was, therefore, no material information concerning the suitability of the Steyr tractors in possession of Uganda Development Bank at the material time that it withheld from the respondent. It was, therefore, wrong in our view, for the trial judge to find that the material information in Exh p.21 was available to Uganda Development Bank when there was no evidence that Exh p. 21 was served on Uganda Development Bank.

Even if it had been served, the respondent stated in Exh D1 that,

After careful investigations concerning the technical reliability of satyr (sic) tractor, we write to formerly (sic) withdraw the above referred to letter and accept the allocation of one Satyr (sic) tractor with the following accessories.....”

A representee, who does not allow the representation to affect his judgment, although it was designed to that end, cannot make it a ground for relief. He may, for instance, like in the instant case, have preferred to rely upon his own independent investigations.

Attwood Vs Small (1838) 6 CI & Fin 232 is an example given in **Cheshire and Fifoot's Law of Contract ninth edition p. 254**. In that case, a vendor accompanied an offer to sell a mine with a statement as to its earning capacity, which were exaggerated and unreliable. The buyers agreed to accept the offer if the vendor could verify his statement and they appointed experienced agents to investigate the matter. The agents who visited the mine and were given every facility for forming a judgment reported that the statements were true. Ultimately the contract was completed.

It was held by the House of Lords that an action for relief based on misrepresentation must fail because the buyers did not rely on the vendor's statement but tested their accuracy by their independent investigations and declared themselves satisfied with the result.

In the instant case, too, the respondent indicated clearly in Exh DI above that he did not rely on the misrepresentations of the officials of Uganda Development Bank, if any, but on his own independent careful investigations concerning the technical reliability of the Steyr tractor. His claim for relief based on misrepresentation therefore cannot succeed.

We accordingly find that the trial judge erred in law in finding that the respondent was induced by Uganda Development Bank officials in accepting the Steyr tractor.

We allow this ground 2.

We now turn to ground 3. The gist of the complaint in this ground, as we understand it, is that the learned Principal Judge erred in law and infact in holding that there were un-rectified design defects in the Steyr tractors which the plaintiff bought and that those defects contributed to the plaintiff's losses:

Dr. Byamugisha contended that there was no evidence that the tractor was delivered with uncertified design defects. He pointed out that the Managing Director of the respondent testified that the tractor worked well from 1992 to 1994. In Exh p.12 the respondent conceded that the tractor worked very well until 1994. Learned counsel argued that the tractor could not have worked so well for two years if the design defects had not been rectified. He pointed out that P.W.1 the Managing Director of the respondent in his oral evidence tried to water down the contents of' Exh p.12. He submitted that the learned Principal Judge should have rejected that evidence and dismissed the suit and grounds 4, 5 and 6 would not have arisen.

Mr. Byamugisha responded that Exh, P.24, a letter dated 29-2-89 from the Chief Agricultural

Engineer to the Hon Minister of Agriculture, shows that up to the date of that letter there was no information or proof that the recommended modifications had been effected. Even Exh P. 25, a letter dated 10.3.89 from the office of the Minister of Agriculture to Mr. Wavamuno of Wavah Holdings Ltd, shows that by the date of that letter there was still no proof that the recommended design modifications had been effected.

Learned counsel supported the trial judge's holding.

The issue in this ground is whether the Steyr tractor which the respondent bought was imported into the country without the recommended design modifications being effect.
The trial judge dealt with the issue as follows:-

*“With respect, the defendant’s above perception of the law of proof is misconceived. In this court’s view, once the plaintiff produced the Namalere report and the exhibits p 19 and p 26 among others, documenting non-modifications on the Steyr, the onus shifted to the defendant to effectively counter the plaintiff’s evidence; and to prove the defendant’s own assertions that indeed modifications were made. See section 101 of the Evidence Act and **Sebuliba Busulwa Vs cooperative Bank(1982) HCB 129,** namely that the burden of proof lies upon he who asserts or alleges the existence of any fact. It is quite evident from the defendant’s written submission that the defendant’s attempt completely failed to dislodge that onus and the burden of proof. The failure is made more poignant at p. 15 of the defendant’s written submission where the defendant’s learned counsel avers as follows;*

“Presumably, as a result of their confirmation of this fact and taking in mind the Minister’s declaration that no importation of the said tractors would take place... the Ministry granted Wavah a go ahead to bring in the tractors”... (Emphasis added).

Quite clearly, the above is no proof...”

We respectfully agree with the trial judge on the onus of proof. Once the plaintiff has produced the Namalere report and other pieces of evidence showing non-modifications of the recommended design defects on the Steyr tractors, the onus shift to the appellant who asserts that the recommended modifications were effected, to adduce evidence to prove that that was so. Mere authorization by the Minister of the importation of the Steyr tractors is no evidence that the recommended modifications were effected. That would be speculation. Exh p. 25, a letter dated 10.3.89 from the office of the Minister of Agriculture to Mr. Jack Wavamuno of Wavah Holdings Ltd, shows that by the date of that letter there was still no proof that the recommended modifications on the Steyr tractor for Uganda had been effected.

Even Exh D4, a letter dated 2.10.91 from Wavah Holdings Ltd to the Uganda Development Bank, did not throw any more light on whether the recommended modifications had been effected on the Steyr tractors for Uganda. The letter merely shows that the Minister had authorized importation of the Steyr tractors into the country. It further shows that before shipment of the 108 Steyr tractors model 8075, a team of experts from the Ministry of Agriculture one from the Ministry and two from Namalere, had visited the Steyr factory in Austria in 1990 for three weeks to confirm that the tractors conform to the specifications recommended for Uganda. The team was comprised of Mr. S. Kisense from Ministry of Agriculture, Entebbe, Mr. F.N Ssozi and Mr. Muwanga, now deceased, from Engineering Division, Namalere.

Dr. Byamugisha argued that because of the visit of that team, by the time the plaintiff bought the Steyr tractor, the defects mentioned in Exh P.21 had long been rectified to the satisfaction of the Ministry of Agriculture and imported them.

With respect, we do not accept that argument. Mere visit of the team of experts to Steyr factory in Austria *per se* is no evidence that the mentioned recommended design defects had been modified to the satisfaction of the Ministry of Agriculture.

Neither a report from the team was tendered in evidence nor did any of the members of the team give evidence to confirm that the recommended modifications had been effected. There is thus no evidence on that point.

We, therefore, can not fault the trial judge's finding that the Steyr tractors were imported into the country without rectifying the recommended design defects.

The next is ground 4. This ground complains about the holding of the trial judge that 30% of the respondent's losses were attributed to the tractor design deficiencies. Dr. Byamugisha contended that as he has argued in ground 2 and 3 above, the defects in the respondent's tractor were not design defects but repairable defects caused by the respondent's over use of the tractor. He submitted that the recommended design modifications had been taken care of before the tractors, one of which the respondent bought, were imported.

Mr. Nester Byamugisha did not agree. He agreed with the trial judge that the design defects were not rectified before the tractors were imported and that they contributed to the respondent's losses. He however disagreed with the trial judge on the degree of the respondent's losses attributed to the tractor design defects. He submitted that 30% was too low arguing that in a crop farming project, like that of the respondent, a tractor is the largest contributing factor. Therefore, the trial judge should have awarded a higher percentage of the respondents' losses attributed to the tractor design defects.

In view of our finding on ground 3 above, that there was no clear and cogent evidence that the recommended tractor design modifications were carried out before the tractors were imported, we agree with the trial judge that the tractor design defects contributed to the respondent's losses, we can not also fault him on his assessment of the portion of the losses attributed to the tractor design defects because there were many other factors that contributed to the respondent's total loss. He exercised his discretion judiciously in arriving at that figure.

This ground and ground 3 of the cross appeal would both fail.

This now leads me to ground 5 which complains against the trial judge's award of 30,000,000 (thirty million shillings) to the respondent in general damages.

Dr. Byamugisha contended that since the court found no fraud on the part of the appellant on the facts available, it should have held that respondent's action was time barred and dismissed it. No damages should have been awarded to the respondent. He pointed out that P.W.1 was not a witness to be believed. The witness who had claimed to have had books of accounts for the respondent and that they were duly audited but refused to produce them in court. He stated that even if he was given time, he could not produce them. He testified that

“By 2nd Jan 1996 I wrote to Uganda Development Bank to say I had bought spares (see exh p.15). I also gave a schedule of possible repayments. But in truth I was only buying time to get the report of Steyr and sue on this matter.”

Learned counsel submitted that P.W.2 too was not worthy of belief. He stated that P.W.2 and P.W.3 who could not acknowledge that the tractors were rectified to comply with the Namalere report were un reliable witnesses. He concluded that if there was no evidence of accounts because the respondent in an effort to hide its state of affairs refused to supply them to court, the court had nothing to rely on to award damages. The cash flow is a mere proposal for purposes of securing a loan. A company by law must keep books of accounts and must have a signed balance sheet to which is annexed the Auditor's report. The respondent was bound to prove its losses and where it did not, it must lose.

To the above, Mr. Nester Byamugisha responded that the trial judge found fraud on the part of the officials of Uganda Development Bank. When the respondent filed the suit in 2002, they were still in time and fully protected by section 5(a) and (c) of the Civil Procedure and Limitation (misc. provisions) Act (Cap 72). Learned counsel conceded, however, that the trial judge was in error when he cited section 5(a) and (c) instead of section 6(1)(a) and (b) of the same Act. In his view, the suit was not time barred by reason of the fact that it was based either on fraud of the defendant or that the right of action was concealed by the fraudulent non-disclosure of the damning Namalere report of the appellant.

Learned counsel argued that the trial judge was right to find fraud on the part of the appellant because Uganda Development Bank officials knew of the existence of Exh p. 21 and its contents but they still induced the respondent all the same to take the Steyr falsely assuring him that it had all the good attributes including suitability, spares, local skill and technical know how e.t.c this was fraud per excellence.

According to Mr. Byamugisha, the trial judge having found fraud on the part of the appellant should have held that the inducement amounted to fraudulent misrepresentation, thereby discharging the respondent wholly from the obligation to repay the outstanding balance of the loan. The reason he gave for that view is that by that misrepresentation the appellant having made it impossible for the contract to be performed, it cannot complain. He cited **Prema Chandra Sheno VS Maximov Odeg Petrovich (CA.), CA NO 24/2002** as his authority for that proposition.

On the credibility of P.W.I, Mr. Byamugisha submitted that belief of a witness is within the discretion of the trial judge who had the benefit of observing the witness give evidence. There was no reason advanced why he should not have believed P.W.I He pointed out that a copy of the respondent's books of accounts were presented to Uganda Development Bank but it never presented them to challenge the respondent's claim of loss.

Learned counsel, however, criticised the trial judge for describing the ID P.1 as rather 'exaggerated and inflated.' He also criticised the trial judge for basing his assessment of damages partly on lack of mitigation of loss by the respondent. According to counsel, the appellant did not plead mitigation nor adduced evidence to prove it, The issue mitigation was never canvassed at the trial. The respondent was, therefore, under no duty to mitigate his losses.

Learned counsel submitted that the learned trial judge was wrong to award only 30 million as general damages.

The trial judge dealt with the issue of general damages as follows:

“In light of all these, it is quite evident that the un rectified design defects of the plaintiff's Steyr tractor were not the sole contributor to the plaintiff alleged business losses. The defects were only partial contributors. All the other factors discussed above did also contribute to the plaintiff's losses. There is no scientific or mathematical formula for apportioning and attributing the losses between the various contributing factors. However, given all the circumstances of this case and the evidence adduced on behalf of both parties, this court rules that only 30% of the plaintiff's losses were attributable to the tractors design deficiencies.

Overall then, the court's findings on issue NO. 2 (i.e. whether the defendant's inducement discharged the plaintiff from its obligations are as follows:

(i) The plaintiff was not discharged from its obligations under the contract. In particular, the plaintiff remained obliged to repay to the Uganda Development Bank the outstanding balance of the loan.

(ii) The plaintiff is entitled to some of the remedies sought in the plaint. However, the extent and quantification of these remedies are left to the court to decipher. But more of this later see paragraph 12 below”.

In paragraph 12 the trial judge dealt with the assessment of general damages. In view of our finding on ground 2 above that the respondent was not induced to accept the Steyr tractor, our finding in ground 3 regarding the effect of the design defects in the respondent’s Steyr tractor on the respondent’s loss is of no consequence. The respondent is, therefore, not entitled to any of the remedies sought.

We therefore:

(1) Allow the appeal and set aside the trial judge’s order giving judgment partly in favour of the respondent.

(2) We substitute for it an order dismissing the respondent’s suit.

(3) We also dismiss the cross appeal.

(4) We award costs to the appellant here and in the court below.

Dated at Kampala this 18th day of OCTOBER 2007

G. M OKELLO
JUSTICE OF APPEAL

A, TWINOMUJUNI
JUSTICE OF APPEAL

C.N. B KITUMBA
JUSTICE OF APPEAL

