BANK OF UGANDA
v
BANCO ARABE E.SPANOL

COURT OF APPEAL OF UGANDA AT KAl\1P ALA

COURT OF APPEAL CIVIL APPEAL NO.23 OF 2000
(ON APPEAL FROM HIGH COURT CIVIL SUIT. No.527 OF 1997)

BEFORE:

HON MR. JUSTICE G.M KATO, JA
HON.MR. JUSTICE S.G. ENGWAU, JA
HON. LADY JUSTICE C.N.B KITUMBA, JA

October 20, 2000

JUDGMENT

G.M. OKELLO, JA: This is an appeal against the judgment of the High Court (BYAMUGISHA, J) dated February 22, 2000. It was entered against the appellant for a sum of US $ 1,762,374.51 as principal and interest on a loan of US$ 1,000,000, plus Ug.Shs.20,000,000/= being general damages for breach of contract with interest at 18% per annum

The brief facts giving rise to this appeal are as follows:

On November 11, 1987, the Uganda Government signed a loan agreement with the respondent in Madrid, Spain. The loan was for US$ 1,000,000 The appellant's representative George Nteeba signed the same agreement on behalf of the appellant as a guarantor. The loan was to be repaid in 7 installments on the following dates: October 11, 1990, April 11, 1991, October 11, 1991, April 13, 1992, October 13,1992, April 13, 1993, and October 13, 1993. The respondent was to reimburse or release the loan money to the Uganda Government within 180 days from the date of signing the agreement, but that date was extended to October 11, 1989.
On May 21, 1991, the first installment was paid together with accrued interest amounting to US$ 195,914.43; prior to that date the borrower had on July 24,1990, paid US$ 52,767.36 as interest. After the payment of May 21, 1990, no further installment was paid by the borrower despite several demands for payment. The respondent eventually made demands to the appellant to pay the debt in his capacity as a guarantor, still no payment was made.

The respondent finally sued the appellant as a guarantor under Clause 18 of the agreement. In its defence the appellant denied liability to pay the debt. It gave a number of reasons one of which was that its liability was limited to causing the borrower pay the debt. The other reason was that

the contract had been frustrated by Uganda Government's policy of liberalisation of coffee trade and dealing in foreign currency. The trial judge rejected the defences and entered judgment in the terms already stated, hence this appeal.

There are 6 grounds of appeal. The main ground is the first, the other 5 grounds were argued in the alternative. The grounds are:
1. The Learned Trial Judge en-ed in law in holding that the loan agreement was enforceable against the appellant as guarantor although it was not executed under seal. IN THE ALTERNATIVE TO GROUND 1 ABOVE;

2. The Learned Trial Judge erred in law and in fact in holding that the Appellant’s liability was not discharged by the variation of the draw down date for the loan by the Respondent and the Government of Uganda without the consent of the Appellant as guarantor and outside the scope of Clause 4 of the Loan Agreement.

3. The Learned Trial Judge erred in law and in fact in holding that the Appellant's liability was not discharged by the several renewals and extensions of the repayment dates for the various loan installments, granted by the Respondent to the Government of Uganda, without the consent of the Appellant.

4. The Learned Trial Judge erred in law and in fact in holding that the failure by Respondent to make prompt and contemporaneous demands upon the Appellant on default by the Government of Uganda in payment of each of the six unpaid installments of the loan did not amount to a waiver or release of the Appellant's liability.

5 The Learned Trial Judge erred in law and in fact in holding that the liability of the Appellant under Clause 18 of the Loan Agreement was personal.

6. The Learned Trial Judge erred in law and in fact in holding that the Appellant's obligations as guarantor were not extinguished by frustration at law.

Although the learned counsel for the appellant Mr. Masembe Kanyerezi had at first indicated to argue ground 6 before ground 5, he ended by arguing the grounds in the order they are indicated above. I propose to deal with them in the same order, starting with the first ground.
The gist of Mr. Kanyerezi's argument on ground one was that the appellant could not be held liable on an agreement which was not executed under the appellant's seal. According to him failure to have the agreenrent executed under seal rendered the agreement' unenforceable against the 'Appellan bank, as it was against the bye-laws of the appellant in particular paragraph 3(e) of the bye-laws. In support of his argument he also relied on the following authorities: CHITTY ON CONTRACTS 22nd Ed. Volume J pages 190-195, *A.R. Wright and Sons Ltd. v Romford Borough Council* [1957]1 QB 431 at pages 435 and 437.

On his part, Mr. Justine Semuyaba, on behalf of the respondent, submitted that the bye-laws made by the Bank of Uganda were not relevant to this case because in the agreement it was specifically agreed in Clause 16 that the contract would be goven1ed by the English law.

According to him, under the Corporate Bodies' Contracts Act 1960 a contract entered into without the seal of a corporate body is not rendered invalid by reason only of lack of a seal on the contract He also submitted that cases quoted by the appellant's counsel which were decided before 1960 were not relevant to this case

Although this issue of invalidity of the contract due to absence of the seal was never pleaded by the appellant in his written statement of defence and was not framed as an issue, the learned trial judge using her discretion under Order 13 rules 3 and 5 of *Civil Procedure Rules*, decided to deal with the matter after it had been raised by Mr. Bossa who testified on behalf of the appellant. After considering the matter at length, she came to the conclusion that the contract was valid and she proceeded to give her reasons why she thought so. I agree with her holding on this issue.

In Clause 16(a) of the loan agreement which was signed by the representative of the appellant, all the par1ies agreed that the law to govern the operation of the agreement was the English Law. The relevant part of Clause 16(a), which was tendered by the respondent in these proceedings as Ex.P1 reads as follows:

> "This agreement shall be governed by and construed in accordance with English law, and the parties hereto irrevocably submit to the non-exclusive jurisdiction of English courts………."

There is no doubt that the word "parties" used in the Clause was intended to include the appellant, since this was a tripartite agreement. The parties freely and clearly chose the English law to govern their dealings. I agree with Mr, Semuyaba's contention that paragraph 3(e) of Bank of Uganda bye-laws which requires all agreements of guarantee to bear the Bank's seal is not applicable to the present case. The law to be followed on this matter is to be found in *Corporate Bodies' Act* 1960, an English statute which does not require a seal to be endorsed on a contract in order to make it valid. Cases decided before this Act was enacted must be viewed with caution. Clause 16(a) of the agreement put the Uganda laws out of application when interpretation of this agreement is in issue. Although the Clause totally excluded the application of Uganda laws, it gave the courts in this country discretionary jurisdiction to hear cases involving the agreement, by using the phrase "non-exclusive jurisdiction of English courts". If it was the intention of the parties to apply the Uganda law they would have used the same expression used when deciding on the jurisdiction.

I agree with Mr. Kanyerezi's submission that the condition and enforcement of a contract is governed by law; but I do not agree with him when he says that the law to be followed here is the bye-laws made by the Bank of Uganda, the parties opted out of that law under Clause 16(a) of the agreement I have not been persuaded by his argument that Mr. George Nteeba was incapable of signing the agreement on behalf of the appellant The learned trial judge correctly held that the power of attorney given to Mr. Nteeba by the appellant was intended to bind the appellant in matters concerning the loan agreement. The deed authorising Mr. Nteeba to act on behalf of the appellant was sealed and it gave him powers to sign the agreement (see Ex.P3).

Her decision is backed by the opinion of the Attorney General (Ex.P4) in particular paragraphs 5-8 which read as follows:

“

1. ....

2. ....

3. …………………………….

4. ……………………………..

5. Under the *Bank of Uganda Act* (Act 5 of 1966) the Bank of Uganda is a body corporate capable of entering into an agreement and has a common seal which may be duly authenticated by the Governor and Secretary of the Bank.

6. In accordance with the laws of Uganda, an Agreement signed by a donor, of a Power of Attorney is as valid and effective as if it were signed by the donor of such Power of Attorney.

7. In my considered opinion the Agreement was Concluded and executed for and on behalf of the Government and the Bank of Uganda by their Respective Attorneys in accordance with the Laws.

8. Furthermore in my considered opinion the Agreement is valid and constitutes legally binding and enforceable obligations on the Government and the Bank of Uganda in accordance with the terms and conditions thereof and there are no more legal requirements to be fulfilled to make the Agreement more binding on the Government and the Bank of Uganda."

Mr. Kanyerezi attacked this opinion on a number of grounds one of them being that the Attorney General was not acting on behalf of the appellant bank so the appellant cannot be bound by his opinion. According to him, for the bank to be bound the opinion should have been given by an independent counsel and not a counsel who was acting for the borrower.

With due respect to the learned counsel, this argument is not supported by evidence, In his testimony, Mr. Bossa who was a sole witness for the appellant did not say that the Attorney General had no power to give an opinion on behalf of the appellant. All he said when under cross-examination and re-examination was that the Attorney General did not address the issue at hand and that he did not agree with some aspects of his (Attorney General's) opinion. That is not the same thing as saying that the Attorney General was not acting on behalf of the appellant when he gave his opinion. I am of the view that the Attorney General was acting on behalf of the appellant when he gave his opinion about the legality of the agreement and his opinion is binding on the appellant.

Another complaint raised by the appellant's counsel was that the Attorney General's opinion was given on December 22, 1987 and yet the agreement was signed on November 11, 1987, which means the opinion was given about a month and half later. The answer to this argument is to be found in Clause 3 of the agreement which reads:

> "3. This agreement will enter into full force and effect as of the date on which ARESBANK receives a legal opinion, satisfactory to the Bank, about the legality, validity and enforceability of this Agreement."

My understanding of this clause is that although the contract was signed on November 11, 1987, it could not be operational until the opinion of the Attorney General about the legality of the agreement was received. The clause made the Attorney General's opinion a condition precedent. The contract remained in abeyance until the respondent received the opinion in February 1988 according to the evidence of Fernando Marques (P.W.I). This complaint cannot be sustained.

Before taking leave of this ground of appeal, I have found it necessary to point out that the telex signed by Mr. Walusimbi, Ag. Director External Management officer on behalf of the appellant dated February 15, 1991, leaves no doubt as to the liability of the appellant to pay the respondent. The telex reads as follows:

> "1657:
> 43754 AREB E 61059 UGABANK UG
>
> 15 FEBRUARY 1991
>
> TO: BANCO ARABE ESP ANOL S.A. MADRID, SPAIN
>
> FROM: BANK OF UGANDA
>
> THIS REFERS TO LOAN AGREEMENT DTD 11 NOV 1987 FOR USDT 1,000,000.00 FOR PURCHASE OF PP BANK WAGONS, AND TR TELEXES DEMANDING PAYMENT OF PRINCIPAL AND INTEREST AMOUNTING TO USD I43,643.73 DUE ON 28 JAN 91 STP
>
> WE DO NOT DISPUTE THE CLAIM, THE DELAY IN PAYMENT IS BEING CAUSED .BY OUR PRECARIOUS FOREIGN EXCHANGE POSITIONSTP WE. ARE HOWEVER, DOING EVERYTHING IN OUR MEANS TO ENSURE THAT PAYMENT IS EFFECTED IN DUE COURSE STP
>
> REGARDS
>
> J Y K W ALUSIMBI AG, DIRECTOR, EDMO BANK OF UGANDA"

I do not agree with Mr. Kanyerezi’s interpretation of this telex that it was only saying that the claim by the respondent against the borrower was valid. The contents of the telex are clear and Mr. Walusimbi was definitely writing on behalf of the appellant not the borrower. The holding of the learned trial judge as to the purpose of Walusimbi's telex is quite correct and it was not irrelevant as Mr. Kanyerezi would like me to believe.

For the reasons given above I find no merit in ground one. It must fail.

The second ground of appeal concerns alterations on the draw down period. Mr. Kanyerezi

submitted that the learned trial judge was wrong when she held that the alteration on the draw down date was not substantial and was not prejudicial to the appellant's interests. According to him the judge applied a wrong test when determining this issue and that had she applied a correct test she would have come to a different conclusion that the alteration had in effect discharged the appellant. He further argued that the mere fact that the appellant was aware of some of the alterations was not enough to hold the appellant on the contract. On this point he relied on: CHITTY ON CONTRACTS 22nd Edition Volume 1 pages 446-448 and *Holmes v Brunskill* [1878] Q.B 495 Mr. Kanyerezi also contended that although the alteration did not affect the loan sum, it had the effect of the appellant remaining exposed under the guarantee for a longer period than it had expected.

On the other hand, Mr. Semuyaba submitted that the judge correctly held that the alteration in draw down date was not substantial and did not amount to discharging the appellant. He contended that the agreement did forbid such an extension although it provided for shortening of the time. He pointed out that since the appellant made payment of U$ 10,000 as commitment fee after the extension of time that meant the appellant was agreeable to the alteration and consented to it (alteration).

The law regarding to alteration in terms of contract between creditor and borrower where such alteration affects the guarantor is summarised in CHITTY ON CONTRACTS 22nd Edition volume two at page 447 paragraph 1016 as follows:

> "Any alteration, however bona fide, by the creditor and the principal, without the assent of the surety, of the terms of the original agreement so far as they relate to the subject-matter in respect of which the surety became responsible for the principal, will exonerate the surety unless it is self-evident that the *alteration is unsubstantial. or one which cannot be prejudicial to the surety,* or unless it is provided for in the guarantee. And when the alteration is not of this trivial character, the court will not, in an action against the surety, inquire as to the effect of it, or allow the question whether the surety is discharged or not to be determined by a finding as to its materiality." (My emphasis).

This principle offers some exceptions when the alteration may not discharge the guarantor even where he has not given his consent. Some of the exceptions are: where it is self-evident that the alteration is unsubstantial, or is not prejudicial to the position of the surety. In the instant case the judge based her decision on these exceptions when she held that the alteration in relation to the draw down date did not discharge the appellant. I agree with her holding on this point and the reasons she gave in support of her decision.

It may be added here that the issue as to whether or not an alteration in the contract discharges the guarantor will depend on the facts of each individual case. In the instant case Mr. Fernando Marques (PWI) explained as to why it was necessary to extend the date for draw down. The reason was that by the time the agreed time of 180 days would have matured the contract would not have matured because some of the conditions precedent had not been fulfilled. Two of those conditions were that an opinion of the Attorney General had to be received before the agreement was operational. The respondent did not receive the opinion until February 1988, long after the

signing of the agreement. The second condition was that the respondent could only release the US $1,000,000 after commercial invoices in respect of the railway wagons had been provided by the supplier. The invoices were not received until October 1989, that was about a year after the agreement had been signed. Without these conditions being fulfilled the agreement remained un-operational.

The extension of time for draw down was therefore necessitated by the peculiar circumstances of this particular agreement. The alteration was not of substantial nature and was not prejudicial to the interests of the appellant at all.

Mr. Wa1usimbi's telex sent to the respondent admitting liability was written on February 15, 1991, long after the alteration being complained of in this ground had been sent to the appellant. Had the appellant been seriously concerned about this alteration it would not have admitted liability in that telex. I do not agree with Mr.. Kanyerezi's submission that this telex by Mr. Walusimbi was irrelevant to the issue of alterations. The document was quite relevant to the whole of this case as it admitted appellant's liability to pay the respondent. In fact on this admission alone the respondent could have been entitled to judgment under Order 11 rule 6 of Civil Procedure Rules if the case did not involve some other issues and if the respondent had so wished. In my view this same telex also negated the appellant’s contention that it never consented to the alterations in dispute. I am inclined to agree with Mr. Semuaba's submission that the respondent was well aware of and consented to the extension of the draw down date judging from the conduct of its officials who never objected to the alteration and later on admitted liability, The second ground of appeal must fail.

The third ground is also about alterations, except that here it is concerned with extension of time in connection with the repayment of the debt. It was the contention of the appellant's counsel that the extensions granted to the borrower by the respondent had the effect of discharging the appellant from its liability as a guarantor. He conceded that the appellant was aware of some of the extensions but it never consented to them. He hastened to submit that knowledge of the extensions or alterations without express consent was not enough to bind the appellant. He relied on the authorities of *Holmes v Brunskill* [1878] Q.B 495, *Pollock v Everest* [1876] 1 Q.B 669 and CHITTY ON CONTRACTS Volume 2 page 446.

Mr. Semuyaba did not agree that there were any alterations or extension of time for repayment by the respondent. According to him the respondent was only reminding the borrower and the Bank of Uganda of the debt as agreed under Clause17 of the agreement

One important matter to be decided upon here is whether or not there were alterations by the respondent in respect of the dates of payment I have had the opportunity of reading the telexes which the appellant’s counsel regard as extensions, After a careful consideration of these documents I have to agree with Mr. Semuyaba's submission that these were reminders to the borrower and the guarantor; the mention of new dates was only of commercial] necessity to inform those concerned as to when the respondent expected the payment after the previous dates had expired. Since these notices did not amount to alteration in the terms of the agreement, the authorities quoted by Mr. Kanyerezi cannot be relied upon, Even if the telexes were to be treated as alterations, they were in favour of the appellant and the borrower as they offered them more

time to organise their resources for payments At any rate the so called alterations did not alter the loan sum, The judge was right in her finding that the renewals did not discharge the appellant. In view of the reasons stated above and in ground two, this ground too must fail.

The substance of the fourth ground of appeal is that the respondent did not contemporaneously make its demand for payment after each installment fell due, According to the appellant's counsel, the judge was wrong

have dealt with this matter generally . In his view had she dealt with it specifically she would have found that the guarantor was relieved of it's obligation b failure of the respodent to make a demand on each default.

It is trite law that mere temporary inaction or forbearance by the creditor to take action against a guarantor does not discharge the guarantor from his obligations: (see *Alwi A. Saggay v Abed Ali Algeredi* [1961] EA 767). In her judgment the learned trial judge dealt with this issue as follows:

> "The agreement as a whole did not specify the period within which a demand had to be made by the plaintiff The plaintiff notified the principal debtor and the guarantor through many telexes that a default had occurred These telexes were sent in line with Clause 7 of the agreement. Admittedly the telexes were not tested in accordance with Clause 18 but they were reminders that a default had occurred and that payment was not being punctually effected. Since the defendant received all the telexes it was put on notice that the borrower had defaulted and soon or later the creditor would be calling on the guarantor to pay."

This passage shows that the judge specifically dealt with the issue of demand for payment. It has to be emphasized that Clause 18 of the agreement did not specify as to when demand was to be made to the guarantor. According to evidence of Fernando Marques (PWl) and paragraph 7 of the plaint the cause of action was against the appellant arose on July 24, 1995 when a telex was sent to the appellant in form of a first demand. In my considered opinion the demand was enough, the respondent's claim could not be defeated by mere failure by the respondent to make demands for payment each time an installment fell due. The appellant's liability to pay fell due on July 24, 1995 when the respondent decided to make a demand for payment but not before that date. The fourth ground cannot succeed.

The appellant's complaint in the fifth ground is that the trial judge was wrong when she held that the liability of the appellant under Clause 18 of the agreement was personal. Mr. Kanyerezi's submission on this issue was to the effect that the appellant's obligation was to cause the Uganda Government to pay the loan but the appellant did not undertake to pay the loan in the event of the borrower defaulting. It was his view that the judge was wrong when she extended the appellant's liability beyond causing the principal to pay, Mr. Semayaba submitted to the contrary. It was his view that Clause 18 of the agreement imposed an obligation upon the appellant to repay the loan in the event of the Government of Uganda failing to do so.

The law relating to the duty of the guarantor or surety to repay a loan is that once the principle borrower defaults the guarantor has a duty to repay the loan. See *Moshi vRep Air Services Ltd*

and Anor [1972] 2 All.E.R 393 in particular at pages 407 – 409.

In the instant case the appellant bank bound itself to repay the loan under Clause 18(a) of the loan agreement which reads as follows:

> "We, the Bank of UGANDA (The Guarantor), a banking institution established under the Laws of UGANDA, and being the central bank of the borrower, hereby unconditionally and irrevocably jointly and severally guarantee the due and punctual payment of any and all amounts payable by the BORROWER under the Loan Agreement in accordance with the provisions set forth herein, In the case of any failure by the BORROWER to punctually pay any interest on, or principal of, or any other amount due under the Loan Agreement, We hereby agree on first demand made by tested telex to cause such payment to be made to you in compliance with the obligations of the BORROWER. Payment by the Guarantor shall be made to ARESBANK in the place and in the manner specified in ARESBANK'S demand, without raising any exception or objection of whatsoever nature, (the State of Israel and the Republic of South African being excluded)"

The wording of this clause is clear in it's meaning the learned trial judge correctly held that the appellant was liable to repay the loan when the borrower defaulted. The appellant's liability was not limited to causing the borrower pay. This ground of appeal must also fail.

The sixth and last ground of this appeal is that the learned trial judge erred in law and fact when she held that the appellant's obligation as a guarantor was not extinguished by frustration.

In his forceful submission Mr. Kanyerezi argued that the contract was frustrated by government's liberalisation of coffee trade. According to that policy the proceeds of sale from coffee were not to pass through the appellant Bank for the appellant to channel any money to the respondent as it had been agreed under Clause 18 (b) and (c) of the agreement. He submitted that Clause 4(d)(iii) upon which the respondent relied did not concern the appellant but it concerned the respondent and the Uganda government in respect of purchase of railway wagons from a third party called INIRAlL.

On this issue, Mr. Semuyaba, submitted that relevant clauses in the agreement ruled out the issue of frustration and that the learned trial judge was correct in holding that the contract had not been frustrated. The doctrine of frustration operates as a defence in appropriate situations. In modern times its operation has been greatly limited as may be seen in the following passage taken from CHITTY ON CONTRACTS 27th Edition pages 1095-1096:

> "Although the doctrine of frustration is of respectable antiquity, having been established in its present form in 1863 in Taylor v. Caldwell. It currently operates within rather narrow confines. This is so for two principal reasons. The first is that the courts do not wish to allow a party to appeal to the doctrine of frustration in an effort to escape from what has proved to be a bad bargain; frustration is "not lightly to be invoked to relieve contracting parties of the normal consequences of imprudent commercial bargains.."

> The second is that parties to commercial contracts commonly make provision within their contract for the impact which various possible catastrophic events may have on their contractual obligations. This, force majeure clauses and hardship and intervener clauses are frequently inserted into commercial contracts. The effect of these clauses is to reduce' the practical significance of the doctrine of frustration because, where express provision has been made in the contract itself for the event which has actually occurred, then the contract is not frustrated. Therefore the wider the ambit of contractual clauses, the narrower is the scope of the doctrine of frustration."

This statement of the law shows that contracting parties can easily opt out of the doctrine as was the case in the present case. I agree with Mr. Semuyaba's contention that relevant clauses of the agreement made the doctrine of frustration inoperative. The clauses are: 4(d)(iii), 11 and18 (e). They read as follows:

> "4(d)(iii) none of the obligation of the BORROWER under this Agreement shall be impaired by any breach, frustration or non-fulfillment of the contract of or by any matter of claim by any person relating to or arising out of the contract and the BANK shall not be concerned in any circumstances with the contract or any such matter or claim.
> 11. The BORROWER hereby covenants and undertakes with the BANK that, from the date of this agreement to the date upon which all monies owing by the BORROWER to the BANK under this agreement are paid in full, it will not create or permit to subsist any encumbrance over any of its revenues or assets present or future without the written consent of the BANK.
>
> 18(e) The BANK OF UGANDA guarantees ARESBANK that the foregoing undertaking and instructions will not be in any way modified or variedby any person as body or public authority of any kind, and that they will remain in full force and effect with all the payment obligations of the borrower hereunder are completely extinguished."

With due respect I do not agree with Mr. Kanyerezi when he says that clause 4(d)(iii) does not bind the appellant. All the clauses in the agreement are binding on the appellant.

The Act amounting to frustration upon which the appellant is relying is that of the government's liberalisation policy of the coffee trade. By this policy both the appellant and Uganda Government lost control over the proceeds of sale of coffee and foreign currency. Even if the doctrine had not been ruled out by the above clauses, still it would not have been proper for the appellant to rely on frustration which was self-induced by both the borrower and the appellant's agents. When under cross examination Mr. Bossa (D.W.l) admitted that under the Bank of Uganda statute, the appellant is supposed to advise the government on financial and economic policies and that it also acts as government agent in financial matters. In view of this position of the appellant, it had a duty to advise the government against the policy of liberalisation of coffee trade and more so since the appellant and the government had already committed themselves to paying the respondent out of coffee sales which had to be channeled through the appellant Bank.

I find Mr. Abdulga M Raghei's (P.W.2's) testimony somehow revealing. He stated that although the coffee sales were not available for payment of this loan, there were other sources from which the appellant would have obtained money to repay the loan 'as other systems were working." It is not clear as to why the appellant never advised the government to resort to some other sources in order to honour its obligation. It has been stated in CHITTY ON CONTRACTS 27th Edition at page 1130 thus:

> "The essence of frustration is that it should not be due to the act or election of the party seeking to rely on it. Thus a contracting party cannot rely on self induced frustration, that is on a frustration due to his own conduct or to the conduct of those for whom he is responsible."

The appellant having contributed to the alleged frustration cannot rely on it as a defence. The learned trial judge was justified in rejecting this defence. Like all other grounds, this one must also fail.

In final result, I would dismiss this appeal with costs to the respondent, here and in the court below.

Since ENGWAU,JA, and KITUMBA, JA agree, the appeal is dismissed with costs in this court and the court below.

BANK ARABE ESPANOL
v

BANK OF UGANDA

HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT)

HIGH COURT CIVIL SUIT NO.527 OF 1997

BEFORE: HON. LADY JUSTICE C. K. BYAMUGISHA

February 22, 2000

Cases referred to:

A.R Wright & Son Ltd v Romford Boroud Council [1957] Q.B. 41
Gabriel Moschi v Lep Dir services Ltd and Lep Transport, Ltd [1972] 2 All ER 393
Halme v Brunskill [1877J 3 Q.B.D. 495
J.W Higgins Ltd v Mayor Alderman and Burqesses and Barqain of Northampton [1927] Ch. 128
National and Grindlays Bank Ltd v Patel and Others [1969] EA 403

Legislation referred to:

1967 Constitution Article 35
Bank of Uganda Act (No. 5/1966) now repeated
Civil Procedure Act Section 26 (2)
Civil Procedure Rules Order 6 rule 5
Evidence Act section 93
Judicature Statute section 35

JUDGMENT

BYAMUGISHA , J: The plaintiff by its amended plaint dated November 21, 1997, sued the defendant claiming the following reliefs:

1. The sum of US $ 1,413,604.70 {United States dollars one million, four hundred and thirteen thousand six hundred and four seventy cents as at the 14th day of March, 1997 when the Suit was first filed;

2. Accrued interest at the libor interest rate of 1 3/4 p.a and a delay interests of libor 3% p. a and thereafter till payment in full.

3. Interest on I, 2 and 3 above at the rate of 45% per annum until payment in full.

4. Costs of the Suit.

5. Any further and alternative relief that the court may deem fit and necessary.

The facts leading to the institution of this Suit are not seriously contested. On November 11, 1987, or thereabouts, a loan agreement No. 1406 (Exhibit P.1) was signed between the Government of the Republic of Uganda as the borrower, the plaintiff as the lender and the defendant as the guarantor. The loan was for the sum of United States dollars one million and it was fully disbursed. The loan was intended to purchase 100 tank wagons for Uganda Railways Corporation. The signing ceremony took place in Madrid Spain. The loan was supposed to be fully repaid within a period of three and a half years between October 11, 1990 and October, 13, 1993 in seven equal semi-annual installments of US dollars $142,857.16 each. By a Bank of Uganda Cheque No. 9775 (Exhibit P.6) the first installment was paid. Thereafter, no more payments were made despite repeated demands and reminders from the plaintiff to the Government of Uganda and Bank of Uganda. On .July 24, 1995, by a tested telex, the plaintiff made a demand to the defendant as guarantor for the payment of the outstanding loan together with accrued interest. The money was supposed to be paid within a period of seven days on the plaintiff's account No. 544-7-627 with Chemical Bank New York. The tested telex was received by the defendant but no money was paid and the plaintiff filed this Suit in accordance with the provision of the guarantee agreement/clause.
In its amended written statement of defence dated October 2, 1998, the defendant averred in paragraph five thereof that it was discharged of its obligations as guarantor by the plaintiff disbursing the loan outside the scope of the contract and by the plaintiff continually renewing the loan facilities without the consent of the defendant. In paragraph six it was contended that the defendant as guarantor has no obligation to repay the outstanding loan and interest as the guarantor was limited in scope and the payment arrangement contained in clause 18 was frustrated by the liberation of foreign exchange dealings which prevented the defendant from recovery any money in coffee sales contracts. The following were the agreed issues namely:

1. Whether the Government of Uganda is indebted to the plaintiff and if so have much;

2. Whether the scope of the guarantee is clause 18 of the loan agreement is such as to make the Bank of Uganda liable for the un recovered loan sum and accrued interest;

3. Whether the plaintiff waived the defendants obligations as guarantor by failing to make prompt demands on the defendant on the default of each of the installments;

4. Whether the scope of the guarantee was defeated by the doctrine of frustration;

5. Whether the defendant is liable on the guarantee in light of the alteration of the contractual obligations in as far as the loan facility was continually renewed outside the scope of the contract;

6. Whether the advances made by the plaintiff to the Government of Uganda was within the terms of clause 4 A of the contract and if not whether the defendant as guarantor can be made liable for these money's advanced outside the scope of the contract;

7. Whether the loan agreement in relation to Bank of Uganda is valid;

8. Remedies if any.

I shall begin with the issue of whether the Government of Uganda is indebted to the plaintiff. Generally both parties to the Suit agreed that a loan agreement (Exhibit P.1) was signed in Madrid Spain on behalf of the Government of Uganda by Robert Ekimu holding powers of Attorney granted by the Minister of Finance. On behalf of Bank of Uganda, George Nteeba the Chief Accountant of the Bank signed on its behalf holding powers of Attorney granted by the Governor. The signatures were affixed in the presence of O. M. J. Ndawula Senior Principal State Attorney. On the plaintiff's part it was signed by the General Manager Salem Zenaty in the presence of Domingo Olago Attorney of law of the plaintiff. The signing ceremony was performed on November 11, 1987. The parties also agree that a loan of US $ one million was disbursed by the plaintiff. The repayment was guaranteed by the defendant. Under clause 5 of the loan agreement, the loan was supposed to be repaid in seven equal semi-annual installments commencing twelve months from the draw down date. The loan was drawn on the October 11, 1989 and the repayment schedule accrued on the following dates:-
October 11, 1990; April 11, 1991; October 11, 1991; April 13, 1992; October 13, 1992; April 13, 1993; and October 13, 1993. The evidence which was adduced and not challenged was that the Government of Uganda through the defendant repaid the first installment together with interest. The rest of the installments on the principal debt together with the accrued interest and delayed interest have to date not been paid. The defendant through its witness Joseph Bossa accepted that position. Therefore the plaintiff has established the existence of an enforceable debt. The first issue will therefore be answered in the affirmative. The next issue to determine is whether the loan agreement is valid and enforcement against the defendant Bank. This issue was framed after the testimony of Joseph Bossa and it was not part of the pleading of the defendant. The law on pleadings is very clear and in particular Order 6 rule 5 of the *Civil Procedure Rules* which requires parties to raise by their pleadings;

> "All matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in point of law and all such grounds of defence or reply as the case may be, as if not raised would be likely to take the opposite party by surprise........ "

The defendant therefore offended this rule and even when the plaintiff gave its evidence, the question of whether the agreement it was trying to enforce against the guarantor was valid or that was not raised. Be that as it may, Order 13 rule 2 of the Civil Procedure rules, gives power to the court to frame issues from the following materials:

(a) allegations made on Oath by the parties, or by any persons present on their behalf, or made by the advocates of such parties;

(b) allegations made in the pleadings or in answers to interrogates delivered in the Suit;

(c) the contents of the documents produced by either party;

In addition to that rule 5 of the same order gives power to the Court.

> "at anytime before passing a decree amend the issues or frame additional issues or such terms as it thinks fit, and all additional may be such amendments issues or as necessary for determining the matters in controversy between the parties shall be so made a framed."

These provisions I think are in line with the provisions of section 35 of the *Judicature Statute* which vests power into the High Court in exercise of its original jurisdiction to grant all such remedies both legal and equitable as any of the parties is entitled to so as to settle all matter in controversy between the parties. The purpose is to avoid a multiplicity of Suits. It is therefore my considered opinion that the issue of whether the loan agreement is valid was framed in light of the above legal provisions. The testimony of Joseph Bossa and the submissions of Counsel for the defendant was that under the *Bank of Uganda Act* (No. 5/1966) now repeated and the by-laws made there under (Statutory Instrument No. 157/69) provided now contracts by the Bank should by-laws and rule 1 thereof, the custody of the seal of the Bank is entrusted to the Secretary who;

> "Shall take all steps necessary to ensure its proper use and safety."

Rule 2 provides that the common seal shall be affixed to a document,

(a) In the presence of the Governor and the Secretary or Deputy Governor and the Secretary; or

(b) In the absence of the Secretary, in the presence of the Governor or Deputy Governor and one officer of the Bank designated in that behalf by the Board.

(c) In the absence of the Governor and Deputy Governor in the presence of the Secretary and two other Officers of the Bank designated in that behalf by the Board.

Rule 3 gives a list of documents whose execution has to be under seal and these include contracts of agency or guarantee.

It was Counsel's submission that it is a mandatory requirement of the constitution of the defendant that contracts of guarantee to which it is a party must be under seal. He referred Court to an exempt from CHITTY ON CONTRACTS where the learned author stated an old common law rule that a corporation can only contract under seal. He also relied on a number of authorities namely *A.R Wright & Son Ltd v Romford Boroud Council* [1957] Q.B. 413 where Goddard C.J. at page 435 held that:

> "From very early times in our law the general rule has been that and unsealed contract is enforceable neither by nor against a Corporation;"

J.W Higgins Ltd v Mayor Alderman and Burqesses and Barqain of Northampton [1927] Ch. 128 where the Court held that there was no contract between these parties at all until the seal of the Counsel was put to the formal contract entered into. Counsel however conceded that the although

the whole agreement is not void, the portion of it and more specifically clause thereof comprising a guarantee by the defendant is invalid and unenforceable as being contrary to the defendant's constitution.

On the plaintiff's part it was submitted that the defendant is estopped from alleging that the guarantee clause is invalid. Counsel pointed out that the person who signed was authorised to sign by the Governor of the Bank. He also relied on the legal opinion of the Attorney General given in pursuant to clause 3 of the loan agreement in which the learned Attorney General re-affirmed the validity of the agreement to the plaintiff. Counsel also pointed the payments which the defendant made to the plaintiff these were: (1) the commitment fee of US $ 10,000/= and the first installment and interest there on. He also relied on the admissions made by Mr. Walusimbi the Ag. Director of External Debt Management with the defendant. The telex dated February 15, 1991, was addressed to the plaintiff with regard to the delay in paying the sum of US $ 143,646 plus interest which was due. In the telex, Walusimbi stated that inter alia that; “we do not dispute the claim”. In the said telex the author referred to the loan agreement signed on November 11, 1987. The other areas which counsel touched to show that the agreement was valid is the written statement of defence paragraph 6 (a) in which the defendant admitted that under clause 18 (a) of the loan agreement it understood in the event of failure by the borrower to pay the principal or interest to cause such payment to be made to the leader in compliance with the obligations of the borrower. On the use of the seal, counsel pointed out that there are officers who are supposed to be present where the seal is used. He pointed out that the loan agreement was signed in Madrid Spain by Mr. Nteeba who was authorised under the byelaws to use the seal and therefore could not have used it outside the premises of the Bank of Uganda. Moreover, it was counsel's contention that the illegality being raised by the defence was not brought to the notice of the plaintiff.

Since the parties reduced their transactions into writing, it is necessary to peruse through them and see what was agreed upon. I must also state that this was a tripartite agreement and there was no separate guarantee agreement between the plaintiff and the defendant. Therefore if the agreement as a whole is not void as Counsel for the defendant submitted, I do not see how it can be invalid in one part. The preamble states in part the considerations for the granting of the loan. The defendant guaranteed the plaintiffs the borrowers of obligations to repay the loan the consideration for the plaintiff granting the same the plaintiff granted the loan. A condition precedent was contained in Clause 3 of the agreement. This clause provided that the agreement will enter into full force and effect as of the date on which the plaintiff received a legal opinion satisfactory to itself about the legality, validity and enforceability of the agreement. Clause 10 (c) of the loan the agreement is also relevant. It says:

> “The borrower has obtained all the necessary approvals and authorisation for this facility and specially represents and warrants that:
> (i) . . . .
> (ii) This facility was obtained with prior permission of the Bank of Uganda”.

The Attorney General as the principal legal advisor to the Government of Uganda and in accordance with article 35 of the *1967 Constitution* gave his legal opinion (Exhibit P.4). In regard to Bank of Uganda, the defendant herein, he stated in clause 5 thereof as follows:

> "Under the *Bank of Uganda Act* (Act 5/1966) the Bank of Uganda is a body Corporate capable of entering into an agreement and has a common seal which may be duly authenticated by the Governor and Secretary of the Bank."

On the powers of Attorney the Attorney-General in clause 6 said:

> "In accordance with the laws of Uganda, an agreement signed by a donor/ of a power of Attorney is as valid as if it were signed by the donor of such power of Attorney."

On the legality and enforceability of the agreement, he said:

> "Furthermore in my considered opinion the agreement is valid and constitutes legally binding and enforceable obligation on the Government and the Bank of Uganda in accordance with the terms and conditions thereof and there are no more legal requirements to be fulfilled to make the agreement more binding on the Government and the Bank of Uganda."

Having stated that, I think I agree with the testimony of D.W 1 and the submission of Counsel for the defendant that under the bye-laws governing the execution of document, a contract of guarantee between the defendant and another party has to be executed under seal. The seal as rightly submitted is affixed in the presence of the officers specified thereof. The same byelaws provide in rule 2(3) thereof that:

> "Unless an instrument bearing the common seal is also signed in accordance with the immediately preceding sub-bylaws, the instrument shall not be regarded as having been validly sealed."

Now it is common ground that the loan agreement was signed in Madrid Spain by Charles Nteeba on behalf of the defendant. Under the bye-laws, he could not have legally affix the seal of the defendant because he is not one of the specified officers authorised to do so. Even if he had affixed it on the loan agreement , the seal would have been of no legal consequence since the Governor and the Secretary of the Bank were not in Madrid. Is the loan agreement invalid in respect of the defendant? I think not first, the defendant signed the loan agreement without imposing any condition as to its legality and enforceability. Secondly the power of attorney given to George Nteeba (Exhibit P. III) authorised him to sign, execute and deliver the loan agreement and generally to do all acts necessary or expedient for the proper execution of the loan agreement. It was declared that the power of Attorney would be irrevocable as long as the loan agreement shall remain in force. The contents of this power of Attorney whose language is clear and unambiguous binds the defendant to the loan agreement in my view. The power is still in force since the loan remains unrepaid. Thirdly, the legal opinion of the Attorney-General assured

the plaintiff that there no more legal requirements to be fulfilled to the make the agreement more binding on the Bank and the Uganda Government. Fourthly, Mr. Walusimbi in his telex already referred to reiterated the commitment of the guarantor and the borrow to pay the loan if the foreign exchange position improves. All these declarations and recitals which are certain, precise and unambiguous bind the defendant to the loan agreement. I am therefore not persuaded that the loan agreement is invalid against the defendant. That issue would be resolved in the negative.

The fourth issue is whether the scope of guarantee was defeated by the doctrine of frustration. Since the defendant guaranteed the obligations of the Government of Uganda as borrower, the Court will resort to the agreement to answer to answer the fourth issue. Clause 4 (d) (Ill) is relevant in this regard. It says:

> "None of the obligations of the borrower under this agreement shall be impaired by any breach, frustration or non-fulfillment of the contract of or by any matter of claim by any person relating to or arising out of the contract and the Bank shall not be concern in any circumstances with the contract or any such matter or claim."

Clause 11 was a special Covenant. It says:

> "The borrower hereby covenants and undertakes with the Bank that from the date of this Agreement to the date upon which all monies owing by the Borrower to the Bank under this Agreement are paid in full, it will not create or permit to subsist any incumbrance over any of its revenues or assets present or future without the written consent of the Bank."

The provisions of these clauses are also clear and precise. In particular frustration was ruled out as a cause for non-payment of the loan. Moreover, the defendant as .the Banker of the Borrower, the manager of the external loans of the Borrower and advisor on monetary, fiscal and economic policies cannot be heard asserting that the liberalisation of the coffee trade was a bad policy after all. I am therefore not persuaded that the repayment of the loan was frustrated. There is nothing on record to show that the borrower and guarantor became insolvent as a result of the liberation policies. The issue will be resolved in the negative.

I shall deal with issues No.5 and 6 together because they concern the alterations. D.W 1 in his testimony testified that the defendant is not liable because the draw down date was changed and the defendant did not consent to that change. The loan was disbursed on October 11, 1989. Some correspondence between the plaintiff and the Borrower were exchanged. The guarantor did not assent to these extensions. Counsel for the defendant relied on a number of authorities which are to the effect that any alteration however bonafide between the creditor and principal debtor without the assent of the surety will exonerate the sure_ unless it is clear that the alteration is unsubstantial and un prejudicial counsel contended that clause 4 (a) of the loan agreement was

materially altered without the consent of the defendant. The other alterations referred to by Counsel was a batch of telexes (Exhibit P.7) in which the plaintiff informed the borrower that it had not been paid the amounts due. The amount were renewed to another date. The telexes were copied to the defendant counsel contended that the renewal of the facility without the defendant's consent discharged the guarantee.

On the part of the plaintiff, counsel submitted that the testimony of P.W 1 was to the effect that before the agreement could be effective and binding, a legal opinion had to be received from the Attorney General. The opinion was received in January 1988. On the extension of the draw down date, counsel referred to various telexes sent by the plaintiff to the Borrower and guarantor asking for the extension. He submitted that the telexes were copied to the defendant. The last telex dated September 15, 1989 was addressed to the Ministry of Finance and Mr. Ivan MulinD.W.a a director in the defendant Bank. In the telex, according to counsel, the Borrower and guarantor were asked whether the extension would cause any inconvenience and if so the matter should be raised with the plaintiff. Counsel stated that the guarantor did not raise objection. Finally, counsel relied on Walusimbi's telex of February 15, 1991 to the plaintiff as evidence to show that the guarantor was still bound by the terms of the loan agreement. It seems trite law that if the creditor alters the course of dealing with the debtor and this has the effect of giving rise to a different debt from the one which had been guaranteed then this would discharge the guarantor. This position was stated in the case of *Halme v Brunskill* [1877J 3 Q.B.D. 495 when COTTON L. J. said:

> "The true rule in my opinion is that if there is any agreement between the principal with reference to the contract guaranteed, the surety ought to be consulted and that if he has not consented to the alteration although in cases where it is without inquiry evident that the alteration is unsubstantial or that it cannot be otherwise than beneficial surety, the surety be the may not to discharged…"

In another case of *National and Grindlays Bank Ltd v Patel and Others* [1969] EA 403 DICKSON J. said:

> "It is trite law that if a creditor, without the consent of the guarantor makes some material alteration to his arrangements with the debtor, the guarantee is discharged."

For the defendant to succeed on the issues of alteration, it has to show that the alteration in the draw down date was substantial and prejudicial to itself. This is largely because the guarantee normally extends only to the debt contracted by the principal debtor at the time when the guarantee is entered into. In the now before the loan contracted and matter Court, guaranteed by the defendant was US $ one million. Changing the draw down date did not have any effect on the amount guaranteed by the defendant. In any case, the defendant was consulted and requested by the plaintiff to state its objections if any on the alterations. It kept quiet. Later its official

Walusimbi wrote to the plaintiff acknowledging indebtedness and promising to pay. As for the renewal of the loan facility, I do not think this was a material alteration from the loan guaranteed by the defendant.The telexes in my view, were a gentleman way of demanding payment. In any case if the Borrower had performed its obligations of making prompt and punctual payments as agreed, the renewals would not have occurred. It is therefore my finding that the alterations were not substantial since they did not alter the nature of the debt guaranteed by the defendant.

The second and most substantive issue to determine in this case is whether the defendant is liable personally for the debt. Clause 18 of the agreement spelt out the obligations of the defendant and for purposes of clarity I shall reproduce it in full. It said:

> "18 (a) We, the Bank of Uganda (the Guarantor, a Banking institution established under the laws of Uganda and being the Central Bank of the borrow, hereby unconditionally and irrevocably jointly and severally guarantee the due and punctual payment of any and all amounts payable by the Borrower under the Loan Agreement in accordance with the provisions set forth herein.
>
> In the case of any failure by the borrower to punctually pay any interest on or the principal of, or any other amount due under the Loan Agreement, we hereby agree on first demand made by tested telex to cause such payment to be made to you in compliance with the obligations of the Borrower. Payment by the Guarantor shall be made to ARESBANK in the place and in the manner specified in ARESBANKS demand, without raising any exception or objection of whatsoever nature. (the state of Israel and the Republic of South Africa being excluded).
>
> (b) If Aresbank does not receive such payment within seven days after its demand, it will be entitled to claim payment from the Libyan Arab Uganda Bank in accordance with the terms set forth below.
>
> (c) The Bank of Uganda undertakes and commits itself to domicile payments by foreign buyers of Coffee sales contracts denominated in US Dollars, for a minimum amount at least equal to US $ 1,000,000 US dollars (one million dollars)
>
> (d) The Bank of Uganda hereby irrevocably instructs and orders the Libyan Arab Uganda Bank (LAUB) to apply the proceeds of such Coffee contracts, channeled through it, to cancel any and all amounts of whatsoever due by the BORROWER under the Loan Agreement.
>
> (e) The Bank of Uganda guarantees ARESBANK that the foregoing under taking and instructions will not be in any way modified or varied by any person or body or public authority of any kind and that they will remain in full force and effect with all the payment obligations of the borrower hereunder are completely extinguished."

It is common ground that the loan agreement was not repaid in full and that on July 24, 1995, the

plaintiff sent the tested telex to the defendant directing the money to be paid on the plaintiff's account No. 544-7-627 with chemical Bank New York. The amount demanded was US$ 1,225,184.27. Payment was expected within seven days. No payment was made.

It was submitted by counsel for the plaintiff that the defendant's undertaking under the guarantee clause was three fold:

1) It unconditionally and irrevocably, jointly and severally guaranteed the due and punctual payment of all amounts payable by the borrower under the loan agreement.
2) In case of any failure by the borrower to punctually pay any interest on or principal of or any other amount due under the loan agreement the defendant agreed on first demand made by tested telex to cause such payment to be made in compliance with the obligations of the borrower.
3) The defendant undertook to pay the plaintiff in the place and manner specified in the plaintiff's demand without raising any exception or objection of whatsoever nature.

Counsel cited a number of authorities which spelt out the obligations of the guarantor which is essentially to answer for the obligations of the borrower should the latter default. The case of *Gabriel Moschi v Lep Dir services Ltd and Lep Transport, Ltd* [1972] 2 All ER 393 where it was held that in the absence of any other agreement to the contrary, guarantor at common law was to see the obligations of the to it that the debtor performed his subject the obligations which of were the guarantee. Counsel concluded his submissions by stating that the defendant is liable for the debt since the creditor need not even have sued the principal debtor.

While responding to the above submission counsel stated that on proper interpretation of Clause 18 (a) the obligations of the defendant in the event of demand being made was not to pay the plaintiff but to cause payment to be made to the plaintiff. He pointed out two matters which he claimed were distinct. One of them was that the defendant had no personal liability to pay the sum demanded from its own resources and the second was merely seeking to cause payment to be made. He stated that on reading Clause 18 (b) it is foreseeable that the plaintiff may make a demand but fail to be paid under this arrangement. He claimed that the liability of the defendant was not of a personal nature but was only to be used to access funds belonging to the principal debtor. A guarantee by its very nature is a separate or secondary agreement in which the guarantor will become liable for the debt of the principal debtor if the latter defaults. Since the parties before court have taken a diametrically opposed position on the scope of Clause 18 the duty of the court is to determine which position represents the what was agreed upon. In doing so, the language used in the document is the determining factor in accordance with the provision of section 93 of the *Evidence Act.* The section provides that:

> "When the language used in a document is plain in itself, and when it applies accurately to existing facts, evidence may not be given to show that it was not meant to apply to such facts."

Is the language in the guarantee clause plain? I think it is my understanding of the language used

is that the defendant guaranteed without any condition the punctual payment of and all amounts payable by the borrower under the loan agreement. It also guaranteed in case of any failure, by the borrower to punctually pay my interest on or principal of or any other amount due under the agreement on first demand made by tested telex to cause such payment to be made to the plaintiff in compliance with the obligations of the borrower. The payment by the defendant under the same clause had to be made to the plaintiff in the manner and place specified by it without raising any exception or objection of whatever nature. In a nutshell the above were the obligations of the guarantor while testifying as to why the defendant did not pay D.W.I stated that no demand was made on it and that it had no legal obligations to pay. He also testified that no demand was made by the plaintiff within the contractual period.

The agreement as a whole did not specify the period within which a demand had to be made by the plaintiff. The plaintiff notified the principal debtor and the guarantor through many telexes that a default had occurred. These telexes were sent in line with Clause 17 of the agreement. Admittedly the telexes were not tested in accordance with Clause 18 but they were reminders that a default had occurred and that payment was not being punctually effected. Since the defendant received all these telexes, it was put on notice that the borrower had defaulted and soon or later the creditor will be calling upon the guarantor to pay.

The guarantee, in my view was a second collateral for the repayment of the loan in the event of the principal debtor failing to pay. I am not persuaded by the submissions of counsel for the defendant, that the scope of the guarantee was not of a personal nature but was only to be used to access funds belonging to the principal debtor. This is contrary to what was agreed.
The clause, “Payment by the Guarantor shall be made to Aresbank without raising any exception or objection of whatsoever nature” did not give defendant access to funds belonging to the principal debtor in my view. The liability created by this clause was personal. The plaintiff is liable for the debt. The last issue to deal with are the reliefs. In view of my findings, the plaintiff is entitled to the reliefs prayed for in the plaint. The first head of claim was the outstanding sum on the loan, accrued interest and delayed interest. At the conclusion of the trial, the calculations done by the plaintiff was that the sum of US$ 1,762,374.51 is due and owing. The defendant did not dispute the amount and therefore it will be awarded. The second relief sought was general damages for breach of contract. The law which has been set out in numerous authorities is that where two or parties enter into a contract which one of them has broken, the damages to be awarded must have been in the contemplation of both parties at the time of the contract. The quantum is at the discretion of the court. The subject matter of the agreement was a loan whose repayment was supposed to end in 1993. The parties are both bankers and knew the consequences of default and the consequences of recovery the same. The plaintiff suggested the figure of 20 Million Shillings as adequate compensation. The defendant raised no complaint about it. I will therefore allow it interest on the decretal sum at the rate of 45% per annum was prayed for. Section 26 (2) of the *Civil Procedure Act* was discretionary powers to the court to order the payment of interest on the principal sum at a rate which the court deems reasonable. What amounts to a reasonable rate is a question of fact. The rate of 45% prayed for by the

plaintiff does not appear to me to be reasonable. It is a higher scale. I will award the current banking rate of 18% on the principal sum and general damages.

Judgment will be entered in favour of the plaintiff against the defendant in the sum of US$ 1,762,374.51 which will carry interest at the rate of 18% p.a from the June 2, 1997, (the date of filing the suit) till payment in full. General damages of Shs. 20,000,000/= which will carry the same interest from the date of judgment till payment in full.The plaintiff is awarded the taxed costs of the suit.