THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO 84 OF 2008

(Arising from the judgment of the High Court Commercial Division Civil Suit No. 298 of 2001 5 delivered by the Honourable Justice FMS Egonda-Ntende dated 25th day of July 2008)

1. COMMODITY EXPORT INTERNATIONAL LTD APPELLANTS

2. KARIM SOMANI

VERSUS

1. MKM TRADING COMPANY LTD RESPONDENTS

2. JAHEED MANAGEMENT ESTABLISHMENT CO. LTD

CORAM: HON. JUSTICE RUBBY AWERI OPIO, JA

HON. JUSTICE GEOFFREY KIRYABWIRE, JA

HON. JUSTICE PROF. L. EKIRIKUBINZA-TIBATEMWA, JA

JUDGMENT

The Respondents (MKM Trading Company and Jaheed Management Establishment herein after jointly referred to as "MBK") brought a suit in the High Court in 2001 against the Appellant Company (Commodity International Ltd herein after referred "CEI") and Karim Somani its majority shareholder, alleging that the Appellants had fraudulently altered their trading accounts in various ways with the intention to cheat MKM.

On 24th June 1999, the parties entered into a Joint Venture Agreement where MKM would provide all the working capital for the venture of trading in cereal seeds up to November 1999 when the venture would end and CEI would be responsible for the actual work. The work in the memorandum of understanding included purchasing and selling of commodities; carrying out all administrative work connected thereto and accounting to MKM for the funds. Further still the parties agreed that the funds advanced by MKM would be used exclusively for the purpose of the joint venture and profits were to be shared equally upon completion of each transaction. Subsequently, MBK remitted a total amount of USD 304,978.00 on various dates to the Appellants.

At the end of the first term of the venture, the first accountant appointed by CEI furnished MKM with

statements of accounts of the joint venture. At the end of the second term, in December 1999, a second accountant was appointed to replace the first accountant. However, the first and second accounts could not be reconciled and so the first accountant was called back to help reconcile the accounts. The second accountant made a second report which indicated that the appellant had applied joint venture funds to non-joint venture purposes and further overstated the amount of taxes paid on sugar in the accounts.

The second accountant made a third report at the end of the term in May 2000. The respondents were dissatisfied with the report had another report (fourth report) prepared by the second accountant which report showed that the Appellants had committed several fraudulent breaches of the Joint Venture Agreement. The particulars of the report showed that, CEI had under-declared profits on 400 metric tons of sugar, under declared trading in 600 metric tons of sugar, in December 1999, under declared profits on 960 metric tons of sugar for March 2000 to May 2000, over declared loss on 480 metric of rice, and as a result MKM has suffered foreign exchange loss.
The second Appellant was added as party to the suit for fraudulently altering accounts of the Joint Venture Agreement as a majority shareholder and Director.

5 At the High Court the Respondents contended that as a result of the fraudulent accounting of the appellants and the diversion of the joint venture funds to non-joint venture activities, MKM suffered a loss of USD 114,486.63. The Appellants accepted that there was a joint venture agreement but denied all allegations by the MKM of false accounting. Judgment was entered in favour of the respondent by the learned trial Judge.

Dissatisfied with the decision of the learned trial Judge, the Appellants filed this appeal. The respondent cross-appealed seeking an award of interest at 11% pa on the damages granted to them. The appellant appeals against the whole decision on the following nine grounds;

1. The learned trial Judge erred in law and fact when he failed to properly evaluate evidence on the record there by arriving at a wrong decision.

1. **The learned trial Judge erred in law and in fact when he held that joint venture funds were used for non-joint venture purposes and wrongfully awarded the plaintiffs general damages of USD 10,000 in lieu of failure to**

prove interest.

2. **The learned trial Judge erred in law and fact when he held that the defendants under declared profits on the 400 metric tons of sugar thereby wrongly awarding the plaintiffs USD 10,040.50.**

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3. **The learned trial Judge erred in law and fact when he held that the defendants under declared profits made on the 960 metric tons of sugar between March to May 2000 by expensing VAT and withholding tax thereby wrongly awarding the Plaintiffs USD 22,781.50.**

The learned trial Judge erred in law and fact when the held that the joint venture had traded in 600 metric tons of sugar thereby wrongly awarding the Plaintiffs USD 41,862 as profits.

6. **The learned trial Judge erred in law and fact when he awarded the Plaintiffs general damages in lieu of their failure to prove foreign exchange loss.**
7. **The learned trial Judge erred in law and fact when he held that the second defendant was fraudulent in accounting to the plaintiff and thereby wrongly held him liable to jointly and severally pay the decretal sum.**
8. **The learned trial Judge erred in law and fact when he awarded interest on the decretal sum from the date of filing the suit till payment in full at the rate of 11% pa which was exercisable in the circumstances.**
9. **The learned Judge erred in law and in fact in lifting the corporate veil of the 1st Appellant Company to join the 2nd Appellant as a party to the suit in the circumstances.**

Representations

Mr. Mohammed Mbabazi and Mr. K Ssekabanja from M/s Ssekabanja & Co. Advocates represented the appellants while Mr. Joseph Luswata from M/s Sebalu & Lule Advocates appeared for the respondents.

This is a first appeal and the duty of the first appellate court is to review and reappraise the evidence adduced at trial and reach its own conclusion having regard to the fact that the Court did not have the opportunity of hearing and seeing the witnesses testify **[Rule 30 (1) (a) of the Judicature (Court of Appeal** 5 **Rules Directions, SI 13-10) and the cases of Pandya v R [1957] E.A 336** and **Kifamunte Henry v Uganda, Supreme Court Criminal Appeal No 10 of 1997** applied]. Having carefully considered the record of proceedings and submissions of both counsel, we will now resolve the issues submitted on. We will resolve Grounds 1 and 2 together.

Ground one and two

The learned trial Judge erred in law and fact when he failed to properly evaluate evidence on record thereby arriving at a wrong decision [and]

The learned trial Judge erred in law and fact when he held that joint venture funds were used for non-joint venture purposes and wrongly

awarded the respondents general damages of USD 10,000 in lieu of failure to prove interest

Appellant's submission on evaluation of the evidence

Counsel for the appellant pointed out that the learned trial Judge wrongly relied on Exhibit P8 which was a computer print-out and was therefore inadmissible because it was not an original. Counsel submitted that the computer diskette which contained the original information was not produced in Court. Counsel further submitted that in relying on the print-out, the trial Judge erroneously

awarded US $ 10,000 to the respondents as damages. He further criticized that the print-out was not signed by Mr. Kikomeko (DW1), the former accountant with the first appellant and therefore its authenticity was questionable.

Respondent's submission on evaluation of the evidence

On the aspect of admissibility of computer evidence, counsel for the respondents submitted that the exhibits contested by the Appellants were admitted without contest. He added that the argument of the exhibits being photocopies and not originals is an afterthought. Counsel for the respondents further submitted that the trial Judge relied on Exhibit P9 (a statement of the SR Trading profit and loss account) and not Exhibit P8 as counsel for the Appellant claims. Counsel pointed out that the background to the documents was clearly explained at pages 73 and 74 by Daniel Ogaro Obwoge, an accountant with the first appellant.

Resolution of the Court

The aforementioned grounds of appeal revolve around the admissibility of the Exhibits P8 and P9 which are computer generated. The parties largely addressed **us** on the **issue** of admissibility of computer generated evidence. In earlier times, such accounting documents would be generated from typewriters or cyclostyle machines which equipment is quite different from modern day computers. Computers are capable of generating electronic and digital evidence.

Admissibility of Electronic Evidence

The Appellants contended that the evidence relied on by the trial Court was inadmissible as it

amounted to secondary evidence being admitted in the absence of the primary documents from which that evidence was generated. The

Appellants argued that the primary document in this case is the computer diskette because it contained the information from which the exhibit was generated from. The issue before the court therefore, is whether electronic evidence, in this case; print-outs of computer-generated documents, are primary or secondary evidence.

> *Section 63 of the **Evidence Act** provides that documents must be proved by primary evidence except in certain situations. Section 61 of the said Act defines primary evidence as "the document itself produced for the inspection of the court." Documents are defined as "any matter expressed or described upon any substance by means of letters, figures or marks, or by more than one of those means, intended to be used, or which may be used, for the purposes of recording that matter/" Secondary evidence generally means copies. **[See:** S. 62, Evidence Act, Cap 6]*

This follows from the common law rule of evidence that states that no evidence is admissible unless it is "the best that the nature of the case will allow." **Phipson on Evidence, 15th Edition pg. 116, para 6-22,** cited *in Omychund v. Barker* **917440 1 Atk. 21, 49**

> Uganda's Evidence Act was passed in 1909, long before computers were invented and the issue of electronic evidence could not have been contemplated. The Civil Procedure Law and Rules in Uganda also do not specifically provide for e- procedures. Since that time, computers and electronic information have come to be an essential part of business and daily life. The Court takes judicial notice of this development. It is important that Uganda moves forward into the digital age in a way that makes it possible to resolve legal disputes effectively.
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> There is no clear precedent in Ugandan law for deciding how to classify electronic evidence for the purposes of the best evidence rule. Today, some of these issues have been handled with the passage of the **Electronic Transactions Act 2011** but that was not the situation at time this case was tried, as the said Act was not yet in force. It is therefore instructive to examine the position at common law and how other jurisdictions have tackled the issue of computer generated evidence for a longer period than Uganda.

The common law position in England seems to be articulated in the case of *Kajala V Nobel* **(1982) 75 Cr. App R 149 at 152** Ackner L.J observed that the best evidence rule has evolved over time. He held:

> *"The old rule that a party must produce the best evidence that the nature of the case will allow and that any less good evidence is to be excluded has gone by the board long ago. The only remaining instance of it is that if the original document is available in one's hands, one must produce it..."*

As to the position of the law, Section 5 of the **United Kingdom's Civil Evidence Act**

1968 states that:

"(1) In any civil proceedings a statement contained in a document produced by a computer shall, subject to rules of court, be admissible as evidence of any fact stated therein of which direct oral evidence

would be admissible, if it is shown that the conditions mentioned in subsection (2) below are satisfied in relation to the statement and computer in question..."

So at common law, documents produced by a computer as was the case here are admissible as evidence of any fact stated therein. The legislature may put some

conditions to this but we do find that the general rule of thumb is that documents created from a computer and its accessories like diskettes are admissible.

Other commonwealth countries seem to take the same position. Looking at legislation in Canada that predates this case Section 4(2) of the Uniform Electronic Evidence Act 1998 provides:

> *"[In any legal proceeding,]... An electronic record in the form of a print-out that has been manifestly or consistently acted on, relied upon, or used as the record of the information recorded or stored on the print-out, is the record for the purposes of the best evidence rule."*

This shows that computer print outs in Canada meet the best evidence rule test. Counsel for the appellants submitted that the computer records were unreliable without the diskette.

Under the United States Federal Rules of Evidence [FRE] states that for "electronically stored information, 'original' means any printout. . . if it accurately reflects the information" [FRE Rule 1001(d)]. Furthermore, Courts in the US have held that "the fact that it is possible to alter data contained in a computer is plainly insufficient to establish untrustworthiness." ***[US v. Bonallo, 858 F. 2d 1427,*** *20* ***9th Cir. Ct. App. (1988)]*** *In* ***Aguimatang v. California State Lottery 234 Cal. App. 3d 769, 798,*** *the court gave near per se treatment to the admissibility of electronic evidence stating "the computer printout does not violate the best evidence rule, because a computer printout is considered an 'original.'"*

Counsel for the Appellant suggested that a picture of the diskette should have been taken and tendered in court as primary evidence. This of course was pushing the argument to unsustainable boundaries! However, it should be noted that

tendering of a diskette without extracting from it the actual information is of no use to Court. As to authenticity of the contents in the computer generated documents, there is no evidence that the computer system or diskette was tampered with or stopped operating. The information was recorded by both the first and second accountants who are not party to the proceedings or will not have any interest in the matter. The information was recorded and stored in the ordinary course of business by the accountant, there is no reason to doubt its authenticity despite counsel's submission that it was not signed and Mr. Kikomeko denied making the document. Mr. Kikomeko was the accountant at the time and no other person could have recorded and stored the accounting information.

We also cannot agree with the argument advanced by counsel for the Appellants that a diskette can be said to be a document. In the case of computer-generated documents, the expression and recordation of matters initially takes place electronically, in a way that cannot be understood by humans without the assistance of a display or printout. Because of this practical reality, it is necessary to recognize **print-outs** of **electronic evidence** as documents constituting primary evidence as long as their authenticity can be ascertained.

Appellant's submission on use of venture funds for non-joint venture activities

The Appellants submitted that there was no evidence led as to any finding of the alleged misuse or use of the funds for non-joint venture activities as set out in the plaint. The learned Judge relied on the testimony of PW2, Daniel Obwoge who used exhibits P3 to P8 prepared by DW1 Mr. Kikomeko to show that there were excesses. The Appellants however contend that if there were any monies taken

out of the joint venture funds, the bank accounts balance would not have balanced and would not have been verified on that date. The Appellants also contend that there was no shortage and if it had been so, PW2 Mr Obwonge would have shown it in his records as to how it would have happened and how it was brought back into the joint venture. The Appellants submitted that the respondent did not show how the excess items affected the joint venture and was therefore a creation of PW2 Mr Obwonge.

Respondent's submission on use of venture funds for non-joint venture activities

The Respondents' submission was that all items under "*excess*" on Exhibits P3-P8 totaling to USD97, 890,000.00 showed that joint-venture funds had been used for non-joint venture activities. Counsel for the respondents submitted that the excess amounts shown in the accounts related to other entities namely “Dairy **Bell Standard Interest"** and **"Crane Finance"** which are not part of the joint-venture.

He argued that the respondents entered into an agreement with CEI to make profit by trading and to achieve this, MBK brought in capital to be used exclusively for the project and that any variations from this agreement resulted in breach of contract and loss to MKM of the opportunity to receive returns of the money invested.

Decision of the Court

We have taken time to peruse the record and judgment of the learned trial Judge and agree with the learned trial Judge on the misuse of the joint venture funds. Despite learned counsel for the Appellants' argument that the record does not prove that there was a shortage of funds which had been used for non-joint

venture activities, the record shows that exhibit P14 which deals with the trading of 600 tons of sugar shows that payments were made for non-joint venture activities like **Dairy Bell** of Shs 36,907,240.00, **Naguru Land** of Shs 3,000,000.00, **Crane Finance** Shs 80,802,000.00 This clearly shows that money from the joint venture funds were used for non-joint venture activities. This is a breach of the terms of the joint-venture agreement entered into by the parties.

The learned trial Judge relied on the testimony of three witnesses PW1 Melville Kenmure the Managing Director of MKM; DW1 Christopher Kikomeko, a former accountant of CEI and DW3 Mr Karim Somani the Managing Director of CEI. DW3 io Mr Karim Somani, the majority shareholder of the Appellant referred to any payments that were not part of the joint venture as *"excess payments"*. DW1 even stated that *"so at the end of the day any monies I would identify as having nothing to do with the joint venture, I would call excess".* It is our finding therefore that DW3 Mr Karim Somani admits to using joint venture funds for non-joint venture activities. The joint venture activities involved sugar trading so it is highly unlikely that it related to entities like **Dairy Bell.**

As to the award of general damages of USD 10,000 we do not see anything in the trial Court's Judgment to suggest that this was awarded in lieu of failure to prove interest. The learned Judge gave the following reasons for the award of general damages at Pg. 370 of the record:

"...in addition to issue No 6 this dealt with the foreign exchange loss arising from a change in price in Uganda shillings of (to?) the US dollar and delay in remitting payments for purchases made in US dollars. On account of these matters I am satisfied that an award of US $ 10,000.00 would be sufficient recompense to the plaintiffs. I

accordingly award general damages of US $ 10,000.00 to the plaintiff..."

The award of damages was made in respect of foreign exchange loss and not interest. This ground was not amended to bring it in line with the judgment of the trial Court and therefore this ground is misconceived.

Grounds 1 and 2 two for the foregoing reasons are therefore dismissed.

Ground three

The learned trial Judge erred in law and fact when he held that the defendants under declared profits on the 400 metric tons of sugar thereby Wrongly awarding the plaintiffs USD 10,040.50.

The trial Judge addressed this ground as issue No 2 in his Judgment and found for the plaintiff (respondent here) in that he was entitled to 50% of the value of this sugar and awarded the plaintiff the sum of US $ 10,040.50.

On appeal, both parties did not address Court on this award. It would appear that neither did the parties address the trial Court on the alleged under declaration of 400 metric tons of sugar.

A perusal of the record shows at pg. 222 that it was abandoned albeit in a fairly shabby way. Mr Luswata for the plaintiff states:

"...my Lord at this stage I need to point out that the claim of 400 metric tons was not pursued by the plaintiff and I was going to indicate to Court that it be struck off..."

No formal application was made but in ensuing discussion with Court and counsel opposite, it transpired that the plaintiff was really pursuing a matter of 480 metric tons of rice to which court simply said "*Okay"* A further look at the amended plaint Para 12 (a) where the matter of 400 metric tons of sugar was pleaded shows that it was crossed out. All in all it appears to us in all fairness that this particular claim was abandoned and so should not have been decided.

The trial Judge's decision is therefore set aside.

Ground Four

The learned trial judge erred in law and fact when he held that the defendants under declared profits made on the 960 metric tons of sugar between March to May 2000 by expensing VAT and withholding tax thereby wrongly awarding the Plaintiffs USD 22,781.50.

This is another ground that was not argued in detail during this appeal. As stated earlier a lot of time was taken up as to the admissibility of the exhibits used to track the finances of the joint venture. However a re-evaluation of the evidence and the submission in the lower Court gives the clear positions of the parties.

Appellant's position

The Appellants' position was that there were only two major transactions that is, the 600 tons of sugar

and 400 tons of rice. In other words, there was no transaction for 960 metric tons of sugar.

It is the case for the appellants that the profit from the sale of the sugar was subject to tax that is VAT and Withholding tax. That is how Mr Christopher Kikomeko DW1 the first accountant explained the matter to Court. The loss would then be in the region of Shs 105,751,253/=

Respondent's position

It is the case for the respondent, relying on PW2 Mr Daniel Ogaro Obwoge who worked for the first appellant company from December 1999 to July 2000, that the profit made in the sale of sugar was wrongly expensed against taxes namely VAT and withholding tax. This is what caused the alleged loss.

Resolution of the Court

There is no doubt in our mind that this dispute on accounting treatment for the sugar could have been handled differently. Indeed we agree with the trial Judge's finding at p 370 of the record when he observes:

> *"...lastly had all the parties, possessed goodwill and business sense, instructed an independent accountant to go over the accounts of the transactions in question that would have elicited a much earlier solution to this dispute than litigation to the final end!..."*

The learned Judge at p 362 was persuaded by the evidence of Mr Obwoge that

the loss was achieved by expensing VAT and Withholding tax on items which could not have been joint venture expenses. On this point he believed Mr. Obwoge as against Mr Kikomeko He found:

“I find no answer to PW2’s testimony that taxes ought not to have been expressed or included into expreses of the joint venture on this particular contract were so expressed, leading to a loss on the transaction, while in fact a profit had been made. In the result I will allow this head claim, and enter judgment for the plaintiffs in the sum of US$22,781.50."

Indeed as we have found earlier, joint venture funds were being used for non- joint venture matters and this appears to be the crux of the issues in this dispute. The trial Judge had a good opportunity to assess both the accountants including their demeanor and came to the conclusion that he believed the testimony of Mr. Obwoge. We cannot fault the Judge on this finding because even the evidence points to mixing up this joint venture with other third party activities. We accordingly uphold the findings of the trial Judge and dismiss this ground of appeal.

Ground Five

The learned trial Judge erred in law and fact when he held that the joint venture had

traded in 600 metric tons of sugar thereby wrongly awarding the Plaintiffs USD 41,862 as profit

Appellant's submission

The Appellants in their submissions attempted to discredit the second accountant by pointing out the inconsistencies in his testimony. The counsel for the appellants further stated that there was no overdraft facility and the Audit Report Exhibit D6 clearly shows that the appellants are exonerated from obtaining any overdraft and therefore PW2 must be untrustworthy. The appellants' counsel also stated that as of December 1999, the joint venture had ended and so if there was such an overdraft then it would have been after the joint venture.

Respondent's submission

The Respondents counsel submitted that exhibit P15 is a claim for agency fees by M/s Speedy Freightways Agency forwarding and clearing company and exhibit P16 is an invoice showing that the Appellants bought 600 metric tons of sugar but only declared 400 tons. The Appellants in their pleadings admitted to importing sugar under paragraph 14 and then later during the course of the testimony of DW2 it was denied that such sugar had ever been imported. This, Counsel submitted was a departure from the pleadings and relied on the authority of **Interfreight** *Forwarders v East African Development Bank Civil Appeal No 33 of 1992* for the proposition in law that a party is not allowed to set up another story that is inconsistent with the pleadings.

Resolution of the Court

We have reviewed the record, the submissions and legal authorities of both parties on this ground.

The learned trial Judge relied on the testimony of the accountant Mr Obwoge PW2, along with Exhibits P9 and P22 to decide this issue. Although the Appellants have challenged Exhibits P9 and P22 as mere copies of an original, their challenge cannot stand. As noted above, it would be both impractical and contrary to the trends of technology in the modern world to hold that print-outs of computer- generated documents are copies. Unless the contrary can be proved (as to their source), the print-outs as stated above, are originals constituting primary evidence for all legal intents and purposes. Here, the documents were created by PW2, an accountant employed by and under the direct control of the Appellants. The documents were created in the course of PW2's employment with the

Appellants. The Appellants did not produce other records to contradict those on record and further did not call the auditor that had been hired during this period to do the same. The learned trial Judge based his decision on this issue on the testimony of PW2 as well as the inconsistency in the Appellants' own pleadings where they conceded that the sugar had been imported.

> The entire transactions were done within the joint venture period as the 1st term of the joint venture was between July and November 1999 and the 2nd term of the joint venture began in December 1999 to May 2000. So the joint venture had not ended as at December 1999 as submitted by the Appellant's counsel.

We therefore uphold the trial Judge's findings on this ground and the award of US $41,862.

Ground Six

The learned trial Judge erred in law and fact when he awarded the Plaintiffs general damages in lieu of their failure to prove foreign exchange loss.

Appellant's submission

The Counsel for the appellants submitted that the learned judge did not properly evaluate and analyze the evidence adduced in proof of the claims. The Appellants further contend that the Respondent's claim was for special damages which had to be strictly proved but were not. He further contended that Court cannot award general damages as a substitute for special damages.

Secondly, he further argued that there was no claim to prove general damages. The Appellants submitted that the documents that the respondent relied on did not support the claim. The Appellants' counsel cited Exhibit P17, 18 & 19 to prove this point.

Respondent's submission

The Respondents submitted that the Appellants delayed to send the money in February and March to pay for the sugar when they had it, but instead diverted the money to their personal use. The money was finally sent between March and June 2000, when the foreign exchange rate had increased from Shs 1,520/= to Shs 10 1,620 thus occasioning a foreign exchange loss. The Appellants relied on the authority of *Uganda Breweries v Uganda Railway Corporation (2000) 2 EA 634* where it was held that proof of exchange rate is done by someone who is conversant with the exchange rate at the time. The Respondent brought Mr. Obwoge, the accountant PW2 as a witness who was responsible for transactions on the account and explained how the rate had shot up around March and June causing a loss of USD 3,764.

Resolution of the Court

We have reviewed the record and the submissions and legal authorities of both parties on this ground.

The Appellants argue that these were claims for special damages that had to be strictly proved and that general damages could not be awarded as a substitute for a claim for special damages. It appears necessary to explain the law on damages.

General damages are those which arise naturally and in the normal course of events, whereas special damages are those which do not arise naturally out of the defendant's breach and are recoverable only where they are not beyond the reasonable contemplation of the parties (See: *Holsbury's Laws of England, Vo 111,* **5** para. 812). **In Stroms BruksAktieBolag v Hutchinson [1905], A.C. 515,** Lord Macnaghten further clarifies the distinction:

"General damages, as I understand the term, are such as the law will presume to be the direct natural or probable consequence of the act complained of. Special damages, on the other hand, are such as the law will not infer from the nature of the act. They do not follow in ordinary course. They are exceptional in their character, and, therefore, they must be claimed specifically and proved strictly. In cases of contract, special or exceptional damages could not be claimed unless such damages were within the contemplation of both parties at the time of the contract."

The trading currency of the joint venture was the Uganda shilling. (See: trial Judge's findings at p. 364, at Para 16 of the Judgment) Foreign exchange rates by **their very nature** fluctuate and **it** was therefore foreseeable that the price of the dollar could change over the course of several months. In this case the joint venture had funds which were not applied in a timely manner because the said funds had been diverted and therefore causing a loss on the exchange

rate. The Courts have routinely granted general damages as compensation for foreign exchange losses (See also: **Ozalid Group (Export) Ltd v African Continental Bank [1979] Vol 2 Lloyd's Rep 231** where court awarded damages for a foreign exchange loss in sterling arising from a late payment of United States dollars; and

Isaac Naylor & Sons Ltd v New Zealand Cooperative Wool Marketing Association

Ltd awarding damages for a foreign exchange loss).

The trial Judge properly found that the Appellants' were in breach on this claim. The issue would be whether in the absence of the respondents failing to prove foreign exchange loss, the court was right in substituting an award of general damages instead of special damages.

In **Uganda Commercial Bank v Mattiya Wasswa (Supreme Court) Civil Appeal No. 6 of 1982 (unreported***),* the appellant had unlawfully detained the respondent's bus. The trial Court awarded general damages in lieu of the respondent's failure to prove loss of earnings and this decision was upheld on appeal. In this case, the trial Judge equated Respondents' loss of interest with lost earnings and awarded general damages in lieu of Respondents' failure to prove the specific sum. The Respondents' failure to satisfactorily prove the specific amount lost as special damages does not prevent an award of general damages on the ground that the interest is included in the damage naturally arising from Appellants' improper use of joint venture funds for non-joint venture purposes. We therefore affirm the trial Judge's grant of general damages under this ground.

Ground seven

The learned trial judge erred in law and fact when he held that the second defendant was fraudulent in accounting to the plaintiff and thereby wrongly held him liable to jointly and severally pay the decretal sum.

The Appellants' submissions

It is the case for the appellant's that the trial Judge wrongly imputed liability on the second appellant in his personal capacity yet if there was any liability then it was that of the first appellant company. The second appellant in his defence denied any fraud and contended that he had no personal liability under the Joint venture.

Respondents' submission

Counsel for the respondent argued that the trial Judge lifted the corporate veil because he believed that the second appellant was involved in the fraud and found so. On the first reason counsel for the respondent argued that the trial Judge believed the respondents that fraud had been proved based on exhibit P14 altered in P13 by the second appellant. The trial Judge also found in favour of the Respondents that the Appellants had pleaded in the plaint that they had traded in the consignment of sugar but only as agents although later during court proceedings denied having traded at all. The trial Judge further found that VAT and withholding tax had been recorded as expenses and this was maintained by both parties. Finally the trial Judge agreed that joint venture funds had been directed to personal business evidenced by Exhibits P3-P8 on excess items and also Exhibits P19-P20.

Resolution of the Court

We have reviewed the record and the submissions and legal authorities of both parties on this ground.

What amounts to fraud was stipulated in the case of **Derry v Peek [1889] 14 App Cases 337,** where the House of Lords *inter alia* held that in an action of deceit, the plaintiff must prove actual fraud. Fraud is proved when it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false. Fraud must be strictly proven. What amounts to fraud was restated in **Fredrick Zaabwe v Orient Bank & 5 Others SCCA No 4of 2006 as:**

> *"... An intentional pervasion of the truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or surrender a legal right. A false representation of a matter of fact whether by words or conduct by false or misleading allegations, or by concealment of that which deceives and is intended to deceive another...."*

There are four particulars of fraud at issue.

a. Changing the tax paid on the 400 metric tons of sugar from the actual Shs. 59,628,000/= to Shs 133,042,000/=

The Respondents argued that the Appellants (especially the second appellant) had changed the tax paid on 400 metric tons of sugar from the actual Shs 20 59,628,000/= to Shs 133,042,000/= evidenced by the Financial Statements (Exhibit P. 13 and 14). The trial Judge found that this instance of fraudulent accounting was proven. For all the reasons stated above, the trial Judge properly relied on the Exhibits. On this finding, we find nothing to fault the trial Judge and agree with him.

(b) Fraudulently concealing a trading in December of 600 metric tons of sugar.

The trial Judge relied on Exhibits P14, P15, and P16 on this issue. He found that

the Appellants imported sugar as an agent of some undisclosed principal and by implication therefore this was part of the joint venture trade. Here again for reasons already given in this Judgment we agree with the trial Judge.

. Changing the character of VAT and withholding tax to an expense which had the effect of reducing profits

The trial Judge relied on Exhibits P9, P10, Pll, P12, and P22 for this issue. The Appellants had recorded VAT and withholding tax as expenses instead of deposits hence creating a loss in the accounts when there was none. Again, for reasons 10 stated before we agree with this finding of the trial Judge.

d. Directing joint venture funds to personal business instead of sending those funds to suppliers in time, thereby causing a foreign exchange loss

The trial Judge's reliance on Exhibits 19 and 20 was proper and his interpretation of the facts as we have already agreed above was sound in finding that the Appellants had diverted joint venture funds to non-joint venture activities hence **resulting in foreign exchange loss.**

In conclusion therefore, we find that the learned trial Judge did not err in law and fact when he held that the second defendant was fraudulent in accounting to the plaintiff and thereby wrongly held him liable to jointly and severally pay the decretal sum. We according disallow this ground.

Ground eight:

The learned trial judge erred in law and fact when he awarded interest on the decretal sum from the date of filing the suit till payment in full at the rate of 11% p.a which was excessive in the circumstances.

Appellant's submission

It is the case for the appellants that the trial Judge's award of interest of 11% pa on the decretal

sum from the date of filing until the payment in full was excessive in the circumstances. However during submissions, counsel for the Appellants did not address court on this ground.

Respondent's submission

Counsel for the Respondent however stated that he supported the award preferring the decretal sum to the special damages of USD 74,000. Counsel relied on the case of **Canabolic Group of Companies Uganda v Sugar Corporation Uganda Ltd CA NO 151/ 1994** where court interpreted **Section 27** of the **Civil Procedure Act, Cap 71.** In that case, the court held that interest is awarded from the date of filing the suit where a debt is due at a time of filing the suit. That is when interest is awarded from the date of filing of the suit. Counsel submitted that the trial Judge was therefore right in awarding the said interest.

Regarding the rate, counsel relied on two cases BM Technical services ltd vs. Crested Transporters Company Ltd; SCCA Number 8 of 2002 and Prema Chandra Chenoi and Another vs. Maximo Olegi Petrovik; CA No.9 of 2003 (SC). In the

former case, court awarded 10% on a transaction that it did not consider commercial and that case dominated in US Dollars and in the latter case the

Supreme Court upheld interest rate of 20%. He further referred to the evidence of PW2 to show that in 2000 when this case was filed, the interest rate on dollar loans was 12% so the Judge in awarding 11% was right and fair.

Resolution of the Court

The trial judge in resolved issues 2,3 and 5 in favour of the respondents and awarded USD 74,000 (United States Dollars seventy four thousand) with interest at 11% pa from the date of filling the suit until payment in full. The Appellant's claim was that the trial judge erred in law and fact in awarding interest to the respondents. The law on interest is that an award of interest is at the discretion of the Court. **In Harbutt's Plasticide Ltd v Wayne Tank 1970 ALL ER 225** held that an award of interest is discretionary. It seems to me that the basis of an award of interest that the defendant has kept the plaintiff out of his money and the defendant has had use

of it himself. So he ought to compensate the plaintiff accordingly. The trial Judge had exercised his discretion in awarding this rate of 11%.

In **Mbogo & Another v Shah [1968] EA 93, Sir Charles Newbold** (P COA EA) held that a Court of Appeal should not interfere with the exercise of the discretion of the Judge unless it is satisfied that the Judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it is manifest from the case as a whole that the Judge has been clearly wrong in the exercise of his discretion and as a result there has been miscarriage of justice.

In our finding, the trial Judge's award of interest on damages was rightly awarded as the Appellants had used the Respondents money to make profits which they deliberately withheld from them and they have suffered an injustice. We according dismiss this ground of appeal.

Ground nine

The learned Judge erred in law and in fact in lifting the corporate veil of the 1st Appellant Company to join the 2nd Appellant as a party to the suit in the circumstances

Appellant's submission

The Appellants' counsel referred to pages **13** and **14** (pages **364 - 365** of the record) of the learned trial Judge's judgment and submitted that there was no justification in lifting the corporate veil and adding the second defendant. Counsel referred to the textbook, **Mason French & Ryan on Company Law (2000-2001)** in the list of authorities where **Sharpe J** in the Canadian case of **Trans American Life Insurance Co. of Canada V Canada Life Assurance Co (1996) 28** OR **423** held that it is difficult to define precisely when the corporate veil is to be lifted, but lack of a precise test does not mean that court is free to act as it pleases on some loosely defined just and equitable standard. Counsel for the appellant submitted that the trial Judge lifted the corporate veil without first determining the matters that were clearly prejudicial to the **2nd** appellant. Counsel for the appellants submitted that this was done on motion even before the fraud was established. Counsel

20 argued that this was to the prejudice of the second appellant and should be set aside.

Respondent's submission

Counsel for the Respondent submitted that the second appellant was added so that he could be allowed

to answer to the allegations of fraud against him which was the right procedure. Counsel prayed that this ground of appeal be dismissed with costs and decision of the trial Court upheld.

Resolution of the Court

We have addressed ourselves to this ground of appeal, the record of appeal and the submissions of both counsel on the ground.

This ground necessitates us to ascertain whether the circumstances in the instant case required the lifting of the corporate veil.

Halsbury's Laws of England, Volume 7 paragraph 621 states that the mere fact that directors are sole directors and/or shareholders will not automatically render them liable for the torts committed by the company. However, there are exceptions to this rule where members may be held personally liable for the actions of the company rule also known as lifting the corporate veil. The rationale behind this position was illustrated by Lord Denning in the case of *HL Bolton Co v TJ Graham and Sons [1956] 3 All ER 624* where he likened a company to a human body with a brain and nerve center which controls what it does. He added that;

> *"Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such."*

In this case the applicable law would be the Companies Act Cap 110 *[now repealed]* (was based on the 1948 Companies Act of England and common law) In ***Gilford Motor Co Ltd v Horne [1933] Ch 935, the Court held that the company*** formed in that case was described as a mere cloak designed to commit a breach ***of covenant. In another case DK C construction Company Ltd v Barclays Bank Ltd*** **[2002-2004] UCLR 201** it was held that the veil of incorporation can be lifted by the Court if it is satisfied that the company was used as a vehicle for fraud by its directing mind.

In this case it is not disputed that the second Appellant is a majority shareholder and director.

Furthermore in the case of **Nigerian Enterprise Limited v Forward Nigerian Enterprises Limited & Farore 1976 N.C.LTR 243** it was held that where the device of a corporation is used for some illegal

purpose, court may disregard the principle that a company is an independent legal entity and lift the veil of corporate identity so that if it proved that a person used a company that he controls as a cloak for an improper transaction, he may be made personally liable to a third party.

The author **Geoffrey Morse** in the text, **Company Law,** 16th Edition at page 22 calls for some evidence of impropriety before the lifting of corporate veil. Furthermore, in the famous case of **Kampala Bottlers Ltd v Dominico (U) Ltd S.C. Civil Appeal No. 22of 1992 (unreported),** it was stated that fraud must be strictly proved and pleaded.

The corporate veil in this case was lifted to allow for the evidence to be adduced regarding the alleged fraud of the defendant. This was the right course of action taken on the part of the Judge as it was pertinent to ascertaining whether the defendant was involved in the fraud alleged. This does not mean that the Judge had established at that point that there was fraud on the part of the second appellant but simply that the corporate veil had to be lifted to ensure that anyone who may have been involved in the fraud would be held accountable and not slip through the hands of justice. We do not find any fault in this being done through an interlocutory process by way of notice of motion (page 2-3 of the supplementary record of appeal). Indeed, the second respondent was put on notice as to the grounds for lifting the veil.

The evidence as we have already seen clearly pointed to the active involvement of the second appellant in the falsification of accounts and trading outside the joint venture yet using the joint venture funds. These are findings of fact tested in evidence and cannot be of prejudice to the second appellant. This ground accordingly fails.

Cross-Appeal Interest on Damages

It is the case for the respondents that the trial court awarded them USD 10,000 (United States Dollars ten thousand) as general damages without any interest as to the amount. Counsel for the Respondents submitted that the trial Judge's decision ought to be varied to provide for interest on general damages. Counsel

submitted that PW 2 testified that in the year 2000, the interest on dollar loans were going for about 12% pa. The Respondents prayed for an order that interest paid on general damages be awarded at 11% pa from the date of judgment till payment in full.

Counsel for the appellants did not address us on this ground of providing for interest on the said award of damages.

The grant of interest on an award of damages has been discussed in several authorities. ***Black's Law Dictionary,*** *9th Edition at page 887 defines interest on damages as "interest allowed by law in the absence of a promise to pay it, as compensation for a delay in paying of a fixed sum or delay in assessing and paying damages."*

In Attorney General v Virchand Mithalal & Sons Ltd, Civil Appeal No. 20 of 2007

Court held that simple interest arises invariably when a party which is liable or owes money fails to pay what is due before or on the date or on the date agreed, stipulated, or implied.

Furthermore in the case of **Gullabhai Ushillingi v Kampala Pharmaceutical Ltd Civil Appeal No. 6 of 1999 (SC)** the court stated that damages were premised on the principle of restitution (ad. *integrum* damages intended to restore the wronged party to the position he would have been if there had been no breach of contract).

In **Harbutt's Plasticide Ltd v Wayne Tank [1970] ALL ER 225 CAW.** was held that an award of interest is discretionary and that the grant of interest was based on a party being kept out of his money by the other party who has use of it. So the party in funds ought to compensate the other party accordingly.

However in **Uganda Revenue Authority v Wanume David Kitamirike, Civil Appeal No.43 of 2010**

the Court held that the party claiming interest is under a duty to support the claim for interest with some evidence.

While Section 26(2) Civil Procedure Act gives court discretion to award interest adjudged on the principal sum from a period prior to instituting a suit or from date of filing the suit to date of decree or on an aggregate sum adjudged from date of decree to date of payment in full, the burden falls on the party claiming interest to adduce evidence entitling that party to interest. This, the respondent has justified. On a re-evaluation of the evidence, we find it must have just been a slip that the trial Judge did not grant interest on the award of general damages. This court shall therefore exercise its discretion in awarding interest of 11% pa from the date of Judgment in the trial Court until payment in full to the

Respondent.

All in all, we allow this appeal in part and dismiss the appeal in part. We also grant the respondents costs in this Court and the trial Court.

We so order.

Dated at Kampala this 16th day of October 2015

Hon. Justice Rubby Aweri Opio, JA

Hon. Justice Geoffrey Kiryabwire,JA

Hon. Justice .Prof. Lilian Ekirikubinza Tibatemwa ,JA