

THE REPUBLIC OF UGANDA,

IN THE HIGH COURT OF UGANDA AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT NO 90 OF 2014

SEROY AIRPORT HOTEL LTD}.....PLAINTIFF

VERSUS

UGANDA BREWERIES LTD}.....DEFENDANT

BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA

JUDGMENT

The Plaintiff commenced this action against the Defendant for several declarations namely:

- (a) A declaration that by purporting to terminate the dealership agreement, the Defendant entered into with the Plaintiff in the manner adopted by the Defendant, the Defendant acted in breach of contract.
- (b) A further declaration that by not passing on a formal dealership agreement with the Plaintiff spelling out the detailed rights and obligations of either party for execution, the Defendant acted negligently, recklessly and in a manner that would entitle the Plaintiff to recover damages for any loss that ensued owing to the above negligence and recklessness.
- (c) A further declaration that the by illegally deducting Uganda shillings 58,110,002/= from the Plaintiffs account and using it for six months, the Defendant caused economic loss to the Plaintiff for non-use of her money for which the Plaintiff is entitled to recompense.
- (d) A declaration that by deducting Uganda shillings 90,000,000/= as security for empties which was never refunded amount to unjust enrichment, and encroachment on the Plaintiffs working capital in the end affecting her performance and profitability which ought to be refunded together with interest thereon from 20th June 2013 until full payment.

- (e) A declaration that by purporting to terminate the contract and thereafter deducting money for the Plaintiffs account which is over Uganda shillings 381,644,948/= over and above what the Defendant would be entitled to after reconciliation, the Defendant acted in breach of contract and illegally took, deducted and used the Plaintiffs money.
- (f) A declaration that in the circumstances, the purported termination of contract by the Defendant was illegal, unfounded, negligently and recklessly done.
- (g) A declaration that the Defendant was only entitled to call on the bank guarantee after reconciling the books of accounts with the Plaintiff and after considering and offsetting the Defendant's stock and goods at the Plaintiff's warehouse.
- (h) A consequential order that the Defendant pays interest on Uganda shillings 58,110,002/= that was deducted with effect from 3rd July 2013 to 13th November 2013.
- (i) An order of specific performance to issue ordering the Defendant to avail her officers for reconciling the stock and take delivery of the stock; beers, cases, empties and other goods that remained in the Plaintiff's stores at the time of termination.
- (j) A declaration that upon termination of the contract, as it were, the property in the stock, empties, cases and other goods that the Plaintiff was distributing on behalf of the Defendant remained vested with the Defendant.
- (k) A declaration that the risk in the goods (stock, empties and cases) remained vested in the Defendant upon termination of the distributorship agreement.
- (l) A consequential order for payment of Uganda shillings 381,644,948/= that was illegally deducted from the Plaintiff's account with Diamond Trust Bank upon the Defendant's premature and unlawful calling on the guarantee.
- (m) An order for payment of interest at commercial rate of 30% per annum from 3rd December, 2013 when the above money was withdrawn till payment in full.
- (n) A consequential order for the payment of Uganda shillings 90 million that was illegally deducted from the Plaintiffs account with interest at commercial rate of 30% from 20th of June till payment in full.
- (o) An order for payment of general damages for the negligence, misrepresentation, economic and/or commercial loss suffered, recklessness owing to the Defendant's irresponsible conduct.
- (p) An order for payment of exemplary damages for high handedness.

(q) An order for payment of the costs of the suit.

The basic facts alleged in the plaint are that the Defendant is a manufacturer of beer and other liquor products and sometime in 2013 advertised in dealership/agency for the distribution of the products in Najjanankumbi territory. The Plaintiff was the successful bidder and was given requirements by a letter spelling out what was expected of her. Thereafter the Plaintiff embarked on the project of fulfilling the desired requirements and meeting the attendant costs consequent to which she was given a letter of intent to begin operations for consummating their relationship. Certain inspections and approvals were done by the Defendant's agents whereupon the Plaintiff's premises were found to be fit for the purpose. The Plaintiff was instructed to open an account with the specified bank where it was expected to deposit the proceeds of the sale was with special instructions that will enable the Defendant to directly access and withdraw money which and the Plaintiff complied by opening an account with Barclays bank Ltd. No formal agreement was executed by the parties. A few months thereafter the Defendant through her agents communicated with the Plaintiff instructing the Plaintiff to get a bigger place/warehouse/store and compound for the easy negotiating and turning of trucks. In order to comply with the requirements or new conditions the Plaintiff sought the facility from the bank to buy and develop land without affecting her operational capital and the Defendant was aware of the arrangement. A few months thereafter the Plaintiff company was robbed of money totalling to over Uganda shillings 150,000,000/= and the same was reported to the police and brought to the attention of the Defendant as well.

The Plaintiff purchased land in the same area and instructed the firm of architects to carry to design and also instructed the firm to construct a bigger warehouse according to the Defendant's demands. On 20th June 2013 the Defendant withdrew Uganda shillings 90,000,000/= as security for empties which was extraneous to the agreement between the parties and contrary to the practice of the business and therefore the Plaintiff could not access money for her business. Sometime in June 2013 the Defendant unlawfully and without justification deducted/withdrew Uganda shillings 58,110,002/= from the Plaintiffs account and this affected the operational capital and minimum capital requirements of the Plaintiff viz a viz the Defendant's requirements. The said amount of money was not refunded until November 2013 thereby causing loss of earnings to the Plaintiff. It had been the practice of the parties for the duration of the contract that

the Plaintiff would not be required to pay for the empties upon taking the same but for some unknown reason the rules were changed by the Defendant.

The Plaintiff communicated to the Defendant its failure to curtail dumping in her territory owing to the Defendant's mode of operation and the Defendant did nothing to curtail the dumping after giving the agency to the Plaintiff and thereby affecting the Plaintiff's performance. On 20th November 2013 the Defendant communicated a decision to terminate the Plaintiff's agency. The Defendant also notified the Plaintiff that an audit would be carried out to determine who owes what to the other. The Defendant went ahead and unilaterally communicated with the Plaintiff's bankers, Diamond Trust Bank demanding to be paid while calling on the guarantee prior to the interparty reconciliation. The Defendant demanded payment prior to reconciliation. Between 20th November and 3rd December 2013 the Defendant attempted to make a partial reconciliation exercise and took beers, crates and spirits worth about Uganda shillings 175,056,107/=. On 2nd December 2013 thieves stole from the Plaintiff's store spirits of different brands worth Uganda shillings 24,500,000/= and the Defendant was informed. According to the Plaintiff's records and after stock taking the available stock had been established to be worth Uganda shillings 146,489,000/= for beers and sales were worth Uganda shillings 32,000,000/= and canned beer worth Uganda shillings 3,118,760/= on 7th of December 2013. When additional figures which require reconciliation the Plaintiff claims Uganda shillings 509,044,948/= in special damages.

The Plaintiff also claims that due to the Defendant's misrepresentation and a breach of contract she was forced to buy three trucks valued at Uganda shillings 80,000,000/= each truck worth Uganda shillings 60,000,000/= +2 smaller trucks each valued at Uganda shillings 45,000,000/= and a spirit van worth Uganda shillings 40,000,000/= which the Plaintiff has no use of upon termination of the contract for which the Plaintiff demands monetary compensation. Owing to the misrepresentation the Plaintiff also suffered additional special damages of Uganda shillings 460,000,000/=.

The Plaintiff alleges that it was compelled to obtain a facility from a bank to purchase and build a bigger warehouse all of which have been rendered useless and the Plaintiff prays for compensation by way of general damages. Similarly the Plaintiff seeks compensation for the trucks purchase and other machines used in the warehouse.

The Defendant admits calling for expressions of interest for the submission of beer and spirits in various areas including Najjanankumbi and the Plaintiff responded to the advertisement. By a letter dated 12th of March 2013 the Defendant appointed the Plaintiff as the distributor in Najjanankumbi for the period between 21st of March 2013 and 21st of June 2013. The letter indicated that upon the Plaintiff satisfying the Defendant of its ability and capacity to render the services, a distribution agreement would be executed between the parties. However no contract was ever executed between the parties. At the time of appointment the Plaintiff was an existing company engaged in trade or business and as such its businesses did not commence with the distributorship of the Defendant's products. The Defendant set targets which were communicated to the Plaintiff in which it was required to distribute 30,000 crates of beer and 5000 cartons of spirit each month. The Plaintiff was required to maintain 5000 crates of beer and 1000 cartons of spirit as the standard stock load. During the term of the distributorship the Plaintiff did not meet the stock load requirements and the submission targets and the Defendant did not enter into any further substantive contract with the Plaintiff. The Plaintiff's warehouse facility was required to support prime mover trucks having the capacity of loading 1300 crates of beer. It was also supposed to have enough space to accommodate the same trucks without obstructing road traffic as trucks are being loaded and offloaded. These requirements were at all times known by the Plaintiff but were never put in place prompting the Defendant to hire smaller delivery trucks at the same cost as the prime mover trucks. Consequently due to the failure to meet the Defendant's targets, the Defendant by letter of 20th of November 2013 terminated the relationship between the parties.

Pursuant to the termination reconciliation was to be carried out to determine which of the parties owed the other in order to settle the account. Subsequently the Defendant invited the Plaintiff to various meetings to carry out reconciliation but the Plaintiff never turned up. The Defendant set up several issues dealing with reconciliation of accounts by detailing the state of the stock and crates et cetera. The Defendant added that it was incumbent upon the Plaintiff to recover monies owed to it by customers by reason of credit sales. In further response to the Plaintiff's allegations of dumping, the Defendant asserts that it only deals with its authorised distributors in any particular geographical area and does not condone or promote dumping and even takes measures to ensure that no dumping occurs.

Apart from supplying the Plaintiff with beer and spirits and ensuring compliance with various requirements such as stock levels, the Defendant never engaged in the Plaintiffs learning of its business or decision-making and at no time did the Defendant request the Plaintiff to seek alternative premises as alleged. The purchase of property by the Plaintiff was not at the instance of the Defendant.

With regard to the deposit of a sum of Uganda shillings 19,000,000/=, the Plaintiff was required to deposit as security for empties, at no time did the Defendant Plaintiff ever contest the withdrawal. The money was withdrawn with the full knowledge and consent of the Plaintiff and is refundable upon return of empties of the equivalent value. The Plaintiff never withdrew the sum of Uganda shillings 58,110,002/= as alleged.

Upon termination of the distributorship the Plaintiff owed the Defendant Uganda shillings 464,596,656/= out of which Uganda shillings 49,462,202/= was owed in stock loan. Uganda shillings 415,134,454/= was owed on the Plaintiffs normal account. The Defendant admits calling on the bank guarantee which had been issued in its favour and at the Plaintiff's instance. In the premises the Defendant only asserts that whoever owes money to the other can be determined by a reconciliation of accounts.

The Defendant denies that the services of the security guard were taken up by the Plaintiff to guard the Defendant's property. While there was an intention to execute the contract, no contract was ever executed between the Plaintiff and the Defendant. The intention to enter into a contract did not create a binding relationship and is not enforceable. The Defendant denies ever acting recklessly or negligently as alleged or making any misrepresentation to the Plaintiff. Furthermore the Defendant contracted DHL to transport its products to various distributors and there was no need for the Plaintiff to purchase any trucks as alleged. The Plaintiff was never kept out of its money and all monies withdrawn by the Defendant were with the full knowledge and consent of the Plaintiff and for consideration of the Defendant's products. Furthermore in the circumstances the doctrine of promissory estoppels does not apply because the Plaintiff did not comply with the requirements set up by the Defendant.

In reply to the written statement of defence the Plaintiff asserts that after the successful performance of the contract and upon lapse of time for the probationary period, the Defendant by

her conduct and omission confirmed and extended the contract but only did not formally draft and have it executed. The Plaintiff was not involved in any distributorship agreement prior to having a relationship with the Defendant. The Plaintiff contends that it was awarded a fully fledged distributorship contract by the Defendant pursuant to the letter dated 12th of March 2013. The Plaintiff complied with all the requirements in the letter of intent. Secondly the letter of termination refers to extraneous clauses that were still unknown to the Plaintiff.

In reply to the written statement of defence the Plaintiff further raises issues dealing with reconciliation of accounts. Secondly the Plaintiff reiterated the averments that it had to carry out certain activities on the advice and expectation of the Defendant in order for it to perform its obligations.

At the hearing of the suit and in the joint scheduling memorandum endorsed by Counsels of both parties some basic facts have been agreed. The Defendant is a manufacturer of beer and other liquor products and sometime in 2013 ran an advert calling for expressions of interest from parties interested in being awarded dealership/agency for the distribution of their products in Najjanankumbi territory and the Plaintiff responded to the advert. By letter dated 12th of March 2013 the Defendant appointed the Plaintiff as the distributor in the said area for the period 21st of March 2013 up to 21st June 2013. On 20th November 2013 the Defendant terminated the distributorship/agency of the Plaintiff. In the joint scheduling memorandum endorsed by both Counsels of the parties, about 40 points of disagreement were set out.

The Plaintiff called two witnesses and the Defendant called one witness whereupon the court was addressed in written submissions. The evidence is considered in the submissions and judgment.

The gist of the facts relied on by the Plaintiff's Counsel is that the Defendant company advertised for an independent agency and verified the Plaintiffs capacity to be a distributor for its products whereupon it appointed the Defendant as an agent for the Najjanankumbi territory. The Defendant had an opportunity of inspecting the requirements it had laid out for the Plaintiff to fulfil the role of a distribution agent for Najjanankumbi territory. After the inspection on approval of the Plaintiff's premises the Defendant granted the Plaintiff a letter of intent and appointed her as a distribution agent for the Najjanankumbi territory. The requirements included purchase of distribution trucks, having a minimum capital of Uganda shillings 600,000,000/=,

warehouse and a number of workers. However a few months after the inspection and approval of the Plaintiff's premises the Defendant demanded that the Plaintiff gets an alternative warehouse which the Plaintiff embarked on procuring. However on 20th November 2013 the Defendant terminated the relationship on the ground of underperformance among other grounds of the Plaintiff. In the termination letter the Defendant undertook to carry out a reconciliation of the accounts of the parties by 3rd December 2013 to establish what owes money to the other. A few days later the Defendant made the partial collection of items from the Plaintiff worth Uganda shillings 175,056,107/= . However the Defendant called on the bank guarantee and withdrew Uganda shillings 464,596,656/= as they were going through the process of reconciliation contrary to its representation in the termination letter. The main question raised thereafter concerns reconciliation of accounts and the Plaintiff's Counsel set out various matters which needed to be taken into account to establish what owes money to the other.

The agreed issues are:

1. Whether there was a distribution contract between the Plaintiff and the Defendant and if so, whether the Defendant is in breach of the same?
2. Whether the Defendant is indebted to the Plaintiff in the sums claimed?
3. Whether the risk in the goods held by the Plaintiff passed onto the Defendant upon termination of the contract?
4. What remedies are available to the parties?

Issue number one:

Whether there was a distributorship contract between the Plaintiff and the Defendant and if so, whether the Defendant is in breach of the same?

The Plaintiff's Counsel submitted that from the evidence on record and according to agreed fact number one there was a contract between the Plaintiff and the Defendant. The contract started with an invitation to treat contained in the newspaper advertisement admitted by consent of the parties as exhibit P1. In that advertisement the Plaintiff offered to be awarded the agency contract which was accepted by the Defendant in the appointment letter dated 12th of March 2013 and which was admitted in evidence as exhibit P2. The letter gave the requirements to be complied with and the Plaintiff complied with the requirements. The Plaintiff started performing

her obligations under the contract. The contract was supposed to lapse on 21st June 2013 and as a condition precedent for granting a full distributorship contract, the Plaintiff was supposed to fulfil all conditions communicated by the Defendant by letter. The letter provided that upon satisfying the Defendant about the ability and capacity of the Plaintiff to deliver on the targets, the Defendant would then proceed to award it a distribution contract. It was only after satisfying the said requirements that the Defendant would award the Plaintiff a distribution agreement. The Plaintiff's Counsel argued that if the Plaintiff did any distribution for the Defendant after 21 June 2013 it implied that the Plaintiff substantially fulfilled the requirements contained in the letter of intent exhibit PE 8 or the Defendant by its conduct varied the above terms. The Plaintiff's Counsel contended that the Plaintiff's duty was to demonstrate that she continued doing distributorship for the Defendant after 21st June 2013. This is proved by PW1 Mr Herman Joseph Semakula, the managing director of the Plaintiff who demonstrates in his witness statement and paragraph 35 to 45 among others that the Defendant continued dealing with the Plaintiff as if there was a distribution contract that had been awarded and executed between the parties. These dealings are demonstrated by exhibit P 14, P 15, P16, P17, the agent and P6 and exhibit P 41 and show that there were dealings between the parties after 21st June 2013. The Plaintiff's argument is that the contract was renewed after 21st June 2013 and was open ended until 20th November 2013 when it was terminated.

The Plaintiff's Counsel further contended that because there was such a contract, on 20th November 2010 the Defendant purported to terminate the agreement as stipulated in exhibit P6. The reference of the exhibiting is the "Notice of Revocation of Appointment and Termination of Distribution Agreement". The termination was signed by the managing director of the Defendant on 20th November 2013. The Plaintiff's Counsel argues that one cannot terminate a contract or agreement that does not exist.

The Plaintiff's Counsel further conceded that it was difficult to tell with certainty the terms of the distribution agreement between the Plaintiff and the Defendant because it was not in writing. On that basis the agreement has to be construed from the conduct of the parties and the documents available. It is apparent that the Defendant honestly believed that there was a written agreement and therefore the termination letter refers to specific clauses/provisions in the contract that was allegedly breached by the Plaintiff. In the premises the Plaintiff's Counsel submitted that this

court ought to find that there was a contract between the Plaintiff and the Defendant even after 21st June 2013.

The second sub issue would be whether the Defendant is in breach of the distributorship agreement?

The agreement ought to be construed from the conduct of the parties and the scanty documentation available. While the contract between the parties was renewed, the Plaintiff's Counsel submitted that this was not in writing. The nature of the contract between the parties is that between the principal and agent. It is settled law that such a contract need not be in writing. The Plaintiff's Counsel relies on *The Law of Contract in East Africa* by R.W Hodgkin, Kenya Literature Bureau of 2007 at page 243. In a commercial company, unless there is provision contrary, contract is valid whether the contract is created by word of mouth or in writing.

The Plaintiff's Counsel further submitted that the appointment of the Plaintiff as an agent can safely be described as agent by estoppels or apparent authority. The law of contract in East Africa (supra) at page 224 describes estoppels or apparent authority as a type of relationship which arises when the principal acts in such a way as to lead other people to believe that the person acting as an agent is his appointed agent. Counsel further submitted that evidence shows that the Plaintiff kept on demanding for a written agreement. This is exhibit P 27. The minutes of the meeting of the Defendant when the Plaintiff dated 28th of May 2013 is evidence of a promise to avail the contract to the Plaintiff.

The Plaintiff's Counsel submitted that the Defendant is in breach of the contract firstly for failure to avail the Plaintiff with a formal contract. Failure to do so is contrary to the letter and spirit of annexure PE 8. Pursuant to the understanding between the parties the Defendant agreed to give the Plaintiff a contract mapping out all the outlets, stock levels, or coverage, warehouse according to exhibit P 27. Failure to do so was a breach of contract.

Secondly, the Plaintiff's Counsel submitted that the Defendant did not give the Plaintiff any notice or any hearing at all but hastened to terminate the distributorship. The Plaintiff was not given time by the Defendant to collect any outstanding dues, its empties or time to sale off the assets she ordered the Plaintiff to purchase. The Plaintiff's Counsel relies on the law of contract in East Africa (supra) for the proposition that the authority of an agent may come to an end either

by an act of either party or by operation of law. There may be a unilateral termination provided reasonable notice is given. The length of notice required depends on the type of relationship that existed between the parties.

There was no formal agreement that the court can look at in investigating the question of parties. The court has to consider the circumstances and determine what would amount to reasonable notice. According to the Plaintiff's Counsel considering the fact that the Defendant instructed the Plaintiff to buy vehicles, buy land for a bigger space and build a warehouse that is bigger, a notice period of five years would suffice. On the other hand the Plaintiff's Counsel submitted that in exhibit P6 and paragraph 2 thereof the Defendant terminated the distributorship with immediate effect. Furthermore, there were several undertakings by the Plaintiff's customers to repay the Plaintiff's money owing to the distributorship but upon determination of the distributorship the Plaintiff had no further authority to do any transaction related to the distributorship. The Plaintiff was required to communicate to all customers that it is no longer authorised to distribute products in the relevant territory. DW1 during cross-examination agreed that the Plaintiff was not supposed to do any work relating to the distributorship of the Defendant's products after termination.

The Plaintiff's Counsel further submitted that the Defendant capriciously or that the Plaintiff to acquire a bigger warehouse and to buy vehicles. This entailed the Plaintiff acquiring a bigger warehouse by purchasing more land. The Plaintiff obtained the above guaranteed to purchase the land but in a dramatic turn of events the Defendant terminated the agreement oblivious to the fact that the Plaintiff had invested a lot of money in the venture. The Plaintiff's Counsel relies on exhibit P9 which is an e-mail advising the Plaintiff to comply with the requirements to get a bigger space accessible to trailers. The Plaintiff relies on the advertisement inviting bidders on 14th January 2013. The Plaintiff responded to the advertisement sat an interview and passed according to exhibit P2. In that document the Defendant gave conditions to be fulfilled before issuing with a letter of intent. This included getting a warehouse with a capacity of 10,000 cases and several cartons of spirits. It was written that upon fulfilling the requirements as to capacity, the Plaintiff would be given a letter of intent. The letter of intent is exhibit P8 wherein the Plaintiff was appointed a distributor in Najjanankumbi territory. Counsel submitted that the Defendant was convinced by 12th March 2013 that the Plaintiff had fulfilled all the requisite

conditions and in particular had a warehouse. The agents of the Defendant and DHL inspected the Plaintiff's warehouse which was designed according to their specifications. The events that took place on 17th April 2013 is after one month and five days of demanding for a bigger warehouse. The Plaintiff was compelled to seek out the Defendant to obtain a bank guarantee according to exhibit P 27 for Uganda shillings 700,000,000/= so as to enable her to purchase the land so as to build a bigger warehouse. Architectural plans were duly procured according to exhibit P13 and receipts were issued accordingly. The Plaintiff suffered inconvenience and loss owing to the Defendant's caprice and breach of contract. Furthermore, it is submitted for the Plaintiff that the Plaintiff acquired delivery vans causing over Uganda shillings 300,000,000/= to meet the specifications for the Defendants business. All this investment became useless after termination of the Plaintiff's distributorship.

The Plaintiff's Counsel further submitted that there was failure by the Defendant to avail its personnel to carry out reconciliation after termination of the distributorship.

The Defendant by termination notice exhibit P6 undertook to carry out reconciliation of accounts between the parties. The Defendant referred to a term of the agreement that after termination, reconciliation was to be carried out so as to determine what owes to the other and thereafter the guarantee would be applied in case the Plaintiff owed money to the Defendant. Counsel prayed that the court strictly interprets the Defendant's letter. The question was whether the Defendant performed its part of the undertaking and availed personnel and resources to carry out reconciliation and 3rd December 2013? From the evidence the Defendant refused to carry out the reconciliation undertaken in the termination letter. PW1 testified that the Plaintiff expected the Defendant of the personnel and resources to carry out reconciliation. The sum total of the evidence of PW1 and PW2 is that the Defendant refused to carry out reconciliation as undertaken in the termination letter. The Plaintiff demanded the Defendant to comply with the reconciliation requirements but to no avail. By letter exhibit P3 dated 21st of November 2013, it can be demonstrated that the Defendant had no intention of carrying out the reconciliation. This is because on 21st November 2013 the Defendant called on the guarantee without the reconciliation. On the other hand the Plaintiff wrote to the managing director, Diamond Trust Bank requesting the bank not to honour the call on the guarantee prior to the reconciliation in exhibit P 16. Furthermore there was a back and forth correspondence by e-mail between the parties on the

question of reconciliation of accounts. This included request to pick the goods from the Plaintiff's store. The Plaintiff's Counsel relies on exhibit P10, exhibit P 29 and exhibit P 28 as well as P 34. The Plaintiff tried to ensure on more than one occasion that the goods are delivered to the Defendant but the Defendant remained uncooperative. This was a first step towards reconciliation.

Furthermore due to the failure to reconcile accounts the Defendant withdrew money over and above what she was entitled to.

The Plaintiff's Counsel also submitted on several other grounds which included failure to collect items upon termination of the contract. The Plaintiff was required to deliver up to the authorised representative said items namely or bottles and crates as well as any stock or product held as stock loan. The Plaintiff took the initiative of delivering them at the Defendant's premises but the Defendant refused to receive them. The Defendant finally collected items from the Plaintiff between 21st of June 2014 and 26th of June 2014. The contract was terminated on 20th November 2013. The Defendant was duty bound to immediately pick its items soon thereafter.

Counsel submitted that the Plaintiff called on the guarantee before the reconciliation of accounts when it was to be done after 3rd December 2013 or at least after final reconciliation of accounts between the parties.

Counsel submitted that by calling on the guarantee without a final reconciliation which has never been done to date, the Defendant acted in breach of contract.

The Plaintiff's Counsel also submitted that the Defendant erroneously withdrew money from the Plaintiff's account and made use of it to the detriment of the Plaintiff. Under this head the Plaintiff's Counsel submitted that the Defendant erroneously withdrew Uganda shillings 58,110,002/= from its account on 29th June 2013. Exhibit P 15 is a reconciliation certificate in which the parties agreed that the Defendant would refund his money. The agreement was reached on 30th July 2013. The money was only credited to the Plaintiff's account on 13th November 2013 and the Plaintiff seeks interest at the rate of 30% for the period the Defendant kept the money. The Defendant again erroneously withdrew Uganda shillings 90,000,000/= on 20th June 2013 from the account. This was in amounts of Uganda shillings 18,000,000/= withdrawn five times on 20th June 2013. The amount was purportedly deducted as a charge for

empties without any corresponding supply of liquid. There is no evidence that there was any agreement for there to be any deduction of monies for empties. In the premises, the Plaintiff seeks refund of the said amount of Uganda shillings 19,000,000/= plus interest of 30% and from 20th of June 2013 until payment in full.

The Defendant reduced the Plaintiff working capital by Uganda shillings 148,000,000/= which is almost one quarter of the Plaintiff's minimum capital requirements. The Plaintiff's Counsel submitted that by deducting Uganda shillings 58,110,002/= as well as Uganda shillings 90,000,000/= the Defendant encroached on the Plaintiffs minimum working capital. The Plaintiff's minimum working capital according to exhibits P2 and P3 is Uganda shillings 600,000,000/=. There is evidence that on 22nd March 2013 the Plaintiff deposited Uganda shillings 600,000,000/= on the Defendants account. The Defendant could not justify withdrawal of Uganda shillings 148,110,002/= from the Plaintiffs account. DW1 admitted that this amount was deducted and reflects about a quarter of the minimum capital requirements and therefore resulted into a serious effect on the company's performance. The deductions were not only breach of the contract between the parties but also caused loss and inconvenience to the Plaintiff.

The Plaintiff's Counsel further submitted that the Defendant did not bother to curb dumping in the territory of Najjanankumbi of the Defendant's products. The Defendant defined territories where each agent could operate. Each agent had a sole distribution franchise for his or her territory and is given expected targets periodically. The Plaintiff's expectation was that it was the duty of the Defendant to make sure that the parameters given to the Plaintiff are fulfilled. The Defendant failed to ensure that there was no interference by way of dumping by one agent in the territory of another agent. The issue was raised between the parties and the Defendant assured the Plaintiff that it will inform the Plaintiff when the company dumping is in its territory. By not curbing dumping in the Plaintiff's territory, the Plaintiff's sales were definitely affected.

Furthermore, the Plaintiff argues that the money accruing from sales is the Defendant's money. And the Plaintiff's case is that it was the Defendant's duty to provide security for her money. Money stolen belonged to the Defendant and the risk thereof belonged to the Defendant.

Finally the Plaintiff's Counsel submitted that the Defendant refused to carry out a final reconciliation. The Plaintiff's Counsel reiterated submissions that the Defendant never

cooperated in the reconciliation effort by availing her staff and resources to do so. Even after stock and property kept with the Plaintiff was collected, the Defendant refused to do the reconciliation so as to refund to the Plaintiff the value of the goods such as crates, empties and full goods. The Defendant argued that the goods had expired and it was the Plaintiff to shoulder the burden. This would not only defeat logic but the principle of fairness as both the empties and the stock were all taken by the Defendant. The failure to reconcile was not only in breach of contract per se but also amounted to unjust enrichment and borders on criminal misconduct. By refusing to carry out a final audit, the Defendant acted in breach of contract for which the Plaintiff would pray for general and exemplary damages.

In reply on the first issue of whether there was a distributorship contract between the Plaintiff and the Defendant and if so, whether the Defendant is in breach of the same; the Defendants Counsel agreed to certain facts.

It's an agreed fact that on 14th January 2013 at page 13 of the New Vision newspaper, the Defendant called for additional beer undisputed distributors in various areas including Najjanankumbi. The Plaintiff responded to this advertisement and upon consideration of the Plaintiff's proposal by letter of 6th of March 2013 the Plaintiff was notified that its proposal was successful. The Plaintiff was requested to put in place various requirements and upon satisfying the Defendant of its ability and capacity to obtain these requirements it will be issued with a letter of intent to begin operations. On 12th March 2013 the Defendant appointed the Plaintiff as the distributor in the Najjanankumbi area. By the letter of appointment the Plaintiff was requested to put clearly indicated requirements in place. The letter also specified that upon the Plaintiff's satisfying the Defendant of its ability and capacity to distribute and deliver on the targets set by the Defendant, the Defendant would proceed to award it a distribution contract. The Defendant's case is that the Plaintiff did not meet the targets set by the Defendant and by a letter dated 20th of November 2013 clearly marked "without prejudice", the relationship was terminated.

The Defendant's Counsel proposed to break the first issue into two sub issues namely whether there was a contract between the parties? Secondly, whether there was a breach of the contract?

The Defendants Counsel submitted that whereas there was a distributorship relationship, it did not amount to a contract. The question being if there was a contract when the terms of the contract were? What for instance were the conditions, the duration and the consideration? The Plaintiff conceded that it was very difficult to deal with certainty the terms of the distributorship agreement between the Plaintiff and the Defendant and this was not far from the truth because there was no contract between the Plaintiff and the Defendant. In light of the above submission the Defendant submitted that the letter of 12th of March 2013 was not more than an expression of an intention to enter into a contract and was not enforceable.

As far as the law is concerned, the Defendant's Counsel contended that an agreement to agree on something does not create a legally binding obligation to agree. A valid and enforceable contract must contain essential legal provisions, is not leave either undecided or to be determined at sometime in the future any aspect of such essential legal provisions. Where the essential elements of the contract at present, the document is not binding one is referred to by the courts as an agreement to agree or an agreement to negotiate or even a letter of intent and all cannot be enforced as contracts. The Defendant's Counsel relies on the case of *Foley versus Classique Coaches Ltd* [1934] 2 KB page 1 at pages 13 or [1934] All ER Report 88 at page 92 and the case of *May & Butcher Ltd versus R* (1934) 2 KB 17 for the proposition that an agreement to agree in the future is not a contract. There is no contract if a material term is neither settled nor implied by law and the document contains no machinery for ascertaining it. For there to be a contract there must be a concluded bargain. In *Bweya Steelworks vs. National Insurance Corporation* [1985] HCB 58 it was held by Odoki J (as he then was) that the parties must make their own contract and agree to the terms with sufficient certainty. In the case of *Mayanja Nkangi vs. National Housing Corporation* (1972) 1 ULR 37 it was held that an offer has to consist of a definite promise to be bound provided that certain specified terms were accepted. The Defendants Counsel also relied on several other cases for the same proposition these include *Courtney and Fairbairn Ltd vs. Tolaini Brothers (Hotels) Ltd* and another (1975) 1 All ER 716 and *Walford and others vs. Miles and another* [1992] 1 All ER. Among the holdings was that the reason why an agreement to negotiate, like an agreement to agree, is unenforceable is because it lacks the necessary certainty. Negotiations can be broken off at any time and the court cannot be

expected to decide whether, subjectively, a proper reason existed for the termination of negotiations. A party to negotiations is entitled to pursue his or her own interest.

With reference to the termination letter and the suggested implication that it shows the existence of a contract, the termination letter is marked "without prejudice" and the import of it is that the court cannot place any reliance on it. The Defendants Counsel submitted with reference to Sakar on Evidence, 11th edition pages 213 – 215 that a letter written by an attorney to the opposite party containing an offer to purchase without prejudice cannot be given in evidence. This principle was applied in Peter Kaggwa versus The New Vision Printing and Publication Corporation HCCS 244 of 2002. In the case of Katumba Ronald versus Kenya Airways Ltd Civil Appeal Number 9 of 2008, the Supreme Court of Uganda held inter alia that when a letter is written with the caption "without prejudice" the writer reserves whatever cause of action or defence may be available to him or her. In the premises it cannot be implied that a contract exists by virtue of the termination letter since it cannot be relied on by the court and is irrelevant to the proceedings.

Concerning the doctrine of estoppels barring the Defendant from asserting that there is no contract, the Defendants Counsel submitted that the Plaintiff cannot rely on the conduct of the Defendant found a cause of action in law. He submitted that estoppel is an equitable doctrine that only applies to promises and not representations of fact. For it to apply the promise or representation must be clear or unequivocal or precise and unambiguous. Secondly the equitable doctrine can only be used as a defence to the claim or as a shield and not as a basis for the claim or sword. The Plaintiff cannot succeed on the basis of the conduct of the Defendant on the ground that the Defendant is estopped from asserting that there was no agreement. According to the case of Central London Property Trust Ltd versus High Trees House Ltd (1947) 1 KB 130, it was held that the person seeking to take advantage of the doctrine must have altered his position, usually to his detriment, in reliance on the representation made by the other party.

The Defendant's Counsel further submitted that because there was no distributorship contract, the issue which arises is what the relationship between the Defendant and the Plaintiff is. He submitted that the Plaintiff was not different from an ordinary purchaser of the Defendant's products for resale by the Plaintiff in a specified region. The Plaintiff was pursuant to the

arrangements required to pay for any goods supplied to it by the Defendant and his goods would be paid for by debiting the collection account opened for that purpose. Upon payment and delivery of the goods, the risk in the goods would pass the Plaintiff. It would follow that for each consignment a separate contract would be established. He contended that every time the Defendant supplied the Plaintiff with products, the contract was entered into. In the premises issue number one ought to be answered in the negative because there was in fact no contract but a series of separate contracts entered into every time the Defendant supplied the Plaintiff with products.

In relation to the second sub issue as to whether there was a breach of contract, the Defendants Counsel relies on the submission that there was no contract and therefore a non – existent contract cannot be the basis of a breach.

On the issue of whether there was failure to avail the Plaintiff with a formal contract, the Defendant's Counsel submitted that the submission of the Plaintiff confirms the earlier submission that no contract exists. What is available is evidence of a promise to enter into a contract upon satisfying certain conditions. According to the Defendant's witness no contract was executed between the parties due to failure by the Plaintiff to meet set targets and this evidence was never controverted in cross examination or by adducing evidence to the contrary.

On the question of termination of the agreement without notice the Defendant reiterates submissions that no contract existed. If it had it would have provided for the mode of termination and therefore there was no requirement for notice. In any case the termination letter was marked "without prejudice" and cannot be relied on in a court of law.

On the submission that a period of five years would in the circumstances be reasonable notice, the Defendants Counsel maintains that the letter of 12th of March 2013 provides for three months duration with effect from 21st March 2013 lasting up to 21 June 2013. There is no other document produced in evidence to suggest that the distributorship would last for five years or for an indefinite period. PW1 testified that he spoke to some distributors and he was told that a distributorship agreement would ordinarily last for five years but no distributor was ever called to testify and the testimony is hearsay evidence and therefore inadmissible. With regard to the submission that the Plaintiff was requested to buy vehicles and a bigger space to build a

warehouse, there is no evidence on record that the Plaintiff bought any vehicles. Secondly vehicles were bought by one Herman Semakula and not the Plaintiff. Secondly the Defendant did not order the Plaintiff to buy land or build a bigger warehouse.

On the question of whether the Defendant capriciously ordered the Plaintiff to acquire a bigger warehouse and buy cars. The Defendants Counsel reiterated the above submissions and further submitted that these can be referred to as a condition precedent to the execution of the distributorship agreement but not as a breach. In any case no car was ever purchased by the Plaintiff.

The contention that the Plaintiff was ordered to buy land arises out of an erroneous interpretation of a series of e-mails dated 10th of May 2015 from the Defendant exhibit P9. One of them read "kindly take note of the concerns of our partners DHL and addressed immediately". Secondly it was suggested to the Plaintiff to engage the team to add some murram and stones. With reference to further e-mails Counsel submitted that none of the e-mails directed the Plaintiff to acquire land or build a bigger warehouse. In any case the Defendant maintains that the land was ever acquired by the Plaintiff pursuant to the misinterpretation of the e-mails.

In relation to the sale agreement for the purchase of land between Serwanga Stephen as the vendor and Mr Semakula Herman Joseph as the purchaser, the agreement does not directly or remotely make reference to the Plaintiff. PW1 Mr Herman Semakula is the majority shareholder and managing director in the Plaintiff Company. However the Plaintiff is a separate legal entity from its shareholders. Property purchased by Mr Semakula cannot be said to belong to the Plaintiff.

With reference to the Plaintiff's obtaining a bank guarantee of Uganda shillings 700,000,000/= in terms of exhibit P12, the guarantee is in favour of the Defendant issued by Diamond Trust Bank. It undertakes to indemnify the Defendant in the amount of Uganda shillings 700,000,000/= in the event of breach of conditions of the contract by the Plaintiff. The guarantee makes no reference to the purchase of land by the Plaintiff. With reference to a meeting between the parties was deliberations are contained in the minutes exhibit P 27 of 28th of may 2013 it was written that the Plaintiff needed Uganda shillings 700,000,000/= as funds. The purpose of the funds was not

indicated. There is therefore no evidence to prove that the guarantee was obtained for purposes of purchasing land or buildings or a bigger warehouse.

In support of the allegation that the Plaintiff purchased vehicles is a letter dated 14th of March 2013 exhibit P7 from diamond trust bank to Tata Uganda limited. However it makes reference to the purchase by Mr Herman Semakula of three trucks. Regarding the pro forma invoice in the names of the Plaintiff exhibit PE eight, the receipt from that TATA Uganda limited was also issued in the names of Semakula, (referred to exhibit P9). The conclusion is that the trucks belong to Mr Herman Semakula and not the Plaintiff.

In relation to an alleged breach of contract by failure to provide personnel to carry out reconciliations, the Defendants Counsel submitted that there was no contract providing for such an obligation to carry out reconciliation. In any case the Plaintiff relies on the termination letter which was written "without prejudice".

In relation to the calling on the guarantee prior to reconciliation, the bank guarantee in favour of the Defendant was to settle on demand, in the event of the Plaintiff being in default of its obligations under the distributorship. It was within the Defendant's right to call on the guarantee on the ground that the Plaintiff is in default of its obligations. The guarantee makes no reference to reconciliation. In any case the letter referring to reconciliation was issued "without prejudice" and cannot be relied upon. Furthermore, the fact that the Plaintiff owed the Defendant money was not denied by the Plaintiff's witnesses. In total the Defendant was entitled to call on the guarantee prior to the reconciliation and this would not amount to breach of contract.

Furthermore, the guarantee was obtained against security provided by two other sister companies namely Kisubi High School Ltd and St Josephs College Ltd. The Plaintiff's case is that upon the Defendant calling on the guarantee, the bank forced the Plaintiff to sell its land and businesses because it intended to foreclose. However, no document was tendered in court making the guarantee to Kisubi High School and St Joseph College Ltd. Secondly no demand letter issued by the bank demanding for payment of monies owed to it was tendered into court. Thirdly, no statutory demands under the Mortgage Act such as a notice of default and notice of sale were tendered in court.

Furthermore with reference to the wording of the agreement concerning the land, the vendor's Mr Herman Semakula and St Joseph College School and Kisubi high school were indebted to diamond trust bank Ltd and the obligation was not in any way linked to the Plaintiff. By letter dated 25th of June 2013 the bank indicated that Kisubi high school had an outstanding loan of Uganda shillings 4,400,000,000/=. Therefore Kisubi high school was indebted to the bank in its own right and the debt was in no way related to the Plaintiff. There is no evidence to support the contention of the Plaintiff that the call on the guarantee led to its being forced to dispose of the assets of its sister companies.

Regarding erroneous withdrawal of Uganda shillings 58,110,002/= as well as Uganda shillings 90,000,000/=: the explanation of the Defendant is as follows. In the relation to Uganda shillings 58,110,002/= the amount was debited off the collection account and after a reconciliation it was refunded to the Plaintiff. Secondly, the Plaintiff did not raise the issue at the time of reconciliation and is estopped from reopening the issue. Thirdly regarding Uganda shillings 90,000,000/=: the money was debited with the knowledge and consent of the Plaintiff from the collection account held by the Defendant as security for empties. Until when the empties were returned, the Defendant was entitled to retain the amount as security.

With reference to the reduction of the Plaintiff's working capital by Uganda shillings 148,000,000/= the issue has already been submitted on above.

The Defendant's Counsel further replied on the issue of not bothering to curb dumping in the territory of Najjanankumbi. Counsel submitted that the Defendant tendered for additional distributors and there is no agreement to evidence that the Plaintiff was the sole distributor. In the premises the question of dumping in the territory of Najjanankumbi cannot arise. Furthermore in the minutes exhibit P 27 of a meeting held on the 25th of May 2013 between the Plaintiff and the Defendant the issue of dumping by Rem distributors was discussed and it was agreed that the Plaintiff would report any claims by them to the police. There is no police report in relation to the dumping allegation and there is no evidence of dumping on the court record. The e-mail referring to dumping should have been backed up by additional evidence such as a police complaint.

As to this submission relating to the failure of the Defendant to provide security for her money, there is no contractual obligation, on the Defendant to provide security in any agreement. Secondly, the Plaintiff's business is run by its managers and not the Defendant and the handling duty to provide security for that business. Receipts issued for beer sales were issued by the Plaintiff and not the Defendant and it is a clear indication that the Defendant was not involved in the day to day accounts of the Plaintiff's business. The Defendant was the duty bound to provide security. Furthermore, the Plaintiff was running a hotel prior to taking on the distributorship business which business subsists to date. In exhibit P 24 there is a police report for the theft of cash and it is not indicated anywhere whether the stolen cash was from the distributorship business or the hotel business.

Finally on the allegation of failure to carry out the final reconciliation, the Plaintiff's Counsel alleged breach which was addressed earlier. Every consideration was conducted and it led to the recording of the consent judgment in the suit. The consent provides inter alia that: "by consent of the Plaintiff and Defendant and having conducted a joint reconciliation of the stock load and empties (bottles and crates) the subject of the suit, it is hereby agreed to have the suit partially settled in the following terms". In the premises cannot be said that there was no final reconciliation.

In rejoinder on the first issue the Plaintiff's Counsel wrote an additional 10 pages of submissions.

On whether there was a contract he reiterated submissions that the Defendant is estopped from contesting that there was a contract between her and the Plaintiff on the basis of the evidence referred to in the submissions. With regard to the authorities of *Foley Classique Coaches, May vs. Butcher*, *Bweya Steel Works Ltd* as well as *Mayanja Nkangi vs. National Housing and Construction Corporation* (supra) quoted by the Defendant, each case has to be decided on its own peculiar facts. The Plaintiff's Counsel submitted that the facts of the case before the court are clearly distinguishable from that the above cases where there was no further act between the parties in furtherance of the contract than the agreement to agree. In the particular circumstances of this case the parties went ahead to perform what had hitherto been an intended contract. The terms were certain, the arrangement was clear, goods were delivered to the Plaintiff by the Defendant for distribution, and monies were banked and were withdrawn on the Plaintiffs

collection account with the Defendant. It will be strange to submit that there was no contractual relationship between the parties. The Plaintiff was an agent of the Defendant after 20th November 2013 and DW1 conceded that he made the mistake in paragraph 3 of his witness statement that the Plaintiff was never appointed an agent of the Defendant. The evidence of DW1 should put to rest the issue as to whether there was a contract between the parties. Counsel further referred the court to the evidence on record that I will consider.

In relation to use of the word "without prejudice" contained in the termination letter, the termination letter was admitted in evidence by the Defendant as the document by which the contract was terminated. Secondly, not every correspondence which has the words "without prejudice" is unenforceable. In the case of Filimon Kaggwa versus Luweero Town Council HCCS No 405 of 2002 and Peter Kaggwa vs. the New Vision which was cited therein the intention of the letter is to be considered before the court can decide whether to rely on it or not. He submitted that the purpose of the use of the words "without prejudice" can be discerned from exhibit P6 which in the last sentence provides that the actions taken should not in any way prejudice the rights of the Defendant to seek any remedy available for any breach of the contractual terms.

With reference to the failure to avail the Plaintiff with a formal contract, the Defendant's submissions depend on the resolution of the case of whether there is a contract or not. Secondly, the Defendant's Counsel failed to distinguish between a contract which is written or formal and an oral contract. The court should find that the Defendant had an obligation to avail the Plaintiff with a formal contract and that explains why in exhibit P 27 the Defendant undertakes to give the Plaintiff a contract mapping all the outlets, stock levels, route, coverage, warehouse etc. Moreover the termination letter quotes clause is of an agreement which is not in existence. The effect of the failure to avail the Plaintiff with a formal contract is far-reaching. The court should only investigate the question as to whether the Defendant failed to avail a formal contract or not.

Regarding the submissions on purporting to terminate the agreement without notice, the question is whether the Defendant gave the Plaintiff notice of termination or not. Counsel reiterated submissions that the Defendant failed to review the Plaintiff notice of termination which is contrary to the law.

On whether there was capricious ordering of the Plaintiff to acquire a bigger warehouse and to buy vehicles, the Plaintiff's Counsel reiterated earlier submissions. With reference to exhibit P9 the Defendant's agent wrote to the Plaintiff as the Plaintiff take note of the consignments of the apartment DHL and to address immediately. The instructions are very clear and unambiguous. Inspection of the warehouse and the concerns are contained in the evidence. The Plaintiff was instructed to address the concerns of the Defendant among others by putting up a bigger warehouse.

The Plaintiff's Counsel made a rejoinder on the matter of failure of the Defendant to avail persons to carry out reconciliation. He submitted that the Defendant's reply rests on the proposition that there was no agreement providing that the Defendant had an obligation to carry out reconciliation. The Plaintiff's Counsel reiterated earlier submissions that there was failure to collect the Defendants property upon termination and calling upon a guarantee prior to reconciliation of accounts. The arguments of the Defendant's Counsel are incompatible with the evidence adduced. The question is whether the Defendant collected its items upon termination of the distributorship? And the answer is clearly that they did after the filing of the suit and pursuant to court annexed mediation proceedings. Secondly, the Defendant called on the guarantee prior to reconciliation.

As to the argument that there was no evidence linking the guarantee to Kisubi high school and St Joseph's high school, the evidence speaks for itself. It followed that if the Defendant called on the guarantee, the property of the sister companies used to secure the guarantee would become liable.

On the question of erroneously withdrawing money from the Plaintiff's account and making use of it to the detriment of the Plaintiff, the Plaintiff's case is that the Defendant erroneously withdrew the money from her account and used it for over five months. The Plaintiff was denied the right to use the money and prays for interest for the money use thereof. This applies to the Uganda shillings 58,110,002/=. With regard to the Uganda shillings 90,000,000/= it was the arrangement that the Defendant would deliver the goods and thereafter deduct money commensurate to the delivery upon returning of the bottles. The Defendant would credit the account with money worth the returned empties. While the Defendant agrees that 90,000,000/=

was deducted, it does claim it as a deduction for empties and there is no corresponding evidence to show that the Plaintiff took delivery of empties worth Uganda shillings 90,000,000/= and that the empties were never returned. The amount of money was withdrawn and never returned. Furthermore by depositing Uganda shillings 600,000,000/= on the operational account, the Defendant had secured all payments for the transaction. This was reinforced by a bank guarantee and there was no need for further security. The burden of proving that the Plaintiff took empties worth Uganda shillings 90,000,000/= shifted to the Defendant who failed to lead any evidence that the Plaintiff is in possession of bottles worth that amount.

The Plaintiff's Counsel further reiterated submissions on the issue of reduction of the Plaintiff's working capital by Uganda shillings 148,000,000/= being a sum total of Uganda shillings 90,000,000/= and Uganda shillings 58,110,002/=. The money was not deducted with the consent of the Plaintiff.

With regard to not bothering to stop dumping, the arguments of the Defendants Counsel are simplistic because each agent is given exclusive rights in the territory awarded to them that is why amounts are attached i.e. in exhibit P8. Secondly, there is no evidence that dumping is a criminal offence for it to be reported to the police and there was no necessity of a police report.

With regard to failure to carry out final reconciliation, the Defendant failed to answer to the Plaintiffs concerned in this regard. The Defendant called on the guarantee and withdrew all money and the Plaintiff's operational account before carrying out the final reconciliation to establish what owes the other. The only reconciliation is in respect of Uganda shillings 58,110,002/= exhibit P 15. Secondly the reconciliation referred to in the consent judgment concerns the stock loan and empties it is not a full reconciliation.

Resolution of issue number one

Whether there was a distributorship contract between the Plaintiff and the Defendant, and if so, whether the Defendant is in breach of the same?

I have carefully considered the first issue which has been broken into two parts. The first component is whether there was a distribution contract between the Plaintiff and the Defendant? The second component is whether if so, the Defendant is in breach of the same? The issue was

framed in such a way that the resolution of the second component depends on the resolution of the first component of the issue as to whether there existed a distribution contract between the Plaintiff and the Defendant.

On the first account the Defendant's Counsel submitted that there was an invitation to agree to a contract but no contract was executed between the parties. The Plaintiff's Counsel on the other hand submitted that there was a contract and this could be demonstrated from the evidence and the correspondence or even from the conduct of the parties.

I have carefully considered the submissions of both parties and the question of whether there is a contract between any two parties depends on whether certain ingredients of a contract exists in the material relationship that is being considered.

Starting with the agreed facts, Counsels of the parties pursuant to Order 12 rule 1 of the Civil Procedure Rules filed a joint scheduling memorandum in which certain basic facts are agreed. I will start with these basic facts.

It is agreed that the Defendant is a manufacturer of beer and other liquor products. Secondly sometime in 2013 the Defendant ran an advert calling for expressions of interest from parties interested in being awarded dealership/agency for the distribution of their products in the Najjanankumbi territory in Kampala. Thirdly the Plaintiff responded to the advert by expressing its interest. Fourthly by a letter dated 12th of March 2013 the Defendant appointed the Plaintiff as the distributor in the said area for the period 21st of March 2013 - 21st of June 2013. Lastly it is agreed that on the 20th of November 2013 the Defendant terminated the distributorship/agency of the Plaintiff. In the joint scheduling memorandum endorsed by both Counsels of the parties, about 40 points of disagreement were set out. Most of these points deal with the issue of reconciliation of accounts and who is liable for what. Where there is no contract, there is nothing for the court to enforce.

It is apparent that the parties are in agreement that there was a relationship of a commercial nature between the parties which involved distributorship of the Defendant's products by the Plaintiff. The contention made by the Defendant seems to deal with whether the main contract which was meant to be a long-term contract was ever executed between the parties. Secondly the Defendant proposes that because there was no written contract, then there could be no breach of

contract. It was further argued one way or other that even though a letter of termination exhibit P6 was written "without prejudice" and that it referred to termination of the contract, it could not be relied upon to infer a contract between the parties or it is evidence that there was a contract between the parties.

I will start with how the relationship commenced. The documents were admitted by consent of the parties in the joint scheduling memorandum. It is agreed that the Defendant advertised the position of distributorship in exhibit P1. Exhibit P1 is an advertisement of Monday, January 14, 2013 in the New Vision newspaper at page 30. In it the Defendant advertised under the caption: "AN EXCITING OPPORTUNITY TO PARTNER WITH UGANDA BREWERIES LTD". The advertisement inter alia provided that the Defendant has opportunities for additional beer and spirits distributors in the following regions written as category B. It included Najjanankumbi in Kampala. The requirements for the applicants to fulfil were as follows:

1. Ability to raise appropriate working capital up to Uganda shillings 600,000,000/= for category B. Uganda shillings 400,000,000/= for category C.
2. Ability to avail distribution vehicles with adequate carrying capacity as stipulated by EABL.
3. Appropriately located warehouse facility to accommodate a minimum of 16,000 cases of category B and 8000 cases for category C.
4. Entrepreneurs with commitment to dedicate themselves to this business in a hands-on manner for the foreseeable future.
5. Entrepreneurs with passion for high-performance and growth.
6. Entrepreneurs who are dedicated to high customer service standards and strong business relationship.
7. Entrepreneurs with strong sales of general business expertise, especially in distribution.

Interested persons were requested to apply with specified requirements stipulated and the application was supposed to be marked "application for beer & spirited distributors".

In exhibit P2 the Sales Director of the Defendant in a letter dated 6th of March 2013 wrote to the Plaintiff on the subject of 'Distribution of Uganda Breweries Ltd Products – Najjanankumbi Territory'. He wrote that following the application of the Plaintiff as an interested party in

distribution of their products in the territory and following subsequent interviews thereafter the Plaintiff was informed that it was successful. The Plaintiff was requested to put in place the following:

- Working capital to the tune of Uganda shillings 600,000,000/=
- Warehousing capacity of 10,000 cases of beer and 1000 cartons of spirits.
- Three side loading trucks of capacity 450 crates each.
- A three - wheeler or spirits van for spirits.
- A warehouse manager, an accountant, van salesman, six loaders.
- Open a collection account with our bankers. This is the account through which you will be paying UBL.

It was written that upon satisfying the Defendant about the ability and capacity to obtain the above written items, the Plaintiff would be given a letter of intent to begin operations.

It is clear from the letter written that the Plaintiff had passed upon making the application pursuant to the advertisement. Secondly, exhibit P2 clearly provides that the Plaintiff had to show the ability and capacity to obtain the requirements. When the Plaintiff demonstrated to the Defendant that it had ability and capacity, the Defendant would give it a letter of intent.

On 12th March 2013 the Defendant wrote to the Plaintiff a letter admitted in evidence as exhibit P8. It was on the same subject of: "DISTRIBUTION OF UGANDA BREWERIES LTD PRODUCTS – NAJJANANKUMBI TERRITORY." The letter writes as follows:

"Following your successful bid for the above territory, Uganda Breweries Ltd (UBL) is pleased to inform you that you have been appointed as a distributor in Najjanankumbi (Map attached).

UBL therefore request you to put in place the following:

- Working capital of Uganda shillings 600,000,000/= cash to be transferred to our account.
- Warehousing capacity of 5,000 cases of beer and 1000 cartons of spirits with access to prime mover trucks.

- Three side loading trucks of capacity 450 crates each with the provisions for spirits loading.
- A Spirits van with a minimum capacity of 400 cartons.
- A warehouse manager, an accountant, 3 van salesman, 6 loaders.
- Open a collection account with Barclays bank, Standard Chartered Bank or Stanbic bank. This is the account through which you will be paying UBL.

This letter of intent shall be deemed to have commenced on 21st March 2013, shall govern the relations between you and UBL and shall subsist until 21st of June 2013.

You are required to maintain the following as a bare minimum: ..."

Upon satisfying UBL on your ability and capacity to distribute and deliver your targets, UBL would then proceed to award you a distribution contract. We look forward to a fruitful and mutually beneficial trading relationship with you. ..."

In the letter the requirements for the maintenance of the bare minimum stock was 5000 crates of beer and 1000 cartons of spirits. The monthly target was 30,000 crates of beer and 5000 cartons of spirits.

It is apparent in the letter of intent that there was a limited period envisaged. This could be called a trial period. Secondly the letter of intent reduced the capacity of the warehouse to 5000 cases from 10,000 cases of beer. Thirdly, the three wheeled vehicle was removed and replaced with a spirit van.

Obviously the question that arises is whether we are dealing with two categories of contracts. The letter of intent clearly provides that the trial or probationary period would last up to 21st June 2013. The wording of the letter of intent is very explicit. It provides that upon the Plaintiff fulfilling their targets, the Defendant would award it a distribution contract. Was the Plaintiff awarded the distribution contract? In other words there is no controversy about the period prior to 21st June 2013. Within that period the Plaintiff was required to meet its monthly targets. Apparently the parties continued in the relationship beyond 21 June 2013.

The crux of the Plaintiff's grievance is that the Defendant communicated to the Plaintiff that it should get a bigger place for a warehouse/store and compound for easy negotiating and loading

of trucks according to exhibit P9. Exhibit P9 is an e-mail dated 10th of May 2013 and provides inter alia "kindly take note of the concerns of our partner DHL and address immediately". The concerns of DHL seemed to be on the attached e-mail adduced by the Plaintiff dated 17th of April 2013. The location of the warehouse was on Entebbe road. They noted that the warehouse access from the road was not okay and would cause traffic jam on Entebbe road for trailers when turning from the main road. Secondly the warehouse capacity was small. Thirdly the security was not okay and that the place was not secured with the perimeter fence and no guard was there when they visited. Fourthly the yard was not okay because it was a soft ground and it was doubtful whether work could go on if it rains. They noted that the trailer could not deliver to the warehouse. The premises could be used as a selling point but not a main delivery point. Subsequently the Defendant wrote that the Plaintiff should take note of the concerns of their partner DHL and address immediately. The Plaintiff's assertion is that it addressed the concerns of the Defendant with a view to signing the main contract.

The second point of grievance is that the Plaintiff alleged that there were some people dumping in their territory. It is alleged that a company called REM distributors was dumping products in the Plaintiff's territory of Najjanankumbi.

Notwithstanding the above points, the Defendant communicated in a letter exhibit P6 and dated 20th of November 2013 a notice of revocation of appointment and determination of distribution agreement. The letter was written to the managing director of the Plaintiff and is captioned "without prejudice". The Defendant wrote inter alia that further to extensive interaction and communication between the parties it was apparent that the Plaintiff was not fulfilling its distribution mandate in the territory assigned to the Plaintiff. This included failure to pay the price for the brands by 15th November 2013. Secondly there was continued failure to achieve the performance targets set for the territory for a period of more than six consecutive months. There was failure to maintain minimum stock as well as poor and inconsistent route coverage resulting in poor distribution.

I have carefully considered the testimony of PW1 and PW2 on the question of whether the Plaintiff was able to achieve its monthly targets set by the Defendant in the letter of intent. First of all no additional written evidence has been given about monthly targets other than that

contained in the letter of intent. I have considered exhibit P2 as modified by exhibit P8 which appointed the Plaintiff a distribution agent for a period commencing 21st of March 2013 up to 21st of June 2013. The written testimony of PW1 Mr Herman Semakula does not specify whether the Plaintiff fulfilled its monthly targets. It only contains information about fulfilling the requirements such as to capital and capacity. There is no mention of monthly targets. Instead there is a reference to the Defendant demanding a bigger warehouse and the question of dumping. With reference to the testimony of PW2 Mr Charles Kigozi, certain requirements were fulfilled by the Plaintiff and the distribution arrangement commenced. However the Defendant's agents communicated to the Plaintiff their request for the Plaintiff to get a bigger place. Secondly there was a question of robbery of Uganda shillings 150,000,000/= from the sales of the products. Thirdly the question of withdrawal of Uganda shillings 90,000,000/= and Uganda shillings 58,110,002/= from the company's account is raised. It is alleged that the actions of the Defendant affected the performance of the Plaintiff. There was underperformance in stocking, sales and customer's management. This is explicit in paragraph 23 of the written testimony of Charles Kigozi filed on court record on 6th June 2015. It is contended that the dumping issue affected the performance of the Plaintiff and the Plaintiff brought this to the attention of the Defendant's agents and they were forced to sell goods on credit so as to attract customers in their territory that were being attracted by the products produced by those who are dumping. The Plaintiff alleges that there were further arrangements with the Defendant which included boosting capital from Uganda shillings 600,000,000/= Uganda shillings 700,000,000/= to be able to distribute on credit without affecting the required minimum security.

The Plaintiff demanded for a written contract from the Defendant but in vain.

I have further considered the pleadings of the parties. In paragraph 4 (f) of the plaint the Plaintiff claims to have fulfilled the probationary requirements. On the other hand the Defendant alleged in paragraphs 3 (v) – (viii) that the Plaintiff failed to meet the probationary requirements in the letter of intent hence the letter of termination. In paragraph 5 of the reply the Plaintiff claims to have complied. The issue of whether the Plaintiff fulfilled its monthly minimum targets is therefore a matter in controversy. It is further in controversy because it is the basis of the termination by the Defendant. PW1 testified that upon complying with the requirements in March 2013 the Defendants agents came to inspect the premises and were satisfied with the

initial requirements. On 12th March the Plaintiff was issued a letter of intent exhibit PE 8. On 22nd March the Plaintiff deposited Uganda shillings 600,000,000/= and started distribution on 24th March 2013. However the Plaintiff encountered dumping of the Defendant's products from other agents and brought this to the attention of the Defendant. There is no clear evidence from PW1 about the monthly targets the Plaintiff was required to fulfil.

I have further considered the testimony in cross examination of PW2 Mr Charles Kigozi and it does not specifically indicate whether the Plaintiff fulfilled its monthly targets.

It was DW1 Mr Kimaka David who made reference to monthly targets. In his written testimony paragraph 7 thereof he testified that the Defendant gave the Plaintiff targets to distribute 30,000 crates of beer and 5000 cartons of spirits per month. Secondly the Plaintiff was also required to maintain 5000 crates of beer and 1000 cartons of spirits as a standard stock load. He testified that since the appointment of the Plaintiff, it failed to remit the stock load requirements and distribution targets and therefore the Defendant exercised its rights not to enter into any substantive agreement with the Plaintiff. He was extensively cross examined about the matter and testified that in April 2013 the Plaintiff sold 17,080 crates of beer. In October the Plaintiff sold 22,674 crates of beer. These figures are all below the 30,000 crates per month target.

On the question whether there was a contract between the Plaintiff and the Defendant the answer is obvious. There was no main written contract between the Plaintiff and the Defendant. There was a contract in which the Plaintiff was an agent of the Defendant by appointment under terms contained in exhibit P8. Exhibit P8 stipulated that the duration of the distributorship contract would last until 21st of June 2013. This is a trial period of three months. Exhibit P8 also contained a promise of the Defendant that if the Plaintiff fulfilled the terms of the contract, in the trial period of three months it would be awarded a written distributorship contract. Exhibit PE 8 expressly stipulated that upon satisfying the Defendant about the ability and capacity to distribute and deliver on the targets, the Defendant would proceed to award the distribution contract to the Plaintiff. No such written distributorship contract was ever executed between the parties after the 21st of June 2013 and the Defendant by a letter written in November 2013 terminated the relationship.

From the above scenario, the issue was poorly framed because there was a contract between the parties. The question is which and what kind of contract? There is a distributorship contract or agency and partly the terms of that contract are stipulated in exhibit PE 8. Exhibit PE 8 envisaged that the contract would come to an end on 21st June 2013 and thereafter if the Defendant was satisfied with the performance of the Plaintiff, it would award the Plaintiff a distributorship contract.

After 21st June 2013, the parties continued with the distributorship and the question is whether the Plaintiff was still under probation. What were the terms of this arrangement? I have considered the submissions of the Plaintiff in relation to exhibit P6 which is the letter of termination dated 20th of November 2013 revoking or terminating the distributorship agreement. The Defendant's letter which was written by the managing director of the Defendant purported to rely on certain clauses of the contract. By inference this seems to be the usual terms of the contract given to distributors. The matter was clarified by the Plaintiff's managing director who testified that no written agreement was ever executed between the parties and they kept on demanding from the Defendant a written agreement. The relationship between the parties after 21st June 2013 has to be implied from the conduct of the parties. There is no contest that there were no express terms under this arrangement and the Plaintiff could not prove the terms of a contract.

The Plaintiff would like the court to imply that the contract was meant to last for a minimum of five years given the demands of the Defendant of the Plaintiff which the Plaintiff fulfilled. These included investment in infrastructure and capital such as the purchase of trucks. I have considered exhibit PE 8 which is the letter of intent requiring the Plaintiff to have in place certain capital arrangements. These included working capital of Uganda shillings 600,000,000/=, warehousing capacity of 5000 cases of beer and 1000 cartons of spirits. Three side loading trucks with a capacity of 450 crates each. The Plaintiff also testified that the Defendant demanded that the Plaintiff acquires a bigger warehouse. The contention is that by representation, the Plaintiff was going to get a distribution contract lasting several years.

Any contract is an agreement between two or more persons which must have consensus ad idem. There is therefore an intermediate position after 21st June 2013 whose import has to be

considered. Did it amount to the envisaged contract? Unlike cases for the supply of goods on tender in this case the parties continued with the distributorship contract. A strict interpretation of exhibit P8 which is the letter of intent shows that the trial period ended on the 21st of June 2016. There was no other letter showing that this period was extended. The trial period ended. Can it be deemed to have been extended? On the other hand exhibit P8 envisaged that the Defendant would award a contract of distributorship to the Plaintiff if it is satisfied with the Plaintiff's performance. The action required was that of the Defendant.

The emphasis of the Plaintiff is that the Defendant induced it in consideration for a future contract to be executed to invest its money after appointing it a distributor for the Najjanankumbi territory.

I have duly reviewed the authorities cited by the Defendant's Counsel in support of the proposition that there was no contract between the parties.

The Defendant's Counsel relied on the case of **Foley vs. Classique [1934] All E.R. Rep. 88**. In that case there was in effect an agreement for sale subject to a condition that the Defendant would enter into a supplementary agreement with the Plaintiff for the sale of petrol to them at a price to be agreed upon. The Defendants Counsel relied on the holding of Greer L.J that one cannot add to a contract an implied term inconsistent with the express terms of the contract. The decision cannot apply to this suit because the Defendant's proposition is that there is no contract and not that a term should be implied. Secondly, Counsel relied on the holding of Maugham L.J that unless material terms of a contract have been previously agreed upon, there is no binding obligation. That an agreement to agree in the future is not a contract nor is there a contract if a material term is neither settled nor implied by law and the document contains no machinery for determining the question.

In this case it cannot be said that the material terms of the contract have not been agreed upon. The Plaintiff was only on the trial period. In fact if the Plaintiff performed to the satisfaction of the Defendant it was envisaged that the Plaintiff would continue performing for a longer period than the agreed three months contained in exhibit P8. The specific terms of the distributorship had in fact been offered by the Defendant and accepted by the Plaintiff. The issue that was left

was whether the Plaintiff would perform to their satisfaction and thereby get the full contract. The above authority is therefore inapplicable to the circumstances of this case.

I have also considered the case of **May and Butcher Ltd versus Regem [1929] All E.R. Rep 679**. In that case it was held that because the price for certain items had not been agreed upon between the parties, there was no binding or concluded contract and because there was a stipulation in the agreement that the price should be agreed, it could not be implied that the price was to be a reasonable price. The Defendant's Counsel relied on the holding of Viscount Dunedin for the proposition that the law of contract is that a contract must be a concluded contract, and a concluded contract is one which settles everything that is necessary to be settled and that is nothing still to be settled by agreement between the parties. Furthermore the contract may leave something still to be determined, but then the determination must be a determination which does not depend on the agreement between the parties.

I have carefully considered the holding. With reference to the facts of this case, the question is whether there was a concluded contract stipulating the terms. First of all I agree with the Plaintiff's Counsel that the Plaintiff had been appointed an agent of the Defendant. What was left was to determine whether the Plaintiff would be engaged for a further period than the three months trial period. The price of the goods were known or agreed upon. The capacity which the Plaintiff was to have in order to be a distributor was stipulated by the Defendant and this is what the Plaintiff was required to comply with. The Plaintiff was on a trial period of three months to determine whether it would be able to meet the targets set by the Defendant. The Defendant had passed the Plaintiff under criteria which had been set for distributors. Furthermore the Defendant required the Plaintiff to put in place certain requirements which the Plaintiff did. What was left was whether the Plaintiff would be able to perform to the satisfaction of the Defendant. This was not a question of the terms of the agreement but rather whether the Plaintiff would be engaged for a further term in a written agreement. Last but not least the Plaintiff was indeed engaged for a period beyond that stipulated in exhibit PE 8 which is the letter of intent. For that reason the above authority is distinguishable. Similarly the case of **Bweya Steel Works Ltd versus National Insurance Corporation [1985] HCB 58** is distinguishable. The case concerned a tenancy agreement which had been fixed for three years and which subsequently expired after three years and was not renewed. The Plaintiff continued in occupation of the premises with the

knowledge and consent of the Defendant. The issue was that the Plaintiff had been in the premises for 15 years and the question was whether the offer for a 15 year tenancy made by the general manager was enforceable. It was held that the Plaintiff failed to prove that the promise was made. That even if the promise was made; there was no contract between the Plaintiff and the Defendant where the terms of the contract were spelt out. In other words in the above case the original tenancy of three years was deemed to have continued. But the subsequent offer could not be proved and there were no terms agreed upon. In fact it was held that it was a bare promise not supported by any sufficient consideration and was not binding. It was further held that the landlord was right to terminate the periodic tenancy upon giving the tenant proper notice. What was the periodic tenancy? It was the tenancy which had been subsisting between the parties and which had already been agreed upon. The authority cannot therefore be applied to the facts and circumstances of this suit. I have also considered the case of **Mayanja Nkangi versus National Housing Corporation Uganda Law Reports [1972] 38**. The case concerned the legal status of an offer letter to the Plaintiff which pledged property from the government of Uganda. It was held that the letter was an invitation to treat. Secondly whether there was a contract at all could not be determined by the court as there were no terms of contract and therefore there was no contract in existence.

I have further considered the other cases cited by the Defendant and found that they do not apply to the facts and circumstances of this case because in this suit the Defendant made a definite offer inviting the Plaintiff and other persons in the newspaper advertisement giving clear requirements to indicate their interest in the distributorship contract. The Plaintiff applied and was interviewed. The Defendant followed this up with an invitation for the Plaintiff to set in place certain requirements which if the Plaintiff satisfied, the Plaintiff would be appointed a distributor. The Plaintiff satisfied the Defendant and subsequently the Defendant gave the Plaintiff a letter of intent. What is even more crucial is that the Plaintiff was required to deposit some money with the Defendant. Secondly the Plaintiff was required to access or make available three trucks and storage space as well as to put in place certain personnel. The Plaintiff did as required. The Defendant appointed the Plaintiff as a distributor for a specified period on clear terms and gave the Plaintiff targets to achieve within a definite period of probation of three months. It was stipulated that if the Plaintiff fulfilled the terms namely the targets of the

Defendant to the satisfaction of the Defendant, the Defendant would award the contract to the Plaintiff. After the expiry of three months, the parties continued with the distributorship arrangement but no formal contract was executed between the parties. The question is whether a contract would be implied?

According to **Halsbury's laws of England volume 9** (1) 4th edition (reissue) paragraph 601:

“Whilst it is probably impossible to give one absolute and universally correct definition of a contract, the most commonly accepted definition is a promise or a set of promises which the law will enforce. The expression "contract" may be used to describe (1) the series of promises or acts themselves constituting the contract; (2) the document or documents constituting or evidencing the series of promises or acts, or their performance; (3) the legal relations resulting from that series.”

To constitute a valid contract there must be two or more separate and definite parties to the contract. Those parties must be in agreement in that they must be consensus on specific matters. They must intend to create legal relations in the sense that the promise of each side are to be enforceable simply because they are contractual promises and lastly the promises of each side must be supported by consideration or by some other factor which the law considers sufficient (see Halsbury's laws of England paragraph 603 supra).

The only conclusion I can come to is that there was a contract between the parties which was terminated by the Defendant by a letter dated 20th of November 2013 and admitted in evidence as exhibit P6. I will further elaborate on this conclusion.

On the second leg of the issue as to whether there was a breach of contract? I do not agree with the Defendant's submission that there was no contract and therefore there could be no breach of contract.

I have already established that the Plaintiff did not meet its monthly requirements or targets which had been set up by the Defendant under the contract. However the Defendant also required the Plaintiff to buy three trucks. There are some other aspects of the relationship between the parties which included deduction of monies by the Defendant contrary to the agreed relationship between the parties. I will come to that at a later stage. The most crucial submission and

evidence which the Plaintiff led concerns being made to take a loan in order to improve on the warehousing arrangement. I do not agree with the approach of the Plaintiff's Counsel in dealing with the issue. The Plaintiff did not meet monthly targets set by the express term of the appointment but the relationship continued nonetheless after the 21st of June 2013. While the Defendant on the face may be taken to be entitled to terminate the contract, the vexing question would be terminating what? In other words the Defendant was entitled by the first appointment to refuse to award a contract to the Plaintiff after the 21st of June 2013.

If the Plaintiff's distributorship was lawfully terminated with or without sufficient notice what would still remain is how to handle or mitigate loss. Was the Plaintiff required to leave the distributorship with its investment in vain? Or would the Defendant shoulder for instance the costs of the trucks that the Plaintiff was required to purchase or make available? Would the trucks be handed over to the Defendant? How was the contract supposed to be brought to a mutually acceptable termination?

The Plaintiff submitted that the contract between the parties had been renewed after 21st June 2013. The begging question on those premises is on what terms? A contract can only be deemed to have continued on previous terms already stipulated unless otherwise modified. I however agree with the authorities that an agent can be appointed by a mere letter and the operating terms of the appointment can be established from the letter of intent and conduct of the parties.

As a question of fact there is no doubt that the Plaintiff was appointed as an agent of the Defendant. The first appointment was for a period running from March 2013 up to June 2013. This was a period of three months. It was a trial period considered to be a prelude to a long-term agency. The long-term agency was supposed to be executed in writing. None was executed and the parties continued with the terms in the first offer letter. This was for an additional period of five months running from the 21st of June 2013 up to 20th November 2013. The Defendant purported to terminate the distributorship for failure to meet monthly targets. The Plaintiff claims not to know the terms of the written contract because there was none. If this line of argument is to be accepted, then what were the usual practices? No standard contract of distributorship granted by the Defendant was ever adduced in evidence. The burden was on the Plaintiff to show that the termination for failure to meet the requisite targets was in breach of usual terms and

conditions. Even if the usual terms and conditions are deemed to have been adopted by the parties and by the Defendant quoting clause 5.1.4, 5.1.7, and 5.1.10 of such an agreement, the court is not privy to the specific terms quoted. Even if I proceeded from the premises that the Plaintiff had by conduct of the parties been awarded the contract, what were the usual terms? Was the Plaintiff entitled to one months notice? Was the Plaintiff liable to immediate termination of the distributorship upon breach of any fundamental term? Was failure to reach the monthly targets a fundamental term?

Surprisingly both the Plaintiff and the Defendant purported to rely on clause 6 of an agreement for reconciliation of accounts after termination of the distributorship. In the absence of a standard agreement adduced by the Plaintiff in contracts of a similar nature the court will have to import relevant statutory provisions to the relationship and do the best it can in the circumstances.

Firstly the Plaintiff averred and it is a question of fact that the Defendant never awarded the Plaintiff a written contract. It follows that the continuation of the contract between the parties is deemed to have proceeded from the known terms contained in the Defendants offer exhibit P8. It was up to the Plaintiff to satisfy the Defendant about its competence. It follows that it was incumbent upon the Plaintiff to prove that it acted to the satisfaction of the Defendant particularly on the matter of monthly targets as contained in exhibit P8. The court can also examine the correspondence between the parties and assess the conduct of the parties.

Starting with the statutory provisions, the relationship between the Plaintiff and the Defendant is governed by the Contracts Act, 2010, namely Act 7 of 2010. The Contracts Act 2010 was in force by March 2013 when the parties entered into an agency relationship. The relationship is not governed by the common law. Section 14 of the Judicature Act cap 13 laws of Uganda and subsection 2 thereof provides that subject to the Constitution and the Judicature Act, the jurisdiction of the High Court shall be exercised in conformity with the written law. It is only when the written law does not extend or apply that jurisdiction will be exercised in conformity with the common law and doctrines of equity. If the common law or doctrines of equity do not apply then the High Court exercises its jurisdiction in conformity with established and current custom or usage. From the facts and circumstances of this case the statutory provisions are applicable and the common law cited in the considered authorities does not apply. None of the

Counsels relied on the statutory provisions which deal with the creation of an agency relationship, the terms of the relationship between a principal and agent and the law on the termination of an agency.

Under section 118 of the Contracts Act 2010 an agent means a person employed by a principal to do any act for the principal or to represent the principle in dealing with a third person. Secondly the principal means the person who employs an agent to do any act for him or her or to represent him or her in dealing with a third person. Section 121 of the Contracts Act provides that consideration is not necessary to create an agency. Termination of agency is provided for by section 135 of the Contracts Act 2010. An agency is terminated where the principal revokes his or her authority. It is also terminated where the agent renounces the business of the agency. Thirdly it is terminated where the business of the agency is completed. It is terminated when the purpose of the agency is frustrated. Other grounds which bring the agency to a close include the death of the principal or the agent or where the principal or the agent becomes of unsound mind. Last but not least the agency may be terminated where the principal or agent is insolvent under the law. The agency may also be terminated by agreement of the principal and agent.

What happened in this case?

The facts in this suit are that there was an invitation to treat by advertisement in the New Vision Newspaper exhibit P1 in which the Defendant invited interested persons to express interest in distributorship of its products namely beer and spirits. The Defendant captioned the advertisement with the words: "An Exciting Opportunity to Partner with Uganda Breweries Ltd". It advertised the position of additional beer and spirit distributors. The Defendant invited applications and vetted the interested persons who applied. The Defendant then offered the distributorship on specific terms to be fulfilled by the Plaintiff in exhibit P2. The Plaintiff accepted the terms and the Defendant made another offer for a distributorship to be followed by a full distributorship contract if the terms of the offer are adhered to. The wording of the letter clearly shows that the Plaintiff had been appointed a distributor in Najjanankumbi territory. The Plaintiff accepted and started fulfilling the terms and was appointed a distributor on temporary terms and the distributorship was subject to confirming the Plaintiff on more permanent terms. The Plaintiff was not confirmed in writing on permanent or more lasting terms but instead the

Defendant terminated the contract on the ground of failure to fulfil the terms and conditions set by it for fulfilment by the Plaintiff. Which contract or agency did the Defendant terminate?

On the 28th of May 2013 in a meeting between the Plaintiff and the Defendant's officers and evidenced by exhibit P9 the Plaintiff complained that there was a distributor of the Defendant who was interfering with other people's territories. Secondly it was maintained that for the Plaintiff to ensure enough stock at all times and to supply every outlet in the area, it needed Uganda shillings 700,000,000/=. It was also part of the minutes that the Plaintiff would be given a draft contract mapping out all outlets, stock levels, good coverage, warehouse etc. In the premises I believe that the parties intended to execute a written contract spelling out certain terms.

On the 7th of May 2013 the Plaintiff procured a bank guarantee, guaranteeing the performance of the contract between it and the Defendant. The guarantee document provides that the Plaintiff has a contract with the Defendant for the purchase of various products. The guarantee was for a period of 12 months from the date of issue and was to expire on the 30th of May 2014. It provided that Diamond Trust Bank Uganda Limited guaranteed to the Defendant to promptly pay on the Defendant's demand declaring the Plaintiff to be in default of its obligations under the contract without further proof or conditions or argument such amounts owed as shall be demanded in writing and up to a maximum of Uganda shillings 700,000,000/=. What contract was guaranteed is the begging question. One of the grievances of the Plaintiff is that the Defendant called on this guarantee before the reconciliation of accounts. For that reason the letter calling on the guarantee is relevant. This letter was admitted in evidence as exhibit P3 and is dated 21st of November 2013 just one day after the date of the letter terminating the distributorship. It provided inter alia that the bank guaranteed to the Defendant up to a maximum of Uganda shillings 700,000,000/= and that by November 2013 the Plaintiff owed the Defendant Uganda shillings 464,596,656/=. The Defendant called on the guarantee but did not give the grounds for doing so. Exhibit P3 therefore has to be read in conjunction with the performance guarantee document exhibit P12. It provides in paragraph 2 thereof that Diamond Trust Bank guaranteed to promptly pay the Defendant on demand declaring the buyer to be in default of its obligations under the contract without further proof or conditions or cavil any amount of a maximum of Uganda shillings 700,000,000/=. The Defendant had to be clear that the Plaintiff

was in default of its obligations under the contract. The only inference to be drawn from exhibit P3 which is the demand of the Defendant is that the Plaintiff owed the sum of money demanded and was therefore in default under the contract.

Last but not least the Defendant terminated the distributorship by letter dated 20th of November 2013 and the first paragraph thereof proves that the Plaintiff was an agent of the Defendant. Part of the first paragraph of the letter provides as follows: "it has become apparent that your company is not fulfilling its distribution mandate in the territory assigned to you, predominant amongst which are..." The letter went ahead to revoke the appointment of the Plaintiff as a distributor for the Defendant's brands and to terminate the distributorship agreement between the Plaintiff and the Defendant with immediate effect. While it purports to refer to certain clauses of the contract, it has been demonstrated above that there was no written contract between the parties. However the existence of the contract was also the subject matter of a guarantee for Uganda shillings 700,000,000/= by Diamond Trust Bank Ltd.

Section 136 of the Contracts Act 2010 provides as follows:

"Where the agent has an interest in the property which forms the subject matter of an agency, the agency shall not, in the absence of an express contract, be terminated to the prejudice of that interest."

Secondly section 138 of the Contracts Act provides that the principal shall not revoke the authority given to an agent after the authority is partly exercised, with respect of acts and obligations that arise from acts already done under the agency. Thirdly section 139 of the Contracts Act 2010 provides that where the agency is revoked or renounced without reasonable cause or contrary to an express or implied contract that the agency shall continue for a given period of time, the principal or the agent as the case may be shall compensate the other party for the revocation or renunciation of the agency. Fourthly section 140 of the Contracts Act 2010 provides that a party who revokes or renounces an agency shall give reasonable notice to the other party and make good any damage suffered.

The question to be considered is whether the termination with immediate effect of the agency of the Plaintiff was to the prejudice of the interest that the Plaintiff had in the agency.

On the basis of the above statutory provisions and the evidence as well as the submissions of Counsel the following conclusions can be made:

1. The Defendant after 21st of June 2013 continued with the Plaintiff's agency and engaged the Plaintiff as a distributor of its products in category B for spirits and beer in the Najjanankumbi territory.
2. The Plaintiff had committed its resources to carry out the distributorship agency.
3. No written appointment was communicated to the Plaintiff.
4. The Defendant terminated the distributorship for failure of the Plaintiff to meet its sales targets and to maintain adequate stock levels.
5. There was a contract of distributorship for an indefinite period after 21st June 2013.
6. The agency was terminated with immediate effect on 20th of November 2013.
7. No reconciliation of accounts was carried out before the Defendant made a call on the guarantee procured by the Plaintiff from Diamond Trust Bank Ltd and in favour of the Defendant.
8. Subsequent facts revealed that the Defendant owed the Plaintiff some monies and therefore the demand on the guarantee was to the prejudice of the Defendant.
9. It followed that the demand on the guarantee was without establishing the liability of the Plaintiff for the sum of Uganda shillings 464,596,656/=. This was in breach of the law.
10. Other grounds of breach may be considered.

I have further considered the written submissions of both Counsels which I have summarised at the beginning of his judgment.

The Plaintiff submitted that it was a breach of contract for the Defendant not to affiliate with the formal contract. I do not agree. In the minutes of the parties it was agreed that the Defendant would avail the Plaintiff with the draft contract containing specified matters. That contract could be availed at any time since none was provided for. Secondly the Plaintiff had not met the targets fixed by the Defendant. I therefore find that there was no breach by failure to avail the Plaintiff with the written contract.

Both Counsels submitted on the failure to terminate the agreement without notice. As noted above exhibit P6 which is the termination of the distributorship later clearly provides that the

termination was with immediate effect. This was contrary to section 140 of the Contracts Act 2010. Section 140 provides as follows:

"140. Notice of revocation or renunciation.

A party who revokes or renounces an agency shall give reasonable notice to the other party to the agency and make good any damages suffered."

The Plaintiff was never given any notice and therefore there was no reasonable notice. The agency was terminated with immediate effect on 20th November 2013 which was also the letter of termination and the Defendant immediately wrote a letter on 21st November 2013 according to guarantee from the Plaintiff's bankers. There was therefore breach of law by failure to give reasonable notice contrary to section 140 of the Contracts Act 2010.

Capriciously ordering the Plaintiff to acquire a bigger warehouse and buying cars.

Both Counsels submitted on whether the Defendant was capricious in giving certain requirements to fulfil as part of its qualification for the distributorship. I have considered the submissions as well as the evidence which have been summarised at the beginning of this judgment. I do not agree with the Plaintiff's submissions that there was caprice involved in the arrangement. No evidence was led to show that the Defendant was motivated by malice or ill will. In any case the letter of termination provided that the parties' would meet and reconcile their accounts. Furthermore the law permits the Plaintiff to be compensated for any losses suffered while doing the business of the principal. I will further elaborate on this issue from the statutory provisions when considering whether the Plaintiff is entitled to any remedies or damages. What needs to be noted at this stage is quite simply that the Defendant laid out its requirements and the Plaintiff agreed to fulfil the requirements for the purpose of carrying out the distributorship arrangement. The question then should be what remedies should the Plaintiff be entitled to?

The above notwithstanding the crux of the submission of the Plaintiff flows from the premises that it was compelled to obtain bigger premises and therefore acquire more land for purposes of the warehousing arrangement. The Plaintiff relies on an e-mail exhibit P9. Exhibit P9 is an e-mail dated 10th of May 2013 and provides inter alia: "Kindly take note of the concerns of our

partner the HDL and addressed immediately." On the other hand exhibit D43 which is a credit application to Diamond Trust Bank is a request for the issuance of a bid guarantee on behalf of the Plaintiff for Uganda shillings 700,000,000/=. It is dated 7th of May 2013. In the application the security offered included first legal charge over plot 5785 Kyadondo block 273 Wakiso district registered in the names of Herman Joseph Semakula. Secondly land comprised in private Mailo property on plot 7650 Mengo Busiro block 383. The application was made on the 7th of May 2013.

The question is whether the loan was compelled by the Defendant's demand in exhibit P9. As I have noted above exhibit P9 is dated 10th of May 2013. How come the application was made on the 7th of May 2013? Secondly in exhibit P12 the guarantee was issued on the 7th of May 2013. Last but not least according to exhibit P 27 the Plaintiff and the Defendant held a meeting on the 28th of May 2013. This was after the issuance of the guarantee by Diamond Trust Bank. In the minutes it is written that the Plaintiff needs Uganda shillings 700,000,000/=. The minutes read as if the Uganda shillings 700,000,000/= was required in future. Finally the performance bond exhibit P 16 dated 7th of May 2013 guarantees the contract of distributorship. Paragraph 1 of the guarantee document reads as follows:

"WHEREAS SEROY AIRPORT HOTEL, (hereinafter referred to as "the Buyer") has a contract with you for the purchase of various products (hereinafter referred to as "the contract") AND WHEREAS the Buyer is required to furnish you with the BANK GUARANTEE from a recognised bank as security for the Buyer's performance of its obligations under the contract."

The guarantee document specifically guarantees the performance of the contract for the purchase of various products. In the premises the guarantee was meant for the performance of the distributorship contract and cannot be said to have been requested for capriciously. It was meant to guarantee the performance of the Plaintiff or the Plaintiff's obligations under the distributorship contract.

On the question of failure to provide personnel to carry out reconciliations, I have carefully considered the testimony of PW1 and PW2. The question of reconciliation of the accounts of both parties is protracted. It shall be dealt with when considering the issue of remedies. Secondly

it is a question of fact as to when the Defendant collected its items or property implying that the Plaintiff had to keep some of the property. In other words the failure per se, if any, can be considered in terms of the inconveniences that the Plaintiff underwent pursuant to the termination of the dealership. I must add that a lot of the claims in the suit ought to have been sent for a reconciliation of accounts by auditors in order to establish what owes to whom in the circumstances. I therefore decline to conclude the issue of whether the Defendant was in breach of any obligation to avail personnel to carry out reconciliation. Reconciliation has to be carried out by both parties and preferably by a third party where there is disagreement by both parties on how to carry out. Moreover there has been a partial reconciliation of the accounts between the parties which resulted into a partial consent judgment.

The Plaintiff's Counsel also submitted on failure of the Defendant to collect its items upon termination. This is an issue that is best handled when dealing with remedies inclusive of the issue of reconciliation of accounts. Just like the previous issue, it touches on the inconvenience caused to the Plaintiff, if any, by failure to collect items of time. I would therefore not deal with it as an issue under the first issue of breach of contract but would deal with it as part of the remedies prayed for by the Plaintiff.

With reference to calling on the guarantee prematurely, I agree with the Plaintiff and my reasons for agreeing with the Plaintiff are written above. The guarantee was called on without establishing a reconciliation effort what owes. After the filing of the suit and after some partial reconciliation effort, it was established that the Defendant owed the Plaintiff. The effect of the pre-mature calling on the guarantee will be considered on the question of remedies.

The Plaintiff alleged that the Defendant erroneously withdrew money from its account to the detriment of the Plaintiff and thereby seeks payment of interest on the sum of Uganda shillings 58,130,002/= up to the time when it was refunded. The Plaintiff also claims erroneous deduction of Uganda shillings 90,000,000/=. I must note that there was a partial reconciliation of accounts and the Plaintiff claims interest up to the time when this money was refunded by the Defendant. The question of interest claimed would be considered on its merits on the basis of the assertion that money was erroneously taken away from the business of the Plaintiff and later refunded under the doctrine of deprivation of money without justifiable cause and whether interest should

be charged for the period of that deprivation. While the Defendant contests deprivation by deducting Uganda shillings 90,000,000/=, the issue of deduction of Uganda shillings 90,000,000/= is tied up with the issue of reconciliation of accounts and whether empties were returned to the Defendant. It should not be considered as an isolated issue and the question of empties would be addressed.

The Plaintiff Counsel further submitted on the reduction of its capital by Uganda shillings 148,000,000/=. This is an obligation of the claim that Uganda shillings 90,000,000/= and Uganda shillings 58,110,002/= was deducted by the Defendant from the Plaintiffs account without its consent. This issue just put in another way the previous issue of whether money was erroneously withdrawn from the Plaintiffs account and whether this led to damages. In any case what the effect of a reduction in the capital, if any, on the Plaintiff's performance is a matter that can be considered on the question of damages.

The Plaintiff's Counsel further submitted on failure to provide security for her money. I have not found any contractual provision for the Defendant to provide security for the Plaintiff's money. The Plaintiff deposited the money for operation of an account for the Defendant's products. As to whether some of this money was erroneously withdrawn would be considered when dealing with the question of damages.

The Plaintiff's Counsel submitted on the failure of the Defendant to carry out final reconciliation. This issue is stayed together with the submission on failure to provide personnel to carry out reconciliation. As a matter of fact the reconciliation or partial reconciliation was done after the filing of the suit and resulted into a partial judgment by consent of the parties.

Finally the Plaintiff submitted that from the evidence the Defendant refused to do the final reconciliation in respect of the last delivery on ground that the beer had expired and this included empties and claims which the Defendant took back as the unresolved question of risk. This explains the partial judgment pursuant to reconciliation. The question is whether the Plaintiff should shoulder the costs occasioned by the quantum of goods which had expired when the Defendant failed to pick some of the stock which had been delivered to the Plaintiff prior to the termination of the contract. The Plaintiff seeks general and exemplary damages under this head and the holding that the Defendant is guilty of the above breaches.

The Defendant's contention on the other hand was that it is not true that there was no final reconciliation effort. As far as the Defendant is concerned, the reconciliation which resulted into a partial judgment was a final reconciliation.

Starting with the wording of the consent judgment executed on 5th September 2013 the preamble provides that by consent of the Plaintiff and the Defendant and having conducted a plaintiff reconciliation of the stock load and empties (vocals and reads) the subject of the suit, it was agreed that the suit is perfectly settled. The wording of the consent judgment does not explicitly resolve all issues. First of all in paragraph 1 thereof the Plaintiff was awarded the following sums of money: Uganda shillings 59,732,133.85/= in cash held by the Defendant on account after allocating out all invoices. Secondly Uganda shillings 84,339,674.39/= being the value of the liquid stock returned by the Plaintiff to the Defendant. Thirdly Uganda shillings 4,442,262/= being the balance of monies held on the Barclays bank collection account. Lastly Uganda shillings 95,271,100/= being the value of empties (crates and bottles) returned by the Plaintiff to the Defendant.

The wording of the consent shows that in the first instance as far as liquid stock is concerned is money for the liquid stock returned by the Plaintiff to the Defendant. The question is whether there was any other liquid stock which had not been returned by the Plaintiff at the time of the reconciliation. Secondly money was paid for empties (crates and bottles) returned by the Plaintiff to the Defendant. Where there any other crates and bottles (empties) which had not been returned at this stage at which reconciliation had been done? Finally the consent judgment provided that aspects of the dispute not covered shall be remitted to the court for adjudication. No specific issues were agreed to be remitted to the court and the matter is at large. As far as further reconciliation is concerned, what is left is a question of fact and belongs to the issue of further reconciliation of accounts.

Issue number 2: Whether the Defendant is indebted to the Plaintiff in the sums claimed?

The Plaintiff's Counsel submitted that the Defendant is not indebted on account of the Plaintiff's money that the Defendant withdrew from the Plaintiff's account without supplying the goods or without a final reconciliation. However the Plaintiff's Counsel proposed to handle the issue

together with the one on remedies. Similarly the Defendants Counsel submitted that the Defendant was not indebted as claimed. Issue number 2 and 4 shall be dealt with together.

Issue number 3: Whether the risks in the goods held by the Plaintiff passed to the Defendant upon termination of the contract?

The Plaintiff's Counsel relies on the law of agency for the proposition that title passes with the property in the goods and furthermore that the risk passes simultaneously with title/property. According to PS Atiyah "The Sale of Goods" ninth edition the issue depends on whether the person who disposes of the goods is an agent of the principal (relationship of principal and agent) or whether there is a relationship buyer and seller. The Plaintiff's Counsel submitted that the Plaintiff was an agent of the Defendant and whatever he was doing was done on behalf of the Defendant. The Plaintiff never acquired title to the goods and therefore the attendant risks in the goods such as empties. The Plaintiff merely created contracts between the Defendant and third parties such as the owners who are the final users of the Defendant's products. In those circumstances the property in the goods remained with the Defendant. The Plaintiff only had a duty of care to handle the goods diligently. The Plaintiff also relies on the termination letter exhibit P6 which provides that the Plaintiff was to return the goods upon termination of the distributorship. Counsel further submitted that from the evidence of PW1 it was an agreement and by usage and conduct of the parties that whenever goods expired, it would be returned to the Defendant who would replace them with unexpired goods. In the premises Counsel prayed that the court considers the evidence and concludes that at all material times the Plaintiff did not assume the risk in the goods which was supposed to be delivered back to the Defendant. In fact the Defendant finally picked all the empties, crates, full goods and every other item according to exhibit P 37.

On the other hand the Defendants Counsel submitted that pursuant to section 21 of the Sale of Goods Act cap 82 risks prima facie passes with the property unless otherwise agreed. The provision provides that risks remains with the seller until the property in the goods is transferred to the buyer. Counsel also relies on the case of **Aya Investments (U) Ltd versus DAMCO logistics (U) Ltd HCMA No 15 of 2015 arising from HCCS No. 5 of 2015** that under Ugandan law risk in the goods passes on to the buyer upon the seller putting the goods on the ship or

handing them over to the carrier. Counsel also relies on **Halsbury's laws of England volume 41 in paragraphs 719** that in a contract for the sale of specific or ascertained goods, property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. However prima facie property passes immediately unless a different intention appears where there is an unconditional contract for the sale of specific goods.

In rejoinder the Plaintiff reiterated submissions that the contract between the parties was that of between principal and agent and not a buyer and a seller. He submitted that there was nothing that suggested that the Plaintiff bought goods from the Defendant. Moreover DW1 testified that the Plaintiff is an agent of the Defendant. Counsel contended that a distributor is not a buyer of goods but an agent. In the premises the provisions of section 21 of the Sale of Goods Act cap 82 is not material neither is the case of AYA Investments (U) Ltd (supra).

I have carefully considered the submissions of both Counsel and as earlier noted, both parties have not deemed it fit to quote the provisions of the Contracts Act 2010 which is the applicable law. That notwithstanding, a quick review of the evidence is called for. In exhibit P1 the Defendant advertised for distributors of its products. It required the distributors of beers and spirits to have certain requirements which were spelt out. In the requirement number 7 the Defendant advertised for entrepreneurs with strong sales or general business expertise, especially in distribution. Upon the resolution of issue number one, it was determined that the Plaintiff is an agent of the Defendant. I also agree that in exhibit P6 the Defendant acknowledged that it was revoking the appointment of the Plaintiff as the distributor of the goods of the Defendant and terminating distribution agreement with immediate effect. In the letter it was written that the Plaintiff was no longer authorised to distribute products within the territory. Had the Plaintiff been a customer or consumer of the product, it would have merely bought the goods for consumption in its business. In the premises I agree with the submissions of the Plaintiff's Counsel that the Plaintiff was an agent of the Defendant.

That being the case it was the duty of the Plaintiff under section 145 (1) of the Contracts Act 2010 to conduct the business of the Defendant according to the directions given by the Defendant or according to the usage and custom is prevailing in the business of distributorship. Secondly, the agent had a duty to render proper accounts to the principal on demand under

section 147 of the Contracts Act 2010. In fact in this particular case for the initial three months commencing on 21st March 2013 and by virtue of exhibit PE 8 the Defendant instructed the Plaintiff to meet certain monthly targets in the sale of its products. This was supposed to be to the satisfaction of the Defendant. Secondly, it was stipulated that upon the Defendant being satisfied with the performance of the Plaintiff, it would grant the Plaintiff a distribution contract. Upon the termination of the contract the goods were returned to the Defendant. It follows that the Plaintiff was an agent acting for gain under the arrangement set up by the Defendant. Notwithstanding section 136 of the Contracts Act stipulates that where an agent has an interest in the property which formed the subject matter of an agency, the agency shall not in the absence of an express contract be terminated to the prejudice of that interest. In other words the fact that the agent has an interest in the property does not imply that the property belongs to the agent. The agent may have a lien on the property. However the property belongs to the principal and both parties agree that this was not a sale agreement in respect of the particular goods to be distributed by the Plaintiff. The sale of the goods was conducted by the Plaintiff on behalf of the Defendant and money was remitted to the Defendant.

In the premises and in the absence of any allegation of negligence or recklessness the part of the Plaintiff, the risk in the goods remained in the Defendant.

Issue No 4: What remedies are available to the parties?

The Plaintiff sought several declarations and subsequently consequential orders. Secondly, the Plaintiff seeks specific order for the Defendant to avail her officers for reconciliation of stock and to take delivery of beers, cases, empties and other goods that remained in the Plaintiff's stores at the time of termination. Furthermore for an order to pay Uganda shillings 441,601,604/= illegally deducted from the Plaintiffs account with Diamond Trust Bank. The Plaintiff seeks interest on several claims and an order for the payment of general damages for negligence, misrepresentation, economic and commercial losses suffered, recklessness owing to the Defendant's misconduct. Furthermore, the Plaintiff seeks special damages and lastly payment of exemplary damages for alleged high handedness of the Defendant and for costs of the suit to be provided for. The submissions of the Defendant comprises of 10 pages and more pages in rejoinder.

On the other hand, the Defendant's Counsel opposed the several declarations sought by the Plaintiff. The Defendant opposed the consequential orders flowing from the declarations and the claim for damages. In the final analysis the Defendant sought for dismissal of the suit with costs.

I have carefully considered the written submissions of both Counsels on the question of the remedies sought by the Plaintiff and I do not need to repeat the submissions.

The Plaintiff seeks several declarations. Jurisdiction to grant declarations is expressed under Order 2 rule 9 of the Civil Procedure Rules which provides that:

"9. Declaratory judgment.

No suit shall be open to objection on the ground that a merely declaratory judgment or order is sought by the suit, and the court may make binding declarations of right whether any consequential relief is or could be claimed or not."

A suit may be filed merely to obtain a declaratory judgment whether a consequential relief is claimed in it or not (See **Ellis vs. Duke of Bedford (1899) 1 Ch 494 by Lindley MR at pages 514-515**) in that case the court interpreted Order 25 rule 5 of the rules which is in *pari materia* with the Ugandan order 2 rule 9 quoted above. Lindley M.R. interpreted the effect of the provision at pages 514 when he said:

"Moreover now, under the judicature act, actions can be brought merely to declare rights, and this is an innovation of a very important kind."

In the case of **Guaranty Trust Company of New York versus Hannay and Company Limited [1915] 2 KB 536 at page 562 Pickford LJ** held that:

"...the effect of the rule is to give general power to make a declaration whether there be a cause of action or not, and at the instance of any party who is interested in the subject matter of the declaration".

In **Halsbury's laws of England 3rd edition volume 22 at paragraph 1610** it is written that under the rule, the court is authorised to make binding declarations of right whether any consequential relief is or could be claimed or not.

The rights sought to be declared must have been determined by the court. In this case several issues have been determined and the declaratory orders sought would be granted or refused on the basis of that.

The Plaintiff seeks a declaration that by purporting to terminate the distributorship agreement, the Defendant entered into with the Plaintiff in the manner adopted by the Defendant, the Defendant acted in breach of contract.

I have carefully considered the resolution of issue one and there is no need to grant such a declaration. The prayer for declaratory order is therefore declined.

Secondly, the Plaintiff seeks a declaration that by not passing on a formal dealership agreement to the Plaintiff, the Defendant acted negligently, recklessly and in a manner that would entitle the Plaintiff to recover damages for any loss that ensued owing to the said negligence and recklessness of the Defendant.

I have carefully considered the declaratory judgment sought above. The declaratory order cannot be granted because the facts surrounding termination of the distributorship does not warrant such an order.

Thirdly, the Plaintiff seeks a declaration that by deducting Uganda shillings 58,110,002/= from the Plaintiffs account and using it for five months, the Defendant caused the Plaintiff economic loss.

I have carefully considered the prayer. The Plaintiff only prays for interest from the time the above money was deducted to the time when it was refunded. A declaration issues that the Plaintiff was deprived of the above sum of money until when it was refunded and for a period of five months only. The rest of the prayers would be considered in the prayer for interest generally.

Fourthly, the Plaintiff seeks a declaration that by purporting to terminate the contract and deducting money from the Plaintiff's account which is Uganda shillings 381,103,167/= over and above what the Defendant would be entitled to after reconciliation, the Defendant acted in breach of contract and illegally, deducted and used the Plaintiffs money.

The declaration sought by the Plaintiff should follow from a reconciliation of accounts. The final resolution of who owes money to the other ought to await final reconciliation of accounts between the parties and one of the prayers of the Plaintiff is for final reconciliation of accounts. Moreover under this heading the Plaintiff claims that the Defendant took Uganda shillings 441,163,867/= over and above what it was entitled to.

The Plaintiff further seeks a declaration that in the circumstances, the purported termination of a contract by the Plaintiff was illegal, unfounded, negligent and recklessly done.

I have carefully considered the submissions of both Counsel and have come to the conclusion that having held that no reasonable notice was given to the Plaintiff for termination of the distributorship, that is sufficient. The holding does not challenge the right of the Defendant to terminate the distributorship contract upon giving sufficient notice to the Plaintiff. The rest of the declarations sought under this heading as to whether the termination was negligent or reckless or unfounded cannot be granted because the basis of the claim of the Plaintiff can flow from other premises.

The Plaintiff further seeks a declaration that the Defendant was only entitled to call on the bank guarantee after reconciling the books of accounts with the Plaintiff and after considering and offsetting the Defendants stock and goods at the Plaintiff's warehouse.

The contention is that the calling on of the guarantee was in breach of contract. The Defendant's Counsel submitted that the calling on of the guarantee was based on failure of the Plaintiff to honour its obligations.

I agree with the submissions of the Defendant's Counsel because the nature of the guarantee was that it guaranteed the performance of the contract by the Plaintiff. The Defendant was entitled to call on the guarantee upon breach of contract. From the facts and circumstances the Defendant's case is that the Plaintiff had failed to meet its monthly targets. In the premises, a declaration to the effect sought by the Plaintiff is denied.

The Plaintiff seeks a consequential order that the Defendant pays interest at a commercial rate of 30% per annum on the Uganda shillings 58,110,002/= that was deducted and used for a period of five months.

The Defendant submitted that no evidence was tendered in court to prove that commercial interest is at the rate of 30% per annum. Having considered the above two positions there is no dispute that the Plaintiff was deprived of Uganda shillings 58,110,002/= for a period of five months. The Plaintiff is entitled to an interest on that amount for deprivation thereof. The rate of interest will be considered together with that of other claims.

The Plaintiff also seeks an order of specific performance ordering the Defendant to avail other officers, for reconciling the stock and take delivery of the stock, beers, cases, empties and other goods that remained in the Plaintiff's stores at the time of termination. The Plaintiff's Counsel submitted that the Defendant finally picked the remaining items but refused to do or carry out a final reconciliation. In other words part of the prayer had been overtaken by events. Furthermore, Counsel submitted that the Plaintiff demonstrated that some of the items were stolen and it was impossible to account for them according to exhibit P 25. The Plaintiff finally abandoned the prayer for specific performance. The prayer is accordingly abandoned and considered withdrawn.

The Plaintiff further seeks a declaration that upon termination of contract, the property in the stock, empties, cases and other goods that the Plaintiff was distributing on behalf of the Defendant remained vested in the Defendant. The Plaintiff's Counsel submitted that these include goods that were stolen and the expired goods. He submitted that the Plaintiff never assumed title or risk to the goods. On the other hand the Defendant's Counsel submitted that the Defendant has not instituted any counterclaim seeking for the return of any goods whether stolen or expired or the sale thereof and the declaration would accordingly have no practical effect. Furthermore Counsel submitted that the risk in the goods remained with the Plaintiff who was the buyer thereof and therefore the declarations sought in that regard should be declined.

I have carefully considered the submission which bundles two declarations sought by the Plaintiff regarding whether property in the stock and empties remained in the Defendant and whether the risk in the goods remained vested in the Defendant upon termination of the distributorship agreement.

The facts and circumstances of this case are that the Plaintiff deposited a sum of money amounting to Uganda shillings 600,000,000/= and later a guarantee for Uganda shillings

700,000,000/= as security for collection of goods from the Defendant. The Plaintiff had been appointed a distributor of the Defendant's products. Upon the Plaintiff selling the products to third parties, it would remit the money to the Defendant. Of course this is supposed to be less the margin that the Plaintiff would be entitled to irrespective of whether the entire sales amount is first remitted to the Defendant or not. Furthermore the Plaintiff was required to return the stock, empties and beers upon termination of contract. In other words, the property remained that of the Defendant and there was no purchase of the goods by the Plaintiff as such.

The termination letter of the Defendant exhibit P6 clearly provides that the Plaintiff's distributorship of the Defendant's products was revoked with immediate effect. Secondly the Defendant proposed that by 3rd December 2013, they would have reconciled their accounts to establish any monies outstanding between the parties. Thirdly the Defendant wrote that all bottles and crates as well all stock/products held as stock loan shall be delivered up to its authorised representatives. The Plaintiff was required to communicate to all customers the fact that it was no longer authorised to distribute the Defendant's products within the territory.

In the arrangement, the Plaintiff was an agent of the Defendant and would be supplied with stock on credit and on the security of monies which the Plaintiff had deposited prior to the dealership arrangement with the Defendant. The money remained as security unless and until the Plaintiff failed to remit the proceeds of the sale of the products. Only when the Plaintiff fails to remit proceeds of products supplied and sold could the Defendant help itself to the security equivalent to the sale. Subsequently the security was converted to a performance bond or guarantee the Plaintiff procured from Diamond Trust Bank. The Defendant eventually called on this security after termination of the distributorship of the Plaintiff on 20th November 2013. On 21st November 2013 it wrote to the bank calling on the guarantee. In the premises the goods remained the property of the Defendant and were even subsequently returned. To be more specific upon termination of contract, the goods reverted back to the Defendant and the Plaintiff was forbidden from trading in the stock and in the territory of Najjanankumbi in the Defendant's goods. Stock was subsequently returned to the Defendant. In the premises, the Plaintiff was a bailee with the duties of a bailee charged with taking reasonable care of the goods. When that charge ended the goods which remained were supposed to be handed back to the Defendant.

In the premises, a declaration issues that upon termination of the contract, the property in the stock, empties, cases and other goods, that the Plaintiff was distributing on behalf of the Defendant remained vested in the Defendant.

Secondly, a declaration issues that the risk in the goods remained vested in the Defendant upon termination of the distributorship agreement save that the Plaintiff had a duty of care of a bailee in respect of the goods.

The Plaintiff seeks a consequential order for the payment of Uganda shillings 441,601,604/= that was illegally deducted from the Plaintiff's account with Diamond trust bank.

The Plaintiff's argument is that the Defendant illegally withdrew Uganda shillings 381,644,948/= from her account with Diamond Trust Bank. After the filing of the action the Defendant conceded and paid part of the Plaintiff's money erroneously withdrawn prior to reconciliation when a partial reconciliation was done. The amount of money was paid pursuant to mediation and a consent judgment was entered for Uganda shillings 243,785,170/=. The money was paid on 5th October 2014 yet it had been withdrawn on 6th December 2013. The Plaintiff therefore seeks for interest on the amount at the commercial rate of 30% from 6 December 2013 when the money was withdrawn and to 5 October 2014 when it was paid to the Plaintiff.

The Defendants Counsel conceded that the Plaintiff had been paid a sum of Uganda shillings 243,785,170/= as a refund pursuant to a consent judgment. In the premises the Plaintiff cannot seek an award of the entire sum without taking into consideration money paid back. In relation to the balance of Uganda shillings 197,816, 434/=: the Plaintiff by admission states that it relates to goods which were returned to the Defendant. It was contended for the Defendant that the Plaintiff having purchased the goods, the risk in the goods passed on to it and was accordingly liable for the loss incurred thereby. It follows that the Defendant having sold the goods to the Plaintiff; the Plaintiff is not entitled to this amount. In relation to the claim for interest on the amount of Uganda shillings 243,785,170/=: no evidence was adduced in support of the claim for interest. Counsel contends that the award of interest under section 26 (2) of the Civil Procedure Act is discretionary unless agreed to by the parties. In the unlikely event that judgment is entered for the Plaintiff, the Defendants Counsel suggested interest at the rate of 18% being the Bank of Uganda commercial bank rate.

In rejoinder, the Plaintiff's Counsel submitted that the Defendant received the items which included expired beers and liquor, crates and empties and refused to refund the monies worth to the Plaintiff. The Defendant does not deny receipt of the expired goods and empties. The Plaintiff's Counsel contends that the goods were returned and therefore the sum of Uganda shillings 441,601,604/= should be refunded to the Plaintiff.

I have carefully considered the above submissions and there is no dispute as to matters of fact. It is agreed that the Defendant withdrew certain sums of money. It is admitted by the Defendant's Counsel that certain goods were returned. It follows that it was not necessary to apply the security to cover items which had not been returned or sold that had been in possession of the Plaintiff. The resolution of the dispute rests on the conclusion of the court as to whether the risk in the goods passed to the Plaintiff. This is because some of the goods expired. Having held that the risk in the goods remained with the Defendant and that the Plaintiff only had a duty of care in relation to the goods, it follows that the Defendant has no further justification to hold onto the security of the money after the goods were returned. In any case it was the Defendant's directive to the Plaintiff to return the goods. In the premises, the Plaintiff having been paid Uganda shillings 243,705,170/= is entitled to the balance of Uganda shillings 197,816,434/=. The Plaintiff is awarded the sum of Uganda shillings 197,816,434/= under the above heading.

The Plaintiff is additionally awarded interest on the amount already refunded being the sum of Uganda shillings 243,705,170/= from December 2013 up to September 2014. The rate of interest would be determined at the end of this judgment.

The Plaintiff additionally seeks refund of Uganda shillings 90,000,000/= deducted as security for empties. Secondly the Plaintiff prays for payment of interest at commercial rate of 30% from June 2013 when the sum was withdrawn until payment in full.

In reply the Defendant's Counsel submitted that the refund of Uganda shillings 90,000,000/= held by the Defendant as security for empties namely crates and bottles, can be refunded provided there is a converse order for the return of the empties to the Defendant.

I have carefully considered the issue and the same should await any final orders to be made after considering the other remaining issues.

The Plaintiff further claims general damages for negligence, misrepresentation, economic and/or commercial loss suffered and for recklessness owing to the Defendant's irresponsible conduct. Counsel relies on the manner in which the Defendant terminated the distributorship oblivious or indifferent to the Plaintiff's predicament and also the conduct of the Defendant after termination. He contended that the termination was based on wrong grounds. Relying on the testimony of PW1, the Plaintiff made a loss of Uganda shillings 3,900,000,000/=. This is because the Plaintiff was meant to acquire property for a bigger warehouse and the grounds for the prayer are contained in the testimony of PW1. Counsel contended that the market value of the land which the Plaintiff purchased was Uganda shillings 13,500,000,000/= but the Plaintiff was forced to sell it at Uganda shillings 9,600,000,000/=. The forced sale value of the property was Uganda shillings 9,500,000,000/=. The Plaintiff's Counsel prayed that in the premises the balance of 3,900,000,000/= ought to be paid to the Plaintiff by the Defendant as general damages.

In reply the Defendant's Counsel submitted that the law applicable for the measure of damages in cases of breach of contract is that found in **Hadley vs. Baxendale** (1854) 9 Ex 341. It holds that the damages for breach of contract should be such as may be fairly and reasonably considered either arising naturally or according to the usual course of things from such breach of contract itself or may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract as the probable result of the breach of it. For the same principle Counsel also relies on the case of *Victoria Laundry vs. Newman* (1949) 2 KB 528. The Defendant's Counsel contends that the Defendant made no representation to the Plaintiff which it did not follow through on. The Defendant sets conditions precedent to the award of the contract which conditions were not complied with. The Plaintiff did not adduce evidence to show that it acquired trucks, vans, salesmen and loaders. Secondly, in relation to the property sold, no evidence was tendered in court linking the Plaintiff to the disposal of the property. Thirdly, the vendors of the land are not parties to the suit. They ought to have been the ones making the allegations of loss arising out of the disposal of properties but certainly the Plaintiff is not directly or remotely indicated as linked to the disposal of the property. In the premises, the Defendant's Counsel submitted that the Plaintiff is not entitled to an award of Uganda shillings 3,900,000,000/= arising out of the disposal of properties belonging to Kisubi high school.

The Plaintiff's Counsel also prayed for general damages for loss of expected earnings. He submitted that this was for the prospective loss suffered by the Plaintiff. He contended that the Defendant and the Plaintiff believed that the contract was for a long duration because of the Defendant's instructions to the Plaintiff to buy land and a bigger warehouse. Secondly, there was instruction to buy many delivery vans in addition to what had been inspected and approved of. For the principle on loss of expected earnings the Plaintiff's Counsel relies on the case of Robert Coussens versus Attorney General SCCA Number 8 of 1999 and the case of British Transport Commission versus Gourley [1955] 3 All ER 796 at 808. In that case it was held that had the Plaintiff not been injured, he would have had the prospect of earning a continuing income may be for many years but there can be no certainty. Prospective loss is not certain while loss suffered up to the date of trial may be certain. Damages have to be assessed as a lump sum once in respect of loss accrued before the trial and in respect of prospective loss. Such damages can only be an estimate of the present value of the prospective loss.

In the premises, the Plaintiff's Counsel submitted that the Defendant's monthly target for the beers was 30,000 crates and the profit margin thereof according to his conclusion was Uganda shillings 180,000,000/= per month. In five years it would be Uganda shillings 10,800,000,000/= which the Plaintiff's Counsel prayed for to be awarded as general damages in respect of beers. With regard to the target of 5000 cartons of spirits per month, the profit margin for each carton was Uganda shillings 10,000/= and therefore 50,000,000/= per month. The prospective loss for five years was Uganda shillings 3,000,000,000/=. He also prayed for an award of this amount totalling altogether to a prayer for an award of Uganda shillings 13,800,000,000/=.

In reply the Defendants Counsel opposed the prayer for an award of general damages for prospective loss of earnings. He relied on the case of Cullinane versus British Rema Manufacturing Company Ltd [1953] 2 All ER 1257 for the proposition that a Plaintiff must elect between claiming reliance expenditure and claiming for loss of expected profits. The Plaintiff is not entitled to recover both. A claim for loss of profits proceeds on the footing that capital expenditure had been incurred and means that the Plaintiff should not recover gross income on profits expected under the contract and also the expenditure incurred in the performance of the contract which he had intended to meet from the gross return.

The Plaintiff's Counsel contends that the Plaintiff's expectation of a long term relationship is without basis. The Defendant whether remotely or directly never made any representations to the Plaintiff that the relationship would be for a long-term. Secondly, no evidence was adduced to show that the Plaintiff purchased any vehicles. The vehicles purchased and according to the evidence were purchased by Mr Herman Semakula. The period of five years is further speculative.

Furthermore the Plaintiff never tendered any evidence in court of the price at which it purchased the products. The Plaintiff never tendered accounts. In the premises the Plaintiff cannot seek for general damages for purported loss of earnings for five years.

In rejoinder the Plaintiff's Counsel submitted that there was no counterclaim for empties on the basis of which Uganda shillings 90,000,000/= had been retained. Secondly, with regard to the claim for general damages for negligence, misrepresentation, economic commercial loss suffered due to recklessness and the Defendant's alleged irresponsible conduct, the Plaintiff's Counsel reiterated submissions that it was a direct result of the Defendant's acts i.e. the condition precedent to award of a letter of intent. Secondly with regard to general damages for loss of prospective earnings, the period of five years is based on the testimony of PW1 that the minimum estimated period for a distributorship is five years. Moreover in cross examination PW1 testified that he expected 15 years but expected machinery to be worn out in about five years. The fact that the Plaintiff fulfilled the conditions precedent set out in the letter of intent is confirmed by DW1 in cross examination. The letter of intent required several things to be done and the evidence has already been referred to earlier in this judgment. In the case of Mohanlal Kakubhai Radia vs. Warid Telecom Uganda limited, the High Court in HCCS No. 0224 of 2011 awarded Uganda shillings 1,000,000,000/= against the Defendant for unreasonably interfering with the Plaintiff's rights to land. Similarly in Robert Kenneth Bataringaya vs. Attorney General HCCS No 250 of 2011 (land division) general damages of Uganda shillings 1,000,000,000/= was awarded against the Defendant for interference with the Plaintiff's use of his land for 10 years. In the present case the Plaintiff's Counsel submitted that the Defendant not only interfered with the land rights of the Plaintiff but abused the entire investment portfolio of the Plaintiff by bringing it to its knees. He therefore reiterated earlier submissions for an award of damages.

Resolution of the issue of whether an award of general damages should be awarded as prayed for by the Plaintiff?

I have carefully considered the Plaintiffs prayers for an award of general damages.

In the first place the Plaintiff claims a refund of Uganda shillings 90,000,000/= deducted by the Defendant in June 2013 on account of empties which had not been returned. The Defendant concedes that such a deduction had been made and the Defendants Counsel prayed for a reverse order that the Plaintiff should be ordered to return the empties. No concrete facts were adduced about how the amount of Uganda shillings 90,000,000/= was reached especially after partial reconciliation of accounts and after the consent judgment. The Plaintiff subsequently conceded that certain stocks had been stolen and the rest were returned. Some goods had expired. These return of property to the Defendant included empties. The Plaintiff submitted that the Defendant did not reverse the deductions upon return of its property. Apparently the Plaintiff abandoned the prayer for a final reconciliation of accounts and later submitted that save for property which had been stolen and goods which were in the hands of the debtors that it could not recover because of loss of distributorship, the Defendant's property had been returned. It is my holding that on the balance of probabilities the Plaintiff has proved that there was no justification for the Defendant holding onto its money when the Defendant's property was returned. It is evident from exhibit P6 which is the termination letter that the Defendant required the Plaintiff to notify its customers that it was no longer a distributor of the Defendant. Secondly, another distributor had been appointed to replace the Plaintiff. The evidence of PW1 and PW2 that other agents took over the business was not rebutted. In the premises, the Plaintiff did the best it could and the rest remained with the Defendant and this new evidence to recover whatever it could recover because the Plaintiff no longer had any authority to deal in the Defendant's property. Moreover several correspondences were proved in evidence where the Plaintiff was pleading with the Defendant's officials to come and collect everything it had in its stores. Some of the property subsequently got stolen and the report was made according to exhibit P 25.

In the premises the Plaintiff is entitled to an award of Uganda shillings 90,000,000/= retained as security for empties. The Plaintiff is further awarded interest on this item from June 2013 up to the date of judgment at a rate to be determined at the end of this judgment.

With regard to the claim for general damages due to loss incurred as a result of the purchase of land to build a bigger warehouse, the claim of Uganda shillings 3,900,000,000/= cannot be sustained on the following grounds:

- The Plaintiff only proved that it withdrew the sum of Uganda shillings 500,000,000/= from the business and substituted the cash deposit with a performance bond of Uganda shillings 700,000,000/=.
- The property was allegedly subsequently sold and therefore on those premises the Plaintiff would be deemed to have recovered whatever investment it had put in the property and perhaps with profit. However, the facts disprove this approach.
- I have duly considered the sale agreement exhibit P 11 dated 20th of June 2013. The Plaintiff bought property in the names of Semakula Herman Joseph at a consideration of Uganda shillings 500,000,000/=. The property is described as LRV 740 folio 8 plot 109 Kyadondo Block 273 Masajja land at Namasuba. The valuation report exhibit P 39 is dated 19th of July 2012 before the distributorship and before the Plaintiff bought property for Uganda shillings 500,000,000/=. The property in the valuation report is found in block 383 Kitende Busiro.
- Thirdly, this property had been pledged as security for a loan with Diamond trust bank. At the time of sale of the property Kisubi high school had a loan secured by the property of Uganda shillings 4, 400,000,000/=. Exhibits P42 and P43 proves this.
- Fourthly the letter of offer for the performance guarantee exhibit P 42 dated 7th of May 2013 shows that the primary security was the company's land and buildings. This was before the Plaintiff ever purchased the property exhibit P 20. Furthermore the attached application to the offer letter is also dated 7th of May 2013. The purpose was to secure Uganda shillings 700,000,000/= in favour of the Defendant and on behalf of the Plaintiff.
- Not all the guarantee was liquidated and the amount in the guarantee has been ordered to be refunded to the Plaintiff. This amount was less than Uganda shillings 500,000,000/=. In theory therefore the Plaintiff never lost.
- I have considered the evidence that a sum of Uganda shillings 500,000,000/= was withdrawn and made available to the Plaintiff before the Plaintiff converted the security under the distributorship to a guarantee. The testimony of PW1 is that the Defendant

allowed the Plaintiff to access Uganda Shillings 500,000,000/= according to the evidence in exhibit P11 and P13. Exhibit P11 is a land sale agreement. Exhibit P13 includes an invoice from Grant Consults Ltd billing Uganda shillings 15,000,000/= on the 10th of September 2013 for architectural plans for a depot on Plot 109 and 472 Block 273. The receipts for payments are dated 13th September 2013 for Uganda shillings 8,000,000/= and dated 8th October 2013 for Uganda shillings 7,000,000/= being the balance thereof.

I only agree that the Plaintiff was required to invest money in order to be a distributor of the Defendant. This arises from the following documents. Exhibit PE 8 required the Plaintiff to have a warehouse with a capacity for 5000 cases of beer and 1000 cartons of spirits with access to prime mover trucks. The Plaintiff was required to obtain three side loading trucks of capacity 450 crates each with a provision for spirits loading. The Plaintiff was required to obtain a spirits van with a minimum capacity of 400 cartons. The Plaintiff was also required to hire personnel which included a warehouse manager, an accountant, three van salesman and six loaders. Later on in the relationship between the parties the Plaintiff got the impression that he was supposed to access more capital to get a bigger warehouse. On the basis of the impression given to the Plaintiff by the Defendants servants, the Plaintiff moved to access bigger premises and obtained Uganda shillings 500,000,000/= in cash from its account and substituted the security with a bank guarantee for Uganda shillings 700 million. The Plaintiff produced exhibit P9 as a batch of emails. The Plaintiff also adduced in evidence the minutes of a meeting between the Defendant and Plaintiffs officials exhibit P27 dated 28th May 2013 in which it was agreed that the Plaintiff needed Uganda shillings 700,000,000/=. The issue of dumping in the territory of the Plaintiff was also discussed. Whereas the security was applied, the Plaintiff would be entitled to general damages for the inconveniences it went through upon termination of contract because the investment was specifically tailored for the Defendants business. All the requirements of the Defendant detailed in exhibit P8 were meant for the business of the Defendant and therefore were sourced for that business. In fact section 156 of the Contracts Act 2010 commands that the agent shall be indemnified against the consequences of all lawful acts done in the exercise of authority conferred upon the agent. The question is what of expenses incurred by virtue of directions of the principal? Section 156 (2) of the Contracts Act provides that: “

Where the principal employs the agent to do an act and the agent does the act in good faith, the principal is liable to indemnify the agent against loss, liability and consequences of the act, although it may affect the rights of a third person.

Was the Plaintiff employed to carry out an act or acts by purchase of certain assets? Yes. It was a precondition for the Plaintiff to acquire those assets listed in exhibit P8 which is the letter of intent and also to deposit Uganda shillings 600,000,000/= as security for the business to kick off. Can it be argued that the assets were acquired at the risk of the Plaintiff as to loss when they were acquired purposely to carry out the business in the manner directed by the Defendant? In the premises as far as the additional land requirement is concerned, the fact that the property was bought in the names of Joseph Semakula is not a defence because the Plaintiff proved that it was acquired for the business of the Defendant and was to be put to that use. It was meant for a depot and sales point. The property was available to the Plaintiff and the Plaintiff was inconvenienced because it had to obtain a guarantee which was eventually called upon by the Defendant in order to secure the property. The Plaintiff was allowed to withdraw the cash security deposit for this purpose according to the testimony of PW2 and paragraphs 39 of the written testimony. DW1 in paragraph 10 of his witness statement testified that the warehouse facility of the Plaintiff was required to support prime mover trucks, having capacity to load 1,300 crates of beer. It was to have additionally enough space to accommodate trucks without obstructing road traffic when loading and offloading. The testimony corroborates the Plaintiff's testimony that its place was inadequate and it had to build a bigger warehouse and therefore they moved to acquire more land. Last but not least exhibit P8 which is the letter of intent initially required the Plaintiff to have a warehouse capacity of 5000 cases of beer and side loading trucks with capacity of 450 crates each. The capacity of 1,300 crates was a new development. It further supports the finding that after the trial period of 3 months the Plaintiff was fully engaged as a distributor after 21st June 2013 but no formal contract was executed between the parties. In any case the Plaintiff had to do what the principal demanded because it was an agent.

The Plaintiff obviously suffered damages by engaging in the business of distributorship because it had to invest heavily on assets to fulfil the demands of the Defendant. Had the security remained a cash deposit as earlier on arranged between the parties, the guarantee would not have been called upon. In other words the Plaintiff had to make good to the bank the amount called on

by the Defendant on the guarantee. The Plaintiff had an arrangement with sister companies on how to secure this guarantee. Flowing from the principle of *restitutio in integrum*, which principle is reflected in the cases cited on damages above, the loss that flowed from the injury of termination of agency without reasonable notice included: The commitment for a guarantee and the calling on of the guarantee and having to pay for additional property. I note that this land/property was available to the Plaintiff and the Plaintiff can mitigate its losses by selling the property. The Plaintiff has not demonstrated that it has tried to mitigate the loss by selling the property. The property that was subsequently acquired was not the property that was used to secure the guarantee. In the absence of that the Plaintiff has also been awarded damages for the calling on of the guarantee earlier on in this judgment.

In the premises, the Plaintiff would be awarded general damages for inconvenience in investing in additional land according to the requirements of the Defendant in the amount of Uganda shillings 30,000,000/=. The Plaintiff has additionally claimed special damages for specific items flowing from the same premises and I will address those under that heading of special damages further below in this judgment.

With regard to the claim for purchase of trucks, I do not agree with the submission of the Defendants Counsel that the trucks were purchased in the names of Herman Joseph Semakula and therefore there is no relationship to the Plaintiff. It was a requirement of the letter of intent exhibit P8 that the Plaintiff should buy three trucks etc as summarised above. However to mitigate their losses, the Plaintiff had the option of selling the trucks and vans. Again in the Plaintiff's case these trucks and vans which the Plaintiff bought were a requirement for the business of distributorship according to the letter of intent exhibit P8 and were to be put in place before the distributorship could be awarded or commenced. They were necessary to do the business. I have considered exhibits P7 letter dated 16th March 2013 from Diamond trust Bank on the purchase of 3 Motor vehicles LPT 713S Light Truck (4/2) by Mr. Herman Semakula. The bank wrote to TATA Uganda Ltd that it would finance 80% of the purchase and was making available US\$ 67,200.00. This document attached the invoice for the vehicles and a receipt from TATA Uganda Ltd for the payment of 3 trucks on the 16th of March 2013. Did the Plaintiff mitigate its losses by offering the vehicle to the Defendant or selling it to recover capital? What happened to the vehicles? In the absence of evidence of mitigation of loss upon termination of

contract the Plaintiff cannot prove damages arising from buying vehicles or trucks. The Plaintiff is only entitled to general damages for inconveniences suffered because it has to dispose of the assets on its own or use it for other purposes. No amount of damage was proved in evidence and the court will award the Plaintiff general damages for inconvenience in acquiring other assets in addition to investment in land of Uganda shillings 10,000,000/=. I will further address the rest of the issues when dealing with the special damages claimed by the Plaintiff.

Coming to the claim for loss of prospective business, in issue number one the court determined that the Defendant was entitled to bring the distributorship to an end and upon giving the Plaintiff reasonable notice. The Plaintiff was not given reasonable notice and suffered several other inconveniences of trying to obtain a reconciliation of accounts and to return the Defendant's property in the stock and empties. Some of the claims have been put under submissions for special damages and I will consider them in due course. However I agree with the Defendant's Counsel that if the Plaintiff's capital is returned or compensated for adequately, the Plaintiff cannot claim in the same breath loss of prospective earnings. I agree with the authority of *Cullinane vs. British Rema Manufacturing Company Ltd* [1953] 2 All E.R. 1257. In the case of **Cullinane v British "Rema" Manufacturing Co Ltd** [1953] 2 All ER 1257 the Defendants sold to the Plaintiff equipment for £6,578 and warranted that it could produce dry clay powder at the rate of six tons per hour but when installed it produced powder at the rate of only two tons per hour. The Plaintiff sued for damages for breach of warranty. The damages claimed were for the loss of capital, being the difference between the cost of the plant, buildings to house it, and ancillary plant, and their estimated break-up value. Secondly, the Plaintiff claimed interest on gross capital expenditure, and thirdly, they claimed loss of profit for three years. The Defendants counterclaimed for £1,078, the balance of the purchase price. The High Court awarded the Plaintiff on the first claim £7,370 1s 5d. For the second claim £1,608 4s 9d and for the third claim £8,913 1. The amount of the Defendants counterclaim was offset from this amount. The Plaintiff retained the machinery. On appeal by the Defendants the Court of Appeal was composed of Sir Raymond Evershed MR, Jenkins and Morris LJJ.

Sir Raymond Evershed MR held at page 1261 with the concurrence of Jenkins L.J. that the Plaintiff has to elect either to claim the capital asset or loss of profit. He noted that the claim was

not sustainable because the Plaintiff sought to recover both the whole of his original capital loss and also the whole of the profit which he would have made. He held:

“As a matter of principle again, it seems to me that a person who has obtained a machine such as the Plaintiff here obtained, which was mechanically in exact accordance with the order given, but was unable to perform a particular function which it was warranted to perform, may adopt one of two courses. He may, when he discovers its incapacity and that it is not what he wanted and is useless to him, claim to recover the capital cost he has incurred less anything he can obtain by disposing of the material that he got. A claim of that kind puts the Plaintiff in the same position as though he had never made the contract at all. He is, in other words, back where he started, and, if it were shown that the profit-earning capacity was, in fact, very small, the Plaintiff would probably elect so to base his claim. Alternatively, he may, where the warranty in question relates to performance, make his claim on the basis of the profit he has lost, because the machine as delivered fell short in its performance of that which it was warranted to do. If he chooses to base his claim on that footing, depreciation has nothing whatever to do with it.”

In this case there is no evidence about what happened to the machinery or assets and to what use or profit they can be put. The Plaintiff was entitled to reasonable notice within which it would wind up the business and deal with the issue of any assets it had acquired and also seek for compensation for costs. It would be able to collect stock sold on loan as proved in exhibits P18 – exhibit P20. The reasonable notice is based on the finding that the Defendant alleged failure to meet set targets by the Plaintiff and the Plaintiff could not prove that it did so. Issue was taken as to whether the dumping could have affected the Plaintiff’s performance. This required the Defendant to review its performance targets set for the Plaintiff. There is no evidence that the performance targets set in exhibit P8 were either revised or dealt away with. With such a ground the Defendant could bring the contract to an end upon giving the Plaintiff reasonable notice. I do not agree that reasonable notice was five years. Three months notice would suffice. During this time the parties would wind up their affairs and the Defendant would have an opportunity to source for another distributor. The evidence is that the Defendant advertised in January for distributors and the Plaintiff started operations on the 21st of March 2013. It took the parties

about 10 months to reconcile accounts and a partial consent judgment was reached in September 2014 while the termination occurred in November 2013.

Similar to the other claims for general damages the Plaintiff will be awarded general damages in lieu of notice of three months and damages for inconveniences suffered investing in machinery which it did not require for the specialised purpose of distributorship of the Defendants products. I have considered the evidence of PW1 which has not been rebutted. However, the Plaintiff calculated monthly profit on the basis of full performance on the targets set when the basis of the termination was performance of sales below monthly targets. In the premises while the Plaintiff claimed 180,000,000/= per month for beer sales, the Plaintiff will be awarded half that amount per month for beer sales and is awarded Uganda shillings 90,000,000/= per month. The Plaintiff claimed monthly sales of Uganda shillings 50,000,000/= per month but will be awarded half this amount per month at Uganda shillings 25,000,000/= per month. Monthly beer and spirit sales at the above rate total to Uganda shillings 115,000,000/= per month. In the premises the Plaintiff is awarded Uganda shillings 345,000,000/= as general damages in lieu of notice under this head.

Special damages:

The Plaintiff prayed for several heads of special damages. This includes a claim for special damages of Uganda shillings 460,000,000/= being money for vehicles and broken down as follows. Uganda shillings 430,000,000/= for vehicles, Uganda shillings 15,000,000/= for architectural plans and Uganda shillings 15,000,000/= being the cost of obtaining a bank guarantee.

I have carefully considered the claim for the cost of vehicles and in light of the issue on prospective earnings, and also the claim for general damages for investing in the business, the Plaintiff has not proved that it does not have the vehicles and that the vehicles do not make money or cannot recover the Plaintiff's investment in them. No damage has been proved and the claim is disallowed.

With regard to the claim for architectural designs, the Plaintiff has been compensated by an award of damages in lieu of notice and the said claim fails.

With regard to the claim of Uganda shillings 15,000,000/= for maintenance of the guarantee, the guarantee was a performance guarantee and the contract was partially performed. The guarantee was used in the business from May 2013 up to 20th of November 2013. The claim for maintenance of the performance guarantee is accordingly disallowed.

With regard to the claim of Uganda shillings 61,100,000/= as money paid out a salary for the few workers the Plaintiff had continued employing after termination because it still held the goods for the Defendant and was awaiting reconciliation of accounts. The Plaintiff claims this amount from the date of termination on 20th November 2013 until 27th June 2014 when the goods were finally picked by the Defendant.

In reply the Defendant's Counsel submitted that there was no evidence that the Plaintiff was paying salaries for the employees. He contended that special damages had to be strictly proved. The court cannot establish whether these employees were already employees of the Plaintiff who had been in business before.

I do not agree. The Plaintiff had to maintain personnel and this is demonstrated by the various e-mails exchanged with the Defendant on the question of reconciliation of accounts. It was necessary to maintain a security guard and an account and each time stock was released or taken. Reconciliation of accounts had to be made. However the Plaintiff has been awarded damages in lieu of notice. In other words, the Plaintiff is entitled to a period of three months immediately after termination of the contract. The contract was terminated on 20th November 2013. It followed that the Plaintiff will only be awarded salaries for the period March 2014 up to June 2014, being a period of four months. Salary for the three personnel namely the operations manager, the accountant and the security guard for that period amounts to Uganda shillings 19,400,000/=.

Additionally the Plaintiff claimed Uganda shillings 7,000,000/= as rent for accommodating the goods. The Plaintiff was required to accommodate the goods by virtue of the contract by having in place the warehouse. When the contract was terminated, the Plaintiff's additional expenditure was not rent but maintenance of the security personnel. In the premises, the claim for Uganda shillings 7,000,000/= as rent for keeping the goods cannot be sustained and is accordingly disallowed.

In the premises, the Plaintiff is awarded Uganda shillings 19,400,000/=.

With regard to the claim for Uganda shillings 58,130,002/=, Uganda shillings 197,456,424/= and finally Uganda shillings 90,000,000/=, the court has already dealt with this claim and the claim for special damages on this item is a duplication of claims and special damages claimed under this heading cannot be sustained.

Exemplary Damages:

The Plaintiff claims exemplary damages of Uganda shillings 2,500,000,000/=. The Defendants Counsel opposed the claim and relied on the locus classicus case of Rooks versus Barnard and others [1964] AC 1129 that special damages are awarded for oppressive, arbitrary or unconstitutional actions. Exemplary damages may also be awarded where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at expense of the Plaintiff.

Exemplary damages are defined by **Osborn's Concise Law Dictionary** as damages awarded in relation to certain tortuous acts (such as defamation, intimidation and trespass) but not for breach of contract. In contrast to aggravated damages which are compensatory in nature, such damages carry a punitive aim at both retribution and deterrence for the wrongdoer and others who might be considering the same or similar conduct. The grounds for award of exemplary damages was considered by the East African Court of Appeal sitting at Nairobi in **Obongo and another v Municipal Council of Kisumu [1971] 1 EA 91** per Spry VP at page 94 by way of a summary of the case of Rooks vs. Barnard [1964] A.C. 1129. He said:

“In the first place, it was held that exemplary damages for tort may only be awarded in two classes of case (apart from any case where it is authorized by statute): these are, first, where there is oppressive, arbitrary or unconstitutional action by the servants of the government and, secondly, where the Defendant's conduct was calculated to procure him some benefit, not necessarily financial, at the expense of the Plaintiff. As regards the actual award, the Plaintiff must have suffered as a result of the punishable behaviour; the punishment imposed must not exceed what would be likely to have been imposed in criminal proceedings if the conduct were criminal; and the means of the parties and

everything which aggravates or mitigates the Defendant's conduct is to be taken into account".

Exemplary damages are not awarded for breach of contract. The cause of action that succeeded in this matter was for breach of contract by failure to serve reasonable notice. In the premises there is no basis for an award of exemplary damages and the same is disallowed.

Interest:

Beginning with the issue of the rate of interest, I agree that section 26 (2) of the Civil Procedure Act is applicable. It gives discretionary power to the court to award reasonable interest. Section 26 (2) of the Civil Procedure Act provides that:

"Where the decree is for the payment of money, the court may in the decree, order interest at such rate as the court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the court thinks fit."

What is reasonable interest? Reasonable interest in the commercial sense is interest which fulfils the purpose of restitutio in integrum. And it is calculated on the basis that it is the interest that the Plaintiff would have earned the money if it was lent out on the profit that the Plaintiff would have made had it had the use of the money. This was considered in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** by Lord Wright explains the essence of an interest award in the following words:

"...the essence of interest is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...."

According to **Halsbury's laws of England fourth edition reissue volume 12** (1) paragraph 850 another way of considering the rationale for the award of interest is an assumption that the Plaintiff would have borrowed to replace the deprived money (with interest):

"... it is assumed that the Plaintiff would have borrowed to replace the assets of which he has been deprived..."

Finally this was succinctly expressed by Forbes J in **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** at page 722 when he held that:

"... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld."

Reasonable interest is therefore the rate at which the Plaintiff would have had to borrow money to replace that which was withheld. That is the rate at which a commercial bank would have lent the money to the Plaintiff.

In the premises, the rates at which the Plaintiff was awarded interest in the above judgment is at 20% per annum.

In addition to the award of interest in the above judgment, the Plaintiff is awarded interest on the aggregate sum at the date of judgment at the rate of 20% per annum until payment in full.

Costs

Costs follow the event under section 27 (2) of the Civil Procedure Act.

In the premises the Plaintiff is awarded costs of the suit.

Judgment delivered in open court on 19th August 2016

Christopher Madrama Izama

Judge

Judgment delivered in the presence of:

David Sempala for the Plaintiff

Earnest Sembatya for the Defendant

Plaintiffs Herman Semakula in court

Charles Okuni: Court Clerk

Christopher Madrama Izama

Judge

19th August 2016