

THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA AT MENG0

COR: (MANYINDO, D.C.J., ODOKI, J.S.C., & TSEKOOKO, J.S.C.)

CIVIL APPEAL 17/1994

BETWEEN

NATIONAL ENTERPRISES CORPORATION.....1ST APPELLANT

NEC TRADING LIMITED.....2ND APPELLANT

NEC MOBILITY LIMITED.....3RD APPELLANT

-VERSUS-

NILE BANK LIMITED.....RESPONDENT

(appeal from the judgment and Decree of the High Court of Uganda delivered by His Lordship MR. JUSTICE J.H. NTABGOBA P.J. on 23rd day of May 1994 in the High Court Suit No. 912 of 1993)

JUDGMENT OF ODOKI – J.S.C.

This appeal arises out of a decision of the High Court whereby the appellants' suit against the respondent for recovery of its vehicles and damages for wrongful seizure, was dismissed with costs.

The first appellant, National Enterprises Corporation (NEC) is statutory body incorporated under the National Enterprises Corporation Ordinance 1989. It established a number of subsidiary companies in which it had majority shareholding. These companies included the second appellant NEC Trading Company Limited, and the third appellant NEC Mobility Limited. It had another subsidiary called NEC Bakery and Confectionary Limited, which was incorporated in October 1990. The respondent is a limited liability company carrying on business as a financial banking institution in Uganda. The disputed in this case arose as a result of the respondent's seizure of three vehicles of the appellants following failure to repay an initial loan of Shs. 16

million which had risen to shs. 160 million, obtained by the first appellant on behalf of NEC Bakery and Confectionary Limited.

From the evidence it is clear that the first appellant wanted to establish another subsidiary called NEC Bakery and Confectionary Limited. Therefore on 9.2.90, Dr. Duncan T. Kafeero who later became a Director of NEC Bakery wrote to the General Manager of the defendant bank applying for an overdraft facility of Shs. 16 million “as working capital base to enable them start production of bread at their newly completed modern bakery Kawempe.”

On 23.2.90., the Board of Directors of the appellant passed a resolution which authorized the corporation to borrow Shs. 16 million from the defendant bank “from the account of NEC Bakery to be applied towards preliminary capital and recurrent expenditure of the newly established NEC bakery in order to facilitate prompt operations of the factory.”

On 22.10.90, a debenture was executed by the first appellant in favour of the defendant bank to ensure the advances to NEC Bakery by way of loan permitting the company other financial accommodation from time to time to an aggregate amount not exceeding Shs. 50 million or such lower limit as might for the time being be fixed by the bank. The debenture charged the company’s fixed and floating assets as security and provided for remedies in the event of default.

All this was done before NEC Bakery was incorporated. According to its certificate of incorporation the company was registered on 24.10.90.

Subsequently the respondent bank opened a loan account in the name of NEC Bakery. However, the account became overdrawn by Shs. 160 million. After repeated demands without payment, the respondent bank seized two motor vehicles which were lorries, on 19.7.93. one of vehicles Registration No. 352 UAB was registered in the name of the first appellant and the second No. UXE 302 was registered in the name of the second appellant.

On 21st .7.93. in exercise of its right under the debenture, the respondent advertised for the sale the two vehicles and three other vehicles registered in the name of the first appellant. The vehicles which were seized and those advertised for sale were in possession of the third appellant by powers of attorney executed by the first and second appellant on 6.12.93. The third appellant kept away the three vehicles threatened with seizure.

After the seizure of the vehicles, the appellants demanded for their return but in vain. The appellants therefore filed an action for wrongful seizure and detention of their vehicles, claiming recovery or their market value and damages for loss of use of the vehicle and defamation arising out of the advertisement. In its written statement of defence, the respondent gave a general denial of the claims by the appellants.

At the hearing of the case, seven issues were framed, namely

1. Whether the motor vehicles of the first and second plaintiffs (Reg. No. 352 UAB and UXE 302) were unlawfully seized and detained by the defendant.
2. Whether the continued detention and withholding of possession amounted to appropriation and/or conversion of the first and second plaintiff's reversionary interest and title in the motor or user vehicles.
3. Whether the continued detention and withholding of possession amounted to appropriation and/or conversion of the first and second plaintiff's reversionary interest and title in the motor vehicles.
4. Whether the powers of attorney had any effect as regards the use of the motor vehicles.
5. Whether there was apprehension and fear of imminent and immediate unlawful seizure of motor vehicles UPS 009, UPP 671 and UPR 182 caused and created in the third plaintiff, justifying the putting away for safe custody of the said motor vehicles.
6. Whether the advertisement for sale of the motor vehicles constituted defamation.
7. What remedy, if any.

On the first issue the learned judge held that although the debenture contract was a nullity in as far as it was concluded on behalf of a non-existent company, the first appellant who concluded the contract and had the majority shareholding in the company was liable on the contract. The second issue was answered in the negative, the learned judge holding that the debenture authorised a distress or execution by writ, besides appointing a receiver. The rest of the issues were answered in the negative.

The appellants filed eleven grounds of appeal. However, at the hearing of the appeal they abandoned grounds 5,7,9 and 10. The remaining six grounds can be summarised as follows:

1. The learned judge erred in law by contracting himself when, after rightly holding that the debenture was a nullity, he proceeded to hold that it was enforceable against the first appellant.
2. The learned judge erred in law and on facts in making erroneous and ambiguous findings regarding the principle of lifting the veil.
3. The learned judge erred in law and on facts in failing to correctly interpret clause 6(a) of the debenture (Exhibit D1). Thereby coming to an erroneous decision.
4. The learned judge erred in law when he allowed the respondent to adduce evidence not based on its pleadings.
5. The learned judge erred in law and on facts when he held that the third appellant could have instituted objection proceedings instead of hiding the vehicles.
6. The learned judge erred in law and on facts when he failed to give effect to the special legislation governing the first appellant as a statutory corporation.
7. The learned judge erred in law in not holding that the seizure of the vehicles was illegal and unlawful and not ordering the recovery of the vehicles and not awarding special damages to the appellants for unlawful seizure and threatened seizure of their vehicles.

On the first ground of appeal Mr. Mbabazi, for the appellants, submitted that since the learned judge held that the debenture was null and void he erred in enforcing it. He also contended that the judge erred in lifting the veil of a company which was not a party to the suit. Mr. Twesiime for the respondent, supported the decision of the learned judge and submitted that while the debenture was a nullity as between NEC Bakery and the respondent, it was a valid contract between the respondent and the first appellant because in the first place, the officials of the first appellant negotiated and signed the debenture, secondly, he contended that the respondent never dealt with NEC Bakery and thirdly that the intention of the parties as can be gathered from the relevant documents, resolutions and letters from the first appellant was that the first appellant should be bound. Lastly, he argued that the first appellant accepted the indebtedness and made part payment towards the debt.

In dealing with this issue, the learned judge said,

“If a pre-incorporation contract is purported as in the instant case to be made by a company which does not exist, the contract is anullity and neither the company when

formed, nor the promoter whose signature is added again as in the debenture in this case can sue or be sued on the contract, **(See Newborne Vs Sensolid (Great Britain) (1954) 1 QB 45)**. If, however the promoter has contracted, ostensibly as agent for a non-existent company he may be made personally liable on the contract. In such case the party with whom he has contracted can show that, though having contracted as agent, he is in fact the principal, for it is only by holding him personally liable that any effect can be given to the contract. **(Kelner v. Baxter (Supra) and Newborne V. Sensolid (Great Britain) Ltd 1954 1QB 45 at p.47.)**

It is well settled that a contract made before a company is formed cannot bind the company formed afterwards. Nor can a company by adoption or ratification obtain the benefit of a contract purporting to have been made on its behalf before it came into existence. In order to do so a new contract must be made with it after its incorporation on the terms of the old one. **See: Touche V. Metropolitan Railway Warehousing Co. (1870) 6 CR. App. Cas. 671, Howard V. Patent Ivory Manufacturing Co. (1888) 38 CR. D. 156 Kelner V. Baxter (1866) L.R. 2CP 174 and Colonization Co. Ltd. V. Pauline and Colliery Syndicate, (1904) A.C. 120.**

In the present case the debenture was executed by the first appellant before NEC Bakery came into existence. NEC Bakery did not enter into new contract when it came into existence and purported to adopt the debenture. In these circumstances, the learned judge was correct in holding that the debenture was a nullity as between the respondent and NEC Bakery.

In order to hold that the debenture was enforceable between the respondent and the first appellant, the learned judge lifted the veil of NEC Bakery and held in effect that this was one of the cases where the principle of corporate personality should not be used to defeat justice. In this connection the learned judge said,

“I think that this is the right situation in which an exception to **Salmon V. Salomon (1897) A.C. 22** would be applied. It is clear from the evidence that the percentage in NEC Bakery and Confectionary Ltd. However although the Courts are in general precluded by Salomon’s case from treating a company as the “alia, agent trustees or nominees” of its members, they will nevertheless do so if corporate personality is being blatantly used as a cloak for fraud or improper conduct. There is a dictum which has been

so influential in the United States, for instance that when the notion of legal entity is used to defeat public convenience, justify wrong, protect fraud or defend crime, the law will regard the corporation as an association of persons. Courts will also do so where agency can be established in fact, either in respect of particular transactions or even as regards the whole of the company's business. They are more ready to hold that agency is established where the controlling shareholder is another company; indeed there is evidence of general tendency to ignore the separate legal entities of various companies within a group and to look instead at the economic entity of the whole group. See L.C.B. Gower, *Modern Company Law* 2nd edition at p. 208.”

I respectfully agree with the principles expressed in the above statement, which is derived substantially from Gower's **Modern Company Law (supra)**. Those principles have received approval in Canada where they were applied in Ontario Court of Appeal in **Manley Inc et al V. Fallis (1977) 38 CPR (2nd) 74, cited in Schools V. Canadian Meat Processing Corporation and Another (1980 -84) LRC Comm. 778 at p. 779 where Lacourciere J.A. is quoted to have said at pp. 76 – 77.**

“This is the case where the court is not precluded from lifting the corporation veil, and in effect, regarding the closely related – respondent companies as essentially one trading enterprise, in the interests of the affiliated companies, in circumstances of his breach of a fiduciary trust. Cases, where this derogation of Salomon's case (*Salomon V. Salomon and Co. (1877) AC. 22*) is permitted are collected in Professor Gower's *Modern Company Law*, 2nd ed. 1957 particularly in C. 10 entitled lifting the veil.”

To illustrate the above principles, the learned judge considered – two cases referred to by Prof. Gower namely **The Roberts and Co. V. Caddies (1937) 58 LIL Rep. 159 and Holdsworth and Co. V. Caddies (1955) I W L R 352.** In relation to group enterprises. In **The Roberta** case (supra) a parent company held liable on bill of lading signed on behalf of its wholly subsidiary, the court saying that the subsidiary was “a separate entity in the name alone, and probably for the purpose of taxation.”

In **Holdsworth and Co. V. Caddies** (supra) Mr. Caddies had been appointed managing director of the company upon the terms that he should “perform the duties and exercise the powers in

relation to the business of the company, and the businesses... .. of its existing subsidiary companies which may from time to time be assigned to or vested in him and the Board of Directors of the company.” After disagreements between him and the board he was directed to confine his attentions to one of the subsidiaries only. This was held not to be a breach of contract by the company employing him. The argument “that the subsidiary companies were separate legal entities each under the control of its own board of directors described as “too technical” since an agreement in **re mercatoria** must be construed in the light of the facts and realities of the situation, which were that the parent company had full control of the internal management of its subsidiaries.

After considering all these authorities, the learned judge concluded:

“Accordingly in answer to the first issue, I hold that the debenture contract, in so far as it was concluded on behalf of a non-existent NEC Bakery and Confectionary Ltd, was a nullity upon the authority of **New borne – Vs – Sensolid (Great Britain) Ltd** (Supra). That on the principle of **Roberta and Holds worth and Co. – Vs – Caddies** case, and in view of the public funds involved in the debenture contract, the first plaintiff is liable on the contract and also in view of the case being one of the exceptions to **Salomon – Vs – Salomon** case. The same would equally apply to not only the two seized and detained motor vehicles but also to those vehicles that were advertised for sale and as a result of which the third plaintiff hid them, being apprehensive of their imminent sale. In other words in view of the principle in **Roberta and Holdsworth and Co. Vs Caddies** case, it was lawful to lift the veil and hold the first and second plaintiffs’ motor vehicles liable to seizure and sale in execution of the debenture.”

In my judgment, the learned judge came to the right conclusion that the first appellant was liable on the debenture. He lifted the veil of the subsidiary companies and found that they were owned and controlled by the first appellant who had the majority shareholding in each of them. He was therefore prepared to ignore the separate legal entities of the various companies within the group and look instead at the economic entity of the whole group.

I agree with the learned judge that the argument that the first Appellant and NEC Bakery were entities was too technical because in reality the two entities were one for the purpose of this case.

The first appellant is the one which set up NEC Bakery as one of its subsidiaries with 98% shareholding. The management of the two organisations seems to have been the same. The first appellant is the one which applied for a loan from the respondent to capitalise NEC Bakery. When there was a failure to pay the money, the first appellant wrote a letter dated 28th January 1992 to the respondent bank undertaking to repay the money. The letter which headed “Loan Rescheduling,” stated that,

“Therefore with the aforementioned being the basis of the Bank’s understanding of the poor financial status of the Bakery project and its willingness to assist in redressing the situation the corporation shall proceed to fulfil its obligations.”

Therefore it appears from the evidence that although the first appellant ostensibly contracted as agent for NEC Bakery, it was in fact the principle since NEC Bakery was not in existence. There is ample authority for holding that if a person contracts ostensibly as an agent for a non-existent principal, for instance a company which is not yet formed, he can be held personally liable. **See Kelner V Baxter(supra) and Newborne V. Sensolid (Great Britain) Ltd.** (supra).

In **Kelner V. Baxter**, one Kelner sold wine to a company yet to be formed. The contract showed that it was agreed to be sold to certain men who were the proposed directors of a company which was coming into existence. They agreed to buy. The potential directors intended to buy the wine on behalf of the Company, but the Company was not in existence at the time the contract was made or at the time when the goods were delivered. They took delivery of the goods and therefore it was held that as they had contracted on behalf of the principal who did not exist, they must, having received the wine, pay for it.

This case supports the decision of the learned Judge since the first appellant contracted on behalf of a non-existent principal and did receive the loan, it must repay the loan.

In **Newborne V. Sensolid (Great Britain) Ld (supra)**, a contract which purported to be entered into for sale of certain goods by Leopald Newborn (London) Ld, was signed, “Leopald Newborn Ld” and underneath was the name Leopald Newborn. On the back of the document were set out the names of Leopald Newborn and M. Newborne as directors of the Company. The market fell and when the goods were tendered to the buyers they refused to take delivery. A writ was issued in the name of Leopald Newborne (London) Ld, against the buyers claiming damages for breach

of contract, namely, failure to accept the goods. Whilst the case was in progress it was discovered that the time when the contract was signed the company, Leopald Newborne (London) Ld, was not registered, and steps were taken to substitute for the name of the company, as plaintiff, that of Leopald Newborne.

It was held that Leopald Newborne never purported to contract to sell nor sold the goods either as principal or agent. The contract purported to be made by the company, on whose behalf it was signed by a future director, and in as much as the company was non-existent at the material time, the contract was a nullity.

In approving the principle in **Kelner V. Baxter** (supra), Paster J. who heard the suit said,

“The principle there laid down is that if a person, contracts ostensibly as agent for non-existence principal, as for example, a company which is not yet formed, he can be held to be personally liable. That indeed is **Kelner V. Baxter**, and it is plain that this principle, that the agent is liable, is not based on breach of warranty of authority because as I have said, the principle is not in existence, it is not based on any question of estoppel but it is based on this principle that it is only by holding him personally liable that any effect can be given to the contract. In other words, it is permissible for the plaintiff seeking to hold the agent liable to show that that agent, though he has contracted as agent is himself in fact the principal.”

The suit was dismissed because it was held that the appellant had not contracted to undertake personal liability. On appeal, by the plaintiff, that decision was upheld, the Court of Appeal holding that the contract was made with the company and not the plaintiff, who merely signed as officer and not agent of the company which did not exist. Therefore there was no contract as the company was not in existence.

Commenting on the case of **Kelner V. Baxter** (supra) Lord Goddard C.J. observed:

“That decision seems to me to stop far short of holding that every time an alleged company purports to contract – when there is no company in existence – everybody who is signing for the company is making himself personally liable.”

The Court held that the defendants were entitled to take the point that they did not contract with the plaintiff, but the company and as it was non-existent, the contract was a nullity.

It should be noted here that the defendants had not taken delivery and refused to pay. They refused to perform the contract by not accepting delivery. If they had accepted delivery the principle in **Kelner V. Baxter** would have applied.

Accordingly, I am of the view that the learned Judge was correct in holding that the contract was enforceable between the first appellant and the respondent because although the first appellant contracted ostensibly as agent of NEC Bakery, it was in fact the principal since NEC Bakery was not in existence at the time the debenture was concluded. It is only by holding the first appellant so liable that effect can be given to the contract. To refuse to do so would be to allow the first appellant to escape the consequences of its breach of contract. The first ground of appeal therefore, fails.

On the second ground, it was submitted for the appellants that the learned judge made ambiguous and erroneous findings regarding the principle of lifting the veil. It was argued that the judge did not disclose the veil of the particular company whose veil had been lifted.

It is clear from the judgment of the learned judge that he lifted the veil of NEC Bakery to find out who were its owners of shareholders as well as management, and he found that it was owned as a subsidiary of the first appellant with 98% shareholding. I do not accept the argument that it was wrong to lift the veil of NEC Bakery to understand it was not a party to the suit. It was not a party to the suit because it was not a party to the contract. The contract was purported to be made on its behalf by the first appellant. Therefore it was right to discover who owned NEC Bakery to understand its relationship with the first appellant. Similarly the judge lifted the veil of the second and third appellants to find out its shareholders and found that they were owned by the first appellant. The judge did not lift the veil of the first appellant and therefore the submission that the Company Act did not apply to Corporations was irrelevant. Therefore I find no merit in the second ground of appeal.

It is convenient to dispose of ground four here. It was contended that the issue of lifting the veil was not put before the judge and that the learned judge erred in allowing the respondent to adduce evidence not based on its pleadings. The respondent denied in its written statement of

defence that the seizure of the vehicles was unlawful and it adduced evidence that the seizure was in exercise of its right under the debenture. The respondent also adduced evidence regarding the relationship between the first appellant and its subsidiary companies to show that the first appellant owned these companies. That evidence was to justify their seizure of the appellant's vehicles. To the respondent the first appellant and the subsidiaries were one and the same entity for the purpose of this case. Therefore evidence of the relationship between the first appellant and its subsidiaries namely the second and third appellants and NEC Bakery, which was the process of lifting the veil, was necessary to identify the true parties to the contract. The evidence was within the pleadings and issues framed and the learned judge was justified in admitting it and considering it in order to arrive at a just decision. Therefore ground four must fail.

As regards, the third ground of appeal, counsel for the appellant submitted that the learned judge misconstrued clause 6(a) of the debenture when he held that it provided for distress or execution to enforce the rights of the respondent. It was his contention that the enforcement clause was clause 7, which provided for appointment of a receiver. Counsel for the respondent argued that clause 6(a) empowered the respondent to seize vehicles. He also submitted that the respondent acted under sections 2 and 7 of the Mortgage Decree 1974, and therefore the seizure was unlawful.

Clause 6 of the debenture provided as follows:

- “6. The principal moneys and interest hereby secured shall immediately become payable without demand.
- (a) If s distress or execution either by writ or by appointment of a Receiver is levied upon any part of the property or assets hereby charged and the debt for which such levy is made or Receiver appointed is not paid off within seven days; or
 - (b) If an order is made or an effective resolution is passed for the winding up of the company; or
 - (c) If the company without the consent of the Bank ceased to carry on its business or threatens to cease to carry on the same; or
 - (d) If the company commits or attempts or purports to commit any breach of any of the covenants contained in clause 4 or clause 5 hereof.”

In dealing with this issue, the learned judge said,

“At this juncture, I should point out that the debenture does not provide only the appointment of a receiver as the means of execution. Clearly “a distress or execution” by writ is provided as a means of execution, besides the appointing of a receiver –(See clause 6 (a) of the debenture).”

He concluded,

“Arising from my holding on the second issue, it follows that the third plaintiff although it was dispossessed of the two motor vehicles seized the dispossession was not unlawful.”

With respect, I think the learned judge misconstrued the effect of clause 6 (a) of the debenture. Clause 6 as a whole provided for the circumstances under which the principal sum became payable but not the means of enforcement to realise the money. Therefore clause 6(a) did not authorise the respondent bank to realise the security by distress or execution, and the learned judge was wrong in so holding.

It seems clear from the provisions of the debenture that the means of realizing the security was by appointment of a receiver under clause 7 which provided as follows:

“(7) At any time after the principal moneys hereby secured become payable either as a result of a lawful demand being made by the Bank or under the provisions of clause 6 hereof the Bank or not to be a receiver and manager of the property hereby charged or any part thereof and may in like manner from time to time remove any receiver and manager so appointed and appoint another in his stead.”

Clause (8) enumerates the powers of a receiver to include to take possession of the property charged, to sell the property, and to carry on the business of the company.

Therefore appears that the respondent bank did not have the power to seize and sell the property charged. It could only do so through the appointment of a receiver, which was not done.

It was argued that the respondent acted under the provisions of sections 2 and 7 of the Mortgage Decree 1974, in seizing the vehicles. This is contrary to the evidence because it is clear from the advertisement of sale by public auction, published in the **New Vision** Newspaper of Wednesday

July 21, 1993 page 9 (Annexature C”). That the sale was “in exercise their right of debenture.” But the debenture contained no such right.

Moreover, the Mortgage Decree does not apply to moveable property like vehicles, as it applies to land only. Even if it applied, there is no provision empowering the mortgage or the bank to sale the mortgaged property without a foreclosure order of the court under section 7 which sale is to be carried out under conditions laid down in section of the Decree. There was no such order of the court in which case. Therefore the Mortgaged Decree had no application to this case.

In the absence of any provision in the debenture or any law authorising the respondent bank to seize the appellants’ vehicles in default of payment of the loan, I hold that the seizure of the vehicles was unlawful, and the learned judge was wrong to hold otherwise. Therefore the third ground of appeal must succeed.

On the sixth ground of appeal, counsel for the appellant argued that the third appellant could not have taken objection proceedings under Order 19 rule 55 of the Civil Procedure Rules, as the learned judge observed, because there was no attachment or decree from court to execute. Order 19 r. 55(1) provides.

“Where any claim is preferred to or any objection is made to the attachment of, or any property attached in execution of decree on the ground that such property is not liable to such attachment, the court shall proceed to investigate the claim or objection with the like power as regards the examination of the claimant or objector, and in all other aspects, as if he was a party to the suit:

Provided that no such investigation shall be made where the court considers that the claim or objection was designedly delayed.”

In dealing with this issue the learned judge said,

“As for the fifth issue I would say that there was apprehension and fear of imminent and immediate seizure of the three motor vehicle namely, registration numbers UPS 009, UPP 671 and UPR 182. So far as the third plaintiff was concerned I have no doubt that the imminent and immediate seizure of the three vehicles that it hid or put off the road was a source of apprehension and fear to it. However whether to it, the seizure appeared

unlawful, so far as it supported by legal authorities as out lined above it was so justified by such fear and apprehension that he should hide the motor vehicles threatened with seizure and sale. A more justified and no doubt acceptable way would have been the instituting of objection proceedings.”

It does not appear to me that the third appellant could taken objection proceedings against the respondent bank because objection proceedings are instituted during the process of executing a decree passed by the court. In this case there was no suit, no judgment and no decree. There was no attachment in execution of a decree, and therefore the provision of 0.19 r.55 could not have been invoked by the third appellant. Ground six must succeed.

Counsel for the appellants submitted on the eighth ground that under section 3 of the National Enterprises Corporation Ordinance, there was a need for a special resolution of the Board authorising the affixing of the seal on the debenture. He also contended that under section 14 of the same ordinance, there must be approval of the Minister of Finance before any money is borrowed by the first appellant, but no such authority was shown.

On the first point, while it is true that section 3 required a resolution of the Board to authorise the affixing of the seal of the Corporation on any document, it is equally clear from the same section that every document purporting to be issued by the Corporation and bearing its duly authenticated seal “shall be received in evidence without further proof, unless the contrary is shown. “The seal on the debenture was duly authenticated, and there was no evidence to show that the provisions of section 3 were not duly complied with.

On the seconds point, there was not evidence to show that the provisions of section 14 had not been complied with and the relevant approval had not been obtained. Accordingly, I find no merit in ground eight.

In ground eleven which is the last ground of appeal, the complaint is that the learned judge erred in holding that the seizure of the vehicles was illegal, in not ordering the recovery of the vehicles and in not awarding special damages for the unlawful seizure and threatened seizure of the appellants vehicles. I have already dealt with the first part of this complaint. I have held that the learned judge was wrong in holding that the seizure was lawful. As regards the order for

recovery of the vehicles, the learned judge ought to have granted it but failure to do so is now of no consequence since the vehicles have been returned to the appellants.

As regards the award of damages, counsel for the appellants argued that the learned judge erred in not assessing the damages he would have awarded in the event of finding for the appellants. The submission is not part of the ground of appeal but even if it were, I do not think that failure to assess damages a judge would have awarded is an error of law which have awarded in the event of finding for the plaintiff is good and should be encouraged, but it is not mandatory. Counsel submitted that as the trial judge did not assess the damages, the case be remitted back to him to do so. I agree that this is generally the practice because it enables the parties to have an opportunity to appeal against the award by the trial court. Ground eleven must therefore succeed in part.

In the result I would allow this appeal in part, set aside the judgment and decree of the trial court dismissing the appellant's claim for special damages for unlawful seizure and threatened seizure of their vehicles, and the order of costs, and substitute judgment for the appellants, in respect thereof. I would remit the case back to the trial judge for assessment of damages. As the appellants have succeeded on ground three which was the decisive ground, I would award them two thirds of the costs of this appeal and in the court below.

Dated at Mengo this 21st day of June 1995

B.J. ODOKI

JUSTICE OF THE SUPREME COURT.

I CERTIFY THAT THIS IS A TRUE

COPY TO THE ORIGINAL

E.K.E. TURAMUBONA

DEPUTY REGISTRAR, THE SUPREME COURT.