THE REPUBLIC OF UGANDA

IN THE SUPREME COURT OF UGANDA

AT MENGO

(CORAM: TSEKOOKO., KAROKORA., MULENGA., KANYEIHAMBA., KATUREEBE., JJ.SC).

CIVIL APPEAL NO. 05 OF 2005

B E T W E E N

ELADAM ENTERPRISES LIMITED ::::::::::::::::::APPELLANT

-Vs-

SGS (U) LTD)
SGS (K) LTD)::RESPONDENTS.
SOCIETE GENERALE DE SURVEILLANCE SA)

(Appeal from the decision of the Court of Appeal (Mukasa-Kikonyogo, DCJ, Okello and Engwau, JJ.A) In Civil Appeal No. 20 of 2003).

JUDGMENT OF KATUREEBE, JSC.

The appellant in this appeal was the plaintiff in High Court Civil Suit No. 187 of 1998 where it was partially successful. It was dissatisfied with the decision of that court and appealed to the Court of Appeal. The respondents were also dissatisfied with the decision of that court and cross-appealed in the Court of Appeal. The Court of Appeal dismissed the appeal with costs and allowed the cross-appeal. Hence this appeal to this court.

The facts of the case can briefly be stated as follows:-

In 1995, the appellant was awarded a tender to supply army uniforms to the Ministry of Defence. It contracted M/s Rift Valley Textiles Ltd (Rivatex) of Kenya to supply 175 bales of suiting fabric for the making of uniforms worth

US$168,000.00=. Rivatex issued Pro-forma Invoice No. 13/95 dated 05/07/95 (exhibit P.3). The materials to be supplied were described therein as 67% Polyester, 33% Cotton and the shade as UGBR421. At the time of this transaction, the law in force in Uganda, namely the Bank of Uganda (Pre-shipment Inspection of Imports) Regulations, 1982 (S.1 1982 No.90) required that all imports into Uganda whose value exceeded US$10,000= had to be subject to inspection. The said Regulations provided that the Inspector was to be the third Respondent. This Inspector was mandated to inspect the goods and satisfy itself that all the requirements had been complied with and then to issue a Clean Report of Findings. The appellant was required to pay the inspection fees amounting to US.$1368 which it did pay. This was paid through the 1st respondent. The physical inspection of the goods was carried out by the 2nd respondent, who issued the reports.

The appellant contended that the respondents failed and or neglected to carry out proper inspection of the goods in accordance with the agreed terms and conditions of the pre-shipment inspection contract. As a consequence some of the materials supplied to and received by the appellant were sub-standard and not in accordance with the specifications in the Pro-forma Invoices. As a result, some of the uniforms made from these materials and supplied to the Army by the appellant were rejected. The appellant further contended that in the case of the first consignment of 6377 meters of material, there was no accompanying inspection report. The appellant alleged that as a result of this failure it was penalized by the Uganda Revenue Authority in the sum of Ug.Shs.497,818=.

The appellant further alleged that the failure to carry out the pre-shipment inspection in time led to delay in delivery of the goods and a loss of 105 working days. As a result of all these alleged breaches, the appellant contended that it

suffered loss and damage and claimed special and general damages. The particulars of special damages were stated as follows:-

i) loss of profits amounting to Ug.Shs.43,275,190/=.

ii) Expenses on laboratory analysis and mailing charges Shs.332,000/=.

iii) Loss of profit for 105 days of production lost Ug.Shs.261,607,500/=.

iv) Cost of labour during idle time Ug.Shs.32,067,000/=.

v) Costs of shortage in quality supplied – Ug.Shs.49,834,239/=.

The appellant claimed general damages for breach of contract, negligence, inconvenience, loss of time reputation and goodwill. It claimed interest at the rate of 23% on special damages from December 1995 till payment in full and on general damages at court rate from the date of filing the suit till payment in full. The suit was defended by the respondents.

The learned trial judge rejected all the claims for special damages as not proven except for Shs.352,000/= representing the expenses for laboratory analysis and mailing charges. She found that the 2nd and 3rd respondents were in breach of contract and therefore liable in general damages. She awarded Shs.50,000,000/= for general damages, and interest on both the special and general damages at 15% from the date of judgment till payment in full. She also awarded costs to the appellant.

The appellant was dissatisfied and appealed to the Court of Appeal while the respondents cross-appealed.

In a unanimous decision, the Courts of Appeal reversed the decision of the High Court, allowing the cross-appeal and dismissing, with costs, the appeal. The appellant has now appealed to this court.

The appeal raised three grounds:

1. ***"The learned Justices of the Court of Appeal erred in law and in fact when they applied the Sale of Goods Act to the transaction between the appellant and the respondents.***

2. ***The learned Justices of the Court of Appeal erred in law and in fact when they failed to award the appellant damages.***

3. ***The learned Justices of the Court of Appeal erred in law in failing in their duty to re-evaluate the evidence and as such came to a wrong conclusion."***

Mr. Mpanga, counsel for the appellant argued these grounds separately, and I will deal with them in that order. In support of ground one, Mr. Mpanga, argued that the Justices of Appeal were wrong to apply the Sale of Goods Act, although he concedes they made correct findings. He submitted that the Justices of Appeal were wrong to say that the relationship between the appellant and the respondents was not based on contract.

On the other hand, Mr. Mulira, counsel for the respondents, opposed the appeal on what he argued were three broad grounds. He argued that the Court of Appeal had based its findings on breach of statutory duty and not on the Sale of Goods Act. Secondly, he argued that the Court of Appeal had considered and re-evaluated the evidence from the High Court. Thirdly, he argued that the provisions of the Sale of Goods Act were only applied hypothetically to the relationship between the

appellant as importer and Rivatex as supplier. He submitted that in this transaction there were three sets of contractual relationships. The first was a relationship between the appellant and the respondents which was based on statutory duty pursuant to S.1 90/82. In that relationship, he argued SGS would be liable if it was found to be in breach of the duties imposed by the regulations. If SGS did not carry out the instructions having been paid by the appellant, it would have been liable for breach under the law of contract. He submitted that the respondents had in fact carried out the instructions given to them and had not been in breach of statutory duty imposed by the regulations.

The other set of relationships, he submitted, was the one between Rivatex, the supplier, and the appellant which was a contractual one based on the Sale of Goods Act. But Mr. Mulira argued, evidence showed that the respondents had received instructions after the goods had been imported into the country by the appellant. He further submitted that the duty to facilitate the inspection is on the importer as per regulation 4(c) . Evidence showed that the respondent had carried out inspections, found some defects and informed the appellant who decided he would accept defects up to 4% and confirmed so in writing. Therefore, he submitted there could be no liability whatsoever on the part of the respondents. The court had fully and properly addressed itself to the law and evidence.

I find the argument by Mr. Mpanga very curious indeed. There is no doubt that the inspection of the goods was a requirement of the law, i.e. The Bank of Uganda (Pre-shipment Inspection of Imports) Regulations, S.I 1982. The Regulations imposed certain obligations on importers of all goods into Uganda whose value exceeded $10,000/=. These obligations were ably summarised in the judgment of

Byamugisha, JA. Regulation 1 dealing with payments on imports is particularly important.

It states:

> "***1(1) No payment shall be made in or outside Uganda by or on the authority of the Bank of Uganda or any licensed bank of Uganda, to the credit of any person, in respect of goods subject to pre-shipment inspection under these regulations, unless and until a Clean Report of Findings issued under regulation 5 of these regulations in respect of such goods, is presented together with the relevant shipping documents to an authorised bank."***

Clearly then, if the goods are not inspected or, if inspected, no clean report of findings is issued, no bank is allowed to pay for them. The importer would be entitled to withhold payment under the protection of the law. Regulation 3(1) imposes the duty on the importer to "***apply to the Bank of Uganda for issuance of an inspection order to have such goods so inspected.".*** Regulation 4 sets out the obligations of importers and sellers.

It states:-

> "***Where the Bank of Uganda issues an inspection order under regulation 3 of these regulations, it <u>shall be the duty of the person intending to import the goods into Uganda to</u> ensure <u>that</u> the seller of such goods;***
>
> a) ***gives not less than fourteen days' notice to the Inspecting Authority prior to the proposed date of pre-shipment inspection;***
>
> b) ***provides the Inspecting Authority with full inspection access to the goods;***

c) ***provides the Inspecting authority with all necessary facilities for carrying out quality and quantity inspection and price comparisons, and conducting all such tests, analyses, and other processes as may be required in the circumstances;***

d) ***makes all necessary arrangements for the handling, presentation, unpacking and repacking, sampling, shop – testing and any other thing required in connection with the inspection of the goods;***

e) ***provides the Inspecting Authority with a copy of the pro-forma invoice, indent purchase agreement, sale note, price list, tender papers and any other documents relevant to the importation of the goods which the Inspecting authority may consider necessary;***

f) ***submits to the Inspecting Authority a copy of the final settlement invoice covering the goods."*** (emphasis added).

It appears to me that the importer of goods would first need to show that he had himself complied with the statutory obligations with respect to the inspection of the goods before he could lay claim against the seller. In particular, it is his duty to ensure that the seller is given all the information it needs to comply with its obligations under Regulation 4.

Regulation 5(1) then mandates the Inspecting Authority to issue a Clean Report of Findings if it ***"is satisfied that all the necessary requirements have been complied with."***

Regulation 5(2) allows for the Inspecting Authority to issue a "Non-negotiable Report of Findings" where the inspection of the goods reveals any discrepancies or anomalies in the goods. The effect of this is that the seller would not be paid until all the anomalies and discrepancies have been put right.

It would appear to me that the Government wanted to ensure that only goods of quality as ordered by importers were actually imported into the country and paid for. This must have been intended to prevent the country's valuable foreign exchange being spent on substandard goods, hence the involvement of the Bank of Uganda. It would follow therefore that where an importer of goods by-passed these regulations and accepted un-inspected goods or paid for them, such importer would himself be in breach of the law.

The Inspecting Authority is appointed under Regulation 6(1) which reads thus:-

> ***"The Societe Generale de Surveillance SA of 1, Place de Alpes, Geneva, Switzeland, is hereby appointed the Inspecting Authority."***

So the 3rd respondent would be liable in case liability is established.
Regulation 6(2) would cover the 1st and 2nd respondents in so far as they were, at all material times, ***"subsidiaries, affiliates, agents and other authorised representatives"*** of the 3rd respondent.

Having looked at the Regulations, there can be no doubt about the statutory nature of the obligations of the parties to this transaction. In that respect I entirely agree with the findings of the learned Justices of Appeal. I also agree that the performance, or non-performance of these obligations, did not take away or in any way interfere with the parties' obligations under the Sale of Goods Act. Again the Regulations are very clear on this.

Regulation 9 states:

> ***"Nothing in these Regulations shall be construed as relieving any seller of his contractual obligations to the buyer of any goods liable to pre-shipment inspection."***

It is indeed possible that the inspector may be negligent in his duty of inspection and defects pass unnoticed. But if the importer himself should discover the defects notwithstanding the inspection report, why should the importer not exercise his rights under the Sale of Goods Act. The inspector will have been in breach of his statutory duty and may well be penalized or sued for it for consequences arising there from. However, the application of the sales of Goods Act is not done away with. The learned Justices of Appeal were right and I see no reason to interfere with their decision on this point.

Mr. Mpanga further argued that even if the Sale of Goods Act applied sections 34 and 55 cited by the Justices of Appeal dealt only with acceptance of the goods and the right of the buyer to reject goods. These sections did not remove the right to damages and he cited section 52 in support of his contention.

This argument is tenable where the buyer is suing the seller. As Mr. Mulira argued the appellant and the supplier had a contractual relationship under the Sale of Goods Act. Indeed had the appellant sued Rivatex, the supplier of the materials, the above arguments might as well have come into the picture. But since the supplier was never sued, the appellant cannot bring in the respondents under this argument. They were not the sellers or suppliers of goods. They only acted under a statutory duty to inspect the goods and could only be sued for breach of such statutory duty.

I see no merit in ground one of the appeal and it ought to fail.

Counsel next argued ground 3 of appeal. He claimed that the Court of Appeal had failed in its duty to re-evaluate the evidence as a whole. He argued that there were seven witnesses in all, and the judgment does not indicate that the court considered all the evidence because it did not indicate which evidence was credible and which was not. He claims that the plaintiff's first witness gave extensive evidence at page 70 -71 of the record which was not challenged in cross-examination. He submitted that on the basis of the decision in ***HABRE INTERNATIONAL CO. LTD –VS- KASAM AND OTHERS, [1999] 1 EA 115,*** where evidence was not challenged in cross-examination it must be taken to be admitted as true. He cited the passage at page 138 of the Law Report which reads as follows:

> ***"Whenever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination it must follow that he believed that the testimony given could not be disputed at all. Therefore, an omission or neglect to challenge the evidence – in-chief on a material or essential point by cross-examination would lead to the inference that the evidence is accepted subject to its being assailed as inherently incredible."***

The point to note here is that the above legal position refers to cross-examination on evidence in chief. The purpose of cross-examination is to test the veracity of the witness on his evidence in chief.

In his evidence in chief, PWI, Eyasu Sirak. Managing Director of the Appellant company, made it clear that the contract of supply was made with Rivatex Kenya. The respondents were to carry out pre-shipment inspection. Fees for the pre-shipment inspection was paid. This was never in dispute. One will recall that the

law requires that goods subject to pre-shipment are not to be paid for until and unless they have been inspected and a Clean Report of Findings been issued. The witness admits that the first consignment was imported and accepted by him without the Pre-shipment Inspection Certificate. Again one will re-call the statutory duty placed on the importer to ensure that inspection is done. He failed in that duty and was penalised by customs in the sum of Shs.497,818/=. In his evidence, he stated this (page55):

> ***"When the materials came, it went to customs. Customs asked me for the Pre-shipment Inspection certificate, there was none. As a result of that I was penalised Shs.487,818/= for bringing goods against the law, without Pre-shipment Inspection Certificate. I have the invoice from Rivatex which Panama and mixed colour."***

Later in his evidence at page 58 of the record the witness states how he complained to SGS (U) Ltd about the quality of the supplies and he was assured that his case would be handled "***with utmost care."*** Asked whether this was done, he replied in respect to the officer of SGS (U) LTD.

> ***"He did intervene and he told Rivatex that they had supplied wrongly and they should rectify. As a result of this intervention, Rivatex wrote to us and promised to rectify. The letter was copied to SGS also."***

Under cross-examination he said:-

> ***" A delegation of three people came from Rivatex to inspect the goods. It was around the 3rd consignment. I showed the bad fabrics to them. They said sorry. <u>We agreed that I should go ahead and make uniforms out of them at their own risk.</u> I told them 4500 uniforms had been rejected. They said "never mind." The Road consignment notes are prepared by Rivatex……The loading was done at Rivatex. <u>The supplier was under a duty to supply proper goods, according to my contract.</u>"*** (emphasis added).

Having elicited these answers, what was the cross-examiner, representing the respondents expected to do? The witness is now left to allege that ***"Rivatex the supplier was undertaking to replace the defective goods. SGS collaborated with other people to send rubbish."***

He admitted having allowed himself to accept the goods on the undertaking of the supplier to replace them. The appellant admits having accepted the goods without a Pre-shipment Inspection Report.

The evidence of this witness PWI was carefully reviewed by Byamugisha, JA, at page 20 of her judgment, and her colleagues agreed. I am satisfied that the court addressed itself to all the relevant evidence and arrived at the right conclusion. In the result ground 3 fails.

Under ground 2, counsel argued that the Court of Appeal erred in not awarding damages to the appellant. He asserted that the court dealt with the issue of damages only briefly and only on contractual obligations not on statutory duty. He claimed that the evidence of the Managing director of the Plaintiff on the question

of damages had not been challenged and therefore must be deemed to have been accepted, on the basis of the HABRE case *(supra)*.

On the other hand, Mr. Mulira was of the view that the Court of Appeal had correctly addressed itself on the authorities and the law governing assessment of general damages, and correctly concluded that this case did not quality for an award of general damages. He also agreed with the court's findings in respect of special damages. With great respect to Mr. Mpanga, I do not agree with his above assertions. In my view, the court did address the matter of damages sufficiently. The point was made that damages flow from liability, whether in contract or in breach of statutory duty where such liability is established.

At page 17 of the judgment, Byamugisha, JA states:-

> ***"I agree with the submissions of counsel for the appellant that not all special damages must be proved by documentary evidence. What the law requires is strict proof. The appellant is a company that must be keeping books of accounts. In such circumstances, it is not difficult to adduce evidence of how much it was paying its workers and why the workers were idle for the period stated in the plaint. According to the testimony of P.W.1, he has been Managing Director of the appellant for 13 years. This means that the company must be making garments for sale to other organisations and the general public. It is therefore inconceivable that it can afford to keep workers idle for over 100 days because of one order from the Ministry of Defence. The learned trial judge was right to reject claims. They had no supporting documents. Moreover the rejection of the uniforms by the Ministry of Defence cannot be termed a***

direct result of the breach or breaches allegedly committed by the respondents."

At page 19, the learned Justice of Appeal states what the appellant had to show to prove liability on the part of the respondents.

"In order for the appellant to succeed in its claim against the respondents, it had to show that under the regulations, the respondents were liable. I agree with the learned trial judge that the respondents had a duty to carry out the inspection of the goods with utmost care before issuing the Clean Report of Findings."

The question therefore is whether the evidence established that the respondents had failed in their duty, and that failure had resulted in loss to the appellant. After reviewing the evidence, the learned Justices of Appeal found that the appellant had accepted the goods notwithstanding defects pointed out by the Inspecting Authority. Byamugisha, JA, states at page 257:

"The inspection was done and defects were pointed out. The buyer accepted fabrics whose defects were below 4%. After that acceptance, the Inspecting Authority issued a Certificate of those fabrics. It is the final consumer who rejected the uniforms made out of those fabrics. The appellant was the author of its own misfortunes. When it was accepting fabrics with defects of 3 – 4% there was no evidence that the final consumer agreed to those defects. This, cannot, in my humble opinion, be blamed on the respondents as inspectors."

I agree with this conclusion. By accepting and paying for goods that had not been inspected, the appellant breached the regulations. By accepting defective goods, albeit with defects below 4% it risked its rights under the contract with the supplier, Rivatex.

In my view, the appellant failed to establish liability on the part of the respondents, which liability would then give rise to a claim for damages.

Even after accepting the goods, it could still have maintained an action in damages against the supplier under the Sale of Goods Act. It did not do so.

Having failed to establish that the respondents were liable, I do not see how the appellant can then claim that it should have been awarded damages. I think the learned Justices of Appeal addressed this matter sufficiently and I see no reason to interfere with their findings and decision.

Therefore, ground 3 also fails. In the result I would dismiss the appeal with costs, here and in the courts below.

Dated at Mengo this 10th day of July 2007.

Bart M. Katureebe
JUSTICE OF THE SUPREME COURT

JUDGMENT OF TSEKOOKO, JSC.

I have read in advance the judgment prepared by my learned brother, the Hon. Mr. Justice Katureebe, JSC, and I agree with his conclusions that the appeal should be dismissed and that the appellant should pay costs of this appeal and in the two courts below.

The facts of this appeal are set out in the judgment of my learned brother. For purposes of this brief concurring judgment, I need not go into details. The appellant, a Ugandan registered Company, sought to import suiting fabrics from a Kenya based Company called Rivatex to make army uniforms for the Ministry of Defence. The fabrics were to be of specified standards. The appellant contracted with Rivatex for the supply of the fabrics. Under authority of the **Bank of Uganda (Pre-shipment Inspection of Imports) Regulations, 1982 (SI.1982 No.90)**, these fabrics had to be inspected by the 3rd respondent in the country of origin, before shipment, to ensure that the fabrics conform to, inter alia, the specifications of the importer, the appellant. The 3rd respondent, of which the first and second respondents are subsidiaries, apparently carried out the pre-shipment inspection, found defects in some fabrics and duly notified the appellant. The appellant deliberately decided to accept the fabrics with the defects and made the army uniforms some of which uniforms were rejected. As a result of that rejection, and also of payment of some Uganda Revenue Authority penalties imposed on it as a result of its failure to comply with certain requirements, the appellant chose to institute a suit in the High Court. It claimed for special damages amounting to shs. 387,184,929/= and general damages from the respondents on grounds of breach of duty and contract. The respondents filed written defences denying liability.

In the High Court, the appellant succeeded principally against the 2nd and 3rd respondents. The suit against the first respondent was dismissed. The appellant appealed against the whole judgment where upon the respondents lodged a cross-appeal in the Court of Appeal. The Court of Appeal dismissed the appeal and allowed the cross- appeal by the respondents. The appellant has appealed to this Court against the decision of the Court of Appeal and based its appeal on three grounds. These grounds appear in the judgment of Katurebe JSC. The gist if the grounds is: -

- That the Court of Appeal erred when it applied the sale of Goods Act to the transaction between the parties.
- The Court of Appeal should have awarded damages to the appellant.
- The Court of Appeal failed to re-evaluate evidence.

Mr. D. F. K. Mpanga argued the appeal on behalf of the appellants, while Mr. Peter Mulira opposed the appeal.

As my learned brother has explained in his judgment, these complaints have no sound basis.

The obligations of the appellant, as an importer, and of Rivatex, as a seller, and the respondents, particularly the third respondent who had been appointed by the Uganda Government as the Inspecting Authority, are clearly spelt out in the **Bank of Uganda (Pre-shipment Inspection of Imports) Regulations 1982** (SI 1982 No.90). My learned brother has adequately discussed the relevant regulations. It is unnecessary for me to

consider the relevant ones herein details. However, a perusal of these regulations reveals that whilst Government must have intended that valuable foreign exchange would not be misapplied or spent without value, the Government also protected the importer, in this appeal, the appellant if such appellant and the Inspecting Authority complied with all the necessary requirements.

As correctly observed by my learned brother in his judgment, the appellant does not seem to have cared much about the protection afforded to it by SI 1982 No.90 or indeed by the law of contract. The appellant accepted some substandard fabrics from Rivatex and proceed to interfere with those fabrics by making uniforms for the Ministry of Defence, well aware that the fabrics were defective. The appellant thus deliberately, not only threw away its rights to sue Rivatex under the law of contract, but also similarly threw overboard whatever protection it could get under SI 1982 No.90.

I therefore agree with the contention of Mr. Peter Mulira, learned counsel for respondents, that the Court of Appeal adequately and correctly set out and then discussed statutory duties of each party. I think that the court based its decision on breach of statutory duty, discussed the relevance of the provisions of the **Sale of Goods Act** before it concluded, correctly in my opinion that the Act did not apply to the relationship between the appellant and the respondents.

I do not, with respect, agree with the contention of Mr. Mpanga, counsel for the appellant, that the Court of Appeal failed at all, or in anyway, in the evaluation of evidence and the application of the relevant law thereto. I

think that the Court of Appeal was correct when it held that the appellant failed not only to establish its claim but also failed to prove that the respondents were liable in damages to the appellant.

I would dismiss this appeal with costs to the respondents, both here and in the two courts below.

As the other members of the court agree, it is so ordered.

Dated at Mengo this 10th day of July 2007.

J.W.N. Tsekooko
JUSTICE OF THE SUPREME COURT

JUDGMENT OF MULENGA, JSC

I have had the benefit of reading in draft the judgment of my learned brother, Katureebe, J,S.C, I agree with him that this appeal be dismissed with costs.

Dated at Mengo, this 10th day of July 2007.

J.N. Mulenga

JUSTICE OF SUPREME COURT

JUDGMENT OF KANYEIHAMBA, JSC

I have had the benefit of reading in draft the judgment of my learned brother, Katureebe, J.S.C, and I agree with him that this appeal be dismissed with costs.

Dated at Mengo, this 10th day of July 2007.

G.W. Kanyeihamba

JUSTICE OF SUPREME COURT