

THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)
CIVIL SUIT NO. 159 OF 2020

STANBIC BANK UGANDA LIMITED ::::::::::::::: PLAINTIFF

VERSUS

1. UGADEN COCOA TRADING LIMITED

2. SKOVBO HERLUF SVENINGSEN ::::::::::::::: DEFENDANTS

BEFORE: HON. LADY JUSTICE PATIENCE T.E. RUBAGUMYA

JUDGMENT

Introduction

This matter was filed on 25th February 2020, by the Plaintiff for a declaratory order that the Defendants breached the terms of the overdraft facility extended by the Plaintiff, an order for payment of USD 50,000 to the Plaintiff being the sum guaranteed by the 2nd Defendant, an order for payment of USD 257,993 to the Plaintiff being the outstanding sum and interest thereon for the breach of the terms of the overdraft facility, interest on the decretal sum at 9% per annum from the date of default till payment in full, general damages at an interest rate of 15% per annum from the date of Judgment till payment in full and costs.

Background

On 9th March 2018, the Plaintiff granted the 1st Defendant a business overdraft facility of USD 200,000 (United States Dollars Two Hundred Thousand Only) to finance the purchase, processing and export of cocoa. The overdraft was payable on demand and would immediately become due

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and payable without any obligation to give the 1st Defendant notice in making, or prior to the demand by the Plaintiff. On 13th April 2018, the 2nd Defendant issued a personal guarantee not exceeding USD 50,000 (United States Dollars Fifty Thousand Only) in favour of the 1st Defendant, guaranteeing the payment and satisfaction of all liabilities and every sum owing to the Plaintiff incurred by the 1st Defendant either solely or jointly. It is alleged that the 1st Defendant withdrew from the overdraft facility but never fulfilled the repayment terms under the facility despite numerous demands and reminders to fulfil the repayment obligations which has left the overdraft in arrears of USD 257,993 (United States Dollars Two Hundred Fifty-Seven Thousand Nine Hundred Ninety-Three Only) and interest on the said amount continues to accrue at the contractual rate till payment in full. It was stated by the Plaintiff that at the time of filing the suit in February 2020, the Defendant owed the Plaintiff a total sum of USD 307,993 broken down as follows;

- a) Principal sum and interest at USD 257,993.
- b) Personal guarantee of the 2nd Defendant for the liability of the 1st Defendant at USD 50,000.

Representation

The Plaintiff was represented by Counsel Horace Nuwasasira of M/S Signum Advocates while the Defendants were represented by M/S Buwule & Mayiga Advocates.

On 30th October 2023, when this matter came up for hearing, it proceeded ex parte against the Defendants after this Court was satisfied that the Defendants on several occasions had been served with the hearing notices as per the affidavits of service by Mr. Ejalu Emmanuel dated 25th

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September 2023 and 25th October 2023 and the acknowledgement of receipt thereto but failed to appear.

Issues for Determination

1. Whether this suit was prematurely filed?
- 5 2. Whether the Defendants breached their contract with the Plaintiff?
3. What remedies are available to the parties?

Plaintiff's submissions

Issue 1: Whether this suit was prematurely filed?

In his submissions, Counsel for the Plaintiff submitted that paragraph 4
10 of P. Exh 1 expressly provided that the overdraft facility was repayable strictly on demand, in which event the facility would immediately become due and payable, even without notice. That on 19th July 2019, the Plaintiff issued the 1st Defendant's directors, the 2nd Defendant inclusive with a notice of default (P. Exh 4), requiring the former to pay the outstanding
15 sum and interest which had accrued at the time, to USD 257,993. However, no payment was made within the twenty-one days.

Counsel quoted **Lord Denning** in the case of **Attica Sea Carriers Corporation Vs Ferrostaal Poseidon Bulk Reederei G.M.B.H** (1979) 1 Lloyd's Rep. 250 that;

20 *"The aim of the law is to ensure that an innocent party receives his full due and that no rule or equity can compel him to take a loss no matter how minute it may be".*

Lord Denning further stated that;

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“An Innocent party should be adequately compensated. The only compensation for non-payment of a debt is payment of the debt. The innocent party in other words is entitled to that no loss end and is empowered to achieve it by an action for debt. The contract breaker cannot escape his contractual liability or limit his liability by repudiating it and insisting that such repudiation be accepted by the innocent party”.

He submitted that the Defendants did not honour the demand as made in P. Exh 4 despite utilising the overdraft facility and that it is from the Defendants’ omissions that the Plaintiff’s claim to recover the sums in issue arose and that the claims that this suit was prematurely filed is misconceived.

Analysis and Determination

This matter arises out of the overdraft facility of USD 200,000 (United States Dollars Two Hundred Thousand Only) granted by the Plaintiff to the 1st Defendant to finance the purchase, processing and export of cocoa dated 9th March 2018. The facility is undisputed but the Defendants allege this suit was prematurely instituted.

As provided for under **Section 101 of the Evidence Act, Cap. 6**, whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist. (See also **Sections 102,103 and 104 of the Evidence Act**).

Section 42 of the Contracts Act, Cap. 6 is instructive on when a contract can be performed.

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It is the Defendants' assertion under paragraph 4(a) of their Written Statement of Defence that the one-year limit within which to repay the overdraft facility was waived by the Plaintiff hence rendering this suit premature since the repayment period ceased to be of essence. I have studied the defence but no document was attached to prove the above assertion.

On the other hand, the Plaintiff through PW1 presented P. Exh1 a facility letter dated 9th March 2018. Paragraph 4 therein provides for the period and repayment and paragraph 4.2 expressly states that;

"The OD Facility is repayable strictly on demand, in which even the OD Facility shall immediately become due and payable and the Bank shall not be obliged to give any notice in making, or prior to demand".

I have also studied P. Exh 4 which is a notice of default dated 19th July 2019, on the loan on the overdraft facility. The notice showed that the Defendants were at the time 66 days past the due date of repayment. No evidence has been adduced in this Court to show that the Defendants disputed the notice above. In the foregoing, I find that the filing of this suit by the Plaintiff was not premature.

Issue 2: Whether the Defendants breached their contract with the Plaintiff?

As to whether the Defendants breached their contract with the Plaintiff, Counsel referred to the case of **Barclays Bank of Uganda Limited Vs Howard M. Bakojja HCCS No.53 of 2011** in which the Court while addressing whether there was a breach of contract arising from failure to pay loan instalments as agreed, held that;

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“...a breach of contract occurs where that which is complained of is breach of duty arising out of the obligation undertaken under the contract”.

Counsel submitted that in that case, the Court noted that there was a
5 breach of contract as a result of the failure by the Defendant to pay the
Plaintiff the agreed monthly instalments thereby defaulting.

Counsel submitted that similarly in this case, the Defendants breach lies
in its failure, refusal or neglect to pay in full for the overdraft facility upon
a demand being made by the Plaintiff. That the 1st Defendant was notified
10 of its default by way of a letter dated 19th July 2019, P. Exh 4 highlighting
that the overdraft on account number 9030008064910 was 66 days due,
with an outstanding balance of USD 257,993 and that P. Exh 7 highlights
various correspondences between the Plaintiff and the 2nd Defendant. He
stated that as of 13th August 2019, the Defendants had not honoured the
15 notice of default which required them to pay the monies within 21 days.
That on 13th August 2019, the Plaintiff through its officer, Ms. Namulindwa
Proscovia sent an email to the 2nd Defendant at 7:55 am requesting him to
share a payment plan to which he responded on the same day at 9:45 am,
to the effect that they would be able to pay back all the debt in less than
20 24 months.

However, that all the Defendants' promises did not come to fruition but
that a further request for the Plaintiff to convert the overdraft facility into
a fixed term loan according to P. Exh.5, a letter from the 2nd Defendant as
the Managing Director of the 1st Defendant was made. The Defendants
25 further undertook to pay USD 9,000 every month towards repayment of
the fixed term loan, if allowed and the first instalment to be paid from
December 2019. This request was declined by the Plaintiff due to the

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Defendants' failure to comply with the pre-requisite conditions highlighted in P. Exh 6. The Defendants did not make any payments despite the various notices issued by the Plaintiff.

In conclusion on this issue, Counsel contended that at the time of filing this suit, the overdraft facility was still accruing a contractual interest rate of 12.75% per annum which increased to 20.75% upon default under clause 5.3 of P. Exh 1.

Analysis and Determination

Black's Law Dictionary, 9th Edition defines a contract to mean an agreement between two or more parties creating obligations.

Section 10(1) of the Contracts Act, 2010 also defines a contract as an agreement made with the free consent of parties with capacity to contract, for a lawful consideration and with a lawful object, with the intention to be legally bound.

A breach of contract is where one or both parties fail to fulfil obligations imposed by the terms of the contract. (See the case of ***Nakawa Trading Co. Ltd Vs Coffee Marketing Board Civil Suit No.137 of 1991***).

While relying on **Section 91 of the Evidence Act**, Lady Justice C. K. Byamugisha in the case of ***William Kasozi Vs DFCU Bank Ltd HCCS No.1326 of 2000***, stated that;

“Once a contract is valid, it creates reciprocal rights and obligations between the parties to it. I think it is the law that when a document containing contractual terms is signed, then in absence of fraud or misrepresentation the party signing it, is bound by its terms”.

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From the above facts and as per the testimony of PW1, it is undisputed that on 9th March 2019, the Plaintiff granted the 1st Defendant a business overdraft facility of USD 200,000 to finance the purchase, processing and export of cocoa which was payable on demand as evidenced by P. Exh1.

5 In its Written Statement of Defence, the 1st Defendant does not dispute the debt but the sums claimed. Having found above that this suit was brought after the 1st Defendant defaulted on the payment of the amount claimed, I find that it breached its obligations in the contract.

As to whether the 2nd Defendant breached the contract, PW1's testimony
10 was to the effect that in clause 8.2 of the facility letter, the Plaintiff required the 2nd Defendant to issue a personal guarantee, guaranteeing payment and satisfaction of the overdraft facility to the limit of USD 50,000. That on 13th April 2018, the 2nd Defendant executed the personal guarantee having obtained independent advice from his Counsel. P. Exh 2 and P.
15 Exh 3 were exhibited in evidence and satisfied this Court that indeed the 2nd Defendant guaranteed payment of the facility to the limit of USD 50,000.

However, in their Written Statement of Defence, the Defendants do not dispute the 2nd Defendant's guarantee as well as P. Exh 2 and P. Exh 3,
20 but contend that the 2nd Defendant was discharged from liability in respect of the purported personal guarantee when the Plaintiff waived the twelve months' limit within which to repay the overdraft facility, without his consent. The 2nd Defendant did not attach any document to support this assertion.

25 PW1 stated that P. Exh.7 highlights various correspondences between the Plaintiff and the 2nd Defendant and shows at page VII that as of 13th August 2019, the Defendants had not honoured the notice of default which

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required them to pay the monies within 21 days. That on 13th August 2019, the Plaintiff through its officer Ms. Namulindwa Proscovia sent an email to the 2nd Defendant at 7:55 am, requesting him to share a payment plan to which he responded on the same day at 9:45 am, that they would
5 be able to pay back all the debt in less than 24 months.

The Defendants further undertook to pay USD 9,000 every month towards the repayment of the fixed term loan, if allowed and the first instalment was to be paid from December 2019. This request was declined by the Plaintiff due to the Defendants' failure to comply with the pre-requisite
10 conditions highlighted in P. Exh 6.

I have observed and examined all the correspondence as per P. Exh 7 between the parties via email and note that the Plaintiff through Ms. Namulindwa Proscovia kept on reminding the Defendants to clear the facility however, the Defendants kept on promising to repay the debt. I also
15 note that on 1st August 2019, the 2nd Defendant emailed the Plaintiff requesting fresh work capital but the same was declined on 5th August 2019 and the Defendants were asked to submit their repayment plan but the 2nd Defendant insisted on the funding to reconstruct the 1st Defendant Company.

As laid out in **Section 101 of the Evidence Act**, he who alleges must
20 prove, in the instant case, since the Defendants did not attach any documents to their Written Statement of Defence that Court would have probably relied on, in the assessment of the Plaintiff's evidence, I am therefore persuaded by PW1's testimony and P. Exh 7, P. Exh 6 and P. Exh
25 5 that the 2nd Defendant was not discharged of his duty of a personal guarantee.

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Section 85 of the Contract Act is to the effect that;

(1) In every contract of guarantee, there is an implied promise by a principal debtor to indemnify a guarantor.

(2) A guarantor is entitled to recover from a principal debtor any sum the guarantor rightfully paid under the guarantee on the contract.

The law provides for recourse for the guarantor to take as against the principal debtor and this is an option available to the 2nd Defendant in this case.

According to **Section 71 of the Contracts Act**, the liability of a guarantor is to the extent to which a principal debtor is liable and takes effect upon default by the principal debtor.

In the circumstances, since the 1st Defendant is in default of the overdraft facility extended to it, the 2nd Defendant is only liable for the sum of USD 50,000 in respect of which he provided a personal guarantee. The balance of the outstanding amount is payable by the 1st Defendant.

Accordingly, I find both Defendants in breach of the contract in issue.

Issue 3. What are the remedies available to the parties?

In its plaint, the Plaintiff sought for several remedies which I shall consider hereunder.

I have taken into consideration the principles relating to the contract of guarantorship and the law thereto. The said contract is meant to act as

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security and to assure the creditor that the money borrowed by the principal debtor shall be paid.

It is therefore my understanding from the above, that the guarantor's liability is to the extent of the limit of the guarantee. According to P. Exh2 (the personal guarantee under clause 8), the USD 50,000 was to act as security and it was limited to the aforementioned sum. Accordingly, the Plaintiff cannot seek to recover the total outstanding principal sums and the interests thereto and the sums in the security from the 2nd Defendant. The 2nd Defendant's liability is only limited to USD 50,000.

10 General damages

Counsel submitted that general damages are an established form of remedy against violations or infringements of rights whether constitutional, contractual or otherwise. Counsel further submitted that in the instant matter, the case has been made for the grant of pecuniary recompense for an actionable wrong done to the Plaintiff by the Defendants.

It is trite that general damages are awarded at the discretion of the Court to restore the aggrieved person to the position they would have been in had the breach or wrong not occurred. (See the cases of ***Takiya Kashwahiri & Anor Vs Kajungu Denis, CACA No.85 of 2011, Hadley Vs Baxendale (1854) 9 Exch 341 and Kibimba Rice Ltd Vs Umar Salim, S.C. Civil Appeal No.17 of 1992***).

As laid out in the case of ***Uganda Commercial Bank Vs Deo Kigozi [2002] 1 EA 305***, in the assessment of such damages, the Court should be guided by the value of the subject matter, the economic inconvenience

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that a party may have been through and the nature and extent of the breach or injury suffered.

Taking the above into consideration and having found that the Defendants are in breach of contract and the fact that the Plaintiff is a financial institution in the business of banking, I hereby grant general damages of UGX 10,000,000/= (Uganda Shillings Ten Million Only).

Interest

The Plaintiff herein prayed for interest at the rate of 9% per annum on the total sum of USD 307,993 from the date of Judgment till payment in full and on general damages from the date of Judgment at the rate of 15% per annum till payment in full.

Section 26 (2) of the Civil Procedure Act empowers this Court to award interest on a decretal sum.

Furthermore, in the case of **Wallersteiner Vs Moir (1975) 1 All ER 849**, **Lord Denning M.R** stated that;

“..In equity interest is awarded whenever a wrongdoer deprives a company of money which it needs in its business. It is plain that the company should be compensated for the loss thereby occasioned to it. Mere replacement of the money years later is by no means adequate compensation, especially in days of inflation. The company should be compensated by award of interest... But the question arises; should it be simple interest or compound interest? On general principles I think it should be presumed that the company (had it not been deprived of the money) would have made the most beneficial use open to it. It may be that the company

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would have used it in its own trading operation; or that it would have used it to help its subsidiaries. Alternatively, it should be presumed that the wrongdoer made the most beneficial use of it. But whichever it is, in order to give adequate compensation, the money should be replaced at interest with yearly rest.” (See also the case of **Waiglobe (U) Ltd vs Sai Beverages Ltd CS No.16 of 2017**).

The Supreme Court in the case of **Surgipharm Uganda Ltd Vs Anatoli Batabane Civil Appeal No. 11 of 2020** authoritatively made a distinction on the award of interest for special and general damages.

In his submissions, Counsel for the Plaintiff stated that at the time of filing the suit, the sum of USD 257,993 was the outstanding amount inclusive of interest thereon for the breach of the terms of the overdraft facility by the 1st Defendant. Accordingly, the interest component was already embedded in the sum claimed for in the plaint. In the circumstances, and given the fact that this is a commercial transaction, I shall grant interest of 9 % per annum on the decretal sum as prayed by the Plaintiff from the date of filing the suit until payment in full.

I further award interest at the Court rate of 6% per annum on the general damages from the date of Judgment until payment in full.

Costs

As provided for under **Section 27 of the Civil Procedure Act**, the costs of any action, follow the cause unless otherwise provided. In the

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circumstances, since there is no reason to deprive the Plaintiff of the same, it is entitled to the costs of the suit.

In the circumstances, the following orders are issued;

- 5 1. The Defendants are liable for breach of the overdraft facility extended by the Plaintiff.
2. Payment of USD 257,993 (United States Dollars Two Hundred Fifty-Seven Thousand Nine Hundred Ninety-Three Only) to the Plaintiff by
10 the 1st Defendant.
3. Payment of USD 50,000 (United States Dollars Fifty Thousand Only) to the Plaintiff by the 2nd Defendant.
4. General damages of UGX 10,000,000/= (Uganda Shillings Ten Million Only) shall be paid by the Defendants.
- 15 5. Interest at the rate of 9% per annum on the decretal sum in (2) and (3) above from the date of filing the suit until payment in full.
6. Interest at the Court rate of 6% per annum on general damages from the date of Judgment until payment in full.
7. The Defendants shall pay the costs of the suit.

20 I so order.

Dated, signed and delivered electronically this **11th** day of **December, 2023.**



25 Patience T. E. Rubagumya

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11/12/2023