THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA

(COMMERCIAL DIVISION)

CIVIL SUIT No. 0470 OF 2016

PROTEA CHEMICALS EAST AFRICA LIMITED …… PLAINTIFF

VERSUS

KAC CHEMICALS AND PAINTS (U) LIMITED …… DEFENDANT

Before: Hon Justice Stephen Mubiru.

JUDGMENT

a) The Plaintiff's claim;

The Plaintiff is a company incorporated in Mauritius, one of whose businesses is dealing in chemical supplies. Its case against the defendant is for the recovery of US $ 63,412 being the value of chemical supplies ordered but not paid for by the defendant. By three proforma invoices dated 18th July, 2013; 13th August, 2013 and 23rd October, 2013 respectively, together with three corresponding agreements bearing the same dates, the defendant agreed to purchase from the plaintiff, chemicals worth US $ 177,092 payable within ninety (90) days of the defendant's receipt of the bills of lading. Thereafter, unpaid amounts were to carry interest at the rate of 12% per annum from due date until payment in full. The plaintiff duly made the first shipment of products worth US $ 53,400 and transmitted to the defendant a bill of lading in respect thereof dated 27th August, 2013. The plaintiff made the second shipment on 13rd August, 2013 worth US $ 70,392 and transmitted to the defendant a bill of lading in respect thereof dated 15th August, 2013. The plaintiff made the third shipment on 23rd October, 2013 worth US $ 53,300 and transmitted to the defendant a bill of lading in respect thereof dated 23rd October, 2013. Although the total amount due from the defendant on the three shipments was US $ 177,092, the defendant paid only US $ 113,680 thereby leaving an outstanding balance of US $ 63,412 unpaid, hence the suit.

b) The defence to the claim;

In its written statement of defence, the defendant denied being liable to the plaintiff as claimed or at all. It contended that it dealt with a company by the name "Protea Polymers Limited East Africa and not the plaintiff. The defendant paid in full for all chemical products supplied to it. The defendant thus prayed that the suit be missed with costs.

c) The issues to be decided;

Two issues were raised for trial, namely:

1. Whether the plaintiff is entitled to payment of US $ 63,412 as claimed.
2. What remedies are the parties entitled to?

d) The submissions of counsel for the plaintiff;

Counsel for the Plaintiff M/s S & L Advocates the defendant does not deny the transaction and during the hearing D.W.1 Mr. Charles K. Bahemuka admitted partial indebtedness in the sum of US $ 23,000. The plaintiff's witness P.W.1 Sanet Jacobs Fourie provided a summary of how the debt arose, exhibit P. Ex.9. It is a reconciliation of the payments against the invoices. It shows that the invoice in respect of the 3rd delivery worth US $ 53,300 was not paid at all. On the second shipment worth US $ 70,392 a sum of US $ 10,112 is still outstanding, hence the total sum of US $ 63,300 claimed. All sums of money the defendant claimed were in full settlement of that debt are reflected in the plaintiff's reconciliation. The sum of US $ 35,062 was paid on account of "Crown Seals Meads Co" upon instructions of the defendant yet the defendant unsuccessfully sought to deny that transaction. The email correspondences between it and the plaintiff prove the plaintiff's version. Having proved its case to the required standard, the plaintiff is entitled to the remedies sought in the plaint.

e) The submissions of counsel for the defendant;

Counsel for the defendant M/s Kahara and Co. Advocates submitted that the defendant had dealings with "Protea Polymers Limited Eastern Africa" and not the plaintiff. The sum of US $ 35,062 credited to the account of "Crown Seals Meads Co" was erroneous since it was not upon the request of the defendant. The payments were not being made per invoice but rather were made on account against a reducing balance which the defendant eventually cleared in full. The defendant exhibited three instances of electronic funds transfer for a total of US $ 94,024 which do not correspond to those acknowledged by the plaintiff. The defendant proved that it paid in full for all goods supplied and therefore the plaintiff is not entitled to the reliefs sought.

f) The decision;

It is necessary to consider as a preliminary issue the claim raised in the defendant's written statement of defence that it did not deal with the plaintiff company but rather with "Protea Polymers Limited Eastern Africa." This was supported by the testimony of D.W.1 Mr. Charles K. Bahemuka.

It is trite that the name of a company is not an immutable part of its identity; a company can change its name. A change of name does not reform, re-incorporate into a different entity or dissolve the company (see *Oshkosh B'Gosh Inc. v. Dan Marbel Inc. Ltd [1989] BCLC 507*). The change of a company's name does not affect its Articles and Memorandum of Association (see *Economic Investment Corporation Ltd v. CIT (WB) AIR (1970) 40 Com Cases 1 (Cal*). All assets, liabilities and obligations of the company continue after the name change. The company with the altered name is the same company it was before the name change. Changing the name of a company does not remove any of its assets and liabilities because it is still the same company. No rights or liabilities of the company are affected by the change (see *Pioneer Protective Glass Fibre (P) Ltd. v. Fibre Glass Pilkington Ltd, (1986) 60 CompCas 707 Cal*). Any contracts executed in its former name can be enforced by or against it in the new name after obtaining a certificate stating the change of name. It is for that reason that the courts have held that proceedings commenced by the

company in its former name can be continued under its new name (see *Solvex Oils and Fertilizers v. Bhandari Cross-Fields (P) Ltd. (1978) 48 Com Cases 260 (P &H*).

The Plaintiff's exhibit P. Ex.13 is a certificate of change of name issued under sections 24 (c) and 36 (2) of *The Companies Act, 2001* of the Republic of Mauritius which further provides under sections 36 (3) that:

> 3) A change of name of a company shall -
>
> (a) take effect from the date of the certificate issued under subsection (2); and
>
> (b) not affect the rights or obligations of the company, or legal proceedings by or against the company, and legal proceedings that might have been continued or commenced against the company under its former name may be continued or commenced against it under its new name.

The above provisions are in *pari materia* with section 37 (6) of *The Companies Act, 2012* of Uganda which provides that a change of name by a company does not affect any of the rights or obligations of the company or render defective any legal proceedings by or against it and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.

Once there is a change of name, proceedings cannot be commenced in the previous company name. For example in *Malhati Tea Syndicate v. Revenue Officer (1973) 43 Comp Cas 337* a company changed its name from "Malhati Tea Syndicate Ltd." to "Malhati Tea and Industries Ltd." It filed a suit in its former name. Declaring the suit to be invalid, the court held that nothing in the Act authorised the company to commence legal proceedings in its former name at a time when it had acquired its new name which has been put on the register of joint stock companies. For that reason, the plaintiff could not institute the instant suit in its former name after it had changed its name. Accordingly this part of the defence is rejected. I find that the plaintiff's change of name had no effect on its existing rights under contracts entered into with the defendant.

1st issue; whether the plaintiff is entitled to payment of US $ 63,412 as claimed;

In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant / debtor owes the money claimed. Generally, a plaintiff must show: (i) the existence of a contract and its essential terms; ii) a breach of a duty imposed by the contract; and (ii) resultant damages.

According to section 10 (5) of *The Contracts Act, 7 of 2010*, a contract the subject matter of which exceeds twenty five currency points (500,000/=) must be in writing. This requirement is satisfied by any signed writing that; (i) reasonably identifies the subject matter of the contract; (ii) is sufficient to indicate that a contract exists; and (iii) states with reasonable certainty the material terms of the contract. Writing all material terms is not required; what is required at a minimum is a sales of goods contract is an acknowledgment of agreement by the parties and a specification of the quantity of goods that are to be exchanged. Multiple writings relating to each other can be combined to show that a single contract exists to satisfy this requirement. While this provision is designed to avoid fraudulent enforcement of contracts that never took place, that the contract was carried out can also be powerful confirmation of the agreement. Therefore in a sale of goods contract, delivery of the goods and acceptance of those goods by the purchaser is a sufficient substitute for writing. The agreement is enforceable to the extent of the goods delivered and accepted. In other words, performance renders an oral contract for the sale of goods enforceable, but only to the extent of the performance.

In considering whether these requirements are met, the court should focus on substance rather than form and consider how a reasonable person in the position of the parties would have understood the documents exchanged, given their terms and the context in which they were written. When interpreting the contract the court should be mindful of the fact that it is not the function of the court to improve the parties' bargain (see *Wood v. Capita Insurance Services Ltd, [2017] 2 WLR 1095; [2017] AC 1173; [2017] 4 All ER 615*).

For a contract to come into existence, there must be an offer made by one party which is, in turn, is accepted by another party. An offer is a promise to provide something specific if the other party agrees to do something specific in return. The acceptance must be stated either by words spoken or written or by conduct. Either words or conduct constitute acceptance of an offer if it occurs in accordance with and in response to the specific terms of the offer.

As proof of the offer made to the defendant, the plaintiff relies on a proforma invoices dated 18th July, 2013 (exhibit P. Ex.1) and 23rd October, 2013 (exhibit P. Ex.5) the third in respect of goods worth US $ 70,392 was not exhibited. By the two proforma invoices, the plaintiff offered to sell to the defendant goods worth US $ 54,000 and US $ 53,000 respectively. On each of the proforma invoices the defendant signified its acceptance by affixing its common rubber stamp and signature of its authorised principal officer. An agreement between parties is legally binding if, in the opinion of a reasonable person who is not a party to the contract, an offer has been made and accepted (see *RTS Flexible Systems Ltd v. Molkerei Alois Müller GmbH & Co KG [2010] 2 All E.R. (Comm) 97*). I therefore find that the signed proforma invoices constitute the contract between the parties to this suit.

The rights and obligations of parties to a contract are determined by the terms of that contract. By those proforma invoices the plaintiff had the obligation to deliver the goods and the defendant to pay the stipulated price. As proof of delivery, the plaintiff relies on bills of lading dated; 13th August, 2013 (exhibit P. Ex.3); 27th August, 2013 (exhibit P. Ex.2); and 15th November, 2013 (exhibit P. Ex.6). A bill of lading is a written receipt that confirms the transportation of goods by a carrier. The shipper acknowledges that the cargo was received without damage and provides the carrier with a receipt that acts as legal evidence of delivery. Although the plaintiff did not adduce evidence of this, in his testimony D.W.1 Mr. Charles K. Bahemuka, admitted that the goods were received by the defendant as revealed in paragraph 3 of his witness statement. I therefore find that the plaintiff has proved performance of its side of the bargain by delivery of goods worth a total US $ 177,092.

It was the testimony of P.W.1 Ms. Sanet Jacobs Fourie that the plaintiff then delivered three separate invoices; the 1st was dated 13th August, 2013 for US $ 53,400 (exhibit P. Ex.4); the 2nd

was for US $ 70,392 (not exhibited) and the 3rd was for US $ 53,300 (not exhibited) hence the total of US $ 177,092. The defendants made only two payments; one of US $ 23,750 and the other of US $ 89,930 hence a total US $ 113,680. Invoice 192 for an amount of US $ 53,300 was not paid at all. The other invoice No. 133 in the sum of US $ 53,340 was paid in full; invoice No. 131 in the sum of US $ 73,912 only US $ 60,280 of it was paid leaving a balance of US $ 10,112. The total balance outstanding is therefore US $ 64,312. She summarised the invoices and payments made against them in a ledger exhibited as P. Ex.9. It is trite that subject to the provisions of any other law in force, no particular number of witnesses in any case may be required for the proof of any fact (see section 133 of *The Evidence Act*). In the instant case the testimony of this witness establishes a *prima facie* case of a debt owed by the defendant.

Although jurisprudence abounds that, in civil cases, one who claims has the burden of proving it; however the general rule is that a party is not called upon to prove his negative averments, even when they may be necessary to his pleading. It is often impracticable to prove a negative with satisfactory evidence, hence a party should not be required to prove a negative. Where the creditor introduces some evidence of the debt establishing a *prima facie* case, the burden of going forward with the evidence, as distinct from the general burden of proof, shifts to the debtor, who is then under a duty of producing some evidence to show payment. When the existence of a debt is fully established by the evidence, the burden of proving that it has been extinguished by payment devolves upon the debtor who offers such defence to the claim of the creditor. Consequently, the evidential burden rests on the defendant to prove payment, rather than on the plaintiff to prove non-payment. The debtor has the evidential burden of showing with legal certainty that the obligation has been discharged by payment.

In his testimony, D.W.1 Mr. Charles K. Bahemuka admitted only owing "around US $ 23,000" which they discovered as owing only this year. He insisted that he said sum of money was owed to the "previous company." They were confused by the change of name and the inconsistent figures and hence could not pay. He contended that in the plaintiff's ledger (exhibit P. Ex.9), a sum of US $ 23,000 was not reflected yet it had been paid. He further contested the sum of US $ 23,000 that the plaintiff credited to M/s Crown Seals stating that it did so without authorisation from the defendant.

Regarding the sum of US $ 23,000 which D.W.1 claimed was not reflected in the plaintiff's ledger (exhibit P. Ex.9) yet it had been paid, P.W.1 Ms. Sanet Jacobs Fourie explained that as she stated in para 3.7 of her witness statement, the defendant's first attempt to pay that sum was on on 23rd October, 2013 was unsuccessful because the defendant had cited a wrong swift code. It was bounced back to the defendant who later remitted it successfully and it was credited on18th December, 2013. I find this explanation well corroborated by email correspondences to that effect (exhibit P. Ex. 8). I therefore find that this amount was duly incorporated in the plaintiff's ledger.

Regarding the sum of US $ 23,000 that the plaintiff credited to M/s Crown Seals Meadas stating that it did so without authorisation from the defendant, P.W.1 Ms. Sanet Jacobs Fourie explained that the two companies, the defendant and M/s Crown Seals Meadas, sell to the same customers and both are the plaintiff's customers. Crown Seals Meadas could not effect a bank transfer and asked the defendant to do it on their behalf. That sum of US $ 35,062 although paid by the defendant, was credited to the account of M/s Crown Seals Meadas. This was upon authorisation and instructions of the defendant (as shown by exhibit P. Ex.14).

Examination of the email correspondences (exhibits P. Ex.13, P. Ex.14 and P. Ex.15) exchanged between October, 2013 and November, 2013 show that the three companies, the plaintiff, the defendant and M/s Crown Seals Meadas, were communicating about this payment. The correspondences were copied to the MD of the defendant. Crown Seals Meadas tried to pay the defendant and then asked the defendant to pay to the plaintiff, which transaction failed initially, but eventually went through on 24th November, 2013. Additional correspondences are to be found at pages 3-5 of the plaintiff's supplementary trial bundle which were correspondences sent by the defendant to explain the context of the transaction. The overall picture painted by the correspondences is that the defendant knows Crown Seals Meadas and the payment the defendant made on their behalf.

Generally speaking, the principal officers of a company, who include its owners, officers, directors and/or managers, have authority to bind a company. However any other person in the company acting as its representative, regardless of their role in the company, who acts within the scope of his or her "actual" or "apparent" authority, may create a legally binding obligation on behalf of

the company. Such authority can be established through direct evidence or can be implied through the actions of others at the company. This arises from conduct of the company, whose effect is to hold out that a person (agent) as having authority to deal with the company's affairs on its behalf.

Apparent or ostensible authority is proved by evidence showing that; (i) a representation that the agent had authority to enter on behalf of the company into a contract of the kind sought to be enforced was made to the contractor; (ii) that the representation was made by a person or persons who had actual authority to manage the business of the company either generally or in respect of the particular matter to which the contract relates; (iii) the third party was induced by the representation to enter into the contract; and (iv) under its memorandum or articles of association the company was not deprived of the capacity to enter into a contract of the kind sought to be enforced or to delegate authority to the agent to enter into a contract of that kind. The representation, if acted upon by the third party by entering into the contract, operates as an estoppel. That prevents the company from denying that it is not bound by the contract.

Persons contracting with a company and dealing in good faith may assume that acts within its constitution and powers have been properly and duly performed and are not bound to inquire whether acts of internal management have been regular (see Royal *British Bank v. Turquand (1856) 6 E&B 327*and *Kanssen [1946] AC 459*). The rule is designed for the protection of those who are entitled to assume, just because they cannot know, that the person with whom they deal has the authority which he or she claims. The third party can assume that the affairs of company have been complied with, unless something has happened that would cause it to question that state of affairs. If the third party has actual or constructive notice that such steps had not been taken, he or she will not be able to rely on any ostensible authority of the directors and their acts, being in excess of their actual authority, will not be the acts of the company (see *Criterion Properties plc v. Stratford UK Properties LLC and others [2004] 1 WLR 1846*).

I find that by those email correspondences, a representation was made that the defendant had authority to pay on behalf of Crown Seals Meadas. That representation was made by a person or persons who had actual authority to manage the business of the defendant either generally or in respect of this particular payment. The plaintiff was induced by the representation to credit the

payment to Crown Seals Meadas. There is no evidence to show that under the defendant's memorandum or articles of association it was deprived of the capacity to give instructions or to make a payment of that hind or to delegate authority to Crown Seals Meadas. The representation, was acted upon by the plaintiff, which operates as an estoppel which prevents the defendant from denying that it is not bound by the payment made under that instruction.

It follows that the plaintiff having made out a *prima facie* case in his favour, the defendant has failed to discharge its evidential burden to prove that the debt was extinguished by payment in full. Consequently judgment must be entered in favour of the plaintiff for the sum claimed. The defendant having failed to meet its burden of proving payment, this issue must be resolved in the plaintiff's favour. The defendant's indebtedness to the plaintiff in the sum of US $ 63,412 has been established on the balance of probabilities.

2nd issue; what remedies are the parties entitled to.

Under section 64 (1) of *The Contracts Act, 2010* where a party to a contract, is in breach, the other party may obtain an order of court requiring the party in breach to specifically perform his or her promise under the contract. For that reason the plaintiff is entitled to recover the sum of US $ 63,412 outstanding due. The plaintiff further claims interest thereon since the amount fell due and the costs of the suit.

i. Interest.

Under section 26 (1) of *The Civil Procedure Act* where interest was not agreed upon by the parties, Court should award interest that is just and reasonable. In determining a just and reasonable rate, courts take into account "the ever rising inflation and drastic depreciation of the currency. A Plaintiff is entitled to such rate of interest as would not neglect the prevailing economic value of money, but at the same time one which would insulate him or her against any further economic vagaries and the inflation and depreciation of the currency in the event that the money awarded is not promptly paid when it falls due (see *Mohanlal Kakubhai Radia v. Warid Telecom Ltd, H. C.*

Civil Suit No. 234 of 2011 and *Kinyera v. The Management Committee of Laroo Boarding Primary School, H. C. Civil Suit No. 099 of 2013*).

Interest can be demanded only by virtue of a contract express or implied or by virtue of the principal sum of money having been wrongfully withheld, and not paid on the day when it ought to have been paid. Interest falls due when money is wrongfully withheld and not paid on the day on which it ought to have been paid (see *Carmichael v. Caledonian Railway Co. (1870) 8 M (HL) 119*). If a party does not pay a sum when it falls due the aggrieved party is entitled to interest from the time payment is due to the time of payment. The other justification for an award of interest traditionally is that the defendant has kept the plaintiff out of his money, and the defendant has had the use of it himself so he ought to compensate the plaintiff accordingly. An award of interest is compensation and may be regarded either as representing the profit the plaintiff 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 (see *Riches v. Westminster Bank Ltd [1947] 1 All ER 469 at 472*).

Interest is a standard form of compensation for the loss of the use of money. The award should address two of the most basic concepts in finance: the time value of money and the risk of the cash flows at issue. As per the coerced loan theory, the plaintiff was effectively coerced into providing the defendant with a loan at the date of the original breach, and therefore deserves to earn interest on this forced loan at the unsecured borrowing rate. Compensation by way of interest is measured by reference to a party's presumed borrowing rate in the relevant currency because that rate fairly represents the loss of use of that currency (see *Dodika Limited & Others v. United Luck Group Holdings Limited [2020] EWHC 2101 (Comm*). The borrower typically pays interest on a loan at a rate equal to the base rate plus an agreed applicable margin.

The invoices issued to the defendant show that the amounts billed were payable within a period of ninety (90) days from the date of the bill of lading. Invoice 192 for an amount of US $ 53,300 was not paid at all while invoice No. 131 in the sum of US $ 73,912 only US $ 60,280 of it was paid leaving a balance of US $ 10,112. Since the last bill of lading is dated 15th November, 2013 the

sum recoverable under the contract should attract interest upon expiry of ninety (90) days from the date, i.e. 15th February, 2014.

Information provided by the Ministry of Finance is to the effect that lending rates for foreign currency denominated loans decreased to an industry average of 4.7 per cent in December from 5.6 per cent to November 2020 (see the "*Daily Monitor*" Newspaper of Wednesday 24th March, 2021). Considering that this rate may be significantly lower than the rates prevailing in the year 2015 when payment fell due, the plaintiff should not be prejudiced by averaging it at 6% per annum from the date of default, i.e. 15th February, 2014 until payment in full.

ii. Costs.

The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule. Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;

a) The sum of US $ 63,412 as the outstanding amount.
b) Interest thereon at the rate of 6% p.a. from 15th February, 2014 until payment in full.
c) The costs of the suit.

Delivered electronically this 27th day of September, 2021 ……Stephen Mubiru……..

Stephen Mubiru
Judge,
27th September, 2021.