

**THE REPUBLIC OF UGANDA,  
IN THE HIGH COURT OF UGANDA AT KAMPALA  
(COMMERCIAL DIVISION)  
CIVIL SUIT NO 141 OF 2012**

**FULL LINE DISTRIBUTERS LTD}.....PLAINTIFF**

**VERSUS**

**CROWN BEVERAGES LTD}.....DEFENDANT**

**BEFORE HON. MR. JUSTICE CHRISTOPHER MADRAMA IZAMA**

**JUDGMENT**

The Plaintiff is a limited liability company and filed this action against the Defendant which is also limited liability Company for declaration that the conduct of the first Defendant amounted to breach of a distributorship contract/agreement between the parties; for special and general damages; for interest thereon and for costs of the suit.

The case of the Plaintiff disclosed in the plaint is that the Defendant entered into a distributorship agreement with the Plaintiff in which the Plaintiff was the distributor of the Defendant's products in the territory of Wandegaya - Makerere Mulago on an exclusive basis involving marketing and selling of the products by opening multiple resale distribution points for a period of two years. The Plaintiff duly performed its obligations and purchased and sold and distributed the soft drinks successfully. During the lifetime of the contract the Defendant purported to arbitrarily set new terms of the contract without the consent and approval of the Plaintiff and the Plaintiff objected. On the 24<sup>th</sup> of May 2011 the Defendant without any notice or grounds and on the basis of false allegations arbitrarily terminated Plaintiff's distributorship contract while making demands on the Plaintiff with menaces. The Defendant accordingly cut off the Plaintiff supply and the Plaintiff run out of stock and was exposed to business loss. The Plaintiff protested in writing and demanded a hearing and compensation for the loss and the Defendant ignored the request. The Plaintiff lost all its supply and failed to meet its corresponding financial obligations and lost its properties and tenancy options and was unable to sell products. The Plaintiff was consequently exposed to extreme financial hardships and her business immediately ground to a standstill. On the 27<sup>th</sup> of May, 2011 the Defendant delivered a letter admitting the error and purported to withdraw the termination letter for having been issued in error. However it was too late to redeem the Plaintiffs business which came to a complete halt. The Plaintiff alleged that the conduct of the Defendant amounted to breach of the distributorship agreement/contract. Furthermore, the Defendant engaged in soliciting contracts with third parties to take over the

Plaintiff's exclusive distributorship and the termination of the Plaintiff contract was calculated to perfect bad faith actions of the Defendant. The Plaintiff claims special damages for loss of monthly profits in supply for 24 months at a rate of Uganda shillings 3,200,000/= per month. The Plaintiff also claimed general damages.

The Defendant contested this suit and filed a written statement of defence denying all the allegations and admitting that there was indeed a distribution contract which was to run with effect from July 2009 and was due to lapse by effluxion of time in June 2011. The Defendant agreed that the termination letter of 24<sup>th</sup> of May, 2011 was withdrawn on the 27<sup>th</sup> of May, 2011 just after two days and could not have resulted in the alleged losses resulting into special damages as claimed. On the contrary the Defendant asserts that the contract was finally terminated on 14<sup>th</sup> June, 2011 for breach of contract of the Plaintiff. The Defendant asserts that the Plaintiff's performance over time remained below the set targets and the Plaintiff was guilty of maintaining low stock levels in violation of the contract terms. Furthermore it is averred that the Plaintiff violated the provisions of clause 7.2.5 of the contract by failure to maintain minimum stock which was a material term of the contract. The Defendant terminated the contract without notice in accordance with clause 10.2.6 which entitles it to do so. There was no bad faith on the part of the Defendant.

In reply the Defendant averred that the contract was valid until July 2011 and was subject to renewal. Secondly, the Plaintiff's performance was above the targets set. Thirdly, the Defendant arbitrarily and without notice, varied the minimum stock level of four days according to annexure "D3". Furthermore the contract was terminated under clause 10.1 and not 10.2.6. The contract was terminated on the 24<sup>th</sup> of May, 2012 and not on 14<sup>th</sup> June, 2011 and the withdrawal of the termination and fabrication of the termination letter thereafter was a strange act and constitutes an admission that the earlier termination was unfounded.

The following issues were agreed for trial in the joint scheduling memorandum namely:

1. Whether the Defendant's termination of the distributorship agreement was contractually proper?
2. Whether the Defendant acted in breach of contract?
3. Whether the Plaintiff acted in breach of contract?
4. Whether the distributorship agreement was terminated on the 24<sup>th</sup> of May 2011 or 14 June 2011?
5. Remedies available to the parties

The Plaintiff was represented by Counsel Simon Tendo Kabenge while the Defendant was represented by Counsel Raymond Aruho.

The Plaintiff called two witnesses while the Defendant called one witness and the court was addressed in the written submissions.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

The basic facts of this dispute are set out in the written submissions of both Counsels which also give the basic background to the dispute. The facts of the dispute which are not controversial is that in July 2009 the Defendant executed a distributorship agreement with the Plaintiff in which the Defendant, a manufacturer of soft drink products, contracted the Plaintiff as a distributor to provide soft drink products from the Defendant for sale and distribution in the territory of Wandegeya – Makerere Mulago. The Plaintiff had exclusive distributorship rights in the territory. On the 24<sup>th</sup> of May, 2011 the Defendant without any notice, terminated the Plaintiff's distributorship contract according to the written letter exhibit PE 3. The letter is dated 24<sup>th</sup> of May, 2011 and is addressed to the Managing Director of the Plaintiff Ms Nansubuga Flavia. The letter reads in part as follows:

"We are writing to inform you of our decision to terminate our agreement with you effective 24<sup>th</sup> of May, 2011 in reference to clause 10.1 due to your consistent failure to honour your contractual obligation with regard to adequate stock levels which is a result of under capitalisation.

According to clause 11.0 of your distributor agreement, you are required to conform to the post termination obligations as stipulated in 11.1.1 to 11.1.8 to our Territory Development Manager and to formally offset all outstanding debts with our Revenue Department before your account is officially closed.

I wish to take this opportunity to thank you for the time you worked with CBL as a distributor and wish you all the best in your endeavours.

Sincerely Yours,

..."

On the 27<sup>th</sup> of May 2011 the Defendant wrote another letter to the Managing Director of the Plaintiff and part of the letter reads as follows:

"RE: REVIEW OF FULL LINE BUSINESS STATUS

In reference to the termination letter issued to you on 25<sup>th</sup> of May, 2011, we request to withdraw it as it was issued in error.

We regret the inconveniences caused and request for a meeting on Thursday, 2 June 2011 at crown beverages limited, head office to review your business and the letter you wrote on the 9<sup>th</sup> of May 2011.

Sincerely yours,

..."

On the other hand the Defendant asserted that the Plaintiff continued doing business with the Defendant after the 24<sup>th</sup> of May, 2011. On 14<sup>th</sup> June, 2011, the Defendant finally terminated the contract for the same reason of inadequate stock levels. The Defendant relied on exhibit D2 which is a letter dated 14<sup>th</sup> of June 2011. Exhibit D2 reads as follows:

"RE: TERMINATION OF DISTRIBUTORSHIP CONTRACT

We are writing to inform you of our decision to terminate our agreement with immediate effect. This is due to your continued failure to honour your contractual obligation stated in clause 7.3.5 with regard to inadequate stock levels.

According to clause 11.0 of the distributor agreement, you are required to conform to the post termination obligations as stipulated in 11.1.1 to 11.1.8 to our Territory Development Manager and to formally offset all outstanding debts with our Revenue Department before you account is officially closed.

I wish to take this opportunity to thank you for the time you worked with CBL as a distributor and wish you all the best in your endeavours.

Sincerely Yours,

..."

The Plaintiff's Counsel addressed issue number 4 first on the ground that if it is resolved, it would narrow down the issues for resolution. Issue number four is: **Whether the distributorship agreement was terminated on the 24<sup>th</sup> of May, 2011 or 14<sup>th</sup> of June, 2011?**

He submitted that the contract between the parties is an admitted document. PW1 and PW2 testified that termination of the contract between the parties could only be done under clause 10 of the agreement. The distributorship agreement was terminated on the 24<sup>th</sup> of May, 2011 by the letter exhibit P3. The only way the contract could be resurrected would be by signing a new contract or a joint document to revive the old document. There is no such document and none was adduced in evidence. There was no evidence that the Plaintiff took any additional stock after termination of the 24<sup>th</sup> of May, 2011. Furthermore the letter of the Defendant dated 27<sup>th</sup> of May, 2011 exhibit D4 alleging that the termination letter of the 24<sup>th</sup> of May 2011 exhibit P3 was issued in error was an afterthought and of no legal effect and could not revive the contract which had been terminated. Secondly, the Defendant's letter dated 27<sup>th</sup> of May, 2011 exhibit P4 is an admission by the Defendant that there was no basis for the action to terminate the contract by the letter dated 24<sup>th</sup> of May, 2011 and admitted as exhibit P3. It was further an admission of the Plaintiff's claim that the termination was in breach of contract.

The Plaintiff's Counsel further submitted that the Defendant's letter dated 24<sup>th</sup> of June, 2011 exhibit D2 purporting to terminate the contract on new grounds was of no consequence and only

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

exposes the Defendant as approbating and reprobating and shifting goalposts. The letter of termination of 24<sup>th</sup> of May and that withdrawing it unilaterally to review the Plaintiffs business is clear demonstration of the Defendants arbitrary and capricious conduct. The only provision for renewal of the contract is clause 3.1 and this option was never exercised by the parties jointly in writing after termination on the 24<sup>th</sup> of May, 2011. Parties must be bound by the provisions of the agreement. He referred to the case of **Simon Tendo Kabenge versus Mineral Access Uganda Limited HCCS Number 275 of 2011**. In the premises the Defendant's Counsel submitted that the contract was terminated by the letter dated 24<sup>th</sup> of May, 2011 exhibit P3 and not the letter dated 14<sup>th</sup> of June, 2011 exhibit D2.

In reply the Defendant's Counsel submitted that the letter of the Plaintiff dated 24<sup>th</sup> of May, 2011 withdrew the termination letter of 24<sup>th</sup> of May, 2011. Admittedly, the Plaintiff received this letter. In the written statement of defence the Defendant revoked the first termination letter which was inconsequential because it was withdrawn and the parties continued doing business. This was the testimony of DW1 and DW2. On the 27<sup>th</sup> of May, 2011 after the initial termination letter, the Plaintiffs admitted truck number UAH 140 X took out of the Defendant's factory 950 crates of soda. In cross examination DW2 steadfastly maintained that the parties conducted business after 24<sup>th</sup> of May, 2011. He contended that the products could not be loaded and taken out of the Defendant's factory without a contract in place. In effect the Plaintiff overlooked the termination of 24<sup>th</sup> of May, 2011. DW1 assured by exhibit D9, the receipt dated 27<sup>th</sup> of May, 2011 that the Plaintiff issued a DFCU cheque number 2311 exhibit P5 as payment for the goods after 24<sup>th</sup> of May, 2011. It was the norm to receive the goods upon receipt of cash or a cheque and that is why the load out of goods was 27<sup>th</sup> of May, 2011. These facts prove that business was done after 24<sup>th</sup> of May, 2011. Furthermore the Defendant's Counsel submitted that the Plaintiff's decision to stop a cheque does not erase the fact of the prior transaction for which it was issued after the 24<sup>th</sup> of May, 2011. Performance in the transaction had been done by the time the Plaintiff wrote to DFCU on the 31<sup>st</sup> of May 2011 stopping the cheque and this cannot extinguish the Defendant's right to sue for the value of the corresponding goods supplied.

He further submitted that it was important to note that as a contract distributor, the Plaintiff could only get goods on the basis of the contract. The cheque was issued on the basis of the contract. Indeed, that is the reason the Plaintiff took out 950 crates on the 27<sup>th</sup> of May 2011 after it issued a corresponding cheque because there was a contract in place. Termination therefore occurred on 14<sup>th</sup> June, 2011 after the Plaintiff declined to attend the meeting to discuss her business, as she had requested.

In rejoinder the Plaintiff's Counsel submitted that the Defendant failed to show any evidence that after termination of the contract on the 24<sup>th</sup> of May 2011 there was ever any agreement whether written or oral out of a meeting of the parties to revive the contract. The Defendant's attempt to refer to an alleged cheque payment to argue that the contract remained alive after termination is a desperate attempt. The cheque number 002311 exhibit P5 was issued and receipted on the 24<sup>th</sup> of

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

May 2011, one day before the Defendant delivered its termination letter on the 25<sup>th</sup> of May, 2011. It cannot therefore be said that the cheque which was issued during the life of the contract and before the termination was received and is proof that the parties conducted business after the contract. The fact is that the Plaintiff countermanded this cheque and the Defendant failed to adduce any evidence that the Plaintiff owed it any monies, and this negates the allegation that any business was carried out after termination by letter dated 24<sup>th</sup> of May 2011 or that delivery was made to the Plaintiff as no agents of the Plaintiff were identified or names were given for receiving the goods by delivery note and number plates on the vehicles were not for the Plaintiff. In the premises no evidence exists that the contract was revived by written or oral contract and the only letter of termination is that dated 24<sup>th</sup> of May, 2011 which terminated the contract.

Resolution of issue number 4:

I agree with the Plaintiff's Counsel that the question of whether the contract was terminated by letter dated 24<sup>th</sup> of May, 2011 or 14<sup>th</sup> of June, 2011 should be determined first because it would narrow down the issues.

I will start with the question of fact as to whether the letter dated 24<sup>th</sup> of May, 2011 indicating that it is a termination letter of the distributorship agreement between the parties was received on the 25<sup>th</sup> of May, 2011 or on the 24<sup>th</sup> of May, 2011.

A copy of the letter adduced by the Defendant in the Defendant's trial bundle has handwritten notes showing that exhibit P3 which is the letter dated 24<sup>th</sup> of May, 2011 was received by the Plaintiff's Managing Director Nansubuga Flavia on the 25<sup>th</sup> of May, 2011. Secondly, the letter of the Defendant dated 27<sup>th</sup> of May, 2011 immediately after the subject caption writes that the termination letter was issued on the 25<sup>th</sup> of May 2011. This corroborates the Plaintiff submission and evidence that the letter of termination dated 24<sup>th</sup> of May, 2011 was received on the 25<sup>th</sup> of May, 2011.

The cheque relied upon as payment is a DFCU cheque number 2311 and is referred to in exhibit P6 which is a letter written by the Plaintiff dated the 28<sup>th</sup> of May, 2011 countermanding the cheque. The Plaintiff wrote to the manager, DFCU Bank, Jinja Road, Kampala – Uganda. The Plaintiff wrote as follows:

"This serves to countermand the payment of the above-mentioned cheque which was issued to Crown Beverages Limited for Uganda shillings 12,800,000/=.

The payee purported to terminate the contract and the consideration for the payment has therefore failed.

Do not hesitate to contact me in the event of any clarification on this instruction. ... "

The letter itself suggests that the cheque was issued before the termination of the contract. This can be seen from paragraph 2 thereof that: "the payee purported to terminate the contract and the consideration for the payment has therefore failed." A receipt was issued by the Defendant for that cheque on the 27<sup>th</sup> of May, 2011 according to exhibit D9. Another receipt purports that the cheque number 2311 is dated 27<sup>th</sup> of May, 2011.

I have carefully considered the above evidence and the logical conclusion I can reach is that the cheque was issued before the termination letter. Furthermore, dates on cheques can be post dated dates and is not evidence that the Plaintiff issued any cheque after the 25<sup>th</sup> of May, 2011. PW1 Enoch Musisi denied having taken out any stock after termination of the 25<sup>th</sup> of May, 2011. He further testified that after termination the Managing Director of the Plaintiff went into shock and could not understand what was happening.

DW2 Mr Ivan Mutiibwa testified that there was a practice of issuing post dated cheques. It was not necessary for the cheque to have matured for the Defendant to issue a receipt. He could not confirm whether the Defendant made every supply in respect of a material receipt. He was not aware whether the Defendant had any money claim against the Plaintiff.

I have carefully considered the evidence and I have come to the conclusion that the Defendant did not supply any goods after termination of contract by letter dated 24<sup>th</sup> of May, 2011 for the Plaintiff. Secondly, the parties did not continue doing business after the 25<sup>th</sup> of May, 2011 when the Plaintiff received the termination letter dated 24<sup>th</sup> of May, 2011. It follows that the contract was terminated by letter dated 24<sup>th</sup> of May, 2011 and not by letter dated 14<sup>th</sup> of June, 2011.

Furthermore it is a question of law as to when a contract is terminated. When is the termination effective?

The starting point of analysis is the agreement of the parties. The agreement of the parties was admitted by consent of the parties as exhibit P1. Clause 3.1 thereof provides as follows:

"The contract shall be for a period of two years unless renewed and subject to termination as provided under the terms of this agreement."

Termination is therefore governed by the agreement of the parties. Termination is provided for under clause 10 of the contract. Clause 10.1 and 10.2 provide as follows:

"10.1 The Company at its sole discretion reserves the right to terminate this agreement upon giving 14 days notice to the Contract Distributor in the event that he obtained an overall Inadequate Performance Rating as stipulated in schedule 6 to The Contract.

10.2 The Company shall have the right at any time to terminate this agreement without written notice to the contract distributor if: ..."

Clause 10.2 gives the various instances, giving the Defendant a right to terminate without notice. There are six instances where the Defendant may terminate without notice. Exhibit P3 which is the termination letter according to the resolution of which is the applicable letter terminating the contract between the parties and which is dated 24<sup>th</sup> of May 2011 provided that the Defendant relied on clause 10.1 for the Plaintiff's alleged consistent failure to honour contractual obligations with regard to adequate stock levels as a result of under capitalisation. From the express wording of the agreement, the termination was without notice and on account of alleged failure to maintain adequate stock levels as a result of under capitalisation.

Issue number four is therefore resolved in favour of the Plaintiff. It is an express rescission of the contract whether properly or improperly. According to **Halsbury's laws of England fourth edition reissue volume 9 (1)** and paragraph 920, a contract may be discharged in two major ways. It may be a discharge in accordance with the contract or a discharge against the contract. An illustration given is a contract of service may be terminated in four ways. It may be terminated by mutual consent; secondly it may be terminated by the employer or the employee giving notice stipulated in the contract; it may be terminated by the wrongful dismissal of the employee or it may be terminated by the employee terminating his contract of service contrary to his contractual obligations.

Furthermore, where there are contractual provisions for termination, it can be determined by the requisite notice. According to **Halsbury's laws of England** (supra) and paragraph 983 thereof, at common law, if the contract contains an express or implied provision that one of the parties to it may determine it by notice, notice must be given in accordance with the terms of the contract. They further write that a notice of termination validly given cannot thereafter be withdrawn without agreement.

Precedents on the issue however suggest that even if the termination was wrongful, the contract would remain alive in law but in actual fact the contract has de facto ceased to be performed. The aggrieved party would be entitled to damages if the termination was wrongful. An analogy was given by Salmon L.J. in **Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 2 All ER 216**. The summary of the reported facts is that by an oral agreement in March 1967 the Plaintiffs, a French manufacturing company, undertook not to sell their goods in the United Kingdom to anyone other than the Defendants. Secondly, to ship goods with reasonable dispatch on receipt of the Defendants' orders and thirdly, to supply the Defendants on demand with certain advertising material. On the other hand the Defendants undertook firstly, not to sell goods competing with the Plaintiffs' goods. Secondly, to pay for the goods which they bought by bills of exchange due 90 days from the date of the invoice, and thirdly to try their best to create a market for the Plaintiffs' goods in the United Kingdom. They undertook to develop that market to its maximum potential. The agreement could be terminated by reasonable notice given to either side. The Defendants incurred expenses in promoting the Plaintiffs' products in the United Kingdom. Due to their efforts the sales of the Plaintiffs products increased substantially and by

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

April 1970 accounted for 83 per cent of the Defendants' business. The Defendants were consistently late in meeting their payment obligations. They often paid after receiving money from their customers. The delays in payment varied from 2 to 20 days. In April 1970, the Plaintiffs without notice to the Defendant arranged for another company to be appointed their sole concessionaires in the United Kingdom. On 9<sup>th</sup> April, the Plaintiffs wrote to the Defendants in effect alleging that the Defendants had wrongfully repudiated the agreement by failing to pay the bills on time and purported to accept the repudiation and bring the agreement to an end. The Plaintiffs filed an action claiming the amount of the unpaid bills, sums for goods sold and delivered. They sought a declaration that the Defendants had ceased to be their sole concessionaires in the UK. The trial judge gave judgment for the Plaintiffs in respect of the dishonoured bills and the goods sold and delivered, and for the Defendants on their counterclaim for a declaration that they remained the Plaintiffs' sole concessionaires in the United Kingdom. He further held that the agreement was only terminable by 12 months' notice by either party and ordered the Plaintiffs to pay the Defendants damages for their own breach of contract. The Plaintiffs undertook (a) to continue supplying the Defendants with their products until the expiry of 12 months' notice to terminate the agreement, (b) not to appoint any other persons as concessionaires for their products in the United Kingdom until that date and (c) not themselves to sell or distribute such products in the United Kingdom until that date. They subsequently served a notice to determine the agreement on the Defendants.

At page 223, Salmon LJ said:

“I doubt whether a wrongful dismissal brings a contract of service to an end in law, although no doubt in practice it does. Under such a contract a servant has a right to remuneration, including what are sometimes called fringe benefits, in return for services. If the master, in breach of contract, refuses to employ the servant, it is trite law that the contract will not be specifically enforced. As I hope I made plain in the Denmark Productions case, the only result is that the servant, albeit he has been prevented from rendering services by the master's breach, cannot recover remuneration under the contract because he has not earned it. He has not rendered the services for which remuneration is payable. His only money claim is for damages for being wrongfully prevented from earning his remuneration. And like anyone else claiming damages for breach of contract he is under a duty to take reasonable steps to minimise the loss he has suffered through the breach. He must do his best to find suitable alternative employment. If he does not do so, he prejudices his claim for damages. I doubt whether, in law, a contract of service can be unilaterally determined by the master's breach. Perhaps the servant could sit still whilst the contract ran its course with the knowledge that the contract was, in law, still alive. But, in practice, this knowledge could be of little real comfort to him because he would be failing to take reasonable steps to minimise his loss—and, since a claim for damages is his only money remedy, he would be prejudicing that

claim by doing nothing. Accordingly he would, as a rule, be far better off to treat his contract as if it were at an end; and this is usually what happens.”

In this particular case the Defendant purported to write a letter on the 27<sup>th</sup> of May 2011, revoking the termination which it claims was issued in error. In exhibit P3 the Defendant wrote that there was consistent failure to honour contractual obligations with regard to adequate stock levels as a result of under capitalisation by the Plaintiff. On the 27<sup>th</sup> of May, 2011 exhibit P4; the Defendant purported to withdraw the termination letter. Secondly, the Defendant proposed to review the business of the Plaintiff according to an earlier letter of 9<sup>th</sup> of May, 2011. Hardly 18 days later, the Defendant wrote another letter dated 14<sup>th</sup> of June, 2011 giving the ground of continued failure to honour contractual obligations by the Plaintiff as provided under clause 7.3.5 with regard to inadequate stock levels. The differences in the two letters are that the Defendant quotes clause 10.1 in the letter of 24<sup>th</sup> of May, 2011 and in the letter of 14<sup>th</sup> June 2011 he quotes clause 7.3.5. The reason for termination is continued failure to honour contractual obligations on account of adequacy of stock levels remains the same. These two clauses however deal with different grounds for termination and different terms of notice that we need to compare.

It is apparent that the Defendant attempted to cure the failure to quote the appropriate clause of the agreement in the termination letter. Clause 10.1 requires a 14 days’ notice to be given to the Plaintiff. On the 24<sup>th</sup> of May 2011 no 14 days notice was given and the termination was without notice contrary to the express provisions of clause 10.1 of the agreement between the parties. Secondly, clause 10.1 gives the ground of overall inadequate performance rating. On the other hand clause 7.3.5 provides that the Plaintiff shall at all times maintain a minimum stock of six days full range per stock.

It follows that the reason could either be failure to maintain a minimum stock of 6 days full range of stock or overall inadequate performance rating. The two things are not the same. An overall performance rating is based on reviews and scoring by the Defendants officials while a minimum stock level is a specific item which may be an ingredient in the overall performance rating. The Defendant insists on the letter of 14<sup>th</sup> of June, 2011 for the termination presumably because its case is not about overall inadequate performance rating of the Plaintiff at all. In the premises the Plaintiff is within its rights to rely on the letter of the 24<sup>th</sup> of May, 2011 which it complied with. It was however issued not in accordance with the requisite notice period of 14 days. I have additionally considered the duration of the contract which was for two years with effect from the commencement date. The contract admitted in evidence was executed in July 2009. There is however no commencement date that is stipulated under that the stipulation in the definition section clause 1 that the date of commencement is the date when the company started carrying out their respective obligations under the agreement. The Defendant concedes that the contract would have come to an end by 30<sup>th</sup> of June 2011 and I will work with that date. The only point for consideration is that the contract was meant to come to an end around June 2011 by effluxion of time. If the Defendant wanted to terminate the contract, all it needed to do was to give notice

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

that the Plaintiff's contract would not be renewed. After all it is the Defendant's evidence that the contract was coming to an end in June 2011. I will however conclude this issue in considering the other remaining issues. I will further consider the same matter on whether there was an agency relationship between the parties.

For issue number 4, I agree with the Plaintiff that the contract was brought to an end by letter dated 24<sup>th</sup> of May, 2011 about a month to the end of the contract period.

Issues 1, 2 and 3.

The Plaintiff's Counsel argued issues number 1, 2 and 3 together and I will consider them together as well.

The Plaintiff's Counsel submitted that his submissions were affected by the resolution of issue number 4. The resolution of the issue is that the Plaintiff's distributorship was terminated by the letter of the Defendant dated 24<sup>th</sup> of May 2011 exhibit P3. The three issues are intertwined in that they deal with the question of whether there was breach of contract. For purposes of ease of reference the three issues are reproduced herein below:

1. Whether the Defendant's termination of the distributorship agreement was contractually proper?
2. Whether the Defendant acted in breach of contract?
3. Whether the Plaintiff acted in breach of contract?

The Plaintiff's Counsel submitted that termination under clause 10.1 was proper only upon giving the Plaintiff a 14 days' notice but this term was breached. This is because the termination was effective immediately and the Plaintiff was not given a 14 days' notice. Secondly he emphasised that the clause deals with overall inadequate performance rating as stipulated by Schedule 6 to the contract. The performance rating was supposed to be based on the Defendant's rating. The Defendant's witnesses failed to produce in court contract distributor's performance evaluations. For that reason the Defendant acted arbitrarily. On the other hand the Defendant relies on the Plaintiffs letter dated 9<sup>th</sup> of May 2011 as the basis that the Plaintiff admitted failure to maintain the minimum stock levels. He submitted that the document cannot be imported into the party's contract that specifically provided for a review process and the contract distributors performance and a valuation report which would form the basis to determine the performance rating.

In reply the Defendant's Counsel submitted that the Defendant's reason for termination was the low stock levels. Indeed the Defendant's Counsel relies on the letter of the Plaintiff's Managing Director dated 9<sup>th</sup> of May, 2011 exhibit D1 on the subject of minimum stock requirements. He contended that PW2, the Plaintiffs Managing Director admitted that the stock levels were below the minimum and was a point of concern between the parties.

The Defendant's submissions are premised on clause 7.3.5 while the Plaintiff's submissions are based on clause 10.1. The requirements for the two clauses are different as I have noted above.

In addition to the resolution of issue number 4 above, the question here is whether the Plaintiff is an agent of the Defendant bound by the provisions of the Contracts Act 2010. The question of whether the Plaintiff was an agent of the Defendant can be determined primarily by the consideration of the kind of relationship between the parties created by the contract exhibit P1. I have perused the relevant terms of the contract and they are in summary as follows:

The Plaintiff is described as a Contract Distributor with the right to carry on the business of the distribution of the products of the Defendant in Wandegeya – Makerere territory on an exclusive basis according to clause 2 of the agreement. The business was granted by the Defendant and involves the sale and marketing of the Defendant's manufactured products. The Plaintiff was required to open multiple resale or distribution points to ensure full availability of the products in all parts of the granted territory at all times. The Defendant had retained the right to supply all products based on orders and the price dictated for the products from time to time. The Defendant would provide advertising and promotional materials for the products from time to time at its sole discretion. The Defendant exclusively owned the copyright, design rights, trademark rights, service mark or logo, image and sound associated with the products among other things. The Defendant offered training programmes to selected employees of the Plaintiff. The Defendant reserved the right to inspect the Plaintiff's business and generally supervise or guide the contract distributor's operations. Secondly, the Plaintiff was required to buy exclusively from the company/Defendant. It would collect the products from the Defendant Company at its own risk and meet the targets set by the Defendant. The Plaintiff was required to keep an up-to-date record of purchases, sales and resources of all transactions. The Plaintiff was supposed to immediately distribute, promote and procure sales of the products throughout the territory to satisfy the market demand. The Plaintiff was required to avail to the Defendant the Plaintiff's sales personnel for field merchandising, advertising, and distribution of promotional materials for special events whenever required by the Defendant. The Plaintiff was required to employ sufficiently qualified sales personnel at all times as demanded by the business. The employees were required to be dedicated to the full-time requirements of the business and not to be deployed on any other activities not related to the business.

The Plaintiff was not required to use any advertising, promotional or selling materials which were not either supplied by the company or approved in writing by the Defendant in advance. The Defendant also set rules that the products would be stored in a warehouse acceptable to meet the technical requirements of the products in the territory and to handle the products in accordance with the care demanded by the Defendant. The Plaintiff was required to report immediately to the company any problems in the market. The Defendant reserved the right to inspect the storage of the products at all times without notice. The Plaintiff was required to maintain a minimum stock and to comply with the products handling procedures notified by the

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

Defendant. The Plaintiff was required to inform the Defendant on a weekly basis or other time as required by the Defendant about the stock levels. She was required to report any infringement of the Defendant's rights in the territory. They were required to supply weekly and monthly sales reports and other information required by the Defendant relating to the business in the form acceptable to the Defendant and to render to the Defendant an analysis of the business done in the preceding month on a monthly basis. Most importantly the Plaintiff was required to keep accurate and separate books and records and accounts in respect of the business at all times and to avail it to the Defendant as and when required. Furthermore, the Plaintiff was required to promptly refer to the Defendant company any enquiries from prospective purchasers or other leads outside the territory and to supply the Defendant any information which may come into its possession which may assist the Defendant to effect sales or other dealings in the products whether inside or outside the territory. The Plaintiff was supposed to keep an accurate and up-to-date list of actual and potential stockists and retailers and to supply a copy of the list to the Defendant. The Plaintiff was forbidden from entering into any arrangement or contract that would conflict with the Defendant's interest in the contract. The Plaintiff was required to keep certain number of vehicles and employees which vehicles would bear the signs of the Defendant i.e. the colours as specified and approved by the Defendant. The employees of the Plaintiff were required to wear approved uniforms having the Defendant's trade name, logo or trademarks and such colours as are specified and approved in writing in advance by the Defendant.

I cannot come to any other conclusion other than that the Plaintiff was an agent of the Defendant. This is so in so far as the Plaintiff was required to purchase the products, it was still subject to control by the Defendant and its distributorship could be terminated by the Defendant within 14 days notice or without notice if the conditions stipulated by the contract warranted it among other things. The Plaintiff had to act in most things under the direction and control of the Defendant.

Furthermore, it is important to distinguish the contract exhibit P1 from a contract of service or for services. The test was laid down in the case of **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968] 2 QB 497**, (see also **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance Minister of Social Security v Greenham Ready Mixed Concrete Ltd and Another Minister of Social Security v Ready Mixed Concrete (South East) Ltd and Another [1968] 1 All ER 433 at 439 - 440**) where MacKenna J held that a contract of service exists if three conditions are fulfilled namely:

“A contract of service exists if the following three conditions are fulfilled: (i) The servant agrees that in consideration of a wage or other remuneration he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*^\*~?+: maXimum728securityx 2016 style*

of the contract are consistent with its being a contract of service. I need say little about (i) and (ii). As to (i). There must be a wage or other remuneration. Otherwise there will be no consideration, and without consideration no contract of any kind. The servant must be obliged to provide his own work and skill. Freedom to do a job either by one's own hands, or by another's is inconsistent with a contract of service, though a limited or occasional power of delegation may not be: see MR Atiyah's Vicarious Liability in The Law of Torts (1967), pp 59–61, and the cases cited by him. As to (ii). Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when, and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant. The right need not be unrestricted. "What matters is lawful authority to command, so far as there is scope for it. And there must always be some room for it, if only in incidental or collateral matters."... To find where the right resides one must look first to the express terms of the contract, and if they deal fully with the matter one may look no further. If the contract does not expressly provide which party shall have the right, the question must be answered in the ordinary way by implication. The third and negative condition is for my purpose the important one, and I shall try with the help of five examples to explain what I mean by provisions inconsistent with the nature of a contract of service. ..."

In this case the contract distributor buys the goods from the Defendant for valuable consideration and they earn a margin of profit on the goods sold as consideration for buying exclusively from the Defendant. Clause 6 of the contract stipulates that the contract distributor's obligations include buying all brands from the Defendant, meeting the targets as set by the Defendant, keeping a security deposit with the Defendant, selling the products at the company's recommended price, selling the products in a given territory and providing sales reports, which obligations show that the Defendant had substantial control over the contract distributor. As such this element of control would qualify this as a contract of service; however, the remuneration on commission basis per product sold brings out an aspect of agency though the same contract is titled as a distributorship contract. **Black's Law Dictionary, 8<sup>th</sup> Edition, page 1434**, defines a distributor to mean a wholesaler, manufacturer or supplier that sells chiefly to retailers and commercial users. The Plaintiffs case is quite different in that it buys only from the Defendant and is accountable to the Defendant.

**Honeywill & Stein Ltd v Larkin Bros (London's Commercial Photographers) Ltd, ([1933] All ER Rep 77** it was held that it is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract.

That case however dealt with vicarious liability for injury to third parties and not the relationship between the contractor and employer. As far as agency is concerned I considered a similar question in **Seroy Airport Hotel Ltd vs. Uganda Breweries Ltd HCCS No 90 of 2014**. In that case there was a distributorship agreement under which the Plaintiff deposited security with the Defendant who supplied it with goods for distribution in a designated territory against the security deposit. The goods remained the property of the Defendant and the Plaintiff would periodically remit moneys from sales. The goods were bought by the Plaintiff but the Defendant retained control in very many areas. This is what I held on the issue of whether there was a distribution contract between the Plaintiff and the Defendant and if so, whether the Defendant is in breach of the same:

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

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

Section 136 of the Contracts Act 2010 provides as follows:

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

Section 138 of the Contracts Act provides that the principal shall not revoke the authority given to an agent after the authority is partly exercised, with respect of acts and obligations that arise from acts already done under the agency. The Defendant prejudiced the rights of the Plaintiff by appointing another distributor for the same territory as we shall note hereunder. The Plaintiff's agents clashed with another distributor thereafter.

The reason given for termination of the contract in a letter received on 25<sup>th</sup> May, 2011 was the poor performance rating of the contract distributor. However, PW1 in his testimony in cross examination testified that the Plaintiff performed all her obligations as required in the contract in that the Plaintiff always had sufficient stock and also provided the required data to the Defendant in a timely manner as required by the contract. The Plaintiff submitted genuine data and having low stock is a material factor, and even if the stock was low the reason was because it had not been supplied by the Defendant. He further testified that the Plaintiff had an impeccable performance with the Defendant for 10 years. Most importantly no performance rating was done and thus no evaluation was issued. Moreover, the Managing Director of the Defendant rated the Plaintiff in Exceed and asked for a review which was never done. DW1 the Market Manager of the Defendant testified that he did not visit the Plaintiff's premises to carry out a quarterly review and he did not issue any performance evaluation to the Plaintiff.

PW2 the Managing Director of the Plaintiff also testified that the Defendant did not inspect the contract distributor's business or supervise their operation or carry out review of the distributor's performance which were their obligations according to the contract. They never had inadequate stock below 88% and also the contract does not provide that a distributor must achieve a 100% performance. That their performance was rated exceed which means 99%.

She testified that as a result of the termination of the distributorship, the Plaintiffs business came to a stop and they could not earn on their investment anymore.

DW2, the Company Secretary of the Defendant testified that he did not sign the contract between parties or deal with the Plaintiff neither did he carry out any review process.

**Section 140** provides that a party who revokes an agency shall give reasonable notice to the other party to the agency and make good any damage suffered.

PW1 also testified that the Defendant had already got another distributor and they were already looking for premises and this testimony is corroborated by the testimony of PW2 Ms. Flavia the

Managing Director of the Plaintiff, who testified that they did not go for review because they had already been terminated with immediate effect and another distributor had been appointed and their operations had been halted. That the Plaintiff's sales team clashed with the distributors in the market selling the same products like them in their territory at Mulago and Kivulu. The new distributor was TEK Distributors whose owners are Mr. and Mrs. Robert Wabbi and this was brought to the attention of the Defendant's Head of Marketing.

Lastly section 139 of the Contracts Act 2010 provides that where the agency is revoked or renounced without reasonable cause or contrary to an express or implied contract that the agency shall continue for a given period of time, the principal or the agent as the case may be shall compensate the other party for the revocation or renunciation of the agency. Section 140 of the Contracts Act 2010 provides that a party who revokes or renounces an agency shall give reasonable notice to the other party and make good any damage suffered.

For the above reasons I agree with the submissions of the Plaintiff's Counsel that there was no basis for the termination of the Plaintiffs business or contract because such a basis was not adduced in evidence. This is also in light of the several years the parties were in the business (over 10 years). Secondly, the Plaintiff was not given a 14 days' notice. Thirdly, the contract came to an end on the 25<sup>th</sup> of May, 2011 when the Plaintiff received the Defendant's termination letter dated 24<sup>th</sup> of May, 2011. The Defendant cannot purport to rely on another letter of 14<sup>th</sup> of June, 2011 when the contract could have come to an end on account of the expiry of the two-year period agreed upon. This submissions and evidence the Defendant's Counsel relies upon have no basis on the grounds of termination of the letter of 24<sup>th</sup> of May, 2011. For that reason I do not need to belabour the point by considering the evidence based on false premises on which the Defendants Counsel relies. I find for the Plaintiff on issues 1, 2 and 3.

## **Remedies**

The Plaintiff's Counsel submitted that PW2, the Managing Director of the Plaintiff, testified that she had run her business with the Defendant from 2001 for 14 years and from that time the contract had been renewed automatically upon expiry for more than eight times because the Plaintiff continued to remain a distributor and was performing well. Had it not been for the actions of the Defendant on terminating the contract, the Plaintiff's contract was to be automatically renewed. In the premises he submitted that the special damages claimed by the Plaintiff for profit she would have earned for another two years upon renewal of the contract which was anticipated should be granted. Secondly, the Plaintiff's Counsel submitted that the Plaintiff's documents in support of the claim for special damages particularly the financial statements were not contested.

As far as the claim for general damages is concerned, they would be under two headings namely general damages for breach of contract for loss of business reputation. He submitted that the

purpose of general damages is to put the Plaintiff in the same financial position had the Defendant not breached the contract. This would restore the Plaintiff to her position before the breach. He contended that the loss suffered by the Plaintiff in not having the contract renewed on account of the business termination was proximate and a direct consequence of the breach of contract of the Defendant. In the circumstances, given the loss of opportunity to earn income for a renewed period of two years, the contract valued at Uganda shillings 76,800,000/= would be the loss of business reputation. Secondly general damages of Uganda shillings 100,000,000/= would be adequate in the circumstances to atone for the Plaintiffs suffering. In the premises the Plaintiff prays that the declaration issues that the conduct of the Defendant amounted to breach of the distributorship contract/agreement. Secondly that the Plaintiff is awarded special damages of Uganda shillings 76,800,000/=. Thirdly, the Plaintiff should be awarded interest on special damages at 30% per annum from 24<sup>th</sup> of May, 2011 till payment in full. Fourthly, he prayed that the Plaintiff is awarded general damages at Uganda shillings 100,000,000/=. And interest at the rate of 20% per annum from the date of judgment till payment in full. Finally he prayed for costs of the suit to be awarded to the Plaintiff.

In reply the Defendant's Counsel prayed that the suit is dismissed with costs. He submitted that it was clear that the Plaintiff breached the contract and cannot profit from its own wrong. Furthermore, he submitted that the evidence shows that the dispute could have been resolved only if the Plaintiff appeared for the fixed meeting. The Plaintiff callously declined to attend the meeting and the contract itself set out the mode of dispute resolution in clause 13.1 which required any dispute irrespective of magnitude to be resolved by the parties. The Plaintiff was invited for a meeting to review matters but its Managing Director declined to attend. He suggested that the matter would not be in court and the meeting taken place and therefore he prayed that the suit is dismissed with costs to the Defendant.

Without prejudice as far as the claim for special damages is concerned, the Defendant's Counsel submitted that the contract was for a fixed duration of two years. He contended that by 30<sup>th</sup> of June, 2011 the contract would more or less have expired unless renewed by the parties. The claim that it would have been renewed after 30<sup>th</sup> of June, 2011 was sheer speculation because there was already an existing point of friction on persistent low stock levels of the Plaintiff. He further submitted that contracts are made by free consent of the parties according to the principles in section 10 (1) of the Contracts Act 2010. Such consent cannot be imagined beforehand. PW1 and PW2 could not be sure where the monetary claim of Uganda shillings 76,800,000/= for a period of 24 months was derived. It was based on the belief that the contract could have been renewed. He contended that this was sheer imagination.

Furthermore, he contended that the contract was terminated on 14<sup>th</sup> June, 2011 and there were only 16 days left to the lapse of the contract. Furthermore the Defendant's Counsel submitted that in the event that the court finds that the Defendant improperly terminated the contract, the court should consider the days left on the contract. He submitted that the Plaintiff admitted that it

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

was earning monthly profit of Uganda shillings 3,200,000/=. Because there were 16 days left, the court should award Uganda shillings 1,706,656/= for the remaining period of 16 days. He contended that this sum was a reasonable sum for purposes of restitution.

Without prejudice if the court finds that the Defendant improperly terminated the contract on the 24<sup>th</sup> of May, 2011, it meant that the contract was left with 35 days or five weeks to lapse. The net profit would be Uganda shillings 106,666/= multiplied by remaining days amounting to Uganda shillings 3,733,310/=. In both scenarios an award of net profit as special damages for the corresponding period left the contract would be a total compliance with the requirements of restitution. He relied on the case of **Ahmed Ibrahim Bholm vs. Car and General SCCA number 24 of 2002** for the holding of Tsekooko JSC that damages are intended to restore the wronged party into a position he or she would have been in as if there had been no breach of contract. This is premised on the principle of *restitutio in integrum*.

As far as general damages are concerned, there is no proof that the contract would have been renewed for the next 24 months as claimed. He contended that the Plaintiff flagrantly and admittedly breached the contractual terms on minimum stock levels. Furthermore, the Defendant's Counsel submitted that the Defendant in humility withdrew its first termination letter so that the parties resolve their issues by mutual discussion. The Plaintiff unreasonably declined to give alternative dispute resolution a chance. More so in the face of clause 13.1 of the contract that provided for mandatory ADR mechanisms. The refusal to attend the ADR meeting was a stand-alone breach of contract by the Plaintiff. It is not far-fetched to believe that the suit would not have come to court if the ADR process had been utilised.

The Defendant's Counsel further contended that the trial commenced on 28<sup>th</sup> of May, 2013 and the Defendant and in good faith without prejudice made an offer of Uganda shillings 9,600,000/= to end the litigation. The letter was copied to the court. The Plaintiff declined the offer and is pursuing a claim of 24 months loss of profit which is speculative. In the premises the court should reject the claim for general damages. Secondly, the claim of Uganda shillings 100,000,000/= in general damages is baseless and is a gross exaggeration of the claim. Thirdly, the claimed interest of 30% per annum is unjust and should be declined. In the premises the Plaintiff's suit ought to be dismissed with costs.

In rejoinder the Plaintiff's Counsel reiterated earlier submissions and further prayed that the court should note the concessions that the Defendant had made. Those concessions amounted to admissions of liability to the Plaintiff and the court should build on them to uphold the Plaintiff's prayers for special damages. He contended that the Plaintiff's financial statements for the period were not contested and the court should award them as prayed for.

With regard to general damages, the Plaintiff's Counsel submitted that the Defendant did not show any humility but simply thought it would pay the Plaintiff peanuts to silence it after closing

the entire business of the Plaintiff. The sum of Uganda shillings 9,600,000/= is too low for the embarrassment and inconvenience incurred by the Plaintiff closing its business which it had carried on for a period of 10 years within one day. He reiterated submissions that the sum of Uganda shillings 100,000,000/= would go a long way in amending the Plaintiff's embarrassment and inconvenience but also would send a message to the Defendant to treat its agents fairly and with caution.

Resolution of the issue of damages.

Special damages:

Special damages have to be specifically pleaded and proved. According to **Halsbury's Laws of England, 4<sup>th</sup> Edition Vol. 12 (1) at paragraph 812**, special damages are those which do not arise naturally out of the Defendant's breach and they are recoverable only where they were not beyond the reasonable contemplation of the parties. Special damages can be calculated in financial terms and must be proved. In **Musoke v Departed Asian's Property Custodian Board and another [1990–1994] 1 EA 419** Seaton JSC who delivered the judgment of the Supreme Court held that:

“It is clear that special damage, as was claimed by the Plaintiff to have been suffered, is such a loss as the law will not presume to be the consequences of the Defendants' act. Such damage, as the learned editors of Odger's Principles of Pleading and Practice (21ed) point out; (at 164):

“... depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the Defendant's conduct...”

In **Uganda Telecom Limited v Tanzanite Corporation [2005] 2 EA 331** Oder JSC at page 341 considered the nature of special damages and held that:

“It is evident from the respondent's pleadings that their claims for loss of unused materials and for the unpaid bank loan were special damages. According to “Atiyar's Sale of Goods Act” (supra), “Special damages” is that damage in fact caused by wrong. It is trite law that this form of damages cannot be recovered unless it has been specifically claimed and proved or unless the best available particulars or details have before trial have been communicated to the party against whom it is claimed.”

Finally in Odgers Principles of Pleading and Practice in Civil Actions in the High Court of Justice 22nd edition at pages 170 – 171 the learned author notes that:

"Special damage, on the other hand, is such a loss as the law will not presume to be the consequence of the Defendants act, but which depends in part, at least, on the special circumstances of the case. It must therefore always be explicitly claimed on the pleadings, and at the trial it must be proved by evidence both that the loss was incurred and that it was the direct result of the Defendant's conduct. In the expectation or apprehension of loss is not sufficient. And no damage could be recovered for a loss actually sustained, unless it is either the natural or probable consequence of the Defendants act, or such a consequence as he in fact contemplated or could reasonably have foreseen when he so acted. All other damage is held as "reward". Loss of the kind which is foreseeable it unexpected, and any damage (e.g. loss of profits) which, although the direct result of the wrongful act, may not have been the immediate consequence of it, should be pleaded in enough detail to inform your opponent of the case you will have to beat and, if possible, enable him to make his own calculations of the amount. In many cases, proof of special damage is essential to the right of action; in these the writ must not be issued until the special damage has accrued, and then it must be alleged with special care."

Considering the totality of the above authorities, it is my conclusion that the claim for special damages of Uganda shillings 76,800,000/= in paragraph 7 of the plaint is pleaded as loss of monthly profits on supply for 24 months at a sum of Uganda shillings 3,200,000/= and is premised on the renewal of the contract of distributorship between the parties. It is a fact that the contract was terminated and the Defendant relies on the termination letter dated 24<sup>th</sup> May, 2011, albeit with the submission that the termination was wrongful. Secondly, there is a written contract between the parties governing the relationship. Clause 3.1 provided that the contractual would be for a period of two years and unless renewed and subject to termination as provided under the terms of the agreement. Clause 10.1 provided that the company could at its sole discretion terminate the agreement upon giving 14 days notice to the contract distributor. Secondly, the contract expires upon the expiration of two years. Thirdly, post termination obligations are provided for in clause 11 of the contract. It is provided in paragraph 11.1 that on the expiry of the termination of the agreement for whatever reason the contract distributor undertakes to promptly dispose of all products in hand in accordance with the Defendant's instructions.

In other words, termination brings the contract to an end. As to whether, the contract would have been renewed is speculative. In the premises, the Plaintiff is only entitled to such damages as have been proved.

The Plaintiff was entitled to 14 days notice under clause 10.1 and is awarded special damages of Uganda shillings 1,493,324/= for that period. No other special damages pleaded and any losses that the Plaintiff could have incurred pursuant to the unlawful termination of contract cannot be recovered as special damages.

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

General damages:

I have carefully considered the Plaintiff's claim for Uganda shillings 100,000,000/= and the Defendant's concession that it had without prejudice offered to the Plaintiff a total of Uganda shillings 9,600,000/= to end the litigation. Taking into account the fact that according to PW2 and PW1 the Defendant had already appointed another agent for the same territory in which the Plaintiff was operating, the Defendant simply wanted to bring the contract to an end in order to replace the Plaintiff with another agent. The Plaintiff incurred losses from contracts it had with other customers. However the losses cannot be beyond the monthly profit that the Plaintiff was admittedly earning of Uganda shillings 3,200,000/= per month. The Defendant had calculated three months to arrive at the figure of Uganda shillings 9,600,000/= as an olive branch offer to the Plaintiff.

In the case of **Hadley vs. Baxendale** (1854) 9 Ex 341 it was held that damages for breach of contract should be such as may be fairly and reasonably considered either arising naturally or according to the usual course of things from such breach of contract itself or may be reasonably supposed to have been in the contemplation of both parties at the time of making the contract as the probable result of the breach of it. This principle was echoed by Lord Wilberforce in **Johnson and another v Agnew [1979] 1 All ER 883** where he held that an award of general damages is compensatory and is intended to put the innocent party as far as money can do so in the same position as if the contract had been performed.

Furthermore prospective damages are defined by **Halsbury's Laws of England 4<sup>th</sup> Edition Vol. 12 (1) paragraph 810**, as damages awarded to a Plaintiff, not as compensation for ascertained loss which he has been sustained at the time of trial, but in respect of future damage or loss which is recoverable in law. In the case of pecuniary loss it is usual to quantify separately the past and prospective loss.

I would in the premises award the Plaintiff general damages equivalent to 7 months profits, taking into account the manner of termination of the Plaintiff's business as well as the suffering, loss of rental space and inconveniences suffered by the Plaintiff. The Plaintiff's claim for general damage is assessed as follows: The plaintiff is awarded a representative amount of 7 months profit in the sum of Uganda shillings 22,400,000/= together with damages for the inconvenience suffered of Uganda shillings 10,000,000/=. This amounts to general damages of Uganda shillings 32,400,000/=. The Plaintiff is deemed to have suffered these damages by the time it filed this action in April 2012.

Interest:

Section 26 (2) of the Civil Procedure Act gives the court discretion where a decree is for payment of money to order interest:

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

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

This suit was filed about one year after the cause of action arose in May 2011. In the premises I award the Plaintiff interest at the rate of 20% per annum from the date of filing the suit till date of judgment.

Additionally the Plaintiff is awarded interest at the rate of 19% per annum from the date of judgment on the aggregate award at the date of judgment till payment in full.

Costs

Under section 27 of the Civil Procedure Act, costs follow the event unless the court for good reason otherwise orders.

I do not see any reason to deny the Plaintiff costs and costs are awarded to the Plaintiff.

Judgment delivered in open court on the 20<sup>th</sup> of December 2016

**Christopher Madrama Izama**

**Judge**

**Judgment** delivered in the presence of:

Aruho Raymond for the Defendant

Ivan Mutiibwa of the Defendant in court

Counsel Simon Tendo Plaintiff’s counsel is absent

MD of Plaintiff Flavia Nansubuga present.

Charles Okuni: Court Clerk

**Christopher Madrama Izama**

**Judge**

*Decision of Hon. Mr. Justice Christopher Madrama Izama \*~\*~?+: maXimum728securityx 2016 style*

**20<sup>th</sup> December 2016**