

**THE REPUBLIC OF UGANDA,**

**IN THE HIGH COURT OF UGANDA AT KAMPALA**

**(COMMERCIAL DIVISION)**

**CIVIL SUIT NO 88 OF 2013**

**MOGAS (U) LTD}.....PLAINTIFF**

**VERSUS**

**BENZINA (U) LTD}.....DEFENDANT**

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

**JUDGMENT**

The Plaintiff filed this suit against the Defendant for declaration that the Defendant breached the contract with the Plaintiff for the supply of 1000 metric tons of bitumen and orders that the Defendant pays the Plaintiff special damages amounting to USD 13,900 (United States Dollars Thirteen Thousand Nine Hundred), the Defendant compensates the Plaintiff USD 84,100 (United States Dollars Eighty Four Thousand) being the income lost by the Plaintiff as a result of the breach of contract by the Defendant, pays interest on those sums at commercial court rate from the date when the cause of action arose till payment in full and pays general damages for breach of contract and costs of the suit.

The Plaintiff's grievance is that the Defendant breached the contract executed with the Plaintiff causing loss of USD 94,100 [United States Dollars Ninety-Four Thousand and One Hundred]. On the 6<sup>th</sup> day of June, 2012 the Plaintiff contracted M/s Emerald Energy Limited to supply and deliver 500 metric tons of Bitumen grade 60/70 and 500 metric tons of Bitumen grade 80/100 which the Defendant had failed to deliver. The Plaintiff bought Bitumen from Emerald Energy Limited in order to mitigate on the losses that it was incurring as a result of failure to supply its customers the bitumen they had ordered but which the Defendant had failed to deliver. Prior to ordering from Emerald Energy Limited, the Plaintiff had inquired

from the Defendant on several occasions when the Bitumen ordered would arrive and when Bills of lading would be forwarded, but there was no response at all from the Defendant instead the Defendant informed the Plaintiff that the Bill of lading had got lost but could not even provide a copy of the same. The Bitumen ordered from M/s Emerald Energy Limited was finally delivered to the Plaintiff on 29<sup>th</sup> August, 2012 and was supplied to the Plaintiff's clients but in purchasing from Emerald Energy, the Plaintiff incurred additional expenses and delays which it should not have incurred had the Defendant supplied as per the contract. Several email correspondences were exchanged in order to compel the Defendant to comply with the contract but there was no delivery of the bitumen as ordered. On 24<sup>th</sup> May, 2012 the Plaintiff stopped the clearing of the bank guarantee in the Defendant's favour because the said Bitumen had not been delivered by the Plaintiff, nor did the Defendant send the Bills of lading hence this suit.

The Defendant filed a Written Statement of Defence denying the whole claim and counterclaimed on the ground that the Counterclaimant procured five containers of Bitumen for the Respondent/Plaintiff which the Respondent refused to take delivery of to date thus causing it a loss of gain/profit on the same of approximately USD 50,000 (United States Dollars Fifty Thousand only). As a result of the Respondent's failure to pay taxes for the Bitumen containers, the Counterclaimant incurred expenses in the form of administrative fees, crane handling charges, storage charges and bond fees amounting to Uganda shillings. 10,000,000/= (Uganda Shillings Ten Million only). The Plaintiff's refusal to take delivery of the Bitumen caused the Defendant to suffer immense financial loss due to price fluctuations for the Bitumen from the date of purchase, and the difference amounts to USD 25,000 (United States Dollars Twenty-Five Thousand only). The actions of the Respondent caused the Counterclaimant gross inconvenience and damages.

The Plaintiff filed a reply to the written statement of defence and counterclaim in which they repeated contents and prayers sought in the Plaintiff and averred that the written statement of defence filed by the Defendant is a sham, a failed attempt to evade the course of justice and the same should be dismissed with costs. In further reply to the contents of the plaintiff, the Plaintiff contended that the Defendant made a quotation to the Plaintiff for the supply of 500 metric tons

of Bitumen grade 60/70 and 500 metric tons of Bitumen grade 80/100 at a rate of USD 580 (United States Dollars Five Hundred and Eighty) per metric ton and altogether making the total purchase price of USD 780,000 (United States Dollars Seven Hundred and Eighty Thousand). The said quotation was delivered to the Plaintiff on 15<sup>th</sup> February, 2012. On 16<sup>th</sup> February, 2012 the Plaintiff issued a local purchase Order against the Defendant's quotation stating that the Bitumen was required immediately. On 17<sup>th</sup> February, 2012 the Plaintiff applied for a bank guarantee that was granted on 24<sup>th</sup> February, 2012. It was a term of the bank guarantee that the same had to remain in force until 24<sup>th</sup> May, 2012 when the said Bitumen was supposed to have been delivered and sold by the Plaintiff. It was agreed with the Defendant that the Plaintiff had to receive a bill of lading for the said Bitumen immediately. On 19<sup>th</sup> March, 2012 the Plaintiff's managing director by email wrote to the Defendant's then Business Development Manager, Miss Margriet van der Veen reminding the Defendant of the order. The Defendant did not deliver the said Bitumen even after the said email indicating that the Plaintiff would be comfortable with the delivery made on or before 10<sup>th</sup> April, 2012. On 24<sup>th</sup> May, 2012 the Plaintiff stopped the clearing of the bank guarantee in the Defendant's favour because the said Bitumen had not been delivered by the Plaintiff nor did the Defendant send the Bills of lading. The Plaintiff through their advocates M/s Synergy Solicitors and Advocates on 26<sup>th</sup> June, 2012 issued a demand to the Defendant for the Defendant's breach of Contract and loss of business to the Plaintiff which was received by the Defendant on 27<sup>th</sup> June, 2012 but no response was given. Following the breach by the Defendant, on 6<sup>th</sup> June, 2012 the Plaintiff contracted M/S Emerald Energy Limited to supply and deliver 500 metric tons of Bitumen grade 60/70 and 500 metric tons of Bitumen grade 80/100 which the Defendant failed to deliver. The Plaintiff as a result of this arrangement was required to furnish a Bank Guarantee in favour of M/S Emerald Energy Limited which it did. The Bitumen ordered from M/S Emerald Energy Limited was finally delivered to the Plaintiff on 29<sup>th</sup> August, 2012. The Plaintiff lost money and time during the process of engaging M/S Emerald Energy Limited which money and time it would not have lost had the Defendant supplied the Bitumen. The Plaintiff claims to be compensated for this loss of money and time. The Plaintiff has never contracted the Defendant to procure 210 (two hundred ten) tonnes of Bitumen from another source. The Defendant is accordingly put to strict proof of the allegations. The Plaintiff will prove that the Defendant's core business is the supply of bitumen and

accordingly the 210 (two hundred ten) tonnes of Bitumen alleged were imported by the Defendant in the course of its business and not on the Plaintiff's behalf. The Plaintiff has never received a Proforma invoice nor bills of lading in its names from the Defendant for the said quantity and it has never issued a Local Purchase Order in the Defendant's favour to procure and supply 210 (two hundred ten) tonnes of Bitumen from another source. The Plaintiff could neither pay for taxes for goods not in its names (as consignee) as claimed by the Defendant nor pay for demurrage, administrative fees, crane handling charges, storage charges and bond fees. The Defendant is accordingly put to strict proof of the allegations. The Plaintiff further contends that it was under no known contractual obligation to take delivery of any form of bitumen from the Defendant as the contract between the parties had lapsed as of 24<sup>th</sup> May, 2012. The Plaintiff prayed that judgment is entered against the Defendant in the terms prayed for.

The Plaintiff was represented by Counsel Samuel Kakande while the Defendant was represented by Counsel Kagoro Friday Robert. At the close of the pleadings the court was addressed in written submissions. On 18<sup>th</sup> November, 2016 the parties filed a Joint Scheduling Memorandum wherein two issues each were agreed to in respect of the main suit and the Counterclaim to wit:

**MAIN SUIT.**

- (a) Whether the Defendant breached the contract of delivering Bitumen entered with the Plaintiff?
- (b) Whether the Plaintiff is entitled to the remedies sought?

**COUNTERCLAIM.**

- 1. Whether the Plaintiff/Counter Defendant breached the contract executed with the Counterclaimant/Defendant?
- 2. Whether the Counter Defendant is entitled to the remedies sought?

The parties addressed Court on the above raised issues by submitting on issues (a) & (1) concurrently and (b) & (2) concurrently.

**SUBMISSIONS**

ISSUES (a) AND (1).

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**(a) Whether the Defendant breached the contract of delivering bitumen entered with the Plaintiff?**

**(1) Whether the Plaintiff/Counter-Defendant breached the contract executed with the Counterclaimant/Defendant?**

In resolution of these issues, the Plaintiff's Counsel cited the case of **Dada Cycles Ltd V Sofitra S.P.R.L. Ltd HCCS No. 656 of 2005** citing the case of **Ronald Kasibante vs. Shell Uganda Ltd HCCS No. 542 of 2006 [2008] ULR 690**, where the Honourable Justice Hellen Obura (as she then was) defined breach of contract as:

"Breach of contract is the breaking of the obligation which a contract imposes which confers a right of action for damages on the injured party. It entitles him to treat the contract as discharged if the other Party renounces the contract or makes the performance impossible or substantially fails to perform his promise; the victim is left suing for damages, treating the contract as discharged or seeking a discretionary remedy."

Counsel submitted that from the evidence on record before this Honourable Court, the Defendant had an obligation to the Plaintiff which was to deliver/supply 1000 metric tons of bitumen, 500 metric tons of bitumen grade 60/70 and the other 500 metric tons of grade 80/100 which it wilfully refused to deliver as had been agreed causing the Plaintiff to lose time, business and incur costs they would otherwise have not incurred had the Defendant performed part of its bargain. It is also apparent from the evidence submitted before Court by the Plaintiff that the Defendant has never at any one time honoured its obligations towards the supply of the said bitumen. During cross examination of DW1 it comes out very clearly that the Defendant did not supply the Bitumen. PW1 in his examination in chief makes the same point that the Defendant Company did not deliver 1000 tons of bitumen as had been agreed. This was an act of breach which the Defendant is liable for and has no just reasons for being excused from the same. It was agreed that the Plaintiff had to receive a Bill of Lading for the said Bitumen immediately which is specifically quoted in the local purchase order dated 16<sup>th</sup> February, 2012 which evidences the contract between the Plaintiff and the Defendant and the same is on record before this honourable court. The Plaintiff had applied for a bank guarantee of USD 780, 000 (United States Dollars Seven Hundred and Eighty Thousand) from Stanbic Bank (U) Ltd which was to cover the purchase price, freight and clearing, apart

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from the 10% Duty of the Bitumen. It was granted to last for 90 days in respect of this transaction in favour of the Defendant and in any case it was not to exceed the 24<sup>th</sup> May, 2012. The word "immediately" in this instance meant a period of 90 days for which the guarantee was to last. The Defendant's Managing Director, DW1 in cross examination also confirmed that "immediately" in this context meant a period of 90 days and that the Defendant attempted to deliver a consignment of Bitumen after the agreed 90 days which the Plaintiff refused for reasons that it did not match the agreed quantity of 1000 metric tons and neither was it within the agreed time frame. The Defendant did not deliver any bill of lading to the Plaintiff noting that it had gotten lost and neither did it bother to avail a duplicate of the same. This was followed with failure to supply the agreed quantity of bitumen and only an attempt to supply a small quantity of bitumen was made after the period of 90 days. This is also confirmed by DW1 through cross examination. It is a breach of a major term of contract between the Plaintiff and the Defendant to supply 1000 metric tons of Bitumen immediately. The crux of the counterclaim by the Defendant/counterclaimant is that the Plaintiff in the main suit breached the contract by refusal to take delivery of the Bitumen. The Bank Guarantee obtained by the Counter Defendant in favour of the Counter Claimant in respect of this transaction was rejected by the latter's bankers and the Plaintiff failed to pay taxes. There is no breach on the part of the Plaintiff/Counter Defendant.

It would not be expected for the Plaintiff/Counter Defendant to take delivery of the goods that did not match with the quantity that had been agreed upon in the Local Purchase Orders reflected on Pages 12 and 13 of the trial bundle. It is the Counter Claimant's evidence that they supplied less quantity than agreed for reasons best known to them which is a breach of contract; moreover even this supply was made past the agreed time after the Plaintiff had sought for alternative supply. It was agreed in the Local Purchase Orders that the supply was to be immediate as had been indicated above and no such supply was ever made by the Counter Claimant which fact has not been challenged at all. In paragraph 5 of DW1's witness statement he states that the Bank guarantee issued by the counter Defendant was rejected by the counter claimant's bank. He further states that it made it problematic from the onset and yet in cross examination it comes out clear that the Defendant did not cancel the contract. In cross examination of DW1, it comes out clearly that the letter referred to is a rejection of a loan application and not the guarantee and

besides there was no communication of the rejection that was made to the Plaintiff. It also came out clearly in cross examination of DW1, the Defendant's only witness that the rejection did not in any way stop the supply. The refusal to supply by the Defendant was a wilful act and it ought to pay for its direct consequences.

On the failure to pay taxes, the Plaintiff/ Counter Defendant could not pay taxes in its names as consignee because there was no receipt of a Proforma invoice nor bills of lading in its names from the Defendant/Counter Claimant for the said quantity and it has never issued a Local Purchase Order in the Defendant's favour to procure and supply 210 (two hundred ten) tons of bitumen from another source. The Defendant breached the contract executed with the Plaintiff in April 2012 and the Plaintiff is entitled to compensation for the same. Counsel submitted that the Plaintiff did not breach any of the terms of the contract and prayed that the court decides in favour of the Plaintiff and accordingly dismiss the Counter Claim.

**In reply to these issues the Defendant's Counsel submitted** that it was the evidence in chief of DW1 Tarig Muhammed that his company the Defendant offered to supply Bitumen to the Plaintiff by way of a quotation which quotation was accepted by the Plaintiff by issuance of two (2) Local Purchase Orders Nos. 3624 and 3625 worth USD 780,000 [United States Dollars Seven Hundred Eighty Thousand only]. It was the Defendant's evidence in chief that the Plaintiff was to provide a bank guarantee acceptable to the Defendant's bank or pay cash in advance before any delivery of the goods was to be made. DW1 testified that the Plaintiff's bank guarantee was not accepted by the bank as evidenced by annexure "B" to the Defendant's additional list of documents nor did the Plaintiff pay any cash for the purchase of the Bitumen. The Plaintiff failed to perform the contract almost from the onset and left the Defendant to suffer with it.

DW1 further testified that despite being unable to receive any payment from the Plaintiff, all efforts were made to get the goods delivered through alternative means. In fact USD 150,000 [United States Dollars One Hundred Fifty Thousand only] was wired to Iran on 7<sup>th</sup> March, 2012 to M/s Aria Two General Trading L.L.C and this was evidenced by Annexure "C1" and "C2" at page 33 of the Joint Trial Bundle which was

never contested during the hearing by the Plaintiff. It was the Defendant's evidence in chief that despite making the payment for the purchase of the Bitumen, the same could not be delivered due to the sanctions imposed by the United States of America upon the Iranian Government. This was evidenced by the confirmation of blockage at page 35 of the Joint Scheduling Memorandum which was never contested by the Plaintiff. Notwithstanding the Plaintiff's breach of the contract by non-payment of cash or provision of bank guarantee acceptable to the Defendant's bankers. It can authoritatively be said and stated that the contract was frustrated by the trade sanctions against the Iranian government by the United States of America government. Despite all the above, it went ahead to make delivery of the first batch of Bitumen which the Plaintiff rejected as was indeed evidenced by the DW1's testimony in his examination in chief specifically from paragraphs 10 to 16 and the annexure mentioned thereto. The actions of the Plaintiff in not providing the Defendant's bank with a bank guarantee acceptable to them or paying cash in advance were in breach of the contract and the Plaintiff is liable.

Despite the contract being frustrated by the sanctions made upon the Iranian government from where the Bitumen was to be imported from and the breach of the contract by the Plaintiff from the onset, the Defendant did deliver the goods which were rejected by the Plaintiff as evidenced by annexure 'G' at pages 94 and 95 of the Joint scheduling memorandum. The issue of immediate delivery cannot be believed by this court given the kind of contract the parties entered into which was as per the local purchase order CIF (Cost Insurance Freight) Mombasa; which clearly meant that delivery could not be immediately for reason wherefore the Plaintiff is estopped from denying the fact that for an international contract like the one in issue, it is difficult to order for goods to be imported from abroad and the same to be delivered immediately. The evidence in chief of Francis Okello Oscar the Finance Manager of the Plaintiff's Company specifically paragraphs 5, 8 and 9 is clear on the kind of contract the parties entered into. The Plaintiff confirms having received part of the goods as evidenced under paragraphs 3.2.5 and 3.2.6 where it stated that "the Defendant failed to supply the agreed quantity and the attempt to supply the small quantity was made after 90



days". The submissions of the Plaintiff in this regard clearly show an admission of delivery of the goods. It is not true that the goods were supposed to be delivered within 90 days as submitted by the Plaintiff. The 90 days mentioned in the bank guarantee that was never accepted by the Defendant's bank cannot bind the parties at all. In fact the 90 days would have been part of the contract only if the bank guarantee had been accepted by the Defendant's bank which was not the case. The 90 days in the bank guarantee did not form part of the contract. The Plaintiff even paid taxes for the goods that were delivered and only changed its position when the Defendant demanded for payment as evidenced by the email of DW1 Tarig Mohammed at page 93 (annexure 'G') of the Joint scheduling memorandum which clearly states the demand for payment and a request for the Plaintiff to pick the goods. The Court should find that the Plaintiff breached the contract and the two issues be resolved in favour of the Defendant/Counterclaimant. Black's Law Dictionary 5<sup>th</sup> Edition at page 171 defines breach of contract as where one party to a contract fails to carry out a term. Counsel cited the case of **Nakawa Trading Co. Ltd versus Coffee Marketing Board Civil Suit No. 137 of 1991** where court defined a breach of a contract as where one or both of the parties fails to fulfil the obligations imposed by the terms of a contract. Also in the case of **Stanbic Bank Uganda Limited Versus Haji Yahaya Sekalega T/A Sekalega Enterprises High Court Civil Suit No. 185 of 2009 at page 6** court observed that;

"A breach of contract is the breaking of the obligation which a contract imposes which confers a right of action in damages to the injured party. It entitles him to treat the contract as discharged if the other party renounces the contract or makes performance impossible or substantially fails to perform his promise."

The above cited cases are very clear as to what amounts to a breach of a contract. It is very clear that the Plaintiff made it impossible for the Defendant to perform the contract when it failed to provide a bank guarantee that was acceptable to the Defendant's bankers or pay cash in advance. Relating to the facts it's very clear that the Plaintiff did not perform at all its part of the bargain when it failed to avail a bank guarantee acceptable to the Defendant's bankers or pay cash in advance. In fact it is the

Defendant who performed its part of the bargain despite the hardship it went through by eventually making delivery of the goods. As regards frustration of contract **Section 66 of the Contract Act** provides for discharge by frustration. **Sub Section (2)** provides that any sum paid or payable to a party under a contract before the time the parties are discharged under **Section (1)**, shall in the case of the sum paid, be recoverable from the party as money received by the party for his or her use and in the case of any sum payable, cease to be payable. Since the Plaintiff knew where the Bitumen, was to be purchased from and the problems that happened to the Defendant and continued to push the Defendant to spend more money to deliver the goods, therefore it should compensate the Counterclaimant all the money it spent within the meaning of the cited law.

## **ISSUE 2.**

### **Whether the Plaintiff is entitled to remedies sought?**

The Plaintiff's Counsel submitted that the Plaintiff is entitled to the special and general damages, interest and costs as claimed. It is trite law that a party is entitled to payments of the sums of the money that party claims after proof or establishment of the said claims.

With regard to Special Damages, the Plaintiff seeks recovery of special damages amounting to USD 13,900 (United States Dollars Thirteen Thousand Nine Hundred). The Plaintiff specifically claims the loss of USD 3900 (United States Dollars Three Thousand, Nine Hundred) being money lost towards arrangement fees for the Bank Guarantee. [This was agreed to between the parties and exhibited before the Court]; USD 5,000 (United States Dollars Five Thousand) lost towards seeking alternative supplies for the customers who had placed orders with the Plaintiff, but which order could not be fulfilled as a result of the breach by the Defendant; USD 5,000 (United States Dollars Five Thousand) as miscellaneous expenses for the loss of time the order was placed till filing of the suit. The Defendant's failure to supply the Bitumen put the Plaintiff to unnecessary losses in trying to secure other alternative suppliers. Following the breach by regarding interest the Plaintiff prayed for interest on all the sums claimed for the losses visited on the Plaintiff at the Commercial rate from the date of breach of contract until payment in full and since the Plaintiff has proved that he is entitled to the special damages, general damages and

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compensation for breach of contract then in the same vein it is entitled to the interest as prayed. **Section 26 of the Civil Procedure Act** and the case of **Dr. Vincent Karuhanga t/a Friends Polyclinic v NIC & URA HCCS No 2002 [2008] ULR 660** state that this court has power to award interest. The Plaintiff in the circumstances of this case would be entitled to interest on the amounts awarded in special and general damages. He prayed that interest is awarded on commercial bank lending rate on the special damages from the date of breach of contract until payment in full and at court rate on general damages from the date of judgment until payment in full.

With reference to costs, Counsel cited the general principle under **Section 27 (2) of the Civil Procedure Act Cap. 71** that costs follow the event and a successful party should not be deprived of costs except for good reasons. Counsel prayed that the Plaintiff be awarded costs for this suit as there is no good reason for the denial of such grant.

#### **ISSUE 4.**

##### **Whether the Counter-Defendant is entitled to the remedies sought?**

With regards to this issue, the Plaintiff's Counsel invited court to hold that the Counter Claimant is not entitled to any of the remedies sought in the counter claim. It is the Counter claimant's allegation in paragraphs 17 and 18 of DW1 's witness statement that it suffered immense financial loss but however it was brought out clearly through cross examination that no documentary proof was available for the alleged loss of USD 50, 000 (United States Dollars Fifty Thousand). DW1 further admitted that there was no evidence of payment of administrative fees that was tendered before this Honourable Court. There is no such loss that was incurred by the counterclaimant and therefore this issue should be resolved in the negative. The Plaintiff/Counter Defendant did not breach any of the terms of the contract and that the claims by the Defendant/Counter Claimant are baseless and this Honourable Court should find this issue in the negative. The Defendant/Counter-Claimant Company by avoiding its lawful obligations to the Plaintiff as has been proved before this Honourable court by the evidence on record, he prayed that this court be pleased to rule in favour of the Plaintiff/Counter Defendant and grant all the remedies as prayed. Counsel also prayed that the Counterclaim be dismissed for lack of merit and accordingly deny all the remedies

prayed for there under and grant the Plaintiff/Counter Defendant costs for prosecuting the said counterclaim.

**In reply to Issue (b) and (2) the Defendant's Counsel submitted** that the Plaintiff is seeking for recovery of sums of monies in the Plaint that it has never lost. PW1 Partha Ghosh the Plaintiff's Managing Director in his examination in chief categorized the losses and damages allegedly suffered by the Plaintiff from paragraphs 52 to 55 of his Witness Statement but did not at all specifically prove the same throughout the trial. It is the Defendant's submission that the Plaintiff did not prove the loss of a minimum profit margin of 15% of the total cost of Bitumen totalling 70,200 as alleged under paragraph 52 of his Witness Statement nor did it specifically prove the loss of USD 3,900 [United States Dollars Three Thousand, Nine Hundred only] as the cost of procuring a bank guarantee as alleged under paragraph 53 and also the USD 5,000 [United States Dollars Five Thousand only] for compensating customers and a further USD 3,000 [United States Dollars Eight Thousand only] for associated costs relating to the failure by the Defendant to deliver the Bitumen.

In fact it is the Defendant/Counterclaimant who proved to court that it lost USD 150,000 (United States Dollars One hundred and Fifty Thousand) due to the sanctions against Iran and more so lost a total of USD 50,000 being lost profit, Uganda Shillings 10,000,000/= (Uganda Shillings Ten Million) being expenses in administrative fees, crane handling charges, storage charges and bond fees. The Defendant also proved loss of USD 25,000 (United States Dollars Twenty Five Thousand) resulting from price fluctuations. The Plaintiff having breached the contract, it cannot have any claim against the Defendant. Counsel requested court to award the Defendant the prayers sought in the Counterclaim which have been proved to the satisfaction of this Honourable Court. As a rule, breach of contract entitles the injured party to an award of general damages. In the case of **Bank of Uganda versus Fred William Masaba & 5 others SCCA 3/98**, the Supreme Court while relying on the case of **Esso Petroleum Co. Ltd versus Mardon (1976) 2 ALLER** held that;

"The damages available for breach of contract are measured in a similar way as loss due to personal injury. You should look into the future so as to forecast what should have been likely to happen if he never entered into the contract".

It is trite law that costs follow the event and since the Counterclaimant has demonstrated its case to this Court, in the event that this Court allows the counterclaim and dismisses the Plaintiff, costs be awarded to the Counterclaimant. Given the above proposition of the law, the Plaintiff is not entitled to the prayers sought and Court be pleased to dismiss the Plaintiff's suit with costs and allow the counterclaim with all the remedies prayed for.

### **Judgment**

I have carefully considered the Plaintiff's suit and the Defendant's counterclaim. They present irreconcilable differences. Either the Defendant breached the contract for the supply of specified quality and quantity of bitumen on an agreed timeline or the Plaintiff breached the contract by failure to take the supply of what the Plaintiff ordered hence the counterclaim. The Defendant further averred that the contract was frustrated by sanctions imposed on Iran because Iran is where the goods were supposed to be sourced from. The Defendant also averred and presented the position that the bank guarantee agreed to was to be obtained from the Defendant was not acceptable to the Defendant's bankers and the Defendant had to look for alternative funding thereby causing the delay in supply to the Plaintiff. There is also controversy as to when the bitumen was contractually supposed to be delivered.

I will start with the pleadings of the parties to examine the pleaded position of both parties in the plaint, defence and counterclaim and in response to the counterclaim.

The Plaintiff's action as disclosed in the plaint against the Defendant is for a declaration that the Defendant breached the contract executed with the Plaintiff for the supply of 1000 metric tons of bitumen. Secondly, it is for an order that the Defendant pays the Plaintiff special damages amounting to US\$13,900. Thirdly, the suit is for an order that the Defendant compensates the Plaintiff in the amount of US\$84,100, being the income lost by the Plaintiff as a result of alleged

breach of contract by the Defendant. Fourthly, the Plaintiff seeks an order for interest to be paid on the above sums claimed at commercial rate from the date when the cause of action arose till payment in full. The Plaintiff also seeks for an order for the Defendant to pay general damages for breach of contract and for costs of the suit to be provided for. Generally the facts averred in support of the suit of the Plaintiff is that on 15<sup>th</sup> February, 2012 the Defendant made the quotation to the Plaintiff for the supply of 500 metric tons of Bitumen grade 60/70 and 500 metric tons but in great 80/100 and the rate over US\$580 per metric ton and altogether making the total purchase price of US\$580,000. The agreed payment terms were to be by payment guarantee for the full amount secured and accepted by the Defendant's bankers Messieurs Orient bank Uganda limited. The Plaintiff accepted the Defendant's quotation and made an order for the purchase of the requisite 1000 metric tons of bitumen by a local purchase order dated 16<sup>th</sup> of February 2012 and the agreed price. The Plaintiff complied with the terms of the quotation by taking out a bank guarantee for US\$780,000 to cover the purchase price, freight and clearing apart from a 10% duty for the bitumen. It was clearly indicated that the bitumen was required immediately. The guarantee executed was valid for 90 days from the date of the Bill of lading and in any case not later than 24<sup>th</sup> of May 2012. Sometime in April 2012, the Defendant informed the Plaintiff that the vessel loaded with bitumen had left Iran for Mombasa but by this time of filing the suit on 27<sup>th</sup> February, 2013 the bitumen had not been delivered. The Plaintiff requested for the bill of lading but the Defendant informed the Plaintiff that it had got lost and did not even provide a duplicate Bill of lading from the shipping line. The Plaintiff requested the Defendant to get a loan of at least payment for 100 metric tons to meet the orders placed with the Plaintiffs customers by the Defendant failed or neglected to supply the same. It followed that the Plaintiff because of the failure of the Defendant to deliver the goods lost income on all orders placed by its customers and incurred costs for procuring the bank guarantee. It is alleged that the Defendant failed to mitigate the loss by at least supplying 100 metric tons through borrowing the amount of money needed to make the supply. It failed to provide the Defendant with a Bill of lading when requested for.

The Defendant denied the claim and admitted that there was an offer for the supply of bitumen with two quotations. One was inclusive of taxes CIF Kampala and the other exclusive of taxes CIF Mombasa. It was further agreed that the bitumen would be sourced and imported from Iran.

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Thirdly, the Plaintiff was required to provide a bank guarantee acceptable to the Defendant's bank as a prerequisite for the said contract. However, the guarantee issued by the Plaintiff was rejected by the Defendant's bank and though this was brought to the Plaintiff's attention, it was ignored. The Plaintiff promised to get an acceptable guarantee but due to factors outside the Defendant's control, the importation of the bitumen from Iran was frustrated by force majeure in that sanctions had been placed on Iran. The Defendant's money to the tune of US\$ 150,000 was frozen as the result of the sanctions imposed on Iran. This was brought to the Plaintiff's attention who then requested the Defendant to procure 210 tonnes of bitumen from another source. The Defendant managed to procure 210 tonnes of the bitumen as requested by the Plaintiff and the Defendant asked the Plaintiff to provide finance to pay taxes for containers amounting to Uganda shillings 40,000,000/=. The Plaintiff issued cheques for a lesser sum demanded by Uganda Revenue Authority amounting to Uganda shillings 25,000,000/=. Upon failure to clear Uganda Revenue Authority taxes, the containers were held and incurred extra costs of demurrage for a period of 14 days amounting to Uganda shillings 10,000,000/=. Subsequently, when the Defendant insisted on the Plaintiff paying taxes, the Plaintiff cancelled the contract and directed the Defendant to sell the bitumen to other people at its own loss. In the premises the Defendant maintained that it had always been willing to perform the terms of the contract and the continued breach was on the part of the Plaintiff. Furthermore he maintained that the Plaintiff suffered no prejudice and loss and is not entitled to the remedies sought. Counsel prayed for dismissal of the suit and counterclaimed for loss of game/profit of approximately US\$50,000 on the ground that the Defendant/counterclaimant procured five containers of bitumen but the respondent to the counterclaim/Plaintiff declined to take delivery thereof. Failure to take delivery of the bitumen caused the Defendant immense financial loss due to price fluctuations for the bitumen from the date of the purchase and the difference amounts to US\$25,000. Whereas the counterclaim is for loss of profits amounting to US\$50,000, Uganda shillings 10,000,000/=:, US\$25,000, general damages for breach of contract and interest at court rate from the date of filing the suit until payment in full as well as for costs of the counterclaim.

In reply to the counterclaim, the Plaintiff/respondents to counterclaim averred that the Defendant made the quotation to the Plaintiff for the supply of 500 metric tons of bitumen grades 60/70 and the 500 metric tons of bitumen grade 80/100 at the rate of US\$580 per ton altogether giving a

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total purchase price of US\$780,000. The quotation was delivered on 15<sup>th</sup> February, 2012. On 16<sup>th</sup> February, 2012, the Plaintiff issued a local purchase order against the Defendant's quotation stating that the bitumen was required immediately. On 17<sup>th</sup> February, 2012 the Plaintiff applied for a bank guarantee that was granted on 24<sup>th</sup> February, 2012. It was a term of the guarantee that it had to remain in force until 24<sup>th</sup> May, 2012 when the bitumen was supposed to have been delivered and sold by the Plaintiff. It was agreed with the Defendant that the Plaintiff had to receive a bill of lading for the bitumen immediately. On 19<sup>th</sup> March, 2012 the Plaintiffs managing director wrote to the Defendants and business development manager reminding the Defendant of the order. The Defendant did not deliver the bitumen even after the e-mail indicating that the Plaintiff would be comfortable with the delivery made on or before 10<sup>th</sup> April 2012. On 24<sup>th</sup> May, 2012 the Plaintiff stopped the clearing of the bank guarantee in the Defendant's favour because the bitumen had not been delivered by the Plaintiff nor did the Defendant send the bills of lading. Thereafter the Plaintiff through its advocates wrote on 26<sup>th</sup> June, 2012 a demand to the Defendant for the Defendants breach of contract and loss of business but no response was received from the Defendant. On 6 June 2012, the Plaintiff contracted Emerald Energy Ltd to supply and deliver 500 metric tons of bitumen grade 60/70 and 500 metric tons of bitumen grade 800/100 which the Defendant failed to deliver. The Plaintiff furnished a bank guarantee in favour of Messieurs Emerald Energy Ltd. The said company delivered to the Plaintiff on 29<sup>th</sup> August, 2012. The Plaintiff lost money and time during the process of engaging Messieurs Emerald Energy Ltd which money and time it would not have lost had the Defendant supplied the bitumen.

Furthermore, the respondent to the counterclaim averred that the Plaintiff has never received a pro forma invoice, or bills of lading in its names from the Defendant for 210 metric tonnes of bitumen from another source. The Plaintiff could not pay for taxes for goods which are not in its names as consignee or paid demurrage, administrative fees, crane handling charges, storage charges and bond fees. Because the contract between the parties had lapsed on 24<sup>th</sup> of May, 2012, the Plaintiff/respondent to the counterclaim was under no contractual obligation to take delivery of any formal bitumen from the Defendant.



In the joint scheduling memorandum giving points of agreement and disagreement executed by both Counsel of the parties dated 18th of November 2014, there are some agreed facts and issues for determination of the suit.

The undisputed facts are as follows:

1. The Plaintiff is a company dealing in the buying and selling of variance petroleum products in the Eastern and Central Africa and region.
2. The Defendant carries on the business of selling petroleum products in Uganda.
3. On 15th of February 2012, the Defendant made the quotation the Plaintiff for the supply of 500 metric tons of bitumen grade 60/70 and 500 metric tons of bitumen grade 80/100 at a rate of US\$580 per metric ton and altogether making the total purchase price of US\$580,000.
4. Under the quotation, the terms of payment were to be by way of payment guarantee for the full amount secured and accepted by the Defendant's bankers Messieurs Orient bank Uganda limited.
5. The bitumen was to be sourced and imported from Iran.
6. The Plaintiff accepted the Defendant's quotation and made an order for the purchase of 1000 metric tons of bitumen by a local purchase order dated 16th of February 2012 at the agreed price and it was clearly indicated that the bitumen ordered was required immediately.
7. The Plaintiff complied with the terms of the quotation by taking out a bank guarantee for US\$780,000, the purchase price, freight and clearing, apart from the 10% duty of the bitumen.
8. The guarantee executed was valid for 90 days from the date of the Bill of lading and in any case not later than 24th of May 2012.
9. It was a term of the bank guarantee that the same had to remain in force until 24th of May 2012 when the said bitumen was supposed to have been delivered and sold by the Plaintiff.
10. The Plaintiff has to date not received the bitumen from the Defendant.

Following the agreed facts, I have considered the relevant documents namely the quotation to the Plaintiff for the supply of bitumen and the relevant local purchase order dated 16<sup>th</sup> February, 2012. I have also considered the bank guarantee in question.

The quotation for bitumen issued by the Defendant dated 15<sup>th</sup> of February 2012 was an agreed document. Secondly, a copy of the local purchase order issued by the Plaintiff to the Defendant dated 16<sup>th</sup> February, 2012 for the delivery of bitumen is also an agreed document. Thirdly, a copy of the local purchase order issued by the Plaintiff to the Defendant dated 16<sup>th</sup> of February 2012 for freight and clearing charges is an agreed document. Fourthly, the application for the payment bank guarantee dated 17<sup>th</sup> February, 2012 by the Plaintiff is an agreed document. Fifthly, a copy of the bank guarantee issued by the Plaintiff's bank versus standard bank (U) Ltd is an agreed document.

The quotation for bitumen is actually dated 14<sup>th</sup> February, 2012 and on 15<sup>th</sup> February, 2012. The quotation is for 500 tons of bitumen and 60/70 party new steel drums of 183 kg at US\$580 per ton (exclusive of taxes) delivered in Mombasa. Secondly it is for 500 tons of bitumen 60/70 party new steel drums of 183 kg at US\$780 per ton (exclusive of taxes) delivered in the bonded warehouse Kampala. The payment terms were either advance payment or bank guarantee accepted by the Defendant's bank.

By local purchase order dated 16<sup>th</sup> February, 2012 the Plaintiff ordered from the Defendant 500 metric tons of bitumen grade 60/70 with the unit price of US\$580 the total value being US\$290,000. Secondly, the Plaintiff ordered 500 metric tons of bitumen grades 80/100 and rate of US\$580 per unit amounting to US\$290,000. The price quoted was CIF Mombasa and the total purchase price being US\$ 580,000. It was indicated in the local purchase order that it was required immediately.

By a second document dated 16<sup>th</sup> February, 2012 being a local purchase order issued to the Defendant by the Plaintiff, the Plaintiff requested the Defendant for freight and clearing charges excluding duty for bitumen delivered to a bonded warehouse in Kampala for a total of 1000 metric tons when a unit price of 200 per metric ton amounting to US\$200,000. The delivery time was supposed to be immediate.

In the application to issue a Stanbic bond/guarantee is dated 17<sup>th</sup> February, 2012 in which it is written that Messieurs Stanbic bank should arrange to issue a bond or guarantee in accordance with certain instructions. The applicant is the Plaintiff and the beneficiary is the Defendant. The nominated bank is Orient bank main branch account number 11546902010501. The currency amount is that US\$780,000 and the validity period from the date of the bond is 90 days commencing 24<sup>th</sup> February, 2012 up to 24<sup>th</sup> May, 2012. The type of bond was a performance bond/guarantee. There is a document entitled guarantee to beneficiary.

Agreed issues:

- 1. Whether the Defendant breached the contract of delivering bitumen entered into with the Plaintiff?**
- 2. Whether the Plaintiff is entitled to the remedies sought?**
- 3. Whether the Plaintiff/counter Defendant breached the contract executed with the counterclaimant/Defendant?**
- 4. Whether the counter Defendant is entitled to the remedies sought?**

Issues number one and three are intertwined. In issue number one the Plaintiff seeks to establish that the Defendant breached the contract for delivery of bitumen. In issue number three, the Defendant/counter Defendant seeks to establish that the Plaintiff breached the contract for the supply of bitumen. Issues number two and four related to the remedies available if the above issues number 1 and 3 are answered. Issues number 1 and 3 are at cross purposes. The question is whether there was a breach of contract by any of the parties or by both of the parties. The Plaintiff and Defendants Counsel addressed issues number one and three together and I will adopt the same approach.

I have carefully considered the agreed facts and documents as well as the evidence. The question of whether there was a breach of contract by any of the parties or by both answers issue numbers 1 and 3.

It is undisputed that there was a contract for the supply of 1000 metric tons of bitumen and the terms of contract are reflected in two documents namely a quotation for the supply of the goods and the local purchase order pursuant to the quotation. The Defendant admitted that there was a

contract for the supply of 1000 metric tons of bitumen. Similarly, the Plaintiff agreed that there was such a contract for the supply of 1000 metric tons of bitumen. It is further an agreed fact that the Plaintiff did not get the supply as contracted. The Plaintiff's case is simply that the word "immediately" in the local purchase order, in relation to the period of the supply meant that the supply was supposed to be made within 90 days from 24<sup>th</sup> of February 2012. The Plaintiff relied on an application for the bond or bank guarantee it made to Stanbic bank whose terms are that the bond would be for a period of 90 days. However, the evidence of a bond admitted in evidence is not the bond document itself but a message which was captioned and reads as follows: please forward this guarantee to beneficiary without any responsibility on your part". The document does not indicate who was responsible for the message and it has the Plaintiff's name at the top. Could this be considered as the bond or guarantee? Further evidence is required to prove whether the Plaintiff did obtain a bond or payment guarantee to assure the supplier that money was available for payment of the contracted bitumen.

I have accordingly considered the testimony of PW1. PW1 Mr Partha Ghosh is the managing director of the Plaintiff Company in Uganda. His testimony is in writing. He testified as follows. The Defendant is known to the Plaintiff as another local dealer of bitumen and other petroleum products. In January 2012 the Plaintiff received various orders for bitumen from its customers but did not have enough quantities in the storage to meet all the orders. It decided to promptly source for bitumen from the Defendant to satisfy the demands of its customers. PW1 personally visited the Defendant's offices at Bugolobi, in Kampala and had a discussion with the managing director of the Defendant, Mr Tariq Mohammed. Upon the managing director of the Defendant confirming the availability of the bitumen, he made the orders for the supply by the Defendant. The Defendant's managing director requested for payment by bank guarantee issued in favour of the Defendant's bankers Messieurs Orient bank limited. On 14<sup>th</sup> of February 2012, he received a quotation for the supply of bitumen from the Defendant through the Defendant's managing director, Mr Tariq Mohammed. The Plaintiff's managing director confirmed the letter of quotation as well as the local purchase orders. He testified that he emphasised that they required the bitumen immediately. They further requested the Defendant to supply the bank details for processing of the guarantee/bond. On 21<sup>st</sup> February, 2012 a draft a bank guarantee was processed and forwarded to the Defendant to share with the bank for approval. The Defendant's bankers

requested the Plaintiff's bankers to amend the guarantee to suit the Defendant's bank specification which was communicated to Messieurs Stanbic bank Uganda limited. On 29<sup>th</sup> February, 2012, Stanbic bank issued a revised copy of the bank guarantee which was forwarded to the Defendant.

On 6<sup>th</sup> March, 2012 the Defendant promised the Plaintiff to deliver a sample of bitumen and the Bill of lading within two weeks according to a copy of the e-mail. The e-mail is dated 6<sup>th</sup> of March 2012 from Margriet van der Veen, the Business Development Manager of the Defendant and copied to Mr Tariq Mohammed and addressed to the Plaintiffs managing director. She wrote that the Defendant's bankers were still in the process of the bank guarantee procedure. In paragraph 2 of the e-mail he wrote as follows:

"I can tell you that within these days, my colleague Jignesh Patel will deliver samples of the bitumen to your office. We expect the bill of lading within the next 2 weeks...."

PW1 further testified that he enquired about the time of delivery of the bitumen by e-mail on 18<sup>th</sup> March, 2012 and in response the Defendant wrote inquiring about the quantity of bitumen the Plaintiff was interested in beginning of April 2012. He responded by saying that the Plaintiff needed 100 metric tons of each consignment that is the 60/70 and 80/100 by 10<sup>th</sup> of April 2012. After various correspondences on the issue on 28<sup>th</sup> March, 2012 the Defendant who its business development manager, informed the Plaintiff by e-mail that the supply of bitumen will not be earlier than 5<sup>th</sup> April, 2012. However, there was no delivery of the bitumen. Whereupon PW1 approached the Defendant's managing director/chairman about the issue.

Thereafter in June 2012, the Plaintiff obtained alternative supply from Emerald Energy Ltd to supply 250 metric tons of the 60/70 grade and 250 metric tons of the 80/1000 grade at US\$655 per metric ton C & F Mombasa.

On the other hand the Defendant's managing director confirmed the quotation and the local purchase orders as contained in the evidence of PW1. The Defendant's managing director is Tariq Mohammed DW1. In his written testimony paragraph 5 thereof, his testimony is that the Plaintiff failed to provide the bank guarantee that was acceptable to the Defendant's bank, a fact that made the performance of the contract problematic from the onset. He relied on a letter dated

9<sup>th</sup> of March 2012 addressed to the managing director of the Defendant being an application for a loan facility of US\$780,000. The letter reads as follows:

"We refer to your application for a loan facility of US\$ 780,000 dated 21<sup>st</sup> February, 2012 against a payment guarantee from Stanbic bank Ltd in favour of your buyer (MGS International (U) Ltd).

We have given careful consideration to your request described above but advise that we are constrained to proceed with the processing of your application until we get a full understanding of the current unfolding events in the Iran oil industry (where you intend to procure the bitumen); which present potential supplier risk.

Yours faithfully..."

He further testified that at the beginning of the transaction, he informed the managing director of the Plaintiff Company. Thereafter the Defendant made efforts to get delivery of the bitumen without the bank guarantee by making a transfer of US\$150,000 only on the 7<sup>th</sup> March, 2012 to Messieurs Aria Two General trading LLC a company based in the Iran. On the same day the finance sent for the purchase of the bitumen was blocked by the United States government allegedly due to the sanctions imposed against Iran government, a fact that could not be controlled by the Defendant. That fact made it impossible to deliver in the earliest time possible. All efforts were made by the Defendant to get the funds released but nothing fruitful came out after the date of the testimony yet the Defendant continued to pay interest on the money. The blockage of the money that was sent to purchase the bitumen frustrated the whole contract much as he wanted to deliver at all costs. Despite the blockage of the Defendant funds in USA, DW1 testified that he made every effort and duly imported the bitumen into the country according to a copy of the bill of lading. In the mid-June 2012, the consignment of bitumen arrived in the country pursuant to which it was assessed by Uganda Revenue Authority for payment of taxes. The Defendant duly informed the Plaintiff upon the arrival of the bitumen and on 23<sup>rd</sup> July, 12 requested the Plaintiff to advance it funds for payment of the taxes. On 24<sup>th</sup> July, 2012 the Plaintiff duly paid the money requested for payment of taxes to the Defendant amounting to Uganda shillings 25,910,685/=. On 26<sup>th</sup> and 27<sup>th</sup> July, 2012, the Plaintiff requested the Defendant

to pick up the bitumen and finalise payment. However, on 27<sup>th</sup> of June 2012, the Plaintiff's managing director informed him that they could not take delivery of the consignment and requested the Defendant to refund the money advanced for the payment of taxes. As a result of the Plaintiff's refusal to take delivery of the bitumen, the Plaintiff company lost profit from the transaction amounting to US\$ 50,000 and over Uganda shillings 10,000,000/= was lost in the form of administrative fees, handling charges, storage charges and bond fees. He prayed that the court directs the Plaintiff to pay the Defendant for the losses.

I have duly considered the evidence in cross examination of DW1. Paragraph 5 of the witness statement of Mr Tariq Mohammed, the managing director of the Defendant is problematic. He asserts that the Plaintiff failed to provide a bank guarantee that was acceptable to the Defendant bank, a fact that made the performance of the contract problematic from the onset. He relied on a letter attached to paragraph 5 of his statements and marked as annexure "B". I have already quoted the letter dated 9<sup>th</sup> of March 2012 from Messieurs Orient bank Ltd addressed to the managing director of the Defendant Company. The letter proves that Orient bank had a payment guarantee from Stanbic bank Ltd arranged by the Plaintiff. The letter confirms that the Plaintiff had obtained the payment guarantee from Stanbic bank. It was against this payment guarantee that the Defendant applied for a loan facility of US\$780,000. Orient bank Ltd voiced its concern about the unfolding events in the Iran oil industry where the Defendant intended to procure the bitumen. They considered it to present potential supply risk. They halted the processing of the application for a loan until they gained a full understanding of the unfolding events in the Iran oil industry.

The prudence of the Defendant's bank, Messieurs Orient bank Ltd, can be demonstrated by the testimony of DW1 himself that money which he sent of US\$150,000 was blocked by the United States government on account of sanctions against Iran. It is therefore not true that the Plaintiff did not provide a bank guarantee acceptable to the Defendant's bankers namely Messieurs Orient bank Ltd. Quite the contrary, it is the Defendant's application for a loan that was considered risky because of the venture of importing bitumen from Iran.

Curiously, the Defendant's managing director testified that the contract was frustrated. This was echoed by the Defendant's Counsel. It also formed the basis of the admission that there was

delay in the execution of the agreement. This is because the Defendant later on in June 2012 imported some bitumen from other sources. The Defendant premised its defence and counterclaim on breach by the Plaintiff by failure to provide an acceptable bank guarantee to the Defendant's bankers Messrs Orient Bank Ltd. In further support of this position, the Defendant in the written statement of defence of the Defendant paragraph 4 (d) avers the untenable pleading to the effect that the guarantee issued by the Plaintiff was rejected by the Defendant's bank. The testimony of PW1 is consistent with the fact that there were amendments which were sought to the wording of the guarantee and this was subsequently done and sent back to Orient Bank for approval. The subsequent evidence proves that a payment guarantee was in place when the Defendant applied for funding of the suit project of importation of bitumen. The letter of Messieurs Orient bank Ltd proves that the Plaintiff's bankers Messieurs Stanbic bank Ltd had issued a payment guarantee and it was acceptable to Orient bank Ltd. It was against the payment guarantee that Orient bank Ltd considered the risky venture and the application for a loan by the Defendant. In other words the Defendant was not facilitated with the loan for the importation of Bitumen because of the risky venture of importing it from Iran. In paragraph 4 (f) of the written statement of defence, the Defendant pleaded force majeure. It indirectly confirms the testimony of PW1, the managing director of the Plaintiff, that there was no importation of Bitumen within the expected time. The wording of paragraph 4 (f) is very clear that the importation of the bitumen from Iran was frustrated as it was clogged by force majeure when sanctions were placed on Iran. The contract was either frustrated or the terms of delivery later on amended. By pleading that the contract was frustrated, the Defendant pleaded a defence to timely delivery. In other words there was no timely delivery. For emphasis the Plaintiff's case is that there was no timely delivery and it had to source for the bitumen from elsewhere. The rejection of the bitumen imported later by the Defendant by the Plaintiff can only lead to a separate issue as to whether the parties waived the terms of the contract and the Plaintiff is thereby stopped from rejecting the late (or frustrated early delivery) of the bitumen.

The defence of frustration of a contract now has a statutory basis. Sections 66 (1) and (2) of the Contracts Act, 2010 Act 7 of 2010 (hereafter referred to as the Contracts Act 2010 codifies the common law doctrine of frustration to the extent that it provides inter alia as follows:



“66. Discharge by frustration.

(1) Where a contract becomes impossible to perform or is frustrated and where a party cannot show that the other party assumed the risk of impossibility, the parties to the contract shall be discharged from the further performance of the contract.

(2) Any sum paid or payable to a party under a contract before the time the parties are discharged under subsection (1) shall, in the case of the sum paid, be recoverable from the party as money received by that party for his or her use and in the case of any sum payable, cease to be payable.

Section 66 (1) of the Contracts Act 2010 provides for discharge of parties to a contract from future performance of the contract unless the opposite party assumed the risk of impossibility. In this case it is the Defendant pleading impossibility of performance or frustration. It simply means that both parties ought to be discharged of their obligations for the future performance of the contract. In other words the Defendant is discharged from the supply obligation as much as the Plaintiff is discharged from the obligations of a buyer. Frustration and performance are strange bedfellows. Either the contract is frustrated and the parties are discharged or not. Was it partially frustrated? What are the rights of the Plaintiff if any? Did the Plaintiff waive any of its rights, if any?

The Defendant even relied on section 66 (2) of the Contract Act 2010 for the counterclaim. Section 66 (2) is a consequential provision and depends on a finding of frustration. It provides that: “Any sum paid or payable to a party under a contract before the time the parties are discharged under subsection (1) shall, in the case of the sum paid, be recoverable from the party as money received by that party for his or her use and in the case of any sum payable, cease to be payable”. It addresses two case scenarios. Where money is paid by a party to a contract before discharge by frustration of the contract, that money is recoverable from the party to the frustrated contract who received it and by the party who paid. The second scenario is that where money is payable under a frustrated contract, it ceases to be payable and the party with the obligation to pay is discharged from the payment obligation.

The common law is that frustration deals with impossibility of performance due to intervening factors beyond the control of the party pleading frustration. In the case of **Krell vs. Henry [1903] 2 K.B. Page 740**, there was an appeal from the dismissal of a suit of the Plaintiff for enforcement of a contract to rent a room. The trial court held that the foundation of the contract was that the Defendant wanted to watch the Coronation procession which had been fixed for a particular date. However, the Coronation was postponed and the Defendant refused to pay for the room. The Defendant had paid a deposit but did not take up the room. The judge held that the Plaintiff was not entitled to recover the balance of the rent fixed by the contract. He relied on the case of **Taylor versus Caldwell (1863) 3 B. & S 826**. On appeal to the Court of Appeal per Vaughan Williams L.J. discussed the principle in **Taylor versus Caldwell** at page 748:

"where from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time of the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

At page 751:

Surely the view of the Coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab – namely, to see the race – being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract."

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The questions out by the court to establish whether there is impossibility of performance are question of fact. What is the foundation of the contract? The supply of bitumen and payment for the same. Secondly, was the performance of the contract prevented? This is what the Defendant pleaded and the Defendant admitted that the supply could not be made as contemplated by the parties. The third question is whether the event which prevented performance could not have been reasonably contemplated by the parties to the contract. Were the alleged sanctions or alleged blockage of the Defendant's funds for payment of bitumen from Iran without the reasonable contemplation of the parties? This is what the party relying on the frustrating event pleads and the Plaintiff sought to avoid the contract. From the Defendants pleadings the parties ought to be discharged from their obligations.

Section 66 (1) and (2) of the Contracts Act 2010 is further consistent with the case law previously applicable on the subject. In **Fibrosa Spolka Akeyjna vs. Fairbairn Lawson Combe Barbour Ltd [1942] 2 All ER 122**, the House of Lords considered the rule in **Chandler versus Webster [1904] 1 KB 493**. This rule is described by Lord Russell as the rule "that in cases of frustration loss lies where it falls, or that where a contract is discharged by reason of some supervening impossibility of performance, payments previously made and legal rights previously accrued according to the terms of the contract, will not be disturbed, but the parties would be excused from further liability to perform the contract. There are situations in which the party who paid the money may be able to recover his money.

The problem is that the Defendant in the same breath avers and testified through DW1 that notwithstanding the frustrating event, it sourced for funding for the bitumen elsewhere and imported some bitumen. In other words the contract was not frustrated by the blockage of money except perhaps as to time.

From the above analysis issue number 1 of whether the Defendant was in breach of contract for delivery of bitumen to the Plaintiff is resolved as follows:

The Defendant did not have the capacity to import the 1000 metric tonnes of bitumen and its application for a loan for funding to do so was rejected. The rejection of the loan application was not because of any defect or desirability of the payment guarantee issued by Messrs Stanbic

Bank on the Defendant's behalf. Secondly, the Plaintiff's funds were blocked on account of sanctions imposed against Iran. The contract embodied in the quotation of the Defendant to the Plaintiff dated 14<sup>th</sup> February, 2012 does not specify that the bitumen would be imported from Iran. Secondly, the local purchase order of the Plaintiff dated 16<sup>th</sup> February 2012 does not specify from where the bitumen specified therein is to come from. Thirdly, the price of bitumen was negotiated at C & F Mombasa. The grade of bitumen was specified. It was 500 metric tonnes of Bitumen Grade 60/70. Fourthly, it was also 500 metric tonnes of Bitumen Grade 80/100. The quotation was for CIF Mombasa.

The second local purchase order is for clearing and freight to convey the goods from Mombasa to a bonded warehouse in Kampala, Uganda. There is no mention of Iran in these documents. Last but not least I have considered the evidence of the payment guarantee whose draft was admitted in evidence. The guarantee was merely one guaranteeing payment for delivery of bitumen to Kampala. The contract was described as for payment for Bitumen to be delivered in Kampala. By the bond the Plaintiff undertook to pay US\$ 780,000 upon written demand declaring the provider (supplier) to be in default, without argument. The guarantee was valid until 24<sup>th</sup> May, 2017.

According to Atiyah in *Sale of Goods Ninth Edition Pitman Publishing 1995*, at pages 309 that in certain cases an event which may otherwise be a frustrating event may not frustrate a CIF contract. He noted that in **Tsakiroglou & Co. vs. Noble & Thorl GmbH [1962] AC 93**, the House of Lords held that "closure of the Suez Canal did not frustrate CIF contracts for the sale of Sudanese groundnuts to European buyers, despite the fact that the alternative route was via the Cape of Good Hope, several thousand miles longer. The author notes at page 309 last paragraph:

"The decisive point may have been that these were contracts for the sale of goods c.i.f. in which the buyers were only concerned with the shipment of the goods at the port of shipment, and their ultimate arrival at their destination. Precisely how the sellers got the goods to the buyers was their own business. Conversely, the unloading of the goods from the vessel at the port of destination in a c.i.f. contract is prima facie the sole responsibility of the buyer. If the goods cannot be so unloaded because the buyer has not obtained any necessary import licence, he will bear the loss."

I have accordingly read through the case of **Tsakiroglou & Co Ltd vs. Noble & Thorl GmbH [1961] 2 All ER 179 HL**. In the House of Lords the Appellants argued that there was an implied term in the contract for the shipment to be via the Suez Canal. Their lordships considered the point and were of the opinion that the contract could not be frustrated by the closure of the Suez and the alternative route of the Cape of Good Hope was available. It was material what the terms of the contract were and they set out the obligations of the seller.

It is therefore a question of fact as to whether any contract is frustrated by any even or factor looking into the obligations of the parties. In this case the frustrating event advanced by the Defendant is blockage of its money. I must emphasise that the obligation of the Plaintiff was to provide a payment guarantee which and which conclusion I have reached using the Plaintiff's own document showing that its own bankers were wary of any contract to get supplies of goods from Iran where there were sanctions against Iran. The Defendants counterclaim negates any conclusion that the contract was frustrated by its money being blocked. The Plaintiff ordered for the goods on CIF Mombasa terms and for freight and clearance from Mombasa to Kampala. There was no contract to source the goods from Iran. The parties only agreed on the packaging and grade of bitumen to be shipped CIF Mombasa and the quantity thereof. PW1 never mentioned Iran and the documents of the parties do not have this as a term of the contract. It was the Defendant's prerogative where the goods are shipped from and the Defendant having availed goods cannot say that there was frustration.

Last but not least, I agree with the Plaintiff submission that the Defendant did not avail the bills of lading for the goods as contracted.

The goods were not shipped within the period in the payment guarantee and the Defendant failed in its obligations to ship the goods by April 2010 (the 200 metric tonnes) out of the 1000 metric tons. I agree with the Plaintiff's submission that the words for the goods to be delivered "immediately" meant within the time of the payment guarantee which expired on 24<sup>th</sup> May, 2012. In the premises issue number 1 is answered in the affirmative and the Defendant breached the contract to supply bitumen to the Plaintiff "immediately" after February 2012 CIF Mombasa.

**On issue number 3 whether the Plaintiff was in breach of contract, the question is which contract?**

On the first point the Defendant argued that the contract was frustrated by the sanctions imposed upon Iran. However, I have already held that there was no contract to specifically source the goods from Iran. The Defendant had been warned by its bankers about risk in the venture of importation from Iran in admitted annexure B” to the witness statement of Tariq Mohammad. The second leg of the Defendant’s submission is based on delivery of the first batch of goods which the Plaintiff rejected. The Defendant relied on annexure “G” to the joint scheduling memorandum at pages 94 – 95. By letter dated March 11<sup>th</sup> 2013, PW1 wrote an email to the Defendant rejecting a consignment for which they had paid taxes on the request of the Plaintiff. The email reads in part as follows:

“Dear Mohammed,

We have made an agreement and based on that we have issued an LPO. We are finding new charges everyday – which was not discussed and agreed.

At this rate we cannot take the consignment as we are not aware what other charges you want to pass it onto us.

As you have cleared the taxes in your name – you are free to sell it to anyone of your choice and return the money advanced to you as taxes.

I trust you will find the advise is in order. ...”

I have carefully considered the evidence and the question is whether this was an extension of the earlier contract. I have already ruled that the earlier contract had not been frustrated and the Defendant was in breach of contract. The Defendant had requested the Plaintiff to advance its money for the clearance of taxes which the Plaintiff did but subsequently the Plaintiff rescinded the contract. The question for consideration is whether the Plaintiff had waived its rights to rescind the contract for failure to provide the goods in time as stipulated in the local purchase order. The Plaintiff had a right to rescind the contract on the ground that what was contracted was not delivered on time. I do not agree with the Plaintiff’s Counsel that the Defendant was

required to deliver 1000 metric tons of the goods all at once. That notwithstanding, none of the goods had been delivered by 24<sup>th</sup> May, 2012. Did the Plaintiff elect to continue with the contract by the payment of taxes?

According to Words and Phrases legally defined, 3rd edition 1 volume 2 D – J page 147, the term "election" or the doctrine of election is defined in the case of **Scarf versus Jardine (1882) 7 App Cas 361** per Lord Blackburn:

"Where a party in his own mind has thought that he would choose one of two remedies, even though he has written it down on a memorandum or has indicated it in some other way, that alone will not bind him; but so soon and as he had not only determined to follow one of his remedies but has communicated it to the other side in such a way as to lead the opposite party to believe that he had made that choice, he has completed his election and can go no further; and whether he intended it or not, if he has done an unequivocal act – I mean an act which would be justifiable if he had elected one way and would not be justifiable if he had elected the other way – the fact of his having done that unequivocal act to the knowledge of the persons concerned is an election."

The Plaintiff elected to pay an advance for the payment of taxes. Nonetheless, this was at the request of the Defendant. The fact that the Plaintiff paid taxes for the goods by advancing this money to the Defendant is not disputed. Did the Plaintiff waive its right to rescind the contract at this stage and at least as far as the first consignment of five containers of bitumen imported by the Defendant is concerned? Alternatively did the Defendant's actions amount to a variation of the time of delivery of the first batch of bitumen? Variation of contracts is provided for under section 67 of the Contracts Act which provides that:

"67. Variation of contracts.

Where any right, duty, or liability would rise under agreement or contract, it may be varied by the express agreement or by the course of dealing between the parties or by usage or custom if the usage or custom would bind both parties to the contract."

There was no express variation of contract and the Plaintiff had requested for delivery of the first consignment of 200 metric tonnes latest by April 2012. As far as waiver is concerned, I have considered the case of **Kamins Ballrooms Co Ltd vs. Zenith Investments (Torquay) Ltd [1970] 2 All ER 871** at 894 where Lord Diplock defines waiver to mean:

"The second type of waiver which debars a person from raising a particular defence to a claim against him, arises when he either agrees with the claimant not to raise the particular defence or so conducts himself as to be stopped from raising it" (see WORDS AND PHRASES legally defined third edition R – Z page 405)

The above doctrine imports the doctrine of estoppels which is also codified under section 114 of the Evidence Act cap 6 Laws of Uganda. I duly considered the evidence. According to the Defendants Counsel, relying on annexure "E" to the joint scheduling memorandum, the Plaintiff even advanced the Defendant money for the payment of taxes for the goods that had been imported. This was a first consignment of 5 containers. I note that the goods had arrived by July 2012. The Plaintiff had requested for the delivery of these goods by April 2012 but the Defendant failed to deliver. When the Defendant demanded for payment, the Plaintiff declined to take delivery of the goods in 2013. I have accordingly considered annexure "E" which is an admitted document. It showed that the Defendant received with thanks a sum of Uganda shillings 25,000,000/= on 24<sup>th</sup> July, 2012 for payment of taxes for bitumen. By e-mail dated 27<sup>th</sup> July, 2012, the Defendant wrote that the bitumen was ready for picking and all documents would be released to the Plaintiff upon payment. The Defendant also wrote in annexure "G" which is the e-mail in question, that holding the stock would accrue more charges such as demurrage.

The Defendant had clearly deviated from the terms of the original agreement. Secondly, the payment guarantee had expired by 24<sup>th</sup> May, 2012. Despite the fact that the Plaintiff agreed to pay taxes by way of advance to the Defendant, there is no evidence that the Plaintiff had accepted new terms. The Defendant had proposed payment by bank guarantee or advance payment in the letter of quotation. In the local purchase order, it is provided that the order was made subject to the general purchasing conditions on the reverse page. However, the reverse page was not tendered in evidence. Going by the older terms, the Plaintiff was bound to pay in



advance or by provision of the payment guarantee. The payment guarantee did not work out for the Defendant.

On the other hand, after the rejection of the goods, the Defendant agreed to sell the goods and did not sue for the full value of the goods.

In the premises, the Plaintiff was obliged to pay for the goods according to the quantities which had been imported thus far by the Defendant but the parties modified their rights and decided to rescind the contract altogether. The Defendant had to look for market elsewhere. The only question for me to consider therefore is whether the Defendant was put to extra costs or damages for the particular consignment which the Plaintiff rejected. Having in mind that the Defendant was required to supply 1000 metric tons, also having in mind that the Defendant had only imported the portion of the goods and the Plaintiff was entitled to reject the rest, the Plaintiff breached the subsequent agreement to pay for the particular goods imported by the Defendant and take delivery thereof. The Plaintiff would be liable for any consequential damages arising from a rejection of the goods. The question is therefore whether the Defendant suffered any damages.

### **Remedies**

I have duly considered the written submissions of the Plaintiff's Counsel as well as that of the counterclaim and the evidence adduced for the Plaintiff and the Defendant by the two witnesses namely PW1 who is the Plaintiff's Managing Director and DW1 who is the Defendant/Counterclaimant's Managing Director.

The Plaintiff claims special damages of US\$3900 as arrangement fees for the payment guarantee it took out for importation of the subject matter of the suit namely 1000 metric tonnes of bitumen and US\$5000 for seeking alternative supplies. The Plaintiff also seeks US\$5000 for miscellaneous expenses and the total amount of special damages claimed by the Plaintiff is US\$13,900.

The Plaintiff also claimed loss of profit of US\$70,200 as general damages for failure to supply the goods ordered by the Plaintiff.

The evidence is that the Plaintiff sought alternative supplies from Emerald Ltd on 6<sup>th</sup> June, 2012 before the Defendant supplied the first consignment. I have duly considered the evidence in support of the claim and particularly the testimony of PW1 specifically paragraphs 52 - 57 of the written testimony.

As far as the general damages is concerned, PW1 testified that if the Defendant had delivered in due time the bitumen contracted, the Plaintiff would have obtained a minimum profit margin of 15% of the total cost of the bitumen amounting to US\$70,200.

As far as special damages are concerned PW1 testified that the Plaintiff incurred \$3900 because of procuring the bank guarantee from its bankers. Secondly, a total of US\$ 5000 was lost in compensating customers who had already placed orders with the Plaintiff but were not supplied with the bitumen on time by the Plaintiff. Additionally the Plaintiff lost a total of 5000 for all the associated costs related to the failure by the Defendant to deliver the bitumen. The total amount claimed as special damages is US\$13,900.

I have carefully considered the claim of the Plaintiff starting with the claim for special damages. It is the Plaintiff's case that the Defendant was supposed to supply the bitumen within 90 days as specified in the payment guarantee ending 24<sup>th</sup> May, 2012. One month later, the Plaintiff's sought to get alternative supplies. The Plaintiff therefore incurred additional expenditure which is justifiable. In the premises I award the Plaintiff special damages as follows:

US\$3900 being the costs for procuring the bank guarantee.

US\$5000 being associated costs relating to failure of the Defendant to deliver the bitumen on time.

No evidence was adduced about the compensation to various customers of the Plaintiff amounting to US\$5000 and this claim cannot be allowed.

In total I award the Plaintiff a sum of US\$8900 as special damages based on the clear testimony of PW1.

As far as the claim for general damages is concerned, the basis thereof is the profit margin of 15% of the total cost of bitumen. The Plaintiff sought alternative supplies and there is no calculation as to how much this mitigated the loss of profit. For that reason I award the Plaintiff 10% as profit on 1000 metric tonnes amounting to the CIF Kampala of the goods of US\$ 780,000. 10% of this amount would be US\$ 15,600.

In the premises I award the Plaintiff general damages of US\$15,600 representing the loss due to failure to receive bitumen on time (That is by 24<sup>th</sup> May, 2012).

Counterclaim:

In defence against the claim for US\$50,000 being loss of profit, the Plaintiff's Counsel submitted that no evidence was adduced in support of the counterclaim. On the other hand the counterclaimant's Counsel submitted that the counterclaimant lost US\$150,000 and continued to pay interest on this amount when the sum was blocked by the United States government. The interest presumably relates to a claim of US\$ 25,000 out of the total claim of US\$ 50,000.

I have carefully considered the evidence of DW1. Particularly the heads of claim are specified in paragraph 17 of the written testimony of DW1. The evidence is that as a result of the Plaintiff's refusal to take delivery of the bitumen, his company lost profit from the transaction of US\$50,000. Out of this amount, over 10,000,000/= Uganda shillings was lost in the form of administrative fees, handling charges, storage charges and bond fees.

I have carefully considered the resolution of the issues agreed upon and the counterclaim can only succeed to the extent that the Defendant lost money in the sale of the property or the goods to third parties upon refusal of the Plaintiff to take delivery of the five containers of bitumen. No such evidence was adduced. The counterclaimant is not entitled to claim for loss of profit on the ground of having paid interest on money blocked due to US sanctions against Iran amounting to US\$150,000 as pleaded in the counterclaim. This follows the resolution of issue 1 that the Defendant could not rely on frustration for failure to deliver the bitumen to the Plaintiff as contracted.

The Plaintiff has not claimed for refund of money advanced to the Defendant as taxes. This was Uganda shillings 25,000,000/= advanced to the Defendant on 24<sup>th</sup> July, 2012 for payment of taxes for bitumen and according to receipts issued by the Defendant. This amount of money was a loss to the Plaintiff and the Defendant took the benefit thereof as taxes for the first consignment of bitumen it had imported. There is no evidence that this money was refunded.

In the premises the amount of Uganda shillings 25,000,000/= is sufficient compensation to the Defendant for the Plaintiffs failure to take delivery of the 5 containers of Bitumen. The amount is based on the Defendant's claim that it received the said sum from the Plaintiff in July 2012 for the payment of taxes. This money was paid to the Defendant according to the evidence of the Defendant before the counterclaim was filed. It follows that the counterclaimant/Defendant to the main suit is not entitled to costs and none are awarded.

#### Interest

The Plaintiff is awarded interest on the US\$ 8,900 from the 24<sup>th</sup> May, 2012 at the rate of 10 % per annum till date of judgment.

Further interest is awarded to the Plaintiff at the rate of 8% per annum from the date of judgment on the aggregate sum on the date of judgment till payment in full.

The Plaintiff's suit succeeds with costs to the Plaintiff.

Judgment delivered on the 5<sup>th</sup> September, 2017

**Christopher Madrama Izama**

**Judge**

Judgment delivered in the presence of:

Kagoro Friday Robert for the Defendant

No one from the Defendant Company

Plaintiff's Counsel is absent

Charles Okuni: Court Clerk

Julian T. Nabaasa: Research Officer Legal

**Christopher Madrama Izama**

**Judge**

**5<sup>th</sup> September, 2017**