

UGANDA / JUDGMENT

Assa Abloy (U) Limited v Nsereko (Civil Suit 760 of 2020) [2024] UGCommC 21 (17 January 2024) [2024] UGCommC 21

COURT

Commercial Court of Uganda

BEFORE

Stephen Mubiru, J

CASE / FILE NUMBER

Civil Suit 760 of 2020

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IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA COMMERCIAL DIVISION

Reportable Civil Suit No. 0760 OF 2020

In the matter between

ASSA ABLOY (U) LIMITED PLAINTIFF**And****MICHAEL NSEREKO T/a FADIGA HARDWARE AND HOUSE LOCKS DEFENDANT****Heard: 16 March, 2022 Delivered: 17 January, 2024**

Contract Law — Asset purchase agreements — asset acquisition does not become an easy path for sellers or buyers looking to shirk responsibility. — *The exceptions to therein have been developed to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor.*

Goodwill — Goodwill represents the future economic benefits arising from the other tangible assets acquired in the business such as subsisting contracts, equipment, real estate, and inventory. — *Therefore, goodwill cannot exist independently of the tangible business assets, nor can it be sold, purchased or transferred separately and does not include contractual or other legal rights.*

The plaintiffs claim:

- ## The defence to the claim.

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the premises and began to trade under the name and style of M/s House of Locks. The defendant has never executed any agreement to act as agent of the plaintiff. In order to restock goods, the defendant used contacts he obtained from Josh Fadiga and that is how he was able to contact the plaintiff to supply him stock, whereupon he purchased goods worth shs. 10,000,000/= paid by cheque. The plaintiff erroneously recorded the transaction under the running account of M/s Fadiga Hardware.

The questions for determination;

- [4] The parties agreed issues for resolution as per the joint scheduling conference held on 16th March, 2022 in court and the Joint Scheduling Memorandum endorsed by the parties' Advocates are;
 - 1. Whether the defendant is liable for the debts and liabilities of M/s Fadiga Hardware.
 - 2. Whether the plaintiff is entitled to recover shs. 84,547,981/= from the defendants.
 - 3. Whether there are any available remedies for the parties.
- [5] In all civil litigation, the burden of proof requires the plaintiff, who is the creditor, to prove to court on a balance of probability, the plaintiff's entitlement to the relief being sought. The plaintiff must prove each element of its claim, or cause of action, in order to recover. In other words, the initial burden of proof is on the plaintiff to show the court why the defendant liable for the relief claimed. Generally, the plaintiff in the instant suit must show: (i) the existence of a contract and its essential terms; (ii) a breach of a duty imposed by the contract; and (iii) resultant damages.

Counsel for the plaintiff's final submissions;

- [6] Counsel for the plaintiff submitted that the defendant Mr. Michael Nsereko is one and the same person who was trading as M/s Fadiga Hardware from way back before the alleged purchase of goodwill acknowledged from the receipt of goods delivered and a delivery note signed on 4th July, 2018 exhibited under P. Ex.11. During the cross examination PW1 Ms. Francesca Helen Maniatis, she testified that she met the defendant Mr. Michael Nsereko to discuss the payment and that he did not at any time dispute the sums claimed. Counsel further submitted that the defendant acknowledged M/s Fadiga Hardware's indebtedness by paying shs. 10,000,000/= by cheque No. 00038 dated 18th January, 2019 exhibited as P. Ex.4 and P. Ex.5. This payment was towards clearance of the outstanding debt of M/s Fadiga Hardware as evidenced in the sales statement.
- [7] The implication of purchase of goodwill of a business is that the transferee has a right to use the transferor's business name and he takes over debts and liabilities of the transferor and in this case the defendant failed to do due diligence as to whether M/s Fadiga Hardware was indebted at the time but continued trading as M/s Fadiga Hardware. The defendant enjoyed benefits and advantages from the purchase of goodwill and location of Fadiga

Hardware and after denies liabilities of M/s Fadiga Hardware yet he benefited from the use of the business name.

Counsel for the defendants' final submissions;

- [8] In response, counsel for the defendant submitted that the facts of this case can be discerned from the pleadings of the parties. The defendant bought the location and goodwill of Josh Fadiga who traded as M/s Fadiga Hardware Shop A214 at Nakivubo Trading Centre. Josh Fadiga provided him contacts of customers and suppliers to the business, where the defendant was able to contact the sales manager of the plaintiff a one John Mboizi who delivered the goods on site. The defendant averred that he did not take on liabilities of M/s Fadiga Hardware. Mr. Nsereko is not the same person as M/s Fadiga Hardware, which fact is admitted by the plaintiff through its own books of account P. Ex.2 that the operator is Mr. Fadiga who is a distinctive person from the defendant.

The decision;

First issue; whether the defendant is liable for the debts and liabilities of M/s Fadiga Hardware.

- [9] The general rule at common law is that a contract creates rights and obligations only as between the parties to such contract. A third party neither acquires rights nor liabilities under any contract. Privity of contract is a doctrine of the law of contract that prevents any person from seeking the enforcement of a contract, or suing on its terms, unless they are a party to that contract. For a person to be able to enforce a contract, he or she must have given consideration to the promisor (see *Dunlop Pneumatic Tyre Co Ltd v. Selfridge Ltd [1915] AC 847 at 853*)
- [10] It is common ground between the parties that at all material time before 20th December, 2018 the plaintiff transacted with M/s Fadiga Hardware to supply them with assorted door locks. The divergence between them is that while the plaintiff claims the defendant has at all material time been the person behind that trade name, the defendant refutes this and states that before 20th December, 2018, it

was a one Josh Fadiga who was trading under that business name. It is on 20th December, 2018 that the said Josh Fadiga sold off the business goodwill and location to the defendant. While the defendant relies on the agreement of purchase of goodwill, exhibit as D. Ex.1 as evidence of the transaction, the plaintiff relies on the testimony of its Managing Director P. W.1 Ms. Francesca Helen Maniatis, to the effect that although the defendant claims to have taken over the business on 20th December, 2018 he had since the month of January, 2019 until 25th June, 2020 when he was served with a demand letter continued to trade under that name. The defendant had by a cheque cashed on 18th January, 2019 paid part of the outstanding debt owed by M/s Fadiga Hardware. It is only after service of that demand letter that he disclosed the hitherto unknown transaction of purchase of goodwill, to the plaintiff.

- [11] The plaintiff in effect relies on circumstantial evidence to dispute the defendant's agreement of purchase of goodwill, clause 6 of which states that "the vendor sells the goodwill and location to the purchaser free from any liabilities from third parties. For avoidance of doubt, the purchaser shall not be liable for any debt or obligation owed by the vendor trading as Fadiga Hardware before the execution of this agreement." The plaintiff disputes the bonafides of this agreement and characterises it as ploy contrived by the defendant to avoid the debt. In his defence, the defendant admitted the fact that although upon purchase of the business goodwill of M/s Fadiga Hardware, he assumed trade under the name and style of "House of Locks," he did not deny the fact that he continued to trade with the plaintiff under the name and style of M/s Fadiga Hardware, and indeed that he did not notify the plaintiff of the change of proprietorship.
- [12] The general principle is that just because a person buys the assets of a business, it does not mean that the purchaser becomes responsible for the business liabilities (see **Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 261-62, 692 P.2d 787 (1984)* and **W. Fletcher*, *Cyclopedia of the Law of Private Corporations*, § 1722 at 187 (rev. perm. ed. 1973*). In theory, asset purchase agreements allow buyers to choose the assets they wish to buy and not assume the seller's liabilities. Over the years though, courts have identified certain exceptions to this rule in order to ensure asset acquisition does not become an easy path for sellers or buyers looking to shirk responsibility. The exceptions include;
 - where a buyer by implication or expressly assume liabilities for the seller; where the transaction is deemed a de facto merger or consolidation of the buyer and seller; where the transfer was fraudulent or intended to defraud creditors; where the buyer is a mere continuation of the seller; and where the buyer continues essentially the same operations or product line of the seller (see **Martin v. Abbott Labs.*, 102 Wn.2d 581, 619, 689 P.2d 368 (1984*); **Cashar v. Redford*, 28 Wn. App. 394, 396, 624 P.2d 194 (1981) *Travis v. Harris Corp.*, 565 F.2d 443 at 447; *Freeman v. White Way Sign Maintenance Co.*, 82 Ill. App.3d 884, 893-94, 403 N. E.2d 495, 502 (App. Ct. 1980)* and **Ramirez v. Amsted Indus., Inc.*, 86 N. J. 332, 341, 431 A.2d 811 (1981)*.
- [13] These exceptions have been developed to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions, as well as to determine successor corporation liability for tax assessments and contractual obligations of the predecessor (see **Glynwed, Inc. v. Plastimatic, Inc.*, 869 F. Supp. 265, 271 (D. N. J. 1994) and *Polius v. Clark Equipment Co.*, 802 F.2d 75, 78 (3d Cir.1986*). The idea is to prevent a situation whereby the specific purpose of acquiring assets is to place those assets out of the reach of the seller's creditors or to allow sellers to escape liability by merely changing hats which would amount to fraud. Thus, the underlying theory of the exceptions is that, if a business goes through a mere change in form without a significant change in substance, it should not be allowed to escape liability. In order to impose liability, the successor must have received the benefits from the predecessor's product line or its goodwill.

- [14] The "mere continuation" exception was for example applied in **Cyr v. B. Offen Co., Inc.*, 501 F.2d at 1152-54* where two printing press employees were seriously injured in 1969 by the drying ovens of a machine manufactured in 1959 by B. Offen Company, a sole proprietorship. In 1963 a group of employees of the original

manufacturer had formed the defendant corporation, B. Offen Company, Inc., and had purchased for cash the drying system of the presses from the executor of the estate of the sole proprietor. The contract of sale between the successor corporation and the predecessor's estate provided for the purchase of the predecessor's good will, contract and service obligations, and the continued operation of the predecessor's business without substantial change. The contract expressly disclaimed successor corporation liability for costs incurred by the torts of the predecessor.

- [15] The court held that there was sufficient justification for a jury to treat the successor corporation as the mere continuation of its predecessor for the purposes of imposing tort liability for injuries caused by defective products. It found that the successor corporation continued to produce the same product, through the same employees, in the same physical plant, and under the same supervision as its predecessor, and that by use of essentially the same name held itself out to the world as the same enterprise. The court reasoned that the successor corporation, having reaped the benefits of continuing its predecessor's product line, exploiting its accumulated good will and enjoying the patronage of its established customers, should be made to bear some of the burdens of continuity, namely, liability for injuries caused by its defective products.
- [16] In the instant case, the asset purchase transaction related only to goodwill. Goodwill arises when a person acquires control over a business as going concern and it is recognised as an intangible asset comprising items such as the brand name, excellent location, good employee relations, and relations with a strong customer base. It represents the future economic benefits arising from the other tangible assets acquired in the business such as subsisting contracts, equipment, real estate, and inventory. It is the portion of the purchase price that is higher than the sum of the net fair value of all of the tangible assets purchased in the acquisition, and the liabilities assumed in the process. Goodwill is a premium paid over fair value during a transaction and therefore cannot be bought or sold

independently. It is not possible to determine the recoverable amount of goodwill independently from other assets because goodwill does not generate cash flows of its own; rather it contributes to the cash flows of sock-in-trade. Therefore, goodwill cannot exist independently of the tangible business assets, nor can it be sold, purchased or transferred separately. It differs from other intangible assets that can be separated from the business and sold, transferred, licensed, rented or exchanged, such as computer software, licences, trademarks, patents, films, copyrights and supply quotas. Goodwill also does not include contractual or other legal rights.

- [17] The conduct of the buyer towards third parties following an asset purchase transaction may support an implication that a buyer is assuming the seller's obligations, even if the acquisition agreement clearly provides otherwise. Provisions in the asset purchase agreement stating that buyer is not assuming any liabilities of the seller, except those expressly identified in the agreement, are of no use to a buyer in defending against successor liability claims because the creditor is not a party to the agreement. It is curious in the instant case that the agreement of 20th December, 2018 (exhibit D. Ex.1) purports to sell only the goodwill of M/s Fadiga Hardware, with no reference at all to the tangible business assets. The defendant continued the same business at the same physical location, with the same or little change in the general business operations of the seller, traded with the plaintiff in a manner that assumed the seller's ordinary course business trade debt, by non-disclosure of the change of proprietorship for nearly two years the defendant marketed himself as a continuation of the seller or otherwise continued to trade on the seller's goodwill and his actual knowledge or imputed knowledge of outstanding debts.
- [18] This is further combined with the defendant's failure to require the seller, in the asset purchase agreement, to make any provision for the satisfaction of outstanding debts and the absence of a clause in the asset purchase agreement imposing upon the seller the obligation to indemnify the defendant for retained and

non-assumed obligations. Ultimately the defendant benefited from the reputation and brand name of M/s Fadiga Hardware, its supply line and clientele, and yet seeks to be absolved of its debts. Liability will attach where the buyer holds himself out as a continuation of the seller (see *Turner v. Bituminous Cas. Co., 244 N. W.2d 873, 883-84; Savage Arms, Inc. v. Western Auto Supply Co., 18 P.3d 49* and *Martin v. Abbott Laboratories, 102 Wn. 2d 581, 689 P.2d 368 (1984*). The defendant continued to exploit M/s Fadiga Hardware's goodwill, name and market, thereby effectively becoming to the plaintiff, a mere continuation of the business enterprise that Josh Fadiga established. Clearly the transaction of 20th December, 2018 was intended to be used as a mechanism for avoid liability for accumulated debts with the defendant, as the successor in business, holding himself out to the world as the effective continuation of seller. I therefore find in conclusion that the defendant is liable for the debts and liabilities of M/s Fadiga Hardware.

Second issue; whether the plaintiff is entitled to recover shs. 84,547,981/= from the defendants

Third issue; whether there are any available remedies for the parties.

- [19] The two issues will be considered concurrently. The plaintiff seeks recovery of the sum of shs. 84,547,981/= The law is that not only must such a claim be specifically pleaded but it must also be strictly proved since it is a claim of special damages (see *Borham-Carter v. Hyde Park Hotel [1948] 64 TLR; Masaka Municipal Council v. Semogerere [1998-2000] HCB 23 and Musoke David v. Departed Asians Property Custodian Board [1990-1994] E. A. 219*). Special damages compensate the plaintiff for quantifiable monetary losses such as; past expenses, lost earnings, out-of-pocket costs incurred directly as the result of the breach.

Unlike general damages, calculating special damages is much more straightforward because it is based on actual expenses. It is trite law though that strict proof does not necessarily always require documentary evidence (see *Kyambadde v. Mpigi District Administration, [1983] HCB 44; Haji Asuman Mutekanga v. Equator* *Growers (U) Ltd, S. C. Civil Appeal No.7 of 1995 and Gapco (U) Ltd v. A. S. Transporters (U) Ltd C. A. Civil Appeal No. 18 of 2004).*

- [20] This claim was specifically pleaded and it has been strictly proved. The plaintiff's Managing Director P. W.1 Ms. Francesca Helen Maniatis adduced evidence of a total of ten invoices; collectively marked as exhibits P. Ex.6 dated respectively, 21st February, 2019, 16th March, 2019, 18th March, 2019, 26th March, 2019, 27th March, 2019, 29th April 2019, 30th April 2019, 6th May 2019, 22nd May 2019 and 28th May 2019; and three delivery notes of 27th March 2019, 30th April 2019, and 28th May 2019 which evidence transactions that occurred after the defendant had purchased the goodwill of M/s Fadiga Hardware business, but before the plaintiff had been notified of the purchase. In addition, she also adduced evidence of exhibit P. Ex 11 dated 4th July 2018, which is a delivery note signed by the defendant before the purchase of the M/s Fadiga Hardware's goodwill. Although the defendant denied having signed any of the delivery notes and invoices, the signature on the latter exhibit matches the signatures of the other delivery notes and invoices.
- [21] I observed P. W.1 as she testified in court. She was firm and consistent in her testimony. She appeared to be a steady, truthful and reliable witness. She withstood the rigorous cross-examination of defence counsel. She answered all questions without hesitation or exaggeration. She had no motive of her own to falsely claim the invoices and delivery notes were duly received by the defendant and his agents, if that were not the case. When the existence of a debt is fully established by the evidence, the burden of proving that it has been extinguished by payment devolves upon the debtor who offers such defence to the claim of the creditor. I am not persuaded by the defence of mere denial of the signatures raised by the defendant. It is an incredible in light of the general circumstance of this case and it is accordingly rejected. The plaintiff has on the balance of probabilities proved that the defendant is indebted in the sum claimed. This payment has been outstanding since 21st February 2019 as per the earliest invoice and 28th May 2019

as per the last one. The implication is that the plaintiff has been deprived of the use of that money for nearly five years now.

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

interest from the time when payment is contractually due. The plaintiff is accordingly awarded interest on the decretal sum at the rate of 23% per annum, from 28th May 2019 until payment in full.

- [23] The plaintiff is not entitled to any additional general damages. The common law does not award general damages for delay in payment of a debt beyond the date when it is contractually due (see *President of India v. La Pintada Compagnia Navigacion SA ('La Pintada') [1985] AC 104*). In special circumstances where the loss did not arise from the ordinary course of things, general damages are awarded only for such losses of which the defendant had actual knowledge (see *Hungerfords v. Walker (1989) 171 CLR 125*). The plaintiff not having proved such special circumstances beyond losses arising from the ordinary course of things when there is delay in payment of a debt beyond the date when it is contractually due, it is not entitled to the award of general damages.
- [24] The general rule under section 27 (2) of *The Civil Procedure Act* is that costs follow the event unless the court, for good reason, otherwise directs. This means that the winning party is to obtain an order for costs to be paid by the other party, unless

the court for good cause otherwise directs. I have not found any special reasons that justify a departure from the rule.

Orders:

- [25] Therefore in conclusion, judgment is entered for the plaintiff against the defendant, as follows;
- a) Payment of the business / trade debt of shs. 84,547,981/=.
- b) Interest thereon at the rate of 23% per annum, from 28th May 2019 until payment in full.
- c) The costs of the suit.

Delivered electronically this 17th day of January, 2024 ...Stephen Mubiru.....

Stephen Mubiru Judge, 17th January, 2024.

Appearances

For the plaintiff : M/s Nsubunga & Co. Advocates and Legal Consultants For the defendant : M/s Kasadha & Partners Co. Advocates

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