

UGANDA / JUDGMENT

**Balton (U) Limited v Boona
Bageigahare Nyekundire Group Limited
and 2 Ors (Civil Suit No. 676 of 2018)
[2021] UGCommC 29 (1 April 2021)**

[2021] UGCommC 29**COURT**

Commercial Court of Uganda

BEFORE

Wabwire, J

CASE / FILE NUMBER

Civil Suit No. 676 of 2018

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THE REPUBLIC OF UGANDA**IN THE HIGH COURT OF UGANDA AT KAMPALA****(COMMERCIAL COURT DIVISION)****CIVIL SUIT NO. 676 OF 2018****BALTON (U) LIMITED ===== PLAINTIFF****VERSUS****1. BOONA BAGEIGAHARE NYEKUNDIRE GROUP LIMITED****2. PEACE RUGAMBWA**

**\$10\$ 3. BERNARD RUGAMBWA ===== DEFENDANTS BEFORE HON. MR.
JUSTICE RICHARD WEJULI WABWIRE JUDGMENT**

The Plaintiff instituted this suit against the defendants jointly and severally for the recovery of a contractual sum of \$UGX\$ 347,151,000 (Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand) arising from the breach of contract by the first defendant and fraudulent practices by the second and third defendants.

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The facts as pleaded by the Plaintiff, a limited liability company are that, it entered into a contract dated 07th August 2017 with the first defendant for the supply of specified seeds in consideration of which the first defendant agreed to pay a sum of *UGX 248,000,000*

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(Uganda Shillings Two Hundred Forty-Eight Million) to the Plaintiff. That, the second and third defendants signed the contract on behalf of the first defendant, being the only members and directors of the first defendant. The Plaintiff also pleaded that the second defendant, in her capacity as director of the first defendant, issued fifteen post-dated cheques in favor of the Plaintiff as security for the payment of the contract sum above as referenced in para. 5(b) of the plaint.

On 15th September 2017, the Plaintiff and the first defendant entered into another agreement for the supply of further specified seeds in consideration of which the first defendant agreed to pay UGX 99,200,000 (Ugandan Shillings Ninety-Nine Million Two Hundred Thousand). The first defendant deposited five cheques as security for this transaction as well.

The Plaintiff delivered all the seeds as required under the two contracts and corresponding invoices and delivery notes were issued to the first defendant as indicated under para.5 of the plaint. However, the defendants did not perform their payment obligation for both contracts, with a combined sum of UGX 347,151,000 (Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand) which remains unpaid to date. It was also the Plaintiff's case that the contract dated 15th September 2017 required payment within a period of two and a half months from the date of supply of the order to the first defendant while the contract dated 15th September 2017 required payment within a period of two

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and a half months from the date of supply of the order to the first defendant.

The seeds were delivered on 22nd August 2017, 10th August 2017 50 and 21st September 2017 but no payments have been made to the Plaintiff to date. That on 06th June 2018, the Plaintiff was notified by the bank that the above postdated cheques could not be honored because the first defendant did not have sufficient funds on its account. The Plaintiff pleaded that the second and third defendants 55 had drawn the cheques with full knowledge that the sums on the account were insufficient to settle the contractual sum.

It is therefore the Plaintiff's case that the first defendant breached the contracts, and that the second and third defendants are liable for fraud and improper conduct by using the first defendant as a cloak to shield them from liability.

The Plaintiff called one witness, its Country Director Pinhas Moskovich (PW1). The defendants filed a defence however, they neither appeared at the hearing nor filed written submissions.

The Plaintiff was represented by Mr. Francis Twesige from Cristal 65 Advocates. M/s Twikirize & Co. Advocates, initially represented the defendants but later withdrew from the case.

The issues for determination before this honorable court are:

- a) Whether the first defendant breached the contracts entered into with the Plaintiff.

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- b) Whether there are sufficient grounds to lift the corporate veil and find the second and third defendants personally liable for the contractual sums.
- c) Whether the Plaintiff is entitled to the remedies sought.

Plaintiff's Submissions 75

Ground one:

Whether the first defendant breached the contracts entered into with the Plaintiff.

Counsel for the Plaintiff sought a declaration that the first defendant breached the impugned contracts and orders that the 80 first, second and third defendants are personally liable for the contractual sum and damages arising from the said breach.

On the first ground, the Plaintiff relied on Section 33(1) of the Contracts Act, 2010 which provides that once parties enter into a contract enforceable at law, then such parties are bound by the terms of such contract. The parties are particularly bound to perform their obligations under the contract.

Counsel relied on the case of **Prime Finance Company Limited v Obanda Ntebakaine**, HCCS No. 236 of 2019, where Justice Musa Ssekana held that Section 33(1) of the Contracts Act, 2010 implied 90 that both the Plaintiff and defendant were duty bound to perform their respective bargains. Counsel also cited on the case of **Delights Company Limited v Hajji Muhammed Kitaka**, HCCS No. 0754 of

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2014 where *Justice Wamalaheld* that without evidence of payment, the defendant was liable for the contractual sum.

Counsel submitted that it is an undisputed fact that the Plaintiff executed two contracts with the first defendant dated 07th August 2017 and 15th September 2017 respectively.

He further submitted that under Article \$2(a)\$ of both contracts, it was agreed by the first defendant and the Plaintiff as follows: 100

"2. PAYMENT TERMS

- The parties herein agree that the contractor shall pay the \$(a)\$ supplier for the supplied seeds within a period of two and a half \$(21/2)\$ months from the date of supply of the order."
- It was further submitted that the Plaintiff has led evidence (PW1 & 105 Delivery Notes) to the effect that pursuant to the terms of the said contracts, deliveries of the supplies were made to the first defendant on 10th August 2017, 22nd August 2017 and 21st August 2017. That, it is established by the Plaintiff and undisputed by the defendants that the first defendant has never made any payment in 110 satisfaction of the payment for the supplies made to it under the above-named contracts to date.

Counsel for the Plaintiff therefore, contended that by failing to make payments for the supplies made to it by the Plaintiff, the defendant committed a breach of contract whose terms were binding on it 115 pursuant to **Section 33 of the Contracts Act, 2010**, and prayed that this honorable Court finds the first defendant in breach of the

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contracts dated 07th August 2017 and 15th September 2017 which it entered with the Plaintiff.

Resolution 120

The Plaintiff in their pleadings (para 5a) stated that it entered into a contract dated 07th August 2017 with the first defendant agreeing to supply onion seeds (variety \$- \$ russet F1) and tomato seeds (variety \$ \$ shanty F1).

The obligations of the first defendant (as contractor) was to pay a 125 total sum of *UGX* 248,000,000 (*Uganda Shillings Two Hundred* **Forty-Eight Million**) as consideration for the seeds delivered within a period of two and a half months from the supply of the order. The defendants secured this contract with fifteen post-dated cheques on Bank of Baroda. 130

It was also pleaded by the Plaintiff that a second contract was signed with the defendants on the 15th September 2017 for the supply of 200kgs of onion seeds (variety - russet F1) totaling to UGX 99,200,000/= (Uganda Shillings Ninety-Nine Million Two Hundred) payable within two and a half months from the date of supply of the order.

I agree with counsel for the Plaintiff that it is an undisputed fact that the Plaintiff executed two contracts with the first defendant dated 07th August 2017 and 15th September 2017 respectively

In determining this issue of breach of contract, I also make 140 reference to (para 5c) of the joint written statement of defence by

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the defendants who denied ever perpetuating any fraudulent transactions with the Plaintiff but averred that the circumstances surrounding the delayed payments were outside the control of the second and third defendant and were duly communicated to the Plaintiff's directors.

Counsel for the Plaintiff relied on Section 33 of the **Contracts Act, No. 7 of 2010** which provides:

"33. *Obligation of parties.*"

\$(1)\$ The parties to a contract shall perform or offer to perform, 150 their respective promises, unless the performance is dispensed *with or excused under this Act or any other law*"

Section 33 thus creates a mandatory obligation for both parties to perform any agreed contract terms. The defendant has not in fact denied that the Plaintiff supplied the seeds according to their contracts.

To date, the defendants have never made any payments. This is evidenced by the Plaintiff bank's unpaid advice returning the cheques due to insufficient funds on the drawer's account who are the defendants.

The witness statements of Pinhas Moskovich, the Plaintiff's General Manager and Mbabazi Agnes Kabwisho, the General Manager, Agriculture reiterated the facts pleaded in the plaint and the documentary evidence provided to prove the breach of contract by the defendants through non-payment.

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I am satisfied that the contracts for supply between the Plaintiff and defendant were breached by non-payment of the total contractual sum of UGX 347,151,000 (Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand)

Issue No.1 is answered in the affirmative. 170

Ground 2**Whether there are sufficient grounds to lift the corporate veil and find the second and third defendants personally liable for the contract sums**

Counsel for the Plaintiff acknowledged the general rule that a 175 company is a separate legal entity from its members. However, he submitted that the corporate veil of incorporation may be lifted both at common law and on grounds provided for by statute.

Under the common law, counsel for the Plaintiff submitted that the veil of incorporation can be lifted where a company is a shell, a 180 cloak and an alter ego of the members to hide the true facts. Counsel relied on the case of *Prest v Petrodel Resources limited* [2013] UKSC 34, [2013] 2 A. C 415, the UK Supreme Court set out the scope under which the corporate veil can be pierced. Lord Sumpton held that:

"I conclude that there is a limited principle of English law which applies when a person is under an existing legal obligation or liability or subject to an existing legal restriction which he deliberately evades or whose enforcement he deliberately

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- frustrates by interposing a company under his control. The 190 Court may then pierce the corporate veil for the purpose, and only for the purpose, of depriving the company or its controller of the advantage that they would otherwise have obtained by the *company's separate legal personality.*"
- Counsel also relied on my earlier decision in *John Bosco Muwonge 195 (Suing through his lawful attorney Ssentumbwe Hassan) v Musa Tibamanya & Anor*, HCMA No. 1012 of 2017, which further espouses this common law principle stating that:
- "The Defendants cannot seek to hide in the shadow of the corporate cloak in order to avoid liability. The corporate veil is 200 not intended to undermine but enhance commercial and corporate integrity. It should not be easy for individuals to divorce themselves from the liabilities of their corporate creations by simply invoking distinction of persona of *incorporation.*" *(Emphasis)* 205

Therefore, in circumstances where a party is hiding under the company to avoid liability, this honorable court may lift the corporate veil. That in the instant case, the second and third defendants signed and offered post-dated cheques as security for payment of the sums due under the contract knowing that the first defendant did not have sufficient funds on the account. That this is evidenced in PW1's witness statement (paras. 11,20,25,26,27 and 28) which further proves that this was an intentional dishonest act that has led to the loss of UGX 347,151,000 (Uganda Shillings Three

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Hundred Forty-Seven Million One Hundred Fifty) and legal injury to 215 the Plaintiff yet this would not have occurred had the first defendant company not been in existence. To buttress the point of dishonesty, counsel submitted that the company's registered office is not its place of business, and that the first defendant had not filed any returns since its incorporation. 220

Counsel for the Plaintiff directed the attention of Court to the fact actions of the that the defendants have even prompted investigations from the office of the President of Uganda as evidenced from PW1's witness statement (para.31 and Exh P. 28 at page 54 of the Plaintiff's trial bundle).

Counsel concluded that the aforementioned acts demonstrate that the second and third defendants seek to hide in the shadow of the corporate cloak in order to avoid liability. That the corporate veil is not intended to undermine but enhance commercial and corporate integrity and prayed that the corporate veil be lifted.

The second limb on this ground is the statutory lifting of the veil provided for under Section 20 of the Companies Act, 2012. It creates a statutory exception and vests Court with the discretion to lift the corporate veil where a company or its directors are involved in acts including fraud among others.

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In the case of Salim Jamal & Others vs Uganda Oxygen Limited & Others, SCCA No. 64 of 1995, andin Frederick Zzabwe vs Orient Bank, SCCA No. 04 of 2006, the Supreme Court of Uganda held that '*fraud*' refers to any act or omission calculated to deceive

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another to their legal injury. That, such can be through 240 concealment of material information.

Counsel submitted that the Plaintiff has specifically pleaded and led evidence of the defendants' fraud, being that the second and third defendant's signed and offered post-dated cheques as security for payment of the sums due under the contract knowing that the defendant did not have sufficient funds on the account.

It was further submitted for the Plaintiff that the evidence by PW1 establishes the fact that the first defendant did not have an independent existence from the second and third defendants as it did not have assets, no business nor offices. That the offices 250 indicated have never been occupied and that the second and third defendants used the first defendant as a conduit to obtain goods without payment and also shield themselves from liability under the contract.

It was therefore, counsel's prayer that the corporate veil of the first 255 defendant be lifted such that the second and third defendants be declared liable for the liability of the first defendant under the contracts because of their fraudulent practices that cost the Plaintiff UGX 347,151,000 (Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand) and legal injury to 260 the Plaintiff.

Resolution

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I have carefully perused the submissions of counsel and evidence presented on this issue of lifting the corporate veil and agree with 265 the position of the law from the various authorities cited above.

Counsel cited Section 20 of the Companies Act, No. 1 of 2012 which provides for the statutory lifting of the veil. It provides as follows:

"The High Court may, where a company or its directors are 270 involved in acts including tax evasion, fraud or where, save for a single-member company, the membership of a company falls *below the statutory minimum, lift the corporate veil.*"

The Plaintiff in paras. 5 \$(x)\$ of the Plaint specifically pleaded the particulars of fraud as follows: 275

- \$i.\$ That the second defendant signed and issued the cheques with the full knowledge that the first defendant did not have sufficient funds to make payments under the contract.
- The second and third defendants as Directors of the first ii. defendant company knowingly entered into two agreements with the Plaintiff with the intention of using the first defendant as a vehicle to perpetrate a dishonest fraudulent transaction of seeking supply of seeds from the Plaintiff with no intention of paying for them.

That the second and third defendants with fraudulent intent 285 iii. entered into a contract with the Plaintiff with the aim to defraud and use the first defendant as a vehicle to unjust

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enrichment with no intention of paying back the sums due to the Plaintiff.

the first defendant 290 iv. Incorporating allegedly to promote prosperity for all and development yet using the same to defraud members of the public.

Black's Law Dictionary, 08th Edition, at page 685 defines 'fraud' as knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment. 295

- The persuasive authority of **Dunlop Nigerian Industries Ltd** Forward Nigerian Enterprises Ltd & Farore 1976 N. CL. R 243 is instructive on lifting the corporate veil. The High Court of Lagos held that in particular circumstances, for example where the device of incorporation is used for some illegal or improper purpose, the 300 Court may disregard the principle that a company is an independent legal entity and lift the veil of corporate identity so that if it is proved that a person used a company he controls as a cloak for an improper transaction, he may be made personally liable to a third party. 305

- The Plaintiff seeks to have the corporate veil of the first defendant lifted citing fraud by the second and third defendants as pleaded in their plaint which I have outlined. It is clear that the second and third defendants are the directors of the first defendant and at all times made representations on its behalf while dealing with the 310 Plaintiff to enter into the contracts for the supply of seeds.

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I find that the mere fact that a cheque is returned for insufficient funds does not amount to fraud per se. In the instant case, the post-dated cheques were drawn by the defendants as security for the agreements executed with the Plaintiffs.

In the case of **Abdallah vs Republic** [1970] E. A 657, it was held inter alia that 'the giving of a postdated cheque is not representation that there are sufficient funds to meet the cheque'

That notwithstanding, evidence has also been adduced to the effect that the first defendant has no known assets since it has never filed 320 annual returns from the date of its incorporation as a company limited by guarantee on 06th June 2016. It was also shown that much as the company's registered address is Raja Chambers, Parliamentary Avenue, 2nd floor, Rm F2. 46, P. O Box 23090 Kampala, the first defendant does not exist at this address. The 325 shareholders, who are the second and third defendants double as the directors of the company as per the form 20 filed on 06th June 2016, with the third defendant as the company secretary.

It is a fact based on the evidence on record that the defendants have not made any payments under the two contracts they entered \$ \cup \$ 0 into with the Plaintiff for the supply of seeds. The point of concern is that the defendants have stayed away from defending this suit and their legal representative stated that they no longer have instructions even if a joint statement of defence had been filed. The defendants in their defence admit to breach of contract by failing to 335 pay the Plaintiff under the contracts for the supply of seeds.

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However, they also stated that their failure to pay was due to circumstances beyond their control.

One of the particulars of fraud pleaded was that the second and third defendants incorporating the first defendant allegedly to promote prosperity for all and development yet using the same to defraud members of the public.

The first defendant was incorporated on 06th June 2016 and the contracts between the Plaintiff and defendants were executed on 07th August 2017 and 15th September 2017 respectively, a year after incorporation.

In the circumstances, it is clear that the actions of the defendants have been detrimental to the Plaintiff. However, I find that, on a preponderance of probability, the particulars stated do not amount to fraud but a breach of contract.

This issue fails.

Ground 3

Whether the Plaintiff is entitled to the remedies sought

Counsel for the Plaintiff prayed for orders that the first defendant was in breach of contract and that the second and third defendants 355 personally liable for are the contractual of sum \$UGX\$ 347,151,000(Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand) as submitted in issues one and two.

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- Counsel further prayed for orders of general damages, interest and 360 costs of the suit based on three grounds. First, that it is trite law that general damages are damages that the law presumes to be direct, natural or a probable consequence of the act complained about according to **Storms vs Hutchinson [1905] AC 515**.
- 365 It was submitted that an award of such damages is at the discretion of court, and that the exercise of such discretion is guided by the circumstances and evidence, which principle was affirmed by Hon. Justice Stephen Musota in *Lukoda Yusuf v Biteeba*, HCCA No. 142 of 2016.
- Secondly, that the Plaintiff demonstrated that not only did the 370 defendants fail to make good on payment of the consideration of UGX 347,151,000(Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand) agreed, under the contract, they offered cheques as security knowing that they did not have sufficient funds on the account 375

Thirdly, the Plaintiff also prayed for Court to find the above mentioned circumstances sufficient to exercise its discretion and award general damages to the Plaintiff.

On the remedy of interest, counsel relied on the authority of Lord Denning in the case of *Wallesteiner v Moir* (1975) 1 All ER 849 stated that the Court may award interest to the Plaintiff where the defendant is found to have deprived the former of money, it would have used in its business.

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It was also the Plaintiff's case on this point that the defendants not only failed to pay the contractual sums of the UGX 347,151,000 385 (Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand), they also fraudulently deposited cheques as security knowing that their accounts did not have sufficient funds and continue to hide behind the corporate veil to avoid liability according to para. 20-31 of PW1's witness statement. 390

The Plaintiff averred that by doing so, the defendants deprived them of the money they were entitled to under contract and which they would have otherwise used in business. Accordingly, the Plaintiff prays for an award of interest at Court's discretion on the contractual sum.

In conclusion, counsel for the Plaintiff prayed for judgment against the defendants jointly and severally for: UGX 347,151,000 (Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand); a declaration that the second and third defendants defrauded the Plaintiff thereby causing it loss; an order for lifting the veil of incorporation of the first defendant; interest at a commercial rate from the date the cause of action arose until payment in full; general damages; and costs of the suit.

Resolution

I have considered the submissions by the Plaintiff on this issue of 405 remedies. In their defence, the defendants contended that the suit against them lacks merit and no reliefs prayed for should be awarded.

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Following my findings in issues one and two, the Plaintiff partly succeeds. Counsel for the Plaintiff prayed for recovery of the 410 contractual sum of *UGX 347,151,000(Uganda Shillings Three* Hundred Forty-Seven Million One Hundred Fifty-One Thousand) given the breach of contract, general damages, interest and costs of the suit based on the three grounds in his submissions.

Given my finding on issue one that there was a breach of contract 415 by the first defendant, the Plaintiff is entitled to recover the contractual sum of UGX 347,151,000(Uganda Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand).

Accordingly, I also award general damages considering the inconvenience and financial loss suffered by the Plaintiff due to the 420 first defendants default. I find the sum of UGX \$15,000,000/ \$ = (Uganda Shillings fifteen million only) to be appropriate in the circumstances of this case.

- Counsel for the Plaintiff also sought an award of interest from the date of filing the suit till payment in full. Under Section 26(2) of 425 the Civil Procedure Act, the award of interest is at the discretion of Court and since this was a commercial transaction, where the defendant withheld money from the Plaintiff for which the Plaintiff could have utilized and saved itself the trouble of litigation.
- I accordingly find the Plaintiff entitled to interest at a just and 430 equitable rate and do grant the prayer for interest at a rate which I consider to be just and equitable.

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I also award costs of this suit and of High Court Miscellaneous Application No. 1221 of 2016, to the plaintiff.

Final Orders; 435

- 1. The Defendants are jointly and severally liable to the Plaintiff the contractual sum of UGX 347,151,000 (Uganda for Shillings Three Hundred Forty-Seven Million One Hundred Fifty-One Thousand). It is to be so recovered.
- 2. The Defendants are jointly and severally liable to the Plaintiff 440 in general damages in the sum of UGX \$15,000,000/\$ = (Uganda Shillings fifteen million only).
- 3. Interest shall accrue on Item 1 above at the rate of 17% per annum from the date of filing this suit until payment in full.
- 4. Interest shall accrue on Item 2 at the rate of 17% per annum from the date hereof until payment in full.
- 5. Costs are awarded to the Plaintiffs.

Delivered at Kampala this \$ \cdots \cdots \cdots \cdots \$ 450 RICHARD WEJULI
WABWIRE JUDGE

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