

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

**CIVIL DIVISION**

**CIVIL SUIT NO. 33 OF 2011**

**ROOFCLAD LTD .....PLAINTIFF**

**V**

10 **1. MITER INVESTMENTS LTD**

**2. PETER ABALIWANO.....DEFENDANTS**

**BEFORE HON. HON. LADY JUSTICE H. WOLAYO**

**JUDGMENT**

15 **Introduction**

The plaintiff sued the defendants for recovery of 72, 104,940/ for goods supplied to the 1<sup>st</sup> defendant while Peter Abaliwano was sued for fraudulently representing himself as the director of ABAholdings , a non-existent company which led to supply of goods on credit .

20 Essentially, the cause of action is the dishonoured cheques issued by Abaliwano and another cause of action based on goods supplied and consideration not received.

The 2<sup>nd</sup> defendant Abaliwano in the written statement of defence admitted issuance of cheques to the plaintiff in anticipation of supply of materials but  
25 that these were not supplied and that therefore there is no consideration for

the cheques. He also denied taking over liability of Miter Investments Ltd . He denied representing ABAHoldings ltd to Roofclad ltd.

### **Representation**

30 Verma Jivram & associates appeared for the plaintiff while Alliance Advocates appeared for the defendants.

### **Issues framed for trial**

1. Whether the defendants have ever entered into any contract for supply of construction materials
2. Whether the defendants are indebted to the plaintiff in the sums  
35 declared
3. Whether the cheques issued by the 2<sup>nd</sup> defendant were supported by consideration
4. Remedies

40 **Whether the defendants have ever entered into any contract for supply of construction materials**

This issue covers the other two issues: Whether the defendants are indebted to the plaintiff in the sums declared and Whether the cheques issued by the 2<sup>nd</sup> defendant were supported by consideration. Therefore all three issues will be discussed together.

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A contract is a legally enforcement agreement between two parties supported by consideration. A contract can be inferred from conduct of parties or it can be in writing. There must be a clear offer and an unequivocal acceptance.

Counsel for the defendant submitted that the plaintiff's counsel made  
50 reference to the Contracts Act 2010 when the cause of action arose in 2009 before the Act came into force. The Contracts Act codified common law and case law principles of contract that existed prior to 2010 so that submission lacks merit.

The question to be answered is whether the numerous alleged dealings  
55 between the plaintiff and the two defendants amounted to one contract or each transaction was a separate contract if indeed the dealings are proved.

The legal burden of proof in civil cases rests on the plaintiff to prove its case on a balance of probabilities. Having asserted in the plaint that it is owed 72m plus by the defendants, the burden is on it to prove how this debt arose, the  
60 offer and acceptance by both parties and ultimately whether a contractual relationship existed between them either for supply of goods generally or severally each time there was a delivery.

It was the plaintiff's case presented through PW1 Deepak he was general manager of Roofcad Ltd from 2003 to 2016 and has known the three  
65 defendants since 2008.

It was his evidence that on the instructions (presumably oral) of Abaliwano, he supplied and delivered various materials on credit to Miter investments ltd between January 2008 and December 2010.

It was the evidence of Deepak that by 1.8.2008 , Miter investment ltd owed  
70 Roofclad ltd 81,851,940/ .

It was Deepak's testimony that by 1.1.2010, the outstanding balance was  
91,851,940/.

According to Deepak on instructions of Abaliwano , Roofclad ltd transferred  
liability of MITER to ABA holdings ltd which was a non existent company  
75 sometime on a date he doesn't cite . According to Deepak, Abaliwano took  
over liability for Miter investment ltd who issued cheques in 2009 and 2010  
for payment of the debt that bounced.

#### **Ledger book for Miter investment ltd**

Annexure A , a ledger account kept by Roofclad ltd for MITER between  
80 18.7.2008 and 4.1.2010 . The account opens with a balance due of  
19,067,900/. Goods are then supplied to different entities . On 25.8.2008 ,  
F.D.K Meechantile, , Ishay H/W , Mutansingwa Joseph, Shyam Hardware, Teddy  
Nayunga, KY home depot, viva general merchandise and steel rolling Mills,  
were supplied materials worth 65,091,900/ on credit. A sum of 17,343,000/  
85 remained owing . this style of doing business happened on 18.7.2008,  
13.8.2008, 17.9.2008, 8.10.2008. The total amount reflected as owing by  
8.10.2008 is 87,091,000/ .

The ledger book ( annexure A ) is vague and difficult to interpret. The heading  
of the account is : Miter Investments ltd –Dr. Ledger Account :1<sup>st</sup> January 2008  
90 to 31<sup>st</sup> Dec 2010 but the entries are with respect to companies other than  
Miter investment ltd.



In other words, how the debt of 72m was incurred by MITER is not clear from the ledger book. A vague ledger book cannot be the basis for implying a contract for supply of goods to Miter investment ltd.

95 **Dishonoured cheques.**

It is clear is that Abaliwano issued cheques on various dates in 2009 and 2010, a fact he admits in the written statement of defence.

On 4.9.2009, he issued a cheque in favour of Roofclad ltd in the amount of 4,000,000/; 26.10. 2009 -15m; 7.8.2009 -6,500,000; 14.8.2009 -10m; 21,  
100 8.2009 -10m; 28.09.2009 -10m; on 23.10.2009 - 15m; 22. 5.2010 -8m;  
12.6.2010 -5m; 19.6.2010 -5m; 31.7.2010-8m; 16.7.2010-5m; 7.8.2010-5m.

Total is 106,500,000/ in bounced cheques.

It is not clear against which delivery of goods each cheque was issued . New cheques were accepted even after previous ones bounced makes it difficult  
105 for me to rely on them as proof that goods were supplied but not paid for.

It was the evidence of PW2 Hilal Hussein the legal manager of the plaintiff that the plaintiff continued supplying MITER even after cheques bounced because they had confidence the defendants would pay. I am inclined to agree with counsel for the defendants that these cheques were some kind of security and  
110 not issued against any particular supply.

In the absence of the specific purpose for which these cheques were issued, I am unable to make a finding that they were payment for goods supplied to Miter Investments ltd .

This means that the plaintiff has not proved on a balance of probabilities the  
115 supply and delivery of goods to Miter investment ltd . There is therefore no  
proof of consideration for the cheques issued.

**Proof of supply of materials to ABA holdings through Abaliwano.**

It is apparent from the pleadings that initially the plaintiff sued Miter  
120 investment ltd , ABA holdings and Abaliwano but later ABBA Holdings was  
dropped as a party after it was discovered it's not a registered company . The  
suit then proceeded against Miter ltd and Abaliwano.

It is against the non existent ABA holdings ltd that the plaintiff was able to  
prove an existing business relationship for supply and delivery of goods.

125 Annexure B comprises 13 invoices for supply and delivery of goods to ABA  
holdings ltd.

The total value of goods supplied against these invoices is 66,203,000/. The  
summary of goods supplied and dates when deliveries were made is at page 34  
of the plaintiff's trial bundle. These goods were supplied between 4.1.2010 and  
130 29.9.2010 to ABA Holdings ltd . Deepak, the general manager of Roofclad ltd at  
the time of the transactions, confirmed the supply was at the order of  
Abaliwano in spite of his denial in the written statement of defence.

Worthy of note is that Abaliwano did not appear to testify and the defence  
closed with the written statement of defence only as the only document on  
135 record.



The burden of proof in civil cases rests on a balance of probabilities. The plaintiff has shown that it supplied goods to ABA holdings who made the order through Abaliwano.

140 It was counsel for the defendants' submission that a non-existent company cannot sue or be sued and cannot transact. He cited **National Enterprises Corporation & ors v Nile Bank Ltd SC Civil Appeal No. 17 of 1994** in support .

145 However, the Supreme Court in that case held that as the appellant contracted on behalf of a non-existent company , it became the principal and a person who contracts on behalf of a non-existent company can be held personally liable.

As agent of ABA holdings ltd, a non-existent company, Abaliwano became the principal and took responsibility for paying Roofclad ltd the supplier. That he was the agent was attested to both by Deepak PW1 and Hilal PW2.

150 There may not have been existing tender to supply ABA holdings ltd but each time there was a delivery, a contract was created with the principal Abaliwano. Non payment for goods supplied constituted breach of contract that entitled the plaintiff for payment of the value of goods.

In the premises judgment is entered in the sum of 66,203,000/ for the plaintiff.

155 This sum will carry interest at 10% p.a from date of judgment till payment in full.

Costs of the suit to the plaintiff .

**DATED AT KAMPALA THIS 6<sup>TH</sup> DAY OF APRIL 2018.**

  
**HON. LADY JUSTICE H. WOLAYO**