THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA
[COMMERCIAL DIVISION]
CIVIL SUIT NO.294 OF 2019

TELKAM INVESTMENTS SMC LIMITED :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

AIRTEL UGANDA LIMITED :: DEFENDANT

BEFORE: HON. JUSTICE JEANNE RWAKAKOOKO

JUDGEMENT

Introduction

Telkam Investments SMC Limited (hereinafter referred to as the "Plaintiff") instituted this suit against Airtel Uganda Limited (hereinafter referred to as the "Defendant") claiming breach of contract on grounds that the Defendant illegally and unlawfully terminated the Plaintiff's franchise agreement and seeking the following reliefs;

a) A declaration that the Defendant breached the franchise agreement it executed with the Plaintiff;
b) A declaration that the defendant illegally and unlawfully terminated the Plaintiff's franchise agreement;
c) Special damages of UGX 302,871,616 (Three Hundred and Two Million Eight Hundred and Seventy One Thousand Six Hundred and Sixteen Uganda Shillings);
d) General damages;
e) Interest; and
f) Costs.

Following the institution of the suit the Defendant filed a written statement of defence and counterclaim alleging fraud and material breach of contract by the Plaintiff and seeking the following reliefs;

a) A declaration that the termination of the franchise agreement was regular and lawful.
b) Special damages of UGX 105,553,000 (One Hundred and Five Million Five Hundred and Fifty Three Thousand Uganda Shillings).

c) General damages for breach of contract.
d) Interest on (b) and (c) at the commercial rate from the date of default until payment in full.
e) Costs of the suit.
f) Any relief this honourable Court deems fit in the circumstances.

Background

The Plaintiff instituted this suit on 11th April 2019. The facts of the case is that parties entered into a franchise agreement on 22nd November 2018 through which the Plaintiff was appointed as a franchise partner for the Defendant's products and services in the Lungujja Unit. The Plaintiff claims that the relationship was unilaterally cut short by the Defendant on 26th February 2019 when the Defendant issued the Plaintiff with a Notice of Termination citing suspicion that the Plaintiff was engaging in fraudulent Airtel money transactions aimed at accumulating commission.

The Plaintiff averred in **paragraph 4(e)** of the plaint that at the time of the termination, all of the Plaintiff's capital, money, and stock was invested in the Defendant's console system and agent lines access to which the Plaintiff was immediately cut off when the Defendant Terminated the franchise agreement. The Plaintiff states that it had deposited colossal sums of money which money was never repaid to it. According to the Plaintiff it had taken preliminary steps in the early stages of contracting with the Defendant to invest its money and resources into the enterprise. The Plaintiff's claim is that the Defendant's termination of the franchise agreement was in breach of the agreement as it was not necessary and the conditions for termination were not followed. The Plaintiff further vehemently denied that it was ever engaged in any fraudulent conduct and that its main obligation under the franchise agreement was supplying the Defendant's agents with cash and float to support Airtel Money transactions and it was not under a duty or obligation to further ensure that the money it provided to agents actually reached the Defendant's customers.

The Defendant filed a written statement of defence (WSD) and counterclaim on 6th May 2019 in which the Defendant generally denied the Plaintiff's allegations. Whilst it accepted that the parties executed a franchise agreement on 22nd November 2018, the Defendant contended that the termination was lawful and was conducted in accordance with **clause 10.1.1** of the franchise agreement after a fundamental breach of the terms and conditions of the agreement was discovered.

In **paragraph 8** of the WSD, the Defendant avers that the franchise agreement was terminated due to fraud and deliberate acts of dishonesty by the Plaintiff. In **paragraph 10** of the WSD, the Defendant argues that the Plaintiff is not entitled to any refunds for expenses it seeks which it undertook in accordance with the franchise agreement.

In the Defendant's counterclaim, it seeks the recovery of **UGX 105,553,000 (One Hundred and Five Million Five Hundred and Fifty Three Thousand Uganda Shillings)** as special damages being amounts which were paid to the Plaintiff in error as commission on fraudulent transactions, general damages for breach of contract, interest, and costs of the suit.

The Defendant's counterclaim is premised on allegations of fraud by the Plaintiff and breach of the franchising agreement. In **paragraph 4** of the Counterclaim the Defendant claims the particulars of fraud and breach of contract by the Plaintiff/ Counter Defendant as follows;

a) The deliberate actions of the Defendant by counterclaim to "push and pull float and or E-Value" using the retail infrastructure of Airtel money agents mapped under it so as to earn commission from the Counter Claimant.
b) The Defendant by Counterclaim fraudulently fabricated fictitious transactions leading to an ascertainable sum of UGX 105,553,000 (One Hundred and Five Million Five Hundred and Fifty Three Thousand) being erroneously paid to the Defendant by Counterclaim in the month of January 2019.
c) Deliberate actions and intentions to defraud the Counter Claimant in breach of clause 8.3 of the Franchise Agreement.

The Defendant further claimed that owing to the Plaintiff's material breach of the contract, the Defendant has suffered loss for which it shall claim special damages.

The Plaintiff filed a reply to the Defendant's WSD and Counterclaim. In **paragraph 6** of the Plaintiff's defence to the counterclaim the Plaintiff claims that the termination was made up by the Defendant/ Counter Claimant to avoid paying commission for services rendered to it by the Plaintiff/ Counter Defendant. Further, in **paragraph 7** of the defence to the counterclaim, the Plaintiff avers that the allegations of fraud are malafide and in gross violation of **clause 10.1** of the franchise agreement because there was no breach. The specific allegations of fraud and breach from the Defendant listed above are denied by the Plaintiff in **paragraphs 8**, **9**, and **10** in the defence to the

counterclaim. Specifically, in **paragraph 10** the Plaintiff argues that it could not have fabricated any fictitious transactions over a platform which is entirely operated, managed, and controlled by the Defendant and that the Defendant should be put to strict proof for the allegations made.

Ultimately the Plaintiff maintains that it did not breach the franchise agreement or perform any fraud and that it duly performed its obligations in accordance with the franchise agreement for which it is entitled to payment of commission and reimbursement for the expenses made pursuant to the franchise agreement.

Representation

At the last hearing of this case on 26th April 2022, the Plaintiff was represented by Kikabi Ibrahim and the Defendant was represented by Raymond Ndyagambaki.

The Plaintiff presented two witnesses that is PW1 (Mukasa Herman, the Plaintiff's director) and PW2 (Mbuga Allan, the Plaintiff's systems administrator) and the Defendant presented two witnesses that is DW1 (James Busulwa, the Defendant's risk and fraud analyst) and DW2 (Hudson Andrew Katumba, Defendant's legal and commercial manager).

At the end of the hearing, the parties were directed on the timelines for filing and serving written submissions which submissions were filed and have been considered in arriving at this Judgement.

Issues for Determination

The Parties filed their Joint Scheduling Memorandum on 14th December 2021 in which they agreed on the following issues for determination which issues are hereby adopted;

1. Whether there was a breach of contract, and if so by which party?
2. Whether the Defendant is entitled to the claims in the counterclaim?
3. What remedies are available to the parties?

Resolution

Issue One: ***Whether there was breach of contract, and if so by which Party?***

Section 10(1) of the **Contracts Act, 2010** defines a contract as an agreement made with the free consent of the parties with the capacity to contract, for a

lawful consideration with a lawful object, with the intention to be legally bound. Breach of contract is defined in Black's Law Dictionary 5th Edition on page 171 as a situation where one party to a contract fails to carry out a term. Breach occurs where a party neglects, refuses, or fails to perform any part of its bargain or any term of the contract without a legitimate excuse (see ***Future Stars Investments (U) Limited v Nasuru Yusuf Civil Suit No.0012 of 2017***). Further, the conditions for a breach of contract to arise were articulated in the often cited ***Nakawa Trading Co. Ltd v Coffee Marketing Board HCCS No.137 of 1991*** where it was stated that a breach of contract occurs when one or both parties fail to fulfil the obligations imposed by the terms of the contract.

In civil suits such as the instant case, the Plaintiff has the initial burden to prove the case he is putting forward on a balance of probabilities. In order to prove breach of contract and win in the context of a civil suit, a Plaintiff would need to prove the existence of a contract pursuant to which the Plaintiff enjoyed rights, the breach of that contract and therefore hampering of those rights, and damage arising out of the breach to justify the reliefs they are seeking.

On the question of proof, the established principle derived from **section 101(1)** of the **Evidence Act Cap.6** is that he who alleges a fact must prove that fact. The section provides as follows;

> ***101. Burden of proof***
>
> ***(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he or she asserts must prove that those facts exist.***

In this case, there is no dispute between the parties as to the existence of a contract between them, the dispute concerns who breached the contract, the resulting damage, and who is entitled to what as a consequence.

The Plaintiff brought an initial breach of contract claim on grounds that the Defendant unlawfully terminated the franchise agreement for which the Plaintiff claims caused it a loss of **UGX 302,871,616**. The Defendant denies that the termination was unlawful or in breach of their agreement and counterclaimed for **UGX 105,553,000** as the loss it claims it suffered from the Plaintiff's fraudulent and fictitious transactions, which fraud it avers was the basis for it terminating the contract, to begin with.

The franchise agreement which is the basis of this suit was attached to the Plaintiff's plaint and admitted in evidence as **PEX2**. In the Defendant's WSD the Defendant averred that the franchise agreement was terminated in accordance

with **clause 10.1.1** of the agreement, I have perused **PEX2**, and the mentioned clause reads as follows;

> ***10. TERMINATION***
>
> *10.1 Termination by Airtel forthwith*
>
> *Notwithstanding anything contained in this Agreement, Airtel shall have the right to forthwith terminate this Agreement in writing in the event of any of the following: -*
>
> *10.1.1 If the Franchisee in the sole opinion of Airtel commits a material breach of any of the terms and conditions of this Agreement.*

What constitutes a material breach is not defined under the franchise agreement but in the Plaintiff's written submissions counsel for the Plaintiff made reference to the definition provided in **Black's Law Dictionary 8th Edition on Page 564** where a material breach is defined to mean *a breach of a contract that is significant enough to permit the aggrieved party to elect to treat the breach as total thus excusing that party from further performance.* The Plaintiff also referred to **Nassaf Uganda Limited v Razco Ltd and anor HC (Commercial Division) CS 827/2014** where material breach was explained to mean a breach that has a serious effect on the benefit that the innocent party would otherwise have derived from the contract.

In this case, the Plaintiff was initially contracted by the Defendant to sell and distribute its products and services in the Lungujja Unit. From reading recital B on page 3 in the franchise agreement this included promoting and facilitating the distribution of the Defendant's mobile money transfer service (Airtel Money) in accordance with the terms of the agreement, the Airtel Money Customer Terms of Use and the Airtel Money Super-Agent Manual. From a practical standpoint this meant that, among other things, the Plaintiff was contracted to provide money to the Defendant's Agents either in the form of cash or float where the Agents requested it, to facilitate Mobile Money transactions in its unit of operation, each time the Plaintiff supplied the Defendant's agents with its own money it was repaid the money by the Defendant together with a commission for facilitating these transactions in the preceding month.

The Defendant disputes the Plaintiff's submissions that the act of terminating the agreement itself constituted a breach of contract. In **paragraph 8** of the Defendant's written submissions counsel for the Defendant avers that the contract was terminated after a fair hearing and following a meeting held before the termination date of 26th February 2019. Further, in **paragraph 11** of the

Defendant's written submissions counsel for the Defendant argued that the Plaintiff engaging in cash pull transactions without ensuring the money reached its customers amounted to a repudiatory breach which entitled the Defendant to terminate the contract pursuant to **clause 10.1** in **PEX2**.

The Defendant's claim and the basis on which it terminated the agreement according to the Notice of Termination dated 26th February 2019 is that the Plaintiff was engaging in fraudulent Airtel money transactions aimed at accumulating commission which constituted a fundamental breach. According to the Notice of Termination the Defendant had previously invited the Plaintiff to attend a meeting with the officials of Airtel Uganda following the suspicion which arose following a suspiciously high volume of transactions in January 2019.

During his cross-examination PW1, the Plaintiff's owner and managing director stated that there was a meeting the Plaintiff's officials had with the Defendant's Chief Operating Officer but he states that the meeting was called to discuss the volume of the transactions the Plaintiff had with its clients. PW1 further stated that termination of the agreement was not discussed in the meeting, that the Plaintiff received Notice on 26th February and that according to the Agreement they were supposed to be given 15 days' notice but by the 27th of February at around 11:33 hours, the Plaintiff's console lines were closed yet by that time, according to PW1, the Plaintiff was already in the market transacting. I note that the expression used in the Notice of Termination is that the termination is "immediate" also the phrasing of **clause 10** in the agreement refers to termination "forthwith" implying that such termination can be immediate. I am therefore unsure about where PW1 derived the 15 days notice requirement.

Further in the cross-examination PW1 confirmed that allegations of fraud were raised by the Defendant's COO and legal director and stated "*they were relating to increased volume calling it fraud. They were alleging increased volumes which they called fraud*". In **paragraph 8** of the Defendant's written submissions counsel for the Defendant submitted that the contract was terminated after a fair hearing and following a meeting held before the termination date of 26th February 2019. The Defendant's counsel submitted that the termination was pursuant to **clauses 10.1.1** and **10.1.4** which both allow the Defendant to terminate the contract if "in its sole opinion" the Plaintiff committed a material breach or engaged in conduct that was prejudicial to the business of the Defendant or the marketing of the Defendant's products or services.

The wording of these clauses is such that it left the assessment of material breach and/ or prejudicial conduct alleged to have been conducted by the Plaintiff in the sole hands and discretion of the Defendant. As a consequence of

this, if the Defendant suspected the Plaintiff to have engaged in a material breach or prejudicial conduct and, in its sole opinion, concluded this to be true, it was entitled, under the terms of the agreement, to immediately terminate the franchise agreement. This is expressed as an unfettered right the Defendant had under the agreement.

In ***Future Stars Investments (U) Ltd v Nasuru Yusuf HCCS 12 of 2017*** at page 17 Hon. Justice Stephen Mubiru stated the following;

> *"It is trite that the court does not make a contract for the parties. The explicit terms of a contract are always the final word with regards to the intention of the parties. The court will not improve the contract which the parties have made for themselves, however desirable the improvement might be. The guiding principle was stated in F.A Tamplin Steamship Co Ltd v Anglo-Mexican Petroleum Products Co. Ltd [1916] 2 A.C 297 at p.403. The Court's function is to interpret and apply the contract which the parties have made for themselves."*

The underlying principle, which finds its roots in the long-established parole evidence rule is that, to the extent that a written contract is provided and availed in evidence, the court shall take the wording of the contract to be a true reflection of the parties intentions. And to this extent, the wording of the contract must be taken to mean what it provides. In this instance, by signing the agreement, the Plaintiff effectively gave the Defendant the authority to immediately terminate the agreement if, in the Defendant's sole opinion, the Plaintiff had committed a material breach or done conduct deemed by the Defendant to be prejudicial to its business.

Once such an assessment was made by the Defendant and the Defendant exercised its right to terminate the agreement, in my opinion, the Plaintiff cannot revert back to the court and argue that the Defendant acted unawlfully or breached the contract by exercising its rights which whilst unfettered, are clearly stipulated. Provided the Defendant showed a basis for the termination based on beliefs it honestly held, it was entitled to terminate the agreement at its will in accordance with **clause 10** of the agreement. What, in my view, would have constituted unconscionable conduct on the Defendant's part and amounted breach of contract is if the Defendant had terminated the agreement for no reason at all and without providing any of the justifications for immediate termination listed under clauses **10.1.1 – 10.1.7**.

I, therefore, address this issue, as far as the Defendant is concerned, with a finding that it did not breach the contract by terminating the agreement based

on opinions it held at the time that the Plaintiff was acting fraudulently, contrary to its obligations under the terms of the agreement, and against its business interests.

I wish to say, at this point, that whether or not the fraud had in fact occurred is, in my view, a secondary issue, the main thing to consider is whether or not, at the time of termination, the Defendant had grounds to believe, in its sole opinion, that the Plaintiff had committed material breach and/ or in prejudice to the Defendant's interests, which it did particularly because the money supplied by the Plaintiff to its Agents was not reaching its customers.

When it comes to whether or not the Plaintiff breached the agreement, therefore justifying the Defendant's termination the Defendant's counsel in the Defendant's written submissions argued that the Plaintiff's conduct amounted to repudiatory breach which left the Defendant with no option other than termination. Counsel for the Defendant cited ***Future Stars Investments (U) Ltd v Nasuru Yusuf HCCS 12 of 2017*** where at p.16 Hon. Justice Stephen Mubiru observed;

> *"the test as to whether a breach is repudiatory is whether the occurrence of the event deprived the party who has further undertakings to perform of substantially the whole benefit which it was the intention of the parties, as expressed in the contract that he should obtain as the consideration for performing those undertakings (See Hong Kong Fir Shipping Co. v Kawasaki Kisen Kaisha Ltd [1962] 2 QB 26, [1962] 1 All ER 474). The question to be answered is, does the breach of the term go so much to the root of the contract that it makes further commercial performance of the contract impossible, or in other words, is the whole contract frustrated? If yes, the innocent party may treat the contract as at an end. If no, his claim sounds in damages only."*

In this instance, the Defendant argued that the Plaintiff engaging in cash and pull transactions without ensuring that the money reached its customers constitutes a repudiatory breach that entitled it to terminate the contract.

During cross-examination, PW1 stated on oath that he understood his role to be to avail the Plaintiff's services to the Defendant's Agents by providing funds to support the Defendant's Agents' float. Whilst he accepted that the ultimate goal of supporting the Agents float was to ensure that the money reached the final customer, he did not view that as his role/ obligation under the arrangement. His view was that once the Plaintiff provided float to the Defendant's Agents, the

Plaintiff's obligations ended there and the Plaintiff earned a commission based on providing this float.

The Defendant's lawyer challenged PW1 by stating that money was paid to the Plaintiff erroneously because it never reached the Defendant's customers which was the ultimate purpose for facilitating these transactions. Essentially the allegation being put forward by the Defendant is that there was connivance between the Plaintiff and Defendant's agents through which the Plaintiff would supply the agents with float, and earn a commission off of those transactions but then the money the Plaintiff had provided would disappear because it could not be traced as reaching the Defendant's customers from the Agents who had been supplied with the float.

The main contention raised by the PW1 in cross-examination in response to the Defendant's contentions was that the agents were engaged by the Defendant who had the ultimate oversight over the Agents' transactions and operations through the console system the Defendant owned and operated. Thus PW1 argued that the Plaintiff could not control what the Defendant's agents did with the money it supplied them with or ensure that money was in fact eventually remitted to the Defendant's customers.

In my view, putting the technicalities aside, the crux of the parties' dispute lies in this issue; whose obligation was it to ensure that the funds that were provided by the Plaintiff were actually remitted to the Defendant's customers by the Defendant's agents?

I have perused the agreement and under the Franchisee's rights and obligations listed under **clause 4** of the agreement **clause 4.2** provides that the Franchisee was required to effectively manage and supervise operations within the assigned unit (Lunguja) and subunits and that this included supervising and adequately servicing the Airtel Money Agents. The mentioned clause reads as follows;

> **4. *FRANCHISEE'S RIGHTS AND OBLIGATIONS***
>
> *The Franchisee undertakes and agrees with Airtel through the duration of this Agreement:-*
>
> *[...]*
>
> *4.2. To effectively manage and supervise operations within the assigned Unit(s) and sub units to wit; the Airtel Money Branch Shop, Kiosks, and Mini shops. The Franchisee shall further be obliged to supervise and adequately service the Airtel Money Agents and SIM Selling Outlets (SSOs) within the assigned unit(s).*

As further evidence of the Plaintiff's oversight and supervisory obligations, the Plaintiff was empowered to terminate Agents with the Defendant's prior written consent. This is provided under **clause 4.25.5** which states;

> *4.25.5. In the event that the Franchisee is not satisfied with the performance of any Agents and SSOs within the Unit, the Franchisee may terminate the Agreement with them subject to prior written consent of Airtel. Such consent by Airtel shall not be unreasonably withheld.*

In my view, the above clauses signify two things; firstly to say that the Plaintiff had absolutely no responsibilities or obligations to monitor the Agent's use of the funds it provided would be obviously false given the fact that the Plaintiff had supervisory rights and obligations for agents who operated in its unit. Whilst its ability to control what Agents did with the money it supplied may have been limited, it was certainly under a duty to monitor Agent activity in its unit and raise any suspicious transactions to the Defendant. So the Plaintiff cannot say that it had absolutely no responsibility over how the Agents used the money it supplied as the wording of the agreement provides otherwise.

The second observation is however that the ultimate powers of oversight still lay with the Defendant, which is why under **clause 4.25.5** the Plaintiff could not terminate Agents without the Defendant's consent. So to answer the earlier question simply, both the Plaintiff and the Defendant had an obligation to the Defendant's agents to ensure that the funds supplied to Agents ultimately reached the Defendant's customers. I say this having in mind not all the money the Agents transacted with was always supplied by the Plaintiff, some of it was not and, therefore, did not necessarily impose an obligation on the Plaintiff to monitor. Furthermore, my understanding is that the console system operated in such a way that it would notify both the Plaintiff and the Defendant as to those transactions which were flagged for being irregular. Therefore to say that the responsibility of monitoring Agents lay solely with the Plaintiff is also incorrect as the Defendant equally retained oversight powers. In any event, the Agents were ultimately contracted by the Defendant and with the Defendant's approval and therefore owed a greater duty of care to the Defendant than they did to the Plaintiff.

In light of the above analysis, failure by the Plaintiff to have monitored or adequately supervised the agents within its unit, while it may have constituted a breach, does not – in and of itself – mean that the Plaintiff was acting fraudulently. This is particularly so having in mind the higher standard of proof required for fraud in civil suits. Fraud would have required the Plaintiff to have

been aware of its obligation to ensure proper use of funds by the Agents and have intentionally and deliberately chosen to continue remitting funds to Agents who it either knew would not avail the money to the Defendant's customers or encouraged them to do so. From a practical standpoint, it is unclear to me why the Plaintiff would intentionally and deliberately do that, knowing full well the Defendant would be flagged. What seems more probable to me is that the Plaintiff was aware that ultimately these were the Defendant's Agents, whom the Defendant had the ultimate oversight powers over through the console system it run and operated, and for this reason, the Plaintiff did not see it necessary exercise diligence in ensuring that the money it supplied the Defendant's Agents was actually remitted to the Defendant's customers. The Plaintiff stopped at simply availing the funds when required. This may constitute a breach of contract on the Plaintiff's part thereby entitling the Defendant to terminate the agreement but I am not convinced it constitutes fraudulent conduct.

Fraud was defined in ***Frederick Zaabwe v Orient Bank & 5 ors SCCA No.4 of 2006*** to include anything calculated to deceive whether by a single act or a combination of acts or the intentional suppression of truth. Fraud is a serious allegation, it is often difficult to prove because it carries an element of dishonesty. However the courts have now held that the standard of proof when it comes to allegations of fraud is not the usual standard in civil cases of a balance of probabilities but that an allegation of fraud must be put to strict proof before a court can be convinced and rule in a party's favour, this is a standard slightly higher than that of a balance of probabilities but not as high as the criminal standard of proof which is beyond reasonable doubt (See ***JWR Kazoora v MLS Rukuba Civil Appeal No. 13 of 1992*** and ***Jackson Musoke Kikayira v Rosemary Nalubega & Yahya Walusimbi HCCS No.119 of 1999***).

I would not say, on the evidence that has been adduced, that fraud has been proven to the required civil standard of strict proof, I would however say that failure to effectively monitor the agents or flag them before the Defendant discovered the irregularities did amount to breach of some of the obligations the Plaintiff had under the agreement. I agree with counsel for the Defendant that this constituted a breach which under the terms of the agreement entitled the Defendant to terminate it, however, I disagree with the Defendant that this breach was, necessarily, fraudulent in nature. At least the evidence which has been provided does not strictly prove this.

On this basis, I resolve this issue with a finding that the Defendant did not act unlawfully or in breach of contract when it terminated the agreement with the Plaintiff. I find that it was acting within its powers as articulated under **clause**

10 of the agreement. Having said that, I find that whilst the Plaintiff was in breach of some of the obligations it had under the agreement in as far as effectively managing and supervising operations in its unit, and more specifically supervising Airtel Money Agents to ensure that the money in the cash and pull transactions it facilitated reached the customers, I have not been convinced that it did so fraudulently.

Issue Two: ***Whether the Defendant is entitled to the claims in the counterclaim?***

AND

Issue Three: ***What remedies are available to the parties?***

I shall resolve issues 2 and 3 together since they are related. Having found that the Defendant was not acting in breach of contract by terminating the agreement and it was actually the Plaintiff who breached the terms of the agreement, the reliefs sought by the Plaintiff cannot stand. The necessary question then becomes whether the Defendant is entitled to the claims made in the counterclaim in light of my finding under issue 1 that the Plaintiff acted in breach of the terms of their agreement.

In the Defendant's counterclaim the Defendant seeks the following reliefs;

a) A declaration that the termination of the franchise agreement was regular and lawful.
b) Special damages of UGX 105,553,000 (One Hundred and Five Million Five Hundred and Fifty Three Thousand Uganda Shillings).
c) General damages for breach of contract.
d) Interest on (a) and (b) at a commercial rate from the date of default until payment in full.
e) Costs of the suit.
f) Any other reliefs this Honorable Court deems fit in the circumstances.

When it comes to the UGX 105,553,000/= sought as special damages, the Defendant was under an obligation to prove the basis of these amounts. It is trite law that in civil suits such as the instant case, special damages have to be specifically pleaded and proved before they can be awarded by courts. In ***Bwambale Nickson v Solar Now Services (U) Ltd HCCS 25 of 2015***, the Plaintiff sought to recover special damages for termination of a franchise agreement, Hon. Justice Anthony Oyuko Ojok noted;

"In my considered opinion, special damages must be specifically pleaded and strictly proved in HCT-00-CC-CA-10 of 2011 Diary Development Authority v David Ngarambe, Justice Kiryabwire held that; the principle of law awarding special damages is well settled. Such a claim in special damages must be specifically pleaded and strictly proved. This was pleaded but not proved how UGX 254,824,000 came about."

In this case, the special damages are on claims that this was money which was paid to the Plaintiff on the basis of what the Defendant calls "fraudulent transactions". Questions concerning the basis of this figure were put to DW1 during cross-examination. When asked by counsel for the Plaintiff why the Defendant came back to revisit the payment it made to the Plaintiff in January 2019 DW1 stated that when the Defendant reconciled the commissions they paid the Plaintiff it was discovered that the Defendant had paid an excess of UGX 105,552,000/= in the month of January 2019 and that this was based on what they deemed to be fraudulent transactions.

When asked by opposing counsel as to when the analysis was made (as to which transactions were fraudulent and which were genuine) DW1 conceded that *"It was done by my predecessor so I am just answering what was done"*. I find it problematic that, in alleging fraud and reclaiming UGX 105,553,000/= as amounts paid in error as a consequence of the Plaintiff's alleged fraud, the Defendant did not see it fit to call the person who made these assessments at the time to explain the process through which they found these transactions to be fraudulent and explain the basis of the Defendant's claim to this money.

Instead what the Defendant did was present their current risk and revenue assurance manager who could explain the figures and numbers presented by the Defendant but could not explain the process that was undertaken to arrive at these figures. In my view, this wasn't enough to show this court what actually led the Defendant to conclude that 17,282 transactions in January 2019 constituting UGX 105,553,000/= worth of commissions paid to the Plaintiff in the month of January 2019 were fake. An increased volume in transactions does not, on its own, indicate fraud.

Further, I find the Defendant's practices questionable in so far as commissions were allegedly paid without first conducting a reconciliation and confirmation exercise. During cross-examination DW1 stated, *"January was paid but now in February when we were going to pay we realized that there was a problem and a counter validation was done and we established that 105M was paid in error or it was fraudulent"*. I have already explained my reservations in as far as I am not convinced the Defendant has made out the Plaintiff's fraud to the required civil

standard. However, for arguments sake, if the commission payment was made in error, the Defendant was still under a duty and obligation to show proof of the basis for this error.

It isn't enough for parties to come to court and simply state or provide documents that mention erroneous payments, the basis or process that led to this discovery ought to be clearly laid out such that if an order is made to repay these amounts it is based on clearly substantiated evidence. Going back to **section 101(1)** of the **Evidence Act Cap.6** he who alleges must always prove the basis of their allegations in civil suits. It is not enough to merely allege.

Having found that the evidence does not satisfactorily substantiate the Defendant's claim for the special damages, I am inclined to find that the Defendant is not entitled to the UGX 105,552,000/= sought as special damages in the counterclaim because the Defendant has not effectively made out or provided the basis of these amounts.

In light of the finding that the Plaintiff was in breach of its obligations under the agreement this court shall award the Defendant general damages for the breach.

In ***Uganda Revenue Authority v Wanume David Kitamirike CACA No.43 of 2010,*** the court held that general damages are awarded at the discretion of the court it is intended to restore the wronged party into the position he would have been in if there had been no breach of contract. In this instance, the breach was a failure on the Plaintiff's part to monitor the Agents within its unit and flag those transactions where the Agents did not remit money to the Defendant's customers to the Defendant.

In light of the fact that the responsibility to monitor and oversee Agent transactions was shared between the parties, that is to say, it is the Defendant that contracted the Agents and the Defendants customers understood themselves to be transacting with the Defendant (and not the Plaintiff) for all intents and purposes, and since the Defendant did not satisfactorily make out or provide a basis for the special damages in prayed for in the counterclaim, I am inclined to order a token amount as general damages for breach of the franchise agreement, this court hereby awards the Defendant general damages on the counterclaim in the amount **UGX 10,000,000/= (Ten Million Uganda Shillings Only)**.

CONCLUSION

Having resolved issues 1 – 3 as I have the Plaintiff's claim fails and the Defendant's counterclaim partially succeeds with a finding firstly that the Plaintiff breached the terms of the franchise agreement and thus the Defendant did not act in breach of the agreement when it terminated it.

Secondly, this court finds that whilst the Plaintiff was in breach of the agreement by failing to effectively supervise the Agents under its unit and ensure that the cash and float it availed them was remitted to the Defendant's customers, the Defendant has not made out its case that the Plaintiff's conduct was, necessarily, fraudulent to the required standard of strict proof.

Further, that the evidence does not satisfactorily substantiate the Defendant's claim for the special damages,

I thus make the following orders and declarations;

1. It is hereby declared that the Defendant's termination of the franchise agreement with the Plaintiff was regular and lawful in light of the Plaintiff's failure to meet its obligations under the franchise agreement.
2. Consequently, the Defendant is hereby awarded general damages for breach of contract to the tune of **UGX 10,000,000/= (Ugandan Shillings Ten Million Only)**.
3. Costs are awarded to the Defendant.

I so order.

Jeanne Rwakakooko
JUDGE
30/01/2023

Judgment delivered on the 28th day of February, 2023

DEPUTY REGISTRAR COMMERCIAL DIVISION
28 FEB 2023