**Shenoi and another v Maximov**

**Division:** Supreme Court of Uganda at Mengo

**Date of judgment:** 17 August 2005

**Case Number:** 9/03

**Before:** Odoki CJ, Oder, Tsekooko, Karokora and Kanyeihamba JJSC

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*[1] Contract – Breach of contract – Formation of contract – Misrepresentation – Whether there had*

*been a misrepresentation by the appellants.*

*[2] Evidence – Written document – Authorship of document contested – Modes of proving authorship of*

*disputed handwriting – Whether the first appellant was author of disputed fax – Section 66 – Evidence*

*Act.*

*[3] Judgment – Interest – Award of interest – Award of interest a matter for the court’s discretion –*

*Whether the court had properly exercised its discretion in substituting a higher rate of interest.*

**JUDGMENT**

**Oder JSC:** This is a second appeal by the appellants, Premchandra Shenoi and Shivam MKP Limited, against the decision of the Court of Appeal of Uganda, which confirmed the judgment of the High Court in favour of the respondent, Maximov Oleg Petrovich, who was the plaintiff in the High Court suit. The background to the appeal may be briefly stated as follows: The respondent is a Russian businessman who deals in finance and investment. He is based in Moscow. Through one of his partners, called Ponsov, he got in touch with another Russian, called Kolganov, who was working in Uganda as a journalist. Through Kolganov, the respondent established contact with Mr Patel, living in Uganda. Sometime in May 1994, the respondent received an e-mail from Mr Patel. On receipt of the e-mail, the respondent came to Uganda with one Ponsov Nikoli Andreevic, hereinafter referred to simply as Ponsov, with whom the respondent had several business relationships in Russia. The intention of the respondent in coming to Uganda was to look into the possibility of investing in mining business in Uganda. Mr Patel introduced the first appellant to the respondent. The first appellant informed the respondent that he was the owner of a company called Shivam Limited that deals in gold and diamond. The respondent discussed with the first appellant, the possibility of doing business with him in mineral. After the discussion, the respondent agreed to invest in the mining business of the first appellant. The first appellant was to secure permits, licenses and certificates from the relevant authorities for the establishment of the business. The first appellant took the respondent to several ministries and authorities in this country connected with mining business to familiarise him with the rules and procedure for establishing business in the country. The arrangements between the two formed what came to be known as “the participation agreement” which will hereafter be referred as “joint venture.” It was executed on 9 of June 1994 and was made between “Messrs Shivam Ltd” as the “first participant” and the respondent plus his two associates, Ponsov Nikoli Andreevic and Kolganov Igor Nikolaevich, collectively referred to as the “second participants”. The joint venture was to participate in mining, refining, smelting, trading, importing and exporting and commission business jointly in gold, silver, diamonds, precious and semi-precious metals in Uganda and worldwide. The venture was also to engage in importing, exporting, distributing jewellery, wholesale and the like metals. It was stated in the “joint venture” that the second participants were to provide US$ 42 000 as a token deposit to the first participants, on the signing of the agreement, which was refundable on termination of the agreement. It was also one of the terms of the “joint venture” that the first participant was to appoint the second participants as directors of Shivam Limited. It also contained a clause for automatic determination if US$ 42 000 was not paid within the stipulated time. The “joint venture” agreement was admitted in evidence as exhibit PE1 at the trial. It is one of the documents on which the action was founded. Though it was stated in exhibit PE1 that the “second participants” would provide the finance,in actual fact the respondent became the financier. The others were merely to represent his interest. After the execution of exhibit PE1, the names of Shivam Limited was changed to “Shivam MKP Limited” and the respondents and his two partners were made directors. The respondent was not able to remit the US$ 42 000 to the first participant as agreed. Instead, on 6 August 1994, the respondent instructed the Midlantic National Bank, Moscow, to transfer by wire to Standard Chartered Bank, Uganda to Shivam Limited account number 320/90/11868/000, US$ 20 000. This was received and credited to the account of Shivam Limited on 14 July 1994, (*see* exhibit PE 4 and DE 11). Then sometime in July 1994, the respondent received a handwritten fax message (exhibit P8) in which he was informed of the prospects of the “joint venture”, the possibility of starting a banking business, and the need to purchase land for the construction of a refinery plant. In addition, whoever sent the fax, invited the respondent to invest US$ 200 000, stating that that kind of investment would fetch him US$ 20 to 25 million a year. The respondent also received two certificates in connection with the business. These were a license from the Ministry of Commerce, Co-operatives and Marketing (exhibit PE5), and one from the Ministry of Land and Natural Resources (exhibit PE7). According to the respondent, exhibit PE8 was sent by the first appellant which the latter denied. At the trial, the authorship and authenticity of exhibit PE8 were contested strenuously by the appellants. On receipt of exhibit PE8 and the documents mentioned above, the respondent became convinced that business prospects were good, and so he decided to send the US$ 200 000 asked for in exhibit PE8. In August, he instructed Deanbale Investment Company Limited of Singapore to send US$ 200 000 to Shikam MPK Ltd Account 320/90/1186/000 held with Standard Chartered Bank Ltd, Kampala Branch. Later the respondent received confirmation of the transfer from Deanbale Investment Company Limited. This is exhibit PE10. The value date of the TT was said to be 19 August 1994 (*sic*). The appellant did not acknowledge receipt of that money. It was, Ponsov who sent a fax to the respondent that the money had been received. In his testimony, the respondent, however, insisted that the first appellant confirmed on telephone that he had received the money. Thereafter, there was a complete breakdown in communication between the respondent and the first appellant. This state of affairs continued for sometime. The respondent became apprehensive and concluded that something fishy was happening in Uganda. He travelled to Uganda in October 1994 and met with the first appellant. When he failed to obtain satisfactory explanation concerning the business, another meeting in November 1994 was arranged between the respondent and his lawyers and the first appellant and his lawyers to negotiate amicable settlement. When that broke down, the respondent instructed his lawyers to take action, and went back to Moscow. Later on, the respondent received from Messrs Shonubi Musoke and Company Advocates, the first appellant’s advocates, exhibit P12 informing him that the first appellant was prepared to pay to him US$ 161 623, in total satisfaction of his claim. This letter was marked “without prejudice”. This amount of money was never received by the respondent. The only money the respondent received was US$ 26 000, but he was not informed of the purpose for which it was sent to him. It was contended by the respondent that the appellant undertook to make him and his colleague’s shareholders in the company Shivam MKP Limited to reflect their business participation, but he did not do so. The company was registered in the names of the first appellant and his wife. The respondent contended that the failure of the first appellant to make him and his colleagues shareholders in Shivam MKP appellants represented to him that the joint venture would fetch him a profit of 20 or 25 million US dollars per annum. It was on the strength of the above representation that he paid to them US$ 200 000, that representation turned out to be untrue. The respondent, therefore, sued the appellants jointly and severally in High Court, claiming: (*a*) US$ 220 000, or its equivalent in Ugandan currency, being money had and received to the use of the respondent by the appellants, plus interest of 30 percent; (*b*) General damages for misrepresentation; (*c*) General damages for breach of contract; and (*d*) Costs of the suit. The appellants denied the respondent’s claim and, in particular averred that: (i) they never made any representations as alleged; ( ii) they admitted the joint venture agreement but denied that it was entered into as a result of any representation; (iii) they never promised to make the respondent and his two colleagues shareholders in the Shivam MKP Limited and consequently never breached any contract; (iv) change of name of Shivam Ltd to Shivam MKP Limited was not made to reflect the joint venture; ( v) they never received any monies from the respondent and put it to their own use as alleged and that the offer to pay any money was made *ex gratia* and not with intention of admitting liability. At the trial of the suit, four issues were framed for determination: (*a*) whether first appellant made false representation to the respondent, on the strength of which he remitted US$ 200 000. (*b*) whether the appellants received US$ 220 000 (*c*) whether the appellants breached the contract entered into as a result of the representation, and; (*d*) remedies, if any. The learned trial Judge answered all the issues in the positive and entered judgment against the appellants jointly and severally, as follows: (*a*) the appellants to refund US$ 194 000 to the respondent; (*b*) general damages assessed at US$ 275 000 for breach of contract and/or misrepresentation; (*c*) interest of 6 percent on (*a*) from August 1994 to 2000 and on (*b*) from date of judgment till payment in full; (*d*) costs as taxed. The appellants’ appeal to the Court of Appeal against the High Court decision was partially successful and that court held that: (i) there was no breach of contract and the award of general damages of US$ 275 000 and costs were set aside; ( ii) judgment was entered for the respondent in the sum of US$ 184 000 as money had and received with interest, at the rate of 20 percent from August 1994 till payment in full and; (iii) an award of half of the costs in both the Court of Appeal and those in the High Court. The appellants were dissatisfied with that judgment, hence this appeal. Five grounds of appeal as set out in the memorandum of appeal are:

1. The learned Justices of the Court of Appeal erred in law and fact when they found that the learned trial Judge had properly found the first appellant to be the author of exhibit PE8.

2. The learned Justices of the Court of Appeal erred in law and fact when they found that the appellants had admitted receipt of US$ 200 000 and offered to pay US$ 161 623.

3. The learned Justices of the Court of Appeal erred both in law and fact when they found that the US$ 200 000 is refundable as money had and received.

4. The learned Justices of the Court of Appeal erred both in law and fact when they found that the first appellant is jointly liable to refund the respondent’s money.

5. The learned Justices of the Court of Appeal erred in law when they found that an interest rate of 20 percent per annum was payment to the respondent. The parties filed written submissions under rule 93 of the Rules of the Court. The appellants’ submissions were filed by Messrs Kampala Associated Advocates; and those of the respondent were filed by Messrs Nagwala, *Rezida* and Company Advocates. The appellant’s learned Counsel argued ground one of the appeal separately and first, grounds two, three and four together, and ground five separately. Underground one, the appellant’s learned Counsel criticised the trial court and the Court of Appeal for respectively finding that exhibit PE8 was authored by the first appellant. The learned Counsel contended that the first appellant having denied writing the fax letter, the procedure under section 66 of the Evidence Act, for proving that he had written letter should have been followed (*sic*). He also contended that sections 45 and 72(1) of the same Act should have been invoked to compare the handwriting in exhibit PE8 with any other document known to have been written by the first appellant; In opposition to the appeal, the respondent’s learned Counsel submitted, underground one of the appeal, that the trial court and the Court of Appeal gave reasons for their findings that it was the first appellant who authored exhibit PE8. He contended that both courts found that he had lied as a witness that he did not send the fax letter. The two courts were alive to the fact that there was no evidence from a handwriting expert in this regard. Berko JA, who wrote the lead judgment, referred to certain factors which corroborated the hypothesis that exhibit PE8 came from the first appellant and from nobody else. These included the first appellant’s experience in jewellery that was mentioned in exhibit PE8 and in his testimony; the first appellant’s experience of eight years in Uganda that was mentioned in the fax letter and in his testimony; and the specific request for US$ 200 000 made in the fax letter from the respondent was the sum of money sent by the respondent. US$ 200 000 was not a magic figure, nor was it, baseless or accidental. It was the result of a specific demand for purposes specified in the fax letter. The demand came from the first appellant. Regarding the provisions of sections 45, 72 and 66 of the Evidence Act, the learned Counsel contended that they do not exclude other kind of evidence for proof of disputed handwriting or signature. Finally, there was a departure from the first appellant’s pleadings that he never received US$ 200 000. Instead, he testified that he had received US$ 200 000 from the respondent and he attempted to account for it. Departure by a party’s evidence from his or her pleadings is a good ground for rejecting the evidence as was held in the cases of *AW Biteremo v Damascus Munyanda* Civil appeal number 15 of 1991 (SCU) (UR) and *Interfreight Forwarders* (*U*) *Ltd v East African Development Bank* Civil appeal number 33 [1992] (SCU) (UR). In his lead judgment in the Court of Appeal, with which the other two members of the court agreed, Berko JA upheld the findings of the learned trial Judge that the first appellant authored the fax letter exhibit, PE8. He said this: “I now move to exhibit PE8. This was a handwritten fax message that originated from Uganda. The owner of the fax machine has not been identified. According to the respondent, it was sent by the first appellant. The first appellant denies it. The identity of its author became a live issue at the trial though it was not specifically set down as one of the issues. The learned trial Judge was aware of it and considered it. There was no handwriting expert opinion on it. The learned trial Judge relied on evidence put before him to determine its author. He first considered the credibility of the parties. He found the respondent more credible. The first appellant never impressed him as a credible witness, and found him to be a liar. Was the judge right when he said the first appellant was a liar? I think he was right. I need only to refer to one instance to prove my point. On receipt of exhibit PE8 the respondent sent a telegraphic transfer of US$ 200 000 on 22 August 1994 to Shivam MKP Limited, account number 32/90/11869/000 held at Standard Chartered Bank Kampala. The first appellant was a signatory to that account. This money was received by the bank and credited to the above account on 23 August 1994. The evidence of DW 3 Ndugwa Christoper Nathan, the auditor and accountant of the appellants, shows that the sum of US$ 200 000 which was a remittance from Russia, reflected on the account of first appellant. On receipt of the amount of the US$ 200 000, US$ 150 000 was withdrawn from the account on 23 August 1994 and was used to purchase shillings from the Crane Bank and realised UShs 138 450 000. The sum was paid into the shillings account of Shivam MKP Limited in which the first appellant never acknowledged the receipt of this money to the respondent. In the written statement of defence filed on 12 September 1997, he denied the receipt of that money either by himself or Shivam MKP Limited. The judge was, therefore, right when he said first appellant was a liar.” Mr *Rezida* has submitted that the matters contained in exhibit PE8 are matters peculiarly within the knowledge of the first appellant. Mr *Kabatsi* countered this argument and argued that Ponsov was also aware of those facts. The following excerpts appear in the Fax message: “As per Mr Nikolai’s explanation to you, if US$ 200 000 are available we can take off by exporting products straight away.” The Nikolai here is Ponsov referred to by *Kabatsi*. If Ponsov was the author he could not have made that statement. This rules out Ponsov as the author. Again the language in exhibit PE8 could not have come from Ponsov. His endorsement of exhibit PE8 states “I can tell you all this is thru.” The language and spelling of “True” as “Thru” show that he had no command of English language. This also rules out Ponsov as the author.” The judge was right when he so found. I also agree with Mr *Rezida* that matters contained in exhibit PE8 are matters that also point conclusively to the fact that the first appellant was the author. I need to refer only to a few of them. The author talks about his 8 years’ experience in jewellery business. The first appellant testified that he came to Uganda on 23 January 1978. That was when he started business. He incorporated first company called Pickups – International (*sic*). The second was Shivam Limited, which was incorporated in 1989. This company dealt in precious stones. He obtained the first license on 1 July 1991 to do goldsmith business. This company had a showroom and office at the International Conference Centre and was dealing in gold and diamonds. I have no doubt that it was the first appellant who was talking about his 8 years experience in jewellery business. In court he confirmed it. Next is the land that was purchased along Entebbe Road by the first appellant, and registered in the name of Shivam MKP Limited. This land was not mentioned in exhibit PE1, but it was referred to in PE8. This is what PE3 said about the land: “I have completed location of the land. . .The location of the land is so prime and is on Entebbe Road. This was the very land that was bought.” As regards the location of the office at the Standard Bank, this is what appears in PE8: “We were originally planning to move to Green Land Bank but we have planed to move to Standard Chartered Bank. Please do not object to this because of so many good reasons.” It continued to give those good reasons. This was not mentioned in PE1. Standard Chartered Bank building was the place that was rented for the second appellant company. These instances show that the first appellant and nobody else was the author of PE8.” In my view, the Court of Appeal’s findings, set out above cannot be faulted. As the first appellate court, it re-evaluated the evidence in the case and upheld the trial court’s finding that the first appellant authored PE8. The first ground of appeal should, therefore, fail. The appellant’s counsel next argued grounds 2, 3 and 4 together. They submitted that the principle of money had and received is not applicable to the instant case. According to *Halsbury’s Law of England* (3ed) Volume 8, paragraph 408, page 235, the principle is that where one person has received money from another under circumstances such as in this case, he is regarded in law as having received it to the use of that other, the law implies a promise on his part or imposes an obligation upon him to make payment to the person entitled thereto. In default, the rightful owner may maintain an action for money had and received to his use. According to this authority the obligation to refund the money is imposed upon the person who received it. Before determining whether US$ 200 000 was refundable as money had and received in this case, the Court of Appeal ought to have first established the person who received the money from the respondent. The learned Justices of the Court of Appeal found that there was overwhelming evidence that the appellants received the money. The appellant’s learned Counsel contended that the justices of appeal erred to have made that finding. There was no evidence, whatsoever, on record that the first appellant ever received any money from the respondent. Instead, there is overwhelming evidence that the second appellant received the money. According to the respondent’s evidence he sent the sum of US$ 200 000 to the account of “Shivam Limited” The money was sent by a fax message from Singapore on 16 August 1994 (exhibit PE9). Further, according to exhibit PE12, it was the second appellant, Shivam MKP Limited, which made the offer without prejudice, to refund the US$ 161 623. The first appellant is not mentioned in the offer. Learned counsel contended that according to the principle of independent legal personality in *Solomon v Solomon and Company* [1897] AC 22, the first appellant is separate from the second appellant. In the instant case as it was MKP Limited an independent legal person which received the money, there was no basis for the Court of Appeals finding that it was the first appellant and the second appellant who jointly received the money from the respondent. Learned counsel further submitted that the purpose for which the money was received was also relevant to the application of the principle of money had and received. In the instant case, it was necessary to ascertain the purpose for which the money was remitted. The learned Justices of Appeal relied on exhibit PE8 to establish the purpose, for which the money was remitted, namely the business of the second appellant under the “joint venture” scheme. Learned counsel submitted that the learned Justices of Appeal erred in doing so. Having found, as they did, that the “joint venture” had automatically terminated, the purpose for which the remission of the money was made could only be ascertained from the conduct of the parties. Exhibit DE11 clearly summarises that purpose. The document indicated that the sum of US$ 200 000 was remitted for trade and development of the second appellant. As stated in exhibit PE8 the purpose was to generate money through weekly profits out of jewellery to be able to open a bank. Learned counsel contended that the banking business was never the second appellant’s contemplated business. It was the first appellant’s calculated misrepresentation. In opposition to these grounds of appeal the respondent’s learned Counsel submitted that, as could be gathered from the first appellant’s representation to the respondent on how he used the money, the money was not intended for the business of the second appellant. Learned counsel disagreed with the contention that the second appellant’s business merely turned out to be bad investments, which could not be blamed on anybody. There is no evidence to support such allegation. In his view, this was a mere scheme by the first appellant to unjustifiably enrich himself by using false pretences to do so. In his testimony, the first appellant said that all the decisions of the company were made by himself and his wife. The learned Counsel contended that he should, therefore, be held liable for refunding the respondent’s money. The respondent’s learned Counsel further submitted that the first appellant was estopped from denying responsibility for refund of the appellant’s US$ 200 000. It is trite law that where one party makes another to believe a set of facts and the other acts on such representation, to his detriment, equitable estoppel arises in favour of the party to whom the misrepresentation was made. For this the respondent’s learned Counsel relied on *Halsbury’s Law of England* (3ed) Volume 15 paragraphs 334 and 340; *Nurdin Bandali v Lambank Tanganyika Ltd* [1963] EA 304 at 318 and 319; and *Century Automobiles Ltd v Hurchings Bienois Ltd* [1965] EA, 304 at 313. On this point, Berko JA held: “With regard to the US$ 200 000, there is overwhelming evidence that it was received by the appellants. They have even offered to pay US$ 161 623, to settle it. They are therefore liable to refund that amount as money had and received. This should, however, be reduced by the US$ 26 000 that was sent to the respondent. That would have a balance of US$ 184 000 . . . The judge was right when he ordered the appellants to refund the US$ 184 000. It is not correct as stated in ground two that the order for refund was against the first appellant alone.” It is my considered opinion that in the circumstances of this case the learned Justices of Appeal were justified in upholding the findings of the trial court that the appellants had admitted receipt of US$ 200 000 and offered to pay US$ 161 623; that the said sum of money is refundable by the first and second appellants as money had and received; and that the first and second appellants are jointly liable to refund the respondent’s money. Grounds 2, 3 and 4 of the appeal should therefore fail. On ground 5 of the appeal, the appellant’s learned Counsel submitted that the learned Justices of Appeal erred when they substituted the rate of interest of 20 percent for the rate of 6 percent which the learned trial court had awarded. He contended that the principle to be applied is that an award of interest is discretionary. The basis of an award of interest is that the defendant had kept and used the plaintiff’s money for his personal needs and therefore ought to compensate the plaintiff for it. See *Sietco v Noble Builders* (*U*) *Ltd* Supreme Court civil appeal number 31 of 1995, in which the principle in the case of *Hanbutts’ Plasticine Ltd v Wayne, Tank and Pump* [1970] 1 QB 447 was referred to with approval. In the instant case, the learned Justices of Appeal found that the respondent did not allow the business to operate for a period of at least one year for the profits to be realised. Further, the money was remitted by the first respondent for a business in which he was a participant. Accordingly, the respondent was not deprived of his money to warrant the award of 20 percent interest per annum. In the circumstances, learned Counsel contended that the learned Justices of Appeal applied wrong principles in interfering with the trial court’s award of 6 percent and awarded 20 percent without stating the basis of the interest rate, especially in view of the fact that the transaction was in dollars. The respondents’ learned Counsel did not say anything about ground five of the appeal. In considering what rate of interest the respondent should have been awarded in the instant case, I agree that the principle applied by this Court in *Sietco v Noble Builders* (*U*) *Ltd* (*supra*) to the effect that it is a matter of the Court’s discretion is applicable (*sic*). The basis of awards of interest is that the defendant has taken and used the plaintiff’s money and benefited. Consequently, the defendant ought to compensate the plaintiff for the money. In the instant case, the learned Justices of Appeal, rightly in my opinion, said that the appellants had received the money for a commercial transaction. Hence the Court rate of 6 percent was not appropriate and I agree with them. The rate of interest of 20 percent awarded by the Court of Appeal was more appropriate. In the circumstances, ground five of the appeal should fail. In result, I would dismiss this appeal with costs to the respondent in this Court and in the courts below. Odoki CJ, Tsekooko, Karokora and Kanyeihamba JJSC concurred in the judgment of Oder JSC

For the appellant:

*Mr Rezida*

For the respondent:

*Mr Kabatsi*