**Uganda Telecom Limited v Tanzanite Corporation**

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

**Date of judgment:** 23 May 2005

**Case Number:** 17/04

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

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*[1] Contract – Formation of contract – Uncertainty of terms – Supply of telephone sets – Breach of contract – Loss of unused materials – Whether a contract existed between the parties – Whether the appellants were liable to pay damages for loss of unused materials.*

*[2] Remedies – Damages – Award of special damages – Requirements for the award of special damages*

*– Special damages must be claimed and proved – Whether the respondents had satisfied the conditions for the award of special damages.*

**JUDGMENT**

**Oder JSC:** Tanzanite Corporation (the respondents) jointly sued Uganda Telecom Limited (the appellants) and Uganda Post and Telecommunication Corporation Limited (UPTCL) in the High Court, for general and special damages for alleged breach of contract for supply of telephone sets to the respondents. The remedies sought consisted of loss of profits, loss of unused materials, unpaid bank loan, general damages, interests, and cost of the suit. UPTCL was not served with the summons and, so the suit against it was not proceeded with. The appellant’s defended the suit, denying that there was any contract between the two parties and prayed for its dismissal. The suit was heard by Arach Amoko, J who allowed only the respondent’s claim for loss of unused materials, disallowing all the other claims.

The respondents successfully appealed to the Court of Appeal which allowed all the heads of the respondent’s claim in the suit. Hence this appeal.

The background to the case is briefly this. The respondents were originally incorporated in the USA.

They answered a call by the Government of Uganda for potential investors to come and do business in

Uganda. They became locally registered, and engaged in telecommunication business. The respondents, through their chairman/managing director, Frank Butamila, (PW1), entered into negotiations with the appellants to sell telephone sets to them. The negotiations resulted in a commitment letter from UPTCL dated 6 July 1993 (exhibit P2). On 27 September 1994, the respondents made an offer to supply to the appellants 10 000 Model TA-101 telephone sets at US$ 44-75 per set. The offer was made in a *proforma* invoice number 94/09/101 (exhibit P3). The respondents alleged in their pleadings that on 22 December

1994, the appellants made a counter-offer to purchase 30 000 telephone sets of the same model and on the terms specified in exhibit P3. The appellants accepted the terms and signed the *proforma* invoice (P3) on 21 January 1995.

Thereafter, the respondents allegedly started mobilising funds to buy raw materials and workshop materials to assemble the 30 000 telephone sets. They allegedly established a workshop at Kisugu,

Kampala, and made orders abroad for supply of materials. They also obtained a loan from the

Co-operative Bank Limited which the appellants apparently guaranteed. All this was done to enable the respondents to supply telephone sets to the appellants. It was the respondents’ case that the appellants acted in breach of their contract by taking and paying for only 3 000 telephone sets, leaving the respondents stranded with unsold telephone sets, and unused materials in Kampala and in Hong Kong and an unserviced bank loan. The respondents sued the appellants in the High Court for the remedies to which I have already referred.

At the trial five issues were framed and agreed to. They were:

1. Whether there was a contract for the supply of 30 000 telephone sets or not.

2. If so, whether the appellants breached the contract.

3. If so, whether the respondents suffered any damages as a result of the breach.

4. Whether there was a guarantee of the loan from the Co-operative Bank Limited to the respondents.

5. Whether the respondents are entitled to the remedies sought.

The learned trial Judge resolved issues numbers one to four in the negative. She resolved the fifth issue partly in favour of the respondents and awarded US$ 260 000 to the respondents as the cost of unused materials, and interest there on at the rate of 8 percent per annum from the date of filing the suit till payment in full, and half of the cost of the suit.

The respondents were dissatisfied with the trial court’s decision. They appealed to the Court of

Appeal, which allowed the appeal and granted the remedies which the respondents had sought in the suit hence this appeal. Six grounds are set out in the memorandum of appeal, the last four being in the alternative to the first two.

They are:

1. The learned Justices of Appeal erred in law and fact in finding that there was a contract between theappellants and the respondents for the purchase of 30 000 telephone sets.

2. The learned Justices of Appeal erred in law and fact in finding that the appellants were in breach of contract for the 30 000 telephone sets.

In the alternative, but without prejudice to the foregoing:

3. The learned Justices of Appeal erred in law and fact in awarding general damages in addition to the award for loss of profits.

4. The learned Justices of appeal erred in law and fact in allowing the claim for loss of unused materials in addition to the award for loss of profits.

5. The learned Justices of Appeal erred in law and fact in allowing the claim for unpaid bank loan in addition to the award for loss of profit.

6. The learned Justices of Appeal erred in law and fact in finding that the claim for the unpaid bank loan has been proved.

The memorandum of appeal then prayed for setting aside the judgment and order of the Court of Appeal and costs of the appeal and of the suit.

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The respondents cross-appealed on the following grounds:

1. The learned Justices of Appeal erred in fact and law in failing to award further interest on the head of damages relating to the unpaid bank loan.

2. The learned Justices of Appeal erred in law and fact in failing to award interest on the head of damages for loss of profits from the date of filing suit, as opposed to the date of judgment.

At the hearing of the appeal, the respondents sought and were granted leave to amend the notice of cross-appeal by additional ground, namely, that the learned Justices of Appeal erred in law upon dismissing the appellants’ cross-appeal against the award of US dollars 260 000 for unused materials in falling to affirm the award of 8 percent interest on the said amount granted by the lower court from the date of filing suit till payment in full.

Mr William *Byaruhanga* and Mr *Kasirye*, assisted by Mr *Okuwa* represented the appellants. Mr Ebert

*Byenkya* with Mr Oscar *Kihika* appeared for the respondents. Mr *Byaruhanga* for the appellants argued grounds one and two together. He criticised the Court of Appeal for finding that there was a contract between the parties for supply of 30 000 telephone sets by the appellants to the respondents. Learned counsel contended that there was neither such a contract nor a breach of contract it by the appellants.

Learned counsel criticised the finding of Kitumba JA, who wrote the lead judgment, supported by the other members of the court, that the *proforma* invoice, P3 contained the offer by the respondents to sell to the appellants 10 000 telephone sets at US $ 44-75 per set which was accepted by the parties on 21 January 1995, by signing at the bottom of the document. P3 was preceded by a letter dated 23 December

1994 (exhibit P4) written by the appellants’ managing director acknowledging receipt of exhibit P3 and the terms specified therein. When the appellants’ managing director said in P4 that they had the capacity to purchase 30 000 telephone sets under the terms stated in P3, the appellants were making a counter-offer to buy 30 000 telephone sets. The appellant’s learned Counsel contended that the learned Justices of Appeal erred in finding that exhibit P3 was not a mere formal offer, as *proforma* invoices ordinarily are, because it was detailed in nature and was signed by both parties, specifying their acceptance to be bound by the terms contained therein; and that exhibit P3 and exhibit P4 should be read together. In support of his contention, the appellant’s learned Counsel referred to the definition of “proforma” in *Blacks Law Dictionary* (7ed) at 1227, where it is said to mean “made or done as formality:

of an invoice or financial statement provided in advance to describe items, predict results or secure approval,” He also relied on the book *An Outline of the Law of Contract* (5ed) by GH Treitel

Butterworths, 1995 for the law on acceptance and counter-offer in contract.

Learned counsel further submitted that the signature of the respondents’ managing director at the bottom of exhibit P3 was an approval and not acceptance of the terms; that exhibits P3 and P4 did not create a contract; that there was an offer for the purchase of 30 000 telephone sets which was concluded by the appellants’ several local purchase orders (LPO). Exhibit P4 was not the basis of a contract as a counter-offer, because there was no acceptance by the respondents. Moreover there was uncertainty in exhibit P4 about the number of units being ordered; the time for delivery and how the 30 000 units were to be paid for. This was inconsistent with the well known principle of the law of contract that unless the essential terms of the contract are agreed upon, there is no binding and enforceable obligation: *May and Butcher Limited v The King* [1934] 2 KB 17, CA. In the instant case,the documents on which the Court of Appeal based its finding did not amount to a contract.

In opposition to the appeal, Mr *Byenkya* learned Counsel for the respondents, also argued grounds one and two together. He submitted that the trial court and the Court of Appeal concurrently found that a contract existed between the appellants and the respondents. The learned trial Judge found that there were three separate contracts for a total of 20 000 telephone sets, and the Court of Appeal found that there was a contract for 30 000 sets of telephone. In doing so, the Court of Appeal, as the first appellate court, re-evaluated the evidence and reached its own conclusion, agreeing with the trial court on finding of facts. As a second appellate court, this Court should not interfere with that concurrent finding. Learned counsel relied on *Erisafani Mudumba v Wilberforce Kuluse* Civil appeal number 9 of 2002 (SCU) (UR) and *Lutaya v Attorney-General* Civil appeal number 10 of 2002 (SCU) (UR) *Milly Masembe v Sugar Corporation* and Another Civil appeal number of 2000 (SCU) (UR) and *Banco Arabe Espanol v Bank of*

*Uganda* [1999] 2 EA.

He contended that in the instant case, this Court should not interfere with the concurrent findings by the lower courts that there was a contract between the parties.

The respondents’ learned Counsel further submitted that by exhibit P5 the appellants informed the

Co-operative Bank Limited that the appellants had entered into a contract with the respondents for the latter to supply them with telephone sets to meet their needs and that the appellants:

“Will guarantee and pay the amount due to Tanzanite Corporation directly to the Co-operative Bank Limited which will satisfy all or part of its financing outlay to the Tanzanite Corporation from these funds.”

The learned Counsel submitted that the appellants having guaranteed to pay the proceeds of sale of the telephone sets payable to the respondent direct to the bank; they were estopped from denying the contractual relationship between them and the respondents. They had presented themselves as being in such a relationship, making the respondents act on the presentation by taking a loan to its prejudice. The learned Counsel revealed that it was not the respondents’ case that exhibit P5 was a guarantee (*sic*). It was a representation to the bank which induced it to give the loan to the respondent.

Regarding the appellants’ LPOs, Mr *Byenkya* submitted that they could not have formed the basis of valid contracts, because they were predated by exhibit P5 dated 25 April 1995. It said that a contract for supply of telephones had been made between the appellants and the respondents. This was long before the LPOs dated 2 May 1995, 3 January 1999 and 31 January 1996 were issued. The LPOs did not contain the terms of the contract, but exhibit P3 did. Counsel contended that the respondents proved the terms of the contract by documentary evidence and the oral evidence of their managing director (PW1). On the other hand, all the respondents’ witnesses did not know the terms of the contract, as Kitumba JA found in her lead judgment. Moreover, the appellants did not rebut the respondents’ evidence that a contract existed between the two parties.

Arising from the pleadings in the suit the first issue for trial was whether or not a contract for sale of

30 000 telephone sets by the appellants to the respondents, had been agreed between them and existed. The issue was not whether or not there was a contract for the sale or purchase of 100, 500, 10 000, 20 000 or 25 000 telephone sets. The learned trial Judge answered the first issue in the negative. While rejecting the argument of the counsel for the respondents that exhibit P4 was a counter-offer, the learned trial Judge said this:

“With much due respect to learned Counsel, this letter is very clear. In the first paragraph, UP and TC acknowledges receipt of the plaintiffs’ *proforma* invoice number 94/09/101 offering to furnish single line model TA-101 telephone sets to Up and TC and the plaintiffs “Subsequent inquiry on our (UP and TC) demand market.

In the second paragraph UP and TC confirms that it had received the proposal (contained in the *proforma* invoice) as well as the technical specifications submitted and UP and TC agrees to purchase the said Model TA-101 sets from the plaintiff. PW1 stated that after meeting with UP and TC officials, he went back to their head office in Washington and brought their specifications and a sample which was later tested by UP and TC approved. That also agreed on the price of the phones. Then he made the offer of 10 000 per exhibit P3.

The third paragraph was a response to the last part of the first paragraph which stated ‘Your subsequent inquiry on our demand market’. In that paragraph, UP and TC said it has a capacity to purchase up to 30, 000 telephone sets on the same terms in the *proforma* invoice (exhibit P3).That it is also very likely that UP and TC will have additional need for telephone sets beyond this initial order meaning the 10 000. That UP and TC will also acquire additional units by local purchase order (LPO) from the plaintiffs’ warehouse, ‘Whenever necessary’ since the plaintiff is a local supplier in Kampala.

Lastly, Mr Sempala informed the plaintiff that it is now an approved vendor to UP and TC.

This letter does not and cannot therefore be interpreted by any stretch of imagination to mean that UP and TC placed an order for 30 000 telephone sets. This is also borne out by the fact that exhibit P3 which was signed by both parties afterwards, did not mention 30 000. Exhibit P3 is an invoice of 10 000 sets only and not 30 000. It is also not a counter-offer as alleged.

The plaintiff also alleged that exhibit P5 guaranteed the 30 000 telephone sets. This again is not true. I agree with Mr William *Byaruhanga*, learned Counsel for the defendant there is no reference to 30 000 sets in exhibit P3 was part performance of the process of fulfilling the said contract. I have found no such contract, that statement cannot therefore be true.”

The learned trial Judge then went on to reject the contention by the respondents’ counsel that *proforma* invoice P7 dated 27 September 1995, signed on 28 September 1995 was further confirmation of thecontract for 30 000 telephone sets. She held that exhibit P7 was another and separate contract for thesupply of another 10 000 sets. In the end, on this issue, the learned trial Judge concluded:

“On the basis of this finding, I hold that there was no contract for the supply of 30 000 telephone sets between the two parties … there were instead several independent contacts between the two parties, I have not found any contract for the supply of 30 000 telephone sets between the parties. The answer of two issues is, therefore, negative.”

Contrary to the finding of the learned trial Judge on the issue of contract, the lead judgment of Kitumba

JA was to the effect that there was a contract between appellants and the respondents for the supply of 30 000 telephone sets. She said *inter alia*:

“Counsel for the respondent here and in the court below argued that *proforma* invoice is not a contract but a mere formal offer. That would be the case ordinarily. However in the appeal before this Court the formal offer was made on the *proforma* invoice. It was detailed in nature, time and was signed by both parties specifying their acceptance to be bound by the terms stated therein. Then exhibit P4 that was written before the signing of exhibit P3 made a close reference to exhibit P3. I accept counsel for the appellant’s submission that exhibits P3 and P4 should be read together. I am of the view that there was a contract between both parties. When one considers exhibit P3 that was signed on 21 January 1995 for 10 000 sets, exhibit P6 signed on 5 May 1995 for 500 sets and P7 signed 29 for 10 000 sets. This makes a total of 25 000 which must be part of the 30 000 sets which the appellant was to supply to the respondent. Ground 1 succeeds.”

With due respect to the learned Counsel for the respondents, I am unable to agree with him. As the passages I have referred to from their respective judgments show, the trial court and the Court of Appeal did not make concurrent findings that there was a contract between the parties for supply of 30 000 telephone sets which was an issue in the suit. The two courts made inconsistent findings. In my opinion the learned trial Judge’s finding that there was no such a contract was the correct one. I also agree with the reasons she gave for that finding. In my view, the expression *–* “we have the capacity to purchase 30

000 telephone sets at US$ 44-75 per set under the terms of the *proforma* invoice” in exhibit P4 was part of the negotiation with the respondents, informing them that the appellants were able to supply 30 000 telephone sets to the respondents at the same price which had been conveyed to them by *proforma* invoice. It did not explicitly mention P3 which was a *proforma* invoice. It was therefore an offer to treat not an offer of a contract.

*Black’s Law Dictionary* (7ed) by Bryan 4 (*sic*). Garner defines “*Proforma* invoice” as:

“1. Made or done as a formality

2. ( of an invoice or financial statement) provided in advance to describe items, predict result or secure approval.”

In my opinion, the information in P4 was part of the negotiation between the two parties. It did not make an order to the respondents that they should supply 30 000 telephones. If that was the intention, the appellants would have said so. Further, P4 was not a counter-offer to purchase 30 000 telephone sets. The appellant’s offers to buy telephone sets were made by the appellants’ Local Purchase Orders (LPO) separately which totalled 30 000 telephones, the number received and paid for by the appellants. Further, with respect to the respondents’ learned Counsel, I am unable to agree with his submission that the appellants’ letter of 25 April 1995 (exhibit P5) was evidence that a contract existed between them and the respondents for supply of 30 000 telephones sets. It mentioned such a contract, but it did not say how many telephone sets the appellants would supply to the respondents and other conditions of such a contract. The respondent’s learned Counsel submitted that it was not a guarantee, but an undertaking to induce the bank to lend the respondents money to finance the telephone transaction between them and the appellants. In the circumstances, it is in my opinion that exhibit P5 was not evidence of the existence of a contract between the appellants and the respondents for supply of 30 000 telephones. With great respect to the learned Justices of Appeal, I am of the view that there was no contract between the appellants and the respondents for supply of 30 000 telephones sets, by the latter to the former. Since the contract did not exist, the issue of the appellants having acted in breach of the contract did not arise. Grounds one and two of the appeal must, therefore, succeed. The success of the first and second grounds, in effect, deposes of this appeal as the complaints in the other grounds criticise the Court of Appeal for errors regarding damages arising as a result of the alleged contract for 30 000 telephones which, as I have agreed with the learned trial Judge, did not exist.

I shall, therefore, briefly consider the other grounds of appeal. Grounds 3, 4, 5 and 6 were argued together, in the alternative, to grounds one and two by Mr *Kasinye* for the appellants. His main arguments are, first, that while the learned Justices of Appeal were alive to the principles of pleading and proving special damages, they apparently ignored those principles and instead resorted to section 52 of the Sale of Goods Act alone, to hold that the appellants were not entitled to reject delivery of the telephone sets but to sue the respondents for breach of warranty; for holding that PW1’s oral evidence which merely estimated loss of profit of US dollars 722 259 on 27 000 telephone sets was sufficient proof of such loss because it was not challenged by the appellants; and for relying on subsections (1) and (2) of section 49 of the Sale of Goods Act in exclusion of subsection (3) thereof, which provides that where there is an available market for the goods which are accepted by the buyer the measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current at the time when the goods ought to have been accepted or at the time of the refusal to accept. Learned counsel contended that the learned Justices of Appeal should have followed the well-established legal principle that special damages must be strictly pleaded and proved. He relied on: *Siree v Lake Turkana El Molo Lodges*

*Limited* [2000] 2 EA 520, *Sale of Goods Act* by PR Aiyer; and *An outline of the Law of Contract* by GH

Treited, (5ed) Butterworths.

Learned counsel for the appellants criticised the learned Justices of Appeal for making a finding which was outside the pleadings before the court as if the suit was brought under the Sale of Goods Act.

The plaint prayed for general and special damages. The counsel who presented the respondents’ case at the trial never mentioned the Sale of Goods Act. Learned counsel also criticised the learned Justices of

Appeal for holding that the appellants had guaranteed a loan from the Co-operative Bank Limited to the respondents. He contended that the appellants did not do so. That contention is based on first exhibit P

10. This was a letter written by the bank to the respondents, informing the latter that they should remit money to repay UShs 108 683 330 overdrawn on their account with the bank. The demand for repayment was not made to the appellants, the alleged guarantor of the loan. Secondly, the alleged letter of guarantee (P5) proposed to make direct payment to the bank, but there is no evidence that P5 was accepted by the bank. Thirdly, there was no guarantee of the relationship between the appellant and the bank. Finally, learned Counsel submitted that as there was no contract between the appellants and the respondents, the learned Justices of Appeal should not have upheld the award of US dollars 26 000 for unused materials. In any case, the respondents should have mitigated their loss even if the appellants had acted in breach of a contract in that respect.

In his submissions on damages, the respondents’ learned Counsel, Mr *Byenkya*, submitted that the appellants’ counsel was out of order to argue against the award for loss of profit, without leave of court to challenge that award under rule 97 of the rules of this Court.

Regarding the unpaid loan of UShs 108 683 330, learned Counsel submitted that the Court of Appeal did not award it on the basis of a guarantee by the appellants, but on the basis that it was a foreseeable loss caused by the breach of contract by the appellants. The loss of profit of UShs 722 000 was awarded by the Court of Appeal as the profit margin on 27 000 telephone sets. The Court of Appeal also awarded US dollars 260 000 for loss of unused materials by the respondent. Regarding section 49(3) of the Sale of

Goods Act, the learned Counsel contended that the provisions of that subsection are not applicable to the instant case, because the appellants did not adduce evidence to bring them into pray. Available market should have been established by the appellants (*sic*). On the contrary, it was the respondents who attempted to do so. PW1 testified that he tried unsuccessfully, to sell in Rwanda the telephones the appellants did not purchase. Learned counsel prayed for dismissal of the appeal and for up-holding of the

Court of Appeal’s decision, save for the respondents’ cross-appeal. I shall deal with the cross-appeal after my conclusions on the grounds of appeal concerning the award of damages. It is evident from the respondent’s pleadings that their claims for loss of unused materials and for the unpaid bank loan were special damages. According to “*Aiyar’s Sale of Goods Act*” (*supra*), “Special damages” is that damage in fact caused by wrong. It is trite law that this form of damages cannot be recovered unless it has been specifically claimed and proved or unless the best available particulars or details have before trial have been communicated to the party against whom it is claimed. In a claim for loss of profits, the normal measure of damages, as stated in section 50(3) of the Sale of Goods Act thereby in co-operating the common law as stated in *Barrow v Amand* [1846] 8 QB 610, is that contract price less the market price at the contractual time for acceptance. This represents the amount the seller must obtain to put himself in the position he would have been had the contract been carried out, since he can sell the goods in the market. *See Mc Gregor on Damages* (15ed) 1988.

In the instant case, the respondents, did not, in my view, adduce evidence to prove how the figure claimed as loss of profit was arrived at. The Court of Appeal merely accepted the claim of US$ 722 259 because it was not challenged. In her judgment, Kitumba JA said:

“Regarding loss of profits on the 27 000 phone sets was not challenged in cross-examination. In his evidence,

PW1 stated that the loss of profits on 27 000 sets was US$ 722 259. That in my view is the estimated loss.”

The learned Justices of Appeal based their decision on loss of profits only on the provisions of subsections (1) and (2), without applying those of subsection (3) which, in my view, were the most relevant to the issue of assessment of damages for loss of profit.

The learned Justice of Appeal also said:

“I find that the learned trial Judge considered the correct principles on proof of special damages. However, she did not consider the fact that the case before her was Sale of Goods Act provides (*sic*) . . .”As I understand it, this passage, in the judgment of the justice of appeal, appears to mean that because the suit was about sale of goods the legal requirement that special damages must be specifically pleaded and proved was not applicable. With the greatest respect that would be an error. I think that in a claim for damages for breach of contract for sale of goods, both the provisions of the Sale of Goods Act, especially section 49(3), and the legal principles on pleading and proof of special damages are relevant and are not mutually exclusive. This in my view, is supported by what Lord Wilberforce said in *Reardon Smith Line limited v Yngvar Hamsen-Tangen (t/a HE Hansen-Tangen)* [1976] 1 WLR 989 at 998:

“I would respectfully endorse what was recently said by Roskil LJ in *Cehave NV v Bremer*

*Handek-geseellchaf in 6H* [1976] QB 44, 71:

‘In principle it is not easy to see why the law relating to the contracts for the sale of goods should be different from the law relating to the performance of other contractual obligations, whether charter parties or other types of contracts. Sale of goods law is but one branch, the principles should apply to the law of contract as a whole and that different legal principles should not apply to different branches of that law.’”

The respondents’ learned Counsel argued that the appellants’ learned Counsel should not have argued against the award for loss of profit by the Court of Appeal without the leave of this Court, under rule 97 of the rules of this Court. The learned Counsel did not elaborate. It would appear that he meant rule 97(*a*) of the Rules of the court. Rule 97(*a*) provides:

“97 At the hearing of an appeal:

(*a*) No party shall without leave of the court, argue that the decision of the Court of Appeal should

be reversed or varied except on a ground specified in the memorandum of appeal or in notice of cross-appeal, or support the decision of the Court of Appeal on any ground not relied on by that court or specified in a notice given under rule 87.”

With due respect, I do not find any merit in the submission of the respondents’ learned Counsel in this connection because in ground three of the appeal, the appellants complained against the Court of Appeal for “awarding general damages in addition to the award for loss of profits”. To my mind ground three complains that the Court of Appeal should not have awarded general damages as well as damages for loss of profit.

The Court of Appeal awarded to the respondents UShs 108 683 330 as loss for the unpaid loan they owed the Co-operative Bank. According to Kitumba JA in her judgment, this was because the appellants encouraged the respondents to take the loan, because exhibit P5 was to induce the bank to advance the money to the respondents for the purpose of acquiring materials to assemble the phones, and because the respondents produced exhibit P10, a letter dated 27 April 2000 from the Co-operative Bank demanding from them repayment of the loan. I have already held that exhibit P5 was not evidence of a contract between the appellants and the respondents because, first, it did not mention the amount allegedly guaranteed, and second, the demand to the respondents to pay the loan was not linked with the telephone transaction and was not addressed to the appellants. In the circumstances, I am with the greatest respect; unable to agree with the learned Justices of Appeal that default by the respondents to repay the loan was an event foreseeable by both the parties when the appellants wrote exhibit P5.

The learned trial Judge found, rightly in my view, that there was no contract between the appellants and the respondent, yet she awarded US$ 260 000 as damages for loss on the unused materials.

According to the learned trial Judge:

“This was based on the orders for phone sets placed by the appellants in exhibits P3, P5 and P7 and on the future requirements of the defendant. The plaintiff has advanced two letters (exhibits P8 and P9) from Goodwell Communications Limited, their suppliers in Hong Kong, to the effect that the plaintiff’s accounts have been debited with this amount for 20 000 sets. I, therefore, award this to the plaintiff.”

The Court of Appeal upheld this award. With great respect I am unable to agree with the learned Justices of Appeal, firstly because exhibits P3, P5 and P7, on which the learned trial Judge apparently relied to base the appellant’s liability, in this regard did not form a contract between the appellants and the respondents. There having been no contract, it was inconsistent to hold the appellants liable for unused materials valued at US$ 260 000, which were allegedly ordered from Hong Kong to perform a non-existent contract; secondly, the Court of Appeal (*as per Kitumba JA*) held that it did not matter that

PW1, the appellants’ managing director, could not mention the exact location of the appellant’s factory to assemble the 20 000 telephones for the assembly of which the materials lost in Hong Kong were intended. The learned Justices of Appeal said:

“PW1 failed to describe the exact location of his workshop but explained that streets in Kampala are not numbered. This is indeed true in this country and failure to tell court the exact location of his workshop does not render his evidence incredible.”

The existence in Uganda of a factory to assemble telephones by the respondents for supply of the same to the appellants and the existence, whether in Uganda or Hong Kong, of materials ordered for the purpose was a crucial aspect of the respondents’ case. It is my view that it was therefore necessary for them to prove to the required standard, the existence in Uganda of such a factory. The respondents’ evidence, in my view, failed to do so. With the greatest respect, they appear to have had an erroneous helping hand from the learned Justices of Appeal, in view of the passage of the judgment I have just referred to. In any case, as there was no contract for 30 000 telephone sets, there was no basis for the award of damages for unused materials.

For these reasons, I am unable to agree with the Court of Appeal that the respondents proved the loss of US$ 260 000 worth of unused materials in Hong Kong to the required standard. In the circumstances, they should not have been awarded US$ 260 000 for unused materials by the High Court and, upheld by the Court of Appeal. I would allow grounds three, four, five and six of the appeal. Consequently, I would allow the appeal with costs to the appellants here and in the courts below. I would dismiss the cross-appeal, also with costs to the appellants.

Odoki CJ, Karokora, Mulenga and Kanyeihamba JJSC concurred in the judgment of Oder JSC

For the appellant:

*Mr William Byaruhanga* and *Mr Kasirye and Mr Okuwa*

For the respondent:

*Mr Ebert Byenkya* and *Mr Oscar Kihika*