

5 the appeal be dismissed. I also agree with the award of costs proposed in her judgment.

I however wish to lay a little more emphasis on what constitutes an admission and also discuss the applicability of the law on burden of proof in this matter.

10 **Background**

The brief background of this appeal is that in the months of September 2003 and August 2004 the respondent supplied fuel on credit to the appellant, who was employed as a transport officer in Mukisa Mpewo Transport Company (MMTC). It was an agreed fact
15 that the total value of the supplies was Ugshs. 53, 270,545/=.

The appellant used to pay some money to offset the credit. On 10th February 2005, the respondent filed a summary suit in the High Court vide HCCS No.117 of 2005 claiming an unpaid sum of 24,315,945/=. To support the claim, the respondent adduced
20 affidavit evidence of Ms. Rugambwa who was the Managing Director of the respondent at the time. In the said affidavit, Ms. Rugambwa averred that the appellant had paid off Ugshs 28, 954, 600/= of the total value of supplies and was left with a balance of 24,315,945/=. However, before the suit could be heard, the matter was withdrawn.

25 The withdrawal of the suit was as a result of the company having engaged an auditor in March 2005 who came up with a report indicating that the appellant had only paid Ugshs. 18,991,700/= and not 28,954,600/= and that the balance owed was Ugshs. 34,

5 278,845/= and not 24,315,945/=. Thereafter, the respondent filed Civil Suit No. 640 of 2005 in the Commercial Division of the High Court, to recover the balance of 34, 278,845/=. The appellant disputed the claim and contended that he had paid all money due to the respondent and contended in his submissions that he had in
10 fact overpaid the respondent. He tendered in evidence receipts which he claimed had been issued by the respondent company.

However, the High Court Judge found that the appellant had breached his part of the contract and that he was indebted to the respondent in the sum of Ugshs.34, 278,845/=.

15 Aggrieved with the decision, the appellant appealed to the Court of Appeal on a central ground that:*the learned trial judge erred in law and fact when he did not evaluate the receipts tendered by the appellant in evidence and resolved the inconsistencies in the receipts in favour of the respondent and thereby came to the wrong*
20 *conclusion.*

The Court of Appeal Justices found the appellant in breach of contract for failure to pay the outstanding balance of Ugshs.34, 278,845/=.

Dissatisfied with the above decision, the appellant appealed to this
25 Court on 8 grounds. However, in his submissions, he reduced the grounds to one issue:

Whether the Court of Appeal as the first appellate court while handling Civil Appeal No.38 of 2010 lived up to its statutory

5 **duties and obligations as interpreted in decided cases before arriving at its conclusions.**

Appellant's Submissions

The appellant argued that although in its judgment, the Court of Appeal had correctly stated its duty as a first appellate court, it
10 failed to adequately scrutinize, re-evaluate and weigh all the evidence before reaching its own conclusion on the dispute. That had the learned Justices of Appeal done so, they would not have upheld the findings and conclusions of the trial judge.

The appellant further argued that since there was no reply to his
15 written statement of defence in the summary suit, the figure stated in the affidavit of Ms. Rugambwa was binding on the respondent because it was an admission. In support of this argument, the appellant relied on Section 17 (1) and 17 (3) of the Evidence Act. The Section provides in part as follows:

20 **(1) Statements made by a party to the proceeding or by an agent of any such party, whom the court regards, in the circumstances of the case, as expressly or impliedly authorized by him or her to make them, are admissions.**

25 In addition, the appellant faulted the Court of Appeal's finding that the evidence of thereceiptsrelied upon by the appellant to support his case were not credible and that they were marred with discrepancies in that they bore different names. The said

5 receipts were those claimed by the appellant to have been issued by the respondent each time he settled his debt.

The appellant therefore argued that had the Court of Appeal re-evaluated all the materials relating to the receipts, they would have found Ugshs. 34,278,845 an incorrect figure of the balance owed.

10 The appellant also submitted that the Court of Appeal erred in failing to analyze the contents of Exhibit D1 (this was the respondent's sales book indicating the paid and unpaid amounts in regard to the contract of fuel supply between the appellant and the respondent. It was marked as D1 by the High Court). That the
15 Court of Appeal like the High Court based their findings on Exhibit P1 (which was the respondent's auditor's report) indicating that the unpaid balance was 34,278,845/=. The appellant argued that there was no way Exhibit P1 which was extracted from Exhibit D1 could be more reliable and credible than the source from which it was
20 extracted.

The appellant further faulted the Court of Appeal's failure to appreciate the burden of proof of each party. That the learned Justices cited Section 102 of the Evidence Act and came to the conclusion that the respondent discharged its burden while
25 the appellant had not. The appellant submitted that the respondent had the onus and burden to disprove Rugamba's admission regarding the payments.

5 The appellant concluded the submissions by praying that this Court allows the appeal to succeed and set aside the judgments of the lower courts.

Respondent's submissions

10 The respondent argued that the Court of Appeal carried out its duty as a first appellate court and came to the right conclusion. That the Justices properly re-evaluated the receipts adduced by the appellant and noted that while some of the receipts were in the names of the appellant, some were in the company name. That consequently the court came to
15 the conclusion that the receipts were marred with inconsistencies and could not be relied upon. Furthermore, the respondent pointed to the fact that the Court of Appeal noted that DW 2, appellant's accountant, testified that he did not know why the receipts were issued in names of two
20 different entities and further that he did not know the specific outstanding figures. That on this basis the Court of Appeal was right to hold that the appellant's evidence led by his accountant had many inconsistencies that were never reconciled.

25 In regard to the alleged admission by Ms.Rugambwa, the respondent argued that the statement was made before a proper audit could be made. That when the audit was made and the right sum was discovered, the suit with an incorrect sum was withdrawn under Order 25, Rule 1 of the Civil

5 Procedure Rules which *inter alia* allows a party to discontinue a
suit. The respondent thus argued that the burden lay on the
appellant to bring Ms. Rugambwa to court to support his case.
In addition, the respondent submitted that the failure to call
Ms. Rugambwa on its part did not amount to an admission by
10 conduct on its part. That Section 17 of the Evidence Act was
misapplied by the appellant to qualify the affidavit of Ms.
Rugambwa as admissions in law.

Analysis

What constitutes an admission?

15 The appellant submitted that the affidavit of Ms. Rugwambwa
stating that the balance due as Ushs.28, 954,600/= amounted
to an admission of the debt due.

Section 16 of the Evidence Act defines an admission as:

20 **A statement, oral or documentary, which suggests
any inference as to any fact in issue or relevant fact,
and which is made by any of the persons, and in the
circumstances, hereinafter mentioned. (My emphasis)**

The circumstances referred to in Section 16 above are
elaborated in Section 17 of the Evidence Act to include
25 statements made out of court by a party to the proceedings or
by a person who is their representative, predecessor in title,
associate, agent or referee of a party.

5 I note that the affidavit of Ms. Rugambwa was made at the time when she held the position of Managing Director in the respondent company. Therefore, in line with Section 16 and 17 (supra), her statement would qualify as an admission by the respondent company.

10 I note that an admitted fact need not be proved (Section 22 of the Evidence Act). The essence of the appellant's argument was therefore that the respondent could not ask the appellant for more than the sum averred to by Ms. Rugambwa.

15 However, as earlier pointed out in this judgment, the suit in which Rugambwa's affidavit was adduced as evidence was withdrawn. The question which follows is: *whether the respondent company is still bound by the said admission.*

Section 28 of the **Evidence Act** provides:

Admissions not conclusive proof, but may estop.

20 **Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provisions hereafter contained.**

25 Section 17 of the Indian Evidence Act is in *pari materia* with Section 16 of Uganda's Evidence Act and Section 18 of the Indian Evidence Act is in *pari materia* with Uganda's Section 17 supra.

5 In the Indian persuasive authority of **Nagubai Ammal and others vs. B. Shama Road and others AIR 1956 SC 593**, the Supreme Court in addressing the effect of statements [admissions] made in a previous suit held :

10 **An admission is not conclusive as to the truth of the matters stated therein. It is only a piece of evidence, the weight to be attached to which must depend on the circumstances under which it is made. It can be shown to be erroneous or untrue, so long as the person to whom it was made has not acted upon it to**
15 **his detriment, when it might become conclusive by way of estoppel.**

And in another persuasive authority of **Panchedo Narain Srivastar vs. Jyoti Sahay and another (1984) SCC 594**, the Indian Supreme Court emphasized that admissions can be
20 withdrawn or explained away.

From Section 28 (supra) and the above persuasive authorities, as, it is clear that an admission is not conclusive. In the present matter, it was the explanation of the respondent that the debt sum in Ms. Rugambwa's affidavit was not correct.
25 That the sum was arrived at before the audit was made and it was for this reason that the suit in which Ms. Rugwamba's affidavit had been tendered was subsequently withdrawn. I therefore conclude that what would have been an admission can no longer be binding as it had been explained away. An

5 averment in a withdrawn suit cannot be said to be an admission more especially when both the High court and the Court of Appeal relied on the evidence of the Audit report which determined the exact debt.

Burden of proof

10 I will first discuss the question of who has the burden to prove the debt sum and then who has the burden to prove the authenticity of the receipts.

It was the appellant's submission that the respondent had the burden to prove that he had breached the contract and also
15 disprove the appellant's evidence. That the respondent did not produce evidence whatsoever to explain the disparity in the debt sum. Further that, the burden to disprove the receipts lay on the respondent.

On the other hand, the respondent submitted that since the
20 appellant relied on the affidavit of a withdrawn suit, the burden was upon him to call the said Ms. Rugambwa to support his defence.

Section 102 of the Evidence Act provides:

5 **On whom burden of proof lies.**

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

Section 103 of the Evidence Act provides:

10 **Burden of proof as to particular fact.**

The burden of proof as to any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15 **Section 106 of the Evidence Act** provides:

Burden of proving, in civil proceedings, fact especially within knowledge.

20 **In civil proceedings, when any fact is especially within the knowledge of any person, the burden of proving that fact is upon that person.**

In the present case, the respondent company adduced evidence of a sales record book and an audit report to prove the fact that the appellant was indebted to it in the sum of Ugshs. 34,278,845/=.

25 On the other hand, the appellant adduced evidence of receipts which he alleged had been issued to him by the respondent

5 when he paid for the fuel supplies. In addition he also relied on the affidavit evidence of Ms. Rugambwa which as I have found above is no longer binding and cannot be used to support the appellant's case.

In response to the receipts adduced by the appellant, the
10 respondent company argued that the receipts were fabricated. It was further argued that the lower courts had found them to be marred with inconsistencies and issued in names different from that of the appellant; whereas some receipts bore 'Sebana/ MMTc', others bore 'Mukisa Mpewo' and Nsubuga. In
15 reply to the respondent company's assertion above, the appellant stated that the receipts bearing the name Nsubuga were for comparison purposes with those written in his names, to show that they all originated from the respondent company.

20 I note that the receipts relied on by the appellant indicated that the respondent issued receipts to Ssebana/ (MMTC) and sometimes Mukisa Mpewo as acknowledgment of payment of fuel debts.

On record is the fact that the sales and record book (exhibit
25 D1) adduced by the respondent bore the title: "SEBANA/MMTC". Indeed the auditors also relied on this book to come up with a report. I note that in crediting the appellant's payments to the respondent, the auditors credited the receipts that exclusively bore the appellant's name

5 (SEBANA) as well as receipts bearing both the appellant's name and the business name of MMTC (SEBANA/MMTC). This shows that Sebana and MMTC were considered one and the same person although in law a company and an individual are considered as different persons. On this point, since the
10 evidence of the sales and record book adduced by the respondent showed that Sebana and MMTC were considered one person, I fault the Court of Appeal and the trial court's reasoning that the receipts of the appellant could not be relied on because the names on the receipt were inconsistent.

15 Be that as it may, I must still discuss the question: on whom did the burden lay to prove that the receipts the appellant adduced in evidence were not fabricated?

Section 106 of the Evidence Act (supra) is to the effect that a person who has knowledge of a fact has the duty to prove
20 that fact.

The appellant adduced receipts which he claimed were issued to him by the respondent whenever he paid off his debt. However, the respondent disputed the receipts. To support this argument, PW2 (Managing Director of the respondent
25 company) stated that the colours on the receipts presented by the appellant were different from the colours of the company logo. PW 2 pointed out that whereas some receipts had blue and red colours, others had green and red colours. In addition, PW 2 also pointed out the fact that whereas some

5 receipts were worded FUELEX (U) LTD, others were worded
FUELEX (UGANDA) LIMITED. That these disparities showed
the appellant had forged the receipts.

The appellant did not give any explanation for these
discrepancies. I therefore find that he failed to prove that the
10 receipts in issue originated from the respondent company.

Consequently, I would uphold the decision of the Court of
Appeal, that the respondent proved that the appellant owed
the respondent the sum of Ug shs. 34, 278,845/=.

Conclusion

15 Arising from the above, I would dismiss the appeal.

Dated at Kampala this day of
2017.

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20 **PROF.LILLIAN TIBATEMWA-EKIRIKUBINZA**
JUSTICE OF THE SUPREME COURT

