IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: LUGAKINGIRA, J.A., MROSO, J.A., And MUNUO, J.A.)

CIVIL APPEAL NO. 5 OF 1997

BETWEEN

TANZANIA SARUJI CORPORATION. . . . . APPELLANT

AND

AFRICAN MARBLE COMPANY LIMITED. . . RESPONDENT

(Appeal from the Judgment and
Decree of the High Court of
Tanzania at Dar es Salaam)

(Kaji, J.)

dated 11th October, 1996

in

Civil Case No. 89 of 1987

J U D G M E N T

LUGAKINGIRA, J.A.:

In Civil Appeal No. 38 of 1993, this Court directed the High Court at Dar es Salaam to assess general damages arising from the appellants' act of detaining the respondents' machinery since 4.3.87. The direction followed a successful appeal by the respondents against the decision of the High Court (Mkude, J.) as it related to damages. The High Court appointed the Government Chief Valuer who valued the machinery on 27.11.95 and presented his report on 31.1.96 which showed a depreciation of Shs. 6,770,988.75, being the difference between the machinery's current replacement cost and the depreciated replacement cost. The High Court (Kaji, J.) next directed the respondents to submit in writing on general damages, which they did and came up with a total claim of Shs. 150,760,260.20. The claim was resisted in part by the appellants in reply, but the learned judge approved it as presented and this appeal is against the award. It is contended generally that the judge was unable to

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distinguish between special and general damages and that the award consisted substantially of the former.

We will clear up one small matter before proceeding further. The valuer's report was acted upon without its being admitted in evidence. In his ruling titled "Assessment of General Damages," Kaji, J. stated that his task was to assess the damages but not to hear the suit de novo. That is true, but taking of additional evidence, which the valuer's report was, involves a trial. The judge should therefore have held a trial on the issue of general damages and formally received the valuer's report and any other evidence in that regard. We have pondered on the implications of the irregularity but we do not consider it of much, if any, moment. Counsel on both sides did not appear exercised by it, rightly, in our view, since neither the merits of the impugned decision nor the jurisdiction of the High Court was affected thereby. The case is covered by Rule 108 of the Court of Appeal Rules and we will proceed to the merits of the appeal.

The question is whether Kaji, J. directed himself correctly in assessing general damages. His award comprised of the following items as presented by the respondents:

4.1 Cost of interest on the basic cost of the machinery at 9% p.a. from 4.3.87 to 30.6.96: Shs.117,168,200.00;

4.2 Cost of interest on customs duty at 12% p.a. for the same period: Shs. 670,224.00;

4.3 Prepaid training of staff in the

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US plus interest thereon at 9% p.a. for the same period: Shs.12,858,395.00;

4.4 Prepaid training of staff in Tanzania plus interest thereon at 9% p.a. for the same period: Shs. 12,510,327.00;

4.5 Diminution in market value of machinery from 4.3.87 to 31.1.96: Shs. 6,770,988.75; and interest thereon at 9% p.a. from 1.2.96 to 30.6.96: Shs. 253,911.00 - total Shs.7,024,988.75;

4.6 Valuer's fees: Shs. 528,440.20.

The appellants accept liability for items 4.5 and 4.6 but dispute the rest.

The position is that general damages are such as the law will presume to be the direct, natural or probable consequence of the act complained of (see Stroms Brucks Aktie Bolag v. John & Peter Hutchinson [1905] AC 515); the defendant's wrongdoing must, therefore, have been a cause, if not the sole, or a particularly significant, cause of the damage. In approving items 4.1 and 4.2, the judge merely observed that counsel for the judgment debtor had generally accepted those losses to have been caused by the detention of the machinery; as regards items 4.3 and 4.4, he said the detention of the machinery had prevented the realization of the factory project, rendering nugatory the payments for staff training.

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Submitting on item 4.1, Dr. Alex Nguluma for the appellants argued that interest on the cost of the machinery was not a direct, natural or probable consequence of the machinery's detention. His argument was three-fold: First, the interest was charged by the supplier because the respondents acquired the machinery on credit, the price being payable in nine six monthly instalments, the first instalment being due on 15.6.83 and the last on 15.6.87. The liability for interest thus arose independently of the detention of the machinery; indeed, before the detention. Second, or in the alternative, the detention of the machinery was not accountable for the failure to meet the instalments; at the date of the detention, 4.3.87, all the instalments, except one of 15.6.87, had already become due. Finally, the detention of the machinery was not the cause for the failure of the factory project. The machinery arrived from the United States in November 1982 and, in the evidence for the respondents, the first year of operation would have been 1984 and full production should have been attained during 1986. The detention of the machinery came in March 1987. In totality, therefore, the liability for interest was not a result of the detention. Dr. Nguluma also observed that even if any interest was paid beyond 15.6.87, it was in the nature of specific damage. He concluded that the argument on item 4.1 applied to other items. Mr. Mabere Marando appearing for the respondents did not seek to address Dr. Nguluma's arguments but observed that the arguments were new and had not been put to Kaji, J. He also observed that counsel for the judgment-debtor had admitted the claims before Kaji, J. except for items 4.3 and 4.4. He concluded that the machinery was still detained, as the appellants had obtained a stay of execution, and argued that this was a case for the award

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of exemplary damages.

The case presents no difficulty. As well demonstrated by counsel for the appellants, and not disputed, neither item 4.1 nor 4.2 was the direct, natural or probable consequence of the detention of the machinery. It is not necessary to repeat the argument on item 4.1. As regards item 4.2, the respondents were unable to pay customs duty of Shs. 547,683.00 when the machinery arrived at Dar es Salaam port. They were advanced that sum by the Treasury in November 1982, to be repaid within a period of twelve months after a grace period of three months with interest at 12% p.a. The liability for interest therefore had no connection with the detention of the machinery in 1987. We also agree with Dr. Nguluma that interest generally, and not merely interest which might have been paid after 15.6.87, had at the institution of the suit become specific and could not be claimed as general damages. We wish to adopt a statement to this effect in McGregor on Damages, 15th Ed. Para 1758A that -

> When the precise amount of a particular item has become clear before the trial, either because it has already occurred and so become crystallized or because it can be measured with complete accuracy, this exact loss must be pleaded as special damage.

It seems to us curious that Kaji, J. merely adopted the position of counsel for the respondents/decree-holders. The duty was on the learned judge to examine the evidence and the law and make a judicious decision. We believe he would not have fallen

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into the error he did had he done so. It is also no answer to the judge's apparent inattention to the evidence that he did not have the advantage of arguments as were addressed to us. All that was said are facts derived from the evidence adduced before Mkude, J. which the learned judge had an obligation to read. Finally, with due respect to the learned judge, items 4.3 and 4.4 were specific payments for training which should have been pleaded as special damages. Moreover, it is not the detention of the machinery which caused the respondents to incur the liability so as to be its consequence.

As stated earlier, the appellants are not at issue with items 4.5 and 4.6, the depreciation and the valuer's fee respectively. Indeed in the tort of trespass to goods the measure of damages is the extent of the depreciation where the goods still exist and have been restored to the plaintiff. Mr. Marando pointed out that the machinery remains detained, as the appellants obtained a stay of execution, and prayed for exemplary damages. We consulted the records and satisfied ourselves that the stay granted by Ramadhani, JA on 23.5.97 related solely to the pecuniary award; it did not touch on the restoration of the machinery ordered by Kaji, J. It is somewhat surprising that the respondents have never sought to execute the order at the appellants' expense but have been waiting for the appellants to deliver the machinery.

In the premises, the appeal is allowed and the award is set aside as it relates to items 4.1 to 4.4. It is also proposed to make some orders on item 4.5. The depreciation covered the period 1982 to 1995, a period of 13 years, but the detention accounted

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for nine (9) years of this (rounding up the years). Therefore the appellants are equitably liable for nine-thirteenth (9/13th) of Shs. 6,770,988.75. Moreover, the records before us indicate that the appellants had already paid nominal damages of Shs. 10,000.00 as ordered by Mkude, J. and interest thereon of Shs. 2,100.00 before that order was set aside by this Court. The two sums should be set off from the amount payable to the respondents. The appellants will have the costs of the appeal.

DATED at DAR ES SALAAM this 28th day of January, 2003.

K.S.K.LUGAKINGIRA
JUSTICE OF APPEAL

J.... MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(F.L.K. WAMBALI)
DEPUTY REGISTRAR