IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., MSOFFE, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 40 OF 2005

THE TANGANYIKA FARMERS ASSOCIATION LIMITED …….. APPELLANT

VERSUS

NJAKE OIL COMPANY LIMITED …….. RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania – Commercial Division at Dar es Salaam)

(Kimaro, J.)

dated the 14th December, 2004
in
Commercial Case No. 18 of 2004

JUDGMENT OF THE COURT

14 July & 3 August 2006

KAJI, J.A.:

In this appeal, the appellant, Tanganyika Farmers Association Limited, is challenging the decision of the High Court at Dar-es-Salaam Commercial Division (Kimaro, J.) dated 14.12.2004 in Commercial Case No. 18 of 2004 in which the appellant was ordered to pay the respondent Njake Oil Company Limited Shs. 63,525,763/= being loss of profit, remaining use value of four fuel tanks, three pumps and an electricity generating machine emanating from an agreement which was terminated prematurely.

The appellant is advocated for by Mr. Lukwaro, learned counsel, and the respondent is represented by Mr. Mkoba,

learned counsel. Both counsel also appeared for the respective parties in the trial court.

At the trial the respondent company which was the plaintiff, had adduced evidence to the effect that, by a written contract dated 1.8.2002 (Exh. P1), the appellant and the respondent entered into an agreement in which the latter would supply fuel and related products at the former's petrol station situate at Karatu for a period of five (5) years. Before the supply of the said fuel and related products, the contract required the respondent, at its costs and expenses, to provide to the appellant and install necessary equipments and machinery required to run and operate the station. The respondent claimed to have made some renovations and improvements and to have installed four fuel tanks, three pumps and an electric generator to the station.

In August, 2003, the contract was terminated prematurely. Each party blamed the other for the breach. Consequently the respondent sued the appellant for Shs. 88,348,874.37 being loss of profit, remaining use value of four fuel tanks, three pumps, an electric generator, unpaid fuel and general damages. The trial court held the appellant responsible for the breach of the contract. The respondent was awarded Shs. 63,525,763/=.

The appellant was dissatisfied; hence this appeal.

In a rather verbose memorandum of appeal Mr. Lukwaro, learned counsel, preferred twelve (12) grounds of appeal. However at the hearing he abandoned the last ground after realizing that it ought not to have been listed as a ground of appeal.

In arguing grounds Nos. 1, 2, 3 and 4 together Mr. Lukwaro contended that, Annexture 1 which was supposed to specify the necessary equipments which the respondent was required to provide at its own costs and expenses was not annexed to the contract. It therefore remained unclear which equipments the respondent was required to provide and whether the respondent complied with this condition of the contract satisfactorily as provided under clause 4 of the contract Exh. P1, asserted the learned counsel. In that respect it is the learned counsel's submission that the learned trial judge erred in fact in finding that the respondent installed all the necessary equipments which were necessary to run and operate the station. The learned counsel pointed out that, the equipments which the respondent alleged to have installed, that is, 4 fuel tanks and 3 pumps belonged either to BP or to the appellant.

Mr. Lukwaro further pointed out that, even Annexture 2 which was supposed to specify the renovations, additions and improvements to the station which the respondent was

required to make at its own costs and expenses was not annexed to the contract, and that there was no evidence that the respondent made any renovation, additions or improvements to the station. In that respect the learned counsel faulted the learned trial judge in finding that the respondent made some renovations, additions and improvements as per the agreement.

Mr. Lukwako further observed that, there is ample evidence by DW1 Wilson Jacob Mallya, the Deputy Director of the appellant company, that the respondent refused to accept cheques from the appellant and insisted on prior payment which was a breach of a one month credit facility arrangement as provided for in the contract. Further that there was evidence by DW2 Getrude Mdamu that the respondent refused to supply the required fuel and oil products unless and until paid in advance. Under the circumstances the learned counsel urged us to hold the respondent responsible for the breach of the contract. This last part of his submission covered also the 5th and 6th grounds of appeal.

In elaborating on ground No. 7 the learned counsel asserted that, the term “main supplier” in the contract did not mean the respondent was the sole supplier. In that respect when the respondent refused to supply as demonstrated earlier the appellant sourced supply from

other sources, and that this should not be taken as a breach of the contract, submitted the learned counsel. Submitting on grounds Nos. 8 and 9 together Mr. Lukwaro insisted that the fuel tanks and pumps belonged either to BP or to the appellant. The learned counsel referred the Court to Exh. D1 which is a letter dated 5.2.2002 from BP to the appellant notifying the appellant of their intention to repossess the said tanks and pumps. The learned counsel contended that, since the said tanks and pumps did not belong to the respondent, there was no basis upon which the respondent should be paid by the appellant Shs. 32,250,000/= being use value of the same.

Submitting on ground No. 10 Mr. Lukwaro observed that, the respondent was indebted to the appellant to a tune of Shs. 4,339,225/17 for various business transactions, and that PW2 Michael Mafikiri Maro had admitted that the appellant had some claims against the respondent. The learned counsel urged us to hold that that amount should be treated as a set off. In arguing ground No. 11 the learned counsel insisted that it was the respondent who breached the contract for the reasons stated earlier.

Responding to these submissions Mr. Mkoba, learned counsel for the respondent, contended that, the fuel tanks in issue belonged to the respondent. He conceded that formerly they belonged to BP, but later there was a mutual

understanding between BP and the respondent whereby the said tanks were exchanged with those of the respondent, and so became the property of the respondent. As for the pumps the learned counsel asserted that, BP removed the old ones belonging to BP and the respondent installed three new ones, and that this was supported by the evidence of PW1 Ndekiro Arsel Maimu, and to some extent by DW2 Anamenyisa Johnson Macha. As for renovations, additions and improvements, the learned counsel pointed out that the evidence of PW2 speaks by itself on the renovations, additions and improvements made to the station.

On whether the respondent refused to accept the appellant's cheques the learned counsel asserted that the only cheque turned down by the respondent was the one with less amount after the appellant had unilaterally deducted some amount on the pretext of exercising the right of set off. The learned counsel denied the respondent to have breached the one month credit facility term. The learned counsel observed that that allegation was not even put forward by the appellant when corresponding with the respondent on why the appellant no longer ordered supply from the respondent. The learned counsel conceded that the term "main supplier" did not mean the respondent was the sole supplier. But he was quick to point out that from July, 2003 the appellant never ordered any supply from the respondent and resorted to other suppliers although the

respondent was ready and willing to supply.

Responding to ground No. 8 the learned counsel insisted that, the four fuel tanks and three pumps belonged to the respondent. He doubted whether Exh. D1 referred to the fuel tanks and pumps in issue because when it was written the station was in full operation, unlike Exh. D1 which suggests at the material time the tanks and pumps were lying idle.

Furthermore, while it is processed by computer, the word “Karatu” is hand written, observed the learned counsel. Responding to the claim of Shs. 32,250,000/= as use value of the four fuel tanks and three pumps and the electric generator for the remaining period of two years, the learned counsel pointed out that, the evidence of PW2 is very clear on this. As for the alleged set off the learned counsel supported the learned judge’s finding that it did not comply with the requirement of Order VIII Rule 6 (1) of the Civil Procedure Code, 1966.

Responding to the appellant’s submission on ground No. 11, the learned counsel insisted that it was the appellant who breached the contract by failing to order supply for no good cause and for terminating the contract without the requisite three (3) months notice.

We have carefully considered the rival submissions by learned counsel for both parties. For a better sequence of events, we think, it is appropriate if we deal with the appeal following the order in which it was argued and submitted by counsel. We therefore start with grounds Nos. 1, 2, 3 and 4. Essentially, they refer to whether the respondent provided the equipments required to run the petrol station at Karatu as per the agreement, and whether the respondent made the renovation and the installation as per the agreement. It is common ground that from August, 2000 till around June, 2003 the petrol station in issue was operating, and that the main supplier of fuel and related products was the respondent. This leaves no doubt in our minds that there were equipments necessary for the operation of the station. The only issue on this is whether it was the respondent who was the owner of the equipments. While the respondent is maintaining that they (i.e. four fuel tanks, three pumps and an electric generator) were theirs, the appellant on the other hand is contending that the four fuel tanks and three pumps were the property of BP.

The appellant does not say who was the owner of the electric generator but impliedly denies its existence. Going by the evidence of PW2 it is evident that the four fuel tanks formerly were the property of BP but later they were taken over by the respondent in exchange with their tanks. As for the three pumps, there is evidence by the same witness that

they were installed by the respondent after BP had removed theirs. This was supported to some extent by DW2. There is also evidence by the same witness PW2 that the respondent installed an electric generator for the operation of the station.

As for renovation, additions and improvements, there is evidence by PW2 that the respondent did the following works:-

- Back filling and leveling
- Connection of pipes and calibration.

The state of affairs being as portrayed above, we accept the respondent's learned counsel's submission that Exh. D1 probably referred to other tanks and pumps, especially bearing in mind the anomalies which the learned counsel pointed out.

For these reasons we are respectfully in agreement with the learned trial judge's finding of fact that the respondent provided the equipments and did the above works for the operation of the station.

There is a complaint by the appellant on the absence of Annextures 1 and 2. We will deal with this later.

Coming to grounds Nos. 5 and 6 the appellant's complaint is that, the respondent refused to accept cheques

from the appellant and insisted on prior payment thereby breaching a term of the contract which provided for a one month credit facility. But the totality of the evidence points to only one cheque which was turned down which had less amount on the pretext that the appellant had set off some amount which it was claiming against the respondent for some other business transactions. That refusal was justified as it will become apparent later. There is nothing in the record suggesting that the appellant reduced the one month credit facility. There is nothing to fault the learned trial judge's finding on this.

There is no dispute that from around July/August, 2003 the appellant ceased to order supplies of fuel and related products from the respondent and resorted to other suppliers, precisely CALTEX. In its letter Exh. P2 the appellant did not say why it ceased to order the same from the respondent and resorted to other suppliers. Instead the appellant threw the ball to its advisor, a Mr. P.F. White who was by then out of the country.

The appellant never clarified even when Mr. White was back in the country. That being the case, it is apparent that, although the respondent was not the sole supplier but merely the main supplier, yet where the respondent was ready and willing to supply but the appellant ceased to present its orders for no good ground, the appellant

breached the terms of clauses 1 and 5. This answers the appellant's complaint in ground No. 7.

Grounds Nos. 8 and 9 refer to ownership of the four fuel tanks and three pumps, and the justification or otherwise of their use value. We have already found that the same belonged to the respondent. The use value of the same was clarified by PW2 in his evidence. We have nothing to fault the learned trial judge's finding on this.

In ground No. 10 the appellant's complaint is that, the learned trial judge erred in law and in fact in finding that the appellant had no claim against the respondent entitling the appellant to a right of set off. Admittedly, the appellant had pleaded right of set off to the tune of Shs. 4,339,225/17 in paragraph 11 of the Amended Written Statement of Defence. Even PW2 in his evidence admitted the respondent to be indebted to the appellant for some claims, although he did not specify the amount. The issue here is not whether the respondent is indebted to the appellant or whether the appellant has a right of set off. The issue here is whether the right of set off was properly pleaded.

The law on pleadings allows a defendant to raise a claim of set off in his written statement of defence. But there are conditions which must be complied with as provided for under order VIII Rule 6 (1) of the Civil procedure

Code, 1966. For ease of reference we hereby reproduce the said provision:

> Order VIII Rule 6 (1): Where in a suit for the recovery of money the defendant claims to set off against the plaintiff's demand any ascertained sum of money legally recoverable by him from the plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character a they fill in the plaintiff's suit, the defendant may, within period of twenty-one days of being served with the summons, present a written statement containing the particulars of the debt sought to be set off.

Mogha's Law of Pleadings with Precedents – Fourteenth Edition – Eastern Law House page 322 is also very relevant on how a claim for set off should be. It says:-

> "A claim for set off must --- give all the particulars of the set off, the amount

> claimed, the cause of action for the amount, the person to whom and by whom it is due and the date of which it became due."

In the instant case the alleged set-off was not particularised in the manner envisaged by the above provision. In that respect we fully agree with the learned trial judge in rejecting it for not being properly pleaded.

Lastly is ground No. 11 in which the appellant is blaming the respondent for the breach of the contract for refusing to accept cheques, failure to supply fuel, reducing the one month credit facility and for failure to annex annextures 1 and 2 to Exh. P1. We have already expressed our view on the alleged refusal to accept cheques, failure to supply fuel and reducing the one month credit facility. We think it would be of no practical value to go all over them again. As for failure to annex the above annextures, it is common ground that, indeed they were not annexed. Annexture 1 referred to a list of necessary equipments required to run and operate the station which the respondent was required to supply and install at its own costs and expenses. Annexture 2 referred to renovations, additions and improvements the respondent was required to make at its own expenses. We have already found as a fact that the four fuel tanks, three pumps and the electric generator belonged to the respondent. We have also found as a fact

that some renovations were made as demonstrated earlier. It is also common ground that the station operated for a period of three years. That being the case we are inclined to hold that the respondent supplied the necessary equipments for the operation of the station and made the necessary renovation. Had this not been the case the station wouldn't operate and the appellant wouldn't have remained mum. He would definitely have complained. There is nothing suggesting that the appellant took issues with the respondent on the matter. At any rate, it is our considered view that failure to annex those annextures did not affect the supply of fuel and related products, and the respondent cannot be held responsible for the breach of the contract for the failure.

On the contrary, for the reasons stated, and for the undisputed fact that the appellant terminated the contract without the requisite three months notice, we agree with the learned trial judge that it was the appellant which breached the contract, and was rightly ordered to pay the respondent what the respondent would have earned had the contract been performed to the end.

In the result, and for the reasons stated, we dismiss the appeal with costs.

DATED at DAR ES SALAAM this 27th day of July, 2006.

J.A. MROSO
JUSTICE OF APPEAL

J.A. MSOFFE
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR