IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., NSEKELA, J.A., And OTHMAN, J.A.)

CIVIL APPEAL NO. 113 OF 2008

HOTEL TRAVERTINE LIMITED ..... APPELLANT
VERSUS
M/S GAILEY & ROBERTS LIMITED .....RESPONDENT

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

(Kaijage, J.)

dated the 25th day of August, 2008
in
Civil Case No. 120 of 2003

JUDGMENT OF THE COURT

4 February, 2009 & 5 June, 2009

NSEKELA, J.A.:

The appellant, Hotel Travertine Limited, entered into a contract with the respondent, M/s Gailey & Roberts Limited for the purchase of a caterpillar 3406 TA – CANOPY at the purchase price of 32,000 Euro. The country of origin of the equipment was the United Kingdom. It was the case for the appellant purchaser in the High Court, that the appellant paid advance payment of US$ 25,000 but the respondent failed to supply the generator according to the agreed upon description in the sale agreement. The respondent

supplied a generator which did not answer the contract description. The High Court (Kaijage, J.) agreed with the appellant and awarded, *inter alia*, Shs. 50 million as general damages; Shs. 100,000/= special damages and ordered a refund of US$ 25,000 with interest to the appellant. The appellant was dissatisfied with this decision and has preferred this appeal. The respondent on its part has cross-appealed.

The appellant who was represented by Professor Mgongo Fimbo, learned advocate, lodged a four point memorandum of appeal which provides –

> 1. *The learned trial judge erred in law in ordering refund of the purchase price of a new generator, Model Caterpillar 3406 TA Canopy 350 KVA/240 eKW standby rating and in failing to order specific performance of the contract to supply the said new generator.*
>
> 2. *The learned trial judge erred in law in classifying the appellant's claim for lost income as special damages and in failing*

to award appropriate damages as claimed.

3. *The learned trial judge erred in law in failing to award punitive damages against the respondent.*

4. *The learned trial judge erred in law in ordering return to the respondent of two generators, 320 KVA prime rating generator and 175 KVA.*

The respondent preferred five grounds in the cross-appeal, namely –

1. *The learned trial judge erred in law by forming a scientific/engineering opinion and holding that there is a distinction between a 320 KVA/256 eKW standby rating generator without the assistance of an expert witness.*

2. *The learned trial judge erred in law and in fact by disregarding the opinion of the only expert, namely DW1 and DW2 called to explain whether or not there is a*

distinction between a 320 KVA/256 eKW prime rating generator and a 350 kva/240 eKW standing rating generator.

3. *The learned trial judge erred in law and in fact by disregarding the evidence of PW1 and holding that the canopy fitted in Egypt was not within the specification of the order made by the appellant.*

4. *The learned trial judge erred in law and in fact by awarding general damages without any legal or factual basis.*

5. *In the alternative and without prejudice to the foregoing ground of appeal, the learned trial judge erred in awarding general damages which are so inordinately high as to be wholly erroneous because* ***inter alia****, the learned trial judge had in his assessment of the said damages, failed to take into consideration evidence of the fact that the appellant had remained in possession of the respondent's two generators, 320 KVA prime rating and 175 KVA prime rating for a period exceeding 5 years."*

Professor Fimbo, on the first ground of appeal, strongly contended that the learned trial judge erred in ordering a refund of the purchase price of a new generator. He argued that what the appellant wanted was the delivery of the generator that he had contracted to purchase from the respondent. Simply put, he wanted specific performance of the agreement. He added that the respondent did not deliver the generator. As a consequence of this non-delivery the appellant has lost income calculated at Shs. 2 million per day from 1st January 2003 to the time a new generator is installed. Professor Fimbo further submitted that the respondent did not dispute the fact that there was late-delivery of the generator, which in any case, did not answer the contract description. For instance, the canopy was manufactured in Egypt instead of the United Kingdom. Without much enthusiasm, Professor Fimbo submitted that if the respondent cannot deliver the contractual generator, then the respondent should pay the current market price of the generator as damages to be determined by the High Court.

On the second ground of appeal, Professor Fimbo submitted that the appellant did not classify damages as special damages. The loss of expected income was unknown when the suit was instituted. It was unnecessary, he added, to mention Shs. 2 million, citing the case of **Cooper Motor Corporation Limited v Moshi/Arusha Occupational Health Services** [1990] TLR 96. As regards the fourth ground of appeal, the learned advocate submitted that the appellant did not plead that the generator be returned to them. They prayed for specific performance of the contract in terms of section 53 of the Sale of Goods Act, Cap. 214 RE 2002 (the Act).

The cross-appeal had five grounds of appeal. The first three essentially concerned whether or not there was a breach of the description in the generator that was supplied to the appellant and rejected. The fourth and fifth grounds of appeal related to the question of damages. With deep conviction Ms Fatma Karume, learned advocate for the respondent, submitted that although the respondent delivered to the appellant a 320 KVA 256 EKW prime rating generator, it was the same as a 350 KVA/240 eKW standby

rating. For this submission, the learned advocate relied on the testimony of DW1 James Sele and DW2 Ayman Ezz-El-Din whom she referred to as expert witnesses. She added that the learned trial judge was not justified in rejecting expert evidence. She conceded however that the canopy originated from Egypt.

On the question of damages, the learned advocate complained that the learned trial judge awarded general damages without any basis at all. The amount of Shs. 50 million awarded as general damages were not pleaded and that there was no evidence adduced as to how the amount was arrived at. At best, since general damages were not pleaded and that there was no evidence adduced as to how the amount was arrived at. Only nominal damages, if at all, should be given.

For the sake of convenience, a good starting point in the disposal of this appeal and cross-appeal is exhibit P8, dated 31.10.2002. It was addressed to the appellant. It reads in part as follows –

"Dear Sir,

Quotation

Gailey & Roberts Limited are pleased to offer the following quotation for your consideration

PRICE:	*Price CFR Dar es Salaam*
Model:	*Caterpillar 3406 TA – CANOPY*
Description:	*Output at 50 Hz, 400 Volts, 3 phase, 1500 kVA/240 eKW standby rating*
Amount EURO:	*32,000*
Country of Origin:	*UK*
Delivery:	*7 to 8 weeks from date of your confirmation*
Validity:	*.....*
Payment Terms:	*1) EU 10,000 with the order, 10,000 on delivery, the remaining balance of EU 13,000 in 4 months time.*
	2) 10% cancellation fee is charged in the event on Customer canceling the order."

DW1 James Sele an employee of the respondent testified as follows –

> *"The Generator we supplied him has the capacity to supply 350 KVA as per his order. The said Generator has a name plate which shows the specification. Thereon it is written 320 KVA prime-rated plus 10% overload."*

Then he added –

> *"The said generator was imported from England. A generator has three main components – an engine, an alternator and these were made in the country of origin, England. The generator whose order was made by plaintiffs had a further specification a canopy and this reduces sound. The said Generator was then moved from England and taken to Egypt to manufacture the Canopy. The canopy manufactured in England is different from that made in Egypt."*

Section 15 of the Sale of Goods Act, Cap. 214 RE 2002 (the Act) provides as follows –

> *"15. Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall*

> *correspond with the description; and if the sale is by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description."*

The essence of the first part of section 15 of the Act is to the effect that the goods must correspond with the description. The test applied by the Court to determine whether or not the goods correspond with the description is a strict one. In the case of **Arcos Limited v EA Ronaasen & Son** [1933] AC 470 at pages 479 – 80 Lord Atkin stated thus –

> *"If a written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard. Still less when you descend to minute measurements does ½ inch mean about ½ inch. If the seller wants a margin he must and in my experience does stipulate it ..... No doubt there may be microscopic deviations which businessmen and therefore lawyers will*

> *ignore ..... But apart from this consideration the right view is that the conditions of the contract must be strictly performed. If a condition is not performed the buyer has the right to reject."*

From the respondent's own witnesses, DW1 and DW2 the generator that was supplied to the appellant did not answer the description in exhibit P8. In effect both DW1 and DW2 testified that the generator supplied was **"just as good"**. Furthermore, the canopy was manufactured in Egypt and not the United Kingdom. The fact of the matter is that the generator supplied to the appellant did not answer the description in exhibit P8. This was certainly a breach of the contract between the parties. The learned trial judge in his considered judgment found that the generator that the respondent supplied to the appellant did not correspond with the description contained in exhibit P8. This being a first appeal, we have examined the evidence of PW1 J. Lamba, DW1 and DW2 and cannot fault the finding of the learned judge on this point. We are settled in our minds that the agreement between the appellant and the respondent was a sale by description in terms of section 15 read

together with section 2 (1) of the Act which defines **"specific goods"** –

> *"goods identified and agreed upon at the time a contract of sale is made."*

We therefore dismiss grounds 1, 2, and 3 of the cross-appeal.

We now come to the first ground of appeal. The appellant has challenged the Court's order that US$ 25,000 be paid back to him instead of the court ordering specific performance of the agreement. The learned judge, in our view, correctly came to the conclusion that there was a breach of contract by the respondent. The question that follows is what are the consequences that follow from such breach? This takes us to section 52 of the Sale of Goods Act which provides –

> *"52 (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.*
>
> *(2) The measure of damages is the estimated loss directly and naturally*

> *resulting in the ordinary course of events from the seller's breach of contract.*
>
> *(3) Where there is an available market for the goods in question the measure of damages is* ***prima facie*** *to be ascertained by the difference between the contract price of the goods at the time or times when they ought to have been delivered or, if no time was fixed, at the time of the refusal to deliver."*

The guiding principle in assessing damages is to award the plaintiff an amount of money that will, as nearly as money can, put him in the same position as if he had not been injured by the wrongful act of the defendant. In the case of **Surrey County Council and Another v Bredero Homes Limited** [1993] 1 WLR 1361 Steyn L.J. said at p. 1369 –

> *"An award of compensation for breach of contract serves to protect three separate interests. The starting principle is that the aggrieved party ought to be compensated for loss of his positive or expectation interests. In other words, the object is to put the*

aggrieved party in the same financial position as if the contract had been fully performed. But the law also protects the negative interest of the aggrieved party. If the aggrieved party is unable to establish the value of a loss of bargain he may seek compensation in respect of his reliance losses. The object of such an award is to compensate the aggrieved party for expenses incurred and losses suffered in reliance on the contract. These two complementary principles share one feature. Both are pure compensatory principles. If the aggrieved party has suffered no loss he is not entitled to be compensated by invoking these principles."

Under section 52 (3) of the Act, when the seller fails to deliver the goods, the measure of damages for non-delivery is the difference between the market price of the contracted goods at the time fixed for delivery and the contract price. This formulation has its origin in the celebrated case of **Hadley v Baxendale** (1854) 9 Ex 341.

Professor Fimbo, learned advocate for the appellant, forcefully submitted that the appellant did not ask for a refund of the purchase

price, but the delivery of generator which he had contracted to purchase from the respondent. The appellant wanted specific performance of the agreement. With equal force Ms Fatma Karume resisted that the agreement be specifically performed. She submitted that the remedy of specific performance is discretionary. If damages form an adequate remedy, this will be sufficient.

This takes us to section 53 (1) of the Act. It provides as follows –

> *"53 (1) In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages."*

Section 53 (1) above confers a discretion upon the court to decree specific performance to a contract **"to deliver specific or ascertained goods."** The weight of authority shows that specific

performance will rarely be ordered where the goods to be supplied are **"ordinary articles of commerce"** which the buyer could obtain from elsewhere. **In re Wait** [1927] 1 Ch 606 at page 630 Lord Atkin said –

> *"Speaking generally, courts of equity did not decree specific performance in contracts for the sale of commodities which could be ordinarily obtained in the market where damages were a sufficient remedy."*

There was no evidence adduced before the trial court that the generator in question had any special value or interest or unique. In the case of **Whiteley, Ld v Hilt** [1918] 2KB 808 at page 819 the Court stated –

> *"The power vested in the Court to order the delivery up of a particular chattel is discretionary, and ought not to be exercised when the chattel is an ordinary article of commerce, and of no special value or interest, and not alleged to be of any special value to the plaintiff, and where damages would fully compensate."*

In Socuete Des industries Metallurgies SA v The Bronx Engineering Company Limited [1975] I Lloyds Law Reports 465, the Court of Appeal refused specific performance of a contract to supply a machine weighing 220 tons and costing £ 287,500 even though it would take nine months for a replacement to be manufactured. The Court observed that the Court does not decree specific performance where the commodity is one which can be ordinarily obtained in the market because is such a case damages are a sufficient remedy. With all due respect to Professor Fimbo, learned advocate, we decline the invitation to order specific performance. The first ground of appeal collapses.

However, this is not the end of the matter. Both Professor Fimbo and Ms Fatma Karume, learned advocates, submitted at some length and on the question of damages. This issue is particularly reflected in ground four and five in the respondent's cross-appeal. The trial Court having found and correctly so in our view, that the respondent was in breach of its contractual obligation to the appellant, should have proceeded on to consider the applicability of

section 52 of the Sale of Goods Act (the Act) reproduced earlier on in this judgment. The respondent failed to deliver the generator to the appellant. Thus the appellant's damages for non-delivery *prima facie* would be the difference between the contract price and the market price for similar goods on the date when the generator should have been delivered. The decisive element is the date of breach and the market price prevailing on that date. In the case of **Johnson and Another v Agnew** [1980] AC 367 at page 400H Lord Wilberforce made the following pertinent observations –

> *"The general principle for the assessment of damages is compensatory i.e. the innocent party is to be placed so far as money can do so, in the same position as if the contract had been performed. Where the contract is one of sale, this principle normally leads to assessment of damages as at the date of breach – a principle recognized and embodied in section 57 of the Sale of Goods Act 1893.* ***But this is not an absolute rule: if to follow it would give rise to injustice, the Court has power to fix such other date***

> ***as may be appropriate in the circumstances .....***
>
> *In cases where a breach of contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would appear to me more logical and just rather than tie him to the date of the original breach, to asses damages as at the date when (otherwise than by his default) the contract is lost."* (emphasis added).

Under normal circumstances, the market price concept as embodied in section 52 (3) of the Act and as explained since **Hadley v Baxendale**, above, should be invoked in the assessment of damages. However in certain circumstances, as lucidly explained by Lord Wilberforce in **Agnew's** case, to follow the market price concept on the breach date would give rise to injustice to the appellant.

In the case of **Aronson v Mologa Holzindustric A/G Liningrad** [1927] XXXII Commercial Cases 276, Atkin L.J. quoted

the following passage from **"Sedgwick on Damages"** 7th edition page 552 –

> *"We have first to consider the cases arising from the failure of the seller to perform his agreement. When contracts for the sale of chattels are broken by the vendor failing to deliver the property according to the terms of the bargain, it seems to be well settled as a general rule both in England and in the United States that the measure of damages is the difference between the contract price and the market value of the article at the time when it should be delivered, upon the ground that this is the plaintiff's real loss and that with this sum he can go into the market and supply himself with the same article from another vendor."*

And at page 560, the learned author stated –

> *"But a different case is presented where the purchaser has paid the price in advance ..... and here it has been insisted that the purchaser is not to be limited to the value of*

the article at the time of delivery but shall have the advantage of any rise in the market value of the article which may have taken place up to the time of the trial; and on this point different and conflicting decisions have been made. In England and in New York the latter rule is laid upon, the ground that the purchaser, having been deprived of the use of his property, is entitled to the best price he could have obtained for the article up to the time of settlement of the question."

The appellant had already made advance payment of US$ 25,000 but the respondent has failed to fulfil his part of the bargain to date. The appellant should therefore have the advantage of any rise in the market price which may have taken place up to the time of trial.

In view of what we have said on the assessment of damages, we direct that in terms of Rule 34 (1) (b) of the Court of Appeal Rules, the trial court take additional evidence from the litigants limited on the current market price of the generator described in

Exhibit P8 and assess damages at this sum less the refund of US$ 25,000 as ordered by the High Court.

We therefore dismiss the cross-appeal in its entirety with costs. For different reasons we allow the appeal to the extent explained above. Each party to bear its own costs.

DATED at DAR ES SALAAM this 1st day of June, 2009.

E. N. MUNUO
JUSTICE OF APPEAL

H. R. NSEKELA
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

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

P. A. LYIMO
DEPUTY REGISTRAR