IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MSOFFE, J.A., OTHMAN, J.A. And MASSATI, J.A.)

CIVIL APPEAL NO. 119 OF 2004

1. NATIONAL INSURANCE CORPORATION (T) LIMITED
2. CONSOLIDATED HOLDING CORPORATION ..... APPELLANTS

VERSUS

CHINA CIVIL ENGINEERING
CONSTRUCTION CORPORATION ..... RESPONDENT

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

(Kimaro, J.)

dated the 23rd day of April, 2004
in
Commercial Case No.6 of 2003

JUDGMENT OF THE COURT.

17th February & 30th March, 2010

OTHMAN, J.A:

This appeal arises from the decision of the High Court of Tanzania, Commercial Division (Kimaro, J. as she then was) in Commercial Case No. 6 of 2003. Therein, the respondent, (i.e. plaintiff) China Civil Engineering Corporation in an action for breach of contract sought Tz Shs.84,281,461/32 from the 1st and 2nd appellants, respectively, National Insurance Corporation (T) Ltd (N.I.C) and Consolidated Holding Corporation (i.e.defendants), that

sum representing unpaid charges for services it rendered in the rehabilitation of a building, N.I.C Investment House.

The High Court, on 23.04.2004 entered judgment for the respondent in the sum of Tz shs 84,281,461/32; granted it: (a) interest at "current commercial rate from the date when the debt fell due till date of judgment" and (b) interest at the court rate of 7% from date of delivery of the judgment until final satisfaction. The challenge on this appeal is on the award of the former interest.

The sole ground of appeal in the appellants' memorandum of appeal filed on 31.08.2004 reads:

> *"The learned trial judge erred in law and fact in awarding interest on the Principal amount prior to the filing of the suit which interest was not pleaded, prosecuted and proved and further erred when she awarded the same on an unspecified rate."*

In this appeal, the appellants are represented by Mr. Samson Mbamba, learned Counsel and the respondent is represented by Mr. Amour Khamis, learned Counsel.

Mr. Mbamba essentially submitted that the claim for interest from the date when the payment fell due till the date of the

filing of the suit as a matter of substantive law had to be pleaded as arising out of a statutory provision, contract or trade usage. It was not. He relied on **Francis Andrew v Kamyn Industries (T) Ltd.** (1986) T.L.R. 31 (H.C.) and **Yusuf Abdallah v French Somaliland Shipping Co.** [1959] E.A.25. It was also not a matter of discretion by the Court. He pointed out that the respondent had only tagged the interest it sought in the relief clause of the plaint. It was not pleaded in the body of the plaint as required by law.

That apart, Mr. Mbamba submitted that as section 29 of the Civil Procedure Code, Cap 33 R.E. 2002 does not prescribe a rate of interest for the period prior to the filing of the suit, again as a matter of substantive law such interest if desired must have been pleaded and proved. Unpleaded and unproved, it could not have been awarded by the High Court as a relief. He relied on the statement of the Court in **Kombo Hamis Hassan v. Paraskeyoulous Angelo,** Civil Appeal No. 14 of 2008 that it was trite law that as a general rule relief not founded on the pleadings should not be granted. He also faulted the learned Judge for not specifying in the judgment and decree the exact rate of interest she awarded the respondent as the commercial rate of interest.

On his part, Mr. Khamis submitted that interest, from the date the payment fell due till the date of judgment was pleaded in paragraph 12 of the plaint read together with Annexture ASK-6

referred to therein, which is a Demand Note dated 10.08.2003 from M. Ismail & Co. Advocates to the 1st appellant demanding, apart from the unpaid principal sum of Tz shs 84,281,461/32, interest at 29% per annum (p.a.) on that amount from the date when payment fell due till payment in full. Interest, therefore, was a part and parcel of the pleadings. The Demand Note admitted without objection as Exhibit P.6 constituted proof.

Mr. Khamis submitted that the issue of interest was also exhaustively prosecuted in the evidence of PW1 (Shi Yuan) and Mr. Mbamba's re-examination of DW1 (Jerry Masaga), and had been widely covered in the respondent's final submissions. The learned Judge had properly dealt with it in the judgment.

Relying on **Said Kibwana and General Tyre E.A. Ltd v Rose Jumbe** (1993) T.L.R. 175, Mr. Khamis went on to submit that as the determination of the rate of interest was at the discretion of the learned trial Judge there was no requirement for it to be proved. In any event, the respondent had proved that the prevailing commercial rate of interest was 29% p.a. When the decree is viewed in the light of the judgment read as a whole, it shows that interest at 29% p.a. was decreed.

In rejoinder, Mr. Mbamba submitted that the Demand Note, (Exh.P.6), neither contained the basis on which the interest was

claimed nor did it constitute evidence to establish that the respondent was entitled to it. The requirement for it to be pleaded and proved could not have been dispensed with in the exercise of a discretion by the High Court.

The first question for determination by us is whether or not the interest at issue was pleaded? Now, paragraph 12 of the plaint filed on 15.01.2003 reads as follows:

> *"12. The defendants have admitted the plaintiff's claim for payments and there is no dispute as to the plaintiff's claims. But despite admissions, the defendants have failed to make any payments to the plaintiff hence lost the ground for arbitration in terms of Article 36 of the Agreement thereby giving way for a court action. Attached herewith is the copy of the ignored Demand Note marked ASK-6."*

Paragraph 2 of the Demand Note, admitted without objection as Exhibit – P6 reads:

> *"We further demand from you interest at the rate of 29% p.a. on the outstanding sum [i.e. Tz shs.84,281,461/32] from the date when*

payment was due till payment in full, or by way of damages."

The following reliefs, *inter alia,* were claimed:

(a) Tz shs. 84,281,461/32

(b) Interest on (a) above at rate of 29% p.a. from the date when payment was due to payment in full."

Upon close scrutiny of the pleadings in their totality, we would agree with Mr. Mbamba that the claim for the interest in controversy in this appeal was not particularised in the body of the plaint. The pleadings did not contain any material facts on which the respondent relied upon for claiming that interest as a relief. Moreover, as we shall highlight, the foundation on which the claim for interest ought to have stood was also not laid down in the pleadings. Mere reference to it in the Demand Note (Exh.P.6) could not have validly constituted the basis on which it was claimable in law.

Section 29 of the Civil Procedure Code does not deal with interest for the period upto the date of the suit. That is a matter of substantive law. In **Bengal Railway Co. v. Ruttanji Singh** AIR 1938,67, 70 where a similar issue arose, the Privy Council stated:

"The crucial question, however, is whether the Court has authority to allow interest for the period prior to the institution of the suit; and the solution to the question depends, not upon the Civil Procedure Code, but upon substantive law. Now, interest for the period to the date of the suit may be awarded, if there is agreement for the payment of interest at a fixed rate, or it is payable by the usage of trade having the force of law, or under the provisions of any substantive law entitling the plaint to recover interest ....." (See also, ***The Union of India v W. P. Factories,*** *A.I.R. 1966 S.C.395).*

Learned authorities are consistent and explicit that as a matter of substantive law, interest for the period prior to the date of the suit may be awarded if there is agreement, express or implied for payment of such interest, or it is payable by the usage of trade (see for e.g. **Harilal & Co. and Another v The Standard Bank Ltd.** [1967] E.A. 512, 516-517) or provided for under a statutory provision of the law entitling the plaintiff to recover interest, or arises out of a rule of equity (see, **Mulla, The Code of Civil Procedure,** Vol. I pp 312-313; **Sarkar, Code of Civil Procedure,** 11th Ed, pp. 282, 293; P.K. Majumdar, **Commentary on the Code of Civil Procedure,**

Vol. I, 5th Ed. p. 690). With no foundation of material facts having been laid by the respondent in the pleadings to establish the existence of any of the above state of circumstances which could have attracted a relief in the award of interest for the period upto the date of the suit, with respect, we do not see how the same could have been awarded by the High Court.

For the sake of argument, assuming that the interest was pleaded as strenuously argued by Mr. Khamis, the next question that immediately falls for determination is whether or not it was proved that the prevailing commercial rate of interest was at 29% p.a. The decree issued by the trial court reads:

> *"The plaintiff is granted interest at current commercial rate from the date when the debt fell due till date of judgment."*

Having carefully examined the record afresh, we are of the respectful view that the evidence was unsatisfactory to prove that the prevailing commercial rate of interest was at 29% p.a. The Demand Note (Exh. P6) in itself was grossly insufficient to establish that fact. It was even silent that that was the rate prevailing on 10.8.2002, the date the Demand Note was issued or for the matter was the rate on the date of final certification of the works carried out by the respondent (see, Exhibits P.2, P.3, P4). PW1 did not say

That apart, having carefully examined the record and bearing in mind the rival submissions by learned counsel there are two other issues relevant to the interest now being complained of that call for our attention. **First**, we would agree with Mr. Mbamba that in its decree issued on 23.04.2004, with respect, the High Court erred in granting the interest concerned at an unspecified rate. The terms of the decree does not disclose what is the exact rate the trial court determined as the current commercial rate of interest. This ran contrary to Order XX rule 6 (1) of the Civil Procedure Code in that the decree lacked the specific clarity required in the relief it had granted.

Second, by awarding interest from the date the debt fell due till the date of judgment, it erroneously consolidated two distinct periods (i.e. the period from the date payment fell due upto the date of the suit *and* the period from the date of filing the suit upto the date of the judgment), which are governed by different legal considerations in the award of the interest concerned. The former falls under substantive law, while the latter is in the discretion of the Court. All considered, we are satisfied that there is merit in the ground of appeal raised, which we uphold.

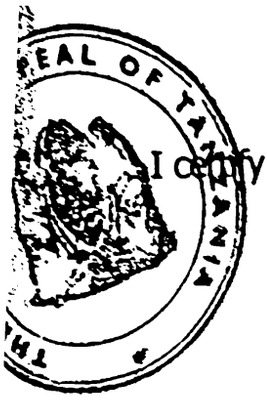
In the result and for all the above reasons, we allow the appeal with costs. Accordingly, the award of the interest to the respondent by the High Court in its decree, which is the subject of this appeal is hereby set aside. Otherwise, the rest of the decree stands.

DATED at DAR ES SALAAM this 25th day of March, 2010.

J. H. MSOFFE
JUSTICE OF APPEAL

M. C. OTHMAN
JUSTICE OF APPEAL

S. A. MASSATI
JUSTICE OF APPEAL



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

(J. S. MGETTA)
DEPUTY REGISTRAR