IN THE HIGH COURT OF TANZANIA

(COMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 146 OF 2017

TRANSCARE LOGISTICS LIMITED .....PLAINTIFF

VERSUS

MAWENI LIMITED LIMITED.....DEFENDANT

7/12/2018 & 5/02/2019

JUDGMENT

MWANDAMBO, J

The plaintiff who acts through Dr Masumbuko Lamwai learned Advocate has instituted the instant suit against the defendant for payment of TZS 384,504,294/= as balance due on account of freight charges for transportation of its goods under two contracts plus interest and costs. The suit has been resisted by the defendant in its written statement of defence filed through Frank Chacha learned Advocate.

The plaintiff's case is premised on the following facts. The plaintiff is a transporter providing transportation of goods to its customers. On 17th March 2017 the defendant contracted the plaintiff to transport 1,000 tons of clinker from Tanga to Dar es salaam at a freight charge of TZS 40,000,000/= payable with 18% Value Added Tax (VAT). That constituted the first contract made through a Local Purchase Order (LPO) dated 17th March 2017. There is little dispute that the plaintiff performed her part of the bargain by transporting the agreed quantity of clinker to the agreed destination. It is equally not in dispute that the plaintiff submitted

invoices regularly for the quantity of transported clinker for settlement but the defendant failed to settle them contrary to the plaintiff's understanding that the same would be settled within a maximum period of one month resulting into an accumulated amount of TZS 114,430,736/=. The plaintiff claims that instead, the defendant made payments as and when it felt convenient doing so on random basis. The second contract was oral and this involved transportation of coal from Songea to Tanga under which it performed its obligations as contracted and invoiced the defendant for the agreed freight charges amounting to a total of TZS 395,073,558. Out of the charges for both contracts, defendant paid only a sum of TZS 125,000,000/= leaving an amount of TZS 384,504,294/= still outstanding culminating into the institution of the instant suit for recovery together with interest at the commercial rate of 30% per annum compounded from the date the invoices were due till the date of judgment as per mercantile custom, interest on the decretal sum at the Court's rate of 11% per annum from the date of judgment till when payment is made in full, costs of the suit and any other relief the Court may deem fit.

The defendant entered appearance and filed its written statement of defence disputing the plaintiff's claims. Essentially, while denying having contracted the plaintiff to transport its goods, the defendant denies that the plaintiff transported the same as alleged. It is the defendant's case that it never agreed with the plaintiff for the payment of invoices within one month but admits having paid a sum of TZS 125,000,000/= to the plaintiff and contends that payment of the balance was subject to reconciliation and verification. At the end of it all, the defendant prays for the dismissal of the suit with costs.

Following failure of mediation, the plaintiff filed her respective witness statement as required by rule 49 (2) of the High Court (Commercial Division) Procedure Rules, 2012. The defendant defaulted in filing hers resulting into

depriving herself right to give evidence in defence. That means that the only evidence on record is that of the plaintiff's witness one Salmin Ahmed Mbaraka (PW1) through his witness statement as well as oral evidence adduced in cross examination and re-examination. During the final pre-trial conference, the Court (Mruma, J) framed the following issues for determination namely:

1. *Whether or not the defendant contracted the plaintiff to transport 1,000 tons of clinker from Tanga to its plant in Dar es Salaam.*
2. *If the answer to the first issue is in the affirmative, what were the terms of payment?*
3. *What is the amount due and payable to the plaintiff*
4. *To what reliefs are the parties are entitled.*

As seen earlier, the plaintiff prosecuted its case through a witness statement of Salmin Ahmed Mbaraka (PW1). In addition, PW1 tendered several exhibits particularly the purchase order, printer out of email communications and copies of invoices. PW1 was subjected to cross examination by the learned Advocate for the defendant. Most of PW1's evidence was an amplification of what the plaintiff had pleaded in the plaint which was not seriously disputed except on a few aspects particularly the time within which payment of invoices were to be paid and the amount outstanding and payable to the plaintiff which the defendant had disputed contending that that the same was subject to reconciliation and verification.

The substance of PW1's evidence was that the plaintiff had been contracted by the defendant to transport 1,000 tones clinker from Tanga to the defendant plant in Dar es salaam sometime in March 2017 at an agreed freight charge of Tshs.40,000,000/=. PW1 tendered a local purchase order originating from the defendant dated 17th March 2017 and the same was admitted as exhibit P1. It is the

PW1's evidence also that the plaintiff transported the coal as contracted and submitted invoices to the defendant for payment but the defendant did not settle the invoices as submitted and instead it chose to pay not in accordance with the invoices rather global amounts to reduce the outstanding liability. It is PW1's evidence that the accumulated charges for transportation of clinker amounted to TZS 113,430,736/=. To substantiate that amount, the witness made reference to a statement of account accompanying the invoices (exhibit P3) submitted to the defendant for settlement. Unlike transportation of clinker, PW1 did not tender any documentary evidence to support the engagement to transport coal from Songea to Tanga. However, PW1 produced invoices for the services rendered and the same were admitted as exhibit P6 collectively. Like payment for transportation of clinker, it was PW1's testimony that the trend of payment of the invoices was the same that is to say; the defendant paid global amounts without reference to any particular invoice. All in all, PW1's evidence was that out of an invoiced amount of TZS 395,073,558 for coal transportation, the defendant paid TZS 95,000,000/= only leaving a balance of TZS 300,073,558/=. That sum combined with the outstanding liability on clinker transportation costs amounted to TZS 384,508,294/= the plaintiff now claims in the suit plus compounded interest at the commercial rate of 30% per annum from the date the invoices were due to the date of judgment per mercantile custom. However, PW1 was too economic with details as to the date each invoice was due for payment as well as the mercantile custom justifying payment of commercial interest of 30% per annum.

After the conclusion of hearing, Dr. Lamwai learned Advocate filed closing submissions in which he implores the Court to find and hold that the plaintiff has sufficiently proved its case and so judgment should be entered as prayed. I must state at this juncture that admittedly, the defendant did not adduce any evidence to disprove the plaintiff's case. However, absence of the defence evidence does not

necessarily give the plaintiff an easy walk. The plaintiff has to discharge his burden of proof on the required standard on all issue to be entitled to judgment. I expressed similar views in several cases conducted ex parte and I think those views are relevant in this case(see: **National Bicycle Company Limited vs. Shanghai Phoenix Company Limited,** Civil Case No. 58 of 2010 and **National Microfinance Bank Plc. v Zawadi Msemakweli,** Civil case No 111 of 2014(both unreported) . I will thus determine the case on that basis.

The first issue seeks to answer whether the defendant contracted the plaintiff to transport 1000 tons of clinker from Tanga to its plant in Dar es Salaam. Dr. Lamwai has addressed the Court on an issue which is reads: *"whether the plaintiff performed his duty of transporting clinker and coal the plaintiff's plaints in Tanga and Dar es Salaam as per the local purchase orders from the Defendant."* With unfeigned respect the Court did not frame that issue and so I will not consider the submissions based on a wrong issue. Going by the pleadings and evidence on record, there is hardly any controversy that the defendant contracted the plaintiff to transport 1,000 tons of clinker from Tanga to Dar es Salaam at the agreed freight charge of Tshs.40,000,000/= plus 18% VAT as evidenced by exhibit P1.

Although the defendant denied existence of such contract in her written statement of defence, the denial was too evasive to constitute a defence and so in terms of Order VIII rule 5 of the Civil Procedure Code, Cap 33 [R. E 2002] the defendant is deemed to have admitted the existence of the contract through exhibit P1. At any rate the defendant has not denied liability on the invoices submitted to her and indeed admits having paid some amount out of the total outstanding liability. Without further ado, the answer to the first is in the affirmative and that answer covers both contracts regardless of the fact the first issue was framed on the basis of clinker only without the other contract for coal transportation. Looking

at paragraph 6 and 7 of the plaint which has not been specifically denied by the defendant in her written statement of defence coupled with the unchallenged testimony of PW1 I hold that that the defendant contracted the plaintiff for the transportation of coal from Songea to Tanga. That aside, the defendant has admitted the existence of the contract by payment of TZS 95,000,000/= of invoiced amount and so I find and hold that the plaintiff has discharged her burden of proof in relation to the existence of the contracts for transportation of both clinker and coal. The second issue relates to the terms of payment. Once again Dr. Lamwai addressed the Court on a different issue that is to say; whether the defendant paid the plaintiff the cost of transportation as in issue no. 1 above and in what sum.

The issue as framed by the Court is, if the answer to the 1st issue is in the affirmative what were the terms of payments. The plaintiff's case is that it was agreed that payment was to be made within a maximum of one month. However, the local purchase order (exhibit P1) forming the contract for transportation of clinker is silent on the terms of payment neither are the invoices for the clinker as well as coal. The defendant has specifically denied at para 4 of her defence any agreement on the payment of invoices within a maximum of one month and so the burden of proof of the existence of that agreement lies on no other party than the plaintiff. Unfortunately that evidence is too general to attract a positive finding. However, it is plain from the documentary evidence through invoices that the plaintiff is registered as a taxable person for the purposes of the Value Added Tax Act, Cap 148 [R.E 2002]. Such a person is by virtue of section 26 (1) of the said Act required to lodge returns with the Commissioner For Value Added Tax within the accounting period which is one month failing which he risks payment of fine prescribed under section 27 of the Act. Based on the foregoing, I hold that notwithstanding the absence of express agreement on the time of payment of the invoices, there was an implied term that payments will be made within a maximum

of one month and I so hold. Having so held, I now turn my attention to the third issue which reads: what is the amount due and payable to the plaintiff by the defendant.

Admittedly I have had difficulties in reconciling the figures reflecting the amount due in relation to transportation of clinker in the light of exhibit P1. It is plain from the plaint as well as PW1's testimony that the defendant contracted the plaintiff to transport 1000 tons of clinker for Tshs.40, 000,000/= per exhibit P1. However, according to para 4 of the plaint the plaintiff alleges that the total freight charges accumulated to TZS 114,430,736/= way beyond the contractual sum of TZS 40,000,000/= plus VAT for transporting 1000 tons of clinker from Tanga to Dar es Salaam. It has not been shown that there was another agreement besides exhibit P1. I note however from the statement of account that the amount is inclusive of interest on the overdue invoices. That may be so but in the absence of any express agreement to that effect it is hard to come to a conclusion as the plaintiff does that the amount stated represents a correct amount due. The defendant has admitted having paid a sum of TZS 125,000,000/= which covers payment for transportation of clinker and coal. On the other hand the plaintiff admits to have been paid a sum of TZS 95,000,000/= from the outstanding amount for transportation of coal. That means that the amount paid on account of freight charges for transportation of clinker is TZS 30,000,000/= leaving a balance of TZS 10,000,000/= exclusive of VAT and interest (if any).

As for the amount due on transportation of coal, there is hardly any dispute that the plaintiff invoiced an total amount of TZS 395,075,558/= out of which the defendant paid a sum of TZS 95,000,000/= leaving a balance of TZS 300,073,558/=. I hold therefore that the amount due and payable to the plaintiff by the defendant is TZS 310,073,558/= exclusive of interest (if any) and that disposes of issue number 3.

Lastly on the reliefs. Having determined the amount due when answering the third issue, I have no difficult in entering judgment for the plaintiff in the sum of TZS 310, 073,558/=. As to interest on the principal sum, the plaintiff claims compounded interest per annum from the date each of the invoices became due to the date of actual payment as per mercantile custom. However, apart from the general assertion that the plaintiff is entitled to interest claimed, there is no evidence of the application of mercantile custom in this case. The basis for claiming interest prior to institution of suits was underscored by the Court of Appeal in **National Insurance Corporation and Another vs. China and Engineering Construction Corporation,** Civil Appeal No. 119 of 2004 (unreported) in which the High Court had awarded interest prior to the institution of the suit. The Court of Appeal declined to uphold the award because it found no evidence or material to support the same. The highest appellate Court stated that the claim of interest is a matter of substantive law or by express agreement or payable by usage or trade having the force of law. The position here is that there is only a claim that interest is payable in the manner claimed by mercantile custom without more. The plaintiff who claims such interest should have led evidence on the application of mercantile custom to the claim under consideration to justify that claim. As the evidence is conspicuously wanting I am constrained to decline granting that relief.

The other relief sought is interest on the decretal sum at the Court's rate of 11% per annum. Order XX rule 21 (1) of the Civil Procedure Code gives power to the Court to award interest at the rate of 7% per annum from the date of judgment until satisfaction of the judgment debt or such other rate not exceeding 11% as the parties may expressly agree in writing before or after the delivery of judgment. No such express agreement has been tendered to justify a rate of interest in excess of 7% per annum and so I will not award the rate claimed by the plaintiff. I will award

interest on the decretal sum at the rate of 7% per annum from the date of judgment till final satisfaction.

In the upshot, judgment is entered for the plaintiff on the following reliefs:

1. Payment of the principal sum of TZS 310,073,558/=
2. Interest on the decretal sum at the Court's rate of 7% per annum from the date of judgment till full and final satisfaction.
3. Costs of the suit.

Order accordingly.

Dated at Dar es Salaam this 5th day of February 2019

L.J.S. MWANDAMBO

JUDGE