IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KENTE, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 72 OF 2020

SIMBA MOTORS LIMITED.....APPELLANT

VERSUS

1. **JOH ACHELIS & SOHNE GMBH .....1ST RESPONDENT**
2. **NIKO INSURANCE (T) LIMITED .....2ND RESPONDENT**

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

(Makaramba, J)

dated the 5th day of December, 2011
in
Commercial Case No. 24 of 2009

JUDGMENT OF THE COURT

2nd & 24th May, 2022

MAKUNGU, J.A.

The appellant, Simba Motors Limited lodged this appeal on 3rd April, 2020 challenging the judgment and decree of the High Court of Tanzania, Commercial Division, (the trial Court), (Makaramba, J as he then was) dated 5th December, 2011 in Commercial Case No. 24 of 2009.

The brief facts leading to this appeal as found in the trial court's record may be briefly summarized that, the 1st respondent won a tender to supply the Zanzibar Municipal Council, inter alia, with seven (7) TATA Trucks of the

specification basic on chassis Model LPT 1615/42TC. The 1st respondent contacted the appellant who was the then TATA dealer in Tanzania over the tender. On 30th March, 2006, the appellant issued a proforma invoice to the 1st respondent for the supply of the seven (7) TATA Trucks, CPT Zanzibar, for the sum of USD. 400,500 to be delivered within 16 weeks from receipt of full payment and order. On 13th July, 2006 the 1st respondent confirmed the order via Order No. 442. 8449 (Exhibit P2 page 471).

On 7th August, 2006 the appellant informed the 1st respondent through email stating that she cannot supply the ordered Trucks anymore because they were no longer in production (exhibit P4 pg 476), but it would however supply a successor Model LPT 1518. The 1st respondent confirmed the acceptance of the replaced model. Later on the appellant asked the 1st respondent not to proceed with the opening of a Letter of Credit (LC) until the appellant sends the 1st respondent the delivery period and shipment confirmation (exhibit 5 pg. 481).

Following the defects in TATA Model LPT No. 1518, on 14th November, 2006 the appellant communicated to the 1st respondent that it would supply the Trucks ordered originally, Model LPT 1615. The appellant promised to deliver five Trucks by the end of February, 2007 and two Trucks by the end

of March, 2007. The 2nd respondent issued an advanced payment bond standing as a surety for the down payment to be made by the 1st respondent to the appellant. The 1st respondent made the down payment of USD 120,150.00 to the appellant, and the appellant undertook to deliver the Trucks in time. Between 12th & 26th February, 2007 the 1st respondent made several inquiries regarding the appellant's shipment details to no avail.

On 23rd January, 2007 the appellant asked the 1st respondent to amend the beneficiary of the contract in the Letter of Credit in the name of TATA ZAMBIA LIMITED. TATA ZAMBIA LIMITED asked the 1st respondent to contact Mr. A.S. Rangan of TATA Automobile Corporation, South Africa for details. On 15th March, 2007, the 1st respondent received an e-mail from Mr. Rangan of TATA Automobile Corporation, South Africa stating that the appellant had never ever placed any valid order with TATA India.

Following those exchanges, on 22nd May, 2007 the 1st respondent then cancelled the order for the supply of the seven TATA Trucks and requested the appellant to reimburse the down payment of USD 120,000.00 plus 5,857.31 as interest from the date of payment and future interest at the rate of 9.75% p.a not later than 31st March, 2007. The 1st respondent also contacted the 2nd respondent about the advance payment bond but her

efforts proved futile. On refusal the 1st respondent sued them and claimed for reliefs some of which are specific damages, general damages, interests, declaratory orders against the appellant and 2nd respondent, and costs as they appear from pages 11 to 12 of the record of appeal (the record).

On 5th December, 2011 the High Court (Commercial Division) entered judgment in favour of the 1st respondent whereby the appellant together with the 2nd respondent were ordered to pay the 1st respondent, such reliefs as can be summarised as follows:

> *"(a) the appellant and the 2nd respondent to pay the amount of USD 120,150.00 to the 1st respondent.*
>
> *(b) The appellant to pay the 1st respondent the liquidated damages of Euro 68,433.25;*
>
> *(c) interest on (a) above at the rate of 9.75% p.a from 30th November, 2006 till the date of judgment;*
>
> *(d) interest on (a) and (b) above at 7% p.a till payment in full.*
>
> *(e) Costs of the suit".*

The appellant was dissatisfied with the decision of the High Court and lodged this appeal on four (4) grounds of complaint as follows:

1. *That, having regard to the evidence on record and the circumstances of this case, the honourable trial judge grossly misdirected himself in fact and in law in finding that there existed a contract between the appellant and the 1st respondent.*
2. *That, having regard to the conduct of the parties namely the appellant and the 1st respondent and the circumstance of the case, the learned trial judge grossly misdirected himself in fact and in law in finding that the appellant was in breach of contract.*
3. *That, the learned trial judge grossly misdirected himself in fact and in law in awarding damages of Euro 68,433.25 to the 1st respondent without concrete evidence on whether the damages were solely attributed to the delay of delivery of vehicles.*
4. *That, the learned trial judge erred in law and in fact in awarding an interest of 9.75% without any evidence on how that rate of interest was arrived at.*

At the hearing of the appeal the appellant was represented by Mr. Richard K. Rweyongeza, learned counsel; the 1st respondent was represented by Mr. Timon Vitalis, learned counsel and the 2nd respondent enjoyed the services of Mr. Osca E. Msechu also learned counsel.

In his oral submission in support of the appeal, Mr. Rweyongeza opted to address us on the last two grounds (3 and 4) and the first two grounds (1 and 2) the Court to consider his written submission. Addressing us on the 3rd ground on special damages, he faulted the trial judge in awarding such damages. He pointed out that in the plaint the 1st respondent pleaded special damages of Euro 68,433.25 and it is a cardinal principle of pleadings that special damages to be awarded they must be specifically pleaded and strictly proven. He added that when filing the plaint no document supporting this claim were attached and on the first date of hearing no list of documents to be relied upon was made and no documents on this special loss were produced because the same had not been served on any of the opposite parties. He argued further that the documents (Exh. P8) were photocopies and no reason was advanced for production of copies and he demanded original documents but no explanation was given to the satisfaction of the court. He submitted that the documents that were tendered being photocopies should be ignored as no reasons were advanced to explain why they were produced in accordance with order XIII Rule 2 of the Civil Procedure Code. In his view that special damages were wrongly awarded.

On the 4th ground of appeal, the learned advocate submitted that the 1st respondent claimed among the reliefs an interest of 9.75% on the outstanding amount. He said the amount outstanding is in dollars. The trial court failed to give explanation on how this 9.75% was arrived at. He submitted further that no facts were put before the court why interest should be 9.75% and not less and the court did not even discuss this rate of interest in the judgment. He concluded that the 1st respondent claimed interest at the rate prayed but failed to produce any documentary evidence to prove it, and therefore there was no basis for granting that interest at that rate of 9.75%. On those grounds he prayed this appeal to be allowed.

Mr. Vitalis urged the Court to reject this appeal. In reply to the 1st ground of appeal on the existence of the contract between the appellant and the 1st respondent, he argued that the existence of a contract is a fact which can be proved by correspondence or conduct of the parties. To fortify his argument, the learned advocate submitted that the trial judge's finding that there was a contract between the appellant and the 1st respondent is hinged on the strength of a proforma invoice issued by the appellant to the 1st respondent on 30th March, 2006 (Exh. P1), Order No. 4428449 sent by the 1st respondent to the appellant of 13th July, 2006 (Exh. P2) and various

correspondences signifying acceptance of exhibit P.2 by the appellant. He maintained that, despite the expiry of 30 days of the proforma invoice, yet the appellant kept in contact with them over the business and even offered to deliver new model of the Trucks. The learned advocate proceeded to say that the conduct of the appellant predestined nothing but acceptance of their offer to do business. To support his argument he referred to the English case of **Butler Machine Tool Company Limited v. Ex-cell Corporation (England) Limited** [1979] 1 WRL 401.

Submitting on the 2nd ground Mr. Vitalis briefly, stated that the appellant failed to deliver the Trucks in time as required by their contract. He strongly submitted that the idea of relocating the burden for breach of contract to the manufactures or any other entity has come as an afterthought and it is legally unfounded to stand. He added that the appellant was acting as a principal and consequently for non-performance of its obligation, it breached the contract.

On the 3rd ground of appeal, the learned advocate submitted that it is a condition that special damages must always be proved at the trial that the loss was incurred and that it was the direct result of the appellant's conduct. He replied that at the trial court that special damages was proved, by the

strength of Exhibit P8 collectively, that due to unjustifiable delays by the appellant the 1st respondent failed to deliver the Trucks to Zanzibar Municipal Council on time. Euro 68,433.25 was deducted from the 1st respondent is penalty for failure to deliver the Trucks on time. He submitted further that the conditions for awarding special damages were fulfilled and, as such, the trial court judge decided correctly to award Euro 68,433.25 to the 1st respondent.

On the last ground of appeal, the learned advocate conceded that it was not proper for the trial court to award the interest rate of 9.75%. He argued that in terms of the provision of Rule 21(1) of Order XX of the Civil Procedure Code, the rate of interest is the courts rate which is confined to only 7% per annum. From that submission, the learned advocate invited us to dismiss the appeal with costs.

On his part Mr. Msechu, learned advocate for the 2nd respondent quickly informed us that he had nothing to submit because his client's interests were not affected by the appeal.

Mr. Rweyongeza's submission in rejoinder was that there was no contract between the parties in existence and therefore there was no breach thereof.

Having heard the submissions from the learned advocates in the light of the judgment of the trial court, the pleadings, issues and evidence, there is no dispute that the appellant and the 1st respondent concluded a binding agreement through exhibit P2. The trial court's finding in relation to the existence of the contract between the parties was a result of their various correspondences and exhibit P2.

We have noted that, what is in dispute between the parties is whether after expiry of 30 days of the proforma invoice (Exhibit P.1), there was still a contract between the two. As correctly observed by the learned trial judge, the appellant was aware of the lapse of time of the proforma invoice, but she continued to make necessary contacts and promises to deliver the Trucks to the 1st respondent. Impliedly, the conduct of the appellant was what made the 1st respondent to believe that even after the lapse of 30 days there was still a contract between them. On this aspect, advocate for the 1st respondent cited the case of **Butler Machine Tool Company Limited** (supra) where it was held that:

"In many of these cases our traditional analysis of offer, counter offer, rejection, acceptance and so forth is outdated. The better way is to look at all documents passing between the parties and glean from them or from conduct of the parties whether they have reached agreement on all material points even though there may be differences between the forms and conditions printed on the back of them".

From the above observation, it is our considered view that, the argument by Mr. Rweyongeza that there was no contract between his client and the 1st respondent is baseless and unfounded, as such, the 1st ground fails.

Next for our consideration is 2nd ground which is related to the 1st ground above. 2nd ground seeks to fault the trial court for finding that the appellant was in breach of contract. On this complaint the appellant summarily argued that, since there was no contract between them, then it is immaterial to argue on this premise. On the other hand, the 1st respondent strongly attacked the argument on the basis that, the appellant received the deal to deliver the Trucks without disclosing that she was acting in her capacity as an agent, instead she presented herself as a principal dealer,

hence, the issue of default on the part of the manufacture cannot stand at this point.

On our part having considered the 1st ground fully, and bearing in mind the submissions of the parties on the matter, the issue that remains is whether there was really a breach of contract by the appellant. On this aspect we are guided by the decision in the case of **Photo Production Ltd v. Securicor Transport Ltd** [1980] 1. All ER 566, Lord Diplock stated that:

> *"Every failure to perform a primary obligation is a breach of contract."*

From the above decision and reading the decision of the trial court, we have noted that the trial Judge was convinced to believe that the contract was breached by the appellant, because the 1st respondent requested the appellant to avail her with necessary details for opening the Letter of Credit but the appellant was reluctant and full of disappointment. We are at par with the learned trial Judge's observation that there was indeed a breach of contract on the part of the appellant. The question that persists is, when exactly was the breach occasioned? Going through the record, we have revealed that, basically the appellant did not dispute the fact that he made a commitment to deliver total units of vehicles to the 1st respondent by the

end of March, 2007. Again, the appellant did not deny the fact that she wrote the letter to the 1st respondent stating the time of delivery of goods. It is our view therefore that, since the appellant dedicated herself to deliver the Trucks to the 1st respondent by the end of March, 2007, the failure thereafter resulted to breach. In the circumstances, the second ground is also devoid of merit.

Ground three faults the trial court for ordering the appellant to pay the appellant liquidated damages of Euro 68,433.25 without concrete evidence on whether the damages were grossly attributed to the delay of delivery of vehicles. We will not labour much on this ground, simply because the damages were awarded following the breach of contract caused by delay of supply of Trucks by the 1st respondent to Zanzibar Municipal Council, hence, the award was nothing but a penalty imposed on the 1st respondent for the liquidated damages which was settled preceding the tender for supply of Trucks. The delay was caused by the appellant as we have demonstrated above. In the circumstances, it was lawful as rightly granted by the trial court. We thus dismiss ground 3.

The last ground of appeal is to the effect that the learned trial Judge erred in law and in fact in awarding on interest of 9.75% without any

evidence on how that rate of interest was arrived at. This ground of appeal will also not detain us. As rightly submitted by Mr. Vitalis under Order XX Rule 21(1) of the Civil Procedure Code, the allowable rate of interest is the court's rate confined to only 7% per annum unless otherwise agreed to by the parties to the suit. With respect, we do not think its application extends to this special damages and so we decline to go along with Mr. Vitalis argument. Since the 7% rate of interest of the court which applies from the date of judgment until payment in full already awarded by the trial court and there was no any term in the contract on the interest, we find it improper for the trial court to grant the interest of 9.75%. Needless to say, we are not satisfied that there was any justification in awarding such special damages in the instant case. We say so because in the record there is no documentary evidence tendered before the trial court to show that the interest rate of 9.75% has been paid at the bank in Germany. We think that by a mere statement or prayer of claim as the 1st respondent has done in this case was not enough to prove the same. It is our considered view that the 1st respondent failed to establish and prove the said damages as required by law. Without further ado, we hold that the award of special damages

was made without any justification. To that extent, we allow this ground and set aside the award of 9.75% in special damages.

In the event, save to the extent indicated, the appeal stands dismissed with costs.

DATED at **DAR ES SALAAM** this 20th day of May, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The judgment delivered this 24th day of May, 2022 in the presence of Ms. Jaqueline Rweyongeza, counsel for the appellant, Mr. Baraka Msana, counsel for the 1st respondent and Mr. Osca Msechu, counsel for the 2nd respondent, is hereby certified as a true copy of the original.

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL