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. 394 OF 2019

MOLLEL ELECTRICAL CONTRACTORS LIMITED ..... APPELLANT

VERSUS

MANTRAC TANZANIA LIMITED ..... RESPONDENT

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

(Fikirini, J.)

dated the 7th day of November, 2019
in
Commercial Case No. 29 of 2018

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JUDGMENT OF THE COURT

5th & 30th May, 2022

NDIKA, J.A.:

On appeal by the appellant, Mollel Electrical Contractors Limited, is the judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam (Fikirini, J., as she then was) dated 7th November, 2019 in Commercial Case No. 29 of 2018. In that action, the trial court entered judgment and decree with costs in favour of the respondent, Mantrac Tanzania Limited, in respect of the following: **one**, the sum of USD. 100,725.20 being the unpaid balance of the purchase price for goods supplied and delivered to the appellant on a contract of sale; **two**, the

amount of USD. 26,447.67 being accrued interest on the aforesaid principal sum as at 9th October, 2017 when the suit was filed; **three**, interest at 15% commercial rate per annum on the aforesaid principal sum and interest from 9th October, 2017 till the date of the judgment; and **finally**, interest on the decretal sum at the court's rate of 7% per annum from the date of the judgment until full payment.

The appeal arises as follows: sometime in 2015, the respondent received orders from the appellant for the purchase of three brand new generators, two for installation and commissioning at the Tibirinzi Amusement Park in Pemba and the other one for the Bank of Tanzania Project at Mtwara. The parties agreed, so the respondent's case goes, that the appellant would remit a down payment upfront upon issuing the purchase orders and that the balance would be cleared upon delivery of the generators by the respondent. The appellant, it was averred, duly remitted the advance payment but refused to pay the balance without any reason after delivery of the generators. The respondent annexed to its plaint three invoices issued against the appellant: one, Invoice No. E002217-01 dated 29th January, 2015 for the sum of USD. 184,080.00; two, Invoice No. E002217-02 dated 31st March, 2015 for USD. 44,840.00; and three, Invoice No. E002262-01 of 11th June, 2015 for USD. 230,205.20. It

was averred that of the invoiced amount of money (that is, USD. 459,125.20), the appellant duly paid the down payment but refused to pay USD. 100,725.20, which remained outstanding at the time of the filing of the suit. Apart from suing for payment of the aforesaid amount, the respondent prayed for payment of USD. 26,447.67 as at 9th October, 2017 being interest at the rate of 8.76% per annum on the unpaid balance for three years of delay in clearing the whole purchase price.

The appellant's response to the respondent's claims, as expressed in its written statement of defence, was somewhat a subtle denial of liability. While it did not specifically deny the existence of the contract of sale between the parties upon which it ordered the generators, it averred, in effect, in paragraphs 2 and 4 of the defence that it paid the purchase price in full but that there was a "small outstanding amount", whatever that means, which had to be verified and reconciled between the parties.

The trial court framed two issues for determination: **one**, whether there was a breach of the contract of sale and by whom; and **two**, to what reliefs are the parties entitled.

In establishing its claims, the respondent relied on the evidence adduced by two witnesses: one, PW1 Pendo Joseph Amasi and PW2 Peter

John Musiba, the respondent's Treasury Accountant and Power Systems Sales Representative respectively. Their evidence was complemented by six documentary exhibits, viz., one, a purchase order dated 10th March, 2015 made by the appellant for the supply of one generator for the Mtwara Bank of Tanzania Project (Exhibit P1); two, the respondent's demand note to the appellant dated 9th October, 2017 for the sum of USD. 127,172.87 being unpaid balance and interest thereon issued by Roman Attorneys (Exhibit P2); three, the appellant's reply to the demand note dated 12th October, 2017 from Brass Attorneys (Exhibit P3); a purchase order dated 21st November, 2014 made by the appellant for the supply of two generators for the Tibirinzi Amusement Park in Pemba (Exhibit P4); two proforma invoices, one dated 10th October, 2014 and another of 17th November, 2014 (Exhibit P5); and a set of emails between the parties (Exhibit P6).

On the other hand, DW1 Emmanuel Adam Mollel, a director of the appellant, was the sole witness in support of the appellant's position. He buttressed his evidence by tendering the appellant's reply to the respondent's demand note dated 12th October, 2017 from Brass Attorneys as Exhibit D1, which, as previously stated, was admitted as Exhibit P3 for the respondent.

In her judgment, the learned trial Judge, at first, dealt with a submission made by Mr. Braysoni Shayo, learned counsel for the appellant, refuting existence of any contract of sale between the parties. She rejected the submission as she held, as shown at pages 218 and 219 of the record of appeal, that:

> *"The submission by the defendant [the appellant herein], refuting existence of any sale agreement between the parties in my opinion is short of making any sense, unless the counsel understands agreements to only be in a specific form. The exchange made of the purchase orders as exhibited in P1 and P4 and the proforma invoices as exhibited in P5, parties set terms and conditions binding upon them. In addition, through exhibits P3 and D1, the defendant acknowledged existence of a contractual relationship between the parties for the supply of generators."*

Citing section 5 (1) of the Sale of Goods Act, Cap. 214 R.E. 2002 (henceforth "the SGA") stating that a contract of sale may be in writing (either with or without seal) or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct of the parties, the learned trial Judge concluded that the purchase orders received by the

respondent against the proforma invoices for the supply of generators at an agreed price and with terms for delivery proved the existence of the contract of sale. In the same vein, having reviewed the pleadings and the evidence on record, the learned trial Judge took the view that it was undoubted that there was an outstanding balance of the agreed purchase price for the three generators but that what was in issue was the exact amount thereof.

In resolving the above contentious issue, the learned trial Judge particularly considered a submission made for the appellant that the respondent failed to prove the amount of the outstanding balance mainly because it failed to produce any receipt of the advance payment to substantiate the balance and that there was no authentic statement of account tendered by the respondent to evidence the alleged unpaid balance. Eventually, she concluded, as reflected at pages 221 and 222 of the record of appeal, that:

> *"Evaluating the evidence and final submissions, it is evident that there was an outstanding balance but what amount is what would task me. The defendant [the appellant herein] despite vehemently challenging existence of any outstanding balance, but the denial is contrary to DW1's statement. DW1*

under oath admitted there being an unpaid amount, which unfortunately he was not sure [of] but assumed to be not more than USD. 20,000.00. This account in my view cannot be swept aside only because there were no receipts of the part payment already received by the plaintiff [the respondent herein] from the defendant so as to justify that there was an outstanding amount. Or that there was no authentic statement of accounts showing that [balance]. Regardless of the argument that the defendant never accepted any liability, I find that the claim that there was an outstanding balance outweighs the defence's assertion that there was no such claim."

Accordingly, the trial court found that the appellant was in breach of the contract of sale by failing to settle the outstanding balance of USD. 100,725.20. Furthermore, on the authority of our decision in **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003 (unreported) that by mercantile practice commercial debts ordinarily attract interest, the court awarded the claimed accumulated interest of USD. 26,447.67 as at 9th October, 2017.

As stated earlier, the appellant is resentful of the High Court's decision, hence this appeal. At the hearing of the appeal on 5th May, 2022, Mr. Shayo appeared for the appellant while Mr. Roman Masumbuko, also learned counsel, represented the respondent. Both counsel had also appeared for the parties respectively before the High Court.

The memorandum of appeal lodged by Mr. Shayo for the appellant contains eleven grounds of appeal but we think that the thrust of the contentions made in support of the appeal is twofold: **first**, whether it was established on the evidence on record that the appellant owed the respondent a balance of the agreed purchase price, and, if so, how much. **Secondly**, whether the respondent was entitled to interest on the outstanding amount of money, if any.

Before delving into the above issues, we wish to remark that in his written submissions and oral argument in support of the appeal, Mr. Shayo incessantly rehashed the contention that he made before the trial court refuting the existence of any contractual relationship between the parties. He argued with verve that the proforma invoices (Exhibit P5) and the purchase orders (Exhibits P1 and P4) did not constitute the terms and conditions of the contract. On the adversary side, Mr. Masumbuko

disagreed with his learned friend, contending that the existence of the contract was a non-issue because it was undisputed by the appellant in its written statement of defence.

With respect, we cannot take Mr. Shayo's submission seriously as it is plainly fallacious and misconceived. In the beginning, it is too plain for argument that the appellant admitted unreservedly in paragraph 3 of its written statement of defence that it ordered the three generators from the respondent but that the respondent failed to deliver them within the agreed time. In our view, it is inferable from this admission that a contractual relationship existed between the parties, which, then, must have been constituted by the documents vide which the orders were made.

Besides, it will be instructive to restate the trial court's reasoning on this aspect that, in terms of section 5 (1) of the SGA, the proforma invoices (Exhibit P5) and the purchase orders (Exhibits P1 and P4), exhibiting an offer by the respondent and an acceptance by the appellant, constituted the contract. That fact is further supported by the emails (Exhibits P6) exchanged by the parties over the respondent's claim for payment of the alleged balance. Our impression from the emails is unmistakably that the

parties acknowledged the existence of the contractual relationship between them while they wrangled over the alleged delayed payment of the balance.

Adverting to the issues of contention, we start dealing with the tenability of the claim for and the quantum of the unpaid balance of the agreed purchase price.

Submitting on the above issue, Mr. Shayo vigorously contended that the respondent had the onus to prove its claim for unpaid balance but it failed miserably to do so primarily because it did not produce the receipts it issued as acknowledgment of the advance payments made by the appellant or any statement of account rendering it impossible to determine the balance, if any. He lambasted the respondent for not heeding to the appellant's invitation for reconciliation of the books of account of the parties so as to verify the alleged non-payment. The appellant's reply to the demand note (Exhibit P3/D1), he added, was not an admission of indebtedness contrary to what the trial court found. He criticized that finding, submitting that it was based on assumptions as opposed to concrete proof. He said it was regrettable that the trial court shifted the burden to the appellant to prove that it paid the whole purchase price while

it was the respondent who had the onus to establish the alleged unpaid balance.

On the other hand, Mr. Masumbuko made a twofold rebuttal. First, he argued that the respondent sufficiently established its claim through the testimonies of PW1 and PW2, supplemented by proforma invoices that they produced indicating the agreed purchase price and stated the amount paid by the appellant as a down payment. Secondly, he posited that the appellant's witness failed to submit any statement of account to rebut the respondent's case. He added that the claim about the botched reconciliation was baseless because the appellant was not committed to it.

We have carefully scrutinized the evidence on record and taken into account the contending submissions of the learned counsel. To determine the issue at hand, this being a first appeal, we are enjoined by rule 36 (1) (a) of the Tanzania Court of Appeal Rules, 2009 to re-appraise the evidence on record and draw our own inferences and findings of fact subject, certainly, to the usual deference to the trial court's advantage that it enjoyed of watching and assessing the witnesses as they gave evidence. See, for instance, **Jamal A. Tamim v. Felix Francis Mkosamali & The Attorney General,** Civil Appeal No. 110 of 2012 (unreported).

We are also guided by the basic rule that he who alleges has the burden of proof as per section 110 of the Evidence Act, Cap. 6 R.E. 2019 as well as the position that the standard of proof in a civil case is on a preponderance of probabilities, meaning that the court will sustain such evidence that is more credible than the other on a particular fact to be proved – see **Paulina Samson Ndawavya v. Theresia Thomas Madaha**, Civil Appeal No. 45 of 2017 (unreported). In that case, the Court also restated that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his burden and that the burden of proof is not diluted on account of the weakness of the opposite party's case.

It is common ground that the appellant ordered three generators from the respondent as evidenced by the two purchase orders (Exhibits P1 and P2 and that the invoiced sum for the generators amounted to USD. 459,125.20. The disparity between the parties concerns how much the appellant paid upfront as down payment and what remained outstanding. As we hinted earlier, the appellant, in paragraphs 2 and 4 of its written statement of defence, appears to have acknowledged the existence of an outstanding balance as it averred that there was a "small outstanding amount", which the parties had to verify and reconcile.

To prove the advance payment made and the resulting balance, the respondent relied upon the testimonies of PW1 and PW2. As hinted earlier, PW1 was the respondent's Treasury Accountant at the material time. Her duties included the management and reconciliation of the accounts of the respondent's clients who included the appellant. On the part of PW2, he was the respondent's Power Systems Sales Representative, who, actually signed and issued the proforma invoices in issue (Exhibit P5). Both witnesses swore that the appellant, having remitted the down payment, refused to pay the balance, that is, USD. 100,725.20. It is true, as rightly argued by Mr. Shayo, that none of these witnesses produced any documentary exhibits (in the form of, say, receipts) as proof of the down payment made in the respondent's favour. Indeed, it is also true that PW1 tendered the invoices and a statement of account as at 16th June, 2017 in respect of the appellant showing the payments and the alleged outstanding balance but these documents were deemed inadmissible for non-compliance with the requirements of section 18 of the Electronic Transactions Act, 2015.

Notwithstanding the absence of supporting documentary exhibit, PW1 gave a breakdown of the payments made by the appellant. She recalled that the payments were made in four tranches approximately

totalling USD. 358,000.00 in the following breakdown: USD 100,000.00 + 100,000.00 + 114,000.00 + 44,000.00. From these approximated figures, she deduced USD. 100,725.20 as the outstanding balance.

As stated previously, the appellant's case rested on the testimony of its director (DW1), the sole witness. Although he essentially denied in his evidence the respondent's claim, he acknowledged that his company's books of account showed that the outstanding balance stood at USD. 20,000.00. In cross-examination, DW1 averred that he did not know the total purchase price of the generators nor did he remember how much the appellant paid upfront for the generators. In further cross-examination, as shown at page 155 of the record of appeal, DW1 maintained that:

> *"USD. 20,000.00 is based on books of account we have at our office. Our lawyer did not ask anything on the books of account. Yes, they are at the office. Yes, we have [an] obligation of showing how much has been paid and the balance due."*

In our judgment, in view of the absence of documentary exhibits on the down payment advanced, the matter must be decided on the basis of the credibility of testimonial accounts. Having reviewed the evidence on record, we are satisfied that PW1's evidence on the breakdown of the

payments received from the appellant was spontaneous, coherent and cogent. In view of her position of responsibility for the management and reconciliation of the clients' accounts at the respondent's offices, we are inclined to find her evidence credible and reliable.

On the contrary, DW1 appeared to have very little grip of the factual matters of the case. That was not surprising. For he was not working with the appellant when the generators were ordered in 2014 as he only became a director of the appellant in 2015. To illustrate the point, once again, we extract part of his cross-examination as revealed at page 153:

> *"I don't remember how much was paid as advance. I don't remember the value of the machines, I also do not remember if we paid in advance.* ***Such huge payments are dealt with directly by the Accounts Department."*** [Emphasis added]

Much as we may agree that DW1 may be excused for being uninformed of the key matters, we wonder why the appellant elected not to produce a witness from its Accounts Department, who should certainly have been more informed of the issues, to rebut the respondent's case. This abject state of affairs is compounded by the appellant's failure to tender the books of accounts that DW1 kept alluding to in his testimony as

he stuck to his guns that the unpaid balance was no more than USD. 20,000.00.

It is, consequently, our firm view, on the totality of the evidence on record, that the appellant sufficiently proved on a preponderance of probabilities that it is owed by the appellant USD. 100,725.20. Accordingly, we uphold the trial court's finding to that effect.

Turning to the question whether the respondent was entitled to interest on the outstanding amount of money, Mr. Shayo contended that there was no proof that the respondent suffered any loss due to the delayed payment to warrant an award of interest on the unpaid balance. On the other hand, Mr. Masumbuko supported the trial court's award, which, as stated earlier, was based upon **Engen Petroleum (T) Limited** (*supra*).

In the above case, this Court stated that:

> *"We take judicial notice of the mercantile practice of paying interest on debts. We think interest on petroleum product sales debts, the subject of the present case, ordinarily attracted interest under mercantile practice."*

Indeed, in terms of section 29 of the Civil Procedure Code, Cap. 33 R.E. 2019, the trial court had power to order interest not just on the

judgment debt but also on the pre-existing debt retrospectively up to the date of the judgment. In the instant case, it was undoubted that the unpaid balance is a debt arising in a commercial transaction and therefore we are decidedly of the view that the principle in **Engen Petroleum (T) Limited** (*supra*) would apply in this case. Accordingly, we uphold the trial court's view that the debt in issue would attract interest as a matter of mercantile practice.

As stated earlier, the trial court allowed the claimed interest of USD. 26,447.67 as at 9th October, 2017 on the unpaid balance. The computation was based on PW1's evidence, as shown at page 137 of the record of appeal. She adduced that the interest was computed at 8.76% per annum agreed upon verbally between the parties for any late payment. The sum of USD. 26,447.67 as at 9th October, 2017 covered a three-year period of non-payment. This piece of evidence was not rebutted in the evidence on record. In the premises, we find no good cause to interfere with the trial court's award of USD. 26,447.67. However, we find no justification for the trial court's award of interest at "the commercial rate" of 15% per annum on the accumulated sum of USD. 127,172.87 as at 9th October, 2017 from that date to the date of judgment instead of adjudging the interest at the

same agreed rate of 8.76% per annum. In the circumstances, we reduce the said rate of interest to 8.76% per annum agreed upon by the parties.

In conclusion, save for the aforesaid reduction of the rate of interest, we find no merit in the appeal, which we hereby dismiss with costs.

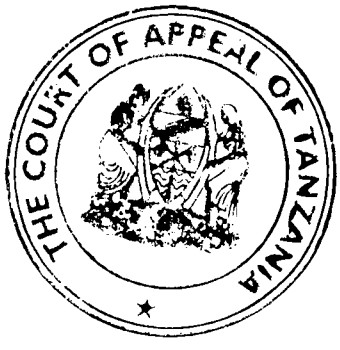
DATED at **DAR ES SALAAM** this 23rd day of May, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The judgment delivered this 30th day of May, 2022 in the presence of Ms. Velena Clemence, learned advocate for the respondent who also holding brief for Mr. Shayo, learned advocate for the appellant is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL