IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: KOROSSO, J.A., GALEBA, J.A., And MAKUNGU, J.A.)

CIVIL APPEAL NO. 203 OF 2019

ROBERT SCHELTENS ..... APPELLANT

VERSUS

SUDESH KUMARI VARMA (As an Administratrix of the estate of BALDEV NORATARAM VARMA, the deceased) ....1ST RESPONDENT
VIKAS VARMA..... 2ND RESPONDENT

NATIONAL FURNISHERS LIMITED .....3RD RESPONDENT

[Appeal from the Decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam]

(Massati, J.)

dated the 26th day of November, 2007
in
Commercial Case No. 26 of 2004

.....

JUDGMENT OF THE COURT

16th March & 16th August, 2022

GALEBA, J.A.:

The respondents, Baldev Norataram Varma (now deceased), Vikas Varma and National Furnishers Limited, were shareholders in a company called Furniture Industries Limited (the company). The company was a registered owner of a Right of Occupancy over Plot No. 6 Mikocheni Industrial Area in Kinondoni Dar es salaam, measuring 6,942 square meters. Sitting on the plot was a Light Industrial Complex constituting of a factory building with various machines and equipment, a canteen building and an office attached to residential flats (the disputed property

or the assets). Robert Scheltens, the present appellant and David Ryan Scholz or DW1, who is not a party to this appeal, were the purchasers of the disputed property and the company. For conveniency in this appeal, the two will be jointly referred to as the buyers.

A postulated sequence of episodes accounting for the background to this appeal started in February 2002. Following a mounting pressure on the buyers to vacate or else face merciless eviction measures from their previous landlord's premises, they approached the respondents and through their company called Holtan Investments Limited, leased the disputed property from February 2002 to September 2002. During the tenancy, the buyers made a decision to acquire the company and the entire assets it owned by way of purchase. On the other hand, the respondents were willing to sell both, the assets of the company and their shares in it.

Parties met and price was negotiated, agreed and settled at United States Dollars 1,500,000.00 (the full purchase price) for both the assets and the shares. They were categorical and certain on what the sellers were selling, and what the buyers were buying and at what price. As for the details, the physical assets of the company were priced at USD 1,475,000.00 and the shares or the non-physical part of it was

agreed to be USD. 25,000.00. Parties too, agreed on the mode of payment. According to their understanding, the buyers would disburse USD 25,000.00 to the respondents in a single bullet payment on 1st August 2002 and the balance of USD 1,475,000.00 would be settled in instalments, whereby USD. 1,200,000.00 would be paid not later than 6th January 2003 and the balance of USD. 275,000.00 would be payable in 18 equal quarterly instalments of USD. 15,277.00 effective 1st July 2003 up to 1st January 2008. It was also an understanding of parties that if there would be a default in settlement of any amount, an interest would be charged on the unpaid amount at a rate of 6% per annum.

Parties, approached one law firm in Dar es Salaam for purposes of paperwork and perfection of their conceived commercial transaction. The legal counsel, drew two major agreements. On 1st August 2002 they drew and parties executed the agreement for sale of shares (exhibit D2), (the first agreement) at an agreed price of USD. 25,000.00. Exactly four months later, on 1st January 2003 the same lawyers drew another agreement for sale of business and goodwill or assets (exhibit P5), (the second agreement) at a price of USD 1,475,000.00 along with a guarantee (exhibit P7), (the guarantee).

Whereas the first agreement was fully performed after its execution, according to the respondents, the USD. 1,200,000.00 which was to be paid latest on 6th January 2003, it was paid in June 2003. Further, up to May 2004, not one of the 18 instalments in respect of the balance of USD. 275,000.00 was paid to the respondents, as agreed.

According to DW1 who was one of the two buyers, at page 528 of the record of appeal, the reason they did not pay any instalment, was because they subsequently went to consult other lawyers who advised them that if they had bought shares in the company, on 1st August 2002, everything in the name of the company including the company assets already belonged to them. And that if they were to buy anything from the company, they would be buying something that was already theirs. Following the same advice, the buyers also refused to pay the USD. 36,000.00 which had accumulated as interest on the delayed payment of USD. 1,200,000.00.

When the respondents were told that they would not be paid anything anymore, they felt highly betrayed such that on 10th May 2004, they instituted Commercial Case No. 26 of 2004, claiming; **first,** USD. 275,000.00; **second,** USD. 36,000.00, **third,** general damages for

breach of contract; **fourth,** interest at court rate and; **fifth,** costs and interest from the date of filing the suit to final payment.

In their written statement of defence, the buyers admitted to have not paid the monies claimed and their reason was that upon signing the first agreement on 1st August 2002 for selling the shares to them, the respondents did not retain any sellable interest in any asset of the company. They further pleaded that the second agreement was, as such, void. They even claimed for a refund of USD. 1,200,000.00 which had been paid to the respondents in June 2003 for tangible assets of the company.

The High Court heard the case, and at the end of the trial, it agreed with the appellant's position that the second agreement could not have been for disposition of goodwill because none of the respondents had any such goodwill to offer or pass on to the buyers. In that respect, the trial Judge reasoned further that, the second agreement was entered by parties while labouring under a mistake of law and concluded that under section 21 of the Law of Contract Act, [Cap 345 R.E. 2002, now R.E. 2019], (the LCA), the contract of 1st January, 2003 was not void. He distinguished the mistake of law under

the above section with a mistake of fact under section 20 of the LCA, which renders an agreement void.

Accordingly, the High Court partly agreed with the respondents and granted them the following reliefs; USD. 275,000.00; USD. 36, 000.00; interest on the USD 275, 000.00 and USD. 36, 000.00 at 6% per month from the date each instalment fell due, until full and final payment; interest on the decretal sums at 7% per annum from the date of judgment to the date of full payment and; costs of the suit.

The appellant was aggrieved by the above decision, hence the present appeal in which he is moving this Court to set aside the decree of the High Court and order that the USD. 1,200,000.00 be refunded to him. Originally, the appeal was predicated upon eleven grounds of appeal, however out of those, grounds 6, 7, 8 and 11 were abandoned thereby retaining 7 grounds of appeal, which are the following:

> "*1. That the trial Judge erred in holding that the respondents proved their case on the balance of probabilities.*
>
> *2. That without accepting the finding of the trial Judge that in entering into the agreement in question, parties proceeded on mutual mistake of law, the trial Judge having found*

that parties belaboured under a mistake of local law pertaining to the ownership of goodwill, erred in law and in fact in failing to hold that such a mistake revolves on the parties' private rights and thus a mistake of fact.

3. *The parties to the agreement in issue being foreigners, the trial Judge erred in fact and in law in not holding that a mistake they made in entering into the agreement for sale of goodwill did not belong to either of the parties, was a mistake on a matter of fact rendering the whole agreement void.*

4. *The trial Judge having correctly found that the respondents had no goodwill to offer to the appellant, erred in law in continuing to determine and decide that the appellant has breached fundamental terms and conditions of the said agreement.*

5. *That the trial Judge after making the finding, though erroneously, that the agreement (exhibit P5) was lawful in the purview of section 21 of the Law of Contract Act, Cap 345; erred in law in continuing to determine the rights of the parties without addressing himself on the essentials of a valid contract.*

9. *That the trial Judge erred in law and in fact in granting the respondents reliefs more than what was pleaded and outside the agreement (exhibit P5) and wrong in granting interest over interest.*

10. *That the learned trial Judge erred in fact and in law for awarding the respondents interest over and above the contractual rate and contrary to the court practice and the existing principles in that regard."*

At the hearing of this appeal, the appellant was represented by Mr. Audax Kahendaguza Vedasto learned advocate, and for the respondents, was Mr. James Andrew Bwana, also learned advocate.

Before hearing could commence, Mr. Bwana informed us that Mr. Baldev Norataram Varma, the first respondent, had passed away on 20th January 2020 and that Mrs. Sudesh Kumari Varma had been appointed administratrix of his estate. He thus prayed under rule 105 (1) of the Tanzania Court of Appeal Rules 2009, (the Rules), that Mrs. Sudesh Kumari Varma be made a party to this appeal in the place of Mr. Varma. There being no objection from Mr. Vedasto, and having been accessed with the ruling of the High Court (Mwaseba J.) in Probate and Administration Cause No. 11 of 2021 in which Mrs. Varma was

appointed administratrix, we made orders substituting the deceased's name with that of Mrs. Varma, under rule 105 (1) of the Rules.

Mr. Vedasto informed us that he would argue grounds 2, 3, 4 and 5 together and he would then pursue grounds 9 and 10 also at the same time. Lastly, his plan was to argue the first ground of appeal on a stand-alone basis. As he had prayed for adoption of the appellant's written submissions lodged earlier on in compliance with rule 106 (1) of the Rules, Mr. Vedasto took advantage of rule 106 (11) of the Rules, to clarify the submissions on record.

When he took the floor, to argue grounds 2, 3, 4 and 5, he challenged the learned trial Judge for having strictly applied the principle of mistake of law, arguing that it is excusable and its application relaxed in civil cases. To support his position, he relied on this Court's decision in the case of **Zella Adam Abrahaman and Two Others v. SG and Six Others**, Consolidated Civil Revisions No. 1, 3 and 4 of 2016 (unreported). He argued further that, as most of the parties in the case except, the third respondent, were foreigners, in the context of section 21 of the LCA, the mistake, if at all, ought to have been held to be a mistake of fact. He also challenged the trial Judge for not indicating which contract he was enforcing having held that there was no goodwill

to sell in terms of the second agreement. His point was that the contract of 1st January 2003 had neither object nor consideration. He cited to us the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd and Others,** Civil Appeal 51 of 2016 (unreported), where the Court stated that, it cannot bless any act of unjust enrichment of a litigant and moved us to allow the above grounds of appeal. As for ground 1, he implored us to rely on his written submissions.

In reply, Mr. Bwana, after praying also to have the respondent's written submissions adopted, submitted that the trial Judge was right to hold that the mistake was that of law because the transaction involved sale of shares, goodwill and the entire infrastructure of the company for a total purchase price of USD. 1,500,000.00, and sale of shares was just a small part of quite a larger deal in magnitude. He contended that execution of the sale of shares agreement on 1st August 2002 did not mean that the entire undertaking changed ownership, because transfer of the entire ownership of the company was dependent on executing another agreement for sale of assets which was executed on 1st January 2003. Generally, Mr. Bwana supported the judgment of the trial court and moved the Court to dismiss grounds 2, 3, 4 and 5.

We have taken quite some time to study the record of appeal with due care and patience. We have also studied very closely the judgment of the trial court, with particular and keen attention to the nature of the complaint in the 4th ground of appeal, which we are certain that disposition of it will be sufficient to cater for the solution sought by the appellant in grounds 2, 3 and 5, thereby rendering consideration of the grounds superfluous and therefore unnecessary. Thus, we will determine the 4th ground first.

The complaint in that ground is that the trial court having found and held that the respondents had no goodwill or business to sell on 1st January 2003, it erred in law to have considered the second agreement as lawful. Mr. Bwana in his written submissions, at page 7 stated that the contract of 1st January 2003 had all essentials of a lawful contract, meaning that Mr. Vedasto's contention was misleading.

We will pause here for a while and consider what is the legal position in Tanzania in circumstances where a contract is entered into without consideration or object. Legally, one of the essentials of a valid contract is existence of an object or a subject matter in respect of which the contract is entered, and that is not all, that subject matter must be lawful. If it is a transaction, the same must not be illegal, illicit or

prohibited by law. If it is an article of trade, the item must be a lawful piece of merchandize for a legalized, and where applicable, a licensed disposition. That is the requirements of section 10 of the LCA which provides that:

> *"All agreements are contracts if they are made by the free consent of parties competent to contract,* ***for a lawful consideration and with a lawful object****, and are not hereby expressly declared to be void: Provided ... (N/A)."*
> [Emphasis added]

On this issue Mr. Bwana submitted that the trial Judge held that the second agreement had all essentials of a valid contract. Nonetheless, we entertained a great deal of difficulty in trying to comprehend Mr. Bwana's submission because at page 725 of the record of appeal, the learned trial Judge himself made the following unambiguous observation:

> *"The bottom line therefore is that goodwill of a business belongs to the business, whether a firm, a partnership, an individual or a company. It follows, in my opinion that,* ***once all the shares of a company are sold, so is the goodwill. So, there was no goodwill left for sale.*** *On the premises, I agree with Mr.*

Ishengoma, that notwithstanding compliance with all the salient provisions of the law of contract pointed out by Mr. Bwana, Exh. P5 was entered into by mistake."

[Emphasis added]

In our view, the import of that part of the trial court's judgment is that, legally there was neither object nor consideration from the respondents in respect of the agreement of 1st January 2003, which was also Mr. Vedasto's contention.

The trial Judge as indicated above, stated that the business and goodwill at the time the second agreement was being concluded, was in the name of the company whose shares had been sold and transferred to the buyers, as of 1st August 2002. Accordingly, if all the shares were sold on 1st August 2002, obviously on 1st January 2003, the respondents would have nothing to sell in the company. The basis of that finding is, the *nemo dat quod non habet* rule, that one cannot give that which he does not have as was observed in **Mathias Erasto Manga v. Simon Group (T) Ltd,** [2014] T.L.R. 518 at 519 and **Abdulatif Mohamed Hamis v. Mehboob Yusuf Othman & Another**, Civil Revision No. 6 of 2017 (unreported).

In other words, for the respondents, to be able to sue on the agreement of 1st January 2003, they must have pleaded and proved that they were owning something of value on that day which they parted with in favour of the buyers. Therefore, with respect to Mr. Bwana, we do not intend to mince words on the settled position of the law in this area. The law in this country is that, a contract without consideration is void and there is no middle ground on that. In this case, the trial court and counsel for the appellant shared a common position, and in our view correctly so, that on 1st January 2003, the respondents did not have anything that they could sell to the buyers.

Briefly therefore, the trial court having made a finding that the second agreement was without consideration flowing from the respondents to the buyers on 1st January 2003, the learned trial Judge had no choice but, to declare that agreement void. As for us, without any further ado, we hereby declare the agreement of 1st January 2003 a nullity, for that is what the High Court was supposed to do, but did not do. By the above discussion and the order made, the 4th ground of appeal is hereby allowed.

Since disposing of the 4th ground of appeal also caters for the relief that the appellant was seeking in grounds 2, 3 and 5 which were

challenging the validity of the second agreement, we do not think that there is any practical meaning in seeking to resolve those grounds, for doing that would, in our opinion, be tantamount to a sheer waste of time and efforts for no returns that one can account for.

A while later we will tackle grounds 1, 9 and 10, but before we get there, we will; **firstly,** describe briefly our mandate as a first appellate court when dealing with an appeal and; **secondly,** we will discuss at some detail the intention of the parties in the disputed transaction vis-à-vis the terms of the agreement dated 1st August 2002.

As a first appellate court to the High Court, we are entitled to re-evaluate and reconsider the evidence tendered in the trial court and if necessary, reach a decision of our own, independent of that of the High Court. That is so in view of the provisions of rule 36 (1) (a) of the Rules. On that aspect, see also our decisions in **Future Century Ltd v. TANESCO,** Civil Appeal No. 5 of 2009, and **Makubi Dogani v. Ngodongo Maganga**, Civil Appeal No. 78 of 2019 (both unreported).

With that point clarifying our mandate when hearing a first appeal, we will now take up the task we intimated above; a discussion on whether the intention of the parties was fully captured in the agreement of 1st August 2002.

According to Mr. Vedasto, in the second agreement of 1st January 2003, there was no asset or goodwill to transfer or to pay for, because everything including, the assets and goodwill had been transferred on 1st August 2002 to the buyers when the shares were transferred. The question that pops up immediately, is this; what was the price for the said assets, the goodwill and the shares all of which were transferred on 1st August 2002 in terms of Mr. Vedasto's contention?

The following part will therefore zero down to pointing at, what did the buyers have in mind to buy and the respondents to sell, at what price and how. That concept in the law of contract, is called intention of the parties, and we propose to start with the pleadings, then we will move to the evidence. The relevant paragraphs of the plaint dealing with the aspect of price for the assets and the mode of payment are clauses 6 and 7 at page 8 of the record of appeal. Those clauses of the plaint are to the following effect:

> *"6. ... **the Plaintiffs soid to the Defendants the assets and business goodwill in a Company known as Furniture Industries Limited for the sum of US Dollars 1,475,000.00...***
>
> *7. ... the Defendants were to pay the agreed price in the following manner namely, **the***

first initial instalment of USD 1,200,000.00 was payable immediately after the signing of the agreement and not later than three clear working days from the date of the agreement and secondly, the balance of USD 275,000/= was to be payable in eighteen (18) equal consecutive quarterly instalments of USD 15,277.00 the first one to be made within a period of six months of the date of Agreement..."

[Emphasis added]

In reply to the above paragraphs, the buyers filed a written statement of defence at pages 29 and 30 of the record of appeal in the following terms:

"2. ***The defendants have noted the contents of paragraphs 5, 6 and 7 of the plaint...,*** *the Defendants state that the object of the alleged agreement is impossible for achievement and therefore void.*

3. and 4 N/A.

5. ***That effectively after executing the said sale agreement of shares, which became operative on the 1st August, 2002 the***

plaintiffs ceased to be members/shareholders of the said Company, meaning that all plaintiffs 'private rights in the said Company ceased to exist...

6....Further that even assuming that there existed goodwill the fact which the Defendants deny, ***the same belonged to the company and not to the plaintiffs."***

[Emphasis added]

Next and relevant to our discussion is the evidence on the issue of what was being sold and at what price as at 1st August 2002. Going by the record, at page 348 of the record of appeal, during his evidence in chief, this is what PW1 told the court:

"MR. JAMES BWANA FOR THE PLAINTIFFS:

What was the price, do you have any indication of the price by that time?

MR. BALDEV NORATARAM VARMA - WITNESS:

...the valuation of the entire project, infrastructure, machinery, the building itself and all the facilities over there we re-issued a figure of 1.8 million Dollar in work after these two friends negotiated and we have just talked with them, ***we reached to a final valuation figure***

of 1.5 million Dollar and after they confirm we enter into a Memorandum of Understanding.

MR. JAMES BWANA FOR THE PLAINTIFFS:

Among yourselves?

MR. BALDEV NORATARAM VARMA – WITNESS:

Among me and my side and their side we signed a Memorandum of Understanding ***and they prepared to buy the whole project for 1.5 million dollar and then they told us that they will be trying to arrange their finance to pay us, ..."***

[Emphasis added]

At page 366 of the record of appeal the witness continued:

"Because every amount was 1.5 million Dollar, the bank were only paying 1.2 million Dollar and they had given me earlier some deposit money, it was 25,000 Dollars so the balance was 275,000 Dollars."

On the same aspect, at page 563 of the record of appeal, one of the buyers, DW1 had the following to tell the court during cross examination:

"MR. JAMES BWANA FOR THE PLAINTIFFS:

So ultimately what was the purchase price regardless of who is buying what?

MR. DAVID RYAN SCHOLZ – WITNESS:

Purchase price was 1.475 million.

MR. JAMES BWANA FOR THE PLAINTIFFS:

And what about the shares?

MR. DAVID RYAN SCHOLZ – WITNESS:

25,000/=.

MR. JAMES BWANA FOR THE PLAINTIFFS:

You said earlier on the price was 1.5 and 25 were paid in shares so the balance was 1.475, right?

MR. DAVID RYAN SCHOLZ – WITNESS:

Yes."

Then at pages 575 to 577 of the record of appeal, it is recorded thus:

"MR. JAMES BWANA FOR THE PLAINTIFFS:

The price set here is 1,475,000 US$ Dollars, is that correct?

MR. DAVID RYAN SCHOLZ – WITNESS:

Yes

.....

MR. JAMES BWANA FOR THE PLAINTIFFS:

And there is a balance of 275,000/= US Dollars were ever been paid?

MR. DAVID RYAN SCHOLZ – WITNESS:

No.

MR. JAMES BWANA FOR THE PLAINTIFFS:

Was a single instalment paid?

MR. DAVID RYAN SCHOLZ – WITNESS:

No.

MR. JAMES BWANA FOR THE PLAINTIFFS:

Has a single instalment fallen due since 1st January 2003?

MR. DAVID RYAN SCHOLZ – WITNESS:

Yes.

MR. JAMES BWANA FOR THE PLAINTIFFS:

Have you paid?

MR. DAVID RYAN SCHOLZ – WITNESS:

No."

In the context of the above pleadings and the evidence as captured, the issue we should get closer to is, if, as stated on behalf of

the appellant, that they bought everything on 1st August 2002, which we think is the case, did they pay for everything in the manner agreed? The pleadings and the evidence available on record, in answering it, is that they paid only USD. 1,200,000.00 and USD. 25,000.00 and the balance of USD. 275,000.00 remained unpaid to date. That is, if the agreement of 1st August 2002 was the only agreement which was meant to be the basis of the buyers taking ownership of both the company' assets and its shares, then the amount which was paid, was only for shares and partly for assets. Nonetheless, it is notable however that there are no express terms as to the price for assets in the agreement of 1st August 2002.

Admittedly, and we must confess that, in law, where there is a written contract, like in this case, the general rule is that parties must have expressed all material terms that they intended to govern their dealing in a particular contract. See the case of **Damodal Jinabhai and Co. Ltd v. Eustace Sisal Estates** Ltd [1957] E.A. 153. However, the court can imply terms especially where such terms were intended by the parties but for some reason the terms were not included in the formal contract, see the case of **Prisimo Universal Italiana S. R. I. V. Temcotank (T) Limited** [2008] T.L.R. 403 where it was observed that:

"To be able to imply a term into a contract, the court must be satisfied that it is obvious that the parties meant to include that point into the contract..."

See also **Leonard Dominic Rubuye t/a Rubuye Agrichemical Supplies v. Yara Tanzania Limited,** Civil Appeal No. 219 of 2018 (unreported), **Sangijo Rice Millers Co. Ltd v. S. M. Holdings Ltd** [2006] T.L.R. 89 and **Merali Hirji and Sons v. General Tyre (E.A.) Ltd,** [1983] T.L.R. 175.

Besides, it is statutory in this jurisdiction that the conduct of parties is a basis for the court to imply appropriate terms in a commercial contract between them. In our view, that is the spirit embodied in section 5 (1) of the Sale of Goods Act [Cap 214 R.E. 2002] which provides that:

"Subject to the provisions of this Act and of any other written law in that behalf, a contract of sale may be made 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."***

[Emphasis added]

Like in some of the above cases, we will in this appeal, imply some terms in the agreement of 1st August 2002, so that it reflects the real

intention and desire of the parties. For avoidance of doubt the parties' intention can be inferred or be deduced from many facts, including:

One, according to the evidence of PW1 and DW1 quoted above, the two had a common understanding that the price, for the whole company, its shares and assets, inclusive was USD. 1,500,000.00; **two,** the conduct of the parties, which was consistent with the spirit of the above agreement where the buyers paid USD. 25,000.00 on 1st August 2002 and USD. 1,200,000.00 in June 2003 as part payment of the agreed USD. 1,500,000.00. **Three,** the valuation report, exhibit P6 at page 241 of the record of appeal, shows that in January 2001, the market value of the asset sitting on the plot was TZS. 1,374,930,000.00. That property, in all reasonableness, a year later could not have been sold at USD. 25,000.00.

Accordingly, the following substance is hereby implied in, and shall be harmonized with the agreement dated 1st August 2002 and form its part:

> *"The agreed amount for sale of shares and assets is USD. 1,500,000.00. Out of that amount, USD. 25,000.00 shall be paid not later than 1st August 2002 and USD. 1,200,000.00 shall be paid on or before 6th January 2003. The balance*

of USD. 275,000.00 to be paid in eighteen equal quarterly instalments of USD. 15,277.00 effective 1st July 2003. Any defaulted or delayed amount shall be charged interest at a rate of 6% per annum from the date of default."

Having implied the substance of the above text in the agreement of 1st August 2002, it is appropriate at this point to start a discussion on the complaints of the appellant in grounds 1, 9 and 10.

The complaints in those grounds are: **one,** that the case was not proved to the required standard and; **two,** that USD. 275,000.00 and interest were neither pleaded nor proved. **Three,** that the trial court erred for granting interest of 6% per month on an unpaid amount and; **four,** that granting of interest on USD. 36,000.00 was tantamount to granting interest on interest, which was, according to Mr. Vedasto, unlawful.

We wish to observe at the outset, that our answers to points two and four above shall also dispose of the first one. We propose to start with the second complaint, that USD. 275,000.00 was not pleaded anywhere in the body of the plaint. To support his point, Mr. Vedasto's relied on the case of **Francis Andrew v. Kamyn Industries (T) Ltd** [1986] T.L.R. 31, where it was observed that a relief not pleaded cannot

be granted and the case of **Makori Wassanga v. Joshua Mwaikambo and Another** [1987] T.L.R. 88, where it was remarked that a party is bound by its pleadings.

As this point is of mixed fact and law, we refer to the relevant contents of paragraph 7 of the plaint (quoted above) where the respondents pleaded that the amount of USD 275,000.00 was payable in eighteen (18) equal consecutive quarterly instalments of USD 15,277.00 but that the amount was not paid at the time the case was being filed. The amount was also prayed at page 9 of the record of appeal. Indeed, by a deed of guarantee, exhibit P7, the buyers guaranteed payment of the said USD. 275,000.00 including all interests that may fall due on that amount. Clause 1 of the guarantee states:

> *"1. **The guarantors (the buyers of company) do hereby unconditionally and irrevocably, jointly and severally, guarantee to the prompt and punctual payment of US Dollars Two Hundred Seventy-Five Thousand ($275,000.00) to the sellers** in the manner agreed upon, provided that the liability of the guarantors hereunder shall be limited to the said $275,000/= plus all interest amounts accruing thereon as a maximum liability."*

[Emphasis added]

The above guarantee is part of the plaint at paragraph 6 and also of the evidence on record as exhibit P7. The fact that the guarantee was executed is fully admitted at paragraph 9 of the written statement of defence at page 31 of the record of appeal. This firm undertaking has never been fulfilled by the buyers. Indeed, there is nowhere in the evidence of DW1, where he stated that the guarantee was at any point in time revoked under section 82 of the LCA. That guarantee being a valid and continuing security as per paragraph 3 of the very instrument at page 249 of the record of appeal, the same was valid at the time the suit was instituted in 2004 through to the time it was tendered and admitted in court. In that respect section 98 of the LCA, provides that:

> *"98. Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary,* ***are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor."***
>
> [Emphasis added]

In this case the buyers were both the sureties and the principal debtors also called principal obligors. To date the above undertaking to pay the said USD. 275,000.00 continues to bind tight on the guarantors.

As for the evidence, it was abundantly proved at pages 366 to 367 of the record of appeal and as already observed above in this judgment that the amount was not paid to the respondents. It is therefore clear to us that the said USD. 275,000.00 was pleaded, prayed and proved contrary to the appellant's contention.

There was one final miscellaneous point fronted by Mr. Vedasto in respect of USD. 275,000.00. He contended that at the time the suit was filed, of the USD. 275,000.00, only 3 instalments out of the agreed 18, were due for payment, therefore according to him, inclusion of a claim for all the instalments in the suit at the High Court, was premature. The trial Judge is blamed for having granted judgment in respect of part of the debt that covered the instalments which were not yet due when the case was filed.

Court practise has it, however that each case must be decided basing on its unique factual and contextual setting. In this case, according to the evidence of PW1 at pages 371 and 372, the respondents had to go to court because the buyers told them in no

uncertain terms, that they were not going to pay any more money due, because the agreement of 1st January 2003 was unlawful and void.

The above fact is also pleaded at paragraph 2 of the written statement of defence (quoted above) and throughout the evidence of DW1, the same position is maintained. It is least expected, in our view, in such circumstances, to expect the respondents to have waited for the 18 successive breaches of all the 18 instalments.

We are of the settled position that after the respondents got clear confirmation from the buyers, that not a single instalment would be paid, which turned out to be true, the respondents were justified to file the suit claiming all instalments. Thus, respectfully, we do not agree with the appellant's position, that the suit in respect of some instalments was filed prematurely.

In the circumstances, the complaints by the appellant that the amounts granted were not pleaded or proved and the complaints that the trial court granted more amounts that were not pleaded or prayed have no basis.

The next two points concern the subject of interest. Generally, interests that may be adjudged and decreed by courts are of three categories which can be conveniently described in three phases in the

dispute's life span. The **first** phase of interest corresponds to the period between when the cause of action arises to the date of filing the suit. The **second** phase spans between the date of filing the suit to the date of delivery of judgment. Interest in this category is also called interest at commercial rate or interest at bank rate. The **third** category of interest corresponds to the period between the date of judgment to the date of final settlement of the judgment debt. This is also referred to as interest at court rate.

In this case, all the three types of interests were prayed. At page 9 of the record of appeal interest is prayed at clauses (c) and (e) of the reliefs paragraph as follows:

> *"(c) payment of interest on (a) and (b) at 6% from the date each instalment fell due until full and final payment.*
>
> *(d) N/A*
>
> *(e) interest on the decretal sum at the court rate from the date of judgment to the date of full and final payment."*

Item (c) in the plaint above, is a combination of the first two categories of interests described above, because it runs from when the cause of action arose (when the respective instalments fell due) past the

date of judgment, to a future date of when the decretal amount would be fully paid.

With that general overview of the basic understanding of the concept of interests and their phases in civil cases, for a little while we will look at both statutory and case law as they relate to the subject. Interests, particularly interests in the 2nd and 3rd phases (after filing the suit) above are covered under section 29 and Order XX rule 21 both of the Civil Procedure Code [Cap 33 R.E. 2019] (the CPC). Section 29 provides as follows:

> *"29. The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and, without prejudice to the power of the court to order interest to be paid upon to date of judgment at such rates as it may deem reasonable,* ***every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied."***
>
> [Emphasis added]

In the same vein, Order XX rule 21 of the CPC, provides that:

"21.-(1) The rate of interest on every judgment debt ***from the date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per centum per annum,*** *as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent:*

Provided ...(N/A).

(2) For the purposes of this rule-

"judgment"...(N/A); and

"Judgment debt" means:

(a) the principal sum;

(b) any interest adjudged on such principal sum for any ***period prior to the institution of the suit****; and*

(c) any interest adjudged on such principal sum for ***the period between the institution of the suit and the delivery of the judgment****."*

[Emphasis added]

Order XX rule 21 (1) fixes the court rate of interest at 7% per annum and if parties agree, the rate can go up to 12% per annum. Paragraphs (b) and (c) of sub rule 2 or Rule 21 of Order XX provide for

interests before filing the suit, and between filing the suit and the date of judgment . The two correspond to phases 1 and 2 respectively.

Many cases have been decided by this Court on this very subject, including **Saidi Kibwana and Another v. Rose Jumbe** [1993] T.L.R. 174, **Njoro Furniture Mart Ltd v. Tanzania Electric Supply Co. Ltd** [1995] T.L.R. 2015, **Rev. Christopher Mtikila v. Attorney General** [2004] T.L.R. 172 and **Ashraf Akbar Khan v. Ravji Govind Varsam** [2019] T.L.R. 59.

In light of the above clarification of interests and the law applicable, we will then proceed to determine the points raised by Mr. Vedasto. The third point on which Mr. Vedasto was challenging the trial Judge was for granting interest at the rate of 6% per month. Mr. Bwana was at one with the learned counsel for the appellant on this aspect. We agree with both learned advocates, that the learned trial Judge plainly erred because, that point was not prayed in the plaint. So, we hold that indeed; the learned trial Judge erred in holding that the decretal sum carried a rate of 6% interest per month. The rate that was pleaded and proved was 6% per annum.

Next for consideration is the fourth complaint, in which the learned trial Judge was challenged for awarding interest on interest,

something which was illegal, according to the appellant's learned advocate. The question that arises out of that complaint, and which we will have to answer is this; does an amount of money (interest) accumulated because of failure to pay a commercial debt, attract interest?

We indicated above that the issue of interest was contractual at 6% per annum on any unpaid amount. In June 2003, when the buyers paid USD. 1,200,000.00, the amount had been delayed because it was supposed to be paid, latest on 6th January 2003. Because of the delay, the amount due accumulated interest of USD. 36,000.00. What the appellant's counsel is up to, is that this amount was not supposed to be charged interest.

In this respect we maintain a firm position that when the buyers withheld the respondents' money (the USD. 1,200,000.00) at the time it became due for payment on 6th January 2003, financially speaking, it meant that the respondents were unfairly denied an economic opportunity to invest their money in any other interest generating ventures or revenue streams of their choice from which they could have earned return on investment. We are settled in our mind that, as the respondents were entitled to the alleged USD. 36,000.00 in June 2003

but were not paid, we find nothing unusual to charge interest on it at 6% per annum as the learned trial Judge did. Besides, interest rates in business, fairly speaking means compound interest a concept which connotes conversion and inclusion of the money realized from interest into a principal debt during the continuance of the indebtedness. In the circumstances, the appellant's complaint that charging interest on USD. 36,000.00 was unlawful, has no basis.

We are also mindful of the fact that, as a matter of law, that interest other than interest at court rate, must be pleaded and proved. See **Zanzibar Telecom Limited v. Petrofuel Tanzania Limited**, Civil Appeal No. 69 of 2014 (unreported). In this case, interest was pleaded at pages 8 and 9 of the record of appeal and proved at pages 370 and 371 of the same record.

We must also stress here that, it is a recognised mercantile practice in this jurisdiction that commercial debts normally attract interests if not paid within the agreed time. See **Engen Petroleum (T) Limited v. Tanganyika Investment Oil and Transport Limited**, Civil Appeal No. 103 of 2003 and **Mollel Electrical Contractors Limited v. MANTRAC Tanzania Limited**, Civil Appeal 394 of 2019 (both unreported). Indeed, that mercantile doctrine is timely and useful

for purposes of inculcating financial discipline to society in general, and to borrowers in particular. In the end, except for granting interest per month which we already held to be unlawful, the rest complaints in relation to interest, have no merit.

As we get close to touching the finish line in this appeal, the deserving message in this judgment for a humble delivery to the buyers, is contained in section 37 (1) of the LCA, which provides that:

> *"37. (1)* ***The parties to a contract must perform their respective promises****, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."*
>
> [Emphasis added]

The principle of law enacted in the above provision is also called the Doctrine of Sanctity of Contract. That principle is the central axis from which all lawful contracts obtain the force of law. Courts in this country, by all means have to protect, cherish and preserve the doctrine of Sanctity of Contract by uncompromisingly compelling and coercing, its obedience, otherwise contracts in this jurisdiction would cease to have any legal worth. An eventuality which, courts and the legal system cannot take lightly for it would be placing the economy at a brink of

failure. Compliance with the canon (sanctity of contract) has been authoritatively restated in many decisions of this Court including in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R. 288 and **Philipo Joseph Lukonde v. Faraji Ally Said** [2020] 1 T.L.R. 556. Sealing the supremacy of the doctrine under consideration, in **Philipo Joseph Lukonde's** case, (supra) at page 557, this Court stated that:

> *"Once parties have entered into a contract,* ***they must honour their obligations under that contract. Neither this Court, nor any other court in Tanzania for that matter, should allow deliberate breach of the sanctity of contract.****"*
> [Emphasis added]

Certainly, the above summarizes our judgment in this appeal. In this case the buyers, one of whom being the appellant, violated their own bond and breached their own undertaking. In the circumstances, grounds 1, 9 and 10 are hereby dismissed for want of merit because, the respondents with assistance of DW1, proved their case on the balance of probabilities.

Finally, the decision of the High Court is reversed to a limited extent for having erroneously held that the agreement of 1st January

2003 was valid and that interest on the judgment debt was 6% per month, to which extent this appeal succeeds. Otherwise, the decision of the High Court is upheld and this appeal is hereby dismissed with costs for want of merit.

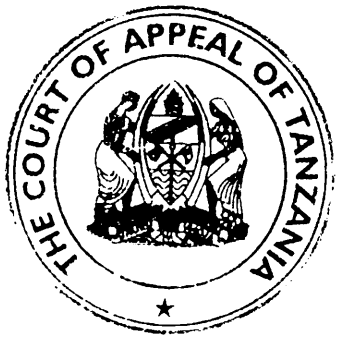
DATED at **DAR ES SALAAM**, this 10th day of August, 2022.

W. B. KOROSSO
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered on this 16th day of August, 2022 in the presence of Mr. James Bwana, the learned counsel for the Respondents also holding brief for Mr. Audax Kahendaguza, advocate for the appellant, is hereby certified as a true copy of the original.



R. W. CHAUNGU
DEPUTY REGISTRAR
COURT OF APPEAL