

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., MWANDAMBO, J.A. And MASHAKA, J.A.)

CIVIL APPEAL NO. 171 OF 2018

SIMAC LIMITED APPELLANT

VERSUS

TPB BANK PLC

(Successor in Title to Tanzania Postal Bank) RESPONDENT

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

(Mgaya, J.)

dated the 1st day of July, 2011

in

Civil Appeal No. 148 of 2009

.....

JUDGMENT OF THE COURT

7th February, 2022 & 5th April, 2023

MASHAKA, J.A.:

The appellant SIMAC LIMITED was the plaintiff in Civil Cause No. 64 of 2003 before the Resident Magistrate's Court of Dar es Salaam at Kisutu while the defendant was TPB Bank PLC (the TPB PLC), the respondent. The appellant's cause of action arose from a loan agreement in which appellant alleged that respondent failed to disburse the approved amount. It is on record that, on 19th October 1998, the appellant entered into a contract with Rufiji District Council for the maintenance and spot improvement of the Bungu-Rungungu and Mtunda- Ruaruke roads (the

contract) at a cost of TZS. 72,189,150.80. The contract required the appellant to complete the works within ten weeks. For that reason, the appellant approached the respondent for a short-term loan of TZS 12,000,000.00 which was approved on 12th March 1999. Among the conditions for the advancement of the loan required the appellant to submit a valid contract between the appellant and Rufiji District Council. Subsequently, on 15th April 1999, the respondent cancelled the approved loan due to the appellant's failure to produce a valid contract as the contract had expired.

Dissatisfied with the action by the respondent cancelling the loan, the appellant instituted the aforesaid civil case against the respondent claiming among other reliefs, TZS. 41,089,902.00 being special damages arising out of the alleged unlawful and abrupt cancellation of the loan by the respondent.

The trial court dismissed the appellant's case holding that the cancellation of the loan agreement was justified as the letters of extension did not fulfill the conditions set forth in the agreement and it further declined to award damages for the reason that there were no any receipts to justify the claims. Aggrieved, the appellant appealed to the High Court

of Tanzania, Dar es Salaam District Registry which partly reversed the decision of the trial court and ordered the respondent to fulfill the agreement and perform her part of her bargain as agreed with the appellant. In this appeal before us, the appellant is still discontented challenging the decision of the High Court.

The appellant lodged a memorandum of appeal predicated on three grounds of appeal complaining that; **one**, the learned Judge erred in law by holding that the respondent had a duty to fulfill an agreement and perform her part as agreed in their contract by disbursing the loan amount to the appellant whereas the road construction project had already been carried out successfully by the appellant as per the contract of construction and was praying for damages for the breach of contract and not disbursement; **two**, the learned Judge erred in law by holding that the appellant failed to prove the costs incurred in hiring the equipment, paying employees and other expenses whereas there was overwhelming evidence to prove that the appellant spent money and that the project was successfully completed. **Three**; the learned Judge erred in law by not awarding damages having found that the respondent was in breach of the contract according to the loan facility letter (exhibit P3).

When the appeal was placed before us for hearing, Mr. Joseph Rutabingwa, learned advocate, appeared for the appellant, while Mr. Julius Kalolo - Bundala, learned advocate, represented the respondent.

At the onset, Mr. Rutabingwa abandoned ground three and commenced by adopting the written submission earlier filed in support of the application as his oral submissions before us. In respect of ground one, Mr. Rutabingwa faulted the decision of the first appellate court that, the appellant never prayed for any disbursement of the loan money as the road's rehabilitation and improvement works had been completed as depicted in the plaint. He argued that after the cancellation of the loan by the respondent, the appellant prayed for extra expenses incurred in the initial preparation of the loan application, allowances paid to workmen, costs of hiring equipment for completion of construction works, interest on the sum at a commercial bank rate of 25% from April, 1999 to April, 2003, discharge of the mortgage under FD number 4370 - MBYLR and return of a title deed to the appellant and costs of the suit arising from non-disbursement of the approved loan.

It was his contention that the first appellate court wrongly awarded the specific performance of the loan agreement and implored us to allow the appeal with costs on the strength of his submissions.

In rebuttal, Mr. Bundala, having adopted the reply written submissions earlier filed as part of his oral submission, began by submitting that the appellant applied for a loan amounting to TZS. 18,000,000./= and the respondent came with a counter offer of TZS. 12,000,000/= subject to terms and conditions which were contained in exhibit P3. He argued that the terms and conditions were not fully complied with by the appellant as it was conditional upon the appellant submitting a valid contract between him and Rufiji District Council for the road maintenance and spot improvement to replace the expired contract which was signed on 19th October, 1998 which had a validity period of ten weeks effective from that date. It was further argued that, the appellant accepted the said terms and conditions of the loan by signing her acceptance on 16th March, 1999. Mr. Bundala claimed that the appellant failed to honor the said terms and conditions before entering into the agreement and instead, she submitted exhibit P6 which was a letter of offer for extension of time for the maintenance of the road and not a contract between the appellant and Rufiji District Council. He added that exhibit P6 required the appellant to provide to the Rufiji

District Council a valid and updated works schedule befitting the extension which was not tendered in court and unknown to the respondent. He emphasized that the respondent could not rely on exhibit P6 by the appellant for purpose of disbursing the approved loan of TZS. 12,000,000/=, as the failure by the appellant to meet the terms and conditions in exhibit P3 connotes that there was no agreement entered between the appellant and the respondent. Thus, the appellant failed to implement part of her obligations in the contract which was to submit a valid contract in which the consequence was the cancellation of the loan disbursement. He concluded that the High Court erred in holding that there was a contract between the appellant and the respondent and invited us to dismiss ground one of appeal with costs.

Having summarized the submissions for and against the first ground of appeal, the Court finds it opportune to consider and determine whether, after quashing the decision of the trial court, the first appellate court had jurisdiction to grant remedies other than those specifically pleaded by the appellant in her claim.

Having examined the record of appeal and as correctly submitted by Mr. Rutabingwa, loan disbursement was not pleaded by the appellant in

the plaint. Neither did it feature as one of the issues framed by the trial court. It is trite law that, reliefs not founded on the pleadings and which are not incidental to the main prayers sought in the plaint should not be awarded. See: **Kombo Hamis Hassan v. Paras Keyoulous Angelo**, Civil Appeal No. 14 of 2008; **Dew Drop Co. Limited v. Ibrahim Simwanza**, Civil Appeal No. 224 of 2020 and **Abraham Israel Shuma Muro v. National Institute for Medical Research & Another**, Civil Appeal No. 68 of 2020 (all unreported).

We are of the considered view that, it was improper for the High Court to grant a relief on specific performance of the contract which was not sought by the appellant. This ground is merited and we allow it.

We shall now go to ground two. In support of that ground, the appellant submitted that the first appellate court erred in holding that special damages were not proved while exhibits P4 and P7 proved the amount prayed of TZS 2,815,902/=. He argued that the appellant proved TZS. 8,799,000/= for allowances paid to workers and TZS. 29,475,000/= being costs for hiring construction equipment together with TZS. 39,377,150/= the computed interest on the total sum under special damages from April 1999 to April, 2003 at the rate of 25% the commercial rate applicable at that time. He maintained that these damages were a

direct consequence of the breach of contract between the appellant and the respondent arising from the cancellation of the loan. Mr. Rutabingwa argued further that had the first appellate court considered the evidence of PW1, PW2 and PW3 and the tendered exhibits, it would have found that specific damages were indeed specifically pleaded and proved on balance of probabilities. In addition, he submitted that the first appellate court misapprehended the evidence on record and invited us to re - evaluate on the authority of the Court's decision in **Director of Public Prosecutions v. Jaffari Mfaume Kawawa** [1981] T.L.R 149. In conclusion, he urged the Court to allow ground two of appeal.

Opposing this ground of appeal, Mr. Bundala argued that, there was no any agreement entered between the respondent and appellant to cover for the expenses incurred in the maintenance of the road project, for the respondent was not a party to the contract between the appellant and Rufiji District Council. He argued further that there was no any term in the said contract which allocated responsibility to the respondent to cover for expenses to be incurred by the appellant. He submitted that the appellant failed to prove the expenses during the trial as all the payments made were not supported by any receipts. He urged that the appellant applied for a loan from the respondent which was approved but not disbursed after

the appellant failed to honor the terms and conditions for the disbursement of the said loan. He reasoned that, all expenses expected to be incurred by the appellant in the said project were to be met by the appellant and not the respondent, and thus she cannot be blamed as she had no obligation in the contract. Bolstering his stance, he submitted that, as a general rule, special damages have to be pleaded and strictly proved referring to the cases of **Zuberi Augustino v. Anicet Mugabe** [1992] T.L.R 137 and **Stanbic Bank Tanzania Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (unreported). Mr. Bundala urged that ground two has no merit warranting its dismissal. Overall, he prayed to the Court to dismiss the appeal with costs.

Ground two is based on an issue whether the exhibits P4 and P7 and the oral evidence of PW1 and PW2 were sufficient to prove the special damages as a direct consequence of a breach of contract between the appellant and the respondent. It is trite law that special damages can only be granted upon being, not only specifically pleaded but also strictly proved. (See **Zuberi Augustino v. Anicet Mugabe** (supra) and **Athumani Amiri and Another v. Ally Faki**, Civil Appeal No. 101 of 2016 (unreported)).

The appellant relies on exhibits P4 and P7 as sufficient proof of special damages. Though exhibit P4 listed the costs of the expenses incurred by the appellant, the list was not accompanied by any receipts issued by the service providers who were paid amounts of money on that list. The same applies to exhibit P7 which shows the invoices issued by the appellant but the documents do not indicate that any payee was paid the amounts in the invoices. Specific damages must arise from breach of an agreement between the appellant and respondent. Mr. Rutabingwa submitted that the specific damages claimed were a direct consequence of the breach of contract between the appellant and the respondent resulting in the cancellation of the loan and the respondent ought to be held liable to pay the damages. However, as rightly argued by Mr. Bundala, there was no any agreement entered between the respondent and the appellant to cover the expenses incurred in the maintenance of the road project assuming that such expenses were indeed incurred. Further, the respondent was not a party to the contract between the appellant and Rufiji District Council. Thus, the respondent had no duty whatsoever to cover or pay for any expenses to be incurred by the appellant or become the financier of the said project. The letter dated 12th March, 1999 admitted as exhibit P3 by the respondent to the appellant approved a loan

amounting to TZS. 12,000,000/= being a counter offer subject to the given terms and conditions for the road maintenance and improvement project in Rufiji District. The letter constituted a credit facility to the appellant approved subject to the fulfilment of the terms and conditions listed as follows:-

- " i) You must submit to the bank a valid contract for road maintenance and improvement in Rufiji District entered between your company and District Executive Director to replace the expired contract which was signed on 19th October, 1998 and which had a validity of 10 weeks effective date.*
- ii) NA*
- iii) NA*
- iv) The security documents must be perfected prior to funds disbursement, thus you must surrender to the bank the original Title Deed Certificate No. 98 – MBYCR of the property offered to the bank as collateral.*
- iv) Disbursement of funds will not be effected until you make full payment of all fees including administrative fees which is 1% of the approved amount - i.e. Tshs. 120,000/= plus legal and loan documentation fees totaling Tshs. 30,000/= and you must sign a Loan Agreement with the bank.*

v) All legal fees/charges incurred by the TPB must be met by yourselves.

vi) NA

vii) NA

viii) The guarantor for the loan, in this case Mr. Michael Ilomo must sign a Guarantor Form.

ix) NA

x) NA."

Under clause (i) of exhibit P3 the appellant was required to submit to the bank (respondent) a valid contract for road maintenance and spot improvement work between her and District Executive Director of Rufiji District Council to replace the expired contract which was signed on 19th October, 1998 which had a validity of 10 weeks from the said date. The appellant failed to submit to the respondent a valid contract for the road maintenance and improvement project between her and the District Executive Director of Rufiji District Council as required by item (i) above. This discharged the respondent from any obligation under exhibit P3. Instead, the appellant submitted a letter from the Rufiji District Council offering ex – gratia extension of time from 1st March, 1999 to 4th April, 1999 vide exhibit P6 subject to providing a valid and updated works

schedule befitting the extension to enable the Council, their consultants and the appellant to deliberate on its clarity and possible adjustments. A similar letter dated 09th April, 1999 as part of exhibit P6 granting extension of time from 5th April, 1999 to 4th May, 1999 referring the terms and conditions of the contract signed on 19th October, 1998 to remain in force.

We are of the considered view that when communication was proceeding on between the respondent and the appellant, there were negotiations going on between the appellant and the Rufiji District Council for extension of time and was required to provide a valid and updated works schedule for the remaining works befitting the extension. There was no valid contract yet between them to attract disbursement of the loan.

The appellant did not fulfil the conditions precedent in the agreement to enable the disbursement of the approved loan. Thus, we find that there was no agreement tendered in evidence between the appellant and the respondent requiring the respondent to pay for damages. On the contrary, through exhibit P3, the respondent had spelt out the terms and conditions which were never fulfilled by the appellant.

In conclusion, having re – evaluated the evidence upon Mr. Rutabingwa's invitation, we are satisfied that the appellant failed to

discharge her burden that the respondent breached the loan agreement warranting award of special damages as claimed. At any rate, the evidence in support of special damages was insufficient to be sustained. The appellant did not strictly prove special damages in line with the decisions referred to above. We find no merit in this ground and dismiss it.

In fine, this appeal fails for lack of merit and we accordingly dismiss it with costs.

DATED at DAR ES SALAAM, this 5th day of April, 2023.

S. A. LILA
JUSTICE OF APPEAL

L. J. S. MWANDAMBO
JUSTICE OF APPEAL

L. L. MASHAKA
JUSTICE OF APPEAL

The Judgment delivered on this 5th day of April, 2023 in the presence of Mr. Erick Simon, the counsel for the Appellant and Mr. Bahati Makamba, counsel for the Respondent, is hereby certified as a true copy of the original.




D. R. LYIMO
DEPUTY REGISTRAR
COURT OF APPEAL