IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KWARIKO, J.A., And FIKIRINI, J.A.)

CIVIL APPEAL NO. 83 OF 2020

AGGREKO INTERNATIONAL PROJECTS LIMITED.....APPELLANT

VERSUS

TRIUMPHANT TRADE AND CONSULTANCY SERVICES LIMITED.....RESPONDENT

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

(Mruma, J.)

dated the 17th day of July, 2019

in

Commercial Case No. 26 of 2017

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JUDGMENT OF THE COURT

6th February & 27th October, 2023

MKUYE, J.A.:

The appellant, Aggreko International Projects Limited (AIPL) has appealed against the judgment and decree of the High Court of Tanzania, Commercial Division at Dar es Salaam (the trial court) dated 14th August, 2019 (Mruma, J.) in Commercial Case No. 26 of 2017.

In order to appreciate the background of the appeal, we find it appropriate to narrate, albeit briefly, the facts leading to this appeal.

The appellant, is a company incorporated in the United Arab Emirates in 2011 while the respondent, Triumphant Trade and

Consultancy Services Limited (TTCSL), is a company incorporated under the laws of Tanzania. In 2011, the appellant secured a contract with TANESCO for commissioning a 100 MW power plant at Ubungo Power Station in order to replenish power shortages into the national grid. While relying on the appellant's undertaking in the contract, the respondent alleged that it all along had offered consultancy services to the appellant, under an oral agreement between the two which, eventually facilitated the appellant to secure the said contract. The respondent further claimed that the oral agreement was made to the effect that the appellant would pay the respondent a commission in a sum equivalent to 6% of the proceeds for capacity standby, running charges, mobilization and demobilization charges made available to the appellant which were estimated at USD 120,000,000.00. The said oral agreement was said to have been concluded in a meeting that had been held at the Harbour View Hotel between Shiraz Sharrif (PW1) and James Shephard (DW2).

On the other hand, the appellant claimed that no such consultancy agreement existed between the parties such that the respondent was not entitled to any proceeds derived from the project. She contended that, in relation to TANESCO Power Project their consultant was Global

Associates Limited to whom they entered into an agreement and had paid him. The parties would not come to any meaningful settlement. This misunderstanding then triggered the institution of civil suit by the respondent in the High Court in which she claimed for among others, payment of USD. 7,200,000.00 being the amount payable to her as a commission for the consultancy services rendered to the appellant.

The trial court, upon hearing both parties was satisfied that there existed an oral contract between the two parties for the provision of consultancy services on the basis of various correspondences between the respondent (PW1) and DW2 through emails (Exhs. P1 – P14). It rejected the existence of an agreement between the appellant and Global Associates Limited being their consultant since none from the said company came to testify in court to that effect. The trial court also found that there were terms and conditions which were implied (derived) from the agreement between the respondent and Buzwagi Mine Project operated by Pangea Minerals Limited. The respondent was, therefore, awarded the amount of USD. 7,200,000.00 claimed for the consultancy plus general damages to the tune of USD. 1,000,000.00, interest at commercial rate of 2% and at court rate of 1%.

Aggrieved by the said High Court decision, the appellant has now appealed to this Court fronting a total of twenty-four grounds of appeal which for the purposes of this Court's decision can be conveniently paraphrased into the following issues:

1) *Whether there was oral consultancy agreement between the parties, and if so,*
2) *What were the terms and conditions of the said agreement.*
3) *What was the formula of the commission.*
4) *Whether there was a breach of agreement.,*
5) *Whether the trial court erred in granting leave to the respondent to amend the witnesses' statements.*
6) *Whether the awards of USD 7,200,000.00 as commission and USD 1,000,000.00 as general damages were proved.*

When the appeal was called on for hearing, the appellant was represented by Messrs. Gerald Shita Nangi and Jeremia Tarimo, both learned advocates, whereas the respondent enjoyed the services of Mr. Peter Kibatala, also learned advocate. Both parties filed their respective written submissions which each party sought to adopt to form part of her oral submissions at the hearing of the appeal.

For convenience, we propose to begin with the issue whether the trial court erred in allowing the amendments to the defectively drawn and attested witnesses' statements.

It is argued by the appellant that, it was wrong for the trial court, to allow amendment of the incurably defective respondent's witnesses' statements by Shiraz Sharrif (PW1) and Lt. Gen. Iddi Salehe Gahu, (PW2) for being attested by an unqualified person to practice as a commissioner for oaths under section 3 (2) of the Notaries Public and Commissioner for Oaths Act, Cap 12 R. E. 2002 (Notaries Public and Commissioner for Oaths Act). According to the appellant, this offended rule 48 (1) (a) and 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (GN. No. 249 of 2012). She is of the view that, under such a situation which was agreed by the trial court, it was incumbent upon it to strike out those statements and dismiss the suit. She made reliance on the case of **Millicom (Tanzania) N.V. v. James Alan Russel and 2 Others**, Civil Application No. 44 of 2016 (unreported) to bolster her stance. In the said case, the Court struck out the application for extension of time since the applicant's affidavit in support of the application was attested by an advocate who was not qualified to practice in Tanzania.

In response, the counsel for the respondent argued that the learned trial Judge (Sehel, J. as she then was), correctly ordered that the respondents to file fresh sets of witnesses' statements without any alteration in contents in the circumstances whereby the respondent was not aware that the previous lawyer did not possess a valid practicing licence. After all, they argued that the Court should take into account the overriding objective principle which is geared towards observing and dispensing substantive justice as was also incorporated in the Commercial Division Rules through amendments. In this regard, the learned counsel beseeched the Court to invoke the overriding objective principle because no prejudice was occasioned on the appellant.

According to section 4 of the Notaries Public and Commissioner for Oaths Act, an advocate would qualify to practice in Tanzania if he possesses a valid practicing certificate, signs the Roll of advocate and pays the requisite fee. It is evident from the record of appeal that on 15/11/2018, the trial Judge (at page 2097 of the record of appeal) delivered a ruling allowing the witnesses' statements of Shiraz Shariff and Lt General Iddi Salehe Gahu to be amended for being defective having been attested by a person who was not qualified to practice as a commissioner for oaths as per section 3 (2) of the Notaries Public and

Commissioner for Oaths Act. It follows, therefore, that the witnesses' statements were rendered defective. Much as it is the appellant's view, while relying on **Millicom (Tanzania) N.V.** (supra), that after the trial Judge had admitted that the witnesses' statements were defective, she ought to have struck out the said witnesses' statements and dismiss the suit, we are of a different view. We shall explain.

Mindful that the law does not specifically provide for amendment of witnesses' statements, we think, each case is to be determined in accordance with its own prevailing circumstances. Considering that the witness statement is similar to examination in chief in a written form, we are of a view that in a proper situation having regard to the prevailing circumstances like the one at hand, before its being adopted as part of the record it can be amended with the leave of the court. On this, we borrow a leaf from the situation whereby an affidavit which is taken to be evidence on oath may with a leave of the court be amended by way of a supplementary affidavit as per Rule 49 (2) of the Tanzania Court of Appeal Rules, 2009.

In this case, it is clear that after having realized that the witnesses' statements were attested by a lawyer who did not possess a valid practicing licence, the trial Judge ordered the respondent to file fresh

sets of witnesses' statements without any alterations in their contents. The consoling part of that order is that it strictly prohibited alteration of the contents which makes an assurance that the appellant could not be and was not prejudiced in any way.

In the wake of the introduction of the overriding principle geared towards dealing with the matter substantively to facilitate substantive justice, we confidently hold that, the trial Judge was justified to allow the filing of the fresh set of witnesses' statements to facilitate substantive justice. We therefore, find no good reason to fault the trial Judge in that regard. Hence, this ground is hereby dismissed.

Next is the crucial issue in this case whether there was a valid oral consultancy agreement or contract between the two parties. In our view this issue covers grounds of appeal nos. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10. It is the appellant's argument that in arriving at the conclusion that there was such a valid contract, the trial court relied on **one,** Exhibits P1 to P10 in which the parties allegedly communicated on Pre-TANESCO Power Project and Exhibits P11 to P14, where the parties through Steve Chapman, DW2 and Ian Barber for the appellant on one hand, and PW1 for the respondent, on the other, negotiated the deal of the appellant or rather communicated about the execution of TANESCO Power Project

and delayed payments to the appellant (pages 2443 to 2448 of the record of appeal). **Two**, the appellant's conduct of continuous engaging the respondent in its contractual relationship with TANESCO which was translated as acceptance to the offer as per section 2 (1) (b) of the Law of Contract Act, [Cap 345 R.E 2002] (the Contract Act). **Three**, that, since the desire by the respondent had been acted upon by the appellant by allowing him to proceed in dealing with TANESCO on her behalf, then it constituted consideration under section 2 (1) (d) of the Contract Act and, therefore, the promise and counter promise under section 2 (1) (e) of the Contract Act formed consideration for each other resulting into a lawful oral contract

However, it is the appellant's argument that, the respondent failed to prove the existence of an oral contract on the balance of probability. It was contended that, even the evidence by PW1 that the parties had met in February, 2011 at Harbour View Hotel in Dar es Salaam where PW1 and DW1 orally agreed for the respondent to act as an agent or consultant of the Power Project at a commission rate of 6% of the above stated payments that would be received by the appellant from TANESCO, was denied by DW1 and even having met in the meeting at Harbour View Hotel. This position was also supported by DW2 and DW3.

It is the appellant's further submission that Exhs. P1 to P14 which were alleged to support an oral agreement did not provide anywhere about the existence of the oral contract. Neither were the terms and conditions of the contract, proved to exist. Besides that, the appellant wondered how could the respondent who had knowledge of the appellants' consultancy and ethics policies through Aggreko Ethics Policy (Exh. D1), The Sales Consultancy Agreement between Aggreko International Projects Limited and Triumphant Trade and Consultancy Services Limited for Pangea Minerals Limited Buzwagi Mine Project in Tanzania dated 1/4/2012 (Exh. D4) and another similar Agreement between the same parties entered on 1/5/2013 (Exh. D5) could have accepted the alleged oral agreement without any proof to that effect. Those exhibits contain specific provision on the commission payable. Apart from that, the appellant argued that the respondent was in constant communication with Charles Mbire of Global Associates Limited (Exhibits P4, P5, P6, P7, P8 and P9), who was their consultant in the TANESCO project.

In reply, the respondent contended that, the High Court was correct to hold that there was an oral contract between the parties on the basis of Exhibits P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P12

and P13 which show the entire transactions and dealings between them. In that contract, the respondent was engaged to provide consultancy services for the procurement of a power provision contract in favor of the appellant from TANESCO which contract was to be reduced in writing. The respondent stressed that, there were extended communications between PW1, the respondent's Principal Officer and various officers of the appellant specifically in relation to TANESCO power project. For instance, the respondent's involvement can be seen where PW1 alerted Aggreko of the power shortages and opportunities envisaged (Exh. P1 - emails dated 13/7/2010 and 2/12/2010); Aggreko asking PW1 to assist in preparing a sales plan (Exh. P2, email dated 8/2/2011); PW1's provision of information to Aggreko on what sites where TANESCO power project would be undertaken and the requirements including how Nicolaus Kjaer would be taken to the sites (emails dated 14/2/2011 and 15/2/2011 Exh. P3). That, through Exh. P6, PW1 played a role of preparing and transmitting to Aggreko the site visit report; and in the email dated 6/3/2011 PW1 notified DW2 on the competition; while DW2 indicated the urgency in securing the deal.

It was the respondent's further submission that, the rejection of oral contract by DW1, DW2 and DW3 should be weighed and analyzed

in the context of Exh. P1 – P10 and contested by the appellant through Exhs. D1 – D8. On top of that, she contended that Exh. P4 corroborates the evidence of PW1 on meeting at Harbour View Hotel Dar es Salaam. The respondent argued further that the contention that PW1's testimony regarding oral contract is not corroborated is immaterial since it is not the number of witnesses that matters, but the quality of evidence that is required to prove a fact. At any rate, it was argued that PW1's testimony was corroborated by Exhs. P1 to P 13.

As regards the terms and conditions of contracts, it is the respondent's argument that the inception, the terms, the performance and benefits are clearly shown in Exhs. P1 to P13. She added that, the appellant accepted and utilized the benefits from the respondent's undertaking but when the hour finally arrived of reckoning the commission, the appellant denied to sanction such contract with the respondent.

In tackling this crucial issue, we wish to begin with expounding as to what does a contract mean. In terms of section 10 of the Contract Act, all agreements are contracts if they are made by the free consent of parties who are competent to enter into a contract for a lawful consideration and with a lawful object and are not prone of being

expressly declared to be void. That section is complemented by section 13 of the same Act on the issue of consent in that *"two or more persons are said to consent when they agree upon the same thing in the same sense".*

It means therefore that, in order for the agreement or contract to be enforceable, it must satisfy several crucial elements which are: **One**, there must be an offer which must be clearly communicated. **Two,** there must be acceptance of the communicated proposal; **three**, parties must be competent or must have capacity to enter into the contract; and **four,** there must be a lawful consideration. It is also noteworthy that the object of the contract must be lawful; and the parties must clearly exhibit intention to create legal relations. It is also important to note that in our jurisdiction, alongside written contracts, there are also oral contracts which are basically defined as *"agreements made with spoken words and either no writing or only partially written."* [See a High Court decision in **Rashid Protas Ndumbo v. Titus Zeno Ndulu**, PC Civil Appeal No. 61 of 2021 [2021] TZHC 9068 20th November, 2021.

As to what entails an offer or proposal to the contract, section 2 (a) of the Contract Act provides for an answer. It defines such term as follows:

> *"When a person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal".*

See also; **Louis Dreyfuls Commodities Tanzania Limited v. Roko Investment Tanzania Limited,** Civil Appeal No. 4 of 2013 (unreported).

In this case, in finding that there was an offer, the trial court relied on various email correspondences between the parties and found that, in fact, the respondent made a proposal which was accepted by the appellant in connection with TANESCO Power Projects. In particular, it relied on the emails admitted as Exhs. P1 – P13 which were various communications by the respondent's principal officer (PW1) and various officials of the appellant in relation to the TANESCO Projects.

It started when the respondent informed the appellant of the possibility of securing Power Project from TANESCO for replenishing power following the shortage that befell the country in the national grid and the appellant showing interest to secure the job. In between they communicated on the proposed power generation project planned for the next four years; how the appellant made preparations geared

towards securing the job (Exh. P3); the misunderstanding on putting their agreement in writing and the payment of commission (Exh. P4), PW1 was assisting the appellant's project to run smoothly, an email dated 23/1/2013 by DW2 which was very harsh to the respondent; including the purported meeting said to have been convened at Harbour View Hotel Dar es Salaam, where it is alleged that they executed a contract.

However, assessing such emails against the requirements of contracts we have expounded above, it is clear that they do not prove or establish with certainty that there was such an offer made by the respondent and accepted by the appellant. In other words, there was no offer or acceptance on a common matter which can vividly be seen in such correspondences showing that there was an offer or proposal communicated from one party and accepted by the other and more so when taking into account that it involved such a huge project attracting a colossal amount money. We say so because, none of the email specifically states so. Even the contention by the respondent that there was a meeting convened at Harbour View Hotel Dar es Salaam (Exh. P4) with DW2 where such an offer and acceptance were made or rather the oral agreement was concluded in relation to consultancy services for

TANESCO Power Projects, is not supported by any evidence or exhibits to that effect. Moreover, assuming, just for the sake of argument that there was such an oral contract, we ask ourselves if there was any consideration being among the essential elements in a contract.

We need to emphasize that consideration is another prerequisite element in any valid agreement as per sections 2 (e) and (h) and 10 of the Contract Act. In the High Court case of **Lilian Sifael v. Mbeya Water Sanitation Authority,** Labour Revision No. 11 of 2020, [2021] TZHC 7110, which we take inspiration, the High Court reiterated that position as follows:

> *"Fundamental elements to the contract are offer, acceptance, intention to create legal relationship* ***and consideration".***
>
> [Emphasis added]

It is important to stress that, in order for the contract to be valid and enforceable, all the elements have to co-exist – see also; **Rashid Protas Ndumbo** (supra).

In this case, PW1 relied on Exhs. P1 to P13 in proving consideration and the trial Judge found that there was a consideration as shown at page 2448 of the record of appeal by deducing from PW1's

evidence, the respondent's desire to assist the appellant that was acted upon by the respondent who allowed her to proceed with the deal with TANESCO. In other words, the trial Judge found that there was a promise and counter promise forming consideration which resulted into an oral or verbal contract.

However, on our perusal in the record of appeal, there is no evidence proving that the respondent and the appellant agreed on the consideration for the provision of the alleged consultancy services. At most it appears that the issue of consideration was not settled reading from the email by DW2 dated 23/1/2013 addressed to the respondent. Part of it reads:

> *"...quite clearly Aggreko are contracted to Global Associates for TANESCO Project, commissions are in line with corporate ethics guidelines and as such much lower than previous such contracts. So, whatever you have agreed as sub agreement with Global Associates you need to align your expectations because there is not the pot of gold. On top of that Aggreko is contracted to you for the Barrick contract which is three years and you benefit from the commission from this.*

Neither Charles nor I can magic a pot of gold up for you, but will pay what is in line with the agreement and corporate ethics policy."

Incidentally, the trial Judge inferred consideration of a commission at the rate of 6% of the payment made by TANESCO to the appellant from the previous contract which the appellant had executed with the respondent in relation to Buzwagi Mine Project operated by Pangea Minerals Limited (Exhs. D4 and D5). That was the source of the commission of 6%. In our considered view, it was not proper for the trial court to infer the consideration from the former contract. In the first place, we wonder as to what was the connection between the transaction at hand and that contract. Secondly, assuming an oral consultancy agreement existed, the commission for the latter contract may not necessarily be at the figure that the parties had agreed on the former agreement. They might have opted for a lower or higher marking depending on the nature of the duties involved in consultancy and the bargaining strength of either party.

Consequently, since it is crystal clear that there was no offer, acceptance and consideration which are vital elements for a valid contract to exist, we are satisfied that there was no enforceable oral

consultancy agreement between the parties. In this regard, the first issue is answered in the negative.

Having resolved the first issue in the negative, determination of the second, third and fourth issues automatically becomes inconsequential and therefore unnecessary.

Ultimately, in view of the foregoing, we are satisfied that the appeal is merited. We thus, allow the appeal, quash the judgment and set aside decree and orders of the High Court with costs.

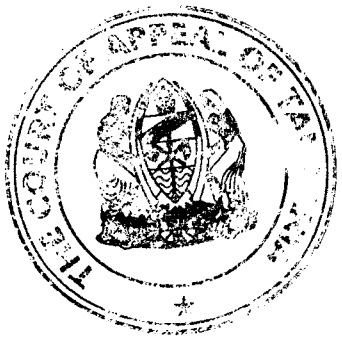
DATED at **DAR ES SALAAM** this 25th day of October, 2023.

R.K. MKUYE
JUSTICE OF APPEAL

M.A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 27th day of October, 2023 in the presence of Mr. Gerald Nangi, learned counsel for the appellant also holding brief for Mr. Peter Kibatala, learned counsel for the respondent, is hereby certified as a true copy of the original.



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