

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO.11 OF 2010

MASUMIN PRINTWAYS & STATIONERS LTD..... PLAINTIFF

VERSUS

THE SAVINGS AND CREDIT COOPERATIVE UNION

LEAGUE OF TANZANIA (1992) LTD.....DEFENDANT

Date of Last Order - 09/08/2010

Date of exparte proof hearing - 01/06/2010

Date of Judgment – 19/08/2010

JUDGMENT

MAKARAMBA J.:

On the 18th day of January 2010, the Plaintiff, a limited liability company dealing in the business of selling of paper and office products, such as computers, cartridges, papers, punching machines and other official facilities, filed a suit in this Court against the Defendant, praying for Judgment and Decree as follows:-

- a) The Defendant be ordered to pay the Plaintiff the sum of Tshs. 30,297,920/= being the outstanding amount in respect of provision of stationery;*
- b) The Defendant be ordered to pay interest on the aforesaid amount at the rate of 12% per month from the date when each claim accrued until the date of judgment or sooner payment;*
- c) The Defendant be ordered to pay interest on the decretal amount at the rate of 7% per annum until payment in full;*

- d) The Defendant be ordered to pay general damages as the court may assess for loss of expected use of income/earning by the Plaintiff;*
- e) The Defendant be ordered to pay punitive damages for breach of term of service;*
- f) Costs; and*
- g) Any other relief(s) that this Honourable Court may deem fit and just to grant.*

As it turned out, apparently the Defendant failed to file its written statement of defence within the prescribed time, and could not satisfy this Court on the reasons for extension of time to file the same, whereupon the Plaintiff prayed to proceed by way of *exparte proof* under Rule 14(2)(b) of Order VIII of the Civil Procedure Code [Cap.33 R.E. 2002], which prayer this Court granted and fixed a date for such *exparte proof* and hence this judgment.

In this suit the Plaintiff is represented by Advocate Zake from the law firm of R.K Rweyongeza & Co. Advocates, and the Defendant was represented by Mr. Mdamu, learned Counsel.

On the date set for the hearing by *exparte proof*, Mr. Zake learned Counsel appeared for the Plaintiff and fielded Mr. Laurence Severine Massawe, Principal Officer of the Plaintiff's company who testified as PW1 and tendered in evidence, three exhibits, Exh.P1, P2 and P3.

PW1 testifying stated that between 2007 and 2009, the Defendant, *The Savings and Credit Cooperative Union League of Tanzania (1992) Ltd* (**SCULT** in short), their client for a longtime, ordered from and was

supplied by the Plaintiff, goods worth Tshs.43,613,072/= and that the Defendant paid only Tshs.13,316,152/=, and to this day the Defendant has not paid the remaining balance of Tshs. 30,297,920/= despite being reminded by the Plaintiff to pay the said balance. PW1 tendered in this Court, statement of account, Local Purchase Order (LPO), delivery note and invoices (**Exhibit P1 collectively**) with respect to this transaction and showing the remaining unpaid balance of the purchase price for the goods the Plaintiff supplied to the Defendant between 12/4/2007 and 16/09/2009. PW1 stated further that the statement of accounts show the total amount of the goods the Defendant was supplied by the Plaintiff and for which single separate invoices, delivery note, and purchase orders were issued.

PW1 testified further that the statement of account confirms the goods delivered and the money the Defendant paid, together with the difference in the purchase price remaining unpaid by the Defendant which he owes the Plaintiff. Deducing from the statement of account, PW1 stated that for example, Item 38745 on the statement of account dated 16/04/2008 is for an amount of Tshs.1,604,400/= and the delivery note No.35050 in respect thereof with a Local Purchase Order No.001026 dated 16/04/2008. PW1 testified further that one of the Terms and Conditions on the footnote of the Tax Invoice was that non-payment of purchase price within agreed time attracts interest at 12%, and return of goods has to be done within 8 days of their purchase. PW1 testified further that the Defendant did not meet the conditions and even the money he paid was too little, considering that on the 16/04/2008, the Defendant took goods

worth Tshs. 835,920/= but to this day he has not been able to pay all and has elected to pay in the manner which he feels convenient to him. PW1 testified further that his Company has incurred loss due to inflation and rising process of goods and despite several demands for payment, the Defendant has not heeded as evidenced by demand note dated 4th of November 2009 (Exh.P2).

According to the testimony of PW1, the Defendant as per their letter to the Plaintiff's lawyer of 06/11/2009 which was tendered in evidence and admitted as **Exhibit P3**, admitted the debt of Tshs.35,897,920/=. PW1 testified further the letter, **Exhibit P3**, has annexures which the Defendant himself prepared showing various goods the Defendant purchased from the Plaintiff from 2007 to 2009, which tally with the amount of money the Plaintiff is claiming from the Defendant. PW1 stated further that the Defendant has paid Tshs.5,600,000/= which brings the amount of the debt due from the Defendant to Tshs.30,297,000/=, which to this day the Defendant has not paid. PW1 testified further it is under those circumstances that the Plaintiff's Company Board of Directors resolved through its letter dated to bring this suit against the Defendant to recover from him the money due. The Plaintiff prayed for this Court to award the Plaintiff the reliefs as prayed in the Plaint.

It is without dispute as evidenced by **Exhibit P1** collectively which PW1 tendered in this Court collectively, and as corroborated by **Exhibit P3**, that during for the period between 12th April 2007 and 16th September 2009 the Plaintiff supplied several stationeries to the defendant for which the Plaintiff raised invoices but the defendant has failed and/or refused to

pay the outstanding amount of Tshs. 30,297,920/= which the Plaintiff now claims from the Defendant. It was a term of the contract that payment for the goods supplied by the Plaintiff to the Defendant had to be effected within a month from the date of the invoice raised, and that an interest of 12% per month would be charged to all and every overdue account which the Plaintiff as from the date of each claim accrued. PW1 explaining the procedure for the supply of goods stated that the practice was for a customer sometimes to request an invoice in order to know the price of the Plaintiff's company products, then the Company would issue to the customer and invoice, whereupon the customer would bring the purchasing order, and upon agreement with the Plaintiff, the Plaintiff would deliver the products to the Defendant. The agreement in this case was for the Defendant to reject the invoice raised by the Plaintiff within 8 days upon finding the goods supplied by the Plaintiff to be incompatible with the purchase order. It was also agreed that the Defendant should pay the purchase price of the goods within 30 days from the date of delivery.

It has been established that as for the goods comprising of various items as indicated in Exhibit P3, which the Plaintiff supplied to the Defendant between 12th April 2007 to 16th September 2009, of Tshs.43,613,072/=, the Defendant has only paid Tshs.13,316,152/=, and therefore the Defendant is still indebted to the Plaintiff for the amount Tshs.30,297,920/= being the balance. This has been evidenced by **Exhibit P1** collectively, comprising of Local Purchase Order (LPO), delivery notices, invoices, and statement of account, which shows the total of the goods delivered to the Defendant. The details of the goods in the delivery note

and the Local Purchase Order also appear in the invoices showing the total products ordered by the Defendant and the delivery note by the Plaintiff, proving delivery of the goods to the Defendant. The statement of accounts which prove the goods delivered also indicate the amount paid by the Defendant which makes it is easier to establish the difference as to what amount the Defendant is still indebted to the Plaintiff. In terms of the contract, non-payment for the goods delivered to the Defendant within one month would attract interest at the rate of 12% per month and return of goods rejected by the Defendant within 8 days. The Defendant clearly did not abide by the terms and conditions of the contract and the money the on 16/04/2008, the Defendant took goods worth Tshs.8,359,020/- but has not been able to pay instead the Defendant has elected to pay in the manner he feels fit.

As per **Exh.P2**, the Plaintiff is demanding from the Defendant a total sum of Tshs.35,897,920/=. Although the Defendant has paid some amount due, as evidenced by **Exhibit P3**, a letter dated 06/11/2009, from SCULT (1992) LIMITED and copies of Masumini Statement of Account attached to it addressed to the Plaintiff's advocates, the Defendant has acknowledged and admitted the debt of Tshs.35,897,920/=: as well as failure to honour the agreement on settlement of the debt due to financial crisis their organization was facing. The attachment to Exhibit P3, which was prepared by the Defendant themselves showing various goods ordered and/or purchased by the Defendant from the Plaintiff between 2007 and 2009 tallies with the amount of money paid and the amount which was supposed to be paid. It is without doubt that as per the defendant's

statement, the amount admitted to be owed to the Plaintiff is the same with the amount the Plaintiff demanded in **Exhibit P2**. As per PW1 testimony until the filing of this suit, the Defendant has only paid Tshs.5,600,000/= of the amount due and therefore still owed Tshs.30,297,000/=, which the Plaintiff is now claiming from the Defendant.

The Plaintiff in its Plea has prayed that the Defendant pay interest on the Tshs.30,297,000/= at the rate of 12% per month from the date when each claim accrued until the date of judgment or sooner payment is made. I am alive to the cases in **EASTERN RADIO SERVICE VS. R.J PATEL (1962) E.A 818** and **Y.F GULAN HUSSEIN VS. FRENCH SOMALILAND SHIPPING CO LTD [1959] E.A 25**, both of which establish the principle that where a successful party was deprived of the use of goods or money by reason of wrongful act on the part of the defendant, the party who has been so deprived of the use of goods or money to which he is entitled should be compensated for such deprivation by the award of interest.

The Plaintiff's other prayer is that the Defendant be ordered to pay interest on the decretal amount at the rate of 7% per annum until payment in full, which is within the purview of Order XX Rule 21 of the Civil Procedure Code Cap.33 R.E 33.

The Plaintiff is also asking for payment of general damages by the Defendant. The general principle as to general damages is that such damages need not be specifically pleaded, and may be asked for by a mere statement or prayer of claim. This was established in the case of **THE COOPER MOTOR CORPORATION LTD. VS. MOSHI/ARUSHA**

OCCUPATIONAL HEALTH SERVICES [1990] T.L.R. 96 (CA). The Plaintiff is praying for general damages for loss of expected use of income/earnings. As per the law, loss of income is a special damage which has to be specifically pleaded and proved. The plaintiff did not tender any evidence of decline in income or of turn-over as claimed. The Plaintiff did not manage to prove in this Court how much the Plaintiff's company was earning in its business and the loss which it has incurred as a result of the breach of the contract by the Defendant for this Court to be able to assess the general damages to be awarded. I am alive to the decision in the case of **RUGARABAMU ARCHARD MWOMBeki VS. CHARLES KIZIGHA AND THREE OTHERS [1984] T.L.R. 350 (HC)**, to the effect that since the Plaintiff has not told the court how much he has been earning in his business, assessment of damages cannot be based on unsubstantiated figures. Given that general damages as a matter of prayer and which need not be specifically be proved, it is difficult for this Court to assess the loss in income the Plaintiff's company has suffered in its business. In the absence of evidence of the loss suffered by the Plaintiff from the income otherwise the Plaintiff's company would have earned from the contract if it had not been breached by the Defendant, this Court is unable to assess and exercise its discretion to award general damages, since it would be doing so from vacuum.

The Plaintiff has also prayed for punitive damages, which in essence are of non-compensatory nature serving as its purpose, penalizing or deterring unacceptable behavior, where the defendant has acted in a willful, wanton, malicious, abusive or other outrageous manner. Punitive

damages are also exemplary in nature for they serve to deter others from behaving in the same manner as the defendant and as such they are not mandatory and are only awarded in addition to an award for compensatory damages. The determination for an award of punitive damages therefore involves a careful examination of the defendant's conduct and state of mind at the time of the misconduct as they are used to punish the party at fault in bad faith. I am alive to the decision in the case of **DAVIES VS. MOHANLAL KARAMSHI SHAH [1957] E.A. 352**, where it was held inter alia that:

"...punitive or exemplary damages are, as their names imply, damages by way of punishment or deterrent. They are given entirely without reference to any proved actual loss suffered by the plaintiff."

More or less legal position was taken in the decision in the case of **ANGELA MPANDUJI VS ANCILLA KILINDA [1985] T.L.R. 16 (HC)** where it was stated that exemplary or punitive or vindictive damages are damages given not merely as pecuniary compensation for the loss actually sustained by the plaintiff, but also as a kind of punishment of the defendant with the view of discouraging similar wrongs in future.

In view of the foregoing decisions from persuasive authorities, which I find no good reason to depart from, the Plaintiff has only stated in the Plaint that "*the defendant failed or refused to pay the amount to the Plaintiff.*" The Plaintiff however, has not established before this Court whether the Defendant intended not to pay the debt or was unsuccessful in trying to do something. It is on record that PW1 when making reference to

Exhibit P3, told this Court that the Defendant acknowledged the debt and failure to honour the agreement on settlement of the debt as a result of financial crisis the Defendant's organization was facing. There is nothing in my view, in the Defendant's behavior suggesting bad faith or willfulness to pay the debt as the default on the part of the Defendant to pay the debt was due to financial crisis and therefore cannot be condemned to punitive damages as the Plaintiff would wish this Court to do.

The Plaintiff prayer for the costs of this suit is quite in order since as a general rule of practice costs should follow the event where the Plaintiff succeeds in the main purpose of his suit as was pronounced in the case of **DEMBENICTIS & OTHERS VS. CENTRAL AFRICA CO. LTD & ANOTHER (1967) E.A 310.**

On the evidence adduced in Court by the testimony of PW1 and the exhibits tendered in Court during the exparte proof hearing, this Court finds that the Plaintiff has managed to prove its case against the Defendant.

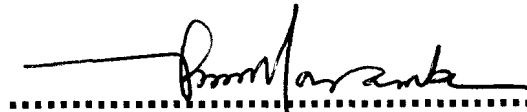
In the event and for the foregoing reasons, judgment and decree is hereby entered against the Defendant as follows:

- a) The Defendant shall pay the Plaintiff the sum of Tshs.30,297,920/= (say Thirty millions, Two hundred and ninety seven thousands, nine hundred and twenty) being the outstanding amount due in respect of provisions of stationery.*
- b) The Defendant shall pay interest on the aforesaid amount at the rate of 12% per month from the date when each claim accrued until the date of judgment or sooner payment.*

c) The Defendant shall pay interest on the decretal amount at the rate of 7% per annum until payment in full.


d) The Defendant shall pay the Costs of this suit.

It is accordingly ordered.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA
JUDGE
19/08/2010

Judgment delivered this 19th day of August 2010 in the presence of Mr. Laurence Severine Massawe, Counsel for the Plaintiff and for the Defendant – exparte proof.



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R.V. MAKARAMBA
JUDGE
19/08/2010

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