

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 75 OF 2012

M/S ROBERT ADVERTISEMENT LIMITED.....PLAINTIFF

VERSUS

THE DIRECTOR, DODOMA MUNICIPAL
COUNCIL.....DEFENDANT

JUDGEMENT

Mansoor, J:

Date of JUDGEMENT- 13TH NOVEMBER 2015

Robert Advertisement Limited, a company which carries its business in Dodoma, herein after referred to as Robert Advertisement filed a suit against Dodoma Municipal Council, herein after referred to as “the Defendant” claiming THz 93,340,000 as special damages arising out of a contract entered to between the defendant and Robert Advertisement.

Roberts Advertisements had won a tender, and was awarded a contract for collection of revenue from hotel owners, collection of hotel levies, and the agreement between the parties was signed on 23rd and 24th November 2012. Prior to signing of the Agreement, and by a letter from the Defendant, the plaintiff was required to deposit THz 39,000,000 before the commencement of the project, Robert Advertisement claims that it made the deposit. Robert Advertisement claims that the defendant also complied with clause 23 of the Agreement entered between them, and supplied to Roberts Advertisement with the copy of the law for collection of hotel levies known as The Hotels Act, Cap 105 (R:E 2006). This law has however been repealed by the Tourism Act, 2008, thus the defendant had supplied to the plaintiff the defunct law. The plaintiff alleges that despite the law been repealed, the defendant held a meeting on 24th November 2011 for purposes of introducing Robert Advertisement as the revenue collectors to Hotel owners, the defendant still insisted that the law applicable is Hotels Act, Cap 105 R:E 2002. As per the Hotels Act, the hotel

levy is charged at 20% of the total income. The plaintiff alleges the hotel owners refused to pay 205 levy, and the plaintiff informed the defendant accordingly. The plaintiff alleges further that there was a meeting held on 5th January 2012 and the levy of 20% was reduced to 2.5 %, and that the arrears be paid at 2.5 %. The plaintiff alleges that it never understood the decrease of the rate from 20% to 2.5 %, and demanded a clarification from the defendant, the defendant never responded, and in return the plaintiff received a notice from the defendant expressing their intention to terminate the agreement. In the notice, the defendant also claimed payments of the monthly instalments starting from 1st October 2011 to 27th February 2012, amounting to THz 212,400,000. The plaintiff responded. The plaintiff states that despite the response, the plaintiff sent another demand notice demanding payment of THz 212,400,000 and terminated the agreement, and threatened to take legal action, if the plaintiff would fail to pay the amount demanded.

The plaintiff alleges that there was a negligent misstatement by the defendant causing the plaintiff to suffer damages, as follows:

- a) THz 100,000 paid as tender fee;
- b) THz 39,000,000 paid as deposit;
- c) THz 5,000,000 as direct and incidental expenses for servicing the project;
- d) THz 49,240,000 being loss of expected income from the project.

It is on the above basis that the plaintiff is demanding payments of THz 93,340,000 from the defendants as special damages, interests, general damages and costs of the suit.

The defendant filed a written statement of defence and a counterclaim. In the defence the defendant admitted some of the facts alleged by the plaintiff, especially the fact that there was a meeting to introduce the plaintiff to Hotel Owners, and the fact that the hotel levy was 20% as in the

Hotels Act. The Defendant also noted many of the alleged facts without either disputing them or admitting them. The defence was actually not clear.

In the counter claim, the defendant demanded payments of THz 113,839,720 being the accruing debt of Hotel Levy collected from the year 2011/2012. In the counterclaim, the defendant admits that the plaintiff deposited THz 39,000,000 but refused to have ever received any levies collected monthly by the plaintiff from the Hotel Owners.

The defendant alleged in the counterclaim that the contract was terminated on 14th March 2012 but the plaintiff continued to collect the levies until 30th June 2012 without the permission from the defendant.

On 26 March 2013, the Court settled the following issues:

1. Whether there was breach of Hotel Levy Agreement by either party;

2. To what reliefs, if any, are the parties entitled to.

During Trial, the plaintiff produced the following documents as exhibits;

1. Exh P1- Advertisement for Tender in Mwananchi dated 20 July 2011;
2. Exh P2 and P3, NMB Cash deposit slips for payments of THz 39,000,000 deposits;
3. Exh P4- the Agreement entered to by the Parties on 23/11/2011;
4. Exh P5-Letter dated 6/02/2012 from Roberts Advertisements to the defendant seeking for clarification on the percentage of hotel levies;
5. Exh P6-letter dated 27th February 2012 from the defendant to Robert Advertisement, intention to terminate the contract and demand of THz 212,400,000;
6. Exh P7-Reply Letter from Roberts Advertisements to the defendant dated 6th March 2012;

7. Exh P8- Letter dated 14th March 2012 from the defendant to Robert Advertisement terminating the Contract, and notice to take legal action;
8. Exh P9- letter from Nyangarika Advocates of intention to sue on behalf of Roberts Advertisement dated 17th March 2012;
9. Exh P10- submission for Tender from Robert Advertisements;
10. Exh P11- receipts;
11. Exh p12- a receipt for payments of Tshs 100,000 for tender;

The defendant tendered the following documents which were admitted as exhibits:

1. Exh DE1- Letter of acceptance issued by the defendant to Robert Advertisement dated 29th August 2011;

2. Exh DE2- letter from Robert Advertisement dated 31st August 2011 tender;
3. Exh DE3- letter dated 05th September 2011 and 2/08/2011 from Robert Advertising to various Hotel Owners;
4. Exh DE4- Cash deposit slip from CRDB Bank dated 30/09/2011;
5. Exh DE6-Receipts issued to Hotel Owners by the Dodoma Municipal Council;
6. Exh DE7- Register of Counterfoil Receipts
7. Exh DE8- 5 books of sub treasury receipts issued by Dodoma Municipal Council;
8. Exh DE9- 30 books of sub treasury receipts issued by Dodoma Municipal Council

The defence brought as a witness one Mr Onasis Jackson Mwabusila who testified that he knows Roberts Advertisements as the levy collector for the years 2011/2012. This witness is working as an officer in

Dodoma Municipality. Mr Mwabusila testified before the Court the entire tender process and that Robert Advertisement won the tender, and was awarded the contract he also testified that Robert Advertisement paid THz 39,000, 000 as cash deposit for the project on 30th September 2011 after his cheque payments were bounced. This witness testified that Hotel Owners used to pay hotel levies to Robert Advertisements. That Roberts Advertisement was supposed to remit the levies to Dodoma Municipal Council every month and amount set was THz 439,392,000 for every month. Robert Advertisement never remitted the levies as agreed. Following failure to remit the levies he was collecting, Dodoma Municipal council issued him with a notice. He also testified that Robert Advertisement started collecting the levies before the effective date of the Agreement. The effective date of the Agreement was 1st October 2011, the Agreement was signed on 23rd and 24th November 2011, but Robert Advertisement started collecting the levies from September 2011. He started collecting levies in

September as he was instructed to do so by the defendant. This witness testified that Robert Advertisements was collecting levies from Hotel owners since September 2011 but he did not have proof that Robert Advertisement was indeed collecting levies from the Hotel owners.

Another witness for the defence was Mr Chavuma Haruni Taratibu. He owns a Guest House. He testified that Robert Advertisement was introduced to them as the Hotel Levy Collector, and that he would be collecting Hotel Levies for the period 2011/2012. This witness produced a letter coming from Robert Advertisement which was an introduction that Robert Advertisement was appointed by the Dodoma Municipal Council as the revenue collector from Hotel Levy. These letters are dated 5th September 2011 from Robert Advertisement and another was dated on 2nd August 2011 (Exh DE3), the letters were requiring the Hotel Owners to pay Hotel Levy to the Account of Robert Advertisement from September 2011. This witness confirmed that he paid the levies for

his two guest houses to the Account of Robert Advertisements.

Another witness for defence was Mr Barnabas Ngugo who testified that, Robert Advertisements started collecting the levies in the month of September, and he signed the agreement on 23rd November 2011. This witness testified that Robert Advertisement wrote to Dodoma Municipal Council seeking for settling the matter amicably, after he was served with the first notice of intention to terminate the contract, and this signifies that Robert Advertisement was performing the duties of collection of hotel levies and he was making money. He testified further that Robert Advertisement introduced himself to Hotel Owners, and he started collecting levies from them since the month of September 2011. He testified that Robert Advertisement used to direct the Hotel Owners to pay him money into his bank accounts, and he used to give them receipts. Robert Advertisements issued the Hotel Owners with

receipts from his office located at Kazimoto Complex in Dodoma. This witness referred to Exh DE7, DE8 and DE9 which are registers of counterfoil receipts, and receipts issued to various Hotel owners. This witness testified that the owner of Robert Advertisement used to send one Mr Ramadhani Mwambola to collect receipts books from Dodoma Municipal council, and it was this same person who collected the Letter of Acceptance from the defendant's office. During cross examination, this witness admitted that there was no official introduction of Mr Ramadhan Mwambola to Dodoma Municipal Council introducing him as the representative of employee of Robert Advertisement. This witness also testified during cross examination that the person who was receiving the receipt books on behalf of Robert Advertisement was written as Ramadhan Said, and sometimes no name was written, only reference to Hotel levy. This witness also testified during cross examination that a clause in the Agreement Exh P4 states that the Levies will be collected by the Municipal Council and not

by the Agent. He also testified that the rate was reduced by the Municipal Council from 20% to 2.5 %, and that Clause 23 of the Agreement states that the Dodoma Municipal Council was obliged to give the laws to Robert Advertisement.

The Plaintiff brought to Court Mr Robert Modu as the plaintiff's witness. Mr Robert Modu is the Managing Director of Robert Advertisement. He explained the entire tender process, and that he won the tender and was given the letter of acceptance. This witness testified that he paid THz 39,000,000 as deposit for the project. He produced two receipts one dated 30/09/2011 and another dated 6/1/2012. He also produced the Agreement he had signed with Dodoma Municipal Council on 23rd November 2011. He testified that he was given the Hotel Levy Act by the defendant, and he started charging 20% as shown in the Act. He testified further that the Hotel owners objected to paying 20%, and he

notified the defendant of the objections. He said, the hotel owners wrote to Roberts Advertisement that the hotel levy charges is now 2.5 % instead of 20%, and Roberts Advertisement wrote to the defendant for clarifications. He also testified that the defendant did not respond to the letter, instead it had written them a notice of intention to terminate the contract, and later on he said he received a letter from the defendant terminating the contract.

This witness testified that he has suffered loss as he paid THz 100,000 for tender form, THz 39,000,000 as deposit THz 5,000,000 as costs for preparing for tender. He also suffered the loss of THz 4,000,000 every month, as he expected to collect THz 54,000,000 every month, and he was to remit to the defendant only THz 39,000,000. This witness produced before the Court Exh P11, which are receipts showing the expenses he has incurred. During cross examination Mr Robert said he never started work, and never used to send anyone to represent him. He

testified that he never assigned anyone to do any job for him, and that he never started collecting the levies.

Having heard the plaintiff's case and the defence case, and the case on counterclaim, the Court shall answer the settled issues as follows:

- a. Whether there was a breach of contract and who was responsible for the breach

The plaintiff admits to have bid for the tender to be an agent for collection of Hotel Levies, and admit to have won the tender. He also admits to have paid THz 39,000,000 as deposit for the project. He also admits that he signed the contract on 23rd or 24th November 2011. He never disputed to have introduced himself to Hotel Owners in Dodoma via his letters dated 5th September 2011 and 2nd August 2011. He however stated that he never started collecting the levies as the Hotel Owner disputed paying the levy at the rate of 20% as the Hotel Levy Act was already repealed by the

Tourism Act, 2008. That it was a mistake on the part of the defendant to supply him with the defunct law. The plaintiff relied on item 23 of the Agreement that it was the duty of the defendant to supply him with the correct law for collection of Hotel Levy, and by supplying him with the defunct law, the defendant had breached clause 23 of the Agreement, and instead of supplying him with the correct law, the defendant terminated the Agreement.

The defendant on the other hand maintained that the plaintiff did collect the levies from Hotel owners. He started collecting the levies since September 2011, even before the contract was signed. It is clear from the testimonies of the three witnesses from the defence that one Ramadhani Mwambola, the plaintiff's representative who was sitting at the plaintiff's offices that he collected the letter of acceptance from the defendant, he collected the receipts books from the defendant, he issued the letters (Exh DE3) to various Hotel Owners introducing himself as the Agent for collection of Hotel levies on behalf of the Defendant. One

Mr Haruna Taratibu confirmed that he paid the Hotel Levy to Robert Advertisement and started paying since September 2011. He used to pay at the Bank, and he went to collect receipts at Robert Advertisement office located at Kazimoto Complex in Dodoma, and he used to meet one Mr Ramadhani Mwambola, and he also met Mr Robert Modu. There is strong evidence proved on the balance of probabilities by the defendant that Mr Ramadhani Mwambola was the Representative or was working for Robert Advertisement, and he was doing all the work for Robert Advertisement. The Accounts shown in the deposit slips and the Accounts mentioned in Roberts Advertising Letters (Exh DE3) tallies signifying and confirming that the money from Hotel owners as hotel levies were being deposited in Roberts Advertisement Account.

I did not see any misstatement by the defendant, and I agree by the defendant that there was no proof of the fact that the defendant had acted negligently or had given any negligent misstatement causing the plaintiff to suffer

damages. Having known that the Hotel levy Act was repealed, and consequently, having been directed to collect the levy using 2.5% instead of 20% was not a misstatement. It is abundantly clear that a person cannot charge tax or levy based on a law which has been repealed. The plaintiff was equally bound to act within the laws, and this cannot be used as an excuse to charge levies outside the limits given by the law. In any case, and as submitted by the defendant, Section 6 (3) of the Local Government Finances Act, Cap 290 R: E 2002 permits the defendant collect the revenue at 2.5 %, and this is what the plaintiff was directed to do. There is no proof adduced by the plaintiff that he was directed by the defendant to collect the hotel levy using the rates prescribed under the defunct Hotel Levy Act.

Apart from denying that Mr Ramadhani Mwambola is not the employee or representative of Robert Advertisement, the plaintiff filed to produce any contrary evidence to show that Mr Ramadhan Mwambola did not collect the acceptance letter on its behalf, and he never collected the receipts

books from the defendant. The plaintiff also failed to give any contrary evidence to defeat the case of the plaintiff that the hotel owners did not pay the hotel levies to its bank account No. 0150205475900 held at CRDB Bank in the name of Robert Advertisement Limited as shown in Exh DE3. Exh DE3 also confirms that Robert Advertisement offices are located at Kazimoto Complex, and this is where Mr Ramadhani Mwambola used to sit.

There is overwhelming evidence adduced by the defendant proving that Robert Advertisement did collect the levies specifically the letter dated 5th September 2011 from Roberts Advertisements to Hotel owners instructing them to make payments through his bank account held at CRDB Bank, pay in slips showing payments made by him 19,000,000 to the defendant on 06 January 2012. He could not have paid this amount of money if he was not performing any work on behalf of the defendant. Exh DE4 which is a receipt showing that the payers used to deposit money into the bank Account No. 0150205475900

belonging to Robert Advertisement, also Exh DE5, DE6, DE8 and DE(, which are receipts issued by Robert Advertisements to various tax payers. Another proof is the receipt books Exh DE9 used by the plaintiff workers acknowledging payments made to it by various tax payers. There is also proof that the plaintiff wrote a letter dated 06/02/2012 seeking for clarification of changes in rates of the levy (Exh P5), showing that he was indeed he Agent of the defendant, and was actively involved in the collection of levies, he was even known by the tax payers as the Agenet of the defendant.

I would therefore answer issue no one that the agreement required the plaintiff to remit THz 39,392,000 every month. He remitted only the deposit of THz 39,000,000 in two instalments of THz 20,000,000 on 30/09/2011, and the second instalment of THz 19,000,000 on 06/01/2012. He never remitted any further money after that despite having collected the levies from the hotel owners. Thus, it was the plaintiff who had breached the terms of the Agreement.

To what reliefs are the parties entitled

Having established that it was the plaintiff, Robert Advertisement who had breached the Terms of the Agreement, the plaintiff case is therefore dismissed with costs, and the prayers by the defendant as contained in the counterclaim are all granted.

It is so ordered.

DATED at DAR ES SALAAM this 13th day of November, 2015

**MANSOOR
JUDGE
13th November 2015**

The plaintiff alleges that there was a negligent misstatement by the defendant causing the plaintiff to suffer damages, as follows:

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