IN THE HIGH COURT OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY
AT DAR ES SALAAM

(ORIGINAL JURISDICTION)

CIVIL CASE NO. 86 OF 2004

MIRAGE LITE LIMITED . . . . . PLAINTIFF
VERSUS
BEST TIGRA INDUSTRIES LIMITED
(FORMERLY TIGRA INDUSTRIES LTD) . . . . . DEFENDANT

Date of Last Order: 23rd July, 2015
Date of Judgment: 4th September, 2015

JUGEMENT

Feleshi,J.:

This law suit is premised on the dispute arising out of the execution of a sixteen calendar weeks fixed price commercial contract for electrical installations at Defendant's edible oil factory on Plot No. 56 Mbagala Industrial Area, Temeke Municipality in Dar es Salaam **offered** by the Plaintiff company on or about 18/1/1997 at a cost of **TShs. 396,984,191/20** which was **accepted and awarded to her** by the Defendant Company on 5th March 1997 at the contract price worthy **TShs. 392,516,929/10=** commencing from 1/3/1997 to 30/6/1997. The consideration was to be paid in five installments as per duly specific approved certificates with the mobilization fund payable into three parts.

At the hearing each party called one witness. Whereas HARBHAJAN SINGH testified for the plaintiff, the defendant on the other hand called one TANUJ RAJA. On **11/9/2007** the Court framed the following four issues:

1) **Was there a contract between the Plaintiff and the Defendant for electrical installations at Mbagala Factory, or not?**
2) **Was there default on the contract terms, or not?**

3) What are the parties entitled to?

4) Any other relief?

Harbhajan Singh (PW1) deposed as the Managing Director, shareholder and Chairman of Plaintiff Company which was formed in 1991 and is based in Nairobi. He is registered by the Ministry of Energy and holds a Class A licence which allows him to do all types of electrical jobs and has in fact done and supervised several projects in Kenya including- factory installations in the Kenyatta Conference Centre, Nairobi Hilton Intercontinental Hotel, Moi Airport in Mombasa and Safaricom Internet.

He said, in 1997 he was awarded a tender by the Defendant Company worthy Kshs.38, 000,000/= or Tshs.396, 000,000/= which was advised in Nairobi through consultants. The tender documents and signed agreement were admitted in evidence as Exhibits P1 and P2 respectively. He requested for mobilization fund which was belatedly paid to the Plaintiff as shown in Exhibit P3. He said, when they went to the site and found the building of the structure had not started he expressed the concern through the fortnight meetings he held with all engineers, contractors and the client.

He also said the construction of the building and purchase of electrical equipment like Switchgear, ringmaster, generators and the Control Panels all delayed. The motors, pumps were also not in position to be wired. All that caused delay in everything as the contract was supposed to be completed in June or July, 1997. At the same time he said the defendant issued a variation letter and stated that she would purchase the equipment and be directly responsible. The items purchased directly were the generators, HB switchgear, transformer, LB Switchgear Medium Voltage Switchgear, and control cables and those items were not purchased in time. He however did not have any document

showing that the items were not ordered in time. Though the client did not give them the shipping documents he knew that the Switchgears were made available in December 1997 and the generators were made available just as they were commissioning the project. Whereas the Switchgears were supplied by TANESCO the client purchased and supplied the generators and cables from the ABB and KENWEST FAL Works Limited, Nairobi respectively. He completed the electrical works and commissioned the works on 8/7/1998. Though there was no document confirming the handing over he said it was obvious that TANESCO came on site and were satisfied. On 8/7/1998 he signed the Bill of Quantities prepared by the electrical engineer which was admitted as in evidence as Exhibit P4.

He said the delay affected the Plaintiff cost-wise because he had staff on site and there was an additional of $ 36,000.00 which he had discussed with the client and the engineer. A copy a copy of the schedule of worker's rates and the Valuation Number Four document dated 9/8/98 he had sent to the client were admitted as Exhibit P5 and P6 respectively. Despite making the several demands his offer for an amicable settlement and waiting for five years the Defendant offered no response or payment. The demand notices were collectively admitted in evidence as Exhibit P7. The Plaintiff thus claimed for the principal amount of $ 126,000/= plus interest, liquidated damages of Tsh.1, 500,000/=, costs of the suit and interest.

On being cross-examined by Mr. Mwandambo, the learned Defence Counsel, PW.1 deposed that he prepared, signed and rubber-stamped Exhibit P4 on 8th July 1997 when the Company had two different sets of rubber stamps and letter heads. He said the correct date in Exhibit P.4 is that shown at Page 77 and not P.74 or 76 which had erasure. Dates were also put on the figures in items 1-

10 and on the summary and final summary. He prepared the schedule of workers' rates on 8/7/1998 and sent the first reminder together with the Bill of Quantities on the final balance payment which was otherwise supposed to be due 14 days after preparing the certificate. He got extension of time through his immediate supervisor, the electrical engineer after discussing the matter with the client. He said Exhibit P5 was additional document reflecting the change in the Exchange rate. That the total of Kshs.2, 907,000/= ($ is 53,834 / $ 36,000) based on 204 hours per month, the exchange rate being Kshs.79 and Kshs.54 respectively for December 1998 for Exhibit P4 (made on 8/7/1998) and Exhibit P5 (made for 28/8/1998).

PW.1 however conceded that though he had a valid electric licence in Nairobi he did not have one in Dar es Salaam because he was not active. The agreement for extension was made before July but was not given a specific date of completion as they did not know when the client would complete the building. TANESCO came on site and installed the electricity, checked on the connections and supplied the power before the Plaintiff handed over the work on 8/7/1998.

On being re-examined by Mr.Rutabingwa, PW.1 reiterated the claim of $36,000 and that there was no condition that required the Plaintiff to be licensed in Tanzania as the tender was awarded in Nairobi. He said if TANESCO was not fully satisfied by her work she could not have connected the power. That marked the end of the plaintiff's case.

On 15/4/2015 **Tanuj Raja (DW1),** a co- defendant company's director deposed that their edible oil Refiner Company was registered in 1994 or 1995. He said they received the Plaintiff's Bill of quantities that was verified by the Electrical Consultant M/S Kentoplan Limited and awarded her the contract in 1997. DW.1 identified and acknowledged the specifications and Bill of quantities

contained in Exh. P1 and also the sixteen calendar weeks fixed price contract Exh. P2 which was signed on 5th March, 1997 at Tshs.392, 516,929.10.

They gave her (the Plaintiff) the site and paid the mobilization fee of Tshs.16, 350,000/= as an Advance to the work. She was required to obtain all the statutory licences and permits from the Contractor's Registration Board (CRB). They latter noted that the Plaintiff was not capable of managing such a big project as she started to play game with it. It brought PW1's son one Gurdeep and made him a site foreman. This Foreman did not show up and in most of the days he was not at work and did not adhere to the Electrical Consultant or project manager's instructions and kept making false promises. As a result, the project delayed. They however continued to pay for the work as per the approved certificates though the contract was not completed by the Plaintiff.

At some point in time the site Foreman deliberately damaged the electric Control Panel and caused many electrical works to stop. The damaged Control Panel was sent to ABB Tanlec Arusha and its repair costed about $ 200,000. Following the disappearance of the Forman from the site the Defendant employed Industrial Electricians to complete the project. DW.1 did not however remember how much the defendant incurred but he said it was more than the agreed contract price.

DW.1 disagreed with the Plaintiff's claim of 126,000 USD and his demands for his payment in regard to Certificate No. 4 in Exh.P6 saying it is not correct because it was not certified by the Electrical Consultant and Exh. P6 was thus out of context. Either, he faulted Exh. P4 and the endorsements made on Page 74, 76 and 77 saying the document is tainted and fictitious.

He further deposed that for the suit to be preferred to in 2004, about 7 years after he was last served with the reminder on 8th July, 1998, implied that the decision to sue her was an afterthought and the act was malicious. He said if the claims were genuine the Plaintiff would have filed her suit earlier and straight away to mitigate his loses. Either, he said, when signing the contract he was not aware of the Plaintiff's legal personality which he came to learn about it in the course of the proceedings that the Plaintiff was registered as a Company much later after they had signed the contract with her which meant she signed the contract before she was registered and hence her suit void.

DW.1 deposed that they raised a Counter Claim against the Plaintiff's breach of the contract as she abandoned the site and she further damaged the control panel hence the claims for the expenses they incurred in repairing the Control Panel and additional money spent in completing the project all amounting to about $ 300,000. He thus invited the Court to dismiss the Plaintiff's case and grant her Counter Claims and the Plaintiff in addition order the Plaintiff to pay the costs for maliciously suing him.

On being cross-examined by Mr. Rutabingwa, DW.1 said he did not remember to have directly dealt with M/S Kentoplan Limited. He said apart from the mobilization fee he did also pay for four certificates. He said they purchased some materials from both Tanzania and outside the country but he was not sure if they were delivered on time. That it was true that the contract was signed on 5th March, 1997 and was supposed to have been completed by July, 1997 and that when we handed over the site everything was complete to allowing electrical work to be carried out. The M/S Kentoplan Limited was answerable to him. He denied having any report by M/S Kentoplan Limited abandoning the

site/work or request for extension of time. He said on the site there were no contractor's sign or stickers displaying the ongoing electrical works.

He added that at the time TANESCO switched on the power the Plaintiff had abandoned the work but he could not remember the name of the individual they subsequently engaged to complete the Electricity installation. He also did not remember whether that individual was approved by the M/S Kentoplan Limited and he did not have any formal writing to show that the Plaintiff abandoned the work before completing the project. However, they had held a meeting and discussed about the project delay and the destruction of the Control Panel and amicably agreed to move on with the work.

DW.1 conceded that there was nowhere in his defence (WSD) where he pleaded her claim for the damaged control panel and he did not remember if there was a question put to PW1 in connection to the damaged Control Panel. He did not have any letter or written proof supporting her claim. However, he maintained that the Defendant deserved to be paid even if she did not plead for the claim. He said they spent about $100,000.00 more to pay for other works in order to complete the work and did not include the payment they made to the destroyed control panel. He however did not have any specific document to prove the claim of $ 100,000.00. Though he authored Exh. P2, he did not remember if it contained payment on specific damages as its Paragraph (j) provides for liquidated damages. As regards the genuineness or otherwise of the rubber stamp he said he did not know who can confirm its genuineness in court.

On being re-examined by Mr. Bethuel, DW.1 said before handing over the site the Plaintiff visited the site and was satisfied with what he saw on site. He reiterated that the Defendant's Counter Claim is based on the Plaintiff's acts to abandon the work, his misrepresentation and neglect to secure professional

licences from the CRB and Electrical Lisencing Board and his failure to hand over the project within 16 weeks. And when asked by the Court as to why the Defendant did not claim the amount of damages he asks for the court to award he said the Defendant did not include them in the Counter Claim out of ignorance. That marked the end of the defendant's case.

Then both Messrs.Rutabingwa and Bethuel, the learned counsels for the Plaintiff and Defendant respectively, gratefully filed their very delightful final submissions which I will consider in disposing the raised issues.

Concerning the 1st issue -**Was there a contract between the Plaintiff and the Defendant for electrical installations at Mbagala Factory, or not?** the evidence adduced by PW.1 and DW.1 above, and that contained in Exhibits P.1 and P.2 has it that the Plaintiff company on or about **18th January 1997** submitted a tender to the Defendant Company for electrical installations at defendant's edible oil factory at a cost of **TShs. 396,984,191/20** and the defendant accepted the offer and on 5th March 1997 awarded her a 16 calendar weeks fixed price contract of **TShs. 392,516,929/10=** running from 1st March 1997 to 30th June, 1997 (see: part (c) of Exh.P2). That the payments were to be made by installments as per specific five duly approved certificates and mobilization fund payable into three parts.

The above position is unanimously shared by both counsels who are of the unfeigned opinion that the exchanges of offer and acceptance manifested by Exhibits P.1 and P2 respectively satisfies section 7 of the Law of contract Act, [Cap. 345 R.E. 2002] which provides that:

> **"In order to convert a proposal into a promise, the acceptance must:-**
> **(a) Be absolute and unqualified;**
> **(b) Be expressed in some usual and reasonable manner....."**

The 1st issue is thus settled in the affirmative.

In settling the first issue, Mr.Bethuel immediately raised two legal points: one, that Plaintiff Company was legally incompetent on 18th January, 1997 when she submitted her tender and on 5th March, 1997 when it procured the Defendant Company's acceptance for a sixteen weeks priced contract award; and two, the Plaintiff Company did not obtain the requisite approvals from the relevant authorities. I will therefore first consider these points in the light of adduced evidence.

Mr.Bethuel submitted that though on the face of record it appears that there was a contract, the said contract in their opinion was void right from the time it was executed since the Plaintiff Company was incorporated in Tanzania on 3rd July 1997 whereas it had submitted the tender documents, Exhibit P1 on 18th January, 1997 over 6 months before it had been registered. He submitted that the misrepresentation by the Plaintiff Company was manifested by its acts of accepting and signing the sixteen weeks price fixed contract on 5th March 1997 which was over 4 months before the plaintiff company was duly registered. That meant when Harbliajan Singh (PW1) offered and bound himself to implement the price fixed contract on behalf the Plaintiff Company his Company was nonexistent. He said, in terms of sections 10, 11(2) and 19(1)& (3), of the law of Contract Act (supra) those actions by the nonexistent company makes the contract in question null and void.

As regards the Plaintiff Company's failure to obtain the requisite approvals Mr.Bethuel submitted that the award based on representation by the Plaintiff Company that it had a professional Licence from the Electrical Licensing Board **(ELB)** and as such registered by the Contractors' Registration Board **(CRB)** in Tanzania, a fact which was later on found to be not true.

In his submission, Mr.Rutabingwa submitted that DW.1 made it clear that the Plaintiff Company was not registered and did not obtain a licence from the electrical licencing board for obvious reason that both the tender advertisement and its evaluation were done in Nairobi Kenya where as PW1 told the court he had his 50 years standing experience and his membership with the Association of Electrical and Supervisory Electrical Engineers based in United Kingdom holding a class A licence and registered with the ministry of Energy in Nairobi was un questionable. He also told the court of the various projects undertaken by his company. Therefore, if the plaintiff was not qualified through her officers, then it would not have been awarded the tender/contract.

After all, he added, that apart from DW1's verbal claims there was not any letter or document that was directed to the Plaintiff requiring her to produce the alleged licence and registration. He argued, even the contact (Exhibit P2) has no requirement of such licence nor is there a provision for registration. What is provided under clause (i) page 3 of exhibit P2 is only that the Plaintiff was required to obtain Tanesco/Statutory inspection approvals. Mr.Rutabingwa submitted that PW1 told the court that all approvals were obtained from TANESCO that was why the power was duly connected to the factory.

I agree with Mr.Rutabingwa that clause (i) at page 3 of Exhibit P.2 did not explicit put a mandatory requirement that the Plaintiff Company was obliged to procure a professional Licence from the Electrical Licensing Board **(ELB)** and be registered by the Contractors' Registration Board **(CRB)** in Tanzania. The said clause (i) reads:

> **"(i) you have agreed to obtain all required Tanesco/statutory inspection approvals at all stages and pass on the same to us immediately."**

From the foregoing, it is therefore evident to me that the words **obtaining all required Tanesco/statutory inspection approvals at all stages** does not connote that it was mandatory that the Plaintiff Company be licenced by TANESCO, ELB or CRB. Had it been so that was an area the Defendant was supposed to lead evidence to prove that requirement. Therefore, I am in agreement with Mr.Rutabingwa and PW.1 that TANESCO was fully satisfied by the Plaintiff's work that's why it connected the power. I therefore reject the complaint for want of merit.

As for the first point I agree with Mr.Bethuel that the evidence adduced by DW.1 faulting the competence of the Plaintiff Company was not disproved by the Plaintiff. Section 11(2) and 19(1) of the law of Contract Act (supra) provides:

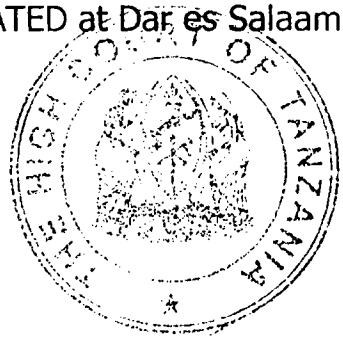
> **"11(2)An agreement by a person who is not hereby declared to be competent to contract is void.**
>
> **"19(1) When consent to an agreement is caused by coercion, undue influence, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused."**

Now, as the Defendant Company had its acceptance and award on the price fixed contract to the Plaintiff Company **obtained by misrepresentation** as chronologically illustrated above, it is obvious that the contract between the Defendant and the Plaintiff is *void ab initio*. Therefore, the same was and is incapable of being breached. The second issue is thus disposed accordingly.

In view of the foregoing, there is no how a party who misrepresented himself or misrepresented vital information can be entitled to the reliefs couched in the Plaint. I therefore dismiss the suit. On the other hand, the party whose consent or acceptance and award were obtained but by reason of misrepresentation is entitled to general damages. Despite the fact that no pleading and prayers made in relation to the established misrepresentation by

the Plaintiff Company bearing in mind the cumulative effect of the mischief done to the Defendant, the Plaintiff shall pay Tshs. ten million (Tshs.10,000,000/=) to the Defendant Company being general damages for the inconvenience she suffered from the voidable fixed price contract. The Plaintiff shall also pay the costs.

DATED at Dar es Salaam this 4th September, 2015



E.M. Feleshi
JUDGE

Judgment delivered in the Court this 4th day of September, 2015 in the presence of Ms. Neema Kayuni, Advocate for the Plaintiff and also holding brief of Mr.Bethuel, Advocate for the Defendant. Right of appeal explained.

E.M. Feleshi
JUDGE
4. 9. 2015