IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CIVIL CASE NO. 40 OF 2012

OSE POWER SOLUTIONS LIMITED. . . . . PLAINTIFF

VERSUS

AIRTEL TANZANIA LIMITED. . . . . DEFENDANT

Date of last Order: 31/5/2017

Date of Judgment:14/7/2017

JUDGMENT

TEEMBA, J.

The plaintiff is a limited liability company incorporated under the Companies Act, Cap 212 of the Tanzanian laws. The defendant is also a company with limited liability and was incorporated under the same law. Whereas the defendant provides airtime (Mobile phone) services, the plaintiff provides services of installation and electrification of towers to airtime providers.

The plaintiff filed this suit by presenting a plaint on 20th March 2012. She amended the Plaint after obtaining leave of this court. The Amended Plaint was filed on 17th May 2013. The first Plaint had a number of annextures which were once

again referred to in the paragraphs of the amended Plaint. In addition, new annextures were filed with the Amended Plaint to reflect the additional claims. The former Plaint had a principal claim of Tshs 1,506,190,715.99 and USD. 117,119.98, while the Amended Plaint reflects a claims of Tshs 1,920,998,371.79 and USD 143,484.72 being costs of goods supplied and services rendered to the defendant. The plaintiff is also praying for payment of Tshs 300,000,000/= being damages for breach of contracts; interest at commercial rate from the date of filing the suit to the date of judgment; interest on the decretal sum at the court rate; costs and any other relief this court may deem fit to grant.

The defendant filed her Written Statement of Defence and a Counter claim. While denying the plaintiff's claims, she is praying for refund of Tshs 479,229,406.91 and USD. 644,312.50 being overpayment for supply of 23 pieces of 20 KVA generators. The defendant alleged that instead of paying USD 808,475 she instructed the payment of total USD 1,452,787.50. The defendant also alleged that in 2010 she ordered the plaintiff to supply fuel of Tshs 75,205,139.70 but mistakenly paid the plaintiff a total amount of Tshs 554,434, 546.61.

The plaintiff and defendant were represented by Mr F. Mgare and Mr.Z. Galeba, learned counsel respectively. Each party procured only one witness at trial and the learned advocates filed their written final submissions.

BENEDICTO TIGAHELA (PW1) testified as the General Manager of OSE Power Solutions Limited since 2010. In his testimony he stated that on diverse dates between 2009 and 2012 the defendant ordered the plaintiff to supply goods and services. The goods included generators, spare parts and fuel. The services supplied were electrical installation in the Airtel Towers, other electric services and general services to Towers and generators including supply of fuel and batteries to the sites. It is on record that the plaintiff did the electrical installation at 39 sites in Dar es Salaam, Iringa, Mbeya, Rukwa, Katavi, Kigoma and Coast Regions.

The mode of receiving instructions were by issuance of Local Purchase Order (LPO); Phones from the defendant informing the plaintiff about a defect on the sites; Local Purchase Order from the Procurement Unit through email; and emergency calls in case of technical problems. The plaintiff thereafter raised invoices for payment. These were accompanied by Site check Lists prepared by the plaintiff

and confirmed by the signatures of defendant's Site engineers at the respective sites. PW1 produced Exh. P1 to P.17 for the sites attended to and the supplies made by the plaintiff. The exhibits have either Site check list, LPO or email communication.

It is also on record that when the invoices were presented for payment, the defendant promised to pay but never paid the plaintiff. Failure to get the payments in time, the plaintiff suffered loss as the capital was held up and could not circulate. As a result, PW1 concluded that the company died and failed to get other businesses.

On the other side, the defendant's witness was FRANK MUNALE (DW1), the operations Manager. He narrated the procurement process used by the defendant in purchasing goods and services. He stated that they sign agreements or issue Purchase Orders (POs) and even on emergency cases, they issue purchase orders. DW1 added that a Purchase Order states the services/goods to be procured, price, quantity, terms and conditions and it must be signed and stamped by both parties.

Where a local Purchase Order (LPO) is issued, the contract will be based on the terms and conditions stated therein and if there is a need to amend it, then the former LPO has to be cancelled and replaced by a new one in writing. He went further and stated that when the services are completed as agreed, the provider will issue a Delivery Note to be signed by himself and a representative of the defendant. He said all the exhibits tendered by the plaintiff are not supported by Delivery Notes.

In respect of payment claims, DW1 testified that supplier must present an invoice together with the Delivery Note showing the LPO number; quantity of services rendered, the amount claimed and the name of the payee. That, the Partner Help Desk Officer will receive the Invoices and stamp them before returning a copy to the supplier. The witness denied to have seen any of the invoices in the plaintiff's exhibits stating that Airtel office does not have any of those invoices.

As for the counter-claim DW1 maintained that the defendants overpaid the plaintiff for the supply of fuel and installation of generators. There were no exhibits tendered to prove the claims for overpayments.

Before the commencement of trial, the court in consultation with the learned advocates framed the following issues:

1. Whether there is a breach of contract by the defendant.
2. Whether the plaintiff is entitled to the costs of goods and services rendered to the defendant.
3. Whether the payment made to the plaintiff exceeded the costs of goods and services rendered to the defendant.
4. What reliefs are the parties entitled to.

The learned counsel differ on the answers to the issues. While Mr Mgare submitted positively for the first issue, Mr Galeba strongly submitted that the issue was not proved. The latter argued that there was no any contract between the parties and therefore no breach of contract can be proved. Mr. Galeba contended that the LPOs tendered in court as exhibits were all photocopies and not signed and Exh P15 has no LPO tendered. The learned counsel also challenged other documents such as Check lists and Certificates of Compliance arguing that even DW1 did not recognize

them. It was his submission that if there were no genuine signed LPOs or POs then there was no contract between the parties. Hence no breach of any unexisting contract.

On the other hand, Mr Mgare for the plaintiff submitted that there existed a contract under section 2(1) (a) and (b) of the Law of contract Act, Cap 345 RE 2002 as there was willingness to provide the goods and services and the defendant assented. He submitted that there was an offer and acceptance with consideration and therefore an enforceable agreement. The learned counsel listed five ways which were used by the defendant to give instructions to the plaintiff. One, normal site visit by the defendant and upon identifying any need or problem, the defendant's officers would phone the plaintiff by giving her the reference number for the goods and services required. Second, defendant's phones the plaintiff whenever a defect is detected at the towers. Again a reference number would be issued to the plaintiff. Third, the normal issuance of Local Purchase Order (LPO) for items like supply of generators, spare parts and fuel. Fourth, the use of LPOs through emails sent by the procurement unit, and Fifth, emergency phones in case of any technical problem. The above modes were used to instruct the plaintiff and after performance there was a

check list or a Certificate of compliance signed by the defendant's site engineers as a proof of the work done. The learned counsel added that at times there was monthly reconciliation to sign those documents before an invoice was raised by the plaintiff.

The exhibits tendered by PW1 are being challenged by Mr Galeba for various reasons. One of them is that they were generated by the plaintiff and the defendant never issued LPOs to the plaintiff. The other challenge is that the Check lists or Certificates of Compliance were prepared by the plaintiff and signed but no Airtel engineers who signed them otherwise they should have been called as witnesses. Let me start by the latter. I have perused the exhibits and indeed, some have mere signatures without names but most of them have full names of the signatories. These include Exh. P. 3,4,5,6,7,8 etc which are site check lists and Certificates of compliance indicating full names and dates of signing. Unless there is proof that those names are fictitious and the engineers do not exist for those respective sites, it is my considered views that, the documents were duly signed by authorized people.

Upon perusal of Exh.P2, 3,4,6,8,9 for example, one will discover that the Purchase Orders have the business trade mark of Airtel and bear the buyer names plus a stamp of Airtel Tanzania Limited and dates. For instance Exh. P6 which has an invoice for Tshs 21,422,900.00 has a clear picture. This claim is for **"Power Access to Airtel Site Soweto, I Quality"**. The invoice was raised on 16-November-2011. The purchase Order (PO) from Airtel with an official stamp is signed and date inserted (hand written) as 8/9/11. This PO has eleven (11) itemized description for Himo; Utegi; Sokoni 3 CAP S site; Dodoma; Buguruni; Soweto, Iyungi; Mailimbili, Urambo and Sikonge sites. The total price for all these sites is Tshs 168,080,755.00 but each site has a clear price for the service ordered. The services were provided according to the testimony of Pw1. There are claims for each site listed in the PO of Exh P.6 and the documents were tendered at trial. The invoices for these sites were raised separately but quoting the same prices stated in this PO. The Buyer Name according to this PO shows **"Mkizungo, Mrs Teddy Thadeus 844"**. The PO goes on to state **"30 days Net"** as the terms of payment.
The Site Check list and the Certificate of Compliance were signed by **IBRAHIM HASSAN and AMIR SHWAIBU** on 1/11/2011. In my considered view, the plaintiff has proved upon

probabilities that there was a contract for service and goods and she performed the same. For the defendant to disown the PO should have come forward to show that the buyer name and the company stamp were forged. But above all, the defendant has neither denied to have received services at those sites nor the existence of the officers who issued/signed the respective documents.

Let me also comment on the testimony of DW1. He said he is the operations Manager with an experience as a **user** in procurement procedures. However, he admitted during cross examination that he is not an expert in the procurement field. In other words, he is not a procurement officer in the defendant's company to understand all the procedures and practice in procuring goods and services from service providers of Airtel.

In his testimony DW1 was recorded saying that 'OSE POWER was engaged by NOKIA for services and maintenance of towers". He added that "the plaintiff was also doing maintenance of Airtel Sites". One may be curious to know when the plaintiff was working for NOKIA or for Airtel. But whatever the case may be, the defendant did not show

any evidence that the plaintiff was paid by Airtel or Nokia for the same services claimed in the present suit.

As signified in Exh P6 by the POs; the contract for service had specific time for payment. The PO in Exh.P6 indicates a period of **30 days Net.** In the event the defendant failed to pay the plaintiff within 30 days from the date(s) of raising the invoice(s) then it amounts to a breach of contract. It is therefore my conclusion that the first issue is answered affirmatively.

I now move to the second issue, whether the plaintiff is entitled for the costs of goods and services provided/rendered to the defendant. The learned counsel submitted at length on this issue. Mr Mugare's submissions are to the effect that this issue was proved while Mr Galeba had strongly argued that the issue was not proved. The latter based his arguments on the point that the plaintiff failed to prove delivery of any goods or services. He cited the case of **BAMRASS STAR FATUMA MWALE [2000] TLR 390** where it was held

> *" It is a trite law that special damage being exceptional in their character and which may consist of off pocket expenses*

and loss of earnings incurred down to the date of trial" must not only be claimed but also strictly proved.

As already discussed in the first issue, there was a contract of service which was breached by the defendant for neglecting to pay the plaintiff. On the basis of those documents and the fact that the defendant has not paid for the goods and services rendered, then the plaintiff is entitled to be paid. This is a principle laid down long time ago in the case of **Hadley vs Baxendale [1954] 9** Exch 341 where it was held;

"where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally i.e according to the usual course of things from such breach of contract itself, or such as may reasonably be supposed to have been in contemplation of both parties, at the time they made the

contract, as the probable result of the breach of it."

Mr Mgare also cited the case of **Victoria Laundry (Windsor) Ltd versus Newman Industrial Ltd [1949] 2 KB 528; [1949] All ER 997** where the same principle was discussed by the Court of Appeal. It was observed that

" . . .the aggrieved party is only entitled to recover such part of the loss actually resulting from the breach, as was at the time of the contract reasonably foreseeable as liable to result from the breach.

What was at the time reasonable so foreseeable depends on the knowledge then possessed by parties or at all events, by the party who commits the breach . . ."

In the present case, the defendant issued the POs quoting the prices for the goods/services. The claims in the invoices reflect the same amount quoted in the POs. It is my considered view that in the circumstances, the defendant was aware of the loss which would actually arise from the breach.

The third issue is whether the payment made to the plaintiff exceeded the costs of goods and services rendered to the defendant. This issue was framed to address the defendant's counter claim. Before I revert to the evidence on record, let me agree with Mr Galeba, learned counsel for the defendant that the plaintiff did not file a Written Statement of Defence for the Counter claim although she filed Reply to the defendant's Written Statement of Defence. It appears that the idea skipped the minds of both counsel and the court as well because none of them made any comment on the pleadings in respect of Counter-Claim until during trial and in the filing of their final submissions. For this reason, the consequences provided for under Order VIII Rule 14 (1) of the Civil Procedure Code, Cap 33 RE 2002 were not acted upon.

However, without prejudice to the above provision, the agreed issue number 3 was framed before the commencement of trial and both parties gave evidence either to support or to deny the claims therein. I will therefore consider the counter claim on the basis of evidence availed to the court during trial.

DW1 testified that the plaintiff was overpaid for the supply of fuel and installation of generators. He stated that instead of paying Tsh 75,205,139.70 the plaintiff was paid Tshs 554,434,546.61 creating an excess of Tshs 479,229,409.91. He went on stating that instead of paying USD 808,475 the plaintiff was paid. USD. 1,452,787.50. The plaintiff's witness dismissed the allegations of overpayments.

I fully agree with Mr Galeba that under the principle 'NON EST FACTUM" (it is not my deed) a party can obtain a remedy if she/he can prove that what she/he did was out of mistake contrary to what the parties had agreed. See the holding in the case of **Tanganyika Bus Service Company Limited versus The National Bus Service [1986] T.L.R 203.**
The question here is whether the defendant has proved the alleged overpayments. It is the submission from Mr Galeba that **the defendant did not need to prove the overpayment because PW1 admitted receipt of the money (USD 1,452,787.50 and Tsh 554,434,546.61) containing the overpaid sums claimed in the Counter claim**. . . " The learned counsel argued therefore that the burden of proof shifted to the plaintiff to prove that they were entitled to the money overpaid to them.

The learned counsel for the plaintiff argued to the contrary that under section 110(1) and 112 of the **Law of Evidence Act, Cap 6 RE 2002** the one who alleges about a certain fact has a duty to prove such an allegation. Indeed, this is the current legal position. Thus, while the plaintiff denies overpayments, the defendant who alleges so, should adduce evidence to prove the actual services and goods supplied and the monies paid for them. Apart from giving the figures in his testimony, DW1 did not produce any supporting documents. When filing the counter claim, the defendant filed the Annextures AIRTEL 1,2, and 3 but as correctly submitted by Mr Mgare, these annextures have no evidential value because they were not tendered as exhibits during trail.

DW1 narrated to this court the procurement procedures but there is nothing in his testimony to show that the processes were followed in paying the plaintiff whatever is alleged as overpayment. Without documents to establish the actual procured services/goods, it is difficult to conclude that the payment was over and above the plaintiff's entitlements. Finally, this issue is not proved and the counter claim is therefore dismissed.

The last issue is on reliefs. On the strength of the evidence adduced by the plaintiff, the Claim of Tshs 1,920,998,371.79 is granted less Tshs 1000/= which is a difference between the amount indicated on para 7 item 15 for Invoice no. 106 (in exh.P. 17). This in invoice is for shs 4,504, 692.48 instead of 4,505,692.48.

The same error occurred in Invoice no. 0000310 of 17 March 2012 (Exh P.16) which reflects the claim of Tshs 4,311,000/= as opposed to the pleadings to the tune of Tshs 4,834,600/=

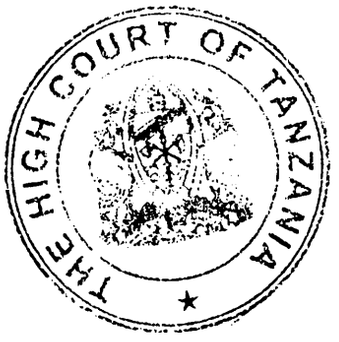
Thus, an amount of Tshs 523,600/= shall also be deducted from the total claim of Paragraph 9 of the amended plaint.

In addition to the claim in Tanzanian currency, the amount of USD 143,484.72 is also granted.

The plaintiff also claimed an amount of Tshs 300,000,000/= being damages for breach of contracts. This claim is a blanket figure to cover loss of reputation and good will of the plaintiff's business. The plaintiff claimed that failure to get the payments, she lost the business with NOKIA and VODACOM companies and the employees left the company because it died. Apart from mere words of PW1, there is no proof of loss of reputation which had to be proved by an outsider of the plaintiff's Company. I could not find any piece of evidence on record to prove the suffering of financial constraints, or loss

of business opportunities. However, the court has discretion to grant general damages. Given the circumstances in this suit, I grant general damages of Tshs 20,000,000/= to the plaintiff for breach of contract.

The interest rate granted in (a) and (b) of the prayers is 20% from the date of filing the suit to the date of judgment. The decretal sum attracts 10% court's rate from the date of judgement to the date of full payment. Similarly, the plaintiff is granted costs of this suit.



R.A.TEEMBA

JUDGE

14/7/2017