IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 133 OF 2018

(Originating from Civil Case No. 14 of 2016, Kinondoni District Court)

INTERCHICK CO. LTD..... APPELLANT

VERSUS

SALUM RAMADHANI POSSA.....RESPONDENT

JUDGMENT

The appellant above mentioned is dissatisfied with the decision of the trial court which awarded the respondent mentioned above a sum of 10,000,000/= for breach of contract committed by the appellant. The respondent also presented a cross objection to this appeal, that he is unhappy with the award challenged by the appellant, on account of being smidgen amount.

In the memorandum of appeal, the appellant grounded that: one, the learned trial magistrate erred in law failing to discuss and adjudicate upon the issues that were before the court during trial; two, the learned trial magistrate erred in law

and fact in failing to fault the respondent while conceding that indeed the respondent had breached the contract; three, that on account of failure to discuss the issue which were framed and were before the court, the learned trial magistrate erred in law in awarding a compensation of Tsh 10,000,000/= without any iota of proof of such sum or any part thereof; four, the learned trial magistrate erred in law and fact in failing to find out and appreciate that the respondent could not have suffered and did not suffer any loss as he had already been paid commensurate moneys by third parties to whom he had sold the chickens.

On his cross-objection, the respondent grounded that: one, the learned trial magistrate erred in law and fact in failing to evaluate the evidence produced by the respondent leading to undeserving award, although correctly recognized liability of the appellant in the breach of contract; two, the learned trial magistrate erred in law by awarding respondent Tsh. 10,000,000/= only instead of the whole specific damages that was proved in the proceedings during the trial.

To start with, I combine and tackle simultaneously the first ground to the memorandum of appeal and first ground to cross-objection.

I entirely agree with argument of the learned Counsel for appellant and respondent that the learned resident magistrate erred in straying away from agreed issues framed at the commencement of hearing. On similar footing, the learned resident magistrate went astray to abdicate his duty, for failure to analyze and evaluate evidence presented at a trial vis-a-vis issues recorded and align facts to the cited provision of the law and judicial precedent.

In the impugned judgment, the learned resident magistrate come up with a lot of theories of his own making, thereby crooked out of line and landed to a wrong destination. This was also attributed by a wrong path chosen by the learned resident magistrate, who attempted to twist and do away with framed issues, instead introduced new issues *proprio motu* at a stage of crafting a judgment. I am aware that amendment or additional issues may be raised at any time even after close of argument on the case or after all witnesses had been examined, see **Mulla on Code of Civil Procedure**, Volume I, at page 873.

To buff up the cause taken, to wit amending issues, the learned resident magistrate, cited the provision of Order XIV rule 5(1) Civil Procedure Code, R.E. 2002. It is true that the

above proviso, allow court to amend or frame additional issues, but the underlying catch words here is that the same can be done where the court seem it is necessary for determining the matters in controversy between the parties. Herein the learned resident magistrate effected amendment for unexplained reason. As alluded by the learned Counsel for appellant, permission under the above law, does not extend to the court's liberty to completely abandon to consider and discuss issues framed and agreed by parties. **Black's Law Dictionary**, 8th Edition, at page 252, define amend to mean,

> *"1. To make right; to correct or rectify. 2. To change the wording of; specif., to formally alter ... by striking out, inserting, or substituting words"*

In view of the above definition, it is obvious that, amendment does not connote the same meaning or extend to abandoning, or ungracious rebuffing existing issues.

Admittedly the court has discretion to amend or frame additional issues, but that cause should not be taken in total disregard or derogatory to issues agreed by the parties. In **Jones vs National Coal Board** (1957) QB.5 cited by the learned Counsel for appellant, it was established, I quote,

> *"... in the system of trial, which we have evolved in this country,* ***the Judge sits to hear and determine the issues raised by the parties****, not to conduct an investigation or examination on behalf of society at large..."* bold added

The two new issues introduced by the learned resident magistrate are: one, whether the plaintiff owes the defendant amount claimed in the plaint; two, if question one above is answered in the affirmative, what reliefs are the parties entitled. These two issues are not exhaustive, do not shade broader light to proposition of fact which parties are at variance, be either evidence presented or averment in pleadings.

As much the learned resident magistrate did not assign reason for the cause taken for total departure to the farmed and recorded issues. And so far the two issues introduced by the learned resident magistrate do not reflect maters on controversy, only bring mockery to justice, as seen both parties are lamenting and bitterly complaining in their respective submission. I ignore the new introduced issues and revert back to framed and recorded issues in the proceedings.

Issues framed and recorded at the commencement of hearing are: one, whether the plaintiff paid to the defendant a total of Tsh. 28,350,000/= being cost of day old chick; two, whether the day old chicks purchased by the plaintiff were not vaccinated for marek's decease by the defendant; three, if answer to one and two above are in affirmative, whether the plaintiff suffered loss of Tsh 28,000,000/=; four, whether the plaintiff paid Tsh 4,410,000 being purchase price of 2,100 day old chick; five, whether the defendant failed to supply the alleged 2,100 day old layers; six, if answer to four and five is in affirmative, whether the plaintiff suffered a loss of Tsh 4,410,000/=; seven, what reliefs parties are entitled.

This being the first appeal, and following an outcry from both parties that the trial court did not evaluate evidence presented, I indulge in deliberating the same as hereunder.

The first issue: whether the plaintiff paid to the defendant a total of Tsh. 28,350,000/= being cost of day old chick. Salum Ramadhani Possa (PW1) who is the respondent herein, testified that he purchased a total of 12,000,000 chicks valued Tsh. 28,350,000. That on 9/11/2015 (second phase) he deposited a sum of Tsh 5,334,000 at NBC to order 700 broilers and 2100 layers and that he still owe the defendant 4,410,000.

However, the respondent had tendered only one invoice No. 07672 dated 20/7/2015 for 1,400 chicks valued 2,430,000/=. Delivery note exhibit P2, P3, P4, P5, P6, P7 and P10 indicate that a total of 9,250 chicks were delivered to the respondent. Nevertheless, these delivery note fall short as does not depict any amount of money. To my view, delivery note alone, without corresponding invoice for payment does not add any value. I say so, because herein the respondent claim liquidated cash which was pleaded as special damages. In other words, the respondent claim for refund of purchase price. In law the one who allege must prove on the existence of a particular fact. And a yard stick for proof of special damages, is strict proof. The respondent did not manage to overcome this hurdle. In absence of receipt or invoice or pay slip evidencing payment, a claim for special damage a sum of Tsh. 28,350,000 plus 5,334,000 cannot stand. I therefore rule that the respondent had managed to prove payment of a sum of Tsh. 2,430,000.00 only. These findings take into board the third issue as well.

The second issue: whether the day old chicks purchased by the plaintiff were not vaccinated for marek's decease by the defendant. The respondent (PW1) and his witnesses PW2,

PW3, PW4, PW5 heaped heavy blame to the appellant that all chicks died because were not vaccinated for day one for merek's disease virus. However, PW6 Mathew Anderson, who is a Pathogical Analysis from Tanzania Veterinary Laboratory Agency, with an experience of over twenty years, stated that merek's is spread by water, food and air. That the day chick ought to get vaccine at Marix. PW6 did not adduce a direct evidence that chicks were attacked by merek's because were not vaccinated at marix. PW7 Elly Dihawi, who is working with the appellant, stated that chicks are normally given vaccine at one-day age.

The author **A. Gregorio Rosales** DMV, MS, PhD, DACPV-Poultry Health Consultant, in his article: Marek's disease control in broiler breeds: Aviagen Brief, 5m Editor 2nd April 218 found at www.thepoultrysite.com, accessed on 30/10/2020 at 11.31 hours, had this to say, I quote,

> *"Effective vaccination prevents the development of tumours from latently (inactive or dormant state) infected T lymphocytes, and* ***although infection and shedding of Merek's Disease Virus can be reduced, it cannot be fully prevented by vaccination***" bold added

The author went on to say by way of conclusion remarks, I quote,

> *"Marek's Disease Virus is present in all commercial flocks regardless of vaccination or health status.* ***Vaccination does not prevent infections and shedding of the pathogenic field virus"*** bold added

In view of that, probably that is why PW6 avoided to rule expressly that a spread of marek's disease virus was solely due to non-vaccination on day one. Therefore, it was wrong for the respondent to throw blame that chicks get infection because did not get vaccination on day one. There might be other underlying causes as depicted by PW6.

Issue number four: whether the plaintiff paid Tsh 4,410,000 being purchase price of 2,100-day old chick. As I have ruled when deliberating issue number one above, there was no evidence for payment of a sum of Tsh 4,410,00. What was tendered was a delivery note exhibit P10 evidencing delivery of 700 broilers. Exhibit P10 does not indicate any sum of money or any undelivered number of chicks. In absence of evidence for payment or undelivered chick, it will be hardly impossible to rule that the respondent is entitled to refund or

the said 2,100 day old chick. These findings take into board the fifth and six issue.

Issue number seven: what reliefs parties are entitled. As I have ruled above, the respondent managed to prove a claim for special damages only a sum of Tsh. 2,430,000.00. Therefore, an argument by the respondent in his cross objection that he was entitled to a whole pleaded sum of special damages, to wit Tsh. 32,760,000/=, is unmerited. As I have said above, special damages must be strictly proved. Impleading into a plaint is one stage, but that alone cannot be a justification for awarding the same. An argument by the respondent that a claim for special damages was proved by exhibit P1 to P11, is legally untenable. A breakdown of details in respect of exhibit P1 to P11, inclusive, is as follows: exhibit P1 is a sole invoice for an amount of Tsh 2,430,000; exhibit P2, P3, P4, P5, P6, P7 and P10 are delivery note for a total of 9,200 chicks, but there is no accompanying invoice, receipt or pay slip evidencing payment of money and the said invoices do not show a price or value of delivered chick; exhibit P8 are mere letters from PW2, PW3, PW4, PW5 (third party) addressed to the respondent claiming refund of a total of 10,500 chicks, but there was no any receipt for payment; exhibit P11 are

laboratory sample test report, which has nothing to do with payment of cash money. In that way, it cannot be said that a claim for special damages was proved on the required standard as contemplated by the respondent.

In view of that, an award of compensation a sum of Tsh 10,000,000/= does not have leg to stand. For one thing, the award was grounded on wrong premises. The purported breach of contract is not there and was not among the issues for adjudication. Secondly, as alluded by the learned Counsel for appellant that there is no scintilla evidence adduced by the respondent to support that award. I therefore fault the trial court award of Tsh 10,000,000 and set it aside.

Having canvassed as above, the appeal succeeds to the extent adumbrated above and a cross objection fails.

The respondent is entitled to a sum of Tsh. 2,430,000.00, being special damages.

The appeal partly allowed. No costs for this appeal.

THE HIGH COURT OF TANZANIA

E.B. Luvanda
Judge
30.10.2020