

IN THE HIGH COURT OF TANZANIA

MWANZA DISTRICT REGISTRY

AT MWANZA

HC CIVIL CASE No. 26 OF 2019

GRENLOT LIMITED..... PLAINTIFF

VERSUS

AFRICAN WHEELS & TYRES LIMITED..... DEFENDANT

JUDGMENT

02nd Sept & 16th Dec, 2020

TIGANGA, J.

The plaintiff, a private limited liability company, dully incorporated in Tanzania and validly licenced to carry on business, sues the defendant also a private limited liability company dully incorporated in Tanzania and validly licenced to carry on business, for payment of Tshs. 338,201,439.49 (say Tanzania shillings three hundred, thirty eight million, two hundred and one thousand, four hundred, thirty nine and fourty nine cents) being the outstanding amount on supply of tires as at 21st January 2019, general damages and costs of the suit.

According to the plaint, the plaintiff was a supplier of automobile tyres branded continental Tyres South Africa (PY) Limited; he was therefore importing the said items to Tanzania and supplying the same to the tyres dealing company and individuals including the defendant.

The plaintiff had contractual arrangements with defendant *albeit* orally where the plaintiff would supply to the defendant and the defendant would sell the tyres to its customer and the plaintiff would raise invoices to the defendant against each batch of tyres sold, and the defendant would settle the invoices.

At the request of the defendant the tyres were stored and kept at the defendant's premises wherein at the agreed interval, the plaintiff and defendant would reconcile the available tyres against what was sold to ensure that the invoices were raised capturing the accurate number of tyres sold by the defendant to its customers.

The said arrangement started to work, the first invoices being annexure BEA - 1, which was settled, in both Tanzania shillings and United States Dollars. Things went well up to when the defendant began to default, that was in the years, 2018 when the Defendant started to default

to settle the invoices raised by the plaintiff, and reaching at 21/01/2019, the outstanding balance on the tyres sold by the defendant to its customer whose invoices were raised by the plaintiff and served upon the defendant was Tshs. 313,422,481.47.

Over and above the amount directly claimed from the sell done by the defendant, the defendant had also guaranteed the payment of Tshs. 13,448,525.80 and Tshs 11,330,432.22 from Brand Tyres Shoppe Limited and Nahima Auto Spares respectively, the said two being trading entities and customers of the defendant's warehouse and the defendant guaranteed their payment.

Following none honouring of the invoices raised, on 28/01/2019, the plaintiff sent a summary of the outstanding liability as at 21/01/2019 to the defendant showing the outstanding liability to be 338,201,439/=. Despite the fact that the defendant received the same on 28/01/2019, still he did not pay and settle the liability. She did not pay even after the lawyer had written her a 14 days demand notice. However, through its letter dated 13/05/2019, the defendant acknowledged the debt and asked for two things one, requested for time to reconcile the debt, two, requested for extension of time to clear the same. However, the defendant did not fulfill

commitment to pay and clear the debt as he promised failure of which was followed by another demand letter dated 07/06/2019 written by the plaintiff requesting for the defendant to immediate pay, which demand was not honoured by the defendant. Following the failure of the defendant to respond to the demand made, the plaintiff through a Board Resolution resolved to file this case before this court.

It is further the plaintiff's averment that, even after this suit has been instituted, the defendant has kept breaching the contract, and refusing to meet its contractual obligation towards the plaintiff. It was also pleaded in the plaint that the cause of action arose in Mwanza, therefore this court has both pecuniary and territorial jurisdiction to entertain the case. In the end he prayed the following orders;-

- i) Payment of Tshs. 338,201,439.49 outstanding at 21st January 2019.
- ii) Interest on the decretal amount at the commercial rate of Tshs. 21% per annum from the date of the last invoice to the date of judgment.
- iii) Interest on the decretal amount at the courts rate of 12% per annum from the date of judgment to the date of full and final satisfaction.

- iv) General damages for breach of contract.
- v) Costs of this suit, and
- vi) Any other relief that the court shall deem just to grant.

Service was effected to the defendant, who appeared through one Michael Erasto, the defendant's sales man who requested to be given time to file their written statement of defence. Following that request the court ordered the defendant to file the defence on or before, 20/11/2019. That order was granted by my brother Hon. Siyani, J on 06/11/2019. However, the defendant did neither file the said defence on or before that date, or on any date subsequent thereto nor appear thereafter. He did not do so even after the matter had been re assigned to me on 25/02/2020 following the transfer of Hon. Siyani, J to another duty station, the defendant had not filed her written statement of defence. Following that state of affairs, this court ordered the case to proceed exparte against the defendant in terms of Order VIII, Rule 14(1) of the Civil Procedure Code Cap. 33 as amended and revised in 2019.

Before the hearing commenced this court framed four issues which are;

- i) Whether there was a contract for doing business between the plaintiff and the defendant?
- ii) Whether the defendant breached the said contract between the parties?
- iii) Whether the plaintiff is entitled to damages caused by that breach.
- iv) To what reliefs are the parties entitled.

In an endeavor to prove the claim, the plaintiff called only one witness Srinivasa - Rao - vella, one of the directors of the plaintiff company, who in essence had his testimony a replica of the plaint; therefore I will make an highlight on few issues which he said for clarification.

In his affirmed testimony, he said they had an oral contract to supply and distribute the tyres with the defendant; they started that business in the year 2017 until 2019, when the defendant refused to pay according to the raised invoice.

He tendered invoice No. 3298 dated 23/01/2019 with Tshs. 14,300,676.97 as exhibit P.1, invoice No. 3267 dated 23/01/2019 with Tshs. 23,861,347.80 as exhibit P.2, and invoice No. 3254 dated 15/11/2018 with Tshs. 10,810,191.96 as exhibit P.3.

He also tendered invoice No. 3253, dated 15/12/2018, with Tshs. 72,420,361.43 as exhibit P.4, invoice No. 3187 dated 13/10/2018, with Tshs. 7,372,574.95 as exhibit P.5, and invoice No. 3163 dated 13/09/2018 with Tshs. 76,166,185.51 admitted as exhibit P.6.

Further to that, he tendered invoice No. 2542 dated 12/07/2018, with Tshs. 46,620, 285.00 as exhibit P.7, invoice No. 2541 dated 13/06/2018 with Tshs. 14,764,507.01 as exhibit P.8, while invoice No. 2540 with Tshs 34,068,977.89 was admitted as exhibit P.9.

Further more he tendered an invoices No. 2539 dated 03/05/2018 with Tshs. 35,692,132.40 as exhibit P.10, the one with No. 2538 dated 03/05/2018 with Tshs. 11,759,834.04 as exhibit P.11, and No. 2537 dated 2537 with Tshs. 55,640,418.39 as exhibit P.12. As part of his evidence, he also tendered invoice No. 2536 dated 21/03/2018 with Tshs 113,369,977.00 as exhibit P.13, invoice No. 2535 dated 21/03/2018, with Tshs. 12,173,344.81 as exhibit P.14, invoice No. 2449 dated 18/07/2017, with Tshs. 4,774,841.00 as exhibit P.15, invoice No. 2448 dated 13/07/2017 with Tshs. 9,507,601.70 as exhibit P.16, and invoice No. 2447 dated 10/07/2019 with Tshs. 13,126,602. 3 as exhibit P.17.

He also tendered, invoice No. 2446, dated 04/07/2017 with Tshs. 5,482,174.97 as exhibit P.18, invoice No. 2445 date 01/07/2017 with Tshs. 6,561,102.01 as exhibit P.19, invoice No. 2444 dated on 28/06/2017 with Tshs. 22,992,274.2 as exhibit P.20, invoice No. 2442 dated 20/06/2017 with Tshs. 15,429,290.5 as exhibit P.21, and invoice No. 2441 dated 16/06/2017 with Tshs. 5,439,496.00 as exhibit P.22.

He also tendered invoice No. 2440, dated 15/06/2017 with Tshs. 2,356,435.9 as exhibit P.23, invoice No. 2439 dated 15/06/2017, with Tshs. 3,200,430.09 as exhibit P.24, invoice No. 2438 dated 14/06/2017 with Tshs. 11,493,303.8 as exhibit P.25 and invoice No. 2437 dated on 12/06/2017, with Tshs. 374,190/= as exhibit P.26.

Invoice No. 2436 dated 12/06/2017 with Tshs. 3,971,697.30/= as exhibit P.27, invoice No. 2434, dated 08/06/2017 with Tshs. 5,891,090.00/= as exhibit P.28, invoice No. 2433 dated 08/06/2017 with Tshs. 2,557,987.20/= as exhibit P.29 and invoice No. 2432 dated 06/06/2017, with Tshs. 583,484.16/= as exhibit P.30.

Also invoice No. 2431 dated on 05/06/2017 with Tshs. 7,902,868/= as exhibit P.31, invoice No. 2429 dated on 31/05/2017 with Tshs.

11,059,726.65/= as exhibit P.32, invoice No. 2428 dated 24/05/2017 with Tshs. 2,618,500/= as exhibit P.33, invoice No. 2427 dated 22/05/2017 with Tshs. 5,861,000/= as exhibit P.34, invoice No. 2426 dated 13/05/2017 with Tshs. 3,687,800 as exhibit P.35, invoice No. 2425 dated 03/05/2017, with Tshs. 1,598,000/= as exhibit P.36, invoice No. 2424 dated 28/04/2017 with 255,00/= as exhibit P.37, invoice No. 2423 dated 25/04/2017, with Tshs. 1,508,600/= as exhibit P.38, invoice No. 2422 dated 21/04/2017 with Tshs. 733,000/= as exhibit P.39 and invoice No. 2421 dated 20/04/2017 with Tshs. 13,635,000/= as exhibit P.40.

Further to that he tendered invoice No. 2419 date 20/04/2017, with Tshs. 1,508,600 as exhibit P.41, invoice No. 2418 dated 18/04/2017, with Tshs. 2,457,000/= as exhibit P.42, invoice No. 2417 dated 06/04/2017 with Tshs. 3,680,000/= as exhibit P.43, invoice No. 2416 dated 05/04/2017, with Tshs. 1,310,002/= as exhibit P.44, invoice No. 2415 dated 05/04/2017 with Tshs. 900,000/= as exhibit P.45, invoice No. 2414 dated 03/04/2017, with Tshs. 819,000/= as exhibit P.46, and invoice No. 2413 dated 03/04/2017 with Tshs. 127,500/= as exhibit P.47.

He also tendered a ledger book account from 1st January to 31st December 2017 as exhibit P.48 and that of 1st January 2018 to 24/06/2019 as exhibit

P.49, while ledger Account dated 1st October 2018 to 23 January 2019 as exhibit P.50, while the demand notice dated 02/05/2019 as exhibit P.51, a request for extension of time by the defendant dated on 13/05/2019 as exhibit P.52 second demand Notice dated 25/05/2019 as exhibit P.53. The plaintiff also filed final submission in support of the claim and in the end asked the claim to be granted as prayed.

As earlier on pointed out, the claim by the plaintiff is built on the breach of contract, in his evidence the plaintiff has tendered no any written agreement proving that there was such a contract, however the plaintiff through PW1 said there was an oral contract between the parties entered into in the year 2017 in which the plaintiff was supplying to the defendant the automobile tyres. Those tyres were to be sold by the defendant to its customers and the proceeds were supposed to be paid to the plaintiff after the plaintiff has raised invoices depending on the tyres supplied to the defendant. The question to ask oneself is whether an oral contract, not exhibited by any written proof is the contract within the meaning of the law?

Section 10 of the Law of Contract Act [Cap 354 RE 2019] provides that;

"All agreements are contracts if they are made by free consent by parties competent to contract for a lawful consideration and with lawful object"

From this quoted provision the stress is on "**all agreement**" including oral agreement are contract, as long as they have been;

- i) entered into by the free consenting parties competent to contract,
- ii) it should be with lawful consideration, and
- iii) it should be with lawful object.

This is also reflected in the decision of my senior brother Hon. Gwae, J in the case of **Naftal Lothomollel vs Jackson Langei**, PC Civil Appeal No. 41 of 2018. HC - Arusha (Unreported)

Also section 5 (1) of the Sales of Goods Act [Cap 214 R.E 2019], provides that;

"Subject to the provision of this Act and any other written law in that behalf a contract of sale may be made in writings (either with or without seal) or by word of mouth or partly in writing and partly by word of mouth or may be implied from the conduct"

This means, the oral contracts are recognised and can be enforced against the parties to it. In this case, although we have not heard from the defendant on whether there is such existence of the said contract, but having been served with the plaint, and having sent the principal officer to appear on its behalf and actually appeared, but failed to file the written statement of defence, it goes without saying that, by necessary implication, the defendant is aware of the said contract.

Further to that, and in line with section 5 (1) of the Sale of Goods Act, (supra) that the proof of the contract may be implied from the conduct by the defendant, it goes without saying that by all necessary implication, especially inferring from the evidence contained in a letter, exhibit P52 from the defendant to the plaintiff requesting for extension of time to pay the amount claimed as per invoice, this shows that there was such a contract and so the defendant was aware of the debt. This shows that there was a contract between the parties. Also see the decision of the Court of Appeal in the case of **Engen Petroleum (T) Limited vs Tanganyika Investment and Transport Limited**, Civil Appeal No. 103 of 2003, CAT – DSM which also held to the same effect in interpreting section 5 of the Sale of Goods Act, (supra)

On the second issue whether the defendant breached the said contract, this need not take much of my time, as the plaintiff's evidence as contained in the testimony of PW1, and in exhibits P1 to P53 prove that the defendant was in breach of the contract. This is also further and specifically proved by the written undertaking by the defendant through its Director one Vicent Hariah, in a letter dated 13/05/2019 and addressed to B&EAKO Law firm the counsel for the plaintiff which was admitted and marked as exhibit P52, in which he requested for extension of time for about 3 to 6 months to reconcile its account and pay. That said and proved, it is instructive to find that the defendant breached the contract between them. The second issue is therefore resolved in affirmative.

On the third issue whether the plaintiff is entitled to any damage caused by such breach. This need not be over emphasized that the plaintiff suffered damages. As stated by PW1 in his evidence that, the plaintiff was actually importing the said tyres from South Africa, it was supplying to the defendant and was raising invoices whenever he supplied the said tyres to the defendant, and looking at the raised invoices, that is, exhibits P.1 to P.47, the fact that the money were not paid proves that the plaintiff suffered damages. Under section 110 and 111 of the Evidence Act requires

the plaintiff in a suit proceedings to prove the claim, section 3 (2) of the same law provides that in civil case or cases of civil nature, the standard of proof is on balance or preponderance of probability. Now looking at the weight of the evidence adduced by PW1 in this case, I find the same to have proved the claim at the required standard of preponderance of probability, that he is entitled to be paid the whole money claimed that is;

- i) Tshs. 338,201,439.49 as the outstanding un paid debt, as at 21 January 2019.
- ii) He is also entitled to the interest on the decretal amount at the commercial rate of 21% per annum from the date of the last invoice to the date of judgment.
- iii) Interest on the decretal amount at the court's rate of 12% per annum from the date of judgment to the date of full and final satisfaction.

Regarding the general damages, in the case of **Tanzania Sanyi Corporation vs African Marble Company Limited** [2004] TLR 155, as quoted in the case of **Jafari Hussein Sinai and Faraji Fadhili vs Silver General Distributors Limited & 5 others**, Civil Appeal No. 272/2017 General damage was defined as follows;

"General damages are such as the law will presume to be the direct, natural or probable consequences of the act, complained of the defendant's wrong doing must, therefore have been cause, if not a sole or a particularly significant cause of damage".

The complained of act in this case is the breach of contract which affected the plaintiff's business, it was expected for the plaintiff to tell over and above financial loss suffered for nonpayment of the amount raised in the invoices, to tell any other effect be it physical, psychological or mental or loss of customer or good will which he actually suffered. In this case, the plaintiff has not said anything in particular which would have aggravated the award of general damage. However, the fact that he did not say, does not mean that it did not suffer, given the circumstances; it goes without saying that, the plaintiff must have suffered.

For that reasons, having considered all the factors including the amount which remained unpaid and the time spent. I thus award the general damage of Tshs. 50,000,000/=.

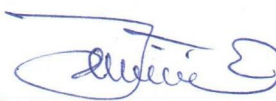
In the up shot, the judgment and decree are passed in the favour of the plaintiff as follows:-

- i) The plaintiff be paid Tshs. 338,201,439.49 the outstanding debt as at January 2019 by the defendant.
- ii) Interest on the decretal amount at the commercial rate of 21% per annum from the date of the last invoice to the date of judgment.
- iii) Interest on the decretal amount at the court rate of 12% per annum from the date of judgment to the date of full and final satisfaction of the decree.
- iv) General Damage to the tune of Tshs. 50,000,000/= (say fifty millions), and
- v) Costs of the suit.

It is so ordered.

DATED at **MWANZA**, this 16th day of December, 2020




J. C. TIGANGA
JUDGE
16/12/2020