

**IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)**

AT DAR ES SALAAM

CIVIL CASE NO. 23 OF 2019

COMFORT TECHNOLOGICAL INVESTMENT (T) LTD..... PLAINTIFF

VERSUS

TANZANIA SHIPPING AGENCIES CORPORATION..... DEFENDANT

JUDGMENT

24th Aug, 2021 & 24th Sept, 2021.

E. E. KAKOLAKI J

Before this court is the plaintiff, a Company duly registered by the defendant to operate as the Shipping Agency in the great lakes. She filed a suit against the defendant on a tort of misfeasance in public office contenting that, the defendant as Regulatory Authority to Shipping Agencies refrained to process and issue her minimum commission, fees and service charges (tariff) since 25th August, 2015 when issued her with the licence to operate and offer shipping agency services. She is therefore praying this court for the following orders against the defendant:

- (a) That the defendant be ordered to pay Tshs. 490,000,000/- being specific damages for loss of business since 2016.

- (b) Declaratory order that, the conduct of the defendant of refraining from issuing of Minimum Commission, fees and Service Charges to the Plaintiff is unlawful.
- (c) General damages as it may be assessed by this court.
- (d) Costs of the suit be paid by the defendant.
- (e) Any other relief this court deems fit to grant.

Earlier on the suit was instituted against the defendant's predecessor a body corporate going as Surface and Marine Transport Regulatory Authority (SUMATRA) which allegedly issued the Plaintiff with a licence to carry on business as Shipping Agent. As SUMATRA's functions, duties and liabilities were partly succeeded by the defendant, the plaintiff successfully sought leave of this court to amend the plaint removing SUMATRA and replacing the defendant for it. When served with the plaint the defendant through its written statement of defence denied any liability against plaintiff's claims putting that she was never officially requested and refused to issue the plaintiff with the said minimum commission, fees and service charges (tariff). In a bid to resolve parties' dispute this court after consultation with them framed the following issues:

1. Whether the defendant issued the minimum commission, fees and service charges to the Plaintiff.
2. Whether the Plaintiff suffered any damages.
3. What relief(s) the parties are entitled.

During the trial, the plaintiff who prosecuted her case under representation of Mr. Cleoplace James learned counsel testified as a sole witness and tendered nine (9) exhibits in a bid to prove her case whereas the defendant

in rebuttal paraded one (1) witness and tendered four (4) exhibits only under legal service of Mr. Charles Mtae, learned State Attorney. In his testimony the plaintiff's managing director (PW1) told the court that, being a company duly registered by the defendant and issued with licence to carry on business of Shipping Agency from 25/08/2015 to 31/12/2016 and 01/01/2016 to 31/12/2016 after renewal, with business licence to perform shipping agency business in Lake Victoria (Mwanza), the defendant denied to issue her with tariff specifying minimum commission, fees and service charges that could enabled her to operate as shipping agency. As a result she failed to operate the business successfully hence suffered great damages given the fact that she had to pay salaries to the employees, buy furniture, office computer and printers and other offices fixtures. Company's certificate of incorporation, shipping agency licence and business licence were tendered and admitted in court as exhibits P1, P2 and P3 respectively. PW1 testified further that, at Mwanza the defendant issued the plaintiff with a letter exhibit P4 directing her company to temporarily apply the tariffs which were applicable before pending approval of the tariff that were to be prepared by the defendant. As the promise of issue of new tariffs could not be honoured by the defendant, the plaintiff through its letter (exh.P5) complained to SUMATRA (defendant) over the continued use of tariffs which were not in compliance with the law and went further to submit her proposal (exh. P6) which unfortunately was never considered nor responded to. Following that acquiescence by the defendant, PW1 told the court, the plaintiff wrote the Ministry of Infrastructure (exh.P7) over the same complaint whereby through Ministry's letter (exh.P8) was notified of the arranged meeting between the Ministry and plaintiff to address the said complaint, pending preparation and approval

of the final shipping agency tariffs for lake agents. As the inaction persisted the plaintiff issued three Demand Notices and Notice of her intention to sue (exh. P9 collectively) which forced her to parade the defendant before this court claiming for the reliefs as referred above. When cross examined as to whether he attended the meeting held on 1/10/2015 to discuss the temporary used tariffs pending review process of the same, PW1 said he did but resisted its application. PW1 therefore prayed the court to grant the prayed reliefs as the defendant denied to issue the plaintiff with tariffs as a working tool for charging clients over the services rendered something that sustained her great loss for failure to conduct business.

In her defence made through the then SUMATRA Economic Regulation Director since the year 2013 up to October 2018 (DW1), the defendant admitted to have licenced the plaintiff as shipping agent in lake ports particularly Mwanza ports for the period of July 2015 to December 2015 and January 2016 up to December 2016. As regard to the claim of defendant's failure to issue the plaintiff with tariffs providing for minimum commission, fees and service charges DW1 said, the claim was unfounded. He testified, there was tariffs used by Mwanza agents dully passed by stakeholders meeting held on 1st – 2nd of October, 2015 pending finalization of the tariff review process which final document was published and operationalized on the 08/02/2018 (Exh.D3). He said, if the plaintiff was unhappy with the said tariffs she would have followed the procedure of reviewing the same by lodging her application with the defendant as provided under SUMATRA (Complaints and Review Procedure) Rules, GN. No. 15 of 2008 which provides for three avenue but the plaintiff failed to pursue any of them. DW1 went on to inform the court that, as there was no application for review from

any stakeholder the defendant suo motu initiated the tariff review process and conducted several meetings with stakeholders at Mwanza and Kigoma for opinion collection in which the defendant attended two of them as per the attendance list exh. D1 but never aired or forwarded her opinion. That aside DW1 said, even when she called upon by the defendant to submit her opinion on the ongoing tariff review process the plaintiff refused to attend the prepared meeting as indicated in the two letters exhibits D2 collectively. It was DW1's further testimony that since the plaintiff failed to attend some of the meetings or submit her applications for review of the temporary used tariffs or submit her opinion on the reviewed tariffs process initiated suo motu by the defendant, she cannot claim to have been denied of any tariffs to work on as there is a proof that she was doing business at Kigoma Port under the temporary issued tariffs as proved by TRA letter and its annexure exhibit D4. When cross examined as to why the defendant failed to attach the tariff rates when issued the shipping agency licence to the plaintiff, DW1 said they were not supposed to so do as that would come from the request by the plaintiff herself after submission of the proposed tariffs. DW1 concluded the plaintiff suffered no damages as she had a duty to request for issue of tariff as per the Surface and Marine Transport Regulatory Authority (Tariff) Regulation, GN. No. 92 of 2019 but failed to so do, thus her claims are baseless and should be dismissed with costs.

At the closure of defence case both parties sought leave of the court to file their final submissions which prayer was granted and complied with. I am thankful to both counsels as their useful submission made possible this judgment. Having so stated and narrated the evidence as testified by both sides in court, I wish to state from the outset that as pleaded by the plaintiff

in paragraph 3 of the plaint this suit is predicated on tort of misfeasance. The plaintiff stated thus:

*3. That, the Plaintiff's claim against the defendant is for payment of Tanzania Shillings Four Hundred Ninety Million only (Say Tshs. 490,000,000/=) **being specific damages for misfeasance on public office for refraining to process and issue minimum commission, fees and service charges** to the plaintiff as the Shipping Agency since 25th August 2015 to date. (Emphasis supplied)*

Since the plaintiff's claims are based on tort of misfeasance I find it instructive to light up a bit on what is the tort of "Misfeasance" and how is it committed. My research of the definition on our laws could not bear fruits as it is not stated anywhere in our laws save for the legal dictionaries. The term "*misfeasance*" is defined by **Black's Law Dictionary**, 8th Ed by Brian A. Garner at page 1021 to mean:

"...a lawful act performed in a wrongful manner 2 more broadly a transgression or trespass."

Misfeasance in Public office is also defined by the same Blacks' Law Dictionary as:-

"The act of excessive malicious or negligent exercise of statutory power by a Public Officer..."

Halsbury's Law of England, 14th Edition Volume 45(2), Butter Worths – London at page 844 provides that, there are two forms under which the tort of misfeasance in Public Office can be committed when said:

*"The tort of misfeasance can be committed **either by an act of targeted malice** (that is, an act which in fact harms the claimant) or **by an intentional and knowingly unlawful act which in fact harms the claimant**. It is sufficient, in order to establish liability for the second type of act, to show that the public officer or authority dishonestly disregarded his or its plain duty or failed honestly to attempt to perform it, there being reasonable foreseeability of injury..."*

The two forms of the tort of misfeasance in public office were once discussed by this court in the case of **Hamisa Hamis Vs. The Principal Magistrate of Mbagala Primary Court and 2 Others**, Civil Case No. 192 of 2011 (HC-unreported) when cited with approval the decision of House of Lords in the Case of **Three Rivers District Council and others Vs. Bank of England** (No 3) [2000] All ER 1 where their *Lordships said inter alia*:

*"... The tort of misfeasance in public office had two forms, namely (i) **cases where a public power was exercised for an improper purpose with the specific intention of injuring a person or persons**, and (ii) **cases where a public officer acted in the knowledge that he had no power to do the act complained of and that it would probably injure the claimant**. In the second category of cases, an act is performed in reckless indifference as the outcome was sufficient to ground the tort Recklessness in that sense was subjective recklessness, and thus the claimant had to prove that*

the public officer acted with a state of mind of reckless indifference to the illegality of his act..." (Emphasis added).

In light of the above cited case it is now an established principle that the tort of misfeasance is committed under two forms. **One**, where a public power is exercised with the public officer for an improper purpose with specific intent to injure the person or persons. **Two**, where the public power is exercised by the public officer by performing a certain act with full knowledge that he has no such power or does it recklessly in such a way that his act is likely to injure the claimant. Applying the above principle to the facts in the present case is it evident to me that this case falls under the second form where the plaintiff is required to prove that the authority (defendant) was duty bound to issue her with tariffs and dishonestly or recklessly disregarded or refused performance of that duty with full knowledge or foreseeability that its act of refraining from so acting would cause injury (loss) to the plaintiff. Having so stated, I now proceed to consider and determine the three issues raised in this matter.

To start with the first issue as to whether the defendant issued the minimum commission, fees and service charges to the Plaintiff, it is the law under sections 110(1) and 111 of the Evidence Act, [Cap. 6 R.E 2019] whoever seeks the court to give him judgment as to any legal right(s) relying on existence of certain facts must prove that the same do existence. And the burden so proving lies on the person who so alleges as he is called to prove to the required standard by the law which is on the balance of probabilities. Similar view was held by the Court of Appeal in the case of **Berelia**

Karangirangi Vs. Asteria Nyalwambwa, Civil Appeal No. 237 of 2017 (CAT-unreported) where at pages 7 and 8 had this to say:

*"... we think it is pertinent to state the principle governing proof of cases in civil suits. The general rule is that, **he who alleges must prove**. ...It is similarly that in civil proceedings, **the party with legal burden also bears the evidential burden and the standard in each case is on the balance of probabilities**." See also the case **Godfrey Sayi Vs. Anna Siame Mary Mndolwa, Civil Appeal No. 114 of 2012** (unreported). (Emphasis supplied).*

In this case it is the plaintiff who is duty bound to prove that she was supposed to be issued with tariff providing for minimum commission, fees and service charges to the shipping agencies when issued with the shipping agency licence by the defendant but was denied. Mr. James for the Plaintiff submits that, the plaintiff when issued with Shipping Agency Licence (Exh. P3) was expecting to have it accompanied with minimum commission, fees and service charges as guiding operational procedures for the Shipping Agent but the defendant negligently refrained to issue the same. Instead through Exh. P4 directed the Port Master of Mwanza Port to allow use of the price list proposed by VESJA INVESTMENT LTD as transitional tariffs which according to him is an admission on the defendant's side that, there was no existing tariff as per the requirement of section 6(1)(b)(iv) and 16 of the SUMATRA ACT, No. 9 of 2001. He said the plaintiff was not supposed to be subjected to Regulation 5(2) of the GN No. 92 of 2010 as the same is applicable to agents in the seas/oceans only and not in lakes as exh. P4 is explicitly stating that, there are different tariffs for the ocean and lakes. As

regard to the assertion that, the plaintiff was bound to lodge complaints under Rule 17 of the SUMATRA (Complaints and Review Procedure) Rule, 2018 Mr. James said the same is misplaced as the law is not applicable to the plaintiff. Since the defendant failed to state under which law she initiated tariffs review process suo motu that is a proof the defendant failed to issue tariff to the plaintiff intentionally.

Conversely Mr. Mtae for the defendant submitted, the defendant under the law was not duty bound to issue plaintiff with the alleged tariffs since it was the plaintiff's duty under regulation 5 of the SUMATRA (Tariff) Regulations, GN. No. 92 of 2010 to apply for the same but she never complied with the law. He said, in resolving stakeholders' complaints on the tariffs the defendant conducted a meeting in Mwanza on 2/10/2015 in which the plaintiff was present as per exh. D1 collectively which meeting resolved to continue charging fees (tariff) which were applicable pending formalization of the reviewed tariffs. Thus the plaintiff's assertion that the chargeable fees used VESJA's proposed tariffs is rendered baseless and misleading Mr. Mtae stressed. He went on submitting that, since the defendant did not receive any request from the plaintiff for review of the said temporary fees or from any other aggrieved party lodged in accordance with Regulation 19 of GN. No. 92 of 2010 or Rule 17(1) of the SUMATRA (Complaints and Review Procedure) Rules, 2008, GN. No. 15 of 2008, she decided to initiate tariffs reviewing process suo motu which entailed collection of opinion and necessary information from different stakeholders before issuing the final and approved tariffs exh. D3. He said, in the process of opinion collection the plaintiff was invited for her contribution in one of the session but declined to attend the meeting as exhibited by her letter exh. D2. With such evidence

he said, the defendant cannot be said to have refrained from issuing the plaintiff with the alleged tariffs as there was temporary fees in place in which the plaintiff used to operate under since there is a proof from TRA Kigoma as per exh. D that, the plaintiff was doing business at Kigoma Port in March 2016.

Having considered both counsel rival arguments as well as the adduced evidence this court is of the finding that the plaintiff has failed to prove on the balance of probabilities that was the defendant negligently refrained from issuing her with tariff. My firm finding is premised on the fact that the law under Regulation 5(1) and (2)(a)(b)(c)(d)(e) and(f) of the SUMATRA (Tariff) GN. No. 92 of 2010 makes it mandatory for whoever intending to engage in any regulated transport services to submit tariff application in the prescribed form accompanied with its supporting documents such as Company's current audited accounts, Performance Report for the last 5 years, business plan, proposed tariff, worksheet of the calculations employed to arrive at the proposed tariffs and other documents that might be required. The said regulation 5(1) and (2)(a)(b)(c)(d)(e) and(f) GN. No. 92 of 2010 provides thus:

5.(1) Any person intending to be engaged in regulated transport services shall submit a tariff application to the authority.

(2)The Tariff application shall be made in accordance with the prescribed form set out in the first schedule to these regulations supported with the following documents:

(a) Current Audited Accounts of the applicant;

(b) Performance Report for the last 5 years depending on the age of the entity in question;

(c) Business plan;

(d) Proposed Tariff;

(e) Worksheet of the calculations made to arrive at the proposed tariff;

(f) Prescribe special tariff for student and children; and

(g) any other document that may be required by the Authority.

My reading from the above provision of the law makes me embrace Mr. Mtae submission that, the defendant was not duty bound to issue the plaintiff with tariffs instead it is the plaintiff who was duty bound to apply the same in which there is no single evidence to prove that she submitted applied for the same and denied. The plaintiff's letter to the defendant titled "*Lake Tariff Proposal*" dated 07/03/2016 purporting to request for issue or approval of the proposed tariff therein in my considered opinion did not amount to application for issue of tariff within the meaning of regulation 5(1) and (2)(a)(b)(c)(d)(e) and(f) GN. No. 92 of 2010 as it ought to be in a prescribed form accompanied with the documents as described above. As to Mr. James's contention that the said Regulation does not apply to the applicant I find the same to be unfounded as under regulation 2 of the said GN. No. 92 of 2010, the same applies to service providers of the regulated sector the plaintiff's inclusive for being regulated by the then (defendant) SUMATRA as Shipping agent.

Having so found and notwithstanding the fact that the plaintiff failed to discharge her duty of applying for the tariffs, I further make the finding there was temporary tariff duly approved by the stakeholders meeting held in Mwanza between 1-2/10/2015 in which the plaintiff attended the first one though is submitting that she contested its application. The fact that she contested its approval does not mean that the same were not approved by the said stakeholders meeting and ceased to apply as temporary fees/tariffs pending review process of tariffs to applicable to all lakes shipping agents. Further to that is the same tariff which undisputedly were applied by her when rendering services at Kigoma Port as evidenced by exhibit D4 as she never procedurally challenged the same as per the requirement of the law under Regulation 19 of GN. No. 92 of 2019 or Rule 17(1) of SUMATRA (complaints and Review Procedure) Rules GN. No. 15 of 2008 as rightly submitted by Mr. Mtae. It is from that background I distance myself from Mr. James's assertion that there was not no tariff issued for the plaintiff to operate under. Despite the fact that, the plaintiff failed to discharge her duty of applying for issue of tariffs, with existence of the temporary fees/tariff providing for chargeable fees and service charges in the lake Victoria, I would conclude the first issue is answered in affirmative that the plaintiff was issued with the minimum commission, fees and charges.

Having answered the first issue in affirmative I now turn to consider the second issue as to whether the plaintiff suffered any damages. It is Mr. James submission that the plaintiff suffered specific damages of Tshs. 490,000,000/= as he incurred costs for employing staff and other operational equipment being the prerequisites for being licenced to operate as Shipping agent. He added as the plaintiff's claims are stemmed on tort of

misfeasance in public office, she was not duty bound to prove specific damages as she suffered exemplary damages. Mr. Mtae is contesting the grant of Tshs. 490,000,000/= as specific damages for want of proof arguing that doing otherwise will be going against the established principle as enunciated in the case of **Bolog Vs. Hutchison** (1950) A.C 515 at page 525 as well as **Zuberi Augustino Vs. Anicet Mugabe** (1992) TLR 137 at page 139, that specific damages being exceptional have to be specifically pleaded and strictly proved, which is not the case in the instant suit. It is true as submitted by Mr. Mtae, it is an established principle of law now that, specific damages being exceptional character must be specifically pleaded and strictly proved as rightly held in the cases of **Bolog** (supra) and **Zuberi Augustino** (supra). Lord Macnaughten in **Bolog** on special damages, held that:

*"... such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character and, therefore, **they must be claimed specifically and proved strictly.**"* (Emphasis supplied)

The Court of Appeal in the case of **Zuberi Augustino** (supra) commenting on specific damages said:

"It is trite law, and we need not cite any authority, that special damages must be specifically pleaded and proved."

Similarly in the case of **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (CAT-unreported) the Court on proof of specific damages observed that:

"The law in specific damages is settled, the said damages must be specifically pleaded and strictly proved..."

In this case as alluded to herein above the plaintiff in paragraph 3 of the plaint specifically pleaded the claim of Tshs. 490,000,000/- as specific damages for misfeasance on public office following the defendant's act of refraining to process and issue minimum commission, fees and service charges to her. Strangely Mr. James submits the claim being premised on tort of misfeasance on public office the requirement of being strictly proved is dispensed with as the damages is treated as exemplary damages. I think this contention need not detain me much as parties are bound by their pleadings. See the cases of **Charles Richard Kombe t/a Building Vs. Evarani Mtungi and 2 Others**, Civil Appeal No. 38 of 2012 (CAT-unreported) and **Yara Tanzania Limited VS. Charles Aloyce Msemwa**, Commercial Case No. 5 of 2013(HC-unreported). In the case of **Charles Richard Kombe** (supra) the Court of Appeal on the need of parties to be bound by their pleadings had this to say:

"It is cardinal principle of pleadings that the parties to the suit should always adhere to what is contained in their pleadings unless an amendment is permitted by the Court. The rationale behind this proposition is to bring the parties to an issue and not to take the other party by surprise. Since no amendment of pleadings was sought and granted the defence ought not to have been accorded any weight."
(Emphasis added)

Applying the said principle to the facts of this case it is uncontroverted fact that the plaintiff herein never pleaded the claim of Tshs. 490,000,000/- as exemplary damages nor did she pray the court to amend its plaint to include it therein. That being the position I dismiss Mr. James submission that the claim of Tshs. 490,000,000/- has to treated as exemplary damages and therefore dispensation with the requirement of proving it. As alluded to above that specific damages must be strictly proved, it was expected the plaintiff would have advanced evidence to justify the award of the claimed amount. However, the contrary was true as PW1 when testifying in-chief was recorded to have said and I quote:

"...following the denial of those guidelines (tariffs) our company suffered great damages to the tune of Tshs. 490,000,000/=. This was a loss incurred after our failure to operate as shipping agency for not having the said tariffs. This amount is for compensation of the loss the company incurred for being denied with the said Tariff as a result was unable to conduct business."

As it can rightly be noted from the plaintiff's testimony (PW1) there is no evidence justifying or giving breakdown on how the claimed amount was arrived at by the plaintiff. I would therefore conclude that the claim of specific damages was never proved by the plaintiff. As regard to the claim of general damages it is the duty of this court to determine and quantify it the same being awarded under discretion of the court. However, though there no legal requirement of having general damages strictly proved like specific damages the requirement of being pleaded in the plaint is of utmost importance. The Court of Appeal in the case of **Peter Joseph Kilibika**

(supra) on the function of the Court when determining and quantifying damages and the requirement of the plaintiff to specifically plead general damages while quoting with approval the case of **Admiralty Commissioners Vs. SS Susqehanna** [1950] 1 ALL ER 392 observed:

"It is the function of the Court to determine and quantify the damages to be awarded to the injured party. As Lord Dunedin stated in the case of Admiralty Commissioners v SS Susqehanna [1950] 1 ALL ER 392.

"If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question."
(Emphasis added)

Applying the principle in the above cited case to the facts of the case at hand it is noted that the plaintiff never pleaded any fact disclosing that she suffered general damages. In absence of such important requirement of the law, I am of the finding that the second issue is answered in negative as the plaintiff suffered no general damages and therefore I refrain from granting the same. Lastly is the third issue as to what relief(s) are the parties entitled. I think this issue also need not detain me. As already found in the first issued that the plaintiff was issued with tariffs and in the second issue that she suffered no damages, the answer to the third issue is none than adjudging that the Plaintiff has failed to prove her case to the required standard and therefore the only relief deserving her is dismissal of this suit which order I hereby issue. The suit is therefore dismissed in its entirety.

Given the nature of the case, I order each party to bear its own costs.

It is so ordered.

DATED at DAR ES SALAAM this 24th day of September, 2021.



E. E. KAKOLAKI

JUDGE

24/09/2021

The Judgment has been delivered at Dar es Salaam today on 24th day of September, 2021 in the presence of the Plaintiff in person and Ms. **Asha Livanga**, Court clerk and in the absence of the Defendant.



E. E. Kakolaki

JUDGE

24/09/2021