IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE DISTRICT REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL APPEAL No 200 of 2020

(Originating from Civil Case No 126 of the District Court of Kinondoni H.M.Hudi Esq RM dated 22. 7. 2020)

BETWEEN

NATIONAL MICROFINANCE BANK PUBLIC LTD COMPANY.....APPELLANT

VERSUS

KIARENI INVESTMENT LIMITED.....RESPONDENT

JUDGMENT

MRUMA, J

The Respondent's action against the Appellant was for recovery of Tanzania shillings 68,411,500/= being a total sum outstanding under a contract for construction of a "Quick Serve Branch", at Misenyi Township in Kagera Region which were claimed as follows;

(i) Shillings 6,650,000.00 being amount outstanding under penultimate certificate;

(ii) Interest on the above mentioned amount at the commercial rate of 18% per month from the date when the amount was due in January 2016 to the

date of filing the suit which was calculated to be equivalent to Shillings 6650000 X 32 months X 18 = 38,304,000.00;

(iii) Shillings 4,265,000.00 being outstanding principal amount under final certificate;

(iv) Interest on item iii above at commercial bank lending rate of 18% per month which is equivalent to shillings 4,265,000.00 X 25 months = 19,192,500.00 as provided for under clause 31(b) of the contract;

(v) Judgment and decree on interest on item b, c, d, and eat commercial bank lending rate of 18% per month from the date of judgment as provided for under clause 31(b) of the contract;

(vi) The Defendant be ordered to pay interest at court's rate on the decretal sum from the date of judgment to the date of payment in full;

(vii) General damages of not less than shillings 600,000,000.00 for breach of contract

(viii) Costs of the suit and;

(ix) Any other relief court may deem fit and just to grant.

The facts disclosed in the plaint are that by a contract made between the Respondent and the Appellant in August 2014 the Appellant contracted the Respondent to construct a "Quick Serve Branch" at the Defendant's premises at Misenyi township in Kagera region (works) at the cost of Shillings 182,765,640/=. The Respondent commenced construction of the works in accordance with the contract and periodically the value of the work executed were certified by the consultant **M/S Spectrum Design Architects** in accordance with the terms and conditions of the contract and an interim certificate issued in respect thereof. The Defendant paid all the interim certificates issued by the Consults save a certificate of practical completion issued on 22nd December, 2015 followed by penultimate certificate (payment certificate), to that effect of shillings 6,650,000.000 which according to the Appellant, was not served on her (See paragraph 5 of the written statement of Defence).

A final certificate for the said works of the value of Tanzania Shillings 4,265,000/= was issued to the Respondent in April 2018. Under the contract terms the Appellant was under an obligation to pay the Respondent for the works done by the Respondent and certified by the consultant but it was the Respondent claim at the trial that the Appellant

refused and/ or failed and ignored to pay the Respondent the said claims despite numerous demands and reminders made by the Respondent.

It was the Respondent's case that the defect liability period was six months from the issuance of practical completion of certificate which was issued on 22nd December, 2015. It was the Respondent's contention that the final measurement of the works was to be carried out not later than 22nd June 2016 and within 30 days as from 22nd June 2016. She averred further that the consultant was mandatorily required to issue final certificate but she neglected to do so. It was the Respondent's contention that the final account (closing account) was unreasonably delayed until April 2018 and the consultant (Architect) issued final certificate of Shillings 4,265,000.000 in favour of the Respondent in April 2018.

The Appellant denied the Respondent's claim. In the written statement of defence the Appellant put the Respondent into strict proof of her claims and contended that the particulars of breach complained of by the Respondent were baseless and hopeless.

In its judgment the District trial court found that on the evidence adduced a breach of contract had been proved. The court held that the act of the Appellant not paying the Respondent for two to three years constituted a breach of contract.

On damages the trial court found that the mere fact that the Respondent was a business entity, which earns its incomes through construction projects and loans, it must have suffered damages for the breach committed by the Appellant. The court went on to award special damages as claimed in the plaint and shillings 250,000,000/= as general damages.

The Appellant was aggrieved and she has appealed to this court on 11 grounds as follows:

1. That the trial Resident Magistrate erred in law and in fact for failure to conclude that the terms of exhibit P1 covered the damages for delayed payments and that the Plaintiff was entitled to those damages only;
2. That the trial Resident Magistrate erred in law by awarding the Plaintiff the sum of shillings 6,650,000/= and shillings 4,265,000/= amount under Penultimate Certificate and Final Certificte respectively while the same had already been paid;
3. That the trial Resident Magistrate erred in law and in fact by ignoring evidence on record specifically evidence of DW3, Exhibit D2 and admissions by the Plaintiff that the

Defendant in July 2019 deposited some amount into the Plaintiff's bank account for Penultimate and Final Certificates;

4. That the trial Magistrate erred in law and fact by ignoring the evidence of DW1 and Exhibit D1 on the reason for delayed payment;
5. That the trial Resident Magistrate erred in law and fact by finding that the Defendant delayed for 2.75 and 2.1 years in making payment for Penultimate and Final Certificates respectively from the date when they were issued to the date of instituting the suit;
6. That the trial Resident Magistrate erred in law and in fact by failing to hold that the Plaintiff failed to prove the basis of the interest rate at 18% each month of delay in making payment for the issued certificates;
7. That the trial Resident Magistrate erred in law and in fact for failure to hold that Exhibit P1 didn't state the specific bank rate and time for delayed payments;
8. That the trial Resident Magistrate erred in law and in fact for failure to hold that BOT rates which were to be applied

as exhibit P1 didn't state the specific bank rate and that DW2 correctly calculated the rate for delayed payment;

9. That the trial Resident Magistrate erred in law and in fact by ignoring the evidence of PW1 and DW2 that interest rates are chargeable annually;
10. That the trial Resident Magistrate erred in law and in fact by awarding general damages at the tune of Shillings 250,000,000/= without justification and evidence to support such an award and;
11. That the trial Resident Magistrate erred in law and in fact for failure to consider the final submissions of the parties.

At the hearing of this appeal the Appellant was represented by Counsel Victor Kikwasi while the Respondent was represented by Counsel Jackline Rweyongeza. Both parties addressed the court in written submissions.

The Appellant's Counsel submitted that in essence the Appellant didn't deny the claim of shillings 6,650,000/= as claim for payment of Penultimate Certificate and Shillings 4,265,000/= being payment for Final Certificate but he vigorously contest the calculations of the amount ordered to be paid. He submits that the amount paid was without basis and was unjustifiable.

I have carefully considered the evidence and the submissions of both counsels for which I am grateful.

Clause 48 of the contract which provides for retention and states;

" Retention

48.1 The Employer shall retain each payment due to the Contractor the proportion stated in the Contract Data until completion of the whole of the Works.

48.2 On completion of the whole of the works, half the total amount retained shall be repaid to the contractor and half when the Defects Liability Period has passed and the Project Manager has certified that all Defects notified by the Project Manager to the Contractor before the end of this period have been corrected.

48.3 On completion of the whole Works, the contractor may substitute retention money with an "on demand" Bank guarantee."

From the above provision, it is clear that the retention was to be paid to the contractor on the completion of the works.

Furthermore, Clause 55 of the contract, which provides for completion provides as follows;

"Completion

55.1 The contractor shall request the Project Manager to issue a certificate of completion of the Works, and the Project Manager will do so upon deciding that the work is completed."

In this case, no certificate of completion was issued by the project manager and therefore, this indicates that the work was not completed by the plaintiff. It would appear to me that based on two letters dated 29th March, 2007 from the First defendant and the 16th July, 2007 written by the plaintiff to the Principal Town Clerk of the 1st defendant 51% of the work had been done.

According to CHITTY ON CONTRACTS Vol. 2 at Paragraph 37-125, the term retention is defined as follows;

"Monies held on account of retention form part of the sums certified by the contract administrator and earned by the contractor but which are not payable to the contractor until the final stages of the contract works."

Furthermore, at Paragraph 37-130 the learned authors write,

"The stages at which retention typically becomes payable- practical completion and the issue of the certificate of making good defects- provide a clear indication that the

practical purpose of retention is to ensure completion by the contractor and nominated sub-contractors."

That being the position of the law I find that the plaintiff did not complete the works. There is also no evidence that the parties when the contract was terminated were able to address what defects existed following the work that was done. What is clear is that the works had to be given to another contractor and therefore the plaintiff is not entitled to the sum of Ushs 7,615,420/= as retention.

Issue two: Whether there was breach of contract.

It is the case for the plaintiff that there was fundamental breach of the contract within the meaning of clause 59 of the contract as a result of the late payment of interim certificate No 2.

Counsel for the plaintiff submitted that the parties agreed that the non payment of a certificate, certified by the Engineer within 84 days constitutes fundamental breach of contract. According to counsel for the plaintiff, the second interim certificate was approved on 29th March, 2007 and thereafter, payment on 30th November, 2007, beyond the stipulated time amounted to fundamental breach.

Counsel for the plaintiff further submitted that, the defendant's witnesses admitted to the delay in payment of the second interim certificate. He disputed the defendant's assertions that the plaintiff abandoned the site upon submission of the second interim certificate, on 26th March, 2007. Counsel for the plaintiff submitted that the plaintiff remained on site and even wrote a letter on 15th February 2008, requesting for revision of the contract due to the increase of costs and materials, but there was no response from the defendants. Furthermore, that the defendants failed to comply with Clause 60 of the contract, because no certificate was issued by the defendant's engineer showing that the plaintiff was guilty of any breach.

Mr. John Higenyi on behalf of the defendants testified that he supervised the work through the Division Engineer as a technical person in that area. Mr. Higenyi testified that there was a breach of contract by both parties, and that on the part of the defendants; the breach was that they made payments on the second interim certificate late, but for reasons that were beyond the defendant's control. He insisted that on the part of the plaintiff, the breach was abandoning the site for a period of two years, fully aware of the contract period in the agreement.

Mr. Higenyi further testified that the 1st defendant did not terminate the contract but it was the plaintiff company that abandoned the work from the time the 1st defendant paid the second certificate in November 2007, to the time it advertised the works in 2009. Mr. Higenyi testified that contract was a fixed price contract and therefore could not have a price adjustment as demanded by the plaintiff. Furthermore, that the defendant did not inform the plaintiff that the contract was terminated before the defendant advertised for a new contractor, because the plaintiff had taken a long period without being at the site, and the date proposed for the completion of the works had passed.

I have carefully considered the evidence on records and the submissions of the parties in this appeal for which I am grateful.

The contract (Exhibit P1) provided 31(b) of the contract provides as follows;

> *If a certificate remains unpaid beyond the period for honouring certificates stated herein, the employer shall pay or allow to the contractor/nominated sub-contractor interest on the unpaid amount for the periodit remains unpaid at commercial bank lending Rate in force during the period of default"*

Under the contract above, failure to make payments within 14 days of the issue of the certificate would amount to a breach of contract (See Appendix "A" to conditions of Contract). As stated herein before, the Appellant did not dispute that there was delay in paying two certificates. For instance the letter dated 24th October, 2016 from the consultant to Isaac Nyirenda of NMB, (the Appellant's bank) indicates that payment certificate No. 4A valued shillings 5,651,251.80 was dated 29th October, 2016. Under the contact such a certificate would have to have been paid on or the 28th May 2018 to avoid breach.

In another letter dated 14th May, 2018 from the Consultant to Cornel Tryphone of NMB, the Consultant writes that certificate No 001 was due and payable.

From these letters and the testimonies of PW1 which was supported by DW1 it is clear that the Appellant had not made payments on the certificate within 14 days required under the contract. I find that the delay of the defendant to make payment on the certificate amounted to a breach of contract, which gave the plaintiff the right to damages.

As to what are the remedies available to the Respondent, from my findings above the Respondent is entitled to the value of the two certificates plus interest.

Clause 31(b) of the contract provided for payment of interest as follows;

> *"If a certificate remains unpaid beyond the period for honouring certificates stated herein the employer shall pay or allow to the contractor/subcontractor interest on the unpaid amount for the period it remains unpaid at commercial lending Rate in force during the period of default"*

In its judgment the trial court found that the Penultimate Certificate was due for payment from 12th November, 2016 as it was issued on 29th October 2016 but it was paid on or after 25th July, 2019 about one year after this case was instituted in court. Regarding Final Certificate the court found that it was issued on 14th May, 2018 instead of sometimes in May 2016. The trial rightly refused the Appellant's defence that delay was caused to auditing processes which were going on within the bank projects. I find the rejection of such defence to be correct because audit queries within the bank projects were not included as one of the terms of the parties' agreement.

I therefore agree with the counsel for Respondent that the trial court rightly held the Appellant liable to pay for unpaid certificates together with interest at the bank lending rate in force during the period of default.

Regarding rate of interest chargeable I would agree with the Appellant's counsel that the 18% awarded by the trial court was so awarded without any evidence to show what was the bank's lending rate in force during 2016 and 2018 which constitute the period of default.

On the general damages, it is trite law that general damages are those damages that arise directly inevitably due to a breach of contract. They constitute damages that would be theoretically suffered by the injured party.

In the case at hand there can be no doubt that delay in making payment for two certificates must have disturbed and accordingly injured the Respondent. However payments of interests on the delayed payments were intended to cover and properly compensate the injured party. I thus, in my view in absence of evidence that the Appellant suffered in terms of its reputation in the business or that due to the delay she failed to re service its loans etc the award of general damages was without any basis.

That said, I allow the appeal to the extent stated above and order as follows:

1. The award of specific damages that is to say;
    i. Shillings 6,650,000/= plus interest at the rate of commercial bank lending rate per annum being the

outstanding amount on Penultimate Certificate and;

ii. Shillings 4,265,000.00 plus interest at the commercial bank lending rate per annum (at the dates of failure to pay i.e. 22nd July, 2016 to the date of filing the suit) being outstanding amount on account of the Final Certificate;

2. The trial court is directed to inquire from the Central Bank of Tanzania Commercial bank lending interests rates between 2016 and 2018 (the default period) and apply the certified rates to be provided by the said Central Bank in calculating the amount payable to the Respondent and issue a decree reflecting that amount.

3. As the Appellant is guilty for breach of contract they will pay costs of the suit in the District Court;

4. Each party shall bear own costs in respect of this appeal.

A.R. Mruma,

Judge

Dated at Dar Es Salaam this 23rd Day of May, 2022.

A.R. Mruma

Judge