IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 15 OF 2020

MM INTERGRETED STEELS MILLS LIMITED..... PLAINTIFF

VERSUS

AUTO MECH LIMITED.....1ST DEFENDANT

HEENA PATEL.....2ND DEFENDANT

RAMESH PATEL.....3RD DEFENDANT

JUDGMENT

Date of last order: 24/08/2022

Date of Judgment: 23/09/2022

E.E. KAKOLAKI J.

The plaintiff a limited company registered under Companies Act, through the services of Davos Attorneys is suing the above-named defendants jointly and severally, the 1st defendant being a company registered under Companies Act, and 2nd and 3rd defendants as directors of the 1st defendant, claiming for the following reliefs.

(a) Payment of USD 861,268.587 as outstanding amount for supply of structural materials by the plaintiff to the first defendant and commitment to pay the said debt by the 2nd and 3rd defendant.

(b) Payment of general damages to be assessed by the court

(c) Payment of interest on (a) above from 30th August, 2019 at the rate of 12 % per annum until full payment

(d) Costs

(e) Any other reliefs this Honorable court deems fit and just to grant.

Briefly here is the summarized facts of the case as gathered from the pleadings. It all started in January 2018, when 1st defendant through 2nd and 3rd defendants requested the plaintiff to supply her on credit basis different types of structural materials worth USD 861,268.587, with commitment of effecting payment within a period of 30 days from the date of delivery of the said goods. It is the plaintiff averment that, since delivery of the consignment until October, 2019, though not disputing the debt and despite of several demands, no single payment was ever made by the defendants apart from making empty promises to pay the outstanding amount. On 17th October, 2019, plaintiff issued a final notice to the defendant for full payment of the outstanding amount of USD 821,268.587 but to date the defendants have failed, ignored or refused to pay for the same. It is plaintiff's further averments that, after being served with the final reminder 2nd and 3rd defendants being directors of the 1st defendant on 29/10/2019 committed

themselves to pay the said debt and scheduled in a way payment program of reducing the debt with the sum of Tshs. 60,000,000 to Tshs. 80,000,000 per month from the end of November 2019 onward. Beside that schedule, defendants allegedly committed themselves to deposit postdated cheques for the whole outstanding debt but failed to honour either of the above agreements. It is averred that, defendants' unpaid debt is reflected in her ledger account with the plaintiff beginning 1st January 2018 to 30th August 2019 at the closing balance of USD 861,268.587. Seeing that his rights are robbed, the plaintiff has brought this case claiming the reliefs as alluded to above.

When served with the plaint, 1st and 3rd defendant through Ms. Simkoko and Co. Advocate filed their WSD, whereby admitted to have entered into contract with the plaintiff, but disputing plaintiff's claim that it was their agreement to pay the due amount within 30 days after supply of materials. It was their defence that, their agreement was that, payment will be effected after being paid by their client. The 2rddefendant also in her defence vide the services of Mr. Rabin Mafuru, learned advocate denied to been indebted to the plaintiff and the facts that she is director or shareholder in the 1st defendants' company.

In short all defendants denied existence of such debt to the extent claimed. On 8th October, 2020 during final pretrial conference, the following issues were framed by court after consultation with the parties and basing on the parties' dispute as pleaded in their pleadings, as enumerated hereunder:

(1) Whether the plaintiff supplied the 1st defendant material worth USD 861,268.587.

(2) Whether there was an agreement between parties that the plaintiff will be paid after the 1st Defendant has received payment from their client.

(3) Whether the 1st and 3rd defendant paid the plaintiff the sum of Tsh.500,000,000/=.

(4) Whether the 2nd and 3rd defendants made commitment to pay the debt by issuing the payment schedule program.

(5) Whether 2nd defendant had legal capacity to transact on behalf of 1st defendant.

(6) What reliefs are the parties entitled to.

The plaintiff at all material time enjoyed the legal services of Mr. Jerome Msemwa, learned advocate, while the 1st and 3rd defendants, were represented by Ms. Dainess Simkoko and 2nd respondent by Mr. Rabin

Mafuru, all learned advocates. It is worthy revealing at this stage that, on 03/03/2022, Mr. Mafuru for the 2nd defendant, withdrew his instruction in this matter after notifying his client, and since she defaulted appearance to inform the Court whether she wished to engage another advocate, it was ordered for the case against her to proceeded ex-parte.

In proof of the suit, plaintiff had in court three (3) witnesses and relied on four (4) exhibits. The first plaintiff's witness is Mehul Dinesh Bhadresa, the logistics supervisor and sales officer, who testified as PW1. Apart from explaining his duties, he told this court that, on 12th February 2018, defendants requested for purchase of structural materials such as Zink and angle line, and the business went well on a different dates. He said, the material supplied worth USD 861,268.87 and the same were delivered at the defendants' yard situated at Tabata by plaintiff's driver namely, Fredrick Castro who was using a motor vehicle with registration No. T. 1190 DFN and its trailer with Reg. No. T.730 DFV. PW1 testified that, he prepared tax invoices and delivery notes which were directed to the 1st defendant, Auto Mech Limited, the documents which were sent to Tabata by the driver. The said invoices and delivery notes were tendered and received in Court as exhibit PE 1 collectively.

PW1 further testified that, to date, plaintiff has not paid a single cent for the delivered goods contrary to their term of agreement that, payment would be made within 30 days of delivery of goods. He was of the testimony that, despite of demand letter the defendants never responded. It was his prayer that, this court order the defendant to pay the debt and grant all the prayers in the plaint.

When subjected to cross examination by Ms. Simkoko and asked whether he knows the LPOs and if he had tendered them, he replied that he knows them as documents requiring supply of material from the client but never tendered any as were left in the office. He further clarified that, to certify delivery of goods, defendants used to sign delivery notes. He also maintained that; defendant had to pay for the goods received within 30 days of the delivery.

When cross-examined by Mr. Mafuru, PW1 confirmed that, the outstanding debt in the ledger is USD 861,268. Though he said that, he did not bring any ledger in court.

PW2 Fredrick Castro Martine, dully employed as a driver of the 1st Defendant on oath testified that, he is the one who delivered the materials to defendants' office situated at Tabata and the materials are angle line and Zink. According to him, he delivered the said cargo by using motor vehicle

No. T. 190 BFN with trailer with registration No. T. 730 DFN. He added that, he delivered the said materials on 12/02/2018 after being directed by his boss Mr. Mehill Dinesh Bhadresa. According to him, when making delivery, were always issued with delivery Notes from the office and hand them back to responsible person. He added that, he delivered materials thrice on different dates to the responsible officer of the 1st defendant who dully received the same. When cross examined on the proof of delivery he said normally the defendants used to sign delivery notes. And when referred to one of the delivery note and tax invoice of 12/02/2018 and asked whether there was any signature appended to exhibit delivery of good, he said there was none. And reiterated his evidence in chief that he supplied the materials thrice (3) only. When called into query with Mr. Mafuru as to what documents are taken back to the office after delivery he said it the copy of delivery note duly signed by the client. And on whether he had encountered any resistance from the client refusing to sign the delivery note he said he has never.

Last witness for prosecution was PW3, Musa Rashidi Lilumbo, plaintiff's company secretary and a lawyer by profession. Apart from explaining the objectives of the plaintiff company and other companies owned by her and his duties in the company, he explained the plaintiff is suing the 1st defendant

because she purchased structural adjustments materials worth USD 861, 268.587 and never paid for the same. According to him, the 2nd and 3rd defendants are sued as they introduced themselves as 1st defendant's directors during the transactions and they attended all negotiation meetings for payment of the debt and further that, it was the 2nd defendant who issued the plaintiff with the commitment letter for the payment of due amount, which letter was tendered as exhibit PE2. He clarified that, the letter was explaining that, the debt will be paid to **M.M. Industries Limited**, though it was supposed to be written M.M Integrated steel Mills Limited as M.M Industries Ltd deals with production of plastics pipes and not iron products which were sold to the defendant.

PW3 further testified that, in the said exhibit PE2, the 2nd defendant as 1st defendant's director and on behalf of his Company and co-director Ramesh Patel, duly authorized to make the commitment, promised to issue postdated cheques for the said amount of USD 861, 268.587 for monthly payments between Tshs. 60-80 million effectively from the end of November 2019. It was PW3's further evidence that, up to 29th November 2019, the promised payment by postdated cheques were never effected by the defendants, despite of unsuccessful follow ups via phone calls and emails. Later on they

instructed their lawyer **Davos Attorneys** to write demand notice the defendants which was tendered and received as exhibit PE3. PW3 also tendered a ledger account indicating the defendants' debt on the delivered goods which was tendered and received as exhibit PE4. When referred to paragraph 3 of the 1st and 3rd defendants WSD, PW3 explained that, defendant alleges to have paid in the name of their good will to the plaintiff Tsh.500 million, as part payment of the whole debt and that the materials are still pending in their ware house for not being delivered to their clients. According to him, the claimed debt is yet to be paid by the defendants to the plaintiff hence prayed the Court to order all the defendants to pay USD 861,268.587 for the materials supplied to them plus interest as the plaintiff secured loan to run its business, costs of the case and general damages which this court will deem feet to grant. When pressed under cross examination by Ms. Senkoko, PW3 clarified that, the agreement was made between Subhash Motibhai Patel as a chairman and managing director of the plaintiff's company by then and Rajesh Patel and Heena Patel as directors of the 1st defendant, though he was not the party to that agreement as he was notified of the same by Mr. Subash M. Patel. Concerning the ledger, PW3 explained that, the same was generated from computer system which

regulates clients' debts and payments made. He clarified further that, the same was generated from the computer of Mr. Jatin Patel who is the authorizer and who prepares the account and send them to the account department before it is sent to his account for access. When referred to exhibit PE2, PW3 clarified that, he was not present at the time of executing the said exhibit, as the same was witnessed by an advocate. During re-examination by Mr. Msemwa, PW3 stated that, in their WSDs, defendants never denied to have been indebted.

On the other side, defendants had only one witness Mr. Ramesh Patel, the owner of the 1st defendant's company who testified as DW1. He started by explaining of his company's business, and his close and long business relationship with the owner of the plaintiff's company the late Subash Patel. He testified that, the late Subash Patel used to supply them with materials without time scheduled for repayment since their relationship based on mutual trust and friendship. According to him, since their main client is TANESCO, they agreed with the plaintiff that, payment will be effected after the defendant is paid by the client upon supply of the consignment. DW1 admitted to have been supplied with materials from the plaintiff in 2018 and that during supply the delivery notes were duly signed and stamped though

he did not tender the said delivery notes on the undisputed supplied materials. When referred to exhibit PE 1, he denied the said delivery notes alleging that, the same do not bear the stamp of their company nor signature of their officer. He testified further that, upon delivery of the consignment, they encountered a stumbling block as TANESCO did not supply them with the Local Purchase Order so that they could supply her the products, and since the same took the long time, Mr. Subash Patel instituted a criminal complaint against them to the director of criminal investigation (DCI) claiming that, they fraudulently obtained goods from him on the ground that were already paid by TANESCO and spent the money. He said, he was summoned to the DCI's office, interrogated but later on found the complaints were unfounded as the materials were found to be still at their plant area. According to DW1, since then Mr. Subash stopped any communication with him rather he wanted them to communicate with his lawyer. DW1 testified further that, he tried to reconcile their indifferences since his company had also deposited some money Tshs. 500 million with the plaintiff but the efforts became fruitless. Further to that, he deposited Tshs. 50,000,000/- in the efforts to reduce the debt which was paid to advocate Msemwa as per the plaintiff's instruction. He said later on the company went into liquidation and

everything was sold thus, could not access anything therefrom. He insisted that, the defendants have not breached any contract, as their contract was oral based on business transaction of buying and selling goods, and the debt borne out of their business transactions if reconciled cannot reach the claimed amount of USD 800,000,.00.

When cross examined by Mr. Msemwa Dw1 explained that, defendants do not deny to have received the consignment. When asked as to whether he tendered any evidence to prove that he has paid Ts.539,000,000 as claimed he said he did not. When referred to exhibit PE2, commitment letter, DW1 said according to it, his daughter who is neither a shareholder nor director of 1st defendant confirmed to be ready to pay the debt of USD 861,000 and that she paid Tsh. 30,000,000 to Mr. Msemwa. On whether post-dated cheques were issues as promised in exhibit PE2, he responded they were never issued. During re- examination, DW1 confirmed that, the last transaction with the plaintiff which is subject of this case is around USD 450,000 up to 500,000. That marked the end of defence case in which thereafter parties filed their final submission as scheduled by the Court.

I had an ample time to read their respective final submissions in support of their respective stances. I truly commend them for their hardworking and

insightful inputs on this suit. I'm not intending to reproduce the same but, in the course, I will here and there refer to their points as raised and argued. Having narrated the evidence by the parties herein in extensor and having gone through the final submission by the plaintiff, I now turn to consider the issues as framed by the court. In so doing, I shall be guided by the principle governing civil cases as encompassed in sections 110(1) and (2), and 111, 112, of the Law of Evidence Act, thus, he who alleges has the duty to prove the allegations, the party with legal burden also bears the evidential burden and that the standard of proof is on a balance of probabilities. See the case of **Anthoni M. Masanga vs Penina (Mama Ngesi and Another** civil Appeal No 118 of 2014, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 and **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017 CAT – (CAT-unreported). In the case of **Berelia Karangirangi** (supra) on the above principles 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 similar 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."*

With those principles in mind, this court is therefore to decide whether the burden of proof has been sufficiently discharged by the plaintiff.

Notably, in the instant case the relationship between the parties is based on oral agreement which in law is binding. It is a principle of law that, once one party by word or conduct promises or gives assurance to the other party intending to create legal relationship and that other party acts on it, then the person who gave promise or assurance will be prevented denying the binding legal relationship as if he/she did not give such promise or assurance. In the case of **Combe Vs. Combe** [1951] 1 All E.R. 767, which was cited with approval in the case of **Catherine Merema Vs. Wathaigo Chacha,** Civil Appeal No 319 of 2017 (CAT-Unreported), Denning, L.J (as he then was) had an opportunity to address the import of oral agreements where it was stated that:

> *"The principle, as I understand it, is that where one party has,* ***by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken at him his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to*** *the previous legal relations as if no such promise or*

assurance had been made by him, but he must accept their legal relations subject to the qualification which he himself had so introduced, even though it is not supported in point of law by any consideration, but only his word.

From the above legal stance it is evident to me that, for an oral agreement to stand there must be proper scrutiny of witness's credibility and the entire evidence as well as parties' conduct before and after such alleged oral agreement. In other words is oral testimony of parties' whichever believed after close examination of both sides evidence that proves oral agreement. Having that principle in mind and the others articulated above, I now start to discuss the 1st issue as to whether the plaintiff supplied the defendants with materials worth USD 861,268.587. In their testimonies, all the three witnesses of the plaintiff alleged that, the materials supplied to the defendant is worth USD 861,287.587 and to prove the same relied on exhibit PE1 delivery notes and invoices, Exhibit PE4, the defendant's ledger account showing the outstanding balance as well as exhibit PE3 in which the 2nd defendant committed the defendant to repay the debt by instalments monthly. On his side the 1st defendant through DW1 does not dispute to have received the goods though disputes the said amount when stated

during re-examination that, if the debt if reconciled the same ranges between USD 450,000 to USD 500,000 and not the claimed amount of USD861,287.587. In his submission Mr. Msemwa submitted in line with the above evidence while Ms. Senkoko insisted that, since the plaintiff did not tender any Local Purchase Order (LPO) showing the types of goods ordered and since the delivery notes were not signed by the defendant, there was no proof that materials were supplied at all and to the claimed amount. It is true as submitted by Ms. Simkoko, no LPO was tendered by the plaintiff to justify her claim that some materials and what type and quantity were requested and supplied to the defendant. This fact is also corroborated by the evidence of PW2 who testified to have supplied the materials to the defendant on 12/02/2018 and other subsequent dates which makes a total of thrice deliveries, but admitted that the delivery notes were not signed by the defendant officer. Glancing at the all delivery notes in exhibit PE1 collectively including three of them allegedly executed by PW2 on 12/02/2018 for supply of 12.035 tons of Zink, 14/02/2018 for 159 pieces of angle line and 15/02/2018 for 176 pieces of angle line, it is to the satisfaction of this Court that none of them was signed by the defendants, hence absence proof of what was supplied and its the quantity. I only differ with Ms.

Simkoko when submitting that, no materials were supplied at all as that submission, contradicts the sole testimony of the defendant witness DW1 and director of the 1st defendant company, who confessed to have received the claimed materials from plaintiff while qualifying that the claimed amount if reconciled ranges between USD 450,000 and UDS 500,000. And that she, failed to deliver the products to her client TANESCO for want of LPO's for the supply of products as the materials supplied by plaintiff were and/or are still pending in her yard to date.

Now since the defendant is admitting to have received the materials worth between USD 450,000 and USD 500,000 and comparing with the amount claimed ledger account exhibit PE3 as reflected in the three transactions of deliveries done by PW2 on 12/2/2018, 14/02/2018 and 15/02/2018 as per exhibit PE1 collectively, whose evidence I have no reason to doubt, I find the same tallying closely with the admitted amount by DW1, ranging between USD 450,000 and USD 500,000. It is gathered from exhibit PE3 that, the opening balance on 1/01/2018 which went uncontested by the defendants was USD, 305,178.208 and the three deliveries allegedly made by PW2 on 12/2/2018, 14/02/2018 and 15/02/2018 are USD 100,174.808, USD 26,100.120, USD 26,797.765 and USD 29,662.934 which in total is USD

487,813.835. Since the total amount of claimed on three dates of the three deliveries by PW2 is ranging between USD 450,000 and USD 500,000 which is admitted by the defendant, this court is satisfied by that the plaintiff supplied the 1st defendant the claimed materials, though not worth USD USD 861,268.587 but rather minimally of USD 450,000.

Next for determination is the issue as to whether there was an agreement between the parties that the plaintiff will be paid after the 1st defendant has received payment from their clients. As alluded to earlier on, parties business relationship was regulated by oral contract, and it is due to the said agreement that parties are at variance as to when exactly the payment goods was to be effected. In this case, Mr. Msemwa argues that, as per the agreement payment was supposed to be effected within 30 days after delivery of the goods while defendants alleges that the same was to be effected after defendant had received payments from the client since business relationship was based on mutual trust and friendship between DW1 and the late Subhash Patel, one of the plaintiff's director.

Notably oral contracts are very tricky and as hinted above to prove the same the court must properly scrutinize the witness's credibility and the entire evidence as well as parties' conduct and the general underlying

circumstances of the case. Thus, to disentangle parties from their dispute in this point, I will scrutinize the evidence and examine parties' conducts and practice to see whether the same can shed light in this matter. In so doing I wish to note that, the onus of proof on this point lies on the plaintiff to prove that it was agreed payments would be done within 30 days of delivery. It was PW1 and PW3's evidence that, payment was to be effected in 30 days after of delivery of materials, the term in which the defendants defaulted. However, when cross examined by Ms. Simkoko PW3 on how the terms of contract were entered echoed that, the agreement was entered between the 2nd and 3rd defendants as directors for the 1st defendant and the late Subhash Patel as chairman and managing director of the plaintiff's company, and he was told of the terms on the mode of payment by the parties, meaning that the two witnesses were not present when the parties entered into agreement. DW1 who was present stated that, it was one of their terms of agreement based on long standing trust and friendship that, payments would be effected upon delivery of consignment to the defendants' client (TANESCO) in which they failed to deliver. In absence of documentary evidence on the terms of agreement plaintiff was expected to put before the Court evidence establishing their previous transactions that were paid within

30 days of delivery as a long standing practice of plaintiff's business relationship with the defendants particularly on payments. In this case neither PW1 nor PW2 came forth with such evidence. It is trite law that in establishing whether the case has been proved on the balance of probabilities in civil cases, the court will sustain such evidence which is more credible than the other. See the case of **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017 (CAT-unreported), where the Court of Appeal on whose evidence will be considered on have proved the case of the balance of probabilities had this to say:

> *"It is trite law and indeed elementary that he who alleges has a burden of proof as per section 110 of the Evidence act, Cap. 6 [R.E 2002]. It is equally elementary that since the dispute was in civil case,* ***the standard of proof was on a balance of probabilities which simply means that the Court will sustain such evidence which is more credible that the other…****" (Emphasis supplied).*

In this case since it evident PW1 and PW2 were not parties during execution of the contract between the two parties except DW1, and since there is no any other evidence to prove that it was their long standing term and practice that payment being paid within 30 days of delivery of consignment, this

Court believes and finds DW1 evidence who was present during contract negotiation to be credible on the fact that, it was their term of agreement that, payments will be effected after delivery of 1st defendant's products to her client. Hence the second issue is answered in affirmative.

Next for determination is the third issue as to whether 1st and 3rd defendants paid the plaintiff the sum of Tsh.500,000,000/=. I hasten to say that, this issue need not detain this court. The reasons I so hold are not farfetched. Apart from telling the court that defendant paid more than 500,000,000 to the plaintiff, DW1 never produced any evidence to prove the same. As alluded to earlier on, in civil cases whoever allege the existence of any fact has the duty to prove it, and the required standard is the balance of probabilities. In this matter since the defendant is claiming to have paid the said Tshs. 500 Million produced no any evidence to prove the said payment, this court believes hence arrives to the findings that, no payment was ever effected them (defendants). The third issue is therefore answered in negative.

The fourth issue is as to whether the 2nd and 3rd defendant made commitment to pay the debt by issuing repayment schedule program. It was Ms. Senkoko's submission that; defendants never at any stage made a

commitment to pay the plaintiff the debt by issuing a repayment schedule and the plaintiff failed to bring any evidence to that effect. According to her, Exhibit PE2 relied on by the plaintiff, the defendants committed to pay to M.M Industries and not M.M integrated. On his side, Mr. Msemwa alleges that, 2nd defendant fraudulently wrote M.M. Industries to avoid liabilities. He argues, the figure committed to be paid is in relation with the materials ordered from M.M. Integrated Steel Mills Limited and further that the letter mentions the amount mentioned by DW1 to have been paid by the 2nd defendant to the plaintiff in a bid to settle the debt as stated in Exhibits PE2 which means that, the said commitment letter referred to plaintiff in this case. It was PW3's evidence that, Mr. Subesh Patel the owner of M.M Integrated Steel Mills Limited is also a shareholder in M.M Industries a company which produces plastic pipes and not Iron sheets the product which defendant ordered. Looking at the parties' arguments, it is apparent that defendants do not dispute existence of exhibit PE2, rather they allege that the same was addressed to M.M Industries and not M.M Integrated steel Mills Limited as Ms. Simkoko is of the submission that documented agreement cannot be superseded by oral account.

Having considered the rival arguments by the parties herein above, I am at one with Ms. Simkoko's proposition that, as the law stands documentary evidence cannot be displaced by oral account unless there are cogent reasons to so believe. This legal stance is premised on the provisions of section 100 of the Evidence Act, [Cap. 06 R.E 2022] providing thus:

> *100.-(1)* ***When the terms of a contract, grant, or any other disposition of property, have been reduced to the form of a document****, and in all cases in which any matter is required by law to be reduced to the form of a document,* ***no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter except the document itself****, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act. (Emphasis supplied)*

In this matter as stated above the terms of agreement in exhibit PE2 sought to be proved by the plaintiff on commitment by the defendants to pay the claimed debt of Tshs. 861,268,578 were reduced down in writing allegedly by the 2nd defendant was witnessed by advocate Norbert Mlwale, but tendered by PW3 who admitted not to have witnessed it when executed. Since the same was witnessed by the advocate it was expected that the plaintiff would have paraded him before the Court to explain on whose

commitment for payment was made against between the plaintiff and M.M Industries. Any attempt by PW3 who did not witness its execution to interpret or explain on who the commitment was directed to, in my considered view is to go against the provision of section 100 of the Evidence Act as rightly submitted by Ms. Simkoko. Further to that I discount the assertion by PW3 and Mr. Msemwa's submission that, the 2nd defendant when executing exhibit PE2, was fraudulently minded as there is no proof to such allegation which in my opinion being of criminal nature calls for proof beyond reasonable doubt. As there is no evidence to prove otherwise that the commitment by the 2nd defendant was directed to M.M Integrated and not the plaintiff I find the fourth issue is answered in negative.

The fifth issue is whether 2nd defendant had legal capacity to transact on behalf of the 1st defendant. In his testimony PW3 testified that, 2nd and 3rd defendant introduced to the plaintiff as the directors of the 1st defendant company during the transaction and negotiations for repayment of the due amount, and that, Exhibit PE2- commitment letter was made by 2nd defendant as a director on behalf of 1st defendant. In her submission, Ms. Senkoko controverted the plaintiffs' assertion submitting that, plaintiff ought to have proved that the 2nd defendant was a director to the 1st defendant

but failed and wanted to shift the burden of proof to the defendants while he is the one alleging that fact. She placed reliance in the case of **Tanzania Cigarette Company Limited Vs. Mafia General Establishment**, Civil Appeal No. 118 of 2017. I embrace Ms. Senkokos submission that, the onus of proving that the 2nd defendant made commitment in exhibit PE2 as 1st defendant's director and her attempt to shift that burden to the defendant contravenes the law which demands that before the party with burden of proof shifting it to the opposite party must discharge it first. This legal stance was adumbrated in the case of **Tanzania Cigarette Company Limited** (supra) where the Court of Appeal had this to say:

> *"It is again trite that the burden of proof never shifts to the adverse party until the party on whom the onus lies discharges his and the said burden is not diluted on account of the weakness of the opposite party's case."*

Whether the 2nd defendant was director to the 1st defendant or not was the fact to be proved by Memorandum and Articles of Association of the company which if the plaintiff was serious could have made a search at BRELA and establish it instead of shifting the burden to the defendants without proving it first. The assertion by PW3 that, the 2nd and 3rd defendants presented themselves as directors to the 1st defendant was not sufficient evidence to

prove that at the time of execution of exhibit PE2, the 2nd defendant was a director to the 1st defendant. In absence of such evidence this Court believes DW1's evidence which was to the effect that 2nd defendant apart from being her daughter was never the 1st defendant's director, hence I hold had no capacity to transact on behalf of the 1st defendant hence not liable to the claims levelled against her by the plaintiff. Thus the 5th issue is answered in negative.

Lastly is the issue as to what reliefs are the parties entitled to. The plaintiff is praying this court to order all defendants to pay her USD 861,268.587 as an outstanding amount for supply of structural materials by the plaintiff to the first defendant and commitment by the 2nd and 3rd defendant to pay, general damages, interest and cost of the suit. Starting by the specific damages, the principle of law is that, the same should be pleaded, particularized and proved. The principle is well articulated in the case of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192 CAT where it was held that;

> *Once a claim for a specific item is made, that claim must be strictly proved, else there would be no difference between a specific claim and a general one; the Trial Judge rightly dismissed the claim for loss of profit because it was not proved.*

In the present case, the plaintiff pleaded and testified to have supplied defendants the materials worth USD 861,268.587 the fact which was proved in the first issue as the amount admitted by the 1st defendant is the minimum of USD 450,000. The law governing contracts is very clear that, parties are required to perform their respective promises unless such promises are dispensed with or excused under the Act or any other law. This is well stated under section 37 of the Contract Act, [Cap. 345 R.E 2019]. That aside, it is also a trite principle of law of contract that, parties are bound by the agreement freely entered into and that there should be sanctity of contract. This sound principle was stated in the case of **Abualy Alibhai Aziz vs Bhatia Brothers Ltd** [2000] TLR 288 at page 289, the case which was cited with approval by the Court of Appeal in the case of **Simon Kichele Chacha vs Aveline M.Kilawe**, Civil Appeal No 160 of 2018, where it was stated that:

> *"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation and no principle of public policy prohibiting enforcement."*

Guided by the above authority and principle of law, it is apparent to me that, the 3rd defendant being directors of the 1st defendant ought to have discharged his duty by making sure that the 1st defendant is paying the outstanding amount claimed by the plaintiff.

With regard to general damages, the same is awarded at the discretion of the court which must be judiciously exercised. Its purpose no doubt is to put the plaintiff in the same position as far as money can do as if his rights has been observed. As it can be gleaned from the evidence adduced in court, though the debt by the plaintiff ought to be paid after the 1st defendant is paid by her client, it is not expected that the same will stay in abeyance indefinitely as the plaintiff was doing business and more than four (4) years have passed now since the last supply of materials. Plaintiff explained on how he made a follow up of his debt with several reminders including two demand notes but all of them became fruitless. Thus, in consideration of inconveniences caused to the plaintiff associated with defendants' failure to pay the claimed amount, the award of Tsh.50,000,000/- as general damages would be adequate under the circumstances to redress the plaintiff.

That said and done, this court makes a finding that the plaintiff has proved his case to the required standard as demonstrated above save for the 2nd

defendant whose case against her is dismissed. Consequently this court enters judgment in favour of the plaintiff. The 1st and 3rd defendants are hereby ordered to jointly and severally pay the plaintiff the following:

(i) USD 450,000 being the outstanding amount for supply of structural materials.

(ii) General damages to the tune of Tsh. 50,000,000.

(iii) Interest at the rate of 7% on item (i) above from 30th August 2019 till full and final payment of the decretal amount.

(iv) Costs of the suit be paid by the defendant of the decretal amount.

It is so ordered.

DATED at Dar Es Salaam this 23rd day of September, 2022.

E. E. KAKOLAKI

JUDGE

23/09/2022.

The Judgment has been delivered at Dar es Salaam today 23rd day of September, 2022 in the absence of both parties and in the presence of Ms. Asha Livanga, Court clerk.

Right of Appeal explained.

E. E. KAKOLAKI
JUDGE
23/09/2022.