IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(IN THE DISTRICT REGISTRY OF DAR ES SALAAM)

AT DAR ES SALAAM

CIVIL CASE NO 235 OF 2019

BETWEEN

M.M. INDUSTRIES LTD.....PLAINTIFF

VERSUS

MAGINGA BUSINESS HOLDINGS COMPANY LIMITED.....DEFENDANT

JUDGMENT

MRUMA, J

The Plaintiff's claim against the defendant as enumerated in its Plaint dated 16th December, 2019 is for recovery of Tshs. 321,101,661.03 plus costs and interests being the amount allegedly due and owing from the defendant to the Plaintiff in respect of water pipes supplied by the Plaintiff to the defendant between the period from 1st January and 12th June, 2019 at the defendant's request and instance. The Plaintiff's case is that the defendant failed to honour its payment obligations and also it failed to honour several promises to pay despite admitting the debt thereby breaching the terms of the contract.

In its amended defence dated 13th February 2020, the defendant denied the Plaintiffs claim and averred that the said agreement was not clear to them and that the amount claimed is unfounded.

The Plaintiff's case stands on the evidence of Mr Musa Rashid Lilombo, it's Corporation Secretary and Mr Yogesh Sharma its Sales and Marketing Manager. Mr. Musa Rashid Lilombo who testified as PW1 adopted his Witness Statement dated 10th May 2022 and produced the Plaintiff's bundle of documents. His evidence is essentially a replication

of the averments in the Plaint, so, it will add no utilitarian value to rehash the same here. It will suffice to state that his evidence is that the water pipes were delivered to the defendant as per Tax invoices and delivery notices the delivery notes (Exhibit P3)

Upon cross examination by the defendant's counsel, PW1 stated that the Plaintiff delivered different sizes of water pipes to the Defendants according to his demands and request and the invoices indicates the price and quantity supplied. He said that he used his office computer Dell type to generate some documents related to the business. He stated that the defendant admitted the debt in writing and he committed to settle the outstanding amount by June 2019 but he didn't.

Another witness who testified for the Plaintiff is Mr Yogesh Sharma (PW2), Sales and Marketing Manager of the Plaintiff's company. He testified that under a memorandum of understanding dated 27th April, 2017 the Plaintiff's company agreed to supply water pipes and materials to the Defendant's company for purposes of executing profoma invoice No. 1567 VAT inclusive and that by a commitment letter the Defendant 's Managing Director Mr Paschal Kinemo committed to pay the Plaintiff the sum claimed but he didn't.

The defendant's case stands on the evidence of Mr Paschal Kinemo, it's Managing Director who testified as DW1. He adopted his witness statement dated 16th May, 2022 in which he stated that the Plaintiff's claim has no factual/legal basis, that it is fabricated, false and that the alleged pipes were never delivered as alleged. He denied the defendant owes the Plaintiff Tanzania Shillings 321, 101,661.03. He stated that there were no commitment neither by the company nor its officials as

alleged by the Plaintiff and that his company being a reputable undergoing cannot enter into a gentlemen agreement I a mere piece of paper with no company seal and no signature of the general manager of the company.

Upon cross-examination, Mr. Paschal Kinome stated that the defendant was buying goods from the Plaintiff, that they used to do businesses with the Plaintiff's company and that they started doing so on 1st January, 2017. He said that on 28th March 2018 his company paid Tanzania Shillings 97,700,000/= to the Plaintiff and that thereafter some more payments were made but the receipts are with his company's accountant. When shown exhibit P4 (a commitment letter), DW1 said that he doesn't recall to have written such commitment though the handwriting looks like his. When shown taxi invoices (Exhibit P3), he admitted that they were issued by the Plaintiff's company and address to his company.

Both parties filed written submissions. On behalf of the Plaintiff, it was submitted that it is undisputed that the parties entered into agreement in which the Plaintiff supplied water pipes and other related equipment to the Defendant and that the goods were duly delivered by the Plaintiff as per the delivery notices which were produced in evidence as Exhibit P3. Counsel for the Plaintiff submitted further that Exhibit P3 (Invoices and Delivery notices) answers issue no 1 that there was an agreement between the parties for supply of water pipes as alleged by the Plaintiff. It is further submission of the learned counsel that leger account (which is part of exhibit P1) shows that T.shs 321,101,661.03 was outstanding after the Defendant failed to pay for the supplied goods. The learned counsel contended that the fact that DW1 didn't challenge the Plaintiff's

evidence, he therefore argued the court to find that the Plaintiff has proved its case on the balance of probability.

It is necessary to recall that the law of contract gives effect to consensual agreements entered into by individuals in their own interests. Accordingly, remedies granted by the courts are designed to give effect to what was voluntarily undertaken and agreed by the parties. Damages in contract are therefore intended to place the claimant in the same position as he would have been in if the contract had been performed. As early as in 1848 in **Robinson v Harman (1848)1 Ex Rep 850** it was held the rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The above statement of the law has been endorsed in numerous judicial decisions both in the Court of Appeal and in this court. This fundamental principle of the common law of damages has attained the rule of law. The compensatory nature of damages for breach of contract, and the nature of the loss for which they are designed to compensate, were explained by Lord Diplock in **Photo Production Ltd v Securicor Transport Ltd [1980] AC 827:** where it was held that:

> *"The contract, however, is just as much the source of secondary obligations as it is of primary obligations ... Every failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach ..."*

By now its trite that a contract is the source of primary legal obligations upon each party to it procures that whatever he has promised will be done is done. Leaving aside the comparatively rare cases in which the court is able to enforce a primary obligation by decreeing specific performance of it, breaches of primary obligations give rise to substituted or secondary obligation on the part of the party in default. Those secondary obligations of the contract breaker arise by implication of law.

In the case at hand there is evidence to the effect that parties had agreement in which the Plaintiff agreed to supply to the Defendants water pipes and other related equipment. Various tax invoices and delivery notices which were produced in evidence as Exhibit P3, indicates that upon her request the Defendants were supplied with water pipes of various sizes and their accessories worth millions of Tanzania shillings. Some payments were made and according to its Managing Director Tanzania shillings 97,700,000/= were paid to the Plaintiff on 28.3.2018. This fact coupled with the commitment letter (Exhibit P4) in which the DW1 acknowledged in his handwriting that his company was supplied with materials which his company had to supply to Magu District Council and that they were unable to pay the Plaintiff due to delay in being paid by the District council, proves that there was agreement between the plaintiff and the Defendant and that the Defendant didn't pay for the supplies she received fro the plaintiff. To successfully claim damages, a Plaintiff must show that: (a) a contract exists or existed; (b) the contract was breached by the defendant; and (c) the Plaintiff suffered damage (loss) as a result of the defendant's breach. The Plaintiff 'is not required to

establish the causal link (between breaches of an agreement and damages) with certainty, but only to establish that the wrongful conduct was probably a cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what could be expected to have occurred in the ordinary course of human affairs, rather than an exercise in metaphysics. A Plaintiff who at the end of a trial can show no more than a probability that he would not have suffered the loss if the contract had been properly performed, will succeed unless the defendant can discharge the onus of proving that there was no such probability. The test to be applied is whether there is evidence upon which a court, applying its mind reasonably to such evidence, could or might find for the Plaintiff. This implies that the Plaintiff has to make out a prima facie case, in the sense that there is evidence relating to all the elements of the claim. The court must consider whether there is evidence upon which a reasonable man might find for the Plaintiff See the case Minister of Safety and Security Versus Van Duivenbodenb2002(6) SA 431 (SCA) 449.

In the instant case, from the evidence adduced the existence of the contract is not seriously in dispute. In fact, on record are several tax invoices and delivery notices (Exhibit P3), indicating that the goods were supplied to the Defendants. Similarly there is a commitment letter (Exhibit P4) in which the Defendant admitted being supplied with the same and being indebted to the Plaintiff. This letter was admitted by DWI in cross examination when he told the court that the handwriting looks like his. The defendant also admitted some invoices in court, but disputed some claiming that they were not signed and stamped by

officers of his company. In my view this amounted to a general denial. In its evidence in court, the defendant questioned the e-mails admitting the debt. He testified that some goods were never supplied. As the saying goes, in every case only the parties (not the court) know the truth, so, it is always the court which is on trial. The court is on trial because the court is expected to unravel the truth and it must do so with great precision. In civil cases the measure of proof is a preponderance of probabilities. Where there are two stories mutually destructive, before the onus is discharged, the court must be satisfied that the story of the litigant upon whom the onus rests is true and the other is false. The question to be decided will always be: which of the versions of the particular witnesses is more probable considering all the evidence as well as all the surrounding circumstances of the case. In **Hemed Said Vs Mohammed Mbilu (1986) TLR 15** this Court Sisya J, held that:-

> "According to the law the person whose evidence is heavier than that of the other is the one who must win"

In **Stellenbosch Farmers Winery Group Ltd & Another v Martell & Others 2003(1) SA 11(SCA) at paragraph 5** the South African Supreme Court of Appeal when faced with somewhat a similar situation explained how a court should resolve factual disputes and ascertain as far as possible, where the truth lies between conflicting factual assertions. The Court stated:-

> "*To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to*

(a), the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

The lesson which emerges from the above dicta is that where versions collide, the three aspects of credibility, reliability and probability are intermixed, and all three must be examined. This endeavour is not to be equated with box-ticking but to underscore the breadth of the field to be covered. The focal point of the exercise remains to find the truth.

Starting then with credibility, this court had the benefit of hearing the parties first hand. This court has the benefit of not only hearing the parties orally, but also relating the evidence to the pleadings, affidavits, witnesses' statements, documents produced and the submissions. It sits in a vintage position to assess the probabilities as they manifest within the circumstances prevailing, and as they apply to the particular witnesses. Of course, the Plaintiff bears the burden of prove. The Plaintiff's witness testified that on 27th April 2017 the Plaintiff and the defendant entered into an agreement whereby the Plaintiff undertook to supply water pipes materials to the Defendant. The tax invoices, delivery notices and e-mail correspondences tendered as exhibit P3 and P1 respectively proves that such agreement existed. This evidence was not disputed. The defendant's case is that some delivery notices were not signed, but there several e-mail correspondences from the defendant admitting the debt including a commitment letter to the Plaintiff and committed itself in writing stating that when the funds are made available, the same will be paid to the Plaintiff's account.The various e-mail communications and the aforesaid letter from the defendant amount to a clear admission of the indebtedness. The defendant filed a defence which is a mere denial. It never disputed the delivery notices or tax invoices in the defence nor did it dispute the admission. The defendant is now seeking to introduce un-pleaded issues by way of

submissions. To this extent, its written evidence and oral evidence by way cross-examination departs from the pleadings. A party is bound by its pleadings. The issues in civil cases should be raised on the pleadings and if an issue arises which does not appear from the pleadings in their original form an appropriate amendment should be sought. Parties should not be unduly encouraged to rely, in the hope, perhaps, of obtaining some tactical advantage, to treat un-pleaded issues as having been fully investigated. The Defendant didn't seriously dispute the existence of commitment letter (Exhibit P4). In his pleadings she simply put the Plaintiff to strict proof thereof. The Plaintiff has discharged that burden by producing it in evidence and the Managing Director (DW1) simply said that the handwriting looks like his handwriting. This was an obvious admission without requiring magnifying glass to ascertain its meaning. It was very clear and unequivocal on a plain perusal of the admission. The defendant in a bid to run away from the admission argues that the e-mails relied upon were not properly produced in evidence since they are electronic documents and that the witness who produced the same is not the author. This argument is attractive. However, it collapses not on one but several fronts. One, the e-mails emanate from the defendant. The defendant never disputed authoring them. Even during his evidence, the defendant's witness who incidentally authored the e-mails did not dispute writing the e-mails. Two, this issue was not pleaded in the defence, but it was introduced through submissions. Three, the bundle of documents was served long before the trial, and the defendant never raised objections or indicated they will call the author. Four, no objection was raised in court when the

documents were formally produced in evidence. It follows that the attempt to dispute the documents is an afterthought.

Testing the credibility of the defendant's evidence, several issues could be raised. First why is the defendant departing from her written statement of defence. Are the issues that the delivery notes were not received raised as an afterthought? True, the defendant offered to pay the debt. This is not seriously disputed in DW1's evidence. The company discussed settlement and DW1 even admits that the handwriting in commitment letter looks like his own. What is the probative value of the commitment letter relied upon by the Plaintiff authored by the defendant's key witness who did not seriously disown it? As we search for answers to the above questions, and also as we ponder the question of credibility, we have to bear in mind the question of reliability. The answer is simple. The defendant's evidence is examined in the context of all the evidence is totally unreliable.

Turning to question of probabilities, where there are two mutually destructive stories, the party bearing the onus of proof can only succeed if he satisfies the court on a preponderance of probabilities that his version is true, accurate, and therefore acceptable, and the other version advanced by the other party is therefore false or mistaken and falls to be rejected. In deciding, whether that evidence is true or not, the court will weigh up and test the respective parties' allegations against the general probabilities. The inherent probability or improbability of an event is a matter to be taken into account when the evidence is assessed. When assessing the probabilities, a court will bear in mind that the more serious the allegation, the more cogent will be the

evidence required. As Lord Denning held in **Miller v Minister of Pensio** (1949) 2 ALLER 372

> *"The standard of proof is well settled. It must carry a reasonable degree of probability. If the evidence is such that the tribunal can say: 'We think it more probable than not' the burden is discharged, but, if the probabilities are equal, it is not*
> "

In almost every legal proceeding, the parties are required to adhere to important rules known as evidentiary standards and burdens of proof. These rules determine which party is responsible for putting forth enough evidence to either prove or defeat a particular claim and the amount of evidence necessary to accomplish that goal. To meet this standard, the defendant was required to do much more. The attempt to dispute its own the e-mail correspondence is unconvincing. The defendant's attempt to dispute some invoices at this late hour smacks of bad faith.

From my analysis of the issues discussed above, it is my finding that the Plaintiff has established its claim to the required standard. Damages for breach of contract are in that sense a substitute for performance. That is why they are generally regarded as an adequate remedy. The courts will not prevent self-interested breaches of contract where the interests of the innocent party can be adequately protected by an award of damages. Nor will the courts award damages designed to deprive the contract breaker of any profit he may have made as a consequence of his failure in performance. The court's function is confined to enforcing

either the primary obligation to perform, or the contract breaker's secondary obligation to pay damages as a substitute for performance.

Accordingly, I find for the Plaintiff and enter judgment in favour of the Plaintiff against the defendant for Tanzania Shillings Three Hundred Twenty One Million One Hundred and One Thousand Six Hundred and Sixty One and three cents (i.e. T.shs 321,101, 661.03) plus costs of the suit. As this was a business transaction, the said sums shall attract commercial interests at the rate of 10% per annum from the date of filing the suit to the date of Judgment and further interest at courts' rate of 3% per annum from the date of this judgment till payment in full of the decreed sum. It is so ordered.

A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 24th day of October 2022.