IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM SUB DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL CASE NO. 16 OF 2020

A ONE PRODUCTS & BOTTLERS LIMITED.....PLAINTIFF

VERSUS

GRAND MOUNTAIN CO. LIMITED.....1ST DEFENDANT

ZHEJIANG BORETECH CO. LIMITED.....2ND DEFENDANT

EX-PARTE JUDGMENT

Date of last order: 15/12/2022

Date of Judgment: 03/03/2023

E.E. KAKOLAKI, J.

The Plaintiff herein a Tanzanian based company duly registered under Companies Act, [Cap. 212 R.E 2002] dealing with production of beverages bottles and their re-filling, instituted the instant suit against the above-named 1st and 2nd defendants which are the companies registered and trading in Taiwan and China respectively praying for the judgment and decree as follows:

(a) Payment of USD 8,103,339.40 by the defendants jointly and severally being loss of capital to the tune of USD 1,250,000.00, USD 755,000.00 as interest loss at 12% per annum from February 2015

till October 2019, USD 5,459,695.00 as loss of business in house from February 2015 till October 2019 and USD 24,787.40 and USD 643,857.00 as costs of purchasing Metal separator and crystallizer system from Husky and Shini companies respectively.

(b) Payment of interest at commercial rate on (a) above from the date of payment of the invoice amount was made to the defendants to the date of filing this suit.

(c) Payment of interest on decretal sum at court's rate of 11% from the date of judgment until full satisfaction of the decree.

(d) Costs of the suit.

(e) Any other relief(s) that the Honourable Court may deem fit and just to grant.

As both defendants are foreign legal persons service was effected through DHL carrier services. Despite of being served none of them filed a Written Statement of Defence challenging the plaintiff's claims the result of which on 03/02/2021 an ex-parte proof order was entered by the Court against the defendants at the instance of the plaintiff.

For better understanding of the parties' dispute leading to the plaintiff's claims in the present suit, I find it imperative to state albeit so briefly the

facts of this case as gathered from the plaint. Sometimes in 2011, the plaintiff was approached and advised by the 1st defendant to purchase from the 2nd defendant a PEP Bottle Recycling Line (Plant) whose main function is the removal of impurities in the PEP (Poly Ethylene Terephthalate) bottles used by the plaintiff in beverage production, at the price of USD 1,250,000.00 in which she agreed and the deal was concluded. After the payments were effected to a large part and time passed without commissioning the plant, when commissioned and tested the plant was found to have defects as the end products did not complement the agreed quality between the parties. After meeting resistance from the defendants to make good the noted defects, the plaintiff was forced to buy other machines from different companies namely Husky and Shini to complement and enable the commissioned plaint run to the international standard, the move which subjected her (plaintiff) to extra costs of production due to the defendants' machine failure to run to the expected standard. When called to redress the loss suffered by the plaintiff, the defendants were adamant despite of several demand notices, the result of which this suit was preferred. At all material time, the plaintiff enjoyed the legal services of Ms. Catherine Solomon, learned advocate. And in proving its claims the plaintiff called in

Court a single witness one Chengal Reddy Bhanvane Swara (PW1) and relied on ten (10) exhibits in which there is no dispute that, the plaintiff purchased and defendants supplied her the alleged PEP Bottles plant. Despite the fact that the matter proceeded ex-parte against the defendant hence Court's failure to frame and adopt issues before the hearing date for determination of plaintiff's claims, for easy and smooth determination of this suit the following issues have been framed and adopted by the Court:

(1) Whether the plant supplied to the plaintiff by the defendants had defects affecting end products.

(2) If the first issue is answered in affirmative, whether the plaintiff suffered any damages and to what extent.

(3) To what reliefs are the parties entitled to.

As alluded to above in a bid to prove her claims the plaintiff relied on the testimony of Chengal Reddy Bhanvane Swara (PW1), the chief executive officer to plaintiff's company. In his testimony PW1 having exhausted on his duties in the company told this Court that, his company is dealing with production of beverages bottles and re-filling of beverages, water or other bottled materials. He then hinted that, the 1st defendant came with a proposal of selling them a Poly Ethylene Terephthalate (PET) bottles plant,

which simply means the bottles recycling and re-filling line Plant, the proposal which was accepted by the plaintiff and the agreement effected. He tendered in proof of existence of such transaction No.3 quotation of the said plant, exhibit PE1 as per contract No. TZ 11084. According to him, the procured plant was a complete plant including the separating part of the used plastic bottles, crusher cleaner up to the point of production of plastic flakes. He elaborated, the plant contained a number of machines from de-baling and bottle sorting, net crushing dilation and friction, washing, drying, mixing and parking machine sections and finally water processing and chemicals solutions circulation machines (sections). According to him the total price of this machine was USD 1,250,000.

PW1 went on testifying that, it was the terms of their agreement that advanced payment of purchase price was to be paid first, while the rest of it was to be effected upon delivery of the plant and installation by the defendants' mechanics/personnel to and tendered the commercial invoices exhibit PE 2 that were received by the plaintiff for effecting the payments. It was his further testimony that, after receiving the invoice the plaintiff effected payment by opening the letter of credit Exhibit PE3, and the total money to be paid was USD 1,250, 000, which was paid by installation starting

with USD 375,000 as advance payment and then USD 35,000 which makes a total of USD 410,000. After that USD 777,500 was also paid leaving behind the balance of USD 62,500, which was to be paid after successful commissioning of the plant to the required standards as per the specifications made in the quotations. In total the paid up amounts to the defendants was USD 1,187,500 save USD for 62,500, which was never paid for failure of defendants to commission the plant meeting the required international standards.

He further stated that; the plant was supplied but the layout was not the same as expected or specified in the quotations. It was his further evidence that, the 2nd defendant had to provide engineers for installation. However, she delayed as the same arrived after several reminders (email) as shown in Exhibit PE4, in which its details were well narrated by PW1. According to him after the plant was installed and commissioned, there were some quality issues noted as the final products were contaminated hence unqualified end products, the defects which were communicated to the 2nd defendant. He tendered exhibit PE5, proving the communication between the plaintiff and the 2nd defendants concerning quality issues of the plant.

PW1 further testified that, the metal detector in the plant was not working properly as well as the metal separator and that, the quality of the gear boxes was not good and working condition too as all these technical issues and concerns were communicated to the defendants through emails (Exhibit PE6). He had it that, the malfunctioning of one part of the plaint affected the rest of the sections of the plant, thus the plaintiff was forced to purchase another metal separator and two more machines for crystallization of flakes from Husky Co. Ltd and SHINI respectively. He tendered exhibits PE7 to prove that fact, and elaborated further that, the plaintiff paid USD 24,787.40 for metal separator, USD 270,000 for crystallizer and USD 373,760 for another crystallizer. He added that, prior to that they had sent samples of the products to two foreign labs in Germany and U.A.E (Exhibit PE8) for testing to see whether after modification of machines by the defendants end products could meet international standards of the plastic flakes, but the same were rejected for containing contaminations. It was his testimony that, the report was prepared by two foreign laboratories KRONES based in German and FIBER PLUS LLC a U.A.E based company.

He told the Court that, since the plaintiff incurred extra costs of buying other three machines, she pressed for compensation from the defendants of all

the cost incurred but the defendant could not heed to her claims. Exhibit PE9, a demand notice was tendered to that effect.

He finally told the Court that, due to that incomplete installation of the plant, the plaintiff suffered loss of business to the tune of USD 5,400,000 as by using the plant procured from the defendants, she would be buying from the vendors used plastics and recycle them for Tsh. 300-400 per kilogram which is equal to 0.30 USD per kilogram, while the cost of importing the materials for one kilogram of plastic which are in use now is 0.9 to 1.1 USD. He elaborated that, after purchasing the machine from SHINI to support the production due to failure of the defendant to commission the plant successful, they are now forced to use 40 % of the flakes produced from local materials to mix up with 60% of the original and imported materials, something which increases production costs on the plaintiff's party.

Concerning the machines from Husky, he said, the plaintiff is forced to mix 25% of the local flakes products and 25 % of the original materials which is more expensive, which in total led to the loss of 5,400,000. PW1 tendered the monthly report (Exhibit PE 10) to prove the said loss.

In winding up his evidence, he prayed the court to grant the plaintiff specific damages of USD 1,250,000, loss of business to the tune of USD 5,400,000,

interest at the rate 12% of the decretal amount per year, USD 24,787.4 as costs for metal detector, USD 270,097 as costs for HUSKY crystallizer and USD 373, 760 as costs for crystallizer from SHINI. That marked the end of plaintiff's case in which after its closure, Ms. Solomon prayed for leave to file her final submission, the prayer which was pleasantly granted. The learned advocate adhered to the filing schedule and I had an ample time to read the said submission which I truly commend her for the insightful inputs that assisted me in deliberating and deciding on the present dispute. However, I am not intending to reproduce the same, as I will be referring it in the course of determination of this suit where need be.

Notably, this being a civil suit the standard of proof is on the balance of probabilities as prescribed in section 3(2)(b) of Evidence Act, [Cap. 6 R.E 2022], which simply means that the Court will sustain such evidence which is more credible than the other. See the cases of **Attorney General and Two Others Vs. Eligi Edward Massawe and Others**, Civil Appeal No.86 of 2002, **Paulina Samson Ndawavya Vs. Theresia Thomasi Madaha**, Civil Appeal No. 53 of 2017, **Berelia Karangirangi Vs. Asteria Nyalwambwa,** Civil Appeal No. 237 of 2017, and **Dar es salaam Water and Sewarage Authority Vs. Didas Kameka & Others,** Civil Appeal 233

of 2019 (all CAT-unreported). Further to that, the law under sections 110(1) and (2) and 111 of the Evidence Act, [Cap. 06 R.E 2022] is very categorical that, he who alleges must prove that a certain fact exists, and the onus of proof lies on the plaintiff. On that note, the court has to satisfy itself basing on the adduced evidence that occurrence of the event was more likely than not. See the cases of **Re Minor** (1996) AC, and the case of **Abdul Karim Haji Vs. Raymond Nchimbi Alois and Another**, Civil Appeal No. 99 of 2004 (CAT-unreported).

Having gone through the pleadings, testimony of PW1 and the Plaintiffs submission, I have no flicker of doubt that there was an agreement between the plaintiff and the defendants. I say so because, it is evident from the records that, defendant proposed to supply PET bottles plant, the proposal that was accepted by the plaintiff and after agreement on the terms (PE2), plaintiff performed her party. There is also no doubt that, the defendant supplied the said plant and the same was dully paid as agreed, as testified by PW1 and evidenced by exhibit PE3. As per the plaintiff's evidence (PW1) she paid a total amount of USD 1,187,500 out of the agreed purchase price of USD 1, 250,000.

Now that being the position the issues which this Court is called upon to determine are three as demonstrated above. Starting with the first issue, *whether the plant supplied to the plaintiff by the defendants had defects affecting end products*, it was PW1's testimony that, one of parties terms of agreement was that, the machines will be supplied in good condition and that engineers for its installation will come from the 2nd defendant, as the final payment will be affected after commissioning of the plant. However, as per his evidence (PW1) contrary was the truth, as the machines parts supplied and installed were not in good working condition as exhibited by exhibit PE6, the acceptance certificate, and exhibit PE8, the test report, since in the acceptance certificate it is noted the defendant admitted that, there was no metal separator installed before twin screws and the metal separator after DRYER was not working. Further to that, the said fact is proved by the communication between plaintiffs and the defendant complaining on malfunctioning of the plant. Thus the first issue is answered in affirmative. By supplying the defective plaint, no doubt the defendants were in breach of the terms of the contract.

Next for determination is the second issue as to *whether the plaintiff suffered any damages and to what extent*. It is noted from the plaintiff's plaint that

she is not claiming for general damages, meaning that her claims hinges on specific damages. The established law in this Court and the Court of Appeal is that special damages must be specifically pleaded, particularized and proved. This well-established principle of law is articulated in a number of cases. See for instance the cases of **Masolele General Agencies Vs. African Inland Church Tanzania** [1994] TLR 192, **Stanbic Bank Tanzania Limited Vs. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 and **Reliance Insurance Company (T) Ltd and 2 Others Vs. Festo Mgomapayo**, Civil Appeal No. 23 of 2019 (both CAT-unreported) (CAT-unreported). In the case of **Masolele General Agencies** (supra) the Court of Appeal 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."*

Similarly in the case of **Reliance Insurance Company (T) Ltd and 2 Others** (supra) the Court of Appeal on proof of specific damages has this to say:

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

With the above principles in mind, I take a move forward to determine the claims by the plaintiff. In the instant case as alluded to above the plaintiff is claiming for USD 1,250,000 as capital loss/cost of the installed and commissioned malfunctioning PET bottles plant, which was pleaded in paragraph 3 and 14 of the plant, USD 755,000.00 as interest loss at 12% per annum and USD 5,459,695 as loss of business, USD 24,787.40 used to buy metal separator and USD 643,857 for purchase of crystallizer, interest on the decreed amount and costs of the suit. In proving the claim of purchase price PW1 testified that, the plaintiff paid to the defendants USD USD 1,187,500 only out of purchase price of USE 1,250,000 as evidenced by commercial invoices (exhibit PE2) and the letter of credit (exhibit PE3), for the purchase, installation and commissioning of the PET bottles plant, the plant which turned out to be malfunctioning. With the two exhibits on the purchase price corroborated with email communications between the plaintiff and defendant over the defects of the commissioned plant exhibits PE 3,4 and 5 respectively, I am satisfied that, the claim of USD 1,187,500 as purchase price of the PET bottle plant is proved to the required standard.

With regard to the claimed amount of USD 24,787.40 spent for metal separator/detector and USD 643,857 for purchase of crystallizer, it was PW1's evidence relying on exhibit PE7 collectively (shipping invoice from Husky and proforma invoice from Shini) as also stressed on by Ms. Solomoni in her submission that, the same accrued from the cost incurred by the plaintiff when forced to purchase new crystallizer and metal separator/detector respectively from Husky Injection Moulding System and another crystallizer system form Shini Plastics Technologies due to malfunction of the plant installed and commissioned to her (plaintiff). Ms. Solomoni submits that, this was done after the test results of the commissioned plant by the engaged two laboratories from Germany and E.A.U, had shown high contamination in the produced flakes. There is no doubt this claim was pleaded in paragraph 11 of the plant annexed with proforma invoices tendered in exhibit PE7 collectively. However, a close and deep scrutiny of the said exhibit PE7 relied on by the plaintiff to prove the above claimed amount leaves this Court with unresolved doubts. I so view as proforma invoice being a document from the supplier providing information of offered services or goods to the prospective buyer in turn of the inquiry made without invoice number, can never be a proof of purchased

and supplied goods. This Court in the case of **Tindwa Medical and Health Services Vs. Marcas Debt Collectors Limited**, Civil Case No. 143 of 2019 (HC – unreported) on the proof of purchase of goods by proforma invoices had this to say:

> *"…proforma invoices in my considered view do not prove the fact that the alleged goods/equipment were in fact purchased …as proforma invoice is the document from the supplier providing information of offered services or goods to the prospective buyer in turn of the inquiry made without invoice number,…"*

In this case apart from reliance on proforma invoices which I have already found not sufficient proof of purchase of goods there is no any other evidence to prove that the said machines were actually purchased and installed to complement functions of the PET bottles plant commissioned by the defendants. It is the law that, once the person bearing the burden of proving existence of a certain fact fails to do so, the value of 0 is returned and the fact is treated as not having happened. This principle of law goverining proof of civil cases was considered in the case of **Berelia Karangirangi** (supra) when cited with approval the case of **In Re B** [2008] UKHL 35, where Lord Hoffman stated as thus:

"If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened."

In this matter since the plaintiff failed to prove that, the alleged three machines were purchased and installed to complement malfunctioning plant, the claims of USD 24,787.40 allegedly spent for metal separator/detector and USD 643,857 for purchase of crystallizer, I hold remain unproved.

Next for consideration is the claim of USD 5,459,695 as loss of business and USD 755,000.00 as interest loss at 12% per annum, in which Ms. Solomon did not touch in her submission though the plaintiff listed them in the particulars of claim in paragraph 14 of the plaint as well as in the reliefs sought in paragraph 15 of the plaint. Apart from listing them in the particulars of claim and reliefs sought in both paragraphs 14 and 15 of the plaint, it is noted that, no particulars of the said claims were pleaded in the plaint as per the requirement of the law so as to notify on how they are alleged to have accrued. Despite of plaintiff's failure to plead facts on the said claims still adduced evidence on the same. It was PW1's evidence relying on exhibit PE10 that, even after installation of the newly procure

machines from Husky and Shini companies, the plaintiff had to import plastic materials so as to mix them with the materials obtained locally through used bottles, the result of which sustained her loss of business to the tune of USD 5,459,695 and interest loss at 12% per annum that makes a total amount USD 755,000.00. With due respect, I think this claim need not detain this Court much. I so view as it is principle of law in proof of specific damages as stated in **Masolele General Agencies** (supra), **Reliance Insurance Company (T) Ltd and 2 Others** (supra) and **Stanbic Bank Tanzania Limited** (supra), that the same must be specifically pleaded and clearly proved. In this case the plaintiff went against the principle by attempting to prove what she had not pleaded. Hence it is the finding of the Court that, this claim lacks merit and it has not been proved.

In the end, this court makes a finding that the plaintiff save for the claim of USD 1,250,000 which has been proved to the extent of USD 1,187,500 only as to the required standard demonstrated above, the rest of the plaintiff's claims are hereby dismissed for want of proof. Consequently this court enters judgment in favour of the plaintiff to the extent stated above and proceed to order the defendants to jointly and severally pay the plaintiff the following:

(1) USD USD 1,187,500 being the costs of the defective plant sold to her by the defendants.

(2) Interest of 12% of the item 1 above from February 2015 to October 2019.

(3) Interest on the decretal amount at the rate of 7% per annum from the date of judgment to the date of payment in full.

(4) Costs of the suit.

It is so ordered.

Dated at Dar es Salaam this 03rd day of March, 2023.

E. E. KAKOLAKI

JUDGE

03/03/2023.

The Judgment has been delivered at Dar es Salaam today 03rd day of March, 2023 in the presence of Mr. Fraterine Munare, advocate holding brief for Advocate Catherine Solomoni for the plaintiff, and Ms. Asha Livanga, Court clerk and in the absence of both defendants.

Right of Appeal explained.

E. E. KAKOLAKI

JUDGE

03/03/2023.


IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
DAR ES SALAAM DISTRICT REGISTRY