IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DISTRICT OF REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

CIVIL CASE NO 55 OF 2018

(Original Jurisdiction)

TANZANIA BUSINESS CREATION COMPANY ..... PLAINTIFF

VERSUS

EQUITY FOR TANZANIA LIMITED..... DEFENDANT

JUDGMENT

17th June & 31st July 2023

F. H. Mahimbali, J.

The Equity for Tanzania Limited (EFTA) the defendant herein, is a legal corporate body which deals with leasing machines, vehicles and equipment in various sectors. Amongst the clients they met in the offering their services was the Plaintiff company (Tanzania Business Creation Company) who wanted machines for manufacturing and distribution of pellet. The financial lease agreement between the plaintiff and the defendant was then dully signed and the requested machines and vehicle were dully supplied as per terms and conditions stated in the said lease agreement. All the supplied

goods (machines) to the plaintiff as per contract worth 106, 268, 000/=and out of it the plaintiff only paid 26,253,688/=.

According to their financial lease agreement between the plaintiff and the defendant, the equipment to be supplied were of five types in the following description:

i. Fuso Fighter, FK618K (1 Unit) worth 72,458,000/=

ii. Mixer – 800Kgs/hr (1 unit) worth 9,000,000/=

iii. Sewing Needle (1 unit) worth 400,000/=

iv. Digital Weigh Scale (1 unit) worth 1,200,000/=

v. 2 Pellet Machines 300kg/hr (1 unit) worth 7,000,000/=

Total amount = 90,058,000/=

The taxes including the VAT 18% = **16,210,440**. Thus investment amount was equal to **TZS: 106,288,440/=.** According to their contract, the total repayment amount which included interest of 48% of the investment amount stood at **156,317,631/=**. This amount ought to have been fully repaid in a period of 36 months in a monthly payment of TZS; 3,751,776 after a grace period of three months after the date of delivery of the said machines. It appears that the said machines were dully supplied to the plaintiff from Feme

Mining Equipment and Agriculture Ltd and Babuu General Supply for Fuso Fighter and the rest of the machines respectively.

It is the plaintiff's claims that the supplied goods/machines were not capable of working as per contractual terms thus could not meet the project's production expectation thus breach of the contract and therefore causing loss on her project. On this, she claims the sum of TZS: 676,189,288/= being loss and general damages suffered by the plaintiff.

On the other hand, the defendant admits covenanting with the plaintiff as stated above, however disputes all the claims as alleged and instead, by way of counterclaim, claims as investment amount a total of TZS: 130,063,943/= in which the plaintiff is indebted by the defendant's company for failure to honor the terms of their contract and thus is in breach of it. She prays that this Court to order the payment of the outstanding sum plus interests and costs of the suit.

For the plaintiff's claims, three witnesses had testified, whereas for the defendant only one witness defended the plaintiff's claims and established the defendant's claims by way of counterclaim.

For plaintiff's claims, PW1 stated how he met the officials of the defendant's company and concluded a deal (exhibit P12). To his surprise, from when the machines were supplied and installed, there has been no any meaningful production as the said machines were not in a good order for production as expected. On that, he wrote several demands to the defendant but in vain and that some of the machines were dismantled without being replaced. Thus, they have incurred a huge loss and failed to meet their clients' needs countrywide.

PW2, who introduced himself as agent with the plaintiff's company for rabbit pellet feed food for the southern higher lands in Iringa region, stated that on 5th May 2017 had placed an order for the said rabbit pellets worth 17,000,000/= from the plaintiff but could not meet any. They kept on following but in vain and decided to abandon the plaintiff as unworthy company to meet their demands.

PW3 testified to the effect that is an engineer and that he was once engaged by the plaintiff in repairing the Fuso truck with Registration No. T.197 DKN so as to modify its carriage capacity from 3.5 tonnage to 10 tonnage. He did it at a cost of 16,200,000/= as per proforma invoice dated 22nd May 2017.

On the other hand, DW1, testified how his company covenanted with the plaintiff company via PW1 as per P5 exhibit which is similar to D1 exhibit (Contract agreement), and financed the requested machines from the recommended suppliers by the Defendant. He admitted that some of the machines were not in good order and taken them for repair. Until 17th May 2023 when he was giving his testimony, admitted that the said machines were not returned to the plaintiff. That was all about the testimony of the case.

In consideration of the claims lodged by both parties, as per evidence in record, it is undisputed that the plaintiff and the defendant had been in contractual relationship as per Exhibit P5 and D1. It is thus not disputed that the plaintiff was in need of being financed/leased machines for her business and that the defendant was duty obliged to finance them. The financing was ultimately done and supplied to the plaintiff. The plaintiff has not discharged his obligation of repayment claiming that the financed machines were not in good order for the production. The defendant admits these claims saying that some of the machines taken by her have not yet been returned to the plaintiff.

In consideration of this case, three issues have been framed for court's consideration:

1. Whether Defendant supplied contracted goods to the plaintiff as per contractual terms and conditions.
2. Whether the truck in dispute was involved in the original contract. If not, whether it had an independent contract and whether the same was complied with.
3. To what reliefs are the parties entitled to.

The first issue for consideration now is whether the Defendant supplied the contracted goods to the plaintiff as per the contractual terms and conditions. In deliberation to this issue, it is important to traverse what the contract says and the obligations of each party. In consideration to the testimony of PW1 and DW1, it is clear that originally parties signed their covenant on 5th May 2017 in which the defendant was Lessor and the plaintiff a lessee of lease equipment in which the defendant was to lease the said equipment to the plaintiff. According to clause 1 of part A of the contract, stipulates:

> *The lessor shall purchase the equipment as described below for the purposes of this agreement and that shall be the exclusive*

property of the lessor who grants to the lessee by virtue of this agreement the right to use the equipment.

Thus, as per this lease agreement, the defendant is the sole owner of the leased properties and that the plaintiff just enjoys the right of use for purposes of enhancing production and pay the debt of the leased properties thereof and not otherwise. It is undisputed that the said leased equipment were delivered to the plaintiff as agreed (Fuso, Mixer 800 Kgs/hr, Sewing Needle, Digital weigh Scale and 2 Pellet Machines 300kg/hr) amounting 90,058,000/= which attracted VAT of 18%, thus making total value of 106,268,440.

However, there is also evidence in record that upon delivery of the said equipment in May 2017, some could not operate efficiently (the 2 pellet machines which were then taken by the Defendant (DW1's testimony). The same have not been replaced to date. Thus, my conclusion to the issue in deliberation is this, there was partial supply of the equipment to the plaintiff instead of full supply in the stated conditions.

The second issue for consideration is whether the truck in dispute was involved in the original contract. If not, whether it had an independent

contract and whether the same was complied with. According to the evidence in record, the fuso truck was one amongst the equipment covenanted on the 5th May 2017 for delivery to the plaintiff. However, evidence in record establishes that it was late delivered as opposed to other equipment. Therefore, my conclusion to this issue, strictly speaking there was no other contract specifically for the supply of the said fuso. The subsequent transactions by the plaintiff in respect of the said truck involved only the issue of insurance cover which was between the plaintiff and the insurance company and not otherwise (see exhibit P9).

The last issue for consideration is to what reliefs are the parties entitled to. Before responding this issue, it was also important as to the nature of claims in this case to establish if there was breach of contract by any party and to what extent. And whether there was any damage suffered by any party. The deliberation of these two issues, would lead to the easy findings of the last issue as to what reliefs are the parties entitled to.

In my considered view as to the evidence in record, it is clear that the defendant took back the two pellet machines for repair or replacement. However, as per annexture EFTA 6 which was replying to exhibit P10 suggests acknowledgment of the fact of ineffectiveness of the leased

equipment to the plaintiff and the possible solution. That the plaintiff should find solution by finding machines of her specifications from any supplier and that the defendant should pay for the operation of the said project. That letter is dated 27th October 2017 responding to the plaintiff's complaint (exhibit P10). It is not clear then how the plaintiff reacted to that letter. There is no evidence in support or its counter. Was there any damage then by the parties? This being a cross suit, it is expected to be two-way response.

The plaintiff suggests to have suffered damage to the tune of **TZS: 676,189,288/=** being loss and general damages suffered by the plaintiff. It being a special damage, there ought to have been clearly pleaded and established. Has it been specifically pleaded and established as per law? My careful scanning of the said evidence, I have not seen any evidence establishing the said damages. I say so because, for one to be awarded with specific damage, the claimant must strictly establish so. As per itemized claims into the plaintiff's statement of claim, specific damage was not established. Borrowing the words of my brother Karayemaha, J in **FINCA Microfinance Bank Ltd vs Mohamed Megayu**, Civil Appeal No 26 of 2020 that, the area of damages is not a virgin one. A lot has been discussed through case laws and literatures. Legendary principles have been

accentuated. I wish, now, to borrow the words of Lord Blackburn in **Livingstone vs, Rawyards Coal Company**, (1850)5 App. Case 25 at 6 Page 39 which was quoted by Hon.Kihwelo,J. (as he then was) in **Njombe Community Bank & Another vs. Jane Mganwa**, DC. Civil Appeal No.3 of2015 atpage 17 where it was stated that damages are:

> *"That sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation".*

In my view, therefore, damages are intended to put the party in the same position, as far as money can do so, as if his rights had been observed. In this case I think the issue of special damages should not detain me. Principles governing this are, as alluded to above, are very clear and elaborative. The case of **Njombe Community Bank & Another vs. Jane Mganwa** (supra) quoting the dictum of **Mcnoughten in Bolag vs. 7 Hutchson**, (1950) AC 515 at page 525 promulgated the correct principle of law on specific damages which is universally accepted that special damages are:

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

In the case of **Zuberi Augustino vs. Anicet Mugabe**, [1992] TLR137, the Court of Appeal held that:

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

It must be insisted here that what is awarded by the court should not be gifts to parties but be based on established claims as per legal standards. It being a civil claim, its standard of proof is only on balance of probability and not otherwise.

In the current case, there has not been any proof by the plaintiff as what actual damage has she suffered for the failure of production of the two taken machines by the defendant and by him failing to submit to the defendant the alternative specifications and the reliable supplier in alternative.

As to the defendant, if there has been any damage occasioned by the plaintiff for failure to refund the financed equipment especially those still in

the hand of the plaintiff, he has a good cause for the intervention as per terms of their contract (see clause 20 of exhibit D1).

It is trite law that parties are bound by the terms of their contract, they are duty bound to honour them. This is because it is common knowledge that parties to a contract are bound by the terms of their contract (See: **Unilever Tanzania Ltd v. Benedict Mkasa trading as BEMA Enterprises,** Civil Appeal No. 41 of 2009; **Philipo Joseph Lukonde v. Faraji Ally Saidi,** Civil Appeal No. 74 of 2019 and **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, Lulu Victor Kayombo Vs. Oceanic Bay Limited and Mchinga Bay Limited, Consolidated Civil Appeals Nos. 22 of 155 of 2020 (all unreported)).

That the parties who freely entered into the agreement like the one at hand are bound by this cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in **Abualy Alibhai Azizi v. Bhatia Brothers Ltd** [2000] T.L.R 288 at page 289 thus: -

> *"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"

That said, I find the plaintiff's claims unmerited before the court for want of establishment and as for the defendant has to exercise her legal rights upon obligations as per covenant.

As the end results, both claims are hereby dismissed. Parties shall bear their own costs.

It so ordered.

Right of appeal is explained.

DATED at Dar es Salaam this 31st day of July, 2023.

F.H. MAHIMBALI

JUDGE