IN THE HIGH COURT OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

CIVIL APPEAL NO. 170 OF 2022

(Arising from the Decision of the Resident Magistrates' Court of Dar es Salaam in Civil Appeal Case No. 101 of 2018)

HIGHER EDUCATION STUDENTS' LOANS BOARD.....APPELLANT

VERSUS

TRAVEL LINK TANZANIA LIMITED.....RESPONDENT

JUDGMENT

23rd March & 05th June, 2023

BWEGOGE, J.

The respondent commenced civil proceedings against the appellant herein in the Dar es Salaam Resident Magistrates Court claiming for special and general damages, among others, for breach of contract. Upon consideration of the evidence tabled before it, the trial court found the appellant liable for payment of USD 20,844 and TZS 2, 272, 000/= as special damages/outstanding debt, among others.

The appellant was dissatisfied with the decision of the trial court and lodged an appeal in this court on 11 grounds of appeal as under:

1. *That, the trial court erred in law and fact by relying on oral evidence of PW3 and held that the respondent herein had an oral agreement for the provision of travel and air ticketing services with the appellant.*

2. *That, the trial court erred in law and fact by holding that the Respondent had a cause of action against the appellant without considering the gist of the respondent's claim, namely, breach of contract entered on 5th September, 2011.*

3. *That, the trial magistrate erred in law and facts by awarding USD 20,844.00 and TZS 2,272,000.00 to the respondent as special damages, being outstanding debt, arising from costs of travel arrangement by relying on exhibit P3 and P4 while there was no privity of contract between the appellant and respondent.*

4. *That, the trial court erred in law and fact by failing to take into consideration the fact that, the Companies Act neither establishes nor governs the appellant's institution.*

5. *That, the trial court erred in law and in fact by entertaining evidence on claims that were not pleaded and proceeded to award specific damages which were not prayed and specifically proved.*

6. *That, the trial court erred in law and fact by pronouncing the judgement in favour of the respondent without proper evaluation and analysis of the evidence adduced during the trial.*

7. *That, the trial court erred in law and fact by failing to hold and consider that the call-off orders placed in 2015 by Mr. George Nyatega (the applicant's former Executive Director) were placed in his personal capacity, thus the appellant was not liable to honour the said orders.*

8. *That, the trial court erred in law by relying on exhibit P3 which did not meet the prerequisite of S. 18 of the Electronic Transactions Act, 2015 and was admitted under a defective certificate of authenticity notwithstanding the points of law raised by the appellant during the trial.*

9. *That, the trial court erred in law for failure to comply with mandatory procedures in admitting exhibits P1, P2 and P3.*

10. *That, the trial court erred in law by relying on Exhibits P2 and P4 which were erroneously admitted during the trial though objected by the appellant.*

11. *That, the trial court erred in law by granting the respondent interest at commercial rate of 15% of the decretal amount from the date of cause of action to the date of judgment and interest on the decretal amount at the court's rate of 12% per annum from the date of judgment till full payment, the claim which was not pleaded and proved to the standard required in law.*

The factual matrix of this case, in the interest of brevity, is as follows: The respondent herein is a registered company carrying on the business of travel and tour with an operation office herein Dar es Salaam. In 2011, the appellant invited a tender (Tender No. PA/030/2011/NC/14) for the provision of air ticketing services and related services. The respondent herein succeeded to secure the same.

Consequently, on 05th September, 2011 the respondent executed a formal contract with the appellant for the provision of air tickets, tour services, car hire services, travel insurance and hotel accommodation reservation services. The contract provided that the completion date of the contract was eight months (intended to last on 01st July, 2012) whereas the date of commencement was expressly stated to be the date upon which both

parties signed the respective contract. The contract was executed by both parties on 30th March, 2012. The relevant contract was not extended after the completion date, as covenanted.

However, the contractual relationship of the parties herein continued in the absence of a formal contract as the former contract was never renewed. Allegedly, the former Executive Director of the appellant herein, used to place call-off orders for travel arrangements and air tickets for the respondent's staff to the different destinations in and out of Tanzania. The call-off orders were either placed by the said Executive Director personally or sometimes through his subordinates through emails. Allegedly, between 17th February and 29th May, 2015 the former Executive Director of the appellant placed call-off orders to the respondent. By August, 2017, the appellant had occasioned debt to the tune of USD 20,844.00/= and TZS 2,272,000/= arising out of unpaid travelling arrangements and air ticketing services offered to her staff who travelled in different destinations, including overseas trips.

The demand letter to pay the outstanding amount was rejected by the appellant, stating that she bore no liability thereof. It was expressly communicated to the respondent that the air tickets were ordered and issued on a personal capacity. Therefore, the respondent was advised to

place the demands on the respective person who placed the call-off orders for settlement. Therefore, the respondent was left without no option but to sue.

The respondent case in the trial court was mainly that, the appellant herein, by continuing to place call–off orders for air ticketing and travel arrangements services to the respondent after the expiration of the formal contract in late 2012, which were acted upon by the respondent, whereas the appellant duly paid for the respective services until 2015 when she defaulted to pay, constituted a contractual agreement between them. By defaulting to pay for services asked for and delivered on part of the appellant, the same breached the contract. Hence, liable to pay for both specific and general damages arose thereafter.

On the other hand, it was the appellant's case in the trial court that the former Executive Director of the appellant, upon the expiry of the formally executed contract, had taken upon himself to place call-off orders for air ticketing and travel arrangement, hence, personally liable to pay.

The trial court, upon conclusion of the trial and consideration of the evidence adduced by both parties, found that the parties herein, by their conduct, entered into an oral contract after the expiration of the contract entered on 05th September, 2011. Consequently, the appellant was found

liable for breach of contract for her failure to pay for services requested and rendered to the financial detriment of the respondent. As aforesaid, the trial court entered a judgment and decree for the respondent for payment of USD 20,844 and TZS 2, 272, 000/= as special damages/outstanding debt; interest at the commercial rate on the decretal sum at the rate of 30% from the date of cause of action to the date of judgment; interest on the decretal sum at the court rate of 12% per annum from the date of judgment to the date of payment in full; general damages of TZS 2,000,000/=; and costs of litigation. The appellant was not amused; hence, this appeal.

Now, I am bent on canvassing the above-mentioned grounds of appeal serially commencing with the 1st ground which in substance is replicated in the 2nd, 3rd, 4th and 7th grounds of appeal. It is averred that the trial court erred in relying on the evidence of PW3 in that the respondent herein had an oral agreement with the appellant for the provision of travel and air ticketing services.

Unarguably, the appellant entered into a formal agreement (exhibit P6) with the respondent for the provision of air tickets, tour services, car hire services, travel insurance and hotel accommodation reservation services. Though the contract indicated that the agreement was made on 05th

September, 2011, in fact, it was executed by both parties on 30th March, 2012. The special conditions of the contract (clause 1.1(c)) provided that the completion date of the contract was eight months (intended to last on 01st July, 2012) whereas the date of commencement was expressly stated to be the date upon which both parties signed the respective contract. Taking into consideration that the contract was executed by both parties on 30th March, 2012, impliedly, it would have expired on 30th November 2012. It is uncontroverted fact that the contract above mentioned was not extended after the completion date.

The expiry of the contract notwithstanding, it is uncontroverted fact that Mr. George Nyatega, the former Executive Director of the appellant herein, placed call-off orders between 17th February and 29th May, 2015 to the respondent for travel arrangements and air tickets for the respondent's staffs to different destinations in and out of Tanzania. I am on all fours with the counsel for the respondent in that the letters for orders of air tickets and travelling arrangements placed by the appellants' former Executive Director above mentioned to the respondent and corresponding acceptance by issuing of air tickets, travelling arrangements and invoices of the services rendered, undoubtedly, constituted the offer, acceptance, and consideration for the valid and binding contract between the parties thereof, notwithstanding the

wanting formal contract of service. See the cases of **Catherine Merema vs Wathaigo Chacha**, Civil Appeal No. 319 of 2017, CA (unreported); **Leonard Dominic Rubuye t/a Rubuye Agrochemical Supplies vs YARA Tanzania Limited** (Civil Appeal 219 of 2018) [2022] TZCA 419; and **Tansino Quarries Ltd & Another vs Advent Construction Ltd & Another** (Commercial Case. 96 of 2020) [2022] TZHC ComD 311.

In the same vein, in the cases of **Zanzibar Telecom Ltd vs Petrofuel Tanzania Ltd** (Civil Case 69 of 2016) [201] TZCA (unreported) it was held:

> *"In the present case, going by the evidence of PW1 Satish Kumar, upon being given instruction through the Letter of Intent, the respondent went ahead to supply the diesel to the appellant's designated locations already mentioned herein. Also, the appellant had signified that she was finalizing the contract, and promised to notify the respondent when ready. As already pointed out, that promise was not fulfilled. Nevertheless, on making the supply the respondent company would prepare invoices and send them the appellant. Evidence was advanced by the respondent to show that the appellant received the product. And some of the invoices were paid for. In our firm stand, therefore, that conduct constituted sufficient acceptance.....hence, there was a binding contract capable of being enforced."*

See also in this respect the decision of the superior court **Engen Petroleum (T) Limited vs Tanganyika Investment Oil and Transport Limited,** Civil appeal No. 103 of 2003 CA (unreported).

It suffices to conclude that in the circumstances of this case, the conduct of the parties herein constituted a binding contract despite the fact that a formal contract between them had expired. And, I would further opine that, by the conduct of the parties herein, impliedly, they extended their contractual relationship beyond 2012.

The counsel for the appellant forcefully argued that the purported existence of an oral contract was not pleaded in the lower court; hence, could not have been asserted by the respondent's witnesses in establishing the fact that there was an oral agreement to extend the contract which ended in 2012. Be that as it may, leaving apart the existence of oral contract between the parties herein, as aforestated, the existence of a contractual relationship between the parties herein was by large established by their conduct.

The pertinent question arising herein is whether the contract entered between the appellant's Executive Director binds the appellant herein. It is the contention of the counsel for the appellant that the contractual relationship between the former appellant's Executive Director was on a

personal basis. That the former appellant's Executive Director had placed a call for order for air tickets and travelling arrangements in his personal capacity, thus, the appellant cannot be liable for non-payment of services rendered. I find this argument invalid. While joining hands with the counsel for the appellant in that the Company Act is inapplicable in this matter, it is my considered opinion that the former Executive Director, as the principal officer of the appellant, a body corporate, by virtue of his position, his actions in course of execution of his official business were the acts of the appellant. The appellant was rightly held to have been privy to the contract entered. Hence, the respondent had a cause of action against the appellant herein.

Likewise, it is common ground that that the appellant's Executive Director placed call for orders to the respondent for the provision of air tickets and accommodation services to various destinations which were duly provided by the respondents. The documents tendered to prove the claim, i.e. the call for order (Exhibits P1, P2, and P3 collectively), the invoices (collective exhibit P4) and payment vouchers (collective exhibits P5) prove that the air tickets and accommodation services were offered to the appellant's staff by the respondent.

The argument that the appellant's Executive Director was not among the authorised officers to place the impugned call-off order and that the said Director used personal email instead of official email would not vitiate the arrangement entered between the parties herein. I need not state that the above-mentioned conditions were in respect of the expired formal contract. I find it pertinent to state that it is in the record of the trial court that one Patricia Ligate Sunday (DW1), deponed that from 2013 to 2014, they began to use the local purchasing order to pay for travel services and not by way of entering formal contract with service providers.

Further, the evidence tendered in proof of payment (exhibit P5 collectively) made by the appellant for services rendered in the years 2013 to 2015, proves that the contractual relationship between the parties continued despite the completion of the formal contract in 2012. As aforesaid, a contractual agreement is not necessarily a formal executed document. The conduct of parties is likewise taken into consideration. The fact that the appellant had paid some of the claims made by the respondent herein, establishes the contractual relationship of the parties herein. I base my opinion on the case of **Zanzibar Telecom Ltd vs Petrofuel Tanzania Ltd** (supra) whereas the Apex Court, in similar circumstances, held:

> *"We have carefully considered the evidence constituted in the annextures to the plaint and testimony of PW1. That evidence includes a pile of invoices which were tendered before the trial court High Court. Those invoices were served to and received by the employees of the appellant company, and were the subject of the outstanding claims.....We are further satisfied that since the appellant's servants continued to receive the supplies after first six months, and considering the conduct of the parties generally as earlier pointed out,* ***it is baseless to complain that the trial judge improperly granted the relief in respect of the undertakings which were made beyond the allegedly agreed period of supply of goods."*** Emphasis mine.

On account of the foregoing discussion, I find the 1st ground of appeal without substance. Likewise, the above discussion disposes of the 2nd, 3rd, 4th, 6th and 7th grounds of appeal.

In respect of the 5th ground of appeal, it was alleged that the trial court entertained evidence for the claims that were not pleaded. Likewise, it was alleged that the trial court awarded specific damages which were not prayed for and, or specifically proved. In arguing this ground of appeal, the counsel for the appellant charged that the special damages to the tune of USD 20,844 and TZS 2,272,000/= being outstanding debt arising out of costs of travel arrangement and air tickets for the appellant's staff purported to have incurred by the respondent were neither pleaded for

nor proved. In the same vein, the counsel alleged that interests under items (iii) and (iv) of the reliefs granted by the trial court were not pleaded for contrary to the law of this land. The counsel cited the case of **Zanzibar Telecom Ltd vs Petrofuel Tanzania Ltd** (supra)to bolster his argument.

Admittedly, I am alive with the principle in the case of **Zanzibar Telecom Ltd vs Petrofuel Tanzania Ltd** (supra) that *"the court cannot grant an interest in a case where such interest was not pleaded and proved."* Likewise, I subscribe to the appellant's counsel in that it is a settled principle that specific damages need to be specifically proved.

I have gone through the proceedings of the trial court and found that one Shiny Abas Datoo (PW2), the respondent accountant, tendered the invoices (exhibit P4) and payment voucher (collective exhibits P5) whereas he categorically analysed the invoices which had been paid at the tune TZS 41,000,000/= and an outstanding amount to the tune USD 20, 944 and TZS 2,272,000/=. I am alive of the fact that the impleaded foreign currency is to the tune of USD 20, 844, not USD 20, 944. This fact alone cannot be employed to arrive at the conclusion that the damages were not proved.

Likewise, upon scrutiny, I found that the general damages were prayed for in the pleading filed by the respondent. The award of general damages seeks to, so far as money can do, place the injured party in the same situation as if the contract had been performed. I need not state that the nominal general damages of TZS 2,000,000/= was awarded at the discretion of the trial court. The respondent was not obliged to specifically prove the same.

It suffices to point out that the special damages were prayed for and proved. Likewise, the general damages, interest at the court rate and costs of litigation were prayed for and rightly granted by the trial court.

However, I join hands with the counsel for the appellant in that the commercial interest of 15% from the date of judgment to the date of full satisfaction was not prayed for. This sort of interest should not have been awarded. Conclusively, I find the 5th ground of appeal unmerited as well. However, I find the 11th ground of appeal pertaining to impugned commercial interest awarded partly with substance.

I proceed to canvass the 8th ground of appeal in which it is alleged that the trial court erroneously admitted exhibit P3 (email letters) contrary to section 18 of the Electronic Transaction Action 2015 based on the defective certificate of authenticity. The appellant's counsel argued that

the trial court was supposed to satisfy itself whether the purported certificate of authenticity met the prerequisite conditions set by law.

From the outset, I am of the considered opinion that this ground of appeal was misconceived. The certificate of authenticity, in my opinion, is required to establish the authenticity, reliability and integrity of an electronically generated document. It is not mandatory in the circumstances such as where the authenticity, reliability and integrity of the exhibit are not questioned. It must be noted that DW1 admitted that some email letters were written by herself and others by her superiors and, or colleagues whom she identified. Likewise, the appellant's former Executive Director acknowledged in his defence that the emails in question were his. It suffices to point out that there is no allegation from the appellant in that the emails were forged or otherwise tampered with. Likewise, there was no evidence called by the appellant to controvert the said emails. This ground of appeal fails.

The 9th ground of appeal avers that exhibits P1, P2 and P3 were admitted without compliance with the law. It was argued by counsel for the appellant that the contents of the documents were not read before they were admitted in evidence. I find the ground of appeal herein without substance. The rule providing for reading out the content of the document

prior to its admission seeks to prevent prejudice to the adverse party. The strict adherence to the rule applies in criminal proceedings to guarantee a fair trial for the accused person.

However, in civil proceedings, the rule against surprise requires documentary evidence to be annexed to the pleadings of the case filed in court to afford a party to a case an opportunity to know the nature and contents of the respective evidence intended to be relied upon by his opponent. Hence, the appellant cannot be heard to lament that they were taken by surprise in the trial court in respect of the impugned documentary evidence. I find this ground of appeal misconceived.

Lastly, I conclude with the 10th ground of appeal in which it is alleged that the trial court erroneously relied on exhibits P2 and P4. The counsel for the appellant argued that the above mentioned exhibits which were secondary evidence, were admitted contrary to section 67 of the Law of Evidence Act whereas the witnesses who tendered the impugned evidence failed to state the whereabouts of the primary document. In the same vein, the counsel alleged that the impugned exhibits were tendered by an advocate, not the witnesses.

I have gone through the proceeding of the trial court and found out that the admission of relevant exhibits was objected to by the counsel for the

appellant. However, on scrutiny, the trial court found that the respondent had issued notice to produce the original document served to the appellant which was not heeded. Therefore, it was ruled that the exhibits were admissible in evidence. I find no cogent ground to fault the decision of the trial court. Likewise, the allegation that the impugned exhibits were tendered by an advocate, not the witnesses, is not supported by the record of the trial court. This ground of appeal, likewise, was misconceived.

Based on the foregoing reasons, I find the appeal herein bereft of merit, save the complaint on the impugned award of commercial interest at the rate of 15% which I found to be untenable. The decision and orders entered by the lower court are hereby upheld, save the award of commercial interest at the rate of 15% which is hereby vacated.

Appeal partly allowed to the extent mentioned above. The respondent shall have her costs.

Order accordingly.

DATED at DAR ES SALAAM this 05th June, 2023.

THE HIGH COURT OF TANZANIA

O. F. BWEGOGE

JUDGE