IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM SUB-REGISTRY)

AT DAR ES SALAAM:

CIVIL CASE NO 231 OF 2019.

THE ATTORNEY GENERAL..... 1ST PLAINTIFF ·

TANZANIA ELECTRIC SUPPLY COMPANY LIMITED

(TANESCO)..... 2ND PLAINTIFF

Vs

M/S INTERTRADE COMMERCIAL SERVICES (P)

LIMITED..... DEFENDANT

EX PARTE JUDGMENT:

28th Nov 2023 & 6th Feb 2024:

KIREKIANO, J;

The 2nd plaintiff Tanzania Electric Supply Company Ltd (TANESCO) deals with the generation transmission and Distribution of Electricity in Tanzania. The defendant's business is the exportation and distribution of Electrical power transmission and distribution Equipment.

In 2013 and 2015 respectively, the second plaintiff and defendant entered into two contracts for supply of tools and equipment for power distribution. The first contract namely PA 001/12/HQ/G/002 was sealed on 25th October 2013, for the supply of metering units and metering cabinets. The performance of this contract was for three consecutive years starting 2014/2015, 2015/2016 and 2016/2017 and the consideration was USD 15,358,494.38 plus Tshs 1,474,415,460.00 for each year of performance of the contract.

The second contract namely PA 001/01/14/HQ/G/026 was sealed on 23rd April 2015, for the supply of tools and equipment for the distribution works. The consideration in this contract was USD 476, 566.999. The mode of payment of consideration in each contract was by instalment, it was agreed that the defendant would be paid 10% as advance payment, 40% upon shipment of goods and 50 % on acceptance of goods by the 2nd plaintiff.

The first contract was performed smoothly in the first two years. The parties' point of departure is the plaintiff's claim that, in the third year of the contract that is 2016/2017, the defendant did not deliver the goods despite the 2nd plaintiff fulfilling her side of the bargain. As such it is the plaintiff's case that

in the second contract, the defendant did not deliver the goods despite being paid the first and second installment as agreed.

More significantly the plaintiff stated in the amended plaint as follows;

Paragraph 9 in respect of the first contract.

> *According to the agreement in the third year of the contract, the defendant was paid 10% of the contract price as advance payment to the tune of USD **1,340,821.98)** and was required to supply 150,000 single-phase BS footprint-type prepayment meters.*
>
> *The defendant was then paid 45% of the contract prices to the tune of One Million, Eight Hundred Forty-Three Thousand, Two Hundred and Thirty-Five United States Dollars. (**USD 1,843,235.11**) and One Hundred and Forty-Seven Million, Four Hundred Forty- One Thousand, and Five Hundred Foly-Six Tanzania Shillings (**TZS 147,441,546)** being payments following the opening of the Letter of credit after receipt of the bill of lading showing the shipment of goods.*
>
> As such respect to the second contract, it was stated;
>
> ***Paragraph 20*** in respect of the second contract;
>
> *That on 26th October 2016, Defendant wrote a letter to the 2nd plaintiff requesting for release of advance payment of 10% of the*

contract price. The 2nd plaintiff paid the defendant 10% of the contract price as advance payment to the tune of USD ***47,651.00*** *on 20th July 2017 and* ***USD 193,009.41*** *after the defendant's submission of the bills of lading of shipment of goods.*

The plaintiffs thus claim from the defendant the following reliefs;

1. A refund of USD 6,705,084.50 and Tshs 810,928,503 being 55% of the contract price paid to the defendant on the third year of the contract.
2. Payment of a sum of Tshs 3,787,217,574.94 being monies paid to TRA as VAT on behalf of the defendant.
3. Payment of the sum of USD 240,666.41 was paid to the defendant for the unsupplied tools and equipment for distribution works under lots 5 and 7.
4. Payment of the sum of Tshs. 1,000,000,000 as general damages for the inconveniences distribution and loss suffered as a result of a breach of the contract.
5. Interest from 1st August 2017 to the date of Judgment but also from the date of judgment till the date of fulfilment.
6. Cost of the suit.

The defendant company in the written statement of defense disputed the plaintiff's claims. The defendant also filed a counterclaim, claiming that the 2nd plaintiff was in breach of the framework of the contract by delaying or defaulting in establishing the letter of credit.

The defendant (plaintiff in the counterclaim) claimed for relief thus, payment of USD 1,125,000 incurred by the defendant in securing trade finance to facilitate the contract, USD 1,800,000 being payment made to the manufacturer. Other claims are Tshs 3,83,977,966/= as payment withheld, special damages amounting to USD 19,733,563, 563.26 and recovery of loss USD 75,000,000, interest and costs.

During hearing the plaintiffs were represented by Miss Consesa Kahendeguza Mr. Steven Urasa and Angelina Ruhumbika learned state attorneys. The defendant herein and the plaintiff in the counterclaim defaulted appearance, during the hearing, efforts to serve them directly and by substituted mode proved futile.

This suit therefore proceeded ex parte under order IX rule 8 and the defendant (plaintiff) claims in the counterclaim were dismissed under Order IX Rule 5 of

the Civil Procedure Code Cap 33 [RE 2019] for want of appearance. Three issues were framed for the determination of the plaintiff's claims, thus:

1. Whether there was a breach of contract.
2. Whether the plaintiffs suffered damages.
3. Relief to the parties

The plaintiff case was by three witnesses, PW1 Enos Kazebula Kasema Principal Technician working at 2nd plaintiff meter workshop, and accountants PW2 Stanley Mgaji and PW3 Joyness Munyaga.

According to PW1 Enos Kasema, the first contract namely **PA/001/12/HQ/G/002** (Exhibit P1) involved the supply of metering units and metering cabinet. According to the amendment of this contract dated 27/11/2014 (Exhibit P–3) this contract was extended to be performed in three years; 2014/2015, 2015/2016 and 2016/2017. As such the subsequent amendment dated 12/08/2014 (Exhibit P – 2) was to the effect of requiring the delivery of the goods into the plaintiff's warehouse.

It was PW1's testimony that the 1st contract was smoothly performed in the first two years 2014/2015 and 2015/2016 only. In the third year 2016/2017, the defendant defaulted performance of her side of the bargain as

the goods were not delivered to the second plaintiff's warehouse as agreed. This is to say, despite paying the defendant 10% in advance and later 45% after submission of the shipping documents.

Proof of consideration was tendered by PW2 Stanley Mgaji. According to him, the first contract (Exhibit P–1) payment was done in two instalments; the first was done on 31/05/2017, USD 604,100.78 and the 2nd instalment was done on 3/07/2017 USD 604,100.78 to the defendant account number 02J 1092 535 200. This is according to the payment voucher and second plaintiff account statement admitted as exhibit P-10, The other advance payment that is 10% Tshs 147,441,546.00 was paid to defendant account number 01J 10 92535200 Swist code no CORUTZTZXXX dated 3/07/2017 (Exhibit P – 10).

The other instalment according to PW3 Joyness amounts to USD. 1,843,235.10 was also paid as 45% of the contract instead of 40% as agreed before. This is according to a letter of credit LC 223TBBL171350001 dated 22/09/2017 and the Bank statement of the 2nd plaintiff of 22/09/2017 (Exhibit P -12).

The second contract (exhibit P–4) was entered on 23/04/2015 for supply of tools and equipment. The consideration was USD 476,566.99. According to

this contract, it was agreed that the defendant would be paid 10% advance payment upon signing of the contract 40% upon tendering of shipping documents and 50% upon delivery of goods. The plaintiff's case is that the 1st and 2nd instalments were duly paid but the defendant did not perform her side of the bargain by delivering the goods.

Proof of payment in this contract was by PW2 Stanley who testified that the 2nd plaintiff paid 10% of the Contract USD. 47,657.00/=which was paid on 26/10/2016 via A/C 02J1020961500 (Exhibit P-11). PW3 Joynes testified that the other advance payment i.e. 40% USD 193,009.41 was also paid to the defendant on 25/09/2017 this is according to a letter of credit ILC 00000189CLM 001 as it is indicated in the second plaintiff account statement no 02J10430111000 (Exhibit P-13)

It was the plaintiff's case that when the defendant defaulted delivery of the equipment as agreed, the plaintiff on 28/09/2017 made communication inquiring about the defendant's performance (exhibit P–7 and P–8). The defendant responded by letters (Exhibit P –5 and P –6). While acknowledging the delay, the defendant associated the same with the predicament faced by the ship carrying the consignment. The defendant did not deliver the goods

despite reminders by the plaintiff. In the end the defendant remained mum and did not even respond to the demand letter by the plaintiff (Exhibit P-9).

The plaintiff's case according to witnesses is that nonperformance of the contract caused the 2nd plaintiff to suffer damages since it could not meet its target of connecting power to 250,000 new customers. This also affected the 2nd plaintiff's public trust and the plaintiff suffered loss by rebudgeting for the unsupplied equipment.

Having heard available evidence that it is the plaintiff's case, I will now resolve the issues raised.

The first issue is on breach of contract. According to the defendant's amended written statement of defence, there is no dispute that the parties entered into the first and second contracts i.e. Exhibits P1 and P4. The terms and conditions of the contracts therein were also admitted. The only dispute is whether there was a breach of these contracts.

Before resolving this issue, it is worth noting that, **firstly** a breach occurs in a contract when one or both parties fail to fulfil the obligations imposed by the terms. **Secondly,** the burden of proof lies with the plaintiff, this is as

provided for under sections 110 and 111 of the **Evidence Act Cap 6 [RE 2019]** that:

> *110 (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.*
>
> *111. The burden of proof in a suit proceeding lies on that person who would fail if no evidence at all were given on either side.*

The plaintiff's side of the bargain in the first contract was to pay an advance payment of 10% this was **USD 1,340,821.98),** the plaintiff also had to pay 40% per cent but it appears from the plaint and the plaintiff evidence that the plaintiff paid 45% of the contract price (**USD 1,843,235.11**). Proof of this payment as indicated was done in installments. The available evidence (Exhibit P10) shows that on 31/05/2017, USD 604,100.78 was paid and on 3/07/2017, USD 604,100.78 was paid to the defendant account number 02J 1092 535 200. It is noted here that in Exhibit P 12 when the defendant raised the invoice to be paid the said 45% (**USD 1,843,235.11**) there was acknowledgement indicating that 10% was fully paid at **USD 1,340,821.98.** As such the other amount 10% was paid (**TZS 147,441,546).** With regards to the second contract, there is evidence as indicated above that the plaintiff paid 10% of the

Contract **USD. 47,657.00/=**but also other advance payment 40% **USD 193,009.41.**

From the above, it is clear that the second plaintiff performed her side of the bargain to the extent indicated which made it obligatory for the defendant to supply the goods as agreed. I have revisited the terms of the contracts both exhibit P1 and P4, particularly on what could have caused a fundamental breach. This is stated in Article 26.2 (a) that fundamental breach of the contract shall include but not limited to the following;

> *"The supplier fails to deliver any or all of the goods within the period specified in the contract or within any extension thereof granted by the purchaser."*

There is evidence on record indicating that there was a delay in delivery of the consignment of the said 150,000 meters this is according to the defendant's letters (Exhibit P – 5 and P – 6) in response to the plaintiff's reminder (exhibit P – 7 and P – 8). According to these correspondences, on 28th September 2017, the defendant indicated the delivery schedule of the consignment, that is to say, 50,000 meters were to be delivered within 14 days, 50,000 within 21 days and 50,000 within 30 days.

This was not implemented. As such according to a reminder letter Exhibit P-8, no further communication was heard from the defendant. The evidence of PW1 was clear that in the end, the defendant did not deliver the goods. From the foregoing, I find as a fact and resolve the first issue in the affirmative that the defendant was in breach of the contracts.

The second issue is whether the plaintiffs' suffered damages. It is clear that where there is a breach of contract, the innocent party may recover damages. These damages vary in nature and the principles governing the award of damages will depend on the type of damages claimed.

I have gone through the amended plaint; the plaintiffs have asked for general damages but went on to quantify the same to the tune of Tshs 1,000,000,000. It is recognized practice and position of law that, if general damages are claimed, it must be averred that the same were suffered by the plaintiff. However, the quantification of such damages is the domain of the court. This is a position fortified in several decisions including M/s **Tanzania - China Friendship vs Our Lady of The Usambara Sisters (Civil Appeal 84 of 2002) [2005] TZCA 67 (19 October 2005** where the Court of Appeal

considered that the Plaintiffs were also claiming for general damages which was quantified to the tune of TZS. 15,000,000. The court held;

> *'Since general damages are awarded at the discretion of the Court, it is the Court which decides which amount to award. In that respect, normally claims of general damages are not quantified'*

As such in **Kibwana and another v Jumbe [1990–1994] 1 EA 223** it was held;

> *The fact that the plaintiff mentioned a specific figure as general damages does not take away the Court's function to determine and quantify the damage suffered.*

Now in this suit, the plaintiff stated in paragraph 23 of the amended plaint that, the defendant's failure to deliver the equipment by contract affected the second plaintiff's ability to provide electricity services to its clients. This was amplified in PW1 Stanley's testimony who went on to say this also affected the second plaintiff's reputation to its clients. He also stated that to conduct its operation the plaintiff was forced to re-budget for the equipment which was unsupplied.

I have taken into consideration that the second plaintiff being a parastatal organization tasked with the generation, transmission and distribution of

electricity had duty to deliver services at the standard expected by its customers. It is thus certain that the plaintiff suffered damages, I thus resolve the second issue in the affirmative that generally the plaintiffs suffered damages.

The last issue is the relief to which the parties are entitled. The plaintiffs have asked for a refund of money paid, damages, and interest at the commercial rate per month from 1st August 2017 to the date of judgment. They have also asked for interest from the date of decision till final fulfilment and cost of this suit. I shall address these reliefs one at a time.

Firstly, a refund of USD 6,705,084.50 and Tshs 810,928,503 being 55% of the contract price paid to the defendant on the third year of the contract. This relief was in respect of the first contract PA 001/12/HQ/G/002 (Exhibit P1). According to evidence tendered and analysis in resolving the first issue the plaintiff proved payment of USD 3,184,057.09 and Tshs 147,441.546. I thus proceed to award a refund of the proved amount which is **USD 3,184,057.09** and Tshs **147,441.546**

Secondly, payment of a sum of Tshs 3,787,217,574.94 as monies paid to TRA as VAT on behalf of the defendant. This claim was not supported with evidence in the plaintiff's case. The same cannot be awarded.

Thirdly, the plaintiff also claimed payment of the sum of USD 240,666.41 paid to the defendant for the unsupplied tools and equipment for distribution works under lots 5 and 7. This relief was in respect of the second contract PA 001/01/14/HQ/G/026 (Exhibit P4). When examining the evidence on the first issue, I made finding that there was proof of payment of this amount and that the goods were not supplied. I thus proceed to grant this relief. This is to say, the defendant should refund the second plaintiff USD 240,666.41 being unsupplied tools and equipment for distribution works under lots 5 and 7.

Fourthly, payment of damages, as I have deliberated in the second issue the damage suffered as pleaded by the plaintiff was general. In assessing the extent of damages, I was guided by the decision in **Hadley v Baxendale [1854] 9 Exch 341** that;

> *'Where two parties have made a contract which one of them had broken, the damages which the other party ought to receive in receipt of such breach of contract should be such as may fairly and reasonably be considered either naturally that is in*

accordance to the usual course of things from such a breach itself or such as may reasonably be supposed to have been in the contemplation of both parties at the time, they made the contract as the probable result of the breach of it'

Back home in our jurisdiction, it was stated in **Anthony Ngoo & Another V. Kitindi Kimaro, Civil Appeal No. 25 of 2014, CAT** unreported) thus;

"The law is settled that general damages are awarded by the trial judge after consideration and deliberation on the evidence on record able to justify the award. The judge has discretion in the award of general damages".

In assessing the amount of damage in this suit, I have considered; the magnitude of the breach, that is to say, the equipment was not supplied at all. As such, the number of customers who were to be serviced by the second plaintiff that is about 250,000. The monetary aspect, that is the type of currency and amount involved in the breach. In the end, I assess that the amount of USD 200,000 will serve justice in this case.

Other reliefs prayed are interest before judgment. This relief appears in the prayers. There is nowhere in the body of the plaint where facts suggest that there was interest accruing from the date before judgement. The principle

governing interest before judgement was well articulated in the case of **National Insurance Corporation T. Limited & Another vs China Civil Engineering Construction Corporation (Civil Appeal 119 of 2004) Tanzania,** thus;

> *'It is a matter of substantive law, interest for the period before the date of the suit may be awarded if there is agreement, express or implied for payment of such interest, or it is payable by the usage of trade having the force of law, or under the provisions of any substantive law entitling the plant to recover interest*

Having scanned the plaint, and the evidence tendered nothing was showing that there was express or implied agreement on interest. Based on the foregoing, the relief on interest from 1st August 2017 till this date of judgement fails.

The plaintiffs have also asked for court interest at 30% from the date of judgment till final payment. Court interest after judgement is governed by order XX Rule 21, of the **Civil Procedure Code Cap 33 [RE 19**] the same provides;

> *"(1) The rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction shall be seven per centum per annum or such other rate, not exceeding twelve per*

centum per annum, ***as the parties may expressly agree in writing*** *before or after the delivery of the judgment or as may be adjudged by consent:"*

It follows from the above excerpt that, interest after judgment cannot exceed 7% unless the parties so agree in writing. This is the position also fortified in several decisions; **Njoro Furniture V TANESCO [1995] TLR 205** but also **Rev. Christopher Mtikila V AG [2004] TLR 172.** I have revisited the pleadings and evidence before me there is nothing to suggest that there was an agreement as to payment of interest exceeding the rate of seven per cent. I thus proceed to award interest of 7% per annum on the decretal sum from this date of judgment till final fulfilment.

Concerning costs, the principal is that costs follow the event, and the plaintiffs having established the claims to the extent indicated deserve to be reimbursed with costs. In the end, the defendant is thus condemned to the cost of this suit. All said and done, this court proceed to pronounce judgment in favor of the plaintiffs as follows:

1. The defendant has breached the agreements executed with the second plaintiff on 25th October 2013 and 23rd April 2015,

2. The defendant should pay the second plaintiff a total of USD 3,424,723.5 and Tsh 147,441.546 as being refund of consideration paid for unsupplied equipment
3. The defendant should pay the plaintiff's Tshs. USD 200,000= being general damages for breach of contract;
4. The defendant should pay the plaintiff interest at the rate of 7% per annum on the decretal amount from the date of this judgment until the same is satisfied in full;
5. The defendant shall pay the plaintiff costs of the suit.

A. J KIREKIANO

JUDGE.

06th February 2024

COURT

Ex parte judgment delivered in the presence of Miss Angelina Ruhumbika- State Attorney and Mr. Roden Sifare 2nd plaintiff Principal Officer and in the absence of the defendant. The defendant is to be served with notice of this judgment.

A. J KIREKIANO

JUDGE.

06th February 2024