IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 42 OF 2004

PRISMO UNIVERSAL ITALIANA S.r.l.....PLAINTIFF
VERSUS
TERMCOTANK (T) LIMITED.....DEFEDANT

JUDGMENT

1. **Date of Final Submissions – 25/7/2007**
2. **Date of Judgment – 3/8/2007**

MASSATI, J.:

The Plaintiff, PRISMO UNIVERSAL ITALIANA S.r.l. (otherwise also in this judgment referred to as "PRISMO") is a building contractor. Sometime in 2002 she was awarded a tender by the Revolutionary Government of Zanzibar to rehabitate the Mtuhaliwa – Chake Chake Road, in Pemba. To achieve this, she contacted the Defendant Company, TERMCO TANK (Tanzania) Limited (also referred to as "TERMCO" in this judgment) for the supply of bitumen. That relationship (i.e. between the Plaintiff and the Defendant) did not end well. It landed the parties in this court.

It was the Plaintiff who filed the suit on 23rd August 2004, through the services of KARUME & CO, ADVOCATES. According to paragraph 9 of the plaint the Plaintiff's claim is for breach of contract, in that TERMCO failed to deliver the remainder of 59 containers of bitumen within the agreed intervals. According to paragraphs 10, 11, and 12 of the plaint, PRISMO has, as a result of the said breach, suffered and so claims damages to the tune of Tshs.498,883,572.18. In addition, PRISMO claims interests thereon at 21% per annum from June 2004 to the date of judgment, interest on the decretal sum and costs.

On the other hand Prof. Mgongo Fimbo, learned Counsel was retained by TERMCO. On 25/11/2004 he filed an Amended Written Statement of Defence pursuant to leave of the court. According to paragraph 3 of the Statement of Defence, the Defendant denies the existence of any agreement in law, and so, that the Plaintiff suffered any damages at all. In the alternative, the Defendant alleged that the Defendant had always been ready and willing to supply bitumen to the Plaintiff subject to shipping arrangements which were outside the Defendant's control, and subject also to the Plaintiff returning empty containers immediately to enable the Defendant load and dispatch the subsequent

consignments. But, that the Plaintiff did not do so as agreed, and so it led to the delays in the supplies thus forcing the Defendant to use containers intended for other clients.

The Defendant also claims that PRISMO delayed in settling the (TERMCO's) invoices, and to renew the bank guarantee which expired on 31/7/2004. So in short the Defendant's case, which is summarized in paragraph 14 of the Amended Written Statement of Defence, is that there was no contract, and if there was any, the Plaintiff prevented the Defendant from performing it. In the alternative, it was TERMCO's contention that the supplies of bitumen, constituted a new contract of sale for each consignment according to costume or usage and that TERMCO, performed its part.

The Defendant also counterclaimed a total of USD 19,110 being the balance of unpaid invoices, USD 14,892 being special damages for failure to return the containers in due time, USD 7,257 as special damages for the Plaintiff's retention of containers and cost of transporting them from Pemba to Dar es Salaam and USD 1,106.71 being special damages as cost of transportation of one container. TERMCO therefore counterclaims a total of USD 42366.71 plus interest and costs.

In its reply to the Statement Defence, the Plaintiff joins issue with the Defendant in its defence, and also denies the Defendant's counterclaim, in that, of the only 26 containers of bitumen supplied by the Defendant, the Plaintiff returned all the empty containers after fully utilizing the bitumen. Furthermore, PRISMO claims that if there was any money due to the Defendants, it was entitled to set off the said sum from the amount owed by the Defendant to the Plaintiff as damages for breach of contract.

In its reply to the defence to the counterclaim the Defendant also joins issue with the Plaintiff, and further states that the plea of set off would not apply in the absence of an ascertained sum of money, and that the rest of the paragraphs in answer to the counterclaim are evasive.

And so, after the completion of the pleadings, this court, Kimaro, J (as she then was) framed the following issues for trial.

1. Whether there was a contract of sale of bitumen between the parties?

2. If the answer to the 1st issue is in the affirmative what were the terms of the contract?

3. Whether the contract is void for uncertainty?

4. Whether there was a breach of the contract and who is responsible for the breach?

5. To what reliefs are the parties entitled?

As will be noted below an attempt to reframe the issues was rejected by Kimaro J (as she then was). However in the course of preparing this judgment I found that an additional issue – **whether time was of essence to the contract** – was necessary for the proper determination of the controversy between the parties. So, I added it as the fifth issue.

The trial in this suit has had its twists and turns. It started in earnest before Kimaro J (as she then was) on 2/5/2005. The record was partly taken by long hand, and partly recorded by the Voice Recognition Machine. A total of 6 witnesses testified before her, of whom, she recorded the evidence of **PW1 CARLO DISIMONE, PW2 IRENE JACOB LUSINDE** and **PW5 PAULO TREVISAN** by long hand. The testimony of PW3, PW4, and PW6 was

recorded electronically. However on 12/4/2006 Kimaro J (as she was) disqualified herself from proceeding with the case. I took over the conduct of the case. On 18/4/2006 the Plaintiff closed her case and I recorded the only defence witness **Dr. ERMANO GHIRARDI (DW1**) and PW1 who was recalled to give evidence in defence of the counter claim and testified as PWD1. At the close of the defence case, the learned Counsel proceeded to address the court after which, it was my turn to prepare the judgment.

In order to prepare this judgment I had to depend partly on the evidence recorded by my predecessor trial judge. Unfortunately, for technical reasons, the transcripts on the evidence of PW4 and PW6, could not be produced before me. The reporters informed the court that the computer disc which had recorded those proceedings had collapsed; thereby making that record irretrievable. After some consultations with the learned Counsel we agreed on recalling those witnesses to give evidence denovo under s. 147 (4) of the Evidence Act and O. XVIII rule 12 of the Civil Procedure Code Act.

On 25/7/2007 we managed to set the case back on retrial. However of the two, only PW4 was available. After his testimony, MS Karume, learned Counsel for the

Plaintiff, decided to do away with PW6. So in this case, any reference to PW6 would only be for historical purposes, as the Plaintiff's witnesses shall continue to be referred to as recorded by my predecessor trial judge. I now turn to consider the evidence on record.

From the examination in chief, cross examination and re- examination of PW1, CARLO DISIMONE, the testimony of this witness is to the effect that he is an engineer with the Plaintiff's Company and was the day to day manager. The Company deals with road construction. On 11/5/2002, the Plaintiff signed a contract with the Ministry of Communications in Zanzibar for the construction of Mtuhaliwa – Chakechake road. He said that the contract was to last for 12 months. There were two addenda to the contract, which effectively extended the period of construction from 1st June 2002 to 30th June 2004. However the contract could not be completed in time. It was completed on 11/11/2204. The delay was attributed to lack of bitumen, and that before that, the works were progressing on very well, in fact ahead of schedule by 90 days.

PW1 further told the court that he contacted the Defendant for the supply of bitumen for the works

exhibited in the 2 addenda. He said that he sparked off the negotiations with the Defendant by a letter dated 29/11/2003 inquiring if he could get 59 containers of bitumen in three instalments. He tendered the said letter as Exh.P1. The essential part of Exh.P1 reads as follows:

> *"In addition to the 14 No containers mentioned in your Email our total requirement for the project is a further 59 No containers to be made available ex your depot to the following schedule*
> *15/01/2003 – 20 No containers*
> *25/02/2003 – 20 No containers*
> *15/03/2003 – 19 No containers*
> *Please be further advised that before a new agreement can be signed we require a firm commitment from you that these additional containers can be supplied as per own above schedule."*

Strangely, the fax is dated 29/11/2003 but the schedule requires supplies to be made long before the date of the inquiry. I, however, note that this was a typographical error, as was to be demonstrated by the subsequent evidence on record.

According to PW1, the Defendant confirmed his ability to supply the required quantity of bitumen vide an email dated 2/12/2003, which he tendered as Exh.P2. Again the crucial part of the email (ExhP2) reads: -

> *"Lastly the request for 20 TC for the 15th January 2004 it is ok. We guarantee that the consignment will be supplied without any delays and subsequent supplies at monthly intervals will be adhered to. However you must give us your schedule for the use of the bitumen so that we can plan our deliveries. In the meanwhile we have already placed the order with Durban so that they can start sending the consignment to Dar to enable us clear the bitumen from the port in time to meet the deadline."*

PW1 went on to tell the court that in another fax dated 6/12/2003 the quantity and the price were confirmed. However, as this was in Italian, the court initially marked it as Identification ID 1. After translation – from Italian to English it was received as Exh.P21.

On the terms of payment, PW1 said that previously they had paid the Defendant through a letter of credit and wanted to do the same in the transaction in question. He tendered the proposed letter of credit as

Exh.P3. However the Defendant rejected this arrangement, and also wanted a reduction of time of payment from 90 to 60 days after delivery. Besides they also asked for partial shipment of the cargo. He tendered the email containing the counterproposals from the Defendant as Exh.P4. Exh.P4 refers to Exh.P3 which is a SWIFT of a letter of Credit with a number of proposals, to which Exh.P4 responded as follows: -

> *"...However there are issues that need to be sorted out before this new letter of credit is accepted and also before we start deliveries.*

Exh.P4 further counter proposed:

> *"(1) We are not ready to pay any bank charges...*
>
> *(1) In the terms of payment it should be 60 days and not 90 days from delivery date. That is from the date you paid the cargo from our depot in Dar es Salaam and not after delivery of goods to its destination. Whenever it gets to your site is all your responsibility.*
>
> *(2) The delivery from our depot to your site should be done by PRISMO as agreed.*

(3) Partial shipment should be allowed. Reasons we cannot realize all the cargo at the same time. This is very important."

So, PW1 went on, by this time the quantity, the time of delivery, and its price had been defined. What remained were the terms of payment. In answer to Exh.P4, PW1 tendered Exh.P5 a fax dated 28/1/2004. Part of Exh.P5 reads: -

"1. Please Invoice to Prismo all the charges you had Prismo is ready to charge you all the damages related to the delay on delivery.

2. As per the first letter of Credit the terms of payment should be 90 days from the delivery date from the depot in Dar es Salaam.

3. No partial shipment is allowed. If Termcotank does not have the capacity to supply us No. 20 container each time, we are very sorry but we cant purchase the bitumen from you.

supplier in order to complete our work on schedule and keep within the limits of our transport expense. We are waiting your prompt response."

PW1 also informed the court that the Defendant responded to Exh.P7 in which they agreed to supply the required quantity and within the time suggested i.e. 12 containers every 10 days. The Defendant's acceptance fax dated 18/3/2004 was tendered and admitted as Exh.P8.

According to Exh.P8 the Defendant committed itself thus:

"We inform you that we have no problem in supplying you with bitumen for your project. To give you a better service we have collected empty containers from other customers and confirm that we will supply the 12 containers on a regular basis."

However, Exh.P8 also put in some suggestions to the Plaintiff: -

"It will be necessary for you to advise us when the ship is due in Dar es Salaam so that we can arrange the destuffing of containers and keep them ready for collection upon arrival of the ship in port. You must

ensure that the empty containers are returned immediately to have them ready for the next consignment.

However in order to manage to supply you without further interruption we suggest that you give your consumption on a daily basis."

PW1 went on to tell the court that by then the terms of payment had not been settled. The Defendant wrote an email suggesting that they were willing to accept a bank guarantee. PW1 said that they accepted this proposal. The witness tendered the email from the Defendant as Exh.P9. He also tendered the drafts of the bank guarantee as Exh.P10 and P11 and P12. On 7/5/2004 the Defendant wrote to accept the terms of payment, and the method of delivery. He tendered the fax from the Defendant as Exh.P13 and the final version of the bank guarantee as Exh.P14. According to Exh.P13 the Defendant informed the Plaintiff:

We are in receipt of your fax of even date and confirm that once we have in our hands the original bank guarantee we will release the 12 TCOU of bitumen 60/70."

It was also the evidence of PW1 that after receiving the original bank guarantee the Defendant supplied the first 12 containers, and expected him to continue with the supply after every 10 days. He said that the Defendant never supplied the next consignment as agreed, but supplied only 6 long after the agreed next 10 days. He said that they had to send a fax and a letter to remind the Defendant of the breach. He tendered the said letter dated 4/6/2004 as Exh.P15. Exh.P15 informs the Defendant thus: -

> *"Following the agreement for the supply of bitumen between PRISMO UNIVERSAL Italiana S.r.l. and TERMCOTANK, we had agreed for deliveries of 12 containers per trip.*
>
> *Your performance todate has been as follows:*
>
> *1st delivery 11/May 2004 – 12 containers*
> *2nd delivery 01/June 2004 – 6 containers*
>
> *While Prismo Universal Italiana expects the balance of six (6) containers, TERMCOTANK says it is not available.*

As you can see you have not fulfilled the terms of our agreement which is causing us delays with considerable consequential losses. We would therefore like to make you aware that all the consequential losses arising from prismo organization and equipment expenses in Tanzania, caused by delays from non performance of your part of the contract, will be claimed from TERMCOTANK."

It was also the evidence of PW1, that the Defendant wrote back in response to Exh.P15 confirming the delay. He tendered the Defendant's response as Exh.P16. It is an email dated 10/6/2006 and the crucial part reads: -

"Regarding the supply of bitumen, as informed over the telephone, we have had problems with the shipping lines for loading in Durban our bitumen container because of over booking. We have a confirmed booking for 6 TCOU (approx DO MT) which will be loaded on the MSC Aurona leaving Durban on 17/6/2004 ETD Dar 23/6. In the meantime our head office in Geneva are arranging the loading of other ships in order to supply your requirement. I will be keeping you informed on the loading schedule."

It was then that PW1 wrote to the Defendant complaining about the stoppage of work due to lack of bitumen and the consequences occasioned by the delay. This, he tendered as Exh.P17 which informed the Defendant that:

> *"Please be informed that from this morning of 10th June, 2004 the works on site are stopped due to lack of bitumen.*
>
> .....
>
> *We further remind you that the Asphalt works were scheduled to be completed on 30th June 2004 according to our contract with MO CT.*
>
> *In view of the above mentioned the consequential expenses and loss that will arise from the delays in deliveries, in terms of Prismo organization in Tanzania, working apparatus etc, will be claimed from Temcotank."*

After this, PW1 continued, the Plaintiff contacted a lawyer who wrote to the Defendant giving him time to supply the remaining 28 containers of bitumen by 15/7/2004. He tendered the demand letter from Karume & Co, Advocates dated 16/6/2004 as Exh.P18. The witness said that the Defendant failed to supply the bitumen. So he had to get the supply from an alternative

supplier, which was ORYX and thus effectively terminating the contract with the Defendant. After inquiries PW1 sent a letter to ORYX accepting the terms of supply from ORYX. He tendered the fax as Exh.P19. According to this Exhibit, the Plaintiff agreed to purchase the alternative bitumen from Oryx at the price of USD/MT 270,100/=. PW1 also said that he instructed his lawyer to terminate the contract with the Defendant. The lawyer wrote a letter on 22/7/2004, terminating the agreement. He tendered that letter as Exhibit P12.

On the question of price, PW1 said that the bank guarantee was for USD 195,000 which covered the value of all 59 containers.

PW1 wound up his testimony by giving details of damages that the Plaintiff has suffered. He said his Company suffered damages by way of depreciation of the equipment at the rate of Tshs.627,405.70 per day for 72 days. The depreciation is computed at 33. 33% per annum for every 3 days. The second item was for Tshs.1,185,122.92 for expatriate staff and 630,049.68 for local staff, 26,204.26 for electricity.

Other damages include, Tshs.1,528,089.39 for hire of equipment, 89,415.99 for telephone, 71,392 for house

rent, 82,666.67 as cost of security guards, 13,333.33 professional services for expatriate staff. For 5 expatriate staff the cost was Euro, 10,000, 3650, 2750 USD 2250, 2600, and 2500 for PW1 himself. Mr. Tetis Costa, Mr. Simone Costi, Mr. Michael, Mr. Paul Trevisan and Mr. Sergio, in that order. He went on to elaborate that for the 72 days of idling about they did not fire any staff and so it cost them Tshs.49,883,572.18 in total but the exact days of stoppage was 87 days.

On the counterclaim, PW1 said that he did not agree with the Defendant's claim, because they are claiming more than what they are entitled to be paid.

Elaborating his testimony in cross examination, PW1 said that while his contract with the Ministry of Communication was to end on 30/6/2004, the bank guarantee was supplied on 10/5/2005. PW1 said that although only 50 days were left to the date of completion, he was confident that he could complete the contract within that period because the Defendant had agreed to supply 12 containers after every 10 days and not 59 containers in 50 days. He said that the first supply of 12 containers was made immediately after the supply of the bank guarantee, to be exact on, 11/5/2004. He said that the bank guarantee marked the conclusion of the sale.

That was on 10/5/2004, and that was the date in which the contract of sale became effective. He said from 29/11/2003 to 10/5/2004, the parties were still negotiating on the terms of the agreement of sale, although there was no written agreement.

PW1 also said in cross examination that he had ordered 14 containers from ORYX weighing 17.5 metric tonnes, a quantity smaller than that supplied by the Defendant. He also admitted that the ORYX price was inclusive of VAT, whereas that from the Defendant was VAT free because the Defendant imported the bitumen on the Plaintiff's behalf and that the project was financed by AID and so was VAT exempted because of the terms with the Ministry of Transport. He said that he used the bitumen for addendum I and 2. He said the suit relates to these addenda. PW1 said that to him the documents listed in paragraph 5 of his plaint constitute the terms of agreement. He went on to give a descriptive explanation of the contents of the exhibits that he tendered in court to make his point. He emphasized that the agreement was concluded on 10/5/2004, and asked the court to look at Exh.P14 as containing the terms of the agreement. Pressed further however, PW1 said, Exh.P14 does not state the quantity of the containers, the frequency of supplies, nor the dates of the first and last

deliveries, nor the unit price, although the total is shown as USD 195,000. Neither do Exh.P7, P8 or P13 contain the unit price. He admitted that neither did those exhibits contain the method of payment.

PW1 said that he did not think that it was important to inform the Defendant of the commencement date of the contract, but the date of completion was 30/6/2004. He said, that the work stopped on 10/6/2004 and both the Resident Engineer and the Ministry complained about the delay. He said that though he had no specific agreement with Oryx, the latter supplied the bitumen although the plaint is silent on the unit price of bitumen from Oryx. He said on receiving tax invoices from Oryx, he paid the same.

On re – examination, PW1 said that the price of the bitumen is contained in ID1 (Exh.P21). Apart from that the quantity was 59 containers, to be delivered in 12 containers on each consignment after every 10 days effective from the date of delivery of the bank guarantee which was 10/5/2004, and that the first delivery took place on 11/5/2004. He said that after receiving the first 12 containers, they did not receive any other deliveries. He said that he did not think it was necessary for the Defendant to know the Plaintiff's detailed consumption of

bitumen. He said that the Defendant undertook to deliver bitumen to the Plaintiff on a regular basis by which he understood to be 12 containers every 10 days. He said that in his view, bank guarantees were issued to people with whom one had an agreement.

He confirmed that apart from the first 12 containers, he received another 6 and then 2 other containers thus making a total of 20 containers although only 19 reached the site. He said that sufficient bitumen was important for the completion of the work, if the Plaintiff was to avoid suffering a penalty. It was Oryx which supplied all the remaining quantity of bitumen required to complete the work. He said that for the supplies from Oryx, they had to pay VAT, because of the time element, otherwise the completion of the project would have been delayed.

PW2, IRENE JACOB LUSINDE, was the next witness for the Plaintiff. As an Administrator/Secretary for the Plaintiff, part of her job was to pay salaries at the end of each month to all local and expatriate staff. She also paid electricity, and telephone bills. She also paid casual labourers fortnightly, on a list prepared by the Accountant.

PW2 went on to testify that in June 2004, the Company ceased work because there was no bitumen and she was the one who used to send faxes and telephone the Defendant to remind and inquire on the supply of the bitumen. She was often told to wait, but the bitumen was never supplied. She said that her boss then asked her to ring BP and inquire if there was any bitumen, but BP had none and so referred her to Oryx where they eventually got the stuff. She said although work had stopped for lack of bitumen, no employees were terminated, and so they continued to be paid. She said that the Plaintiff had between 83 to 85 permanent employees including expatriate staff. She said that she knew their renumerations because she was involved in the preparation of the contracts of employment, and entered their salaries in the computer.

PW2 then illustrated the payments made to both the expatriates, and the local staff as follows:

Expatriate Staff:

1. **CARLO DI SIMONE**
    - Salary Euro 9000
    - Food allowance Euro 1000
    - House allowance USD 300
    - Security guards 4 – Tshs.60,000 each

- Decards – USD 65

Motor vehicle health allowance and Hotel accommodation were also provided at the expenses of the Plaintiff.

2. PET EN NNIO

- Salary – Euro 3600
- Food allowance Tshs.270,000/=
- House allowance USD 300

as well as health allowance, Hotel accommodation and food and motor vehicle.

3. SIMONE SANTICCHIA

The witness said she had no information on this expatriate's salary because his contract was signed in Italy, but that locally he was paid

1. Food allowance – Tshs.270,000
2. House rent – USD 300
3. Security guards (4) Tshs.60,000/= each

as well as Hotel accommodation and food whenever he travels on duty.

4. MICHAEL HARKER

1. Salary – USD 2000
2. Allowance Food – 270,000/=

3. House rent – USD 300
4. Security guards 4 – Tshs.60,000/= each. He had also a motor vehicle.

However, PW2 informed the court that this expatriate was no longer working with the Plaintiff Company, since mid 2005.

5. PAUL TREVISAN

1. Salary – 2000 USD p.m.
2. Food allowance 270,000/=
3. House rent – USD 300
4. Security guards (4) – 60,000/= p.m. per guard.

However PW2 informed the court that this expatriate was now getting a different salary.

6. **PAUL TREVISAN and MICHAEL HARKER** used to share a house at USD 300 rent per month.

7. SERGIO ZENAWIDO

1. Salary USD 2500 p.m.
2. House rent 200,000/= p.m.

He also had a motor vehicle.

According to PW2, the Plaintiff Company paid for all electricity bills in all the houses occupied by the expatriates. The Plaintiff also used to pay telephone bills for the office and the consultant – one PHILIP RUDIE as well as his office rent, which was USD 300 p.m. The office rent for the office was USD 300. The point that PW2 intended to make, was that although work had stopped, in June 2004, to mid October 2004 when work resumed, the Plaintiff continued to pay all these expenses, but she could not recall exactly for how many days work had stopped as, intermittently, work proceeded with the little bitumen that was left. However work began in full swing only upon receiving bitumen from Oryx.

Then with the aid of payrolls to which PW2 refreshed her money, the witness recalled that in June 2004 the amount paid as salaries to local staff was Tshs.8,804,877.06 over 80 employees. In July 2004she paid a total of Tshs.7,732,478.44 to 73 employees. In August 2004 the employees were paid a total of Tshs.8,073,562.26 for 71 employees. In September 2004 a total of Tshs.9,286,268.36 was paid.

On casual labourers, PW2 said that the rate of wages was 2500/= per day. Upon refreshing her memory she said that in June 2004 the Plaintiff paid a total of Tshs.846,840/= for the first two weeks, and Tshs.819,285/= for the second half of June 2004. In July, 2004 a total of shs.585,348.50 was paid in the first two weeks, and shs.694,180/= for the second two weeks. For August 2004 a total of Tshs.637,115/= was paid in the first two weeks, and Tshs.649,600/= in the second two weeks. In September 2004 a total of 621,685/= was paid for the first fortnight, and Tshs.734,030/= for the second fortnight. In October 2004 the Plaintiff paid Tshs.696,740/= for the first fortnight and Tshs.737,910/= for the second fortnight.

As for telephone bills, PW2, upon refreshing her memory, testified that in July 2004 she paid a total of Tshs.1,613,144/=. For the month of June 2004 it was Tshs.2,224,963/=. In August she paid Tshs.2,467,439/=. In September 2004 she paid Tshs.2,022,685/= and for October she paid a total of Tshs.741,548.

On electricity bills, PW2 said she paid the bills as follows: -

Batch	Date		Amount
172	16/9/2004	-	7,272
171	16/9/2004	-	47,295.99
170	16/9/2004	-	206,719.16
169	16/9/2004	-	87,364.07
168	16/9/2004	-	166,342.28
			80,147.59
167	16/9/2004	-	48,490.17
63	6/8/2004	-	90,683.59
60	6/8/2004	-	1,699,839.29
62	6/8/2004	-	152,949.97
64	6/8/2004	-	211,994.40
65	6/8/2004	-	43,518
140	13/8/2004	-	103,000
61	6/8/2004	-	28,486.75
79	11/10/2004	-	49,372.38
77	11/10/2004	-	78,861.26
78	11/10/2004	-	225,355.23
76	11/10/2004	-	328,055.32
	11/10/2004	-	187,715.20
75	11/10/2004	-	28,812.39
173	16/9/2004	-	130,254.76
131	21/12/2004	-	58,195.20

For the month of November – December

134 21/12/2004 - 119,966.87

For the month of September – November

138 29/12/2004 - 223,818.41

For the September – December 2004 bill.

PW2 said that she started working with the Plaintiff on 18/9/2002.

In cross examination, PW2 said that for batch No. 131, the bill was for September – October, November but could not say the amount for each month. Similarly for batch No. 134 for shs.119,966.87 paid on 21/12/2004. So the case with batch No. 138 for shs.223,818 for September – December. PW2 informed the court that she started working with the Plaintiff on 18/9/2002 and that it was PW1 who instructed her to ring to the Defendant, where she spoke to one Karima, but could not recall the exact month in which she started talking to the Defendant. She said that she did not know who Dr. Girhard was, and did not recall having asked the Defendant to send a proforma invoice but did so to Oryx. She said that her role was mainly that of making calls, sending faxes and receiving the same. She said that construction stopped in June 2004, and bought the

bitumen from Oryx in October 2004. She said that she knew that work had stopped because there was no bitumen. Although she was not a recipient of the bitumen she would not recall whether the Defendant supplied any bitumen between June and October 2004.

The next witness for the Plaintiff was **MICHAEL ANTHONY HARKER** (PW3). He said he was an engineer with 37 years experience. He said that he specialized in materials engineering by which he was engaged in testing the materials to make sure that they met the standards for various specifications demanded in contracts. He is also responsible for procurement of those construction supplies from outside.

He said that in 2004, he was working for the Plaintiff Company in Pemba, constructing roads in the island from Mkoani to Chake Chake Airport as a materials manager, at a salary of 2,250 US dollars per month, together with 270,700 Tshs. for food allowances, annual leave, and a return air ticket. He said that he had worked for PRISMO up to September 2005.

PW3 informed the court that he knew TERMCOTANK as supplier of bitumen, but that TERMCOTANK was not able to supply the required

bitumen. He said that the Plaintiff required 900 metric tonnes, out of which the Defendant supplied only 320 metric tonnes or 19 containers. As a result, work had to stop for about 3 months. He said that it was his responsibility to take the containers from Termcotank up to the port and load them onto the chartered ship. However, he experienced problems with the supplier as they did not get 12 containers every 10 days as they had agreed. After this they had to look for an alternative supplier who turned out to be Oryx. They had no problem with Oryx.

He said that although he was not a financial man he knew stoppage of work meant financial loss as workers, like himself had to be paid in full. He said that all the other work except this one was finished, so there was no other work to do for Prismo.

On Termcotank's claim that Prismo kept empty containers belonging to the Defendant, PW3 said that this was not true, because the arrangement was that they would take the empty containers back to Termcotank and bring back the full ones. It would sometimes be Termcotank who would load the full containers on hired vehicles and they (Prismo) would take them to the port and load them onto their ship

chartered from Zanzibar. Once loaded, the containers are taken to Mkoani port, Pemba.

He said that the idea of delivering in 12 container lots was logistical, in that, in that way, the ship would be loaded in full and thus more cost effective rather than loading only half, for the same cost. And besides, 12 was the quantity of containers that they would use every 10 days.

In cross examination, PW2 said that he did not personally source bitumen from Termcotank, as this was done before he joined Prismo. PW3 said he did not remember exactly whether Termcotank supplied 17 or 19 containers, altogether. When asked to read paragraph 8 of the Reply to the Amended written statement of Defence, PW3 said that the Plaintiff said it received only 26 containers from the Defendant, but PW3 said, whether it was 17, 19 or 26 containers, the bottom line was that they did not get the bitumen they required. PW3, said that he could not source bitumen elsewhere earlier before the stoppage because he did not know that Termcotank had such problems in supply. He said that when the work stopped the company had to retain such staff as truck operators, labourers and the usual plant, crusher, quarry staff. In short he said that the whole

team was needed because the same equipment would be engaged. Finally PW3 said hat he left Prismo on his own accord.

The next witness was PW4. As noted above this is one of the witnesses who had to be recalled, as the record of his evidence was technically lost.

PW4 introduced himself as a Chief Accountant with the Plaintiff Company. At the material time, he was working with the Plaintiff in Pemba in the construction of a road to Chake Chake. Basically his duty was to record all the operations of the Company for purposes of preparing annual financial reports. These reports are collected from various documents such as invoices, payment receipts and bank accounts. All these are then recorded in a programme called TALLY. The essence of the evidence of this witness is that he made computations on damages which the Plaintiff has claimed. This he did, by using the information which he had stored in the programme. According to his records the projected total sum claimed as damages is Tshs.405,664,110.35 which consisted of indirect expenses, interests charged on a daily basis, times the number of days on which the operations stopped. Added to that is the difference of the price of bitumen which

they had to obtain from a different source. The costs represent the entire period of stoppage between June to October 2004. According to this witness, the total costs shown above depicted only projected costs because at the time of filing the plaint, he had not yet collected all the relevant receipts and invoices. So on being recalled he had come up with new actual calculations.

According to PW4 the total cost of direct costs was Tshs.3,862,006.47 per day. The total costs of depreciation for fixed assets such as motor vehicles, computers furnitures refrigerators industrial and construction equipment is Tshs.627,403.17 per day. The expatriate salaries cost Tshs.1,185,122.92 per day. Later PW4 said for this item the cost was Tshs.1,037,877 per day. So the total for 72 days was Tshs.346,148,657.54 for June, July and August 2004. He informed the court the 72 days were a total from 25 days (June), 29 days (July) and 18 days (August). He also revealed that of the 346,148,657.54 shs.204,333,414.25 was the total actual cost, whereas the rest was 15% tax and interest at bank rate. For depreciation of fixed assets the total for the three months was Tshs.627,403.70 per day x 72 days totals shs.45,173,061/=; and for expatriate staff for 72 days the cost was Tshs.75,453,960.86. For permanent local staff the total cost for 72 days was

Tshs.34,847,203.51 So the total wage bill for 72 days was 113,675,343.92 and for casual staff the total was Tshs.3,374,152.55. PW4 also told the court that the total cost for electricity was Tshs.1,130,020.30 for 72 days. For rent of equipment was Tshs.41,928,366.49. On telephone bills the total cost was Tshs.6,671,299.32. For house rent, the total cost for the period in question was Tshs.5,172,898.28. There was also cost for gas service which was shs.5,111,311.83 for all the days not worked. Then there was a charge on professional services whose total was Tshs.939,784.95. There were also leasing expenses for some equipment, which according to PW4 cost a total of Tshs.61,501,360.69.

PW4 then testified that the direct costs e.g. on salaries were gross in the sense that they included items such as taxes and social security contributions from the employer. In the end, PW4 summarized that the actual damage suffered by the Plaintiff by way of depreciation of assets, salaries, electricity, equipment rent professional services, telephone bills, house rent and gas services) 346,148,657.54.

PAUL TREVISAN (PW5) was the next witness. He said that he had worked for PRISMO for 2 ½ years as a workshop Manager. He looked after equipment such as

the crusher, asphalt plant, bull dozers, cranes, wheel loaders, drillers and motor vehicles.

He said that in June 2004, they had to stop work because they had no bitumen, but he would not know why it was not there. He said that work stopped for sometime up to October 2004 but the stoppage was not total. However, when the work stopped, he still got his salary of USD 2200 p.m. together with food allowance of Tshs.270,000/= p.m., housing and security services and transport expenses.

He said that in his experience, road construction begins with surface laying, followed by a stone base, and then laying bitumen; which is the last stage. He said that the work at Pemba was for laying bitumen.

PW5 went on to testify that in his workshop he had between 20 – 25 employees including casual labourers. When the work stopped, the workshop was not closed. All employees continued with the work.

In cross examinations, PW5 said that he did not study mechanics but only acquired experience from working with his father, who was a workshop manager. He repeated that from June to October 2004 work had to

stop because of shortage of bitumen. He said in putting bitumen, machines such as a paver, a roller, a water tank and lames are used and all these equipment came from his workshop. At the time of deploying the bitumen, only a few mechanics would go to the site to oversee the equipment. The others would remain in the workshop. As hinted above after recalling PW4 and failing to trace PW6, MS Karume closed the Plaintiff's case.

On the other hand, the Defendant produced one and the only witness, **DR. ERMANNO GHIRARDI** (DW1) who also tendered several documentary exhibits. DW1 described himself as a representative and coordinator of Termcotank for East Africa and that he started working for the Defendant since 1st April 2003. He said that they trade in bitumen and they import it from Durban, South Africa. He went on to inform the court that in Tanzania the other importers of bitumen were Shell, Oryx and MGS.

DW1 said that he knew PW1 CARLO DISIMONE who had ordered bitumen from the Defendant Company for his Company, PRISMO ever since 2003. Referring to paragraph 5 of the plaint, DW1 said that there was no contract, but just an initial request for supply. He went

on to inform the court that there were no negotiations at all, just a request for the supply of bitumen. He specifically referred to ExhP7 and said that this was just an inquiry whether the Defendant could supply bitumen at the rate of 12 containers per trip from the Defendant's depot in Dar es Salaam to Pemba for every 10 days.

DW1 said that there was no total agreed quantity of bitumen that the Plaintiff asked to be supplied with, nor the date of commencement of the supplies, nor the date of completion. He said there were no prices either. Referring to Exh.P8, DW1 said that the Defendant was just expressing its willingness to supply twelve containers, on a regular basis, by which he meant they would be supplying them as and when they received them from South Africa, provided that they received back the empty containers for purposes of refilling them. DW1 also said that they could only effect the supplies if they knew the Plaintiff's consumption of bitumen on a daily basis. He said that this was necessary to enable them monitor the actual requirement/consumption so that they, in turn, could place orders immediately for the next supply from South Africa. However the Plaintiff never sent to them the daily consumption information. Addressing himself on Exh.P13, DW1 said that this was a fax from the Defendant to the Plaintiff, expressing their

readiness to supply 12 small containers of grade No. 67 on receipt of the guarantee. At that time the containers were already with them, but there was no date of release, because they were not certain of the date they would receive the bank guarantee.

Referring to paragraph 6 of the plaint, DW1 said that there was no agreement for the supply of 59 containers of bitumen. He insisted that the contractual relationship between PRISMO and TERMCOTANK expressed in the bank Guarantee, was just a request suggested by the Plaintiff to the bank, but in fact there was no such contractual agreement, but just a normal business relationship. He also said that the Bank Guarantee did not indicate the quantity of containers but just a lump sum maximum amount payable by the bank, neither did it express the frequency of supplies nor the manner of delivery. DW1 admitted to receiving the bank guarantee on 10th may 2004.

Reacting to Exh.P1, DW1 said that this was just a fax from the Plaintiff making inquiries for the supply of bitumen.

He said that at no time had they had any agreement with the Plaintiff nor did they discuss any draft

agreement with them nor received one from them. However, DW1 said that he was aware that PRISMO had a contract to construct Mtuhaliwa to Chake Chake Road in Pemba, and that he learned this from the correspondence, but the Plaintiff never supplied to the Defendant with its work schedule for the construction of the road. He said that it was important for him to know when the work would start and when it would end.

Referring to Exh.P15, a letter from PRISMO, DW1 said that according to this exhibit, there were 2 roads; one needed resealing, and another, (the Mtuhaliwa – Chake Chake road) needed block spot improvement. To his knowledge, resealing meant redoing the bitumen work. However, he insisted that there was no agreement for the supply of bitumen with PRISMO.

DW1 said that to his knowledge in road construction, bitumen was required once the base of the road is completed. He said that according to the evidence on record the Plaintiff completed the base course in middle August 2004. So the Defendant could not have been held responsible for the delay in June 2004. And so it was not true that, at that time, they were doing nothing while waiting for the 12 containers as CARLO DISMONE

had testified. He said that if that was so, that was their fault, work was going on.

DW1 said that he remembered to have delivered first, 12 containers in May 2004, and 6 containers in June 2004, and some more (he couldn't remember the quantity) in July 2004. So, DW1 repeated in closing his evidence in chief, that there was no contract between the Plaintiff and the Defendant. The suit should therefore be dismissed.

In cross examination, DW1 admitted that he had a vast experience as a businessman and knew the basic principles of an agreement of sale. He said that he was aware that in such contract a price had to be known, and that supply would depend on availability. He said that he demanded a bank guarantee from PRISMO to ensure that they paid and that the lump sum expressed in the guarantee only represented the maximum price that PRISMO would pay for the product. With regard to the quantity, DW1 said that it was the Plaintiff who drafted the guarantee and not Termcotank. He admitted however, that finally the guarantee was worded to the Defendant's satisfaction after correcting whatever they did not accept. He was specifically referred to some corrections inserted by hand in Exh.P11. But, despite

the corrections, DW1 insisted that there was no contractual relationship between them and PRISMO because they did not have a signed contract. He tried to place this omission in the hands of KARIMA, an official of Termcotank who had a hand and inserted the corrections in Exh.P11, but DW1 said that he personally did not take part in the formulation of the Bank Guarantee. DW1, however, admitted that KARIMA was working for Termcotank, and that although she had opportunity, she did not correct the expression *"contractual relationship"* in the guarantee and that she had the mandate to change it, but did not.

DW1 also admitted that the amount of USD 195,000/= shown in the guarantee couldn't possibly represent the value of 12 containers. He also admitted that, it was agreed, that delivery would be from the Defendant's depot and not to deliver in Pemba. In that case the Defendant deleted the term from the draft guarantees (Exh.P.11) *"delivery in Pemba"* and substituted with it *"delivered DDU ex – work Termcotank in Dar es Salaam depot...."* He agreed that the terms of payment would be 90 days from the date of delivery upon receipt of an invoice. He said that the wording in Exh.P14 (the bank Guarantee) was borrowed partly from insertions made in Exh.P11 by KARIMA, and eliminated

the wording suggested by PRISMO. However, whatever changes made in Exh.P11 and incorporated in Exh.P14, DW1 kept on reminding the court that he was not personally involved in the changes.

Examined further, DW1, admitted that according to ExhP14 the period of supply extended to 30th September 2004, from 30th June 2004 but said that he did not know the reason behind the changes as he was not involved in the formulation of the bank guarantee. He said that beside the correspondences, there were also communications by phone between DISMONE, himself, Karume, and other officials of Termcotank.

DW1 was emphatic that although the price was known, and the quantity of supply (59 containers) was known, there was no signed agreement. He said that ,however, there was a letter to the Plaintiff that he would only effect supply of the bitumen as and when possible, that is to say on condition that they received their supplies from their supplier in Durban. But he then quickly admitted that he did not inform the Plaintiff that they were not capable of supplying the full quantity of 59 in one lot. To this effect however, DW1 was referred to Exh.P4 and Exh.P5 in which PRISMO categorically denied partial shipment suggested by the Defendant.

DW1 then admitted that the Defendant agreed to reconsider their suggestion, vide Exh.P6. In the end, DW1 admitted that the discussion that followed centered on how to deliver the 59 containers. He admitted that Exh.P7 was a letter for the Plaintiff seeking confirmation on the ability to supply the bitumen and the importance of timely delivery i.e. at 12 containers every 10 days, which for 59 containers would mean 5 trips thus totaling fifty (50) days. He admitted by his letter (Exh.P8) that he could comply with the Plaintiff's demand for the supply of 12 containers per trip of ten days. But on this, DW1 added a rider, that but then the bank guarantee was never issued until May 2004, and these correspondence were in March 2004.

Asked to clarify what he understood by his commitment to supply *"on a regular basis"*, DW1 said, by that, he meant they would supply according to what they would be receiving from their supplier in Durban, but admitted that he did not say that, in the correspondence. He said to him *"regular"* meant according to the wishes of the client, but that, this would not be so if they in turn did not receive what they had undertaken to supply. DW1 then went on at great length, to define what *"regular basis"* meant in his knowledge of the English language, but ended up saying that, to him this meant

"depending on their supply from Durban". He finally succumbed that the word "*regular*" means *"at given intervals"*, and that is what 12 containers at 10 days meant, and admitted that he confirmed this mode of supply to the Plaintiff without mentioning or tying it to Durban, but also went on to note that this was subject to the return of empty containers on an equally regular basis.

DW1 was then taken through the technology of emptying containers full of bitumen and said that they were to be emptied as the road works progressed and that was why he wanted to know their daily consumption. He said that whether they had supplies from Durban or not, it was important that the empty containers were returned as soon as possible in order for them to be refilled. However, DW1, denied that his failure to supply the 59 containers had anything to do with non availability of bitumen from Durban, but said that if he had the containers he would have waited for the supply from Durban, and refilled them. He said, however, he did not receive all the bitumen from Durban.

Turning back to the guarantee, DW1 was led to admit that through Exh.P12, he guaranteed to release the first 12 containers on receipt of the original bank

guarantee and that he received the bank guarantee on 10/5/2004 and made the first delivery on 11/5/2004. He was then asked to reckon that according to an earlier undertaking, 50 days within which to supply would have taken them up to mid July 2004. So in effect DW1 admitted that he knew the dates of commencement and completion of the supply of bitumen, but said that this was decided by KARIMA and the head office in Geneva. However, he admitted that if the Defendant would have supplied beyond 31 July 2004, the bank would not have paid, according to the bank guarantee. But DW1 insisted that personally he had no part in these negotiations and so would not know why the 31st July 2004 was chosen but agreed that there must have been a reason.

DW1 was also led to admit that some bitumen was supplied to the Plaintiff and it was not meant for free, but the supply was based on the bank guarantee. It was not delivered as a gift, but that it was not necessary to have an agreement for someone to buy bitumen from them. He said that in the present case, what they had was some papers in which PRISMO were inquiring whether they could supply them with bitumen, but there was no signed agreement. The Plaintiff could have gone to someone else to get the bitumen, and the Defendant would not have been sued for breach of contract.

However, DW1 was led and further repeated that he knew the price, the quantity, the method of delivery, the mode of payment, and the type of product required by the Plaintiff and the date of commencement; but insisted that there was no signed agreement, as even with those particulars, the Plaintiff could still go for these products somewhere else, and that the Defendant did not stop them. But, DW1 accepted, that Exh.P.14 guaranteed the entire supply, and that they only accepted it in order to cushion any deliveries they could have made. He said that he was not obliged to supply all the 59 containers. The only thing they had, was an agreement to supply whatever was available, and accordingly supplied 18 containers and stopped because they did not get their supplies from Durban. Later DW1 retracted this statement by saying that he wrongly mentioned the word "*agreement*" and that what he meant was that he was free to supply whatever was available and the Plaintiff was free to get these supplies from somewhere else. He said that this was like going to a supermarket where one may not get what one wanted, and the supermarket is not bound to keep all the products that a customer needs.

DW1 then admitted that whether the Plaintiff would have paid by cheque or by bank guarantee they would

still have a problem in supply as they had problems with their suppliers in Durban.

DW1 then admitted that an agreement could be oral, and so could its terms. DW1 admitted that in his counterclaim, he claims for the payment of bitumen supplied to the Plaintiff. He said that they had 12 containers already in their depot, although PRISMO also happened to need 12 containers at the sametime and they agreed to give them after receiving the bank guarantee.

DW1 was also led to admit that road contractors are obliged to construct roads within an agreed time, and that was not different with Prismo. He however, admitted that he was not an expert in road construction as he was not an engineer. He then said that although bitumen could be obtained from other suppliers locally, it was not the sort of product that could be delivered as and when required and is not readily available. He said that he knew for sure that Oryx had the bitumen in stock, but blamed the Plaintiff for waiting for too long before going to Oryx. Later however, DW1 told the court, that by his letter he asked the Plaintiff to wait as they were expecting something in mid July 2004, in the quantities of 8 and 10 containers by 10th July. But according to DW1, the

Plaintiff was still free to look for the product from elsewhere because even with the promised arrivals, it would not meet their requirements in full. However, DW1 said that the shipment did not arrive within the time expected although it takes about 5 to 6 days for a ship to sail to Tanzania. He was also led to admit that, he informed the Plaintiff of the changes in the date of shipment and regretted for that, but did not ask the Plaintiff to look for the product elsewhere, because they (the Defendant) would try very hard to supply the Plaintiff with the rest of the bitumen, and that he apologised for not receiving the product in time and that they found themselves so obliged by the letter of guarantee. He also admitted that by subsequent correspondence, the Defendant kept on informing the Plaintiff of other shipments so as to deliver whatever they could get, and according to what they had agreed to deliver. He said that even the apologies were towards non delivery of the scheduled arrivals from Durban that failed because the products did not arrive in time.

In re examination, DW1 told the court that he didn't know in what context he used the word "*obligation*" to apologise to the Plaintiff in Annexure D4 and D4B to the Written Statement of Defence, but it must have been, just out of politeness. With regard to the delivery of 12

containers mentioned in Exh.P15, DW1 said that it was PRISMO's obligation to ship them from Dar es Salaam to Pemba but he didn't know the size of the ship in question, but he knew that the ship on 1st June 2004 was smaller. He said that he chose TCOU containers because they were smaller and could be loaded on a 15 tonner ship because it was difficult to find a crane that could offload 30 tonnes containers.

On the term "regular basis" DW1 said that he deliberately chose the term because he was not sure if he could be able to get the numbers and that he was not answering to the Plaintiff's terms of delivery of 12 containers every 10 days and that to him *"regular"* basis *"meant"* as and when they received them.

Referring to Exh.P4 and P5 together, DW1 clarified that here the parties had disagreed on the letter of credit which was not accepted by the Defendant and the payment terms of 90 days, and on the terms of delivery which the Defendant suggested that it be from the Defendant's depot. DW1 went on to say that there were also disagreement on partial shipment suggested by the Defendant.

On the quantity of 59 containers, DW1 said that although the Plaintiff had said they needed that much at no time had the Defendant agreed to supply that quantity in one "goal". The original bank guarantee of 3/5/2004 never mentioned the number of containers required or when they were required; nor the completion date; nor the unit price, except the lump sum. He said that the bank guarantee was signed by the bank officials, and that it was KARIMA and the accountant, Mr. Pedro Delgado, who were involved in the formulation of the bank guarantee.

The Defendant then recalled **Dr. ERMANNO GHIRALDI** to present his counterclaim. For the purposes of the counterclaim, the witness retained his description as DW1. He tendered 8 documentary exhibits which together were intended to build up the Defendant's case against the Plaintiff.

According to DW1, the Defendant, first claims from the Plaintiff, the total sum of USD.19110 being the amount of unpaid invoices for bitumen delivered to the Plaintiff which did not form part of the bank guarantee as it was supplied before the guarantee came into force. The second claim is for USD.14,892 being special damages for delay in returning 40 empty containers at

the rate of USD 12 for every container delayed. DW1 said that the rate of penalty for delay had been applied before, as demurrage charges. The third claim is for USD 7257 being USD 3825 the cost of transporting 7 empty containers from Pemba to Dar es Salaam, and a further USD 3432 as retention charges at the rate of 12 USD per day up to 13th September 2004.

DW1 also testified that of the last consignment of 8 containers the Plaintiff collected only 7, leaving behind one. The one left behind had to be transported back to the Defendant's depot at the cost of USD 1,106.71. However, since the Defendant had already invoiced the Plaintiff for all the 8 containers, it sent a credit note for USD 3500 for 1450 tonnes of bitumen contained in the container, to the Plaintiff.

The Defendant tendered the following documentary exhibits. Exh.D1 is a fax dated 3/4/2004 from the Plaintiff to the Defendant's offices in Geneva. For the purposes of the counterclaim, I think the relevant paragraphs are (c) and (d) which read as follows:-

> *"(c) Regarding the payment of USD 59,000 it is not correct that it is overdue. Dar es Salaam delivers (sic) the bitumen 60/70 in two*

consignments, first on 19/December 2003 under invoices Nos. 3641, 3643, and 3644 worth USD 30,811.66 and the second on 09.1.2004 under invoices Nos. 3653, 3654, 3655, 3656 and 3657 worth USD 31153.35. In total this amount to USD 61,965 which shall be paid to you on 09/04/2004 (90 days after delivery) as agreed".

(d) Concerning the supply of MC 70 (your fax of 02/04/2004) it is expected to be delivered on 05/04/2004 and shall be paid for, like the last supply, directly from site to your office in Dar es Salaam."

Exh.D2 is a telefax from Termco to the Plaintiff dated 21 July 2004 reminding the Plaintiff to renew the bank guarantee to cover some unpaid invoices. Exh.D3 is a letter dated 20th August 2004 to the Plaintiff reminding the latter to settle some outstanding invoices. Paragraph 2 of the letter is reproduced for ease of reference:-

"Kindly note that todate the amount overdue is USD 66,256.51, and by the end of this month a further USD 25218.96 will become due, thus bringing the

total due to us to USD 91,475.47 and Tshs.1,597,000/= for transport."

The letter also ended up by threatening the Plaintiff with realizing the guarantee to recover the outstanding invoices and only resume supply of bitumen upon all the dues being paid.

Exh.D4 is a tax invoice dated 13th April 2004 from the Defendant to the Plaintiff for USD 9,609.60 being the gross value (inclusive of VAT) for the supply of 88 drums of bitumen MC. 70 at USD 91.00 per drum. Exh.D5 is also another tax invoice dated 13/4/2004 from the Defendant to the Plaintiff for the value of USD 9500.40, inclusive of VAT, for delivery of 87 drums of back MC 70 at the unit price of USD 91.00 per drum. Exh.D6 is an email dated 26 April 2004 from the Defendant to the Plaintiff reminding the latter to confirm that it will return the 12 empty containers (TCOU). Exh.D7 is another email dated 7/6/2004 from the Defendant to the Plaintiff, inquiring into the reason for returning only 6 out of 12 containers that should have been returned.

And lastly Exh.D8 is a letter dated 2nd August 2004 from PRISMO to Termcotank, acknowledging receipt of the last 8 containers of bitumen 60/70 pan on

31/7/2004, without prejudice to any claim for damages for breach of contract that the Plaintiff might have against the Defendant.

In cross examination Dr. Ghiraldi admitted that as all the other invoices were covered by the bank guarantee, the actual outstanding claim was for USD 19,110 for unpaid invoices Nos. 3753 and 3754 dated 30th April 2004. He admitted that those invoices were due by 12th July 2004, when the relationship between Prismo and Termcotank had broken down irreparably. He denied however that at that time the Defendant owed any money to the Plaintiff as damages for breach of contract, as he did not know the basis of such claims. He said that the supplies were made prior to receiving the bank guarantee, and on expiry of the letter of credit, applicable in the previous arrangement. So the supply was actually made in error.

Asked if it would make any business common sense to pay someone who owes the other, DW1 said it was not, but that in the present case there was no agreement on payment of damages, and that the Plaintiff was free to get supplies from other services. He said that he thought that the Plaintiff had an obligation to pay for the bitumen supplied to them although there was no contract;

however, the bitumen was not supplied as alms. It was just a selling and buying transaction with no strings attached.

On the claim for special damages for the delay in returning empty containers at 12 dollars per day totaling 14892.000 USD, DW1 said that there was a grace period, and the rate was quoted in the quotation letter but could not remember the duration of the grace period; but that this was taken into account in the computations. He admitted however that grace period was essential to be known before calculating the loss. He said, however, that all the calculations were done in the office and he did not have those workings with him in court. He also admitted that he didn't have with him any details of the containers, the number of days of delay, the number of days of grace, neither did he have in court any document covering the rate of 12 dollars per day of delay, except in one letter, but none of the defence exhibits. He said that he remembered that he did complain in one email, to Prismo, about the latter keeping the 40 containers for more than a year but on the 7 containers there were about four correspondences. Later DW1 was led to admit that normally the Defendant did not charge demurrage on delay in returning the containers, unless people took

them to court. But he denied that the counter claim was a result of this.

On the delay of the 7 containers, DW1 said that they charged USD 3432 dollars per day to the containers at 12 dollars per day for 40 days for five times, leaving 10 days grace period, but again admitted that there was no letter in court to exhibit the fact that the Plaintiff was advised of this.

On the question of the claim for USD 1,106.71 for the one container left at the port, DW1 was led to admit that once the container was deposited at the port the risk passed over to Prismo. He, however, said that they had to go and collect the container after receiving a call from the port authorities. But, he admitted it was Prismo's responsibility to pay, and the Defendant had no such obligation, but the Defendant actually paid to the port authority plus 100 USD as transportation. However, DW1 said that he did not exhibit the invoice on which he paid the port authorities, but argued that the port would not have allowed him to collect the container if he had not paid for it. He insisted that the container was among those delivered and taken by the Plaintiff, but this particular one was left behind at the port, where it remained for more than 30 days. And that was

evidenced by a credit note to the Plaintiff in which the particulars of this container were mentioned. He said that there were delivery notes to show that Prismo had collected all the 8 containers but confessed that the said delivery notes were not produced in court although they were attached to the invoices, which were not also produced in court.

In re – examination DW1 was referred to table 3 of paragraph 6 of the written statement of defence, in which the claim is shown for 43 days and not 53 days. He said that the 10 days were grace period. On the container that remained behind at the port; it was the port authority which claimed the demurrage charges from the Defendant and that is why Termcotank had to remove it. And with that the Defendant closed its counterclaim.

In defence to the counterclaim, the Plaintiff recalled PW1 CARLO DI SIMONE whom I christened PDW1. After the usual preliminaries, PDW1 told the court that according to the agreement they had with the Defendant, Prismo would collect the container of bitumen from the Defendant's yard, transport them to the port and ship them to Pemba, use the bitumen and return the empty containers back to the Defendant. He said that once the containers land at the port they are deemed to be

Prismo's. Prismo also chartered the ships which would carry the bitumen to Pemba. Once in Pemba, they also continue to be used in Prismo's name. The containers are then transported to where they would be needed.

On the delay of the 12 containers, PDW1 said that there was no agreement on the duration after which empty containers could be returned, nor did the Defendant send any invoice for the delay. The first time he became aware of the counterclaim was in this suit. He also said that he wouldn't know which containers the claim was about, but presumed they would not be more than 26 containers which he returned.

He said that the delay in returning the 12 containers was caused by the Defendant's failure to supply the new containers full of bitumen. He said, in view of the delay in sending in new supplies, his company suffered considerably and would not be ready to send a ship to return the empties without returning with a corresponding number of containers full of bitumen, because to do so would be uneconomic. He said that of the total of 59 containers contracted, his company received not more than 26. It is true that the TERMCOTANK had to hire a ship to collect the empty containers and take them back to Dar es Salaam but he

didn't stop them from doing so. PDW1 therefore, said that his company was not liable for the claim of USD 46892 as special damage for failure to return the containers since there was no agreement as to the time limit for their return. Besides, PDW1 went on, there was no agreement on the rate of USD 12 per day, neither did they receive any invoice on this account.

On the one container that remained at the port PDW1 said that this was the responsibility of Prismo and he wouldn't know how TERMCOTANK was allowed to collect it, as all the papers were in their name. So he suspected this must have been another container altogether. Since that was Prismo's property and Prismo never permitted Termcotank to collect it. So he didn't think the Plaintiff ought to pay the USD 1,106.71.

On the claim for USD 19110 for bitumen delivered to Prismo MC 70, PDW1 admitted having received the said bitumen, and having not paid for it because there was already in court the present suit; in which the Plaintiff was claiming damages from the Defendant for breach of contract. PDW1 said that if the court so orders the Plaintiff would be willing to pay this sum.

In cross examination, PDW1 admitted that although he had obligations to return the 12 containers, there was no agreed frame of time in which to do so. He admitted however, that according to Exh.D1 the Plaintiff was required to return the empty containers immediately but, PDW1 said, this did not mean immediately upon arrival in Pemba, because the bitumen had to be used, and until then, the containers could not be returned.

On Exh.D7, PDW1 said that he could only return 6 out of 2 containers because that was the capacity of the ship. They had to rent a small ship because the Defendant had intimated that it could only supply 6 containers full of bitumen and not 12 as agreed.

PDW1 emphatically said that all the containers had been returned, but quickly admitted that TERMCOTANK had to collect the remaining 6 or 7 containers, but he would not remember the exact number. Later PDW1 admitted having received a fax from the Defendant informing him about the container left by Mr. Harker at the port, and that the port authorities had advised that it would attract demurrage if not collected, but said that it was their container, and did nothing about it because they were waiting for the other consignment so that together it could be shipped with the others. He

admitted however that he had never collected the said container. But, he argued, since the container did not belong to Termcotank, he did not expect Termcotank to do anything either.

On Exh.D1, PDW1 said that he agreed that 90 days from 19/12/2004 would expire on 18th March 2004 in respect of the payment of USD 59,000. However he had written that he would pay on 9th April 2004 because to him the 90 days counted from the date of delivery of the full consignment and not half. This, he said, was referring to the first contract, which was guaranteed by a letter of credit, not the bank guarantee.

PDW1 later, however, confirmed that he withheld payment for unpaid invoices but wouldn't remember how much was involved. However the witness said that this is not what motivated him to file the present suit, but the delay in the supply of bitumen, and the damages arising therefrom.

He also informed the court that it was his head office in Rome which had to pay, but was not sure if all the invoices were paid.

PDW1 also admitted that the 2 invoices for supply of bitumen MC 70 (ExhD5) all totaling USD 19,110 was covered by the bank guarantee but later retreated and confirmed that this amount was not covered and had not been paid.

In re examination, PDW1 was referred to Exh.P7 and P8 which he described as the offer and acceptance for the supply of bitumen between the Plaintiff and the Defendant, on a regular basis and returning of the empty containers immediately. PWD1 clarified that by the term "immediately" be understood it to mean by return ship but logically this would only be possible after the containers were destuffed of the bitumen. If the containers were to be returned immediately as suggesteded they would go back with the bitumen. Bitumen could only be destuffed after heating for one day and one night and the bitumen is used when hot. So, it was not possible to return the containers, practically on the same day. And so, in the circumstances, PDW1 went on, the term *"immediately"* would mean soon after the Plaintiff had used the previous consignment, and the Defendant was ready to deliver the second consignment, that is when the empty containers would be exchanged for another consignment of full containers, and they would be loaded in the same ship that brought the full

containers. In ExhP7 the Plaintiff deliberately set the frequency of 12 containers for every 10 days because that was the time requisite to empty the containers.

Shown some documents from the Defendant, TERMCOTANK, PDW1 said that at no time did the Defendant say it would hold the Plaintiff responsible for the delay in returning the 6 out of 7 containers which were left in Pemba, but only asked for their assistance in loading them, thanking them in advance. He said that accordingly, the Plaintiff extended to them the necessary support. So, according to PDW1, his attitude was not consistent with the Defendant's claim in the counterclaim, because the assistance he offered was not an obligation, but just a favour. Actually, it was the Plaintiff who had asked the Defendant to go and collect the said empty containers because the Plaintiff could not incur any further loss, after the loss incurred on account of the defendant's breach of contract and to which the Defendant never objected.

On whether the two invoices were covered by the bank guarantee, PDW1 confessed his ignorance on the issue because he was only on engineer, but to his knowledge the bank guarantee covered only supply

within its limits, which was USD 195,000. And with that the Plaintiff closed its defence on the counterclaim.

And so from the totality of the evidence on record, the Plaintiff's case is that from a series of correspondence and conduct, the Defendant agreed to supply 59 containers of bitumen of various specifications, between May 2004 and July 2004. It was further the Plaintiff's case that the Defendant breached the contract by short delivering the contracted supply of bitumen and so this directly let to the delay in the execution of the project, by 72 days. And lastly, that as a result of the delay the Plaintiff suffered damages to the tune of Tshs.376, 148, 657, 54.

On the other hand, the Defendant's case against the suit is that, the exchange of correspondence, notwithstanding, the transaction did not amount to a contract in law, due to uncertainty in several of its terms, such as price, mode of delivery, time of delivery and quantity. All that there were, were inquiries for the availability of bitumen, and if there was any, it would be supplied as and when it was available. In the alternative it was the Defendant's case that if there was any contract, each consignment supplied constituted a separate contract with its own terms, and that the

Defendant never breached any of them. So the suit should be dismissed with costs.

The Defendant further counterclaims a total of USD 42365.71 being claims for unpaid invoices, special damages for delay in the return of 40 containers, for and cost of transporting them from Pemba to Dar es Salaam and from the Dar es Salaam port to the Defendant's yard. The Plaintiff specifically admits liability for USD 19119 for unpaid invoices, but pleads that she was entitled to withhold it against the substantial damages that the Plaintiff had suffered as a result of the Defendant's breach of contract. On the other claims, the Plaintiff's case is that there was no agreement for the claim of damages on delay of the return of empty containers, and in any case, there was no time limit beyond which any further delay would be actionable, and the rate of such damages was not ascertained in advance. As for the transportation of containers from Pemba, the Plaintiff's case was that, the Plaintiff had refused to send back the empty containers in order to minimize its damages from the Defendant's breach of contract, and that in any case the Defendant voluntarily agreed to collect the containers in question at its own expense. On the issue of transportation and demurrage charges pertaining to the 1 container that was left behind at the Dar es Salaam

port, it was the Plaintiff's case that, first, there was no proof that the Defendant paid the said demurrage charges to the port authority, and if it did, it did so out of its own volition, as that was the Plaintiff's responsibility, so long as the container remained in the port premises in its own name. It was therefore the Plaintiff's case that the counterclaim had not been made out and ought to be dismissed with costs.

From the evidence on record and the above summary, the following facts have been established and cannot be disputed. And they are: -

1. That there was a series of correspondence between the Plaintiff and the Defendant on the supply of bitumen, which the Plaintiff needed for the rehabilitation of the Mtuhaliwa – Chake Chake Road, in Pemba.

2. That the Plaintiff's contract with the Ministry of Transport and Communication in Zanzibar was to end in May 11,2004 but this was later extended by two addenda up to 30th June 2004.

3. That the Plaintiff completed the works in November 2004.

4. That the Defendant's payment for the supply of bitumen was secured by means of a bank guarantee.

5. That the Plaintiff has not paid a total of USD 19,110 representing the value of two invoices for the supply of 175 drums of MC 70 bitumen.

6. That the Defendant transported, at its own expense, 6 empty containers from Pemba to its yard in Dar es Salaam.

7. That since the containers belonged to the Defendant they were to returned to the Defendant after destuffing the bitumen.

It is on the basis and in the light of my above findings that I now turn to consider the issues as framed by the court and the submissions of the learned Counsel on these issues.

Now, the first issue that calls for determination is:

WHETHER THERE WAS A CONTRACT OF SALE OF BITUMEN BETWEEN THE PARTIES?

Ms.Karume, learned Counsel for the Plaintiff submitted that there was a contract of sale in that the Plaintiff required some bitumen, the Defendant agreed to sell it at a given price, the terms of delivery and time of delivery were discussed and agreed upon, and most importantly the Defendant did effect some delivery. So by conduct the parties entered into a contract.

Ms. Karume, then took us through the niceties of pleadings in the cases of breach of contract which, I do not find necessary to repeat here. Suffice, if I said that the learned Counsels' submission was that the plaint was decently drafted and did disclose a cause of action for breach of contract, samples of pleadings were cited from **MOGHA'S LAWS OF PLEADING IN INDIA** 16th edition and **BULLEN & LOCKE & JACOBS IN PRECEDENTS OF PLEADINGS** Vol. 1 15th edition. Her conclusion was that an agreement precedes a contract and a contract could not be pleaded before pleading an agreement.

As I said above, I do not intend to dwell much on this area, because the parties should have addressed that issue at the pleading stage, and we are now past that. But according to MS. Karume, learned Counsel, in this case there was an agreement for the purchase of

bitumen between the parties followed by a promise to pay which constituted a consideration and there was performance by which the Defendant delivered 12 containers on 11/5/2004. She said that the promise to pay was in the form of a bank guarantee. She referred the court to the effect of s. 97 of the Law of Contract.

Leaving the generalities apart, the learned Counsel then came to deal with specificities of the present case. She submitted that the correspondences in the present case constituted continuing negotiations between the parties, which presents a practical difficulty that in the end, the parties may disagree as to whether they had ever agreed at all. Referring to **CHITTY ON CONTRACTS**, 29th edition Vol. 1 at page 134 paragraph 2 – 026, the learned Counsel submitted that in such a case the court must look at the whole correspondence and decide whether on its true construction, the parties had agreed on the subject matter. And if so, then there is a contract even though both parties or one of them had reservations not expressed on the correspondence. And that the court would hold that continuing negotiations have resulted into a contract, where the performance which was the subject matter of the negotiations has actually been rendered. She went on to submit that this is not different from what the Court of Appeal of Tanzania

said in **RAYMON MARTIN VS CORAL COVE LTD** Civil Appeal No. 54 of 2004 (unreported) in which the court also cited another case. **AHMED SAID OMAR VS MAZSONS HOTEL LTD** Civil Appeal No. 41 of 1996 (unreported) in which the court inferred the existence of a contract of employment from an exchange of letters between the parties. She said that this was also the ratio decidendi in **GIBSON VS MANCHESTER CITY COUNCIL** [1979] I WLR 294.

The learned Counsel then took the court through all the correspondence from 29th November 2003 to 10th May 2004 and through Exh.P1, P2, P3, P4, P5, P6, P7, P8, P9, P10, P11, P12, P14 and P21. In reference to Exh.P7 Ms Karume tied it with s. 12 of the Sale of Goods Act (Cap 214) regarding how it is to be decided whether time was of the essence of the contract. In conclusion, Ms. Karume, without saying so expressly, was of the view that these correspondences taken together must lead to the finding that there was a contract between the parties and so the first issue should be answered in the affirmative.

On the other hand, Professor Fimbo, learned Counsel for the Defendant, who submitted first, began by conceding that an exchange of correspondence may, in a

proper case constitute a contract. He referred the court to the House of Lords' decision in **GIBSON VS MANCHESTER CITY COUNCIL** [1979] 1 WLR 294. He asked the court to focus on the instruction passage from the speech of Lord Diplock at p. 297. The learned Counsel extracted from that passage, that the House of Lords used the conventioned approach in determining whether there was a contractual offer and acceptance. He then submitted that this passage was quoted with approval and used by the Court of Appeal of Tanzania in **HOTEL TRAVERTINE AND 2 OTHERS VS NBC LTD** Civil Appeal No. 82 of 2002 (unreported) where the Court of Appeal also adopted the conventional approach.

Applying these principles to the present case Professor Fimbo submitted that in this case, and in terms of the pleadings, Exh.P6, P7 and P8 are the crucial documents/correspondences. And these, the learned Counsel submitted, are the documents which this court should construe in order to determine if there was any contractual offer and acceptance, and thus determine whether there was a contract.

He went back to the evidence on record, and analysed that, while the pleading stated that the contract became effective on 18th March 2004, PW1, testified that

in fact the contract became effective on 10th May 2004 thus contradicting his own pleading. He said that it was trite law that parties were bound by their pleadings and those cannot be amended by oral evidence.

In the alternative, the learned Counsel submitted, that if the court accepts 10th May 2004 as the effective date of the contract, then it should also consider the effect of 6 other documents namely Exh.P9, P10, P11, P12, P13, and P14. He submitted that, on a proper construction of these documents, the court should conclude that there was no contract of sale. He pointed out that Exh.P.7 was not a contractual offer, but merely an inquiry, as the word *"buy"* does not feature in the said document. Therefore, in terms of s. 2 (1) (a) of the Law of Contract Act (Cap 345) there was no proposal to buy. Secondly, in the other documents identified by the Plaintiff, there was no agreement as to the quantity to be delivered, the price, the manner or method of payment of the purchase price, the frequency of deliveries of bitumen, and the dates of deliveries. He then referred to what the Plaintiff and the Defendant pleaded on this matter and their testimonies. He said that Exh.P7 simply requested the Defendant to confirm whether the Defendant could supply 12 containers per trip every 10 days, but it did not state the total quantity to be supplied

neither did Exh.P8 in which the Defendant simply expressed his willingness to supply 12 containers on a regular basis. It was thus the learned Counsel's view that in none of these correspondences, did the parties agree for the supply of 59 containers of bitumen. He said that the figure 59, appears in the Plaintiff's fax of 29/11/2003, Exh.P1, but the Defendant did not make a corresponding reference to that figure in his responses (Exh.P2, and Exh.P4) whose dates fall outside the dates pleaded by the Plaintiff for the formation of the contract.

Professor Fimbo went on to submit that, even Exh.P13 and P14 would not help the Plaintiff's case because Exh.P13 refers to 12 containers and not 59 and the Defendant did not undertake to make subsequent deliveries. Even Exh.P14, the bank guarantee does not state the number of containers but merely to *"various supplies you shall make to Prismo"*. He submitted that quantity was a crucial term of the contract which was missing.

Next, Professor Fimbo submitted that in its pleading, the Plaintiff did not plead the price nor the promise to pay. He then referred to the decision of Georges CJ (as he then was) in **HAULA DADI ROSE VS TANGANYIKA LIMITED & HEM SINGH** [1967] HCD. No.

201, in which it was held that in an action on contract, a cause of action is disclosed once the request is pleaded and performance alleged. From this case, the learned Counsel submitted that both, request and performance, must be pleaded in order to formulate a cause of action on contract. He said that in the present case, the Plaintiff did not plead performance at all. He also referred to the court to the decision of the Court of Appeal for Eastern Africa in **AUTO GARAGE LTD V MOTOKOV** [1971] HCD n. 338 on this same point. He said that Exh.P7 dated 6/3/2004 does not contain any promise by the Plaintiff to pay for the bitumen. And according to Exh.D1 of 3/4/2004, the Plaintiff only promised to pay for invoices dated 19th December 2003, and 9th January 2004, long before the effective date of the alleged contract and therefore irrelevant in the present case, for the purposes of ascertaining whether there was a promise.

Even the bank guarantee (Exh.P14) does not constitute a promise by the Plaintiff to pay. Rather it is a contract between the Defendant and Banco de Roma and not between the Plaintiff and the Defendant. For the effect of the contract of guarantee, Prof. Fimbo referred to ss. 78 and 92 of the Law of Contract Act (Cap 345). So there was no consideration moving from the Plaintiff to

the Defendant or from Banco de Roma to the Defendant, a prerequisite under s. 2 (1) (d) of the Law of Contract Act. Therefore, it was contrary to s. 25 of the Act. So on the basis of this aspect, the learned Counsel invited the court to find that the alleged contract does not exist for want of consideration.

Moving on to the question of price, Professor Fimbo submitted that the Plaintiff pleaded the price of USD 255 per metric tonne, but according to the defence (DW1) this price was fixed in December 2003, but during the forthcoming negotiations no price was agreed upon. Exh.P6 and P7 do not state any price either; neither does Exh.P9, P13 or P14. Besides they do not state the method of ascertaining the price. He also contended that the method of payment was never stated in Exh.P6, P7, P8 or P9. On the contrary, payment by letter of credit suggested by Exh.P9 was rejected by the Defendant and Exh.P14 the bank guarantee cannot be said to be a method of payment.

On frequency of deliveries, Prof. Fimbo was of the view that the request in Exh.P7 for 12 containers every 10 days, was not squarely met by the Defendant's response via Exh.P8 to supply 12 containers on *"a regular basis"*, which expression according to DW1, was

used deliberately due to irregular shipments of bitumen from Durban, South Africa. So, submitted the learned Counsel, if Exh.P7 constituted a proposal, then Exh.P8 did not amount to an acceptance at all, in terms of s. 7 (a) of the Law of Contract Act which requires an acceptance to be absolute and unqualified. He submitted that in this case Ex.P8 only formed a counter proposal by the Defendant. So the two documents cannot constitute a contract.

Prof. Fimbo also submitted that Exh.P7 and P8 do not state the dates of deliveries of the bitumen, neither did they indicate that time was of the essence. He said that, considering the evidence of PW1 and DW1, it is clear that the Plaintiff did not require bitumen in May, June or July 2004, since the Plaintiff had not completed the base course. So, concluded the learned Counsel, the first issue should be answered in the negative.

Let me first review the principles of law which I consider would be relevant in a discussion of the subject matter at hand.

According to **CHITTY ON CONTRACT General Principles** Vol. 1 – 23rd edition pp. 21 – 22 there are

three principal essentials to the creation of a contract, which are –

(i) an agreement.
(ii) contractual intention and
(iii) consideration.

An agreement is usually reached by a process of offer and acceptance. However, the offer and, or acceptance may be made in the form of a promise; alternatively the offer may be a promise while the acceptance, by the performance of an act.

In order to decide whether the parties have reached an agreement, it is usual to inquire whether there has been a definite offer by one party and an acceptance of that offer by the other. In answering that question the courts apply an objective test, i.e. if the parties have, to all outward appearances, agreed in the same terms upon the same subject matter, neither can generally deny that he intended to agree (subject to certain defences such as mistake, misrepresentation, durres and undue influence). These principles are incorporated in ss. 2 (1) 3, 4, 5, 7 and 8 of the Tanzania Law of Contract Act (Cap 345). And in particular s. 3 of the Sale of Goods Act (cap 214) defines "*an agreement (contract) of Sale*" thus: -

"3. (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in the goods to the buyer for a money consideration, called the price, and there may be a contract of sale between one part owner and another.

(3) Where under a contract of sale the property in the goods is transferred from the buyer the contract is (termed) a sale, but where the transfer of the property in the goods is to take place at a future time or subject to certain condition to be fulfilled after the transfer, the contract is called an agreement to sell."

On formation of contract s. 10 of the Law of Contract Act Cap 345 is the general provision:

"10. All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.

Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or disapplied by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

And ss. 5 and (6) of the Sale of Goods Act (Cap 214) further provide: -

5. (1) Subject to the provisions of this Act, and of any written law in that behalf, a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties.

(2) Nothing in this section shall affect the law relating to corporations.

6. (1) A contract for the sale of any goods of the value of two hundred shillings or more shall not be enforceable by action unless the buyer accepts part of the goods so sold and actually receives the goods, or gives

something in earnest to bind the contract or in part payment, or unless (some) note or memorandum in writing of the contract is made and signed by the party to be charged or by his agent in that behalf.

and (3) *There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognizes a pre existing contract of sale whether there is an acceptance in performance of the contract or not."*

And the last relevant provision from the Sale of Goods Act (Cap 214) is in relation to price. This is section 10.

"10 (1) *The price in a contract of sale may be fixed by the contract or may be left to be fixed in a manner thereby agreed or may be determined by the course of dealing between the parties.*

(2) *Where the price is not determined in accordance with the provisions of subsection (1), the buyer must pay a reasonable price; and what is a*

reasonable price is a question of fact dependent on the circumstances of each particular case."

It is also not disputed that under s. 25 (1) of the Law of Contract Act, an agreement made without consideration is void unless it is in writing and registered under the applicable law or it is a promise to compensate a person who has already voluntarily done something for the promise, or is a promise in writing and signed by a person or his agent to pay wholly or in part a debt of which the creditor might have enforced payment but for limitation of time.

Section 78 of the Law of Contract defines a contract of guarantee, but s. 79 provides: -

"79. Anything done or a promise made, for the benefit of the principal debtor may be a sufficient consideration to the surety for giving the guarantee."

And lastly s. 29 of the Law of Contract Act, provides that an agreement the meaning of which is not certain or capable of being made certain, is void.

The first issue in this case relates to the formation of contract. The resolution of this issue involves a close examination of several intricate sub issues. In the above expose, I have attempted to point the principal factors that govern the formation of contracts and its ramifications. The first aspect on which the learned Counsel have locked horns on, is whether the series of correspondence between the parties could amount to a contract? It was the contention of the Defendant through DW1, that there was no signed agreement, and the learned defence Counsel submitted that the present series of correspondences did not amount to a contract.

As rightly pointed out by both Counsel, and the cases and textbooks cited, there is no definite answer in each such case, and so each case must be treated on its own special facts. In **GIBSON VS MANCHESTER CITY COUNCIL** [1979] WLR 294, the House of Lords held that upon a true construction of the documents relied upon as constituting the contract, there never was an offer by the corporation, and acceptance by the tenant which was capable in law of constituting a legally enforceable contract. On p. 298 of the report, Lord Diplock, quoted one of the letters relied upon by Mr. Gibson as constituting an offer. The relevant (italicized) words were: -

> *"If you would like to make a formal application to buy your council house, please complete the enclosed application form and return it to me as soon as possible."*

On these words, Lord Diplock, remarked:

> *"My Lords, the words I have italicised seem to me,....to make it quite impossible to construe this letter as a contractual offer capable of being converted in a legally enforceable open contract for the sale of land by Mr. Gibson's written acceptance of it. The words "may be prepared to sell" are fatal to this; so is the invitation, not, be it noted, to accept the offer, but "to make formal application to buy" upon the enclosed application form. It is .....a letter setting out the financial terms upon which it may be the Council will be prepared to consider a sale and purchase in due course."*

So, there, the House of Lords found that the application form and letter from Mr. Gibson did not constitute an unconditional acceptance of the Corporation's offer to sell the house, because there was no contractual offer by the

corporation available for acceptance. This is what is referred to as the conventional approach.

By using this conventional approach in **GIBSON'S case** and applying the principles expounded in **BROODEN VS METRO POLITAN RAILWAY CO**. [1877] 2 App. Case 666, the Tanzania Court of Appeal in **HOTEL TRAVERTINE LIMITED AND 2 OTHERS VS NATIONAL BANK OF COMMERCE LTD** held that the letter dated 7/12/98 from the Respondent bank, did not amount to an acceptance of the terms of a previous letter from the Plaintiff. The court further held that by these two letters, the parties must be taken to be still locked up in negotiations. The court also relied on the wording of s. 7 of the Law of Contract Act and found that the letter of acceptance to the bank's letter which the trial court found was an offer in law, was not only not absolute and unqualified, but also not sent in the **prescribed mode of acceptance.**

On the other hand, the Court of Appeal of Tanzania, in **RAYMOND MARTIN VS CORAL COVE LIMITED** (supra) accepted the proposition that exchange of letters and the conduct of the parties could form a contract even though no formal contract has been concluded.

On continuing negotiations, **CHITTY ON CONTRACTS,** 29th edition Vol. 1 at p. 134 – paragraph 2 – 026 is very instructive, and I have to quote it at length:

> *"Where parties carry on lengthy negotiations it may be hard to say exactly when an offer has been made and accepted. As negotiations progress, each party may make concessions or new demands and the parties may in the end disagree as to whether they had ever agreed at all. The court must then look at the whole correspondence and decide whether, on its true construction the parties had agreed on the same terms. If so there was a contract even though both parties, or one of them, had reservations not expressed in the correspondence, the court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject matter of the negotiations has actually been rendered. In one such case a building sub contract was held to have come into existence, even though agreement had not been reached when the work was begun, because during its progress, outstanding matters were resolved by further negotiations, and this contract may then be given retrospective effect to cover work done before the final agreement was reached."*

So I am certain in my mind that in law, subject to certain statutory exceptions, a contract need not be in writing and can be inferred from a series of letters or telegrams or faxes (or correspondences) or by the conduct of the parties.

Learned Counsel in the present case have also argued on the need for certainty of the terms and consideration for a contract to be valid. Prof. Fimbo has taken exception to the absence of clear terms as to the price of the bitumen required in this case, the quantity, the terms of delivery, and the mode of payment. He has also submitted that there was no consideration. Ms Karume, on the other hand, has submitted that the terms of the contract could be extracted from the various correspondences exchanged between the parties, and that there was no consideration in the form of a promise to pay through the bank guarantee. But according to Prof. Fimbo, the bank guarantee was not a contract between the Defendant and the Plaintiff, but a mere undertaking by the bank to pay a certain amount, if the Plaintiff did not pay for the bitumen.

Since the subject of the contents or the terms of the contract, forms the second issue in this case, I would

reserve my comments on the subject until then. On the issue of consideration, as shown above, I have no doubt that an agreement without consideration is void, subject to certain exceptions expressly indicated in s. 25 (1) of the Law of Contract Act. But, it has been suggested here that the consideration in this case was in the promise by the bank to pay by the bank guarantee. The next point for determination is, therefore, whether the bank guarantee (Exh.P14) constituted a valid and legally enforceable promise to pay.

Pro. Fimbo's argument is that this guarantee is not a contract between the parties herein. I understand Prof. Fimbo to be saying that there was no privity of contract between the parties herein in the bank guarantee. That is so, at common law, but it is certainly not so under s. 2 (1) (d) of the Law of Contract Act (Cap 345). That section reads:

> *"(d) When, at the desire of the promisor, the promisee or <u>any other person</u> has done or abstained from doing, or does or obtains from doing or <u>promises to do or abstains</u> from doing, something, such act or abstinence or <u>promise</u> is called a consideration for the promise."*

The effect of the phrase *"any other person"* is, I think, to broaden the common law rule that consideration must necessarily flow from the parties to the contract. Section 78 of the Act defines a contract of guarantee as: -

> *"a contract to perform the promise or discharge the liability of a third person in case of his default and ....."*

In my view, when s. 2 (1) (d) and s. 78 of the Act are read together, it means that a promise to pay (money) in a contract of guarantee is sufficient consideration in a contract between parties. So, assuming, without deciding yet, that in this case, there was an agreement between the parties for the supply of bitumen, then I would have no doubt that the bank guarantee constituted a sufficient consideration for the contract.

I will next comb through the relevant exhibited correspondences between the parties in order to determine the intention of the parties. In doing so, I will first examine the pleadings of the parties and then the testimonies of the witnesses.

The Plaintiff's case is built on the pillars of paragraphs 4, 5 and 6 of the plaint. According to paragraph 4: -

> *"In November 2003, representatives of the Plaintiff and the Defendant commenced negotiations by way of email and facsimile concerning the supply by the Defendant of bitumen for use by the Plaintiff for rehabilitating the Mtuhaliwa – Chake Chake Road in Pemba."*

Paragraph 5 of the plaint states: -

> *"5. In the course of such negotiations representatives of the Plaintiff and the Defendant exchanged inter alia the correspondence listed hereunder, which read together contains the terms of the Agreement between the Plaintiff and the Defendant for the supply of bitumen.*

And paragraph 6 states: -

> *"6. Therefore in the course of the negotiations between the Plaintiff and the Defendants the parties reached an agreement."*

In response to these averments, the Defendant in its Amended Written Statement of Defence states:

> *"2. That the contents of paragraphs 2, 3 and 4 of the plaint are admitted save that the defendant imports the said bitumen from South Africa."*

According to paragraph 3 of the Amended Written Statement of Defence: -

> *"(3) That the contents of paragraphs 5, 6, and 7 of the plaint are disputed and the Plaintiff is put to strict proof thereof. The Defendant denies that there was a contract for the supply by the Defendant of bitumen to the Plaintiff as alleged, the Defendant states that there was no agreement.*
>
> *(a) on price of bitumen or the method of ascertaining the price.*
>
> *(b) the quantity or quotation of bitumen to be supplied.*
>
> *(c) the frequency of supplies.*

(d) the terms of payment by the Plaintiff, that is to say, whether the payment would be by cash or (cheque) or by letter of credit whether payment would be 60 days or 90 days from the date of supply or collection"

Furthermore in the next paragraphs of the Amended Written Statement of Defence, the Defendant contends: -

"(4) That the alleged contract is void for uncertainty.

(4) That the Bank Guarantee dated 26/4/2004 did not form part of the contract between the Plaintiff and the Defendant."

In my remarks above, I have set aside the issue of uncertainty of the contract for discussion in the third issue. And, I have already held that the bank guarantee, although not between the parties herein constituted sufficient consideration, if I were to find that the parties intended to reach an agreement.

In order to arrive at that conclusion I will now consider the evidence of the parties in the light of the submissions made by the learned Counsel.

Both PW1 and DW1, gave their testimonies at considerable length, the content whereof has already been summarized above.

In resolving the first issue, Prof. Fimbo suggested that the relevant documents for the purposes of illuminating the commencement of the negotiations and to determine whether there was the contractual offer by one party and an acceptance by the other are Exh.P6, P7 and P8. He concluded that on a proper construction of the said documents identified by the Plaintiff there was no agreement as alleged.

I think, the correct approach for the court to adopt in determining whether from a series of correspondence, a contractual relationship can be established, should be a holistic, rather piecemeal. By which, I mean that all the correspondences and the conduct of the parties, and their evidence in court, must be assessed and not only a few letters selected from a bundle of documents. In my judgment, I intend to adopt that approach.

From the pleadings, there is no doubt that the Plaintiff required bitumen for the rehabilitation of the Mtulahiwa – Chake Chake Road in Pemba. According to PW1, the contract with the Ministry of Communication was signed on 12th May, 2002 and was to last for 12 months. However, for various reasons, the contract was extended up to 30th June 2004. It must, however be noted in passing here that the extension of the road construction contract to June 2004, had nothing to do with the current dispute between the parties herein. The Plaintiff contends however that, due to lack of bitumen, the work was delayed from June 2004 to November 11, 2004. According to PW1, before that, work was progressing on well.

It is with this background that I will now proceed to examine the correspondences between the parties placed before this court.

I first looked at the Plaintiff's exhibits in search of a definite offer. These include Exh.P1, P3, P5, P7, P10, P12, P15, P17, P19 and P21. Of the exhibits tendered by the defence, I also singled out Exh.D8 for scrutiny. Of these Exh.P3, P10, P15, P17, P19 and D8 had nothing to do with the subject, under scrutiny. The contents of these documents, presuppose the existence of a contract

between the parties. So for the purposes of the present scrutiny I will not give much attention to them. I will now examine the rest of the exhibits in chronological order.

Exh.P1 is a fax dated 29/11/2003. The subject is supply of 6070 pen bitumen. The crucial part of the letter/fax reads:

> *"In addition to the 14 No containers mentioned in your Email our total requirement for the project is a (further) 59 No containers to be made available ex your depot to the following schedule:*
> *15/10/2003 – 20 No Containers*
> *25/2/2003 – 20 No Containers*
> *15/3/2003 – 19 No Containers*
>
> *Please be advised that before a new agreement can be signed we require a firm commitment from you that these additional containers can be supplied as per our above schedule."*

Although Exh.P1 refers to a previous correspondence from the Defendant, which unfortunately was not tendered for examination by the court it is clear to me that Exh.P1, was intended to severe the parties' past

relationship and commence a new one hence the sentence: -

> *"...before a new agreement can be signed we require a firm commitment from you."*

The next Exhibit is P12 which is dated 6/12/2003. There it was written: -

> *"Following fax and conversations between us I should like to summarise below the agreements related to the bitumen supply necessary for the second stage of our project."*

The **quantities** are indicated:

MC 70 – 350 drums

PEN 60/70 – 885 M/T.

The prices are indicated:

MC 70 – at USD 91.00 VAT exempted

PEN 60/70 – 885 MT at USD 225 – VAT exempted.

The price includes:-

The container's stoppage on site for the time necessary for the bitumen use. Technical assistance on site.

The time and amount of deliveries is shown:-

"At 15 January 2004 – 33.3333%
At 15 February 2004 – 33.3333%
At 15 March 2004 – 33.3333%

The next exhibit is P5, a letter dated 28th January 2004, which not only discusses the terms of payment but also of delivery, but of particular significance, is the sentence: -

"If TEMCOTANK does not have the capacity to supply us No. 20 container each time, we are very sorry but we can't purchase the bitumen from you."

The last exhibit for consideration on this aspect is exh.P7. This is a letter dated 6/3/2004. The crucial paragraph reads:

*"Prismo Universal Italiana are obliged to complete the project works on schedule and in consideration of this, I **agreed** with you that you need to supply us at*

least 12 (Twelve) containers per trip. The frequency of these trips needs to be one trip every ten days up to the completion of the supply."

Considering all the above exhibits together, I have no doubt in my mind that Exhibits P1 and P2 constituted a valid offer and the subsequent Exhibits P5 and P7 confirmed the existence and the terms of the offer from the Plaintiff which we shall examine more closely in the second issue.

The next question that calls for determination is whether the Plaintiff's offer was accepted by the Defendant.

And if so, whether, the acceptance was absolute and unqualified? This entails an analysis of the correspondence from the Defendant in response to Exhibit P1, P21, P5 and P7, which I have held to have constituted a valid offer.

To demonstrate that the Defendant accepted the offer the Plaintiff tendered several documentary exhibits emanating from the Defendant. These include Exhibits P2, P4, P6, P8, P9, P 11, P13, P14 and P16. Of these Exhibits P9, P11, P13 and P14 were correspondence on

the terms of payment and the bank guarantee. So, for the time being, I will eliminate them and examine the remainder.

Of the remaining Exhibits, which again, I will examine chronologically, the first is an e – mail dated 2/12/2003. This had no direct reference to Exh.P1 or P21 but to a telephone conversation. If Exh.P2 had any reference to Exh.P1 and P21 at all, it was in respect of the supply of 20 TC for 15/1/2004. And the answer was:-

> *"...the request for 20 TC for the 15th January 2004 it is O.K. we guarantee that the consignment will be supplied without any delays and subsequent supplies at monthly intervals will be adhered to. However you must give us your schedule for the use of the bitumen so that we can plan the deliveries..."*

So, Exh.P2, if at all it may be taken to be a response to the Plaintiff's offer, was an acceptance with conditions; to wit:

> *"While the Defendant could supply the first consignment on schedule, i.e. by 15/1/2004 and it could, also deliver the subsequent supplies at*

> ***monthly*** *intervals, as suggested in Exh.P1 and P21 if: the Plaintiff would supply their schedule for the use of the bitumen..."*

The next, Exh.P4, was in response to Exh.P3, which was basically on the letter of credit, but as far as the question of acceptance of the offer is concerned the last paragraph of Exh.P4 is significant. It reads:-

> *"Partial shipment should be allowed. Reasons we can not realize all the Cargo at the same time. This is very important."*

Exh.P6 is a non committal telefax dated 5/2/2004 for the increase of the quantity of containers. Exh.P8 is a response to Exh.P7. As seen above, according to Ex.P7 the Plaintiff agreed to the Defendant's suggestion for supply of 12 containers for every 10 days. This, it will be noted, is a departure from the earlier offer of supplying 20 containers every month, contained in Exh.P1 and P21. And the Defendant replied via Exh.P8: -

> *"We have to inform you that we have no problem in supplying you with bitumen for your project. To give you a better service we have collected empty containers from other customers and* ***confirm*** *that*

we will supply the 12 containers on a regular basis. You must ensure that the empty containers are returned immediately to have them ready for the next consignment. However in order to manage to supply you without further interruptions we suggest that you give us your consumption on a daily basis."

Therefore, through Exh.P7, the Plaintiff shifted from a once firm offer to the Defendant to supply 20 containers per month, to 12 containers every 10 days, and this the Defendant accepted on condition that the Plaintiff supplied to them, their daily consumption. So the proposal and counter proposal had resulted into a definite offer of 12 containers per 10 days and a conditional acceptance by the Defendant. At the footnote of Exh.P8, the Defendant writes in bold ink.

NB: ACCEPTANCE OF PRISMO CONDITION FOR SUPPLY OUR FAX REF. 022 AND FAX OF 06.03.2004.

Had it not been for the conditions attached to the acceptance in Exh.P8, I would have no scruples in concluding that an agreement had been reached by looking at Exh.P7 and P8 first and foremost, on the principal areas of the contract, and on Exh.P1 and P12,

on the other terms of the agreement. I say so because, the Law of contract Act, demands that an acceptance be "absolute and unqualified". In the present case, with Exhibits P1, P7, P8 and P21 alone, I cannot say that the acceptance was absolute and unqualified. And the qualifications are that: -

(i) the empty containers be returned immediately, and

(ii) that the defendant give to the defendant its consumption on a daily basis.

Were these qualifications ever accepted with by the Plaintiff. We shall have to determine this question by looking at the remaining documentary evidence tendered by the parties and the conduct of the parties, because the negotiations did not end with Exh.P1, P7, P8 and P.21.

Leaving Exh.P18 and P.20 aside, (as these are just demand letters for breach of contract from the Plaintiff's lawyers) Exh.P9, P10, P11, P12 and P14 covered negotiations on the terms of payment. We shall therefore, also leave them for the time being. We will also look at some of the defence exhibits in the present analysis. These are Exh.D1 and D6. Again for the sake

of consistency, and good order, we shall examine them chronologically.

According to Exh.D1 (a fax dated 3/4/2004 from the Plaintiff to the Defendant which refers to faxes from the Defendant dated 1/4/2004 and 2/4/2004) the Plaintiff summarized the position from his point of view as follows: -

> *"The conditions of bitumen supply and payment terms have already been agreed since 28th January 2004 (please see your fax of 27/1/2004 from Termcotank Dar es Salaam and our reply by fax dated 28/1/2004 Ref. PRS/FX/TAMK/022/MK. The only thing that has changed is the quantity of containers, you will supply per trip (No. 12 instead of No. 20)."*

It may be worth noting that the faxes referred to in the above paragraph of Exh.D1, are Exh.P4 and (P4) already seen in the foregoing discussion.

Next in line, is Exh.D6, an email from the Defendant to the Plaintiff dated 26/4/2006, which requires the Plaintiff to confirm the release of the empty containers. Exh.P13 is next. This is a fax dated 7th May

2004 from the Defendant to the Plaintiff. The crucial part of this exhibit reads:

> *"We are in receipt of your fax of even date and **confirm that once we have in our hands the original bank guarantee** we will release the 12 TCOU of bitumen 60/70." (emphasis supplied)*

Although the fax from the Plaintiff referred to in the above paragraph was not produced for perusal by the court, I take this paragraph to be significant in that the Defendant suggested that the condition precedent for the release of the 12 containers would be the receipt of the original bank guarantee. According to Exh.P14 the original guarantee was received by the Defendant on 10/5/2004. And according to Exh.P15 the first delivery of 12 containers of bitumen was made on 11th May, 2004. A second one was made halfway on 1st June 2004. It was suggested by the Plaintiff in Exh.P15 that the short supply in the second instalment was a breach of contract. Under ordinary circumstances, if there was no contract one would have expected the Defendant to refute such suggestion in response. From the available records there was no such response. The earliest correspondence from the Defendant next to Exh.P15, was an email dated 7/6/2004, which concetrated on the subject of empty

containers that should have been returned. This is Exh.D7. The next was Exh.P16, another email dated 10/6/2004, that directly touched on the supply of 60/70 bitumen. I will quote the relevant part in full: -

> *"Regarding the supply of bitumen, as informed over telephone, we have had problems with the shipping lines for loading in Durban over bitumen container because of over loading.*
>
> *We have a confirmed booking for 6TCOU (approx. DO MT) which will be loaded on the MSC Aurora leaving Durban on 17/6/2004. ETD Dar 23/6. In the meantime our Head Office in Geneva are arranging the loading of other ships in order to supply your requirement"*

In my view, Exh.P16 is confirmatory of all the previous arrangements between the parties on the supply of bitumen. Although DW1 has repeatedly said in his testimony that there was no signed agreement, there is nothing, in all the correspondences placed before the court, that the supply of 59 containers of bitumen would be subject to a formal written agreement and therefore there is nothing to suggest that the acceptance was subject to or conditional upon the preparation of such an

agreement. Even if there was such an expectation, the absence of one did not deny the possibility that there was in existence a valid contract. As the Court of Appeal of Eastern Africa said in **MARMALI TARMOHAMED VS LAKHANI AND CO** [1958] E.A. 567 –

> *"...if the correspondence amounted to an otherwise complete offer and acceptance the mere fact that the respondents desired that the agreement should be put into more formal, legal shape...would not make the contract conditional or relieve the other party from liability under it."*

So, from the correspondences of the parties in the present case, I too, am satisfied that there was a complete offer and acceptance, notwithstanding that there was no formally executed agreement.

But what is more, the parties in the present case did not end in the correspondences. The correspondences were followed by performance by both parties. The Plaintiff performed by offering a bank guarantee, and the Defendant performed by delivering part of the required supplies of bitumen. This is where the conduct of the parties comes in. And this is where **CHITTY'S** (Supra) observations are apposite: -

> *"The court will be particularly anxious to hold that continuing negotiations have resulted in a contract where the performance which was the subject matter of the negotiations has actually been rendered."*

In the present case, the subject matter of the negotiations was the supply of bitumen, and the Defendant supplied, the first instalment of the product as required by the Plaintiff. To me, that is performance which is sufficient to supplement the correspondences and lead the court to the conclusion that there was a contract between the Plaintiff and the Defendant.

Prof. Fimbo, in his submission, referred to several cases on this issue. I am grateful to him for referring to those cases. But in **GIBSON VS MANCHESTER CITY COUNCIL,** (Supra) there was no performance, which distinguishes it from the facts in the present case. **HOTEL TRAVERTIME & 2 OTHERS** case was decided on the ground that the Appellant did not make the acceptance in the accepted form, and that acceptance by conduct was not pleaded. Indeed the Court of Appeal's decision partly rested on s. 7 (b) of the Law of Contract Act which provides, partly:

> *"...if the proposal prescribes a manner in which it is to be accepted, and the acceptance is not made in such manner, the proposer may within a reasonable time after the acceptance is communicated to him, insist that his proposal shall be accepted in the prescribed manner, and not otherwise, but if he fails to do so, he accepts the acceptance."*

In the present case, there was no prescribed manner of communicating the acceptance; and acceptance by conduct is expressly pleaded in paragraph 11 of the plaint. Therefore, with respect, the two cases referred to by Prof. Fimbo on the first issue are distinguishable.

On the other hand, apart from a quotation from **CHITTY,** (op cit) the decision of the Court of Appeal of Tanzania in **RAYMOND MARTIN** (Supra) cited by Miss Karume, is, with respect very relevant. There was, as in the present case no formal contract, but an exchange of letters, the services of the Appellant and the Respondent greatly benefited therefrom. So, as in the present case there was performance there. Referring to another decision of the court, in **AHMED SAID OMAR VS MAZSONS HOTEL LIMITED** Civil Appeal to 41 of 1996 (Unreported) the Court held: -

*"...We are convinced that by **conduct** there was a contract of employment."*

So, from the exchange of correspondence, the performance by each party, and the conduct of the parties, I am more than certain that there was in this case a legally enforceable contract of sale of bitumen between the parties.

Before I part with this issue I wish to remark in passing on the submission raised by Prof. Fimbo on this same aspect although it was also framed as a separate issue, on whether the contract was void for uncertainty. Prof. Fimbo made special reference to the **price** of the bitumen. While I prefer to tackle this aspect along with the others in the third issue as framed by the court, my short answer to the issue of price is that even if the price was not agreed, the law would imply that a reasonable price was meant. This is vindicated by s. 10 (2) of the Sale of Goods Act (Cap 214 R.E. 2002).

So for all the above reasons I would comfortably answer the first issue in the affirmative.

I now go to the second issue, which is: **IF THE ANSWER TO THE 1ST ISSUE IS IN THE AFFIRMATIVE WHAT WERE THE TERMS OF THE CONTRACT?**

I have already answered the first issue in the affirmative. What is to follow is to ascertain the terms of the said contract. Premising his submission on the assumption that there was no contract, Prof. Fimbo took the view that, on the basis of the correspondences and evidence on record, the essential terms of the contract cannot be ascertained. However he did not argue much on this issue before moving on to the third issue.

On the other hand Ms. Karume submitted that there were clear terms that could be woven together out of the correspondences. She said that the correspondences (defined) the product, the price, the mode of supply, and the mode of payment.

Elaborating an each of the said terms, the learned Counsel submitted that the terms of the contract were: -

1. The product was bitumen MC 70.

2. The quantity was 59 containers.

3. The price was USD 255 per metric tonne.

4. The mode of supply was 12 containers every 10 days.

5. The mode of payment was 90 days after receipt of a delivery note and invoice.
6. Payment was backed by a bank guarantee for the entire supply.

7. Supply was to commence upon receipt of a bank guarantee.

8. The conclusion of the contract would be upon receipt of the final consignment, which was 50 days after the date of the final supply.

As hinted above, Prof. Fimbo did not waste much time on this issue. I presume that, this was because he had exhausted the essential arguments while tackling the first issue. From his submission on the first issue, I can gather that, it was his view that: -

1. There was no sufficient evidence to ascertain the quantity of the supply.

2. There was no evidence that the Defendant accepted to supply 12 containers every 10 days, but to supply the same only on a regular basis; and the two terms meant different things.

3. There was no agreement as to price, USD 255 per metric tonne was charged for previous supplies (i.e. in 2003), nor the method of ascertaining it.

4. There was no agreement as to the mode of payment, a bank guarantee being only a promise to pay upon default by the Plaintiff.

5. It was not suggested nor agreed that time would be of essence.

6. There was no agreement as to the frequency and dates of deliveries.

From the submissions of the learned Counsel there is no dispute that the product in issue is bitumen. But in order to buttress his arguments, Prof. Fimbo referred to the following cases. (1) **HAULA DADI & ROSE TANGANYIKA LTD VS HEM SINGH** [1967] HCD no. 201 and (2) **AUTO GARAGE LIMITED VS MOTOKOV** [1971] HCD n. 338.

It is, of course, one thing to say that a contract exists, and quite another to show what the contract consists of. In the present case, the first issue was meant to answer whether the contract exists. In the second issue, the court is required to establish the contents of that contract.

I have already found that the contract in the present case is made up of several correspondences, tied together. The duty of the court is to extract from these correspondences, the actual terms of the contract, because not every statement or suggestion is to be regarded as part of the contract. The court is also required to decide whether any such statement is a condition or a warranty or a mere representation; although in the present case the learned Counsel did not address the court on this aspect.

Whether a statement amounts to a mere representation or a term of contract would depend on a number of circumstances, such as the knowledge of the parties on the subject matter, the time gap between the making of the statement and concluding the contract and the importance of the statement by who presents it, and his subsequent conduct.

After deciding whether a statement amounts to a term of the contract, the next duty of the court is to decide whether the term is a condition or a mere warranty. This is important because breaches of conditions and warranties attract different sanctions. A condition is a major or important term. If it is broken the Plaintiff may repudiate, or reject the contract and claim damages. On the other hand, a warranty is a minor term. If it is broken, then only damages are available and the contract must continue. What amounts to a condition and what amounts to a warranty is a matter of interpretation that the court would attach to the statement, depending on the circumstances of each case. Even if the parties use a particular word to mean the other, the court may hold it to mean the other.

It is also the law that terms may be express or implied.

Express terms are those which the parties openly say or demonstrate in writing. There are, however, times when the court implies certain terms into the contract even though neither party specifically mentioned the same. There are also terms, implied by statute. A word of caution, however, must be sounded here. Primarily,

the court would not imply a term unless by so doing it would be reflecting the intention of the parties, and cannot rephrase, rewrite or alter that agreement. As SPRY J.A. (as he then was) put in **DAMODAR JINABHAI AND CO LTD VS EUSTACE SISAL ESTATES LTD** [1967] E.A. 153: -

> *"It is a general rule of interpretation that where there is an express provision in a contract, the court will not imply any provision relating to the same subject matter... it is not, in my opinion, open to a court to interprete a negative provision as a positive one to do so is ...to imply a term in the contract which the parties did not think fit to include, although they not only had the matter in mind, but were even dealing expressly with it in the contract."*

Other authorities on the subject include **OTIS ELEVATOR CO. LTD VS BHAJAN SINGH** [1967] E.A. 78. To be able to imply a term into a contract, the court must be satisfied that it is obvious that the parties meant to include that point in their contract. But in cases where established usage or custom demands it, a court would easily imply terms, if the said usage is well know to the persons who would be affected by it so that they must be taken to be bound by it when they entered into the

contract, and secondly it must be certain. (See **HARILAL SHAHI AND CHAMPION SHAH VS STANDARD BANK LTD** [1967]. It has also been held that in certain circumstances and from the conduct of the parties the court can and has a duty to imply reasonable terms of the contract even if they are not there. **MERALI HIRJI & SONS VS SONS GENERAL TYRE (E.A) LTD** (1983) TLR 175.

With the above principles in mind, I will now attempt to examine the submissions of the learned Counsel on this issue. As there is no dispute on the product of supply, I will agree with Ms. Karume, that in the present case the agreement was for the supply of 59 containers of bitumen. The proposal for the supply of 59 containers was first communicated to the Defendant by a fax dated 29/11/2003 (Exh.P1). As noted above the Defendant's case was that he did not accept this proposal in any written contract. However according to Exh.P2 dated 2/12/2003, the Defendant responded to the Plaintiff's request for monthly deliveries of 20 containers per month, thus: -

"...the request for 20 TC for the 15th January 2004 it is ok we guarantee that the consignment will be

supplied without any delays and subsequent supplies at monthly intervals will be adhered to."

The Defendant must have been responding to the Plaintiff's proposal on the schedule of supply which was

15/01/2003	-	20 No containers
25/02/2003	-	20 Nos. containers
15/03/2003	-	19 No containers

The total quantity of supply was therefore 59 containers, and the Defendant accepted through Exh.P2 not only to deliver 20 TC by the 15th January 2004, but also *"subsequent supplies at monthly intervals."* Although the dates indicated in Exh.P1 show the year 2003, it is apparent in my view, that this was a typographical error since the fax itself was dated 29th November 2003, and it could not have meant to refer to dates which had already passed but that these must have been referring to 2004 dates. As will be seen later, the times and mode of deliveries, were later changed in the course of the negotiations, the quantity of 59 containers was not changed. In my view, this remained a fundamental term of the contract.

Furthermore, in cross examination DW1 Dr. Ghiraldi, said: -

> *"We knew that there were 59 containers, but we have no agreement, signed agreement."*

When asked later, if the requirement of 59 containers was known to both parties, DW1 replied: -

> *"Correct."*

but that

> *"We could supply the product provided that we received the product from or supplier in Durban".*

and that –

> *"...I did not write, but I inform them and on the phone that we were not capable of supplying the full amount in one go..."*

In my view, from Exhibits P1 and P2 and the testimony of DW1, it is clear that the parties agreed in principle for the supply of 59 containers of 60/70 bitumen. This figure was not changed as the negotiations went on, on

the mode of delivery and the terms of payment. So, I find as a fact that **the supply of 59 containers of bitumen was an express term of the contract.**

The next term was the price. Ms. Karume has suggested that the agreed price was USD. 255 per metric tonne. Prof. Fimbo submitted that this was the price of the product that the Defendant charged the previous year, but there was no agreed price in the subsequent transactions. He combed through several documentary exhibits tendered in court and submitted that none of them carried the price or the promise to pay. In particular, Prof. Fimbo submitted that the bank guarantee was not only a promise to pay in case of default by the Plaintiff, but also that there was a different contract between the bank and the Defendant, and there was no consideration, which rendered it void. On this, Ms. Karume submitted that the bank guarantee was a tripartite agreement and was binding on all the parties here and the bank.

As held above, I have already found that the bank guarantee was a promise to pay the Defendant if the Plaintiff defaulted. To me, this implied that eventually the Plaintiff was bound to pay even, if the bank had paid the Defendant and it is only common sense that if the

bank was to do so it would not have done so as a gratuitous act to the Plaintiff. A promise to pay on behalf of the Plaintiff was/is, in my view, sufficient consideration under s. 2 (1) (d) of the Law of Contract Act. So let me emphasise here that I do not accept Prof. Fimbo's argument that this was not a good consideration for the contract between the parties here.

Next, I agree with Prof. Fimbo, that, in terms of Exh.P1 and P2, although Exh.P1 suggested some prices for MC 70, and PEN 60/70 bitumen, unlike in the case of the quantity and deliveries, the Defendant did not expressly accept those prices in Exh.P2 or in any of the documents tendered by the Plaintiff, except Exh.P14, to which, I will come back later.

First, the position of the law. According to s. 10 of the Sale of Goods Act (Cap 214) the price of goods may be fixed by the contract or may be left to be fixed in a manner thereby agreed or may be determined in the course of dealing between the parties but: -

> *"10 (2) Where the price is not determined in accordance with the provisions of subsection (1) the buyer must pay a reasonable price and what is a reasonable*

price is question of fact dependant on the circumstances of each particular case."

In **SANDS VS MUTUAL BENEFITS** LTD [1971] E.A. 156, it was held that:

"...if the parties enter into an agreement which they believe is enforceable and that the only term left for determination is the price to be paid, for an article, then an agreement to pay a reasonable price is implied."

So in answer to Prof. Fimbo's criticism on the vagueness of the price, in the present case, I will hold that that term can be implied by the court and a reasonable price may be determined depending on other circumstances prevailing in this case. It has been suggested that what is a *"reasonable price"* would be interpreted by referring to the current market price at the time the contract was made (See **R.W. HODGIN: LAW OF CONTRACT IN EAST AFRICA** [1975 ed.] p. 25. I agree with that suggestion.

In the present case there are several ways of determining the price on the basis of the material placed before the court. First, there is the value indicated in the bank guarantee (Exh.P14). According to Exh.P14, the

overall total amount is USD 195,000 for any product supplied by the Defendant from *"today's date"* which was 10th May 2004. By that time the Defendant had accepted the quantity to be 59 containers. If the value of USD 195,000 is divided by the number of containers at least the maximum price per container can be ascertained.

Then, there is Exh.P19, a fax from the Plaintiff to Oryx Oil Company Ltd which quotes the market price prevailing in July 2004 for the same product as USD 270 per metric tonne. Although this was the market price in July 2004, the court could use this figure and by some discounting; to determine the price prevailing in May 2004 when the contract was made.

And last, there is the testimony of DW1. When asked on the relationship between the sum expressed in the bank guarantee and the price of the product, DW1 admitted that there was not only a price, but also that the sum shown in the bank guarantee.

> *"...would represent the maximum that Prismo would pay for that product."*

From the above, I am unable to accept Ms Karume's suggestion that the price of USD 255 per metric tonne

was ***"agreed"*** and I agree with Prof. Fimbo that it was never agreed. However, even if it was not, the court can imply that term and assess a reasonable price or can ascertain it on the basis of materials available. Considering all the circumstances, and particularly the market price of USD 270.00 per metric tonne prevailing in July 2004, I would conclude that USD 255 per metric tonne, was the reasonable price prevailing in May 2004. So to that extent only I agree with Ms. Karume, learned Counsel.

The next term for consideration was the mode of supply. Again, while Ms. Karume thought it was expressly agreed that the supply would be 12 containers every 10 days, Prof. Fimbo is of the firm view that none of the Plaintiff's exhibits, including Exh.P14, ever spelt out this term. Prof. Fimbo however does not dispute that the Defendant finally agreed to supply 12 containers, but his contention is that the Defendant did not agree to the term, "*every 10 days*" but that the Defendant counter proposed the term *"on regular basis"*.

According to the learned Counsel the term *"on regular basis"* was not the same as *"every 10 days"* He elaborated that the term *"regular basis"* meant *"subject to supplies from Durban"*. It is on this basis, that the

learned Counsel submitted that since the Plaintiff did not accept the counter proposal, there was no term as to the mode of delivery. This is what DW1 stated in his testimony. I would quote only the parts asked in cross examination and re – examination. In cross examination DW1 said by regular basis he meant: -

> *"...according to what we are to receive from our supplier in Durban."*

Asked in re-examination, DW1 said: -

> *"...what I was trying to point out is that we could have these containers if we were receiving them from Durban ...and it would have been on a regular basis if we were receiving them."*

It will be recalled that initially the Plaintiff had proposed that the Defendant supply 20 containers per month, with the last instalment of 19 containers (Exh.P1). It was also initially accepted by the Defendant (Exh.P2) that the first 10 containers and subsequent supplies would be supplied as scheduled. After some negotiations, reflected in Exh.P7 and P8, the Plaintiff proposed (Exh.P7): -

> *"at least 12 (twelve) containers per trip. The frequency of these trips needs to be one trip every 10 days up to the completion of the supply."*

The Defendant was asked to confirm, and in response, the Defendant said (Exh.P8):

> *"We inform you that we have no problem in supplying you with bitumen for your project. To give you a better service we have collected empty containers from other customers and confirm that we will supply the 12 containers on a regular basis."*

There were other terms suggested by the Defendant such as the return of the empty containers and the supply of the Plaintiff's daily consumption, but as shall be shortly demonstrated below, these were not expressly accepted by the Plaintiff, but, in my view even if not expressly so accepted, the return of the empty containers was an implied warranty in the contract. But what has attracted considerable debate is the meaning of the term *"regular basis"* used by the Defendant. According to DW1, he meant by that term *"subject to receiving supplies from South Africa"*. If that was so, then I think his statement would have meant no more than a mere representation.

I do not believe that the word *"regular"* in Exh.P8 was meant to have any technical or special meaning other that what that word means in its ordinary dictionary meaning. According to the Concise Oxford Dictionary 16th ed. at p. 874; the word *"regular"* means among other things:-

> *"acting, done, recurring uniformly or calculably in time or manner, habitual, constant, not capricious or casual, orderly..."*

Unless the Defendant intended to use that word in the most unusual manner, it is not consistent with the meaning DW1 attached to it in his testimony, because if that was so, then, the supply would not have been done calculably in time or manner. Instead, it would have been casual, not constant, which, on the facts, was not the intention of the parties.

Even assuming that he was advised to use that word in a legal sense, according to K.J. **AIYAR's Judicial Dictionary,** 13TH Ed. (Butterworth's) at p. 833;

> *"the word "regular" has been defined as steady or uniform in course, practice or occurrence, etc and implies conformity to a rule, standard, or pattern."*

So both in ordinary and legal definitions the word *"regular"* means more or less the same thing and implies conformity to a certain pattern.

Here, the Plaintiff suggested a pattern of supply, to be 12 containers every 10 days. And the Defendant agreed to supply them on *"a regular basis"*. To me, there is only one meaning which brings sense to any ordinary man reading Exh.P8. It can only mean that the Defendant had agreed to supply the product on the pattern suggested by the Plaintiff, no more no less. So I reject the definition of the term *"on a regular basis"* used in Exh.P8, assigned by DW1 in his testimony.

Assuming further that the term "on a regular basis" meant what the Defendant has suggested, it would, in my view, have amounted to a counter proposal. DW1 admitted in cross examination that, apart from the regularity of the supply, he did not mention anything else in Exh.P8 regarding supplies from Durban. He did not suggest which other document communicated that condition to the Plaintiff. So the communication was not

complete. According to s. 4 (1) of the Law of Contract Act:-

> *"4. (1) The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made."*

And s. 4 (2) (b) –

> *"The communication of an acceptance is complete (b) as against the acceptor, when it comes to the knowledge of the proposer."*

In the present case, the Plaintiff's proposal for supply of 12 containers of bitumen every 10 days was accepted by the Defendant when he agreed to do so on *"a regular basis"*. So long as the Plaintiff received Exh.P8, the communication of the acceptance was complete against the Defendant. And assuming that the the acceptance was subject to receipt of supplies from South Africa, which I described as a counterproposal that term was not in Ex.P8 and the Plaintiff had no knowledge of it. The communication of that counter proposal was therefore incomplete. Therefore the contract was valid only on the terms proposed by the Plaintiff and accepted by the Defendant, and the counter proposal was not valid.

I have observed above that the Defendant had imposed certain other terms in Exh.P8. They relate to the return of empty containers, and the supply of the Plaintiff's daily consumption of bitumen. I held that, to me, the return of the empty containers although not expressly accepted by the Plaintiff was an implied warranty because it was not the intention of the parties that the Plaintiff would retain the containers indefinitely. But as for the supply of information on the Plaintiff's daily consumption I do not think this can be inferred as a reasonable term of the contract because I do not think it was a necessary or reasonable requirement because the Plaintiff had already indicated to the Defendant how much bitumen was required, and the frequency of supply. From this information, it was possible, I think to get down to the daily consumption. The place of the two counterproposals made by the Defendant was further relegated by the Defendant's subsequent conduct. First, although those featured in the previous negotiations, the final whistle was blown by the Defendant in Exh.P13.

> *"We are in receipt of your fax of even date and confirm that once we have in our hands the original bank guarantee we will release the 12 TCOU of bitumen 60/70."*

There was no mention here of the requirement to the Plaintiff to supply to the Defendant, the daily consumption of bitumen. And as to empty containers, Exh.P16 speaks for itself: -

> *"I received your fax regarding the empty containers. Regarding the supply of bitumen, as informed over the telephone, we have had problems with the shipping lines for loading in Durban on bitumen containers because of overbooking..."*

In his testimony, DW1 told the court that the return of empty containers was essential if there was bitumen to refill them, and even if there were empty containers they would only be useful if there was bitumen in stock.

So the return of empty containers was not a fundamental term after all because as we shall see later, the availability of the empty containers were not the immediate cause of the Defendant's failure to supply the product.

So, in conclusion, I find and hold that from the correspondences there was a definite mode of delivery and frequency (which is to say), 12 containers of bitumen

every 10 days, till the whole of 59 containers were supplied.

The mode of payment can also be easily ascertained. Although the Plaintiff had initially proposed payment secured by a letter of credit the Defendant rejected those terms and after some haggling the Defendant counter proposed via Exh.P4 that: -

> *"2. In the term of payment it should be 60 days and not 90 days from delivery date."*

But Exh.P9 is also crucial:

> *"If Prismo wants to proceed with the only system of L/C the payment terms must be 60 days instead of the previous 90 days.*
>
> *An other alternative the old approach might be to (consists) a different system of guarantee (ex. Bank Guarantee issued by an European first class bank...)"*

Eventually the parties settled for a bank guarantee (ExhP14). Exh.P14 contains the terms of payment.

"The payment must be made upon reception of the invoice within ninety days of the delivery date."

Prof. Fimbo has submitted that the wording of Exh.P14 is not sufficient to determine the mode of payment, because among other reasons it is not known whether the payment was to be made by cheque or cash. While this information may no doubt be important to remove the vagueness, I am satisfied that in the absence of a clear expression, the court can imply reasonably that the intention of the parties was that payments be made in the currency shown in the contract, and to me it matters little whether the payment was made in cash or by cheque, provided the parties agree so in the course of their business.

So, on the mode of payment I find that the parties agreed to pay in USD currency within 90 days upon presentation of invoice delivery.

On the date of commencement of supply and conclusion of the contract, Prof. Fimbo submitted that there were no dates of deliveries agreed by the Defendant. On the other hand, Ms. Karume submitted that the start of supply was upon receipt of the original guarantee and the conclusion would be upon receipt of the final

consignment which would be 50 days after the final supply.

In my view, the premise should be Exh.P1, P2, P7, P8, P13 and P14 which must be read together to ascertain the intention of the parties. Exh.P1 inquired from the Defendant the possibility of supplying 59 containers. Exh.P2 assures the Plaintiff of the supply not only of the first 20 containers but also of the subsequent supplies at monthly intervals.

Subsequently of course, the mode of supply was changed form 20 containers per month, to 12 containers every 10 days, an agreement sealed after negotiations per Exh.P7 and P8. According to Exh.P8, the Defendant confirmed to be able to supply 12 containers on a regular basis. I have already discussed above what the term *"regular"* means to me. What is significant is that the quantity of 59 containers has not been renegotiated and this, in my view, is what the parties agreed to supply at the rate of 12 containers at intervals of 10 days. When would the supply begin? According to Exh.P13 the first 12 containers would be released *"once we have in our hands the original bank guarantee"*. According to Exh.P14 and the oral testimony of both PW1 and DW1 the first delivery was made on 11/5/2004. To complete

the supply of 59 containers at that rate, it would take the Defendant 5 trips of 12 containers after every 10 days. As correctly submitted by Ms. Karume this amounts to 50 days. This means that the supply was to have commenced on 11/5/2004 would have lasted up to 1st July 2004 or there about.

So with due respect to Prof. Fimbo, I think, from the correspondence, it is possible to calculate the duration of supply (i.e. commencement to completion) with mathematical precision. I would therefore accordingly also reject his argument on this aspect.

Before I dispose of this aspect, let me comment on a few matters which have surfaced in the course of the testimonies of the parties and partly in Prof. Fimbo's submission. These questions were, first whether time was of the essence. Secondly, that this was to be subject to the supply by the Plaintiff of his daily consumption of bitumen, and also that the empty containers would be returned immediately.

According to Exh.P7, the Defendant was informed that the Plaintiff was ***"obliged to complete the project works schedule and in consideration of this, I agree with you that you need to supply us at least 12***

(twelve) containers per trip. The frequency of these trips needs to be one trip every ten days up to be completion of the supply".

This information was received by the Defendant who confirmed through Exh.P8 that: -

> *"We inform you that we have no problem in supplying you with bitumen for your project ... and confirm that we will supply the 12 containers on a regular basis."*

The term *"on a regular basis"* was the subject of discussion somewhere above. There is no doubt in my mind therefore that to the parties, time was of essence in order to enable the Plaintiff complete the project works in schedule.

Exh.P8 however, also disclosed certain conditions by the Defendant with regard to the availability of empty containers and availability of information on the Plaintiff's daily consumption. It has been argued by the defence witness and Prof. Fimbo that there were delays in the return of the empty containers and no information on the Plaintiff's daily consumption was supplied to the Defendant.

As held above, the return of the empty containers and information on daily consumption might have been proposed by the Defendant and although they were not accepted by the Plaintiff expressly, in my view the return of the containers was a mere warranty, whereas the information on daily consumption was not so necessary as could reasonably be implied as a term of the contract especially in the light of Exh.D6, P13 and P16 taken together. If the return of empty containers was that important before a new supply, as amplified in Exh.D6, its importance was extinguished by Exh.P13 which placed the receipt of the bank guarantee as a condition precedent.

> *"We ...confirm that once we have in our hands the original bank guarantee we will release the 12 TCOU of bitumen 60/70."*

Here the availability of empty containers and information on the Plaintiff's daily consumption did not appear to hamper the initial performance of the contract. And as we shall see later, the two conditions had nothing to do with the alleged non performance of the contract by the Defendant. So, yes, they might be terms in the frequency of supplies, but nothing more; but of no consequence.

Having said so, I now conclude the discussion on the second issue to the effect that I am certain, that from all the correspondences, taken together, the terms of the contract can be ascertained as follows:

> *"(1) The description of the product is bitumen 60/70.*
>
> *(2) The quantity of the product is 59 containers.*
>
> *(3) The reasonable price was USD 255 per metric tonne.*
>
> *(4) The supply was to commence on 11/5/2004 and to complete on or about 1/7/2004.*
>
> *(5) It was an implied warranty that the Plaintiff would return the empty containers to the Defendant after destuffing the bitumen therefrom.*

These are the terms that the court could gather from the correspondences. It is not therefore true, in my view, that the terms of the contract cannot be ascertained. This disposes of the second issue.

The third issue is; **"WHETHER THE CONTRACT IS VOID FOR UNCERTAINTY?"**

Part of Prof. Fimbo's contention that there was no contract is that its terms cannot be ascertained and therefore void to that extent under s. 29 of the Law of Contract Act (Cap 345 R.E. 2002). He referred the court to the decisions in **ALFI EAST AFRICA LTD VS THEMI INDUSTRIES AND DISTRIBUTORS AGENCY LTD** [1984] TLR. 256 which followed the English case of **COURTNEY AND FAIR BAIRN LTD VS TOLAINI BROTHERS HOTELS LIMITED** [1975] 1 All ER 716. He went on to submit that in the present case, since the price of the product, which was a fundamental term, of the agreement was not agreed upon, the agreement was to that extent void and therefore unenforceable. He emphasized that vagueness also subsisted in respect of other terms of the contract such as the quantity of the product and the mode and date of deliveries.

Ms. Karume did not want to spend much time on this issue, because according to her, the terms of the agreement were crystal clear. She also relied on s. 29 of the Law of Contract Act.

I think there is no dispute that an agreement which is vague or not certain is void. The basis of this position is s. 29 of the Law of Contract Act, which provides:-

> 29. *"An agreement the meaning of which is not certain, or capable of bring inside certain is void."*

And that is the foundation of the decision of the Court of Appeal of Tanzania in **ALFI EAST AFRICA LTD** case (Supra) cited by Prof. Fimbo. However, the facts in that case were different from the facts in the present case. In that case there was only one single written agreement, where it was indicated that the Respondent was to pay the price of the machinery, but the said price was not mentioned, nor was a method of calculating it, agreed upon. And so the court found that the agreement was void for uncertainty. In the present case, the contract is made up by patching together several correspondences. I have already held above that not only the price, but also other essential terms of the contract can be ascertained if the said correspondences are read as one. In **ALFI's** case there was also a finding that fraud was committed. So, even if the price was known, the contract would still be avoided by reason of fraud. In that case the Court of Appeal's attention was not drawn to the provisions of s.

10 of the Sale of Goods Act. One would never guess what would have been the reaction of the court, if its attention was drawn to that provision. In the present case, I have used s. 10 of the Sale of Goods Act, as a guide, in ascertaining the price of the product in question.

Besides, there are exceptions to the general rule that an agreement which is vague or uncertain in its wording cannot be enforced. These exceptions were highlighted by the East African Court of Appeal in **MUKISA BISCUIT MANUFACTURING CO LTD VS WESTEND DISTRIBUTORS LTD** (NO.2) (1970) E.A. 469. In that case, the appellant Company had contracted with the Respondents for the promotion of the appellant's biscuit sales. The agreement was breached by the Appellant who argued in defence that it was too vague to be enforced. The Court of Appeal considered that the agreement was enforceable, and went on to consider certain exceptions to the rule that a vague contract is unenforceable. The exceptions were:

(i) If the contract is executed or partly executed.

(ii) If the uncertainty was that the parties had omitted to provide for the determination of the

agreement, the courts could imply the giving of a reasonable notice.

(iii) If the uncertainty concerned remuneration the courts would, if possible, imply a proviso giving reasonable remuneration or award on the basis of quantum meriut.

(iv) The courts had a power to imply the machinery for carrying out the intention of the parties as evidenced by their earlier conduct.

However, the Court of Appeal went on to caution that while applying those exceptions, the courts should bear in mind that they should not in the course, seek to rewrite or invent an agreement where none existed, and that the courts should not ignore the wishes of the parties if expressed in clear language.

In the present case, out of the agreed 59 containers of bitumen that the Defendant agreed to supply, the Defendant delivered the initial 12 containers within the agreed time. According to **BLACK'S LAW DICTIONARY** 7th edition at p. 589, part of the definition of the word *"execute"* means: -

(1) To perform or complete (a contract or duty).

In my view therefore, by making the first delivery, in time, and failing to deliver the rest in terms of the agreement, the Defendant must be taken to have partly executed the contract. And by this conduct it is possible for the court to ascertain the intention of the parties. So in my judgment, the agreement between the parties in the present case is not vague and so it is enforceable in law. I will thus answer the third issue in the negative.

The fourth issue for determination is: **WHETHER THERE WAS A BREACH OF CONTRACT AND WHO IS RESPONSIBLE FOR THE BREACH?**

It was contended by Prof. Fimbo, learned Counsel for the Defendant, that even if the court finds that there was a supply agreement between the parties, since there was no agreement as to the quantity, frequency of deliveries, dates of deliveries, then there was no contract to breach. He submitted that neither Exh.P7 nor Exh.P16 nor Exh.D17 sets out any clear terms as the specified dates of deliveries or an agreed number of containers. Besides, the plaint did not plead the date or dates of the alleged breach. He submitted further the 10th day of June 2004 shown in Exh.P17 could not be the

date of the breach because on that date according to the evidence on record, bitumen was not required at that time because the laying of the base course which had to precede the use of bitumen was not done until mid August 2004. He submitted that according to PW6, the road was to be completed in September 2004, and so there could be no breach before August 2004 when bitumen was required. So he urged the court to find that Exh.P17 was false as long as it asserted that the works were scheduled to be completed on 30th June 2004, and with regard to stoppage of the works. He said that even the dates of completion are contradictory. In one instance it was claimed that the works would be completed by 30th June 2004, but PW6 said that the works were to be completed by September 2004. The learned Counsel, further submitted that this court should disbelieve PW1 CARLO DI SIMONE when he stated that the works stopped on 10th June 2004 due to lack of bitumen and instead this court should believe DW1 DR. GHIRARDI. Furthermore Prof. Fimbo submitted that the Plaintiff should be held liable for breach of contract for failing to pay for the supplies which the Plaintiff acknowledged in its paragraph 12 of the plaint. He argued that the defence of set off raised by the Plaintiff against the counterclaim should not be allowed because it contravened the provisions of O. VIII

Rule 6 of the Civil Procedure Code Act 1966. So, it was Prof. Fimbo's view that this court should find that it was the Plaintiff, who is in breach of contract for non payment of the price.

On the other hand, MS. Karume, submitted that the breach commenced from the second supply of bitumen delivered on 1/6/2004 which was short by 6 containers. This breach was immediately followed by a complaint. Overall, Ms. Karume went on, only 26 out of 59 containers were supplied. She went on to say that this was at the Defendant's fault for which the Defendant apologized and even offered to go for the empty containers and solicited assistance from the Plaintiff. It was her contention that for the assistance, Prismo, charged the Defendant and the Defendant paid for such service without any grudge. To the learned Counsel, this was a clear admission of wrong and the Defendant cannot benefit from that wrong. She submitted that for this wrong, the Plaintiff exercised its powers under s. 39 of the Law of Contract Act to put an end to the contract. The learned Counsel then went on to submit on the effects of accepting a breach of contract. Referring to **POLLOCK AND MULLA ON THE INDIAN CONTRACT AND SPECIFIC RELIEFS ACT** at p. 525 that:-

"The injured party....either by bringing an action on the contract or by giving notice to the other party and acting accordingly."

She submitted that three legal effects follow from the acceptance of the breach, which is to say:-

(1) It releases the innocent party from his obligation to perform.

On the basis of this, the Plaintiff was released of its obligation to return the empty containers.

(2) It also releases the guilty party from the obligations to perform.

On the basis of which the guilty party could be sued for damages, but not specific performance, and

(3) The innocent party can sue for damages.

This means that once the innocent party has accepted the breach no supervening events could affect his right to damages.

It was also the learned Counsel's view, that in the present case, it was the Defendant who was in breach, and the Plaintiff wore the shoes of an innocent party.

On the counterclaim, Ms. Karume submitted that so long as the Defendant is the guilty party, and could not benefit from its wrong, the Defendant had no legitimate claims against the Plaintiff over the 7 containers left in Pemba. According to her, the law does not support the guilty party to be rewarded. Secondly there was no agreement for the payment of 12 dollars per day for delay in returning the containers, especially if the Defendant's argument that there was no contract, was anything to go by, because that is a contradiction in terms; for if the Defendant's assertion was to be upheld, then there would be no contract to support his claim for damages for delaying the containers, as it would lose a cause of action. She submitted further that in none of the correspondences did the Defendant intimate that any delay would attract a penalty. In fact, she quoted DW1 as saying that normally they don't charge the USD 12 dollars per day, but that they have raised it now because the Plaintiff sued the Defendant. So, really the claim for USD 12 per day did not stem from a legally established claim, but from the present suit. It was merely, an afterthought. The learned Counsel thus submitted that

the Plaintiff was not liable for the Defendant's claims for USD 1,106.71 USD 14,892 and USD 7,257, as they are not entitled under the law. And for the claim for USD 19,110 for unpaid invoices, the learned Counsel submitted that the Plaintiff has never denied that they owe this amount to the defendant for unpaid invoices. However, it was the learned Counsel's contention that the Plaintiff withheld these payments, because the Defendant had done them damages worth more than USD 400,000/=. She submitted that if the Plaintiff had paid it, it would have amounted to shooting themselves in the feet, and that since the law allows set off, she prayed that this court should allow this amount of USD 19,110 to be set off as pleaded and so no interest should be charged on it.

At a glance it is apparent that the fourth issue as framed, relates to the main suit alone, and is a by product of the first two issues. To determine whether there is any breach of contract one must not only proceed from the fact that a contract exists, but also, from ascertained terms of the said contract. The parties here are at opposite camps with regard to the two issues. The Plaintiff is of the view that there was an enforceable agreement with ascertainable terms. The Defendant on

the other hand, thinks that there was no enforceable contract because its terms were vague.

Be that as it may, as has been demonstrated above the learned Counsel also addressed the court on the counter claim. To avoid confusion, I will first attempt to resolve the fourth issue as it relates to the main suit.

However, before embarking on this issue, I must first put certain aspects in their proper perspective. In particular, I have in mind Prof. Fimbo's submission that the Defendant cannot be held to have been in breach on 10/6/2004 because at that time bitumen was not required for the construction of the road. The second matter is with regard to the time of performance. I will begin with the latter. I am aware that in the course of the trial, it was suggested that additional issues be formulated. One of the proposed issues was, **Whether time was of the essence to the contract?** At that particular time my learned predecessor trial judge, thought it was unnecessary to add that issue. My learned sister judge was entitled to take that decision according to the circumstances and evidence available before her then. But, I think, I will be right in holding that by her order she did not close the doors to the

framing of further issues before decree, because under O. XIV Rule 5 of the Civil Procedure Code Act –

> *"5 (1)The court may at any time before passing a decree, amend the issues or frame additional issues on such terms as it thinks fit, and all, such amendment or additional issues as may be necessary for determining the matter in controversy between the parties shall be so made or framed.*
>
> *(2) The court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced."*

So long as a decree has not been passed, I think the court is entitled to revisit the issues and see if there is any need to amend or strike out any of the framed issues. In the exercise of those powers, I am of the considered opinion that, in the present case the matters in controversy cannot be determined without getting a solution to the following issue:-

> **"WHETHER TIME WAS OF ESSENCE TO THE CONTRACT"?**

I will accordingly proceed to frame it as an additional issue, immediately after the fourth issue, and so this becomes the fifth issue and the present fifth issue becomes the 6th issue.

This issue is really an extension of the second and fourth issues. It had been suggested and strenuously argued by the defence that after all bitumen was not required by the Plaintiff at the time of the alleged breach of contract. I intend to resolve this issue first before coming back to the fourth issue.

I am aware that although the learned Counsel did not specifically address the court on this issue, I am satisfied that they touched on this, in the course of their submission on the third issue, regarding the terms of the agreement. In that regard Prof. Fimbo was of the view that no time of delivery was agreed upon, whereas Ms Karume spiritedly argued that the supply was to commence on 11/5/2004 and thereafter continue after every 10 days until the whole consignment of 59 contains was completed after 50 days. In resolving that issue, I partly found that the supply was to commence on 11/5/2004 and end on 1/7/2004.

When a specific date or a specified time is mentioned, then it is said that time is of the essence of the contract, and completion in accordance with the time or date becomes a condition going to the very foundation of the contract. The consequences of breaching that condition are shown in s. 55 of the Law of Contract Act.

> *"55 (1) When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before the specified time and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract."*

On the facts in the present case, I am of the clear mind, that both parties were aware that the Plaintiff had contractual obligations to complete the construction of the road within a given time. This was clearly brought to the Defendant's attention in Exh.P7 which also suggested the time frame within which the bitumen was to be delivered. The Defendant assured the Plaintiff of supply on a regular basis. So in my view, time was clearly of the

essence, and I have no qualms in answering the additional (5th) issue in the affirmative. This, now puts me in a better position to tackle the next part of the fourth issue, which is ***"WAS THERE ANY BREACH OF THE CONTRACT AND IF SO WHO WAS AT FAULT"?***

I need not repeat my findings that there was a contract between the parties for the supply of 59 containers of bitumen 60/70 within 50 days of 10 days of each consignment from 11/5/2004 to 1/7/2004 and that time was of essence.

The Defendant's condition precedent was the production of an original bank guarantee. And that was produced and received by the Defendant on 10/5/2004. Indeed, the next day, i.e. 11/5/2004 the Defendant delivered the first 12 containers. The next 12 containers were therefore expected on 21/5/2004 if the Defendant was to deliver on "a regular basis" in the frequency suggested and accepted by the parties. However this was not so. The next consignment was not only half the agreed quantity (i.e. 6 containers) but also delivered in as twice as many days (i.e. after 20 days). This, in my view was a flagrant breach of contract, notwithstanding whether or not the Plaintiff needed the product at the time.

Prof. Fimbo, has attacked the evidence of PW1 CARLO DISMONE and argued that Exh.P17 did not reflect the true situation at the site, because according to PW6, bitumen was not required in June 2004. And so, argued the learned Counsel, Exh.P17 should not be given due weight it will be recalled that PW6 was not recalled; so I have no access o his testimony. The learned Counsel also attempted to link Exh.P7 and P16. With due respect, I cannot see any legitimate connection between these two exhibits. Be that as it may, I do not think the contents of Exh.P17 mitigate the fact that at that time the Defendant was already in breach and his attention brought to it through Exh.D8 which was tendered by the Defendant in defence.

> *"We should like to inform you that Saturday 31st July 2004 we received on breach of agreement the last 8 containers of bitumen 60/70."*

The next question posed by the issue, is, who is to blame for the breach?

Again, the basic rule in a contract is, that each party must perform that promise which he has made to the other. In the present case the Defendant promised to

deliver 59 containers of bitumen 60/70 at 5 instalments of 12 containers each at the frequency of 10 days each on condition that the original bank guarantee is received first. The Plaintiff did what it could and delivered the original bank guarantee to the Defendant. Upon receipt of the bank guarantee, the Defendant did make delivery of the first 12 containers as agreed and subsequently delivered consignments of 6 and 8 containers, on 1/6/2004 and 8 on 31/7/2004. So out of 59 containers of bitumen, the Defendant delivered only 26. The Defendant did not therefore wholly perform his part of the bargain in terms of the contract.

I have not, of course, lost sight of the conditions put forward by the Defendant to be fulfilled by the Plaintiff. I have found that it could reasonably be implied that the Plaintiff would promptly return the empty containers once the bitumen was destuffed.

Although there is evidence that the Plaintiff did not perform his part on these two aspects, this was not the immediate cause of the Defendant's failure to deliver the bitumen within the agreed time. According to Exh.P16, and the testimony of DW1, the cause was attributed to the unsatisfactory supplies of the product from South Africa. So, the Plaintiff could not be blamed as

contributing to the breach of contract by delay in returning the empty containers.

Did the Plaintiff know, or have anything to do with the Defendant's dismal performance? According to DW1 what he meant by *"regular basis"* an expression he used in Exh.P8 was that the supply would depend on the frequency of his supplies from South Africa. I have already rejected that part of the Defendant's argument as far fetched and an extraordinary definition of the word *"regular"*. But what is more, if that was what the Defendant meant in Exh.P8, that is to say, that he was not sure of the frequency of his supplies, he did not say so in that document. Therefore, knowledge on the unreliability of the supplies from South Africa could not have been imputed on the Plaintiff. If such knowledge could have been imputed on the Plaintiff then the Defendant would have been entitled to plead impossibility of performance. According to s. 56 (2) of the Law of Contract Act: -

> *"56 (2) A contract to do an act which, after the contract is made becomes impossible or by reason of some event which the promisor could not prevent, becomes void when the act becomes impossible or unlawful."*

According to **BROOM'S LEGAL MAXIMS** 10th ed. at p. 163:

> *"It is ...a general rule (that) where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and has no remedy over there the law will excuse him, and although impossibility of performance is in general no excuse for not performing an obligation which a party has expressly undertaken by contract, yet when the obligation is one (implied) by law impossibility of performance is a good excuse."*

But, there would be no excuse if a man does of his own act, with a fair previous knowledge of the consequences that would follow, and under circumstances over which he had power of controlling the consequences, undertakes to do the said acts. And this is the essence of s. 56 (3): of the Law of Contract Act.

> *"Where one person has promised to do something which he knew or with reasonable diligence might have known, and which the promisee did not know to be impossible, or unlawful, such promisor must make compensation to such promisee, for any loss*

which such promisee sustains through the non performance of the promise."

In the present case, from the testimony of DW1, it is more than clear that the Defendant knew that it had problems with its suppliers. The only difference is that it did not clearly bring this fact to the Plaintiff's attention. So, the defence of impossibility of performance cannot be available to the Defendant.

In paragraph 14 of the Amended Written Statement of Defence the Defendant has pleaded that if there was a contract, the Plaintiff prevented the Defendant from performing its promise. Alternatively, that it supplied the bitumen as requested by the Plaintiff and the Plaintiff received the same on the understanding that each constituted a separate contract of sale under the usual terms according to the custom or usage of the trade. Therefore each contract was fully performed by the Defendant.

In my view, the evidence on record does not support this assertion. On the available evidence, the contract was for the supply of 59 containers of bitumen to be delivered in instalments of 12 containers every 10 days.

Rather than a series of separate contracts it was in my view a single contract in which time was of essence.

It may be that there are customs and usage of trade known to the parties. Unfortunately the Defendant did not produce evidence to prove those trade usages.

As Newbold P (as he then was) in **HARILAL SHAH AND CHAMPION SHAH VS STANDARD BANK LTD** said:-

> *"A trade usage may be proved by calling witnesses, whose evidence must be clear, convincing and consistent, that the usage exists as a fact and is well known and has been acted on generally by persons affected by it. A usage is not proved merely by the evidence of persons who benefit from it unsupported by other evidence."*

Apart from the averment in paragraph 14 of the Amended Written Statement of Defence no attempt was made by the Defendant to prove the existence of such trade usage in the present case.

The averment that the Plaintiff prevented the Defendant from supplying the bitumen is not supported

by the evidence either. After supplying the first consignment the next one should have been on 21/5/2004. The Defendant did not fulfill that promise. Instead he supplied only 6 containers out of 12 on 1/6/2004. The Plaintiff accepted the deliveries. There was no evidence that the Plaintiff prevented the Defendant from supplying even the half consignment. Not only that, the Plaintiff continued to receive the next consignments, (unsatisfactory as they were) amidst protests. Unless by using the word *"prevent"* in the defence, the Defendant assigned the word to another extraordinary meaning, that is not what I understand to be the ordinary meaning of that word.

So in part answer to the fourth issue, I would hold that in the main suit, the Defendant was in breach of contract and is solely to blame for it. There is no evidence that the Plaintiff prevented the Defendant from performing the contract.

As I remarked above, while dealing on this issue the learned Counsel also submitted on the counterclaim. I now intend to deal with that part of the case.

According to the prayers in the counterclaim, the Defendant's total claim is for the amount of USD 42,365.71 comprised of –

(i) USD 19110 being the balance of unpaid invoices.

(ii) USD 14,892 being special damages for failure to return the containers in due time.

(iii) USD 7257 being special damages for the retention of the containers and cost of transporting them from Pemba to Dar es Salaam.

(iv) USD 1,106.71 being special damages for the cost of transportation of one container from the port to the Defendant's depot.

The Defendant also claims for interest and costs.

In reply, the Plaintiff states in paragraph 12 that, if it owes any money to the Defendant, then the Plaintiff had every right to off set the same from the amount owed to the Plaintiff as damages for breach of contract. In a reply to the reply, the Defendant charges that the reply is

evasive, and that a claim of set off does not apply if the claim is not ascertained.

As I had occasion to comment above whether or not a pleading is evasive is better dealt with at the pleading stage and we are now past that. However, for the purposes of the present issue, a discussion on the law on set off cannot be avoided because it affects the final determination of the rights of the parties.

The pleading of a set off is allowed under Rule 6 of Order VIII of the Civil Procedure Code 1966. According to rule 6 (1):

> *"Where in a suit for the recovery of money the Defendant claims to set off against the Plaintiff's demand any ascertained sum of money legally receivable by him from the Plaintiff, not exceeding the pecuniary limits of the jurisdiction of the court, and both parties fill the same character as they fill in the Plaintiff's suit the Defendant may .....present a Written Statement containing the particulars of the debt sought to be set off..."*

So, it is true that a set off can only be pleaded where there is a demand on an **ascertained sum** and the

Defendant must plead the particulars of the debt sought to be set off. Commenting on this provision, **SARKAR ON CODE OF CIVIL PROCEDURE** (10th Edition) Vol. 1 at p. 1046 opines that: -

> *"A set off may be for a sum not admitted by the other side. But it must in any case be a cross – claim for a liquidated amount which can be ascertained with certainty at the time of pleading. When the sum is not determined and quantified, a claim for set off cannot be allowed.*
>
> *...A set off cannot travel beyond the scope and limit of the suit with which it is concerned. It cannot bring out something which is completely foreign to the suit."*

In the present case, whereas the Defendant's claim of USD 19110 is for an ascertained sum, all the Plaintiff's claims are for an unascertained sum, subject to the assessment by the court. So it is not a *"cross claim for a liquidated amount"* which could have been ascertained at the time of the pleading. In the circumstances it is my view that the plea of set off was not properly placed. To that extent, I agree with Prof. Fimbo.

On the evidence, I think there is little dispute that the amount of USD 19110 for unpaid invoices was not paid by the Plaintiff, and it was not covered by the bank guarantee. And in cross examination, **PW1 CARLO DI SIMONE** confirmed that the Plaintiff has not paid this amount. So does Ms. Karume in her submnission.

What was seriously disputed was the claim for damages for the retention and transportation of the empty containers and the remaining container from the port to the Defendant's depot. Gathering from the testimony of **DW1 DR GHIRARDI**, the Plaintiff had a duty of returning the empty containers within a reasonable time, but not exceeding 10 days after using them. I need hardly repeat what PW1 and DW1 had testified on this aspect and their reference to ExhD1, D2, D3, D4, D5, D6, D7 and D8.

It is important to note that Exh.D1, D4, D5 and D6 relate to transactions prior to the commencement of the contract under inquiry which, it must be reckoned, was effective from 10th May 2004 to 1st July, 2004. Exh.D7 was the only exhibit which covered the period of the contract in dispute. Here the Defendant is demanding explanation from the Plaintiff, why only 6 out of 12 containers were loaded aboard the ship. It is perhaps,

important to note also that up to this time the Defendant had delivered 18 containers 12 on 11/5/2004, and 6 on 1/6/2004. Exh.D2, D3, D8 are also dated post 1st July 2004. D2 was a reminder over the renewal of the bank guarantee. Exh.D3 threatens execution of the bank guarantee if the amount of USD 91,475.47 and Tshs.1,596,000/= was not paid by end of August 2004. Exh.D8 is merely a notice of breach of contract from the Plaintiff.

On the basis of evidence on record, Ms. Karume submitted that since the Defence breached the terms of the contract it cannot now benefit from that breach. She submitted that subsequent events may affect the amount of the damages but not the right to them. On the claim of USD 14,892 special damages for the Plaintiff's delay to return 40 containers in due time, Ms. Karume submitted that there was no agreement to pay 12 USD per day. She said that this was more so as the Defendant himself has denied the existence of a contract. Furthermore in none of the correspondence was the question of USD 12 per day of delay ever raised. She submitted that by admission, DW1 testified that the motive of the charge of USD 12 per day was the institution of the present suit. That is why there are neither invoices nor correspondence on the subject, but a mere after thought.

As seen above Ms. Karume admitted that the Plaintiff owes to the Defendant the sum of USD 19110 for the unpaid invoices, but prayed that this be set off from the damages of USD 400,000.

Ms. Karume further, submitted that the counterclaims for USD 1,106.71 had not been established and so has the claim for USD.7,257 as cost of transporting 7 containers.

Prof. Fimbo's submission on the counterclaim was that, not only had the Defendant failed to establish that she was entitled to a set off, but also that he is in breach of the alleged contract for non payment of the price of the product.

As framed, the fourth issue only demands that the court decide whether there was a breach of contract and by whom? In the first part of this question I said that the Defendant was in breach of the contract of supply of bitumen within the time and quantity required by the Plaintiff. On the other hand, the Plaintiff admits to have not paid USD 19110 for unpaid invoices. His defence was set off. I do not think that set off is available to the Plaintiff in this case for the reasons I have endeavored to

set out above. So, I also find the Plaintiff in breach of contract to pay the price of the bitumen.

As for the claim for damages for delay in returning the containers, I find that although from the correspondences, there was an implied warranty by the Plaintiff to return the empty containers and breach of which attracts a penalty by damages, in this case, the Defendant has pleaded specific damages. However, no rate was fixed or agreed upon nor, can the court ascertain a reasonable charge for the delay. If there was any custom or trade usage to so charge, the said trade usage was not proved by the Defendant. Unlike the price of bitumen, there is no material on record either, on which the court could ascertain a reasonable rate of penalty for delay in returning the containers. It is also the law that special damages must not only be specifically pleaded but also strictly proved. In the present case although the Defendant has counterclaimed for USD 14,892 as special damages for the delay in returning 40 containers and another USD 7257 as special damages for retention and transportation of 7 containers, the evidence leaves a lot to be desired. In the absence of proof of an established trade custom or usage, and in the absence of any means for the court to ascertain the price of retention or transportation, it

would be difficult to enforce these claims. The Defendant even failed to produce the receipt which was issued to them for the release of the one container that had remained behind at Dar es Salaam Port.

So to wind up, the 4th issue is answered as follows. Whereas the Defendant is in breach of contract for the failure to supply the bitumen within the time and the quantity required by the Plaintiff, the Plaintiff was also in breach of contract for delaying to pay for the unpaid invoices. The Plaintiff also breached the warranty to return the empty containers within a reasonable time to the Defendant.

I now go to the sixth and last issue. **TO WHAT RELIEFS ARE THE PARTIES ENTITLED?**

It was Ms. Karume's initial contention in her first submission that as a result of the delay in the supply of bitumen the Plaintiff had to stop work for 72 days which led to the loss of 347,330,742/60, being the cost of 72 days for salaries, and wages, depreciation of fixed assets, electricity, rental of equipment. She submitted that this was testified at length by Mr. Simone Santicchia, PW4 and Irene Lusinde, PW2. There were also expenses for telephone bills, house rent, gas services, professional

services and lease of equipment. She submitted that these were the natural consequences of the breach of contract by the Defendant.

Ms. Karume also submitted that in terms of the Sale of Goods Act (which allows one to claim the difference between the contract price and the market price from an alternative source) the Plaintiff has established that an amount of 18,836,946/16 constitutes that difference between the contract price and the price from Oryx. She went on to submit that on these sums, an interest of 21%be granted from the 30th June 2004 to the date of judgment and thereafter interest at 7% on the decretal sum from the date of judgment to that of payment in full. The learned Counsel also asked for the refund of shs.20,000,000/= deposited in court as security for costs. In response to Prof. Fimbo's supplementary submission after recalling PW4, Ms Karume submitted that although the pleaded specific damages was Tshs.498,883,572.18, those were mere projections which according to **MOGHA ON PLEADINGS** was properly pleaded and so, the actual damages of shs.346,148,657.54 was not a contradiction in terms and should be awarded.

In his principal and supplementary submission, Prof. Fimbo, learned Counsel for the Defendant, started by submitting that if there was any breach by the Defendant the Plaintiff could receive general damages but in this case no general damages can be received because they were not pleaded. He submitted that in a case of this nature, where there is a breach of contract, the proper measure of damages is the difference between the contract price and the market price of such goods at the time when the contract is broken. He referred the court to s. 53 (3) of the Sale of Goods Act (Cap 214 RE 2002). He also referred the court to **BARROW VS ANAUD** [1846] 8 QB. 604 as a decision which may have led to the codification of s. 52 (3). However, the learned Counsel gave 4 reasons why the Plaintiff cannot receive damages under this head. Firstly it was not pleaded, secondly the date of breach was not pleaded, thirdly the market price was not pleaded, and lastly the Plaintiff has not proved any loss. He initially said that what (PW4) SANTICCHIA testified on was projected running costs and not actual expenses or actual losses. He submitted that actual cost is classified as special damages which must be strictly proved. Referring the court to **MTEFU VS SENGUO** [1971] HCD n. 254, the learned Counsel submitted that what PW4 managed to prove were projected expenses or losses, not actual losses. He submitted that there was no

evidence of extension of contract neither did the Government of Zanzibar lodge any claim against the Plaintiff. So, he invited the court to hold that the delay stated in Exh.P17 was imaginary. If the court were to find that there was any delay, the Plaintiff would be entitled to only nominal damages. But in this case the Plaintiff has failed to prove his claims and so the suit should be dismissed with costs.

On the counterclaim Prof. Fimbo submitted that the Plaintiff had admitted that he did not pay for the bitumen delivered to it by the Defendant and other items specifically pleaded. He heldged his prayer on s. 50 of the Sale of Goods Act. According to Exh.D4 and D5, the total amount due under this head was USD 19,110 which was not covered by the bank guarantee Exh.P14. Besides, PW1 CARLO DI SIMONE admitted in court the Plaintiff's obligation to pay this sum.

On the return of the containers, Prof. Fimbo submitted that PW1 admitted in court his obligation to return the empty containers immediately. If the Plaintiff would have used and returned the empty containers in accordance with the scheduled of works, there would be no delays in returning them, as the containers would have been utilized at once. But what is clear is that

when the Plaintiff purported to return the containers in June 2004 it had not completed the base course and could not therefore have utilized the bitumen hence the delay in returning the empty containers. The delay in finishing the base course could also account for the Plaintiff's failure to collect the one container that had remained in Dar es Salaam port in July 2004. Therefore, urged Prof. Fimbo, it was due to the Plaintiff's faulty planning that the containers were delayed. So the claim for USD.14892 was justified. Again the Plaintiff has also admitted having failed to return the 7 containers, so that, on that head the Defendant is entitled to the claimed sum of USD.7,257. The learned Counsel also submitted in justification for the claim of USD 1,106.71 as cost of transportation of the one container that had been left at Dar es Salaam port. At the end, Prof. Fimbo, claimed that the Defendant was entitled to judgment on the counter claim, as prayed with interest at 21% p.a. and costs.

Several matters have been raised and have to be determined following the submissions of the learned Counsel. From the submission of the learned Counsel, the first sub issue, is whether special damages can be claimed in a breach of contract of sale? The second is, if so, whether the special damages claimed in this case

have been proved by the parties? Thirdly, whether, if proved, the said damages are the direct and natural consequences of the breach of contract, that is to say whether they are not too remote?

On the first question, whether special damages may be claimed in a case of breach of contract of sale, of course, there is nothing to that effect under s. 52 (2) of the Sale of Goods Act (cap 214) relied on by Prof. Fimbo but s. 55 of the said Act stipulates:

> *"55 Nothing in this Act shall affect the right of the buyer or the seller to receive interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.."*

And s. 73 of the Law of Contract Act (Cap 345) provides:-

> *"73 (1) When a contract has been broken the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused by him thereby, which naturally arose in the usual course*

> *of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."*

From these two provisions, I have no doubt in holding that special damages may be claimed even in a breach of contract for sale of goods.

Before I go the second matter, let me first resolve the third question whether the special damages claimed by the parties in this case are the direct and natural consequences of the Defendant's breach of contract? This is what Prof. Fimbo's submission appears to suggest. Under s. 73 (2) of the Law of Contract Act.

> *"73 (2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach."*

Prof. Fimbo has submitted initially that the Plaintiff has through PW4 SANTICHIA only managed to prove projected, not actual loss. He has relied on the decision of **MTEFU VS SENGUO** (Supra) where it was held that the burden of proving special damages was on the Plaintiff. I think, on that, there is no dispute, and at this

stage the issue is whether the damages on which PW2 and PW4 testified at length were not remote or indirect losses or damages.

It has been said that theoretically, the consequences of a breach may be endless, but there must be an end to liability. The Defendant cannot be held liable for all that follows from the breach. There must be a limit to liability and beyond that limit the damage is said to be too remote and therefore, irrecoverable. The problem is where to draw the line.

(AVTAR SINGH: LAW OF CONTRACT AND SPECIFIC RELIEF, 9th ed. p. 400).

In **HADLEY VS BAXENDAEE**, [1854] 9 Ex. 341, it was held:

> *"Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e. according to the usual course of things, from such breach of contract 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."

Out of this case a rule has been developed with regard to special damages.

"Special damages are those which arise on account of the unusual circumstances affecting the Plaintiff. They are not recoverable unless the special circumstances were brought to the knowledge of the Defendant so that the possibility of the special loss was in the contemplation of the parties."

(AVTAR SINGH – op cit. p. 401. So in **HORNE VS MIDLAND RAILWAY COMPANY** [1873] LR. 8 CP. 131 lack of knowledge of special circumstances prevented recovery of special damages.

The rules as regards to remoteness of damages developed in **HADLEY'S** case were revisited by the English Court of Appeal in **VICTORIA LAUNDRY (WINDSOR) LTD VS NEWMAN INDUSTRIES LTD** [1949] 2 K.B. 528 (CA). It was held there that only such loss is recoverable as was at the time of the contract reasonably foreseeable as liable to result from the breach. Foreseeability, depends upon knowledge possessed by

the parties, or at least by the party who later commits the breach. Knowledge possessed could be imputed or actual. Every one as a reasonable person, is taken to know the ordinary course of things, and consequently to know what loss is liable to result from a breach of contract in that ordinary course. In order to recover any additional loss, the Defendant must not only be shown to have had the imputed knowledge of the ordinary course of things, but also that he had actual knowledge of the special circumstances of the case showing the possibility of more loss arising from the breach.

In the present case, the question is whether at the time of the contract, the Defendant and the Plaintiff had imputed or actual knowledge of the possibility of all the losses claimed by the parties as presented by PW2 and PW4 and DW1.

I will premise from the fact that the Defendant's attention was drawn to the fact that the Plaintiff had a contract for rehabilitating a road in Pemba, and that time was of the essence. Ordinarily, any breach of contract of supply of the product of the contract would have forced the Plaintiff to look for any alternative source of supply. So any difference in price between the contract price and

the market price was within the contemplation of the parties as it is implied in law.

There is also no doubt that in the construction industry, damages may be awarded over expenses such as overheads, loss of profits, interest and finance charges (See **EMDEN'S CONSTRUCTION LAW** Vol. 1 Issue No. 73 – Dec. 2001. Division No. 111 pp 53 – 60).

Although the Defendant here was not in the construction industry as such, its experience in the business of supplying bitumen to construction companies must have exposed him to sufficient knowledge of the consequences of not supplying this product to a road construction Company. So knowledge of its consequence must be imputed to it.

So, I think, in the present case, the Plaintiff was justified in claiming for depreciation of equipment and furniture, salaries, electricity, rent equipment, house rent, telephone bills, professional services, gas, leasing and interest, as these were reasonably foreseeable and the Defendant must be taken to have had a working knowledge of any such business.

The next question is for how long should the court award the said damages. In arriving at this figure the court will take into account the pleadings and the evidence on record and the dictates of s. 73 (4) of the Law of Contract Act that is to say:

> *"73 (4) In estimating the loss or damage arising from the breach of contract the means which existed of remedying the inconvenience caused by the non performance of the contract must be taken into account."*

In the present case the Plaintiff sought to mitigate the losses not only by accepting partial supplies from the Defendant, but also outsourcing the product from alternative suppliers.

In the course of the trial, arguments arose over the difference between the delay pleaded and the period of delay as testified by the witnesses. I will turn to that later in my judgment, but let me first determine whether the said damages have been proved.

The next question is whether the said special damages have been proved. I think it cannot be gainsaid

that special damages are not only to be specifically pleaded but also strictly proved (See **MASOLELE GENERAL AGENCIES VS AFRICAN INLAND CHURCH** [1994] TLR 192 (CA).

In the present case PW2 and PW4 quantified the special damages. PW4, the accountant summarized the said damages as follows: - The actual total cost for 72 days for depreciation of fixed assets, salaries, electricity, rent equipment, telephone bills, house rent, gas service and professional service was shs.204,333,414.28. If 15% thereof is added to this, the total sum comes Tshs.346,148,657.54, which is now claimed.

The general principle is that special damages cannot *"just be plucked from the air"*. In **MASOLELE's** case (above cited) it was held that, normally such evidence should have been supported by documentary evidence, and other details of the business.

In the present case, although records show that there was an application under O. XIII rule 1 of the Civil Procedure Code 1966 to admit some of the accounting books and documents, no such documents were admitted as exhibits. So we are only left with the summary of PW4's evidence to act on.

I think, such evidence is admissible under s. 67 (1) (g) of the Evidence Act 1967, which deals with secondary evidence. The section provides that secondary evidence may be given of the existence, condition or contents of a document in the following cases: -

> (g) .....
> *When the originals consist of numerous accounts or other documents which cannot conveniently be examined in court, and the fact to be proved is the general result of the whole collection."*

Commenting on a similar provision of the Indian Evidence Act (s. 65) **SARKAR ON EVIDENCE** 15th ed. p 1103 observes: -

> *"In the case of voluminous documents, accounts, record etc. it is obvious that it would often be practically out of question by requiring the production of the entire mass of documents and entries to be perused by the jury or read aloud to them. The convenience of trials demands that other evidence be allowed to be offered, in the shape of the testimony of*

a competent witness who has perused the entire mass and state summarily the net result..."

In my opinion, such is the character of the evidence of PW4. The summary of the net result of his examination of the Plaintiff's books of account at the material time, is clearly admissible, and the court will give this its due weight.

I now have to determine the basis of the claims for 72 days stoppage time. I know that from the testimony of PW1 and PW4 the 72 days were arrived at as follows: June 25 days, July, 29 days and August, 2004, 18 days. But none of these witnesses (i.e. PW1, PW2, PW4 and PW5) were able to tell the court exactly the final date of that stoppage. PW2 and PW5 even suggested that stoppage was not total after all, as some works intermittently progressed with the little available bitumen. What is worse is that these particulars were not pleaded. Apart from the round figure of 72 days shown in paragraph 11 (a) of the plaint, there is nothing in the body of the plaint to show when did the 72 days end, although it is pleaded that the works stopped from 10th June 2004. Besides in paragraph 11 (c) the Plaintiff pleaded that on 15th July 2004 the Plaintiff ordered some bitumen from Oryx but it is not pleaded when did

the Plaintiff obtain the said bitumen nor the frequency of the supplies from Orxy. Since the last date of stoppage is not pleaded I will take 15th July 2004 as the cut off date for purposes of assessment. Obviously upon obtaining the bitumen from Oryx the Plaintiff could not be heard to be complaining of continuing to have stopped work. If Oryx again delayed in its supplies the buck cannot be passed to the Defendant. So, I am unable to see the basis of the claim for stoppage from 15th July 2004 to August 2004. For the purposes of assessment of damages, I will knock off 14 days in July and all the 18 days in August. As for June, I will knock off the 10 days in June since according to PW1 that is the date work began to stop and remain with 20 days. So on the basis of the pleadings, in the end, we are left with only 20 days in June, and 15 days in July, 2004 which brings a total of 35 days. So on the basis of the calculation of shs.346,148,657.54 actual costs for 72 mandays, works to an average shs.4,807,620/= per day. If this figure is multiplied by 35 days, the total is Tshs.168,266,708/= which I would award to the Plaintiff. In addition, I would also award Tshs.18,836,946.18 being the difference in price between the reasonable price implied in the contract and the price from the alternative supplier Oryx. This brings a total of Tshs.187,103,654/=. I find and

hold that the Plaintiff has proved these special damages to the requisite standard.

So, judgment is entered for the Plaintiff in the sum of shs.187,103,654/= by way of special damages. This amount shall attract interest of 21% p.a. from 30th June 2004 to the date of judgment, and thereafter interest on the decretal sum at court rate of 7% from the date of judgment to that of payment in full.

On the other hand, the Defendant also succeeds on his counterclaim in the sum of USD 19110 for the balance of the unpaid invoices. Although as a matter of law, breach of warranty attracts an award of damages, and although there is evidence that the Plaintiff in this case has breached a warranty by delaying the return of empty containers, and although the Defendant has pleaded special damages, strict proof of those damages is wanting. Therefore with the exception of the claim of USD 19,110 which the Plaintiff has admitted, I will dismiss the rest of the Defendant's claims. The said sum of USD 19,110 shall also attract interest at 21% from 12/7/2004 when it was due, to the date of judgment, and thereafter at 7% p.a. on the decretal sum from the date of judgment to that of full payment.

The parties shall have their costs on the suit and counter claim respectively. After taxation, the Plaintiff shall be refunded, the Tshs.20,000,000/= deposited in court as security for costs.

Order accordingly.

S.A. MASSATI

JUDGE

3/8/2007

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