

**IN THE HIGH COURT OF TANZANIA**

(COMMERCIAL DIVISION)

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 91 OF 2006**

**SODA ARABIAN ALKALI CO..... PLAINTIFF/RESPONDENT**

**VERSUS**

**M/S ABOOD SOAP INDUSTRIES LTD. ....DEFENDANT/APPLICANT**

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**RULING**

**LUANDA, J.**

Having being served with a plaint filed under Order XXXV of the Civil Procedure Code, Cap 33, the Defendant has filed an application seeking leave to defend the suit. So, this ruling is in respect of that application.

For better understanding of the nature of the application a background history giving rise to the matter is crucial. The background is to this effect: The Defendant/Applicant were in need of caustic soda prills. They approached the Plaintiff/Respondent so that they be supplied with the stuff. The Plaintiff/Respondent supplied the material. Then the Plaintiff/Respondent raised two invoices each of USD 71,775.0. Not only that the Plaintiff/Respondent also drew two Bills of Exchange, the subject

matter of this suit of 19/1/2003 and 16/2/2003 respectively requesting the Defendant/Applicant to pay for the goods supplied. The Defendant's/Applicant's bankers namely Stanbic Bank Tanzania Limited acknowledged receipt of the Bill of Exchange and confirmed that the drawee had accepted the same and would be paid on maturity i.e. 5/5/2003 and 5/6/2003. However, the Defendant/Applicant paid USD 50,000 out of the USD 143,550.0. And the last payment of USD 20,000.0 was affected in January, 2004. Through their letter dated 31/3/2004 the Defendant/Applicant assured the Plaintiff/Respondent that they were taking action to settle the outstanding balance. But on the same date the Defendant/Applicant wrote a letter addressed to the Plaintiff/Respondent informing them that the material supplied were heavily damaged and thus were unfit for the intended purposes. By their letter dated 9/7/2004 they reported the matter to the Health Department, Morogoro Municipal Health Office. The same were later allegedly destroyed.

Mr. Semu learned Counsel for the Defendant/Applicant submitted that the stuff supplied was unfit for industrial use. So, he submitted that there is a triable issue and hence the prayer for leave to defend the suit.

Mr. Masoud learned advocate for the Plaintiff/Respondent on the other hand basically said the Defendant/Applicant committed

themselves to release the fund on 5/5/2003 and 5/6/2003 respectively to pay for the goods supplied or would be supplied. They should not be allowed now to give excuses.

Turning to the two letters of 31/3/2004 Mr. Masoud said that that is unthinkable namely to acknowledge indebtedness and promise to pay the outstanding sum and a few seconds realized that the goods were unfit for the intended purposes. He submitted that the goods were cleared at the Port after it was satisfied that they were in good order. In any case no certificate was issued. Referring to the competency of Morogoro Municipal Authority he said the said Municipal had no such powers. He submitted that no triable issues were raised. He prayed the application be dismissed with costs.

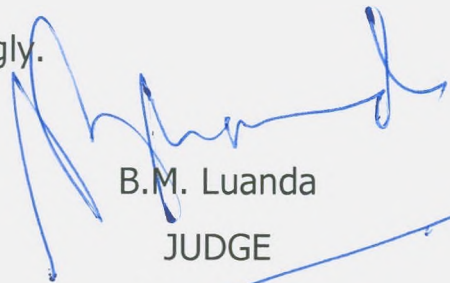
In rejoinder Mr. Semu said there is no need of attaching with a copy of Certificate from Dar es Salaam Port Authority. The said Port Authority cannot examine each and every cargo passes or handled there. He reiterated that the Morogoro Municipal Council had the authority. He prayed the application be granted.

It is now settled that the controlling factor to be considered when dealing with an application for leave to defend under summary suit is whether the facts adduced in the affidavit by the Defendant raises a triable issue.

In our case the Defendant does not dispute to receive the goods. What he is disputing is the quality. He said the consignment was heavily damaged and of poor quality. But the Defendant so far has paid USD 50,000.0. And when reminded he promised to settle the balance. If what he had said is true, then why he partly paid and promise to clear the entire claim? Common sense dictate that the Defendant would have communicated to the Plaintiff about the non suitability of the material at the earliest possible opportunity upon receipt. The Defendant did not do that. And all along the Defendant did not disclose the date the goods were received. Is that an oversight? I don't think so. In my view that was a deliberate omission calculated to impress the court that the material supplied was not fit and eventually destroyed. I am unable to buy that story.

In view of the foregoing, I am not persuaded at all that there is a triable issue worth to be considered by this Court. The application has no merits. The same is dismissed with costs. Since leave to defend has been refused, judgment is hereby entered in favour of the Plaintiff as prayed in the Plaint with costs.

Order accordingly.



B.M. Luanda  
JUDGE  
29/3/2007.