IN THE HIGH COURT OF TANZANIA
[COMMERCIAL DIVISION]
AT DAR ES SALAAM

COMMERCIAL CASE NO. 74 OF 2006

TANZANIA BREWERIES LIMITED.....PLAINTIFF

VERSUS

MARISHAMU KIMARIO.....1ST PLAINTIFF
MARISHAMU KIMARIO ASSOCIATES LTD.....2ND DEFENDANT

Date of last order: 4th March 2009
Date of judgment: 23rd March 2009

JUDGMENT

This suit was instituted under the summary procedure under **O.XXXV r. 1(a)** of the **Civil Procedure Code, [CAP 33 R.E 2002].** Upon issuance of summons for leave to defend, the defendants filed an application to defend which was subsequently granted. The defendants filed a joint Written Statement of Defence which contained also, a Counter Claim against the Plaintiff.

The Plaintiff is a brewer and sale its own brand of beer. It claims from the defendants a recovery of Shillings 41,453,880/= only being a sum outstanding from

dishonoured cheques issued by the 2nd defendant to them. The 1st defendant being a natural person was at all times trading as Marishamu Kimario Associates. Prior to his business being taken over by the 2nd defendant, he was supplied with beers by the Plaintiff on credit. It is alleged that at all times the cheques were drawn and supplied by the 1st defendant as a Director of the 2nd defendant. In spite of several and protracted demands by the Plaintiff, the defendants failed to effect payments. They filed this suit. They are demanding payment of the principal amount as above and general damages; compound interest prevailing at market rate; costs and other relief(s) at the discretion of the Court.

In his defence, the 1st defendants concedes that the 2nd defendant issued cheques which were dishonoured by the Plaintiff's bank but put the Plaintiff to strict proof that he the 1st defendant issued those cheques and or that is liable over them. Generally, the 1st defendants put the Plaintiff to strict proof of the claims. In the counter claim the Defendant claims the following:

(a) a sum of Shillings 50m/= being loss suffered by him due to the unlawful acts of the Plaintiff for breaching a contract between the Plaintiff and the defendant;

(b) that the Plaintiff in breach of the contract withdrew a discount of shillings 100/=per crate which the defendant were entitled as a mini whole seller of the Plaintiff's products. As a result of this withdrawal the defendant suffered a loss of profit of Shillings 1,949,500/= every month from the month that the defendant withdrew the discount to the month this case was instituted;

(c) that the acts of the Plaintiff in breach caused embarrassment and hardship to the defendant and as a result, he is entitled to reparation by way of general damages and according to him shs. 30m/= will make good his claim;

(d) a commercial rate of interest on the principal claim of Shs. 50m/= and court interest on the decretal amount;

(e) Costs, and any other discretional relief that the court may deem fit to grant.

The Plaintiff in his answer to the counter-claim pleaded that it has nothing to do with the bounced cheques issued by the 2nd defendant to the plaintiff. He also observed that the 1st defendant does not deny that he was a director of the 2nd defendant. He traversed the counter claim and pleaded that the Agreement which the Defendant seeks to rely on as authority for grant of a discount of shillings 100/= had expired on 1st of November, 1998 and had expired with that contractual discount. He also stated that the defendant in the counter – claim had a right to vary a discount and the plaintiff in the counter – claim had no right to claim the discount. He labeled a claim for loss of profit as speculative.

In a reply to the answer to the counter claim, the defendant here stated that although the formal contract had expired as alleged but the same was renewed by the conduct of parties and they traded on the same terms of trade as was with the contract. The defendant was at all times referred to in all correspondences with the Plaintiff

as a mini whole seller. He continued to enjoy a 100/= discount per crate until 2001 when it was withdrawn without reason.

Before hearing of the case parties were ordered to file a memorandum of agreed issues. The version filed by the Plaintiff was amended by adding to it immediately after issue 4 the following:

"Whether or not the 1st Defendant is liable for the dishonoured cheques".

Following this addition, item 5 and 6 were renumbered as 6 and 7 respectively. In order to deal with these issues and give them an orderly treatment I deem it fit to re-arrange the issues in the following sequence:

(1) whether the 1st defendant is liable for dishonoured cheques;

(2) whether the plaintiff is entitled to general damages due to issuance of dishonored cheques by the Defendants;

(3) whether the plaintiff is entitled to payment of compound interest caused by dishonoured

cheques by the defendants from the due date to the date of full payment at the rate prevailing in the market;

(4) whether there was a Mini-Whole Seller Agreement between the Plaintiff and the Defendant in the Counter Claim;

(5) In case issue number 3 is answered in the affirmative, whether or not there was any justification for the Plaintiff to withhold Shs. 100/= discount which the Plaintiff in the Counter Claim was entitled to by virtue of the Agreement, if such Agreement existed;

(6) Whether or not the Plaintiff in the Counter Claim suffered any damages by act of the Defendant in the Counter Claim withholding the Shs 100/= discount; and

(7) What reliefs are the Parties entitled to.

The Plaintiff called **Mr. Alex John Mtui** to testify on his behalf. He testified as **PW1.** He was the only witness for the Plaintiff. He testified on the three dishonoured cheques and tendered them in evidence collectively as

Exh. P1. The cheque leafs add up to Shs. 41,453,800. According to him all of them were signed by the 1st Defendant but were drawn by the 2nd Defendant. He was aware that the 1st Defendant was the Managing Director of the 2nd Defendant but that he was always fronting for the 2nd Defendant. His evidence was to the effect that the defendant admitted liability of the debt for which the cheques were issued. He produced a letter which was signed by the 1st Defendant acknowledging the debt. The letter was admitted in evidence as **Exh P3.** The promise and undertakings made in that letter has not been honoured by the defendants at the time of his testimony.

He also agreed that previously the 1st Defendant had traded as **Marishamu Kimario Enterprises.** He entered into a contract as a **Mini- Whole Seller** with the Plaintiff. This contract became effective from the 1st November, 1997. Mr. Mtui testified that the Plaintiff in the Counter Claim were notified through a letter which he entered as **Exh D1** that in their trade with the Defendant they fall under the category of bulk buyers and that customers in the category do not have to make guarantee

contributions. Therefore the Shs 100/= deposit did not apply to him. This category, according to the practice of the Plaintiff's Company, does not require agreements as in Mini Whole Sellers. The witness referred to the sales and deliveries on the 14th; 16th; 19th; and 23rd of June 2003 which were made after the defendants were informed that they were bulk buyers and not mini-whole sellers.

The Defendants called three witnesses to testify. **Mr. Reuben Ali Marishamu Kimario** testified as DW1; **David Mushi** as DW2; and **Mr. Samwel Oforo Ngoti** as DW3. DW1 evidence was to effect that he started trading with the Plaintiff in 1997 as a mini-whole seller. This was a category of beer traders who were buying from the Plaintiff large quantities of beer. They were given as an incentive a discount of shs 100/=. He entered into an Agreement which had a duration of one year from 1st November 1997 and expired on 1st November, 1998. Upon expiration of the Agreement he continued to trade as a mini whole seller under the same terms of the expired agreement.

He formed the 2nd Defendant Company in 1999 and it's Director. He introduced the 2nd Defendant to the Plaintiff by submitting its Memorandum and Articles of Association. He opened a Bank Account at Stanbic Bank and the 2nd Defendant assumed business of a mini whole seller of the Plaintiff's beer buying over 360 crates of beer a day. This discount was removed in 2001 without prior notification by the Plaintiff. The Defendant protested but the Plaintiff did not heed though there were promises to look into the matter by the Plaintiff. During cross examination, DW1 conceded that he did not ask the Plaintiff to withdraw his letter **Exh D1**. In another occasion, he conceded that he did not inform the Plaintiff that his inability to pay or his default in paying the debt was caused by the withdrawal of the discount. In 2003 he asked the Plaintiff to inform him about the quantum of accumulated deposit and was informed through **Exh P1** instead that after all he was not a mini-whole seller but a bulk buyer. According to DW1, the deposit of the discount amount to Shs 50 million. His prayers remains as there are on his Statement of Defence and in the Counter Claim.

DW2 is also a beer trader. He buys beer from the Plaintiff. His testimony was that he used to get a commission of shs 100/=. He entered an Agreement with the Plaintiff as a Mini whole seller in 1996. The Agreement expired in 1997 and was not renewed. Nevertheless he continued trading under the same terms as a mini whole seller until 2001 when he was re-categorized as a bulk buyer. He associated the categorization with being found by the Plaintiff selling Heineken brand of beer which is not a product of the Plaintiff. The witness did not produce the agreement he had referred in his evidence but he is in evidence saying the Shs. 100/= was refunded to him by the Plaintiff. He did not produce the letter which re-categorized him and an impression was created by the Plaintiff's Advocate that this was not true.

The other witness, DW3 is Samwel Oforo Ngoti. He is a freelance accounts technician. He has been a part time accounts technician since 1999. He testified to effect that the 2nd Defendant was trading as Mini-whole sellers of beer purchased from the Plaintiff. According to him, the

2nd Defendant has two directors. The 1st defendant and one Gabriel Kimario are the directors. He produced a document showing movement of the Plaintiff's crates with the 2nd defendant. This was tendered as **Exh P4**. It is from 6th of January 2002 to 18 December 2007 showing a figure of Shs **28,931,600**. This document was prepared by the witness though he did not sign it or date it.

Mr. Ngoti told the court that when shs 100/= was withdrawn, the same was retained as security for the crates which was a new scheme. According to the witness this credit with the Plaintiff did not show up in the annual books of accounts.

DW1 was recalled by the defence. He tendered the Tax invoices dated 1st August, 2002 to 31st August 2002. These were tendered collectively and marked as **Exh D5**. These show purchase of beer by the defendants. In total they show a transaction involving 22,000 crates for that month. The value of those in terms of a discount or security of shs 100/= amounts to Shs **2,200,000/=** only. Invoices for other months of 2002 and invoices for 2003

were not produced because the 1st Defendant thought they were not important.

On the conclusion of oral evidence, I allowed learned Advocates to make their summary concluding submissions in writing. Mr. Tarimo, learned Advocate and Mr. Malima, learned Advocate did submit their written concluding submissions. I must commend both for their valuable and focused submissions. I will consider these submissions in the sequence of issues.

The first issue is whether the 1st Defendant is liable for the dishonoured cheques. First, I notice that there is a common ground that the defence is liable for these cheques. There is no doubt that the 2nd Defendant is liable for payment of the cheques. I understood DW1, who is the Director of the 2nd Defendant conceding that his company is liable to the debt of **Shs 41,453,800** that the Plaintiff is claiming. That is a simple matter. He is also saying the sum has not been paid because to put in his own words, the 2nd defendant is counter claiming on

the quantum arising out of deposit or security in the sum of Shs 50,000,000/=.

It is common ground that after incorporation a company becomes a separate legal entity under the rule in SOLOMON VS SOLOMON & CO LTD [1897] A.C 22. Upon incorporation, the properties of shareholders or directors of the company are separated and becomes distinct from that of a company. Similarly, in this case, the 1st Defendant and or his properties became separate and distinct from that of the 2nd Defendant. In appropriate circumstances, the 1st Defendant will not be jointly responsible for the debts of the 2nd Defendant. That is not an absolute rule. There are exceptions to this general rule. I have read FRANK WERAIRUKA MUSARI V GAPOIL (T) LTD & MUNZA TRADING ENTERPRISES LTD, (Civil Application No. 60 of 2003)(Court of Appeal)(unreported), which was referred to me by Mr. Tarimo, Advocate and I have no reservations that it supports the position I am advancing here. The wording of Mroso, JA is as follows:

"...Normally a party who obtains a decree against a company is not entitled to go for the personal property of a director of a judgment debtor company unless the latter had acted as a guarantor. In certain circumstances, however, the court may have to lift the veil of incorporation of a company, especially when the question of control is in issue and also where a shareholder has lost the privilege of a limited liability"

Reading the submissions of the learned Advocate for the defence, I note also that he is aware of these exceptions to the general rule when he says that there is no evidence to show that the 1st and 2nd Defendants are "really one and the same". Because, if indeed they are, the rule will not apply. Mr. Malima learned Advocate has raised and referred to circumstances that invite this Court to lift the veil. In his opinion, there is no evidence of incorporation of the 2nd Defendant. I will pose here to reflect. The only evidence, beyond reasonable doubt of incorporation of a company known in law, is a certificate

of incorporation issued by an appropriate authority. Such certificates are issued by **BRELA** (Business Regulation and Licensing Authority) formerly, Registrar of Companies in the Ministry of Industries and Trade. The 1st defendant did not even mention who is the other director. This was stated by Mr. Ngoti, a freelance accounts technician. The defence failed to produce any resolution passed by the Board of Directors authorizing any action to be taken on behalf of the 2nd defendant including defending this case or raising a counter claim. In such circumstances, I will agree with the Plaintiff that neither the 1st defendant nor the 2nd defendant has established the corporate existence of the 2nd defendant on a balance of probability.

In the absence of a resolution, specific or general, issued by the Board of Directors of the 2nd defendant here it cannot be said that the 1st defendant was authorized to act for the company. The 1st defendant was acting on the frolics of his own. There was no power conferred on him for the purpose of trading or claiming or defending this claim. The directors of a company have many duties. They are required to act in good faith in the best interest

of the company; use powers conferred on them for the proper purpose; and exercise whatever skill they posses and reasonable care when acting in the company's interests. These are essentially fiduciary and duty of skill and care. It does not appear from evidence and I did not observe from the 1st defendant that he had exercised these common law duties of directors of a company. It was his duty, for example, to take the interests of creditors of the company by paying those debts under the rule in LONRHO LTD V SHELL PETROLEUM CO LTD [1981] 2 ALL E.R 456 by taking measures to minimize any loss to the Plaintiff from the moment it became apparent the amount of shillings 41,453,800/= was due. His conduct to draw out flying kites while he knew there were no funds in the 2nd defendant account is evidence that he failed to act in the best interest of the company.

I am satisfied that this is an appropriate occasion to piece a crack and lift the veil of the 2nd defendant corporate personality in order to protect the creditors such as the Plaintiff here against mischievous conduct of the 1st defendant. I hold and answer the first issue in the

affirmative. The first defendant is liable for the dishonoured cheques.

The court is asked to consider the effect of holding that the 1st defendant is liable for the dishonoured cheques. The effect is obvious that the 1st and the 2nd defendant, are jointly and severally liable to pay a principal sum of Shs. 41,453,800/= which arises from the dishonoured cheques. This quantum was not disputed in the pleadings of parties. Arising from this finding is what is included in the second issue which is **whether or not the Plaintiff is entitled to general damages.** Both Advocates have made brief presentation. The plaintiff claims a sum of Shs 20m/= as general damages and has prayed that this court be inspired by a decision in HEDLEY vs. BAXENDALE (1854) 9 Exch 34. On the other hand, the defence argues that the Plaintiff has not adduced evidence to prove damage under the rule in THEODELINA ALPHAXAD, A Minor s/t next friend v MEDICAL I/C NKINGA HOSPITAL [1992] T.L.R 235, where it was held that general damages for tort, or even breach of contract, are such damages, which so far as money can

compensate, will give the injured party, reparation for the wrongful act. On the basis of this decision, Mr.Tarimo learned Advocate, conceding that the Plaintiff was denied opportunity to use the withhold funds commercially, concludes that the Plaintiff can be compensated by payment of interest which has also been prayed for by the Plaintiff.

Mr. Malima learned Advocate is upbeat that the Plaintiff is entitled to damages. To him the only relevant question is the *quantum meruit*. He argues that the extent of damages will be the value of profit which the Plaintiff would have made if the sum claimed was received in June 2003. The learned correctly points out that this determination is a full determination of the Court in the light of HEDLEY Vs BAXENDALE cited above. The ratio decidendi of this case was cited to be:

> *"Where the 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 arising either naturally, I. e according*

to usual course of things, for such breach of contract itself, or such as may be reasonably supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach."

This is a rule of substance in determination of damages. It does not differ and cannot be distinguished from the one stated in THEODELINA's cited by Mr. Tarimo learned Counsel. I think we have to inquire and read from the evidence whether Parties in this case had reasonably supposed that a breach in effecting payments would probably attract damages. Normally, this will be expressed in a contract, formal or informal or usage of traders in the Plaintiff's products. I did not see that evidence of trade usage or informal or formal understanding. I think this is a matter that consensus id idem is required. None exists here. I will in any event, agree with Mr. Tarimo that interest to be granted will compensate for the value of the quantum of funds arising from the dishonoured cheques. This takes me to the third

issue which is whether or not the Plaintiff is entitled to payment of compound interest.

It has adequately been established that the defendant issued flying kites. These were dishonoured when the Plaintiff presented them for payment. There is no dispute and Parties are agreed that interest on the principal sum is chargeable. The contention between the parties is whether this should be compounded or be left for the court to determine as argued by the defence? Let me examine, for clarity of argument, the position of the defence. Mr. Tarimo learned Advocate has strongly indicated that compound interest has been abolished and to claim it is asking for an illegality. According to Counsel, there are only two types of interest the court can award. This is provided for under Section 29 of the Civil Procedure Code, [CAP 33 R.E 2002] in which case the court has discretion to order payment of interest to the date of judgment. The second part is the one provided for in Order 20 Rule 21 of the Code which provides for rate of interest on every judgment debt from the date of delivery of the judgment until satisfaction and sets that rate at 7%

per annum or such rate, not exceeding 12% per annum. The learned Counsel relied on the case of SAID KIBWANA & GENERAL TYRE (E.A) Ltd v ROSE JUMBE [1993] TLR 175 as authority to support this position.

On the Plaintiff's side, Mr. Malima learned Counsel has distanced himself from the legal opinion of the Defendants. It is clear from his argument that a fundamental issue is one of rates of interest payable and not categories or types of interest. He is of the view that types and categories of interest payable are simple and compound interests and that the rate can apply to either. He further argues that the two categories of interest provided for under Order XX r.21 may apply either to compound interest or to simple interest and that a person wishing compound interest to apply has to satisfy the court as to why the debt should attract a compounded interest. It is argued that the court will have no discretion to deny him the prayer if he satisfies it that there are grounds for adjudging compound interest as payable.

I need to explain my understanding of this subject. Interest is a charge made for borrowing a sum of money.

The interest rate on the other hand, is the charge made, expressed as a percentage of the total sum of the loan taken, for a stated period of time usually a year. For example, a rate of interest of 15% per annum means that for every $100 borrowed for a year, a borrower has to pay a charge $15, or a charge in proportion for longer or shorter periods. In simple interest, expressed in a formula **I=PRT** where I is the interest, P is the principal sum, R is the rate of interest, and T is the period, interest is calculated on the principal loan only. That is the meaning of simple interest.

In case of compound interest, the charge is calculated on the sum of the principal loan plus any interest that has accrued in previous periods. In this case the formula will change and the expression will be $I=P[(1+r)^n -1]$ where *n* is the number of periods for which interest is separately calculated. Thus, if the borrower takes a loan of $100 for two years at a rate of 12% per annum, compounded quarterly, the value of *n* will be $4\times2=8$ and the value of *r* will be $12\div4=3\%$. Compounded interest will yield more than simple interest.

I think this is the simplest way to impart knowledge on this subject. Both modes of interest are chargeable in Tanzania. Compound interest, which in essence is paid on both the principal amount of the loan and interest previously accumulated to it and which is referred sometimes as interest on interest, is not unlawful as Mr. Tarimo seems to argue with zeal. It can be argued that it is immoral but that is for moralists, a different dimension from legality. There are many cases to that effect including THE NATIONAL BANK OF COMMERCE LTD V NABRO LIMITED & MEEDA REUBEN NABURI,(Commercial case No.44 of 2001(HC) (commercial Division) which is referred to me here by Mr. Malima, learned Advocate. My brother, Massati J (as then was) took his precious time to research and in his judgment many cases are reviewed showing ultimately the position and banking practice here which is that banks do charge compound interest. This stretches historically to an *obiter* in HARILAL & CO & ANOTHER V STANDARD BANK LTD [1967] E.A 512. It must be stated though that Massati J was dealing with

interest on a loan which was evidenced by a written agreement and an Overdraft which was also in writing.

In the case before me, this was not a loan strictly speaking. The Plaintiff supplied the defendants with their products but the defendants defaulted in paying the purchase price. Parties did not agree on what interest shall be payable upon default of the purchaser. There is no evidence that the Plaintiff charges compound interest on delayed payments by purchasers of his products. In the event that this was the practice then I am not hesitant to hold that such a practice in the absence of an agreement is unlawful and predatory practice. Even if it is argued correctly that the Plaintiff borrowed from banks in order fill the gap caused by the defendant's default that cannot be a basis to impute charge of compound interest here.

It cannot be disputed that the value of beers purchased from the plaintiff on 14th June to 22nd June, 2003 is not the same as that of today. I am satisfied in this situation that simple interest on the principal debt is capable of putting the Plaintiff in the position he would

have been except for the defendant's default. In the absence of an agreed rate, I think a minimum commercial rate will meet justice of this case. The current minimum interest rate is between 15 - 20%. I think a rate of 15% per annum will meet the justice of this case. I therefore hold that though compound interest is inapplicable here, the defendant shall pay interest on the principal amount of the debt at the rate of 15% per annum starting from the year that the debt was due to the date of filing of this case.

The fourth issue as to whether or not there was a mini Wholesaler Agreement between the Parties is based on the conduct of the Parties here. Parties are at variance with the defendant's firmness that there was such a contract. The basis of this firmness is historical through an Agreement between the 1st Defendant trading as *Marishamu Kimario Enterprises* and the Plaintiff signed on 1st November 1997. The defendants testified as well as in his pleadings that that Agreement expired after a year and was never renewed. It was his evidence also that when the 2nd defendant was incorporated it took over the

business of mini-wholesaler which was previously done by the enterprise. It continued to trade with the plaintiff on the same terms and conditions including a discount of Shs 100/=. It continued to trade as such until 6th June 2003 when the plaintiff wrote to him informing that was in the category of bulk buyer and not mini wholesaler, as shown in **Exh D1.** The letter was replying to the defendant's inquiries on the Shs 100/= deposit accumulation. The defendant had wanted to know how much was accumulated and asked for clear arrangement on how a refund of the amount will be actualized. The other evidence is that the Plaintiff referred the 1st defendant as a mini wholesaler and was invited to meetings conducted for the mini wholesalers by the Plaintiff. Mr. David Mushi is a purchaser of the Plaintiff's beer brands. He trades as a mini wholesaler. He defined a mini whole saler as a trader who buys more than 360 crates a day. He had an Agreement like the one that the 1st Defendant had entered with the Plaintiff. His testimony was that upon an expiration of the Agreement he continued to trade as a

MINI WHOLESALER until today. The witness was not contradicted.

Based on those testimonies, the defence is pleading that through their conduct there was an implied contract of mini wholesaler under section 5 of the **Sale of Goods Act, [CAP 214 R.E 2002]**. The defence is relying on the case of MERALI HIRJI & SONS Vs GENERAL TYRE (E.A) LTD [1983] T.LR. 175, as an authority for the position that a valid contract may be proved by conduct of parties over the years and that where the contract did not provide for terms, the court has a duty to imply a reasonable term.

The Plaintiff differs with the position of the defendant and argues that the defendants have not substantiated the existence of 1997 Agreement. He argues that the document cannot be introduced into the record of the Court during this stage of concluding submissions. Mr. Malima learned Advocate prayed that the court find as a fact that there was no such agreement as mini wholesaler agreement that the Defendants relies on. In the alternative, the learned Advocate argues that Parties were not bound by the terms and conditions of an expired

agreement, if there was such an agreement. I was referred to section 100 of the **Evidence Act, [CAP 6 R.E 2002]** which according to these submissions requires the terms of the contract to be proved only by a document itself. He also cited section 110 (1) of the Act which leave the onus of proof on a person alleging facts different from those in the document.

The plaintiff is also relying on the conduct of the defendants to negate a contract of mini wholesaler. His argument is centered on EXH D2 and the response of the Plaintiff through Exh D1. In the latter, the Plaintiff in clear terms informed the defendants they were not in the category of mini wholesaler but the defendants did not protest. He acquiesced to what the Plaintiff said the defendant was. Further in Exh P3 which is dated 10th July 2003 the defendant was pleading with the Plaintiff to exercise mercy on him and reschedule repayment of the debt. The defendant never raised the issue that he was a mini wholesaler. It is therefore concluded by Counsel that the defendant knew that he was not a mini wholesaler but

a bulk buyer who was not entitled to a discount of Shs 50/=.

I think I can make a decision on this point. First, I do not think Mr. Malima learned Advocate can succeed to challenge the existence of the 1997 Agreement on the ground that it was not produced in evidence. The Agreement was pleaded by the Plaintiff. He cannot turn the back to it at this stage. In evidence it was referred to by the PW1. I find as a fact that there was such an agreement and that the Plaintiff is aware that it was transferred to the 2nd defendant as it is pleaded in the Plaint.

The rule of evidence on superiority of documentary evidence is clear and I think understood by parties. That rule, with due respect, does not apply here. No one is saying that there was a written agreement after the 1997 Agreement had expired in 1998. I understand the Defendant to be saying that in spite of expiry of that Agreement, the Plaintiff traded with him as if he was a mini wholesaler. His claim of a refund of a deposit of Shs 50/= is based on this conduct and not on any written

agreement. I agree entirely with Mr. Tarimo, learned Counsel that a contract may be imputed by conduct of parties. The only issue is whether in the circumstances of this case such imputation will be reasonable.

I had the opportunity to read **Exh D5** which is tax invoices. At the corner of each of the tax invoice there is a space for total empties credit. It was not filled. I have noticed that the exhibit shows that the defendant constantly purchased a total of 360 crates of beer every day. The record in Exh D 5 is not consistent with Exh D4 which was produced by the freelance accounts technician (DW3). The latter does not have a record of some entries or supplies from the Plaintiff. I have already indicated that I do give little weight to Exh D5 but the point missing is that neither of the documents shows clearly the quantum of the discount. This is coupled with lack of oral evidence amplifying the claim as supported by the documents tendered in evidence. I think I must point out that tendering of documentary evidence is not enough to tender a document. Evidence must be led clearly to show for what a document is tendered. In Exh D5, the defence

is said to have purchased 289,316 crates from the Plaintiff. If a crates attracts a discount/ deposit of Shs 50/= that makes Shs 28,931,600. This is the amount that is counterclaimed and from a claim for loss of Shs 50m/= for the plaintiff withholding of Shs 50/=.

I have taken time to consider these positions meticulously and I have come to conclude that an implied contract in the circumstances of this transaction is a farfetched matter. I am inspired in this decision by the conduct of the defendant himself. His reaction to the Plaintiff's notification or reminding him that he was a bulk buyer was not challenged. I agree with the Plaintiff that a person who was aggrieved by what he refers as re-categorization and with non refund of Shs 50/= deposit would have informed the plaintiff about it and that his default in payment of the purchase price of beers was caused by the Plaintiff's failure to release to him the deposit. This conduct negates any implication of existence of contract by implication. I will therefore answer the fourth issue in the negative.

With the treatment of the issues as above, I need not deal with issues (5) and (6). They do not arise. It follows, after travelling this far, that the counter claim also falls and I will seriatim not deal with the claims there because I have substantially dealt with it in the foregoing issues.

The last issue for consideration is about reliefs that parties are entitled as a matter of law. First, the Plaintiff is entitled to the amount of the principal arising from bounced cheques. This amount is Shs 41,453,800/= only. Both the 1st defendant and the 2nd defendant are jointly and severally liable after a veil of incorporation for the 2nd defendant is lifted. This amount shall attract a minimum commercial interest rate of 15% from the date the debt was due to the date of instituting the suit. A further court rate of interest at 7% is granted from the date of this judgment to the date of full satisfaction of the debt. No order as to damages is made. The Plaintiff shall have his costs.

F.M. Werema,

5,981 words

JUDGE

I Certify that this is a true and correct of the original/order Judgement Ruling
Sign
Registrar Commercial Court Dsm.
Date 24/3/04