IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 42 OF 2006

ENGEN PETROLEUM
TANZANIA LIMITED.....PLAINTIFF

VERSUS

TANZANIA – ZAMBIA
RAILWAY AUTHORITY (TAZARA)..... DEFENDANT

JUDGMENT

ORIYO, J.

The facts leading to the dispute in court are brief and uncontroverted. However, the history of the case in this court has not been smooth as one would have expected. The pleadings, (plaint, written statement of defence and reply thereon) were completed and on record by the end of 2006. Initially it was before Massati, J. (as he then was), up to the time when mediation failed. Hearing of the plaintiff's case (PW1, PW2,PW3) proceeded under Luanda, J. (as he then was), until when he was elevated to become a Justice of Appeal. Defence case, (Dw1), was presided over by Oriyo, J. (as she then was), before she was promoted to the Court of Appeal, in February, 2009. From March to June 2009, parties

appeared on different dates before the Registrar and then before Makaramba, J. for various orders and for necessary, further action to be taken in the matter. Eventually, sometime in 2009, the record was forwarded to the Court of Appeal for Oriyo, J.A, to compose the judgment.

As if the delay occasioned by the changes of judges was not enough, it occurred that while in the process of composing the judgment the case file and the Exhibits were somehow misplaced. Efforts to locate their whereabouts at the Court of Appeal and the trial High Court were unsuccessful. It was not until sometime in January, 2012, that the case file and the Exhibits were found mixed up with Court of Appeal records, save for the draft judgment whose whereabouts are still unknown.

Having explained away the delay to determine the case, it is appropriate now to state the brief facts of the case. It is undisputed that the plaintiff, Engen Petroleum Tanzania Limited, (ENGEN), and the defendant, Tanzania – Zambia Railway Authority, (TAZARA), had a trading business relationship dating back to the early 2000. The nature of their business was for the plaintiff to supply the defendant, at the latter's

request, with petroleum products, on credit. The trading relationship was initially on an **ad hoc** basis until October 2004. In November 2004, the defendant offered the plaintiff a one year contract to supply it with the petroleum products on certain terms and conditions stipulated in Annexture "Engen1" to the plaint. At the conclusion of the contract in October 2005, the parties failed to agree on what was due to each, hence the suit.

The plaintiff's claim against the defendant is for the settlement of a sum of USD 433, 277.19 plus interest, being the sum due and outstanding on account of unpaid invoices for supplies of petroleum products delivered to the defendant. The defendant disputed the claim and counterclaimed for USD 597,951.36, being an amount due to the defendant after account reconciliation including tax refunds due to the plaintiff from the Tanzania Revenue Authority (TRA).

In these proceedings the plaintiff was represented by Mr. Nuwamanya, learned counsel of IMMA Advocates. The defendant appeared through Mr. Kambo and Mr.Ndumbaro, learned advocates. At the commencement of the trial, the following agreed issues were famed:-

(1) Whether the defendant is indebted to the plaintiff for the petroleum products supplied to it by the plaintiff.

(2) Whether after consideration for the tax refunds made by TRA to the plaintiff on account of the petroleum products sold to the defendant, the plaintiff is indebted to the defendant.

(3) To what reliefs are the parties entitled.

To prove the claim, the plaintiff relied on the testimonies of three (3) witnesses, namely PW1, Lawrence Mkude, a commercial sales representative, PW2, Hugo Nyakunga, a shipping clerk and PW3, Tumaini Nkonya, a chief accountant. A number of documentary exhibits, "P1" to "P7", were tendered and admitted. On the part of the defendant, testimony was received from one witness DW1, Pascal Mulenga, who was a manager, special duties; formerly, a finance and information technology manager. All the four witnesses were in the employment of their respective parties and duly conversant with the business transactions of their employers.

At the conclusion of the trial, the learned advocates filed their respective Final Written Submissions. It will not be out of place if it is to be noted here that the learned advocates are at one and concur in their submissions that the crux of the matter in the suit is simply **'calculations'.** On this, the plaintiff submitted:-

> *"... the dispute between the parties herein is purely based on **accounting.** Therefore resolving this dispute can only be done by a close examination of the available accounting information"* (Emphasis supplied).

For the defendant, it was submitted:-

> *"... the crux of the matter is **figures.***
>
> (Emphasis provided)

Before discussing the three issues framed at the trial, it will not be inappropriate to establish first, whether there was an agreement or a contract between the parties under which the plaintiff undertook to sell petroleum products to the defendant and the terms thereof. Contracts of sale of goods are regulated by the provisions of The Sale of Goods Act, Cap. 214, [R.E2002]. Section 3 thereof defines a Contract of Sale as hereunder:-

" 3(1) A contract of sale of goods is a contract whereby the seller transfers the property in 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."

Further, section 5(1) thereof states:

" Subject to the provisions of this Act and of any other 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****."* [Emphasis supplied].

Annexture "ENGEN 1" to the plaint is titled:-

"TENDER FOR THE SUPPLY OF GAS OIL AND MOTOR SPIRIT PREMIUM FOR ONE YEAR: 01ST NOVEMBER, 2004 TO 31ST OCTOBER, 2005."

"ENGEN 1" was a Letter of Offer written by the defendant to the plaintiff on 1st November,2004. The Conditions of payment as stated therein were as follows:-

"(iii) Payment Terms:

- 30 days from date of invoice

- Credit limit – Us$ 400,000.00
- Cheque to accompany every Purchase Order".

The Letter of Offer further advised the plaintiff to meet the defendant's relevant personnel in order to conclude a formal purchase/sale agreement. The letter concludes:-

> *"you are therefore requested to meet our corporation secretary to conclude contractual purchase/sale agreements"*

Apparently, no such purchase/sale agreement was concluded and the one year contract of sale/purchase became operational as agreed from 1st November 2004.

In the absence of a formal written contract of sale, the parties adopted the following, as their trading practice. The defendant issued what is called a Local Purchase Order (LPO) to the plaintiff. The LPO was an order that the plaintiff was to supply the defendant with certain specified quantity and quality of the petroleum products as described therein. The LPO was also to show the unit price and the total purchase price. The defendant's LPOs were of two categories. One category was

for the Export Fuel which was for the fuel which was to be consumed by TAZARA across the border in Zambia. The fuel for export was not liable to be taxed because the defendant was exempted from paying taxes in Tanzania. Therefore, the defendant's LPOs on the Export Fuel carried no tax liability; it was "zero rated tax".

On the other hand, there was the second category of LPOs for the fuel that was consumed locally within Tanzania. These LPOs had an additional item, which was a tax liability (fuel levy, excise duty and VAT). These taxes were eventually refunded to the defendant by Tanzania Revenue Authority (TRA).

As stated, the LPOs for the Export fuel bore no tax liability. However it was the practice of the plaintiff, on receipt of the export LPO which had no tax liability on it, to respond by raising a Tax Invoice. The tax invoice raised by the plaintiff had a tax component irrespective of the tax emption status of the defendant. It was uncontroverted evidence of the defendant that usually, the LPO was accompanied by a cheque. Therefore, automatically the defendant's cheque, which accompanied the LPO did not

include the tax element for export fuel and this practice created a debit balance in the defendant's export account with the plaintiff. It was this tax liability in the export account of the defendant which led to the dispute and eventually the suit.

Reverting to the issue on whether there was a contract of sale between the parties or not, I am inclined, in view of the transactions involved, to agree with the plaintiff, that there was a contract of sale between the parties. The contract was partly in writing (Annexture"Engen 1"), and was partly implied from the conduct of the parties.

Now, to answer the first issue as framed at the trial on whether the defendant is indebted to the plaintiff for the petroleum products supplied and remained unpaid for, to the tune of USD 433, 277,19. As stated earlier on, the issue here is **figures** or **calculations.** Several questions arise from the first issue. For example have parties supplied adequate information on the figures/calculations to enable the court to accurately pronounce itself on the issue either way. PW3, Tumaini Nkonya, who was the plaintiff's key witness testified that the disagreement between the

parties was mainly on the Export Account of the defendant maintained with the plaintiff as Account **No Y057.** He told the court that the disagreement was due to the fact that whereas the plaintiff included taxes in the Tax Invoice it raised on the fuel for export, the defendant maintained its export account net of taxes. It was part of the defendant's complaints at the trial that the defendant was not aware as to how much in taxes, the plaintiff had received in refunds from the TRA on account of the Export Account . PW3 informed the court that all the figures/calculations tendered at the trial as documentary evidence, i.e Exhibits "P1" to "P6" were prepared by PW3 himself and the defendant was not involved. These were:- "P1" a summary of all accounts;

Exhibit "P2" LPOs for the local account, No X057;

Exhibit "P3" LPOs for the export account, No Y055;

Exhibit "P4" invoices for the local account;

Exhibit "P5" invoices for the local account;

Exhibit "P6" receipts of payments made by the Defendant to the plaintiff for the fuel received. It is not in dispute that PW3, was the plaintiff's key witness on both the oral and the documentary evidence. And as the defendant was suspicious of the plaintiff's figures/calculations and the

amount of tax refunds the plaintiff had received from TRA why did the plaintiff, not summon an independent witness from TRA and/or the bank to testify on the tax refunds that the plaintiff had actually received from the TRA and that the plaintiff would then testify further to show that such tax refunds it received on the export account was solely used to reduce the defendant's liability with the plaintiff. In the circumstances of this case, an independent witness was necessary for justice to be seen to be done to both parties. There is also the element of human error. For example, during the trial, on 8 June 2007, after the court session, where the testimonies of PW1, PW2 and PW3 had been taken, parties were directed to go through the figures/calculations with their clients in order to verify them. When hearing resumed on 24/7/2007, a report of the verification exercise was given by Mr. Nuwamanya, learned counsel, in the following words:-

> " *My Lord, the exercise is complete of going through the document. However, during the process of verifying both Accountants came across documents which were not fallen (sic) into consideration in respect of claim and counterclaim. Following that the parties agreed to settle. But we are yet to conclude. We pray for adjournment...*"

That was a good example of a human error, where each party omitted to take into account certain documents into consideration when calculating the main claim on one part and the counterclaim on the other, when each party thought that it had perfected the preparations.

Under normal circumstances, the report by the learned counsel in itself was sufficient evidence to alert the plaintiff on the need for an independent witness on the calculations/figures. Actually it was a wakeup call. Unfortunately there was no action taken. Instead, after the learned counsel's report, there followed a series of adjournments without any prospect of a settlement being recorded; when the court ordered that the hearing was to proceed on 24 January, 2008. Other examples of the human factor is where the defendant relied on the same figures supplied by the plaintiff to make its claim, to form the basis of the defendant's counter claim.

The defendant, (DW1), using the plaintiff's figures, testified that the total sum of all LPOs was 3,700,000 USD while the total sum of all Invoices was 4,900.000 USD which resulted into a difference of USD 1,169000, in its

favour. The defendant testified that the plaintiff overbilled it by that sum of USD 1, 169,000. Another example which may appear insignificant otherwise, is that one of the LPOs listed by the plaintiff as an order for fuel submitted by the defendant, was, in the process of verification, found to have been a defendant's order for a different purpose. It was an order for furniture. How did the LPO for furniture find its way to the plaintiff, a dealer in petroleum products, still remains a mystery as no further evidence was led on that. And it is of notable significance as well that the plaintiff has tendered no evidence on how the debt figure of USD 433,277.19 in the plaint was arrived at. Throughout the proceedings, the plaintiff's figure of claim is simply USD 433,277.19 without showing how the figure was arrived at.

In the absence of any explanation from the plaintiff as to why a witness from TRA and/or bank was not summoned, it is assumed that the plaintiff had no such interest.

In the case of **Hemed Said vs Mohamed Mbilu** [1984] TLR 113, the High Court (Sisya, J) had occasion to consider similar circumstances, where a party failed to call a material witness. It was held:-

> *" (iii) where for undisclosed reasons, a party fails to call a material witness on his side, the court is entitled to draw an inference that if the witnesses were called they would have given evidence contrary to the party's interests".*

In view of the discussions above and the decision in the case of HEMED SAID, I am satisfied that the evidence tendered by the plaintiff fell short of the legal requirements. The evidence was insufficient to prove the plaintiff's case on a balance of probabilities. As in HEMED's Case, the plaintiff's failure to call a witness from TRA and/or the bank to testify leads to no other conclusion except the fear that their testimonies would be against the plaintiff's interests. Therefore the answer to the first issue is in the negative.

On the second issue, whether, after consideration of the tax refunds made by TRA to the plaintiff on account of the said petroleum products

sold to the defendant, the plaintiff is indebted to the defendant. In its Written Statement of Defence, the defendant counter claims for Shs 597,951.36 being an amount payable to the defendant by the plaintiff after the reconciliation of accounts and tax refunds received by the plaintiff from TRA as per Annexture "TZRI" to the Defence.

Before proceeding further I will briefly comment on the status of Annexture "TZRI" to the defence.

With due respect, Annexture "TZRI" was purportedly a documentary evidence which was intended to be tendered and admitted in evidence as an exhibit. What actually happened at the trial was that "TZRI" was neither raised nor referred to in the course of the proceedings. And there was no attempt made by the defendant to produce it so that it could be admitted (or refused) in evidence.

Order XIII, Rules 4(1), 7(1) and (2) of the Civil Procedure Code, Cap. 33. RE 2002 provides:-

"4 (1) Subject to the provisions of the next sub-rule, there shall be endorsed on every document which has been admitted in evidence in the suit the following particulars, namely –

(a) the number and title of the suit;

(b) the name of the person producing the document;

(c) the date on which it was produced;

(d) a statement of it having been so admitted; and

(e) the endorsement shall be signed or initialled by the judge or magistrate."

Rule 7 (1) provides further that:-

"7 (1) Every document which has been admitted in evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of the suit.

(2) Documents not admitted in evidence shall not form part of the record and shall be returned to the persons respectively producing them."

As to the consequences of default to comply with the provisions of Order XIII rules 4(1), 7 (1) and (2) of the Civil Procedure Code (supra), inspiration is sought from the case of **Japan International Cooperation Agency (JICA) Vs Khaki Complex Limited,** (2006) TLR 343, where the Court of Appeal made a finding that the learned trial High Court Judge's decision was based on the contents of documents which were on record but had in fact not been recorded as having been produced and admitted in evidence by the trial court, in terms of Order XIII rules 4(1), and 7(1) of the Civil Procedure Code.

Quoting what the Patna High Court in India had stated in the case of **S.M. James and Another V Dr. Abdul Khair,** AIR 1961 at 242 on the construction of the Indian Civil Procedure Code, Order 13 Rule 7 which was in *pari materia* with our Order XIII rule 7(1) and (2),

> *"From Rule 7 above quoted, it is plain that documents admitted in evidence are the only documents that can legally be on the record; and, other documents cannot be on record of the suit. The language of Rule 7 shows that the document must be either placed on the record or returned to*

the person producing it. There is no alternative. Rule7(2) is explicit, and therefore, a document not having been admitted in evidence, cannot be treated as forming part of the record of the suit even though; in fact, it is found amongst the papers of the record."

The Court then concluded as hereunder:-

"There is no denying that except for exhibits P1 and P2, the remaining documents which were "baptized" as exhibits were not part of the record of the suit. This Court cannot relax the application of Order XIII Rule 7 (1) that a document which is not admitted in evidence cannot be treated as forming part of the record although it is found amongst the paper persons on record. The document must be either placed on the record or returned to the person producing it."

Exhibit 'TZRI' was not produced and admitted as evidence at the trial, contrary to the provisions of Order XIII rules 4(1), 7(1) and (2) of the Civil Procedure Code. Therefore it does not form part of the documentary evidence of the defendant.

Further, while DW1 was testifying in support of the defendant's case, the defendant abandoned its earlier pleadings filed in court on the counter claim sum of USD 597,951.36 without amending the pleadings. DW1 testified that the defendant's counter claim was USD 1,169,579.28 allegedly being the difference between the total due on all Invoices less the total of all LPOs. It was under these circumstances that the defendant did not make any attempt to produce "TZR1" as part of its documentary evidence as it was no longer relevant. The counterclaim was not proved to a balance of probabilities. Therefore, it follows that the answer to the second issue is in the negative. The defendant did not lead evidence on the counter claim of USD 597,951.36 at all. In terms of Order XIII rule 7(2) of the Civil Procedure Code Annexture "TZR1" is not part of the record of this case and is accordingly expunged.

The third and last issue is on the reliefs that the parties are entitled to. It is noted that the balance outstanding as of 30th June, 2004 was not controverted by the defendant after it agreed that the said outstanding

balance be forwarded to its auditors, M/S. Price Water House Coopers (PWC). In the event, the plaintiff is awarded the uncontroverted amount, being the sum outstanding as of June, 2004 with interest. The plaintiff is also entitled to $^{1}/_{3}$ costs.

Accordingly ordered.

K.K.Onyo
JUDGE