

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

COMMERCIAL CASE NO.126 OF 2012

SCANIA TANZANIA LTD.....PLAINTIFF

VERSUS

AFRO STAR (T) LIMITED.....1ST DEFENDANT

MAX KIRITA MINJA.....2ND DEFENDANT

Hearing dates: 19th March & 3^d July, 2014

Judgment date: 29/08/2014

Appearances:

Mr. John Kimwaga, Advocate for the Plaintiff

Mr. Nickson Ludovick, Advocate for the Defendants

JUDGMENT

MAKARAMBA, J.:

This is judgment in a suit **SCANIA TANZANIA LTD**, the Plaintiff herein filed in this Court against the Defendants jointly and severally for the payment of **USD 37,289.06**. The suit claim is the unpaid and/or outstanding amount of the purchase price of one Scania truck with registration No. **T 842 ATH** and its trailer No. **T 307 ATD** respectively, which the 1st Defendant bought from the Plaintiff on credit. Part of the purchase price for the suit Scania truck and trailer was financed by **Stanbic Bank**.

The Plaintiff in this suit **SCANIA TANZANIA LTD**, as it is the case with the 1st Defendant, **AFRO STAR (T) LIMITED** are limited liability

companies established under the laws of Tanzania. The Plaintiff, **SCANIA TANZANIA LTD**, deals mainly in importation and sale of Scania vehicles and spare parts and offers related workshop services. The 1st Defendant is the purchaser of a motor vehicle model Scania truck with its trailer, the subject of this suit. The 2nd Defendant, **MAX KIRITA MINJA**, is a businessman based in Dar es Salaam and is the Managing Director of the 1st Defendant Company, **Afro Star (T) Ltd**.

According to the pleadings, **MAX KIRITA MINJA**, the 2nd Defendant herein, executed a Promissory Note in the sum of **USD 38,319.50** in favour of **SCANIA TANZANIA LTD**, the Plaintiff herein. On the 5th July, 2008, **AFRO STAR (T) LIMITED**, the 1st Defendant herein, issued to the Plaintiff, **SCANIA TANZANIA LTD**, a Post dated Cheque in the sum of **USD 38,319.50** but later on the payment of the cheque was stopped by the 1st Defendant's company. The Promissory Note has expired but to the date of the filing of this suit, the 2nd Defendant, **MAX KIRITA MINJA**, has not fully settled his obligations.

Despite repeated demands by the Plaintiff, the Defendants denied the Plaintiff's claim. On the 2nd November 2012, the Plaintiff filed a suit in this Court against the Defendants claiming for the following reliefs:

- a) Payment of USD 37,289.06*
- b) Payment of interest on the principal sum from 5th July 2008 at commercial rate per annum till the date of judgment*
- c) Payment of interest on the decretal sum from the date of judgment until its satisfaction in full at court rate.*
- d) Costs.*
- e) Any other relief as the Honourable Court shall deem fit.*

The Defendants in turn in their joint written statement of defence filed in this Court on 24th December 2012 raised a Counter-Claim/Set Off against the Plaintiff's as follows:-

- 1. That the Defendants claim against the Plaintiff the sum of USD 35,600.00 together with interest at the rate of 30%.*
- 2. That the issued invoice which included VAT which Stanbic Bank paid on behalf of the Defendants.*
- 3. That the Plaintiff did not pay VAT instead appropriated the same. The Defendant is obliged to pay the Bank the said money with interest.*
- 4. That the Plaintiff cleared the truck without paying VAT as the Defendants were exempted by TRA.*

In their counter-claim/set off the Defendants sought the following reliefs:

- 1. That the Court orders the plaintiff to pay the defendant the sum of USD 36,600.00 being money paid as VAT.*
- 2. That the court be please (sic!) to order the Plaintiff to pay interest on the decretal sum at the rate of 39% from the date the Plaintiff received the money to the judgment date.*
- 3. Costs to follow event.*

In making its case the Plaintiff brought two witnesses, **Mr. Sanjay Oza**, the Finance Manager with Scania Tanzania Limited as **PW1**, **M/s Mwantumu Salim**, Legal Officer from Tanzania Revenue Authority (TRA), as **PW2**. The Defendants on their part called only one witness, **Mr. Max Kirita Minja**, the Managing Director in Afro Star (T) Limited as **DW1**. At the close of the trial, the learned Counsels for the parties, **Mr. John Kimwaga**, for the Plaintiff, and **Mr. Nickson Ludovick**, for the Defendants, filed closing written submissions.

This suit is determined on the issues framed and recorded by this Court on the first day of hearing of the suit, which I propose to traverse in the course of this judgment.

The first issue is *whether the Defendants are indebted to the Plaintiff for the payment of USD 37,289.06.*

In his closing submissions Mr. Kimwaga learned Counsel for the Plaintiff argued that, as from the Promissory Note (**Exhibit P1**) and the Post Dated Cheque (**Exhibit P2**), the Defendants are jointly indebted to the Plaintiff for the sum of **USD 37,289.06** being the unpaid purchase price of the one Scania truck and its trailer, the 1st Defendant purchased from the Plaintiff on credit. According to Mr. Kimwaga the arrangements of payments for the said truck and its trailer was that, the Banker had to pay 70% of the Purchase price, which the Banker in fact paid in full, whereas 30% of the purchase price equivalent to USD 37,289.06. had to be effected by the Defendants, which amount the Defendants have not paid.

Mr. Ludovick learned Counsel for the Defendants argued in his closing submissions that, according to the letter dated 19th December, 2007

from the Plaintiff to **Stanbic Bank** which was admitted in this Court as **Exhibit D1**, the Defendants on their party have paid the all of the debt to the Plaintiff and the remaining balance of the purchase price has to be paid by **Stanbic Bank Ltd.**

On the evidence on record and the submissions of learned Counsels, I am of the considered view that the question of payment or non-payment of the purchase price is a matter of evidence. The claim of the Plaintiff is based on the **Promissory Note, Exhibit P1**, and the **Post Dated Cheque, Exhibit P2** which the Defendants issued to the Plaintiff. At the trial PW1 in his testimony told this Court that, the Defendants did not comply with the payment plan and failed to settle the debt beyond the due date of **5th July, 2008** as per the **Promissory Note, Exhibit P1**. Under those circumstances, it was the duty of the Defendants to establish whether indeed they paid as per the **Promissory Note, Exhibit P1**, and the **Post Dated Cheque, Exhibit P2**.

In proving their counter-claim in the defence case, the Defendants tendered in this Court a letter 19th December, 2007 from the Plaintiff to Stanbic Bank dated which was admitted as **Exhibit D1**, in which the Plaintiff acknowledges to have received the required deposit amount for the said truck and the arrangement fee. The same letter, **Exhibit D1**, required the Financier, **Stanbic Bank**, to credit the balance amount of **USD 168,800.00** to the Plaintiff's account. The Defendants further tendered at the trial a receipt No. 180012 dated 7th January, 2008, from Scania Tanzania Brach, which was admitted as **Exhibit D1 collectively**, acknowledging receipt of the balance of **USD 168,799.44**.

On the evidence tendered by the Defendants including the letter **19th December, 2007** and the receipt **No. 180012** which were admitted and marked as Exhibit D1 collectively, the Defendants have established that they are no longer indebted to the Plaintiff.

It is for the above reasons that, the first issue *whether the Defendants are indebted to the Plaintiff for the sum of USD 37,289.06* is to be answered in the negative.

The second issue is, *whether the purchase price of the Scania truck and trailer was inclusive of USD 35,600 as VAT.*

In his closing submissions Mr. Kimwaga learned Counsel for the Plaintiff submitted that there is no dispute that the Defendants were enjoying tax exemption for importation of capital goods, and since the buyer was an approved investor, the item was cleared through customs tax free. However, following refusal by TRA to include the Banker as co-owner/title holder, Mr. Kimwaga further submitted, the Banker was not ready to extend the loan facility to the Defendants. It was resolved to arrange for payment of tax, and in this case the VAT, Mr. Kimwaga pointed out. The Plaintiff therefore issued a Tax invoice No. 170074 of 6th December 2007, **Exhibit P3**, for the purchase price VAT inclusive, to the tune of **USD 213,600** Mr. Kimwaga further submitted The Defendants can no longer rely on the tax exemption which they have opted to forgo *in lieu* of the facility that tied them to the condition of payment of tax, Mr. Kimwaga cautioned. They are stopped under section 123 of the Evidence Act, [Cap.6 R.E 2002], Mr. Kimwaga surmised.

On the Defendants' side, Mr. Ludovick submitted in his closing submissions that, the Plaintiff managed to import the Scania truck and trailer free of tax charges from TRA as indicated on **Exhibit D2**.

I have carefully examined the Customs Declaration Form, **Exhibit D2**. Indeed the Plaintiff managed to import the Scania truck and trailer free of tax charges by Tanzania Revenue Authority (TRA). Furthermore, PW2, an Officer from TRA, told this Court during the trial that, if a person or a company is exempted from paying taxes that person or company cannot at any point in time be required to pay taxes unless that exemption is waived. PW2 added that, the question of refusal by TRA to include the Banker as co-owner/title holder for the Bank to extend loan in the process of tax exemption is not true. According to PW2, TRA may exempt tax charges even if the truck is owned and registered by two different persons. In light of the considered view on the strength of the above reasons that, the purchase price for the imported Scania truck did not include VAT. However, at the trial the Plaintiff issued a Tax Invoice, which was admitted by this Court and marked as **Exhibit P3**, and **Exhibit D1** to Stanbic Bank Limited for a purchase price, which included VAT to the tune of **USD 35,600.00**. In his closing submissions Mr. Kimwaga conceded that, the Bank paid 70% of the purchase price in full including the VAT. Thus, this Court finds further that, the purchase price paid by the Bank to the Plaintiff for the Scania truck and trailer was VAT inclusive.

It is for the above reasons that, the second issue whether the purchase price of the Scania Truck and Trailer was inclusive of USD 35,600 as VAT is to be answered in the affirmative.

The third issue is to the effect that, *if the second issue is answered in the affirmative, whether the Defendants are entitled to the payment of USD 35,600 as VAT.*

Mr. Kimwaga submitted that, following refusal by TRA to include the Bank as co-owner/title holder, the Bank was not ready to extend the loan facility to the Defendants and it was resolved to arrange for payment of tax (VAT). PW1 told this Court that, the condition to have the truck registered in dual name was put forward by the financier, Stanbic Bank. This was not possible because TRA did not permit joint registration if the customer had any exemptions, Mr. Kimwaga further submitted. As a result the Bank then asked the Plaintiff that the VAT exemption not to be used as they (Bank) would not be able to finance the sale if there was no joint registration done, Mr. Kimwaga further submitted. The Defendants can no longer rely on the tax exemption which they have opted to forgo *in lieu* of the facility that tied them to the condition of payment of the tax, Mr. Kimwaga surmised.

Mr. Ludovick on the other hand submitted in his closing submissions that, Scania Tanzania Ltd was misled that the cost of the vehicle included import duty and VAT. Scania Tanzania Limited should reclaim from TRA the VAT and import Duty they mistakenly paid to TRA. The Plaintiff did not show any receipt as evidence to show that the said amount was paid to TRA. In support of his argument Mr. Ludovick referred this Court to a number of authorities including section 10 of the *Value Added Tax Act* [Cap.148 R.E 2006], which states that:

"10(1). "A supply of goods or services is an exempt supply if it is of a description specified in the second schedule to this Act".

10(2). "The VAT is not chargeable on an exempt supply, and deduction or credit of input tax is not allowable on purchases made in respect of the exempt supply. As far as the Defendant is exempted and the vehicle was registered and imported without taxes the Defendant is entitled to the Paid VAT being paid by the Defendant to Stanbic Bank Ltd."

Mr. Ludovick further referred this Court to section 6 and 10 of the *Motor Vehicles (Tax on Registration and Transfer) Act* [Cap.124 R.E 2008] which provides that:

"The Minister may, if in his opinion it is in the public interest so to do by order published in the Gazette,

(a) exempt any Category or categories of Motor vehicles from the Registration tax imposed by this Act.

(b) exempt any person or class of persons from paying of any Registration tax in respect of any respect of any Motor vehicle or any Category or number of motor vehicles owned by that person or class of person.

It is not disputed that, the Bank (Financier) paid to the Plaintiff the purchase price including the VAT as per the Tax Invoice issued by the Plaintiff. It is also not in dispute that the said Scania truck was imported free from taxes and duties. I am of the firm that, the Tax Invoice

(Exhibit P3) was mistakenly issued by the Plaintiff to include VAT. The Bank having paid the purchase price VAT inclusive, as per the invoice, the Defendants are therefore entitled to recover from the Plaintiff the VAT. This is due to the fact that, the Bank has been recovering the purchase price from the Defendants including the VAT.

It is for the above reasons that, the third issue *whether the Defendants are entitled to the payment of USD 35,600 as VAT* is to be answered in the affirmative.

The last issue is *to what reliefs are the parties entitled to*.

On the reasons explained above, the Plaintiff has failed to prove its case on the balance of probabilities, the entire suit therefore fails and it to be dismissed with costs.

On the part of the Defendants, the Counter-Claim succeeds. Judgment and Decree is hereby entered for the Defendants in their counterclaim against the Plaintiff for the payment of **USD 35,600** being the amount of money mistakenly paid as VAT.

In their counterclaim the Defendants have also prayed for the payment of interest on the decretal sum at the commercial rate of 39% from the date the Plaintiff received the money to the judgment date.

It has been established in this suit that, the VAT amount to the tune of **USD 35,600** was mistakenly paid to the Plaintiff. This being the case therefore the Defendants cannot be heard to claim, and have failed to establish how much they have suffered from the VAT amount being mistakenly paid to the Plaintiff. In any event, even if the Defendants were entitled to payment of interest, which as I have determined they are not, the rate of 39% in my view is far on the higher side. In any

event the Defendants have not established the basis for being awarded that rate of interest.

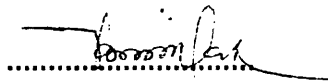
It is for the above reasons that this Court cannot award the prayer of the Defendants for the payment of interest at the rate of 39%.

The Defendants did not make any prayer for payment of interest post judgment. That being the case, this Court therefore cannot award any interest post judgment on the decretal sum.

The Defendants having succeeded in their counter-claim, they shall be entitled to an order for payment costs of their counter-claim by the Plaintiff.

In the whole and for the above reasons, the Plaintiff suit fails. It is hereby dismissed with costs. The counter-claim by the Defendants succeeds. It is hereby upheld. The Defendants are entitled to the following reliefs in their counterclaim:

- 1. The Plaintiff shall pay the Defendant the sum of USD 35,600.00 being money paid as VAT.*
- 2. The Plaintiff shall pay the costs of the counter-claim.*

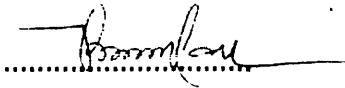


R.V. MAKARAMBA

JUDGE

29/08/2014

Judgment delivered this 29th day of August 2014 in the presence of Mr. Elia Jonas, Business Controller for Scania Tanzania Ltd, the Plaintiff and Mr. Max Kirita Minja, the 2nd Defendant and Managing Director of the 1st Defendant.

A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

29/08/2014

Word count: 2784