IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 61 OF 2013

LEGEND AVIATION (PTY) LTD t/a KING SHAKA AVIATION ..... PLAINTIFF

VERSUS

WHIRLWIND AVIATION LIMITED ..... DEFENDANT

3rd September & 26th May, 2016

JUDGEMENT

MWAMBEGELE, J.:

The plaintiff Legend Aviation (Pty) t/a King Shaka Aviation filed this suit against the defendant Whirlwind Aviation Limited on 19.06.2013 claiming for the following reliefs:

(a) A declaration that the defendant breached both the lease agreements and that the agreements terminated following the breaches;

(b) A sum of USD 245,858.38 (say United States Dollars Two Hundred Forty Five Thousand Eight Hundred Fifty Eight and thirty eight cents only being the defendant's liability to the plaintiff);

(c) Interest on (b) above at commercial rate of 12% from October 2012 to the date of judgment;

(d) General damages at a rate to be assessed by the court;

(e) Interest on the decretal sum from the date of judgment to the date of satisfaction of the decree in full;

(f) Costs be provided for; and

(g)Any other orders or reliefs as this Honourable court may deem fit.

This case commenced hearing before my brother Nyangarika, J. on 15.12.2014. It was Mr. Lusiu Peter, learned counsel, who appeared for the plaintiff at the hearing. Only one witness testified in support of the case – Mr. Russell Ashley-Cooper. He testified as PW1. This witness was a Human Resources Manager of the plaintiff company. His testimony was preceded by his statement being filed earlier. The same was admitted in evidence as his examination-in-chief and marked as PWS1 as per rule 49 (1) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012.

No defence witness was physically fielded. In view of the fact that it could not procure one Cornelius J. Van Eijk, the defence prayed for and was granted leave to introduce in evidence his statement as his evidence-in-chief. Thus the evidence of the defence was not subjected to cross-examination. Following a ruling of this court of 30.06.2015 to that effect, the statement of Cornelius J. Van Eijk was admitted in evidence and marked DWS1.

The relevant background facts of this case are fairly simple and largely undisputed. Let me state them here. The plaintiff is a limited liability company incorporated in South Africa and deals with, *inter alia*, the business of hiring aircrafts to other operators. The defendant, also a limited liability company but incorporated in Tanzania, carries the business of, *inter alia*, Helicopter charter services.

On 06.02.2012, the plaintiff and defendant entered into two different Aircraft Lease Agreements. The first one was in respect of a Helicopter described as BELL 206 BIII with registration number ZS-HCI (Serial Number 4268) and the second one was in respect of a Helicopter described as BELL 407 with registration number ZS-RLC (Serial Number 53379). I shall henceforth be referring to them as simply "BELL 206" and "BELL 407", respectively. The two lease agreements were tendered and admitted in evidence as exhibits and were, respectively, marked as Exh. PE1 (a) and Exh. PE1 (b).

It appears things did not go smoothly as planned as the defendant did not make many payments in advance as agreed in both lease agreements. The plaintiff claims that only one payment was made in advance in accordance with the agreements; the rest were made late and later random part payments were made sporadically and at the time of filing of this suit, the amount due amounted to USD 245,858.38. The plaintiff thus claims that the defendant breached the terms of the Lease Agreements and consequently filed this suit seeking for the prayers indicated above.

On the other hand, the defendant admits the claim partly that it owes the plaintiff only USD 28,700.00 as the amount due from it to the said plaintiff. The defendant states that it could not continue with the operations as planned because Bell 206 was grounded after two months and Bell 407 could not be operated after six months as the TCAA Regulations required that it be deregistered in South Africa and thereafter registered in Tanzania. The defendant also ascribes the failure to the plaintiff's demand to use its (the plaintiff's) pilots.

During the final pretrial conference on 05.11.2014, the following two issues were framed:

1. Whether there was breach of agreement by either party;
2. To what reliefs, if any, are the parties entitled.

The breach of agreement for which the first issue is supposed to answer is in respect of the two lease agreements; Exh. PE1 (a) and Exh. PE1 (b).

I shall start with Exh. PE1 (a) which is the Aircraft Lease Agreement for Bell 206. On this, it is not in dispute that despite the fact that the Agreement was executed on 06.02.2012, Bell 206 was not delivered to the defendant until July 2012. As rightly put by the plaintiff and fortunately not denied by the defendant, clause 4 the Agreement stipulates that payments were to be made in advance. For easy reference, let me quote the clause, it reads:

> "Payment shall be made in advance as laid out in Anexture 1 to include mobilization and demobilization and the amount equal to one months (sic) flying. All other charges such as fuel, airport charges, parking fees, en-route charges, ATNS charges and passenger taxes shall be paid by the hirer. All ferry flights to and from Virginia Airport are from the hirer's account. All associated costs are arising due to importance and use of the helicopter within Tanzania, or such

place as required by the Hirer, are for the Hirer's account."

The evidence shows that Bell 206 was diagnosed to be not airworthy after operating for about two months hence its being grounded. Out of the two months in operation nothing was paid to the plaintiff. This was, in my view, a flagrant breach of what was agreed in the Exh. PE1 (a). I am not ready to accept the defendant's argument to the effect that the plaintiff's failure to deregister the aircraft in South Africa amounted to breach of the Agreement. I say so because the helicopter was grounded and the plaintiff has not claimed anything outside the two months the helicopter was airworthy.

I also am not prepared to accept the defendant's argument to the effect that he failed to pay because the plaintiff insisted to use its own pilots. It was part of the agreement that the plaintiff would supply the defendant with one pilot to run the aircraft. This is evident in Annexture 1 to the Agreement. It is provided under Clause 2.1.2 to the Annexture as follows:

"One pilot to be supplied by King Shaka Aviation on rotation basis to be agreed at the rate of R 1500.00 per day."

The supply of one pilot by the plaintiff was therefore part of the Agreement which the defendant signed. He cannot therefore be heard to complain over the same. Worse more, this complaint does not arise neither in pleadings nor in the communications between the parties before the case was commenced.

The defendant, it seems to me, is therefore raising this alarm at this stage as an afterthought.

As for Exh. PE1 (b) in respect of Bell 407, the same has a clause as Exh. PE1 (a). At the risk of repetition, I hereby reproduce it as under:

> "Payment shall be made in advance as laid out in Anexture 1 to include mobilization and demobilization and the amount equal to one months (sic) flying. All other charges such as fuel, airport charges, parking fees, en-route charges, ATNS charges and passenger taxes shall be paid by the hirer. All ferry flights to and from Virginia Airport are from the hirer's account. All associated costs are arising due to importance and use of the helicopter within Tanzania, or such place as required by the Hirer, are for the Hirer's account."

The plaintiff states, and not disputed by the defendant that Bell 407 was delivered to the defendant timeously. Payment was made timeously only in the first month of the Agreement and thereafter no prompt payment was made and later no payment was made. The defendant admits to owe the plaintiff USD 27,800.00 only. This concession is tantamount to an admission to the breach of contract. The extent of breach and how much it owes the plaintiff is immaterial.

The complaint to the effect that the plaintiff's failure to deregister the aircraft in South Africa does not seem to me to hold water. This is so because the breach of Agreement was witnessed in the second month of Agreement. The six months during which the aircraft would be legally operating in Tanzania, as per Tanzania Civil Aviation Authority Regulations would expire in September 2012. PW1 testified that he commenced the deregistration process in South Africa but halted the process having seen that the defendant was in arrears and there were no prospects of payments. What he got from the defendants were empty promises that he would pay. It seems to me that the plaintiff's course of action to mute the deregistration process in South Africa was quite apposite in the circumstance. After all, it is in pleadings and evidence and not disputed by the defendant that it continued to run Bell 407 even after the expiry of the six months.

The complaint by the defendant to the effect that the plaintiff insisted to use its own pilots cannot be accepted in respect of Bell 407, cannot be acceptable. It is in the plaintiff's reply to the defendant's statement of defence to the effect that the pilot to Bell 407 was the defendant himself. This fact has not been denied by the defendant anywhere. Above all, this condition, unlike the Agreement in respect of Bell 206, is not part of the Agreement over Bell 407.

I therefore find and hold that the defendant was in breach of the Agreement in respect of Exh. PE1 (b) as well.

As was held by the High Court of Uganda in ***Nakana Trading Co Ltd v Coffee Marketing Board*** [1990–1994] 1 EA 448; a decision I find myself highly persuaded with:

> "A breach occurs in contract when one or both parties fail to fulfill the obligations imposed by the terms. Since the contract was in writing the Court's duty was to look at it and determine whether it applies to the facts. No evidence can be adduced to vary terms of a contract if the language is plain and unambiguous."

Failure by the defendant to make payments as stipulated in the Agreements, in my view, constituted nothing but breach. The first issue is therefore answered thus: the defendant is in breach of both Aircraft Lease Agreements executed between it and the plaintiff on 06.02.2012.

The second issue is ancillary; it is about reliefs to which the parties are entitled. Having found that the defendant is in breach of both agreements I now proceed to decide on the reliefs to which the plaintiff is entitled. The plaintiff claims for, *inter alia*, a sum of USD 245,858.38 (say United States Dollars Two Hundred Forty Five Thousand Eight Hundred Fifty Eight and thirty eight cents only) being the defendant's liability to the plaintiff. The plaintiff also claims for general damages at a rate to be assessed by the court. The plaintiff has quite appositely not quantified the general damages prayed to be granted. It is the court which decides which amount to award as general damaged – see ***Tanzania - China Friendship Textile Co. Ltd.*** **Vs** ***Our***

Lady of the Usambara Sisters [2006] TLR 70 and ***Admiralty Commissioners Vs Susqueh-Hanna*** [1926] AC 655 in which it was stated:

> "If the damage be general, then it must be averred that such damage has been suffered, but the quantification of such damage is a jury question [in our jurisdiction the court]".
> [Cited in ***Kibwana and Another Vs Jumbe*** [1990-1994] 1 EA 223].

According to **Black's Law Dictionary** (Abridged 7th Edition) by Bryan A. Garner; Editor in Chief, the term "general damages" is defined at page 321 as:

> "Damages that the law presumes follow from the type of wrong complained of. General damages do not need to be specifically claimed or proved to have been sustained".

This position is reiterated by the court in the case of ***Kibwana and Another Vs Jumbe*** [1990-1994] 1 EA 223 where it was held that:

> "The court, in granting damages will determine an amount which will give the injured party reparation for the wrongful act and for all the direct and unnatural consequences of the wrongful".

In the instant case, the plaintiff being a business legal person, it is certain that it has suffered damages as a result of the defendants' wrongful act of breaching the contract. For that reason, is must be entitled to general damages. Given the circumstances of this case, I assess the general damages at Tshs. 10,000,000/=.

As for the claim of USD 245,858.38 (say United States Dollars Two Hundred Forty Five Thousand Eight Hundred Fifty Eight and thirty eight cents only, it is shown in the 34 tax invoices which were tendered in court as Exh. PE4 that the defendant owes the plaintiff the amount claimed out of which the former admits only USD 27,800.000 and which is not included in the amount claimed. I think the plaintiff, on a balance of probabilities, has successfully proved his case against the defendant and therefore is entitled to the amount claimed in the plaint.

As for damages, the plaintiff has surely been subject to inconveniences and loss of business. I assess general damages at Tshs. 10,000,000/=

In the upshot, I enter judgment for the plaintiff and consequently declare and decree as follows:

(a) The defendant breached both the lease agreements and that the agreements terminated following the breaches;
(b) The defendant should pay the plaintiff a total sum of USD 245,858.38 (say United States Dollars Two Hundred Forty Five Thousand Eight

Hundred Fifty Eight and thirty eight cents only being the defendant's liability to the plaintiff);

(c) The defendant should pay the plaintiff interest on (b) above at commercial rate of 12% from October 2012 to the date of judgment;

(d) The defendant should pay the plaintiff Tshs. 10,000,000/= as general damages;

(e) The defendant should pay the plaintiff 7% per annum interest on the decretal sum from the date of this judgment to the date of satisfaction of the decree in full; and

(f) The defendant should pay the plaintiff costs of the suit.

Order accordingly.

DATED at DAR ES SALAAM this 26th day of May, 2016.

J. C. M. MWAMBEGELE
JUDGE