IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 29 OF 2016

BETWEEN

YARA TANZANIA LIMITED..... PLAINTIFF

Versus

LEONARD DOMINIC RUBUYE t/a

RUBUYE AGRO CHEMICALS SUPPLIES..... 1st DEFENDANT

RUBUYE AGRO BUSINESS COMPANY LTD..... 2nd DEFENDANT

JUDGMENT

MRUMA, J:

The Plaintiff, **YARA Tanzania Limited**, instituted a suit against the Defendants, **Leonard Dominic Rubuye T/A RUBUYE Agro Chemicals supplies** and **RUBUYE Agrochemicals Company limited** claiming for a declaration that the Defendants are in breach of contract and for payment of special damages of T.shs 727,346,800.46 being purchase price of fertilizers supplied to the Defendants but not paid for and general damages self assessed at T.shs 100,000,000/=. The Plaintiff is also claiming for interest on the outstanding amount at the rate of 30% per annum from due date to the date of judgment and further interest at undisclosed court

rate from the date of judgment to the date of full and final payment of the whole sum due and payable and costs of the suit.

The facts giving rise to the plaintiff's claims are that the first Defendant Leonard Dominic Rubuye who was trading in the name and style of RUBUYE Agro-Chemicals Supplies was the Plaintiff's customer in fertilizer business. It is stated that based on the 1st Defendant's orders the Plaintiff supplied to the Defendant various types of fertilizers from 2013 to 2015. It is the Plaintiff's case that under the terms of their agreement the Defendant would pay the Plaintiff within thirty (30) days for every invoice raised against delivery. Huge amount of fertilizers were supplied and delivered to the Defendants but the first defendant could only pay for some of the supplies and by March 2015 the unpaid supplies had reached T.shs 847,346,800.46.

Furthermore it is the Plaintiff's case that on 23rd March 2015, the Plaintiff wrote a demand notice to the Defendant for payment of the outstanding amount. On receipt of the letter, the Defendant paid T.shs 30,000,000/= on 8th April, 2015 and T.shs 40,000,000/= on 22nd April, 2015 and on5th May, 2015 she paid another 50,000,000/= making total payment made T.shs 120,000,000/=leaving an outstanding balance of T.shs 727,346,800.46 which the Plaintiff is now claiming.

On the involvement of the second Defendant, it is the Plaintiff's case that by a letter dated 4th April 2015, the first Defendant notified the Plaintiff that he was trading in the name of the Second Defendant Rubuye Agro business Co. Ltd and also notified her that she had made payment of

T.shs 120,000,000/= In that letter the 1st Defendant requested for reconciliation of her accounts and waiver of a 2% interest. According to the Plaintiff, all the goods were delivered to the 1st Defendant as agreed and corresponding invoices requiring payment were raised. The Plaintiff's contention is that the Defendant breached his obligations under the agreement and despite constant reminders they have failed, refused and or neglected to pay the outstanding balance. The Plaintiff further contends that the said failure constitutes a breach of contract entitling him to special and general damages.

The Defendant on the other hand filed a defence contesting the Plaintiff's claims maintaining that they paid for all fertilizers supplied and received by them. The Defendants contended that Between 11th April 2013 and 11th October, 2014, they made payment to the Plaintiff totalling T.shs 539,958,000/= and that further payment of T.shs 120,000,000/= were made between 27th May, 2014 and 4th May, 2015 making total payment made to the Plaintiff to be T.shs 659,958,000/= besides other payments which the Plaintiff didn't take into account in computing the outstanding balance against them.

At the final scheduling conference, the following issues were framed:-

1. Whether the Defendant are in breach of the contract.
2. And if so, to what reliefs are the parties entitled.

The plaintiff was represented by **M/s NexLaw Advocates**, while the Defendant was represented by **Dickson Consulting Advocates**.

Both sides filed closing submissions. In their written submissions issues No (1) and (2) were handled together.

According to the submissions of counsel for the plaintiff, from the totality of the evidence and submissions of the Defendants the dispute between the parties was essentially on a question of reconciliation of accounts, but the learned counsel hurriedly adds that if indeed reconciliation was a big issue in this case then the Defendants couldn't have paid T.shs 120,000,000/= after they were served with the Demand Notice demanding payment of T.sh. 847, 346, 800.46 on 23rd March 2015.

It is was further submissions of the counsels for the plaintiff that on the evidence adduced the Plaintiff has managed to prove its case on the balance of probability as she was able to produce both a list of invoices which were settled by the Defendants and those which were not settled (Exhibit P2) while the Defendants have produced no any credible evidence that they settled all the invoices raised against them.

Counsel for the Defendants on the other hand, made a lengthy submissions in support of the defendants' case. He cited and quoted various authorities on different issues in a bid to demonstrate that the Plaintiff had failed to prove its case. Quoting **Anson's Law f Contract 29th Edition, Oxford University Press, 2010 at pg 574:1** the learned counsel stated that: *for an action for purchase price it will not be available for the Plaintiff until firstly the contractual duty to pay has arisen and secondly the seller is not entitled to the price unless the property in goods has passed to the buyer or payment is due on a day certain irrespective of*

delivery. The learned counsel contended that the principles enunciated by Anson is in line with the provision of **Section 30 of the Sales of Goods Act, Cap 214 [R.E. 2002]**, to the effect that in sales of goods contract (s), delivery of goods and payment of price are concurrent conditions.

The learned counsel submitted that in the present case the Plaintiff has not been able to prove the existence and enforceability of the terms of the sales agreement as required under Section 110(1) of the Evidence Act. He said that most of the invoices and delivery notices produced do not constitute contract and they do not constitute the 30 days payment due term.

Furthermore it was the counsel's submission that the Plaintiff had not accounted for 82 credit deposits in her account as exhibited in exhibit P2. He also said that admission by the Plaintiff that the Defendant had an opening balance of T.shs 879,279,710.54 on 27.1. 2013 had not been accounted for.

Regarding delivery notices, it was the learned counsel's submission that in law the supplier (e. i. the Plaintiff in this case) has no duty to verify that the goods were delivered to the 1st Defendant.

On the invoices, it was the learned counsel's submission that the same were serially issued in August, September, October and November 2013 but no corresponding demand was issued and there was no claim for breach of contract during that particular period despite a claim here that all invoices were to be paid within a period of 30 days.

Regarding the agreement itself, the learned counsel submitted that though PW1 testified in cross-examination that the contract was by way of exchange of documents, no such agreement was produced in evidence as exhibit.

On the involvement of the second Defendant in the parties' agreement, it is the Defendants counsel's submission that no evidence was tendered to prove that the second defendant was a party to the alleged agreement.

On what was the outstanding amount, counsel for the Defendants submitted that the Plaintiff's evidence on this point is inconsistent and unreliable. He said that there was several different demand claims addressed to the Defendants starting with a letter dated 30th July 2015 in which the outstanding amount including charges were claimed to be T.shs 856,309,284.04., while in another Demand Notice the amount outstanding was stated to be T.shs 879,870,404.54 disregarding payment of T.shs 120,000,000/= which was made by the Defendant. He said that the inconsistent exhibited by the Plaintiff supported the Defendants' call for reconciliation of accounts.

It was also submitted that the fact the Defendant made payments of T.shs 539,958,000/=which was prior to March 2015 and another T.shs 120,000,000/=in April and May, 2015 (As per Exhibits P4 and P6, and on the evidence on record that it was the term of their agreement for all payments to be made within thirty days, the Plaintiff's allegations that these payments were for previous orders is defeated.

Counsel for the Defendant took liberty to frame his own issue regarding the terms of payment in the agreement between the parties. He stated that the issue as to what were the terms of the parties' agreement was at stake. He proceed to ask that issue he answered it in the Defendants' favour in that the terms of payments were by way of serial credit deposits to the supplier's account.

In conclusion counsel for the Defendant submitted that the Plaintiff had not been able to prove the balance due which is an indication that there was no balance due. He accordingly prayed for the dismissal of the plaintiff's case with costs to the Defendants.

This court has carefully reviewed the pleadings and it has internalized the submissions by the Advocates on either side as far as the issues are concerned. In the first place the court has come to a conclusion that the issue proposed by the Defendants' counsel in his closing submissions does not arise from any material proposition of the facts as affirmed by one party and denied by the other as required by the provisions of **sub rule (1) of Rule 1 of Order XIV of the Civil Procedure Code**. Secondly under the provisions of **Rules 3, 4 and 5** of the same Order the duty to frame issues is of the trial court and not the parties or their advocates. I take that liberty to frame one additional issue and that is whether or not the second Defendant was properly joined in this case. I would hurriedly answer that issue in the negative. On the total sum of the evidence adduced the agreement was between the Plaintiff and the 1st Defendant. Notification by the 1st Defendant that she was doing business in the name

of Rubuye Agro Business Company Limited does not on its own transfer any liability of the 1st Defendant to the 2nd Defendant.

Now back to the evidence, the testimony of PW1, January Fabian, who works with the Plaintiffs Company, as Head of Accounting and Reporting was to the effect that parties in these proceedings had entered into oral agreement which was mainly based on exchange of documents. He said that based on 1stDefendant's orders, the Plaintiff's supplied fertilizers to the 1st Defendant. He said that in terms of their agreement the first Defendant ought to have made payments for each invoice within a period of thirty days from the date she received the same. According to the PW1 initially the Defendant was paying promptly but she later on started to default as a result of which in March 2015, there was an outstanding balance of T.shs 847,346,800.46 against her. The witness tendered in evidence Exhibit P1 which is a bunch of documents containing Defendant's Local Purchase Order, Weighbridge Certificates, Delivery Notices and Tax Invoices for transactions done mostly in 2013. He also tendered in evidence statement of account of the 1st Defendant (Exhibit P2). In Exhibit P2 it is shown that the 1st Defendant didn't pay for supplies made under the listed Local Purchase Orders in Exhibit P1. For instance in Local Purchase Order No.00740 the amount stated tallies with that which is stated in the Statement of Account (Exhibit P1). The amount indicated in both documents is T.shs 30,960,000/=. There is also Local Purchase Order No. 0744 in which T.shs 5,112,000/= is claimed, Local Purchase Order No. 0742 for T.shs 26,350,000/= Local Purchase Order No. 0736 for T.shs 33,507,000/=, Local Purchase Order No. 0749 for T.shs 40,568,800/= Local Purchase Order No. 01455 for T.shs 32,550,000/= Local Purchase

Order No. 01453 for T.shs 31,039,000/= Local Purchase Order No 01476 for T.shs 33,280,000/= Local Purchase Order No. 0419 for T.shs 60,000,000/= and other Purchase Orders which were tendered as Exhibit P3. In all these Purchase Orders there are corresponding Delivery Notices and Tax Invoices.

It was further evidence of PW1 that in practice, the 1st Defendant was collecting fertilizer from the Plaintiff's Warehouses in Dar Es Salaam and Makambako and that by March 2015, the Defendant had unpaid balance of T.shs 847,346,800.46/= which had remained unpaid for quite long and had caused the plaintiff to suffer enormous loss and distress as her business is solely dependent on timely payments by the customers.

At the end of that testimony, PW1 was asked questions on whether or not Local Purchase Orders indicate the person who received goods delivered which he answered in the negative. He was not asked any single question on the genuineness or otherwise of Purchasing Orders and Tax Invoices in exhibits P1, P2 and P3.

On the other hand the Defendant didn't lead any evidence to controvert the said Local Purchase Orders, Delivery Notices and Tax Invoices as tendered by PW1. Similarly no evidence was available to show that the Defendants paid the outstanding balance after the Demand Notice of 23rd March 2015 which indicated that the outstanding balance was T.shs 847,376,800.46 which the Defendants acknowledged in their letter to the Plaintiff dated 4th April 2015 (Exhibit P6). If the Defendant payments of T.shs 539,958,000/= allegedly made prior to March 2015 were for

liquidation of the said outstanding balance of T.shs 847,376,00.45 that would have been indicated in Exhibit P6. The fact that the said payments are not stated in that letter is evidence that the amount demanded in 23rd March 2015 letter did consider all payments made before that date which means that the amount demanded was actually pending.

The evidence of PW1 was well corroborated by that of PW2, Hillary Dickson Pato who produced in evidence e-mail correspondences between the parties. For instance in the e-mail dated 27th May, 2014 at 2:18 pm, Mr. Leonard Dominic Rubuye DW1 wrote to PW2 informing him that he had paid T.shs 50,000,000/= being part payment for the outstanding balance and that they will clear the balance in the near future. That response was made a day after DW1 was required by one Pal Oystein Stormorken of the Plaintiff to pay the outstanding balance of T.shs 897 Million in the e-mail correspondence between them dated 26th May, 2014. By conceding that there was an unpaid balance and in view of the Plaintiff's evidence that the unpaid balance was T.shs 727,346,800.46 by March, 2015 which is now claimed in the plaint, the burden has shifted to the Defendant to prove that after that communications she actually made further payments towards liquidation of the balance.

The defendant tendered in evidence Fund Transfer Request Forms issued by NMB Bank (Exhibit D2) and a letter from NMB Bank (Exhibit D3), which were a request to the 1st Defendant to ask the Plaintiff's company to obtain bank statement of her account and check the payments made therein. As correctly submitted by the counsel for the Plaintiff Fund Transfer Request Form is not a proof of payment. It is just a request.

Whether that request was granted and fund thereon transferred has to be proved. In this case it is not proved. Payments to one's bank account can be proved by either a bank statement showing deposits made or bank slips. The defendant can say that bank statement belongs to the account holder and that she could not get hold of it for purposes of evidence, but she cannot be heard complaining about bank pay in slips which are availed to her in depositing any cash to the Plaintiff's Account. The Plaintiff didn't say anything about bank slips.

Similarly a letter from NMB (Exhibit D2), asking the Defendant to request the Plaintiff to check in his account whether the amount stated were paid in cannot be a proof that the Defendant has paid the outstanding debt. In the first place the letter does not specify the payments made. It does not state who made the alleged payments and on which Account of the Plaintiff. The letter simply states that:

> *"Ufuatao ni Mchanganuo wa Malipo ya Pembejeo kwa Msimu wa Mwaka 2013 zilizolipwa kupitia account ya YARA TANZANIA LIMITED Katika Tawi la NMB Makambako Mkoa wa Njombe."*

In absence of proof of the alleged payments by Bank statements or Bank deposit slips it is difficult for the court to hold that the payments were made to the Plaintiff in respect of the outstanding amount now in dispute. Section 110(1) of the Evidence Act places the burden of proof on he who alleges. The law says:

'whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist"

In the present case the Defendants allege that they paid all outstanding debts therefore the burden is on them to prove that they did. This burden has not been discharged.

I therefore find that the allegation that the Defendants paid all the outstanding amount has not been established indeed on the evidence adduced it is an afterthought and is greatly doubted by this court.

Another pertinent issue which casts doubts in Defendants' case is their submissions that the Plaintiff had no duty to track the goods delivered to them. While it is submitted that DW1 and DW2 testified "without any judicial temper" that the plaintiff had no duty to track delivery of the goods to the Defendant, at the same it is submitted that under sections 29 and 30 of the Sales of Goods Act, the duty to confirm delivery is on the seller. This is a clear contradiction because what the two defence witnesses are said to have had stated in their evidence is contrary to the requirement of the law cited. It is also contrary to what is on record as to what DW1 stated during cross-examination as he is on record saying that under the agreement it was the duty of the Plaintiff, the Defendant and the Transporter to confirm delivery.

Again the Defendants contradicted themselves on the existence or non-existence of the agreement and its terms. The Plaintiff's witnesses testified to the effect that the agreement of the parties were oral and

was exhibited by exchange of documents. They tendered documents to substantiate their assertions.

On his part DWI testified that there was a written contract between the parties but nothing was produced to substantiate that. Section 100 of the Evidence Act excludes oral evidence where there is documentary evidence. The law says:-

> *"When the terms of a contract, grant or any other disposition of the property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document no evidence shall be given in proof of the terms of such contract, grant or other disposition.....of such matter except the document itself....."*

If the Defendant was seriously minded to convince this court that there was a written contract between the parties which contained different terms, he ought to have produced it in evidence.

Thus, in line with the above testimonies, this court finds that based on the orders she made to the Plaintiff, the 1st Defendant was supplied with fertilizers and that in view of the unpaid Tax Invoices the Defendant didn't pay for the supplied fertilizers as shown in exhibits P1, P2 and P3. Having obtained goods on credit, it was in my view up to the Defendant to honour his obligations by paying to the Plaintiff the purchase price. This was not done and it constituted a clear breach of contract.

Accordingly, I answer the first issue in the affirmative and declare that the first defendant was in breach of the agreement. On the evidence available it was an abuse of courtesy and generosity of the Plaintiff to turn around that there was no outstanding amount against the 1st Defendant. I am completely sure that no reasonable court can in the circumstances believe the Defendant's stories.

The second issue is about reliefs. I have found as a matter of fact that the Plaintiff has proved her case on the balance of probability. I find that the amount claimed in the plaint has been proved to be outstanding against the first Defendant. Accordingly I enter judgment for the Plaintiff and against the 1st Defendant and order that the 1st Defendant shall pay to the Plaintiff T.shs 727,346,800.46 being the outstanding purchase price for the fertilizers supplied to her.

The Plaintiff is also claiming for general damages. General damages are awardable where the injuries suffered cannot be estimated in a monetary terms. There is no doubt that the Plaintiff has been deprived of the use of his money since 2013 which is a period of five years. Explaining the frustration and inconveniences suffered by the Plaintiff, PW1 Fabian January stated thus:

> *"The Defendants acts and omissions stated above amounts to a breach of contract and terms of business between the 1st Defendant and the Plaintiff and consequently has occasioned enormous loss and distress on the party of the Plaintiff whose business is solely dependent on timely payments by customers"*

The above quoted extract summarizes the suffering and loss caused to the Plaintiff. The general principle for an award of damages is to try and place an injured party in as good position as that party would have been had the wrong complained of not occurred. However, I note that the plaintiff has claimed interest. In my view the award of interest would adequately compensate the loss of use of money the Plaintiff suffered. I therefore hold that in the circumstances of this case the Plaintiff is entitled to interest instead of general damages. I think an award of interest in the circumstances of this case may adequately compensate the Plaintiff and may reflect the profit she would have realized had she invested that money.

As regards to rates, taking into account the inflation rates between 2013 when the breach occurred for the first time and 2018, I would award an interest on the decretal sum at the rate of 16% per annum from the time of instituting the suit to the date of full payment and further interests at court's rate from the date of judgment to the date of full payment.

Finally, it is a general rule of law and practice that costs normally follows the event in the suit. I am therefore inclined to award costs of the suit to the Plaintiff.

A.R. Mruma,

Judge.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

Dated at Dar Es Salaam this 26th day of June 2018.