IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 16 OF 2018

BETWEEN

MANTRAC TANZANIA LIMITED.....PLAINTIFF

Versus

GOODWILL CERAMICS TANZANIA LIMITED.....DEFENDANT

Last Order: 05th May, 2020

Date of Judgment: 11th June, 2020

JUDGMENT

FIKIRINI, J.

This suit arose from a supply contract of 4 generators by the Mantrac Tanzania Limited (hereinafter referred as the plaintiff), a private liability company with business of selling and hiring of construction, mining and engineering machines and equipment, to the Goodwill Ceramics Tanzania Limited (hereinafter the defendant), also a private limited liability company carrying out the business of production of ceramics, tiles and related products. Both parties are incorporated under the laws of Tanzania.

The parties entered into supply contract hereinafter referred as "Equipment Sale Agreement". As discerned from the contract, the plaintiff was to supply four (4) gas generators, according to the agreed specifications in contract, for a price of USD 3, 280, 000, and would supervise the installation and the commissioning process, and after the entire installation work of the generators is completed and tested in accordance with the contract requirements, a Final Acceptance Certificate would be released to the plaintiff (supplier) by the defendant (buyer), and that is when the defendant would pay the last payment of $984,000.00.

As per confirmation of the parties, the generators were delivered as ordered, received and installed at the defendant's factory premises. A total of USD 2,296,000 was paid by the defendant, as per the contract requirement, leaving a balance of USD 984,000 to be paid by the defendant, after the defendant releases the Final Acceptance Certificate after being satisfied with the performance of the generators is as per the contract requirement.

The plaintiff claimed that based on the contract terms the generators were already commissioned since the defendant had started using the warranty confirms the generators had been commissioned. The defendant resisted paying on account that the generators were defective whereas the plaintiff claimed that there were not defective. This is what prompted the plaintiff to sue the defendant claiming for the

payment on the outstanding balance, 15% interest at commercial rate per month from when the balance was due up to the date of judgment and decree, 12% interest on the outstanding balance plus interest, from the date of decree up to final payment, general damages, costs of the suit and any other relief deemed fit and just by this Court. Concurrently the defendant also raised a counter – claim, and claimed for several itemized damages totaling to USD 4,314,068.73 to have been incurred, the defendant also claimed, general damages, interest on the grand total, costs of the suit and any other reliefs deemed fit and just.

After the initial process including mediation which failed, on 24th June, 2019, the following issues for determination were framed:

1. Whether the defendant is in breach of the Agreement by failing to pay the outstanding purchase price;

2. Whether the plaintiff is in breach of the Agreement by supplying generators contrary to the Sale Agreement; and

3. To what relief (s) are the parties entitled to.

Mr. Roman Masumbuko learned counsel featured for the plaintiff whereas Mr. Wilbert Kapinga learned counsel appeared for the defendant. A total of seven (7) witnesses were summoned; four (4) for the plaintiff namely: PW1-Tamer

Mohamed Gamal – Engineer who supervised the installation and commissioning of the generators and through him most of the documents were admitted into evidence. This included exhibit P_1 – Site Readiness Report to show that the commissioning process was about to commence; exhibit P_2 – Correspondences on Installation issues; exhibit P_3- Commission Check List & Report; exhibit P_4 – Site Visit Report; and exhibit P_5 –Email correspondences. PW2-James Serre - Power Systems Sales Manager, who through him the following documents were admitted into evidence: exhibit P_6 – Memorandum of Understanding to show what was initially agreed before the final agreement; exhibit P_7 – Equipment Sale Agreement to show terms of their agreement; exhibit P_8 – importation documents to show the imported generators; P_9 – Certificate of Origin P_{10} – Email on change of supplier from Egypt to Turkey; and P_{11}- Demand Notices asking for the payments.

PW3 – Elias Kinyunyi an Application Sales Engineer with the plaintiff since 2006, his role being responsible for installation supervision, confirmed commissioning of the generators and that the defendant commenced using Warranty as per exhibit P_7. His testimony essentially restated what PW1 and PW2 testified and through him also exhibit – P_{12} - Site Visit Reports was admitted. The last witness was PW4-Pendo Joseph Amasi, the Treasury Accountant who worked with the plaintiff since

2008, in course of her testimony exhibit P_{13} – Statement of Account, showing the outstanding balance of USD 984,000.0 was admitted.

The plaintiff as well tendered two (2) extra documents which resulted from cross-examination of DW1-Jian Chen and DW3-Robin Huang. The two documents, are work permits for DW1 and DW2 which were initially admitted as exhibits D_1 and D_2, but correct way was for them to be marked as plaintiff's exhibits since they were admitted during the cross-examination.

That was the plaintiff's case in summary given to prove their case.

The defence case featured three (3) witnesses: DW1-Jian Chen – Generator Supervisor, who studied electrical engineering in Japan and attained a diploma, and worked for the defendant since 2017. His testimony was that the plaintiff sold the defendant four (4) generators which were delivered and installed by the plaintiff's staff. The generators were later realized not to be producing the required energy for production of ceramic tiles, the business the defendant was engaged in. The problem was communicated to the plaintiff who brought a total of nine (9) experts, (4) from Tanzania and five (5) from abroad, still the generators could not be fixed, despite of those experts visiting the site in February 2017, March 2017, April 2017, May 2017, July 2017 and August 2017, trying to resolve the problem.

DW2- Fen Tiao -a Production Manager, with Bachelor degree with specialization in Ceramic, working for the defendant as from 2016. His testimony was mainly on how the factory functioned and the process involved in production of tiles. The last witness was DW3-Robin Huang – Deputy Managing Director of the defendant. It was his account that he had been working for the defendant since 2015 and in 2016 the plaintiff and the defendant entered into sale agremment of four (4) generators. The generators were for the production at the factory manufacturing ceramic tiles.

After the close of the case by the plaintiff and the defendant, counsels requested to be allowed to file written final submissions, the request which was granted.

There was essentially no dispute that the defendant ordered four (4) gas generators which were timely supplied and delivered at Mkiu village, Coast region as per the agreement and in compliance to section 10 (1) of the Sale of Goods, Cap. 214 R.E. 2002 (the Sale and Goods Act). Two (2) instalments were paid and the outstanding balancc of USD. 984,000.0 was to be paid by May, 2017.

The remaining balance of USD 984,000.0, has not been paid and that is what was being contested.

Mr. Masumbuko, submitting for the plaintiff's case, stated that the generators were commissioned and accepted and Mr. Fang, who was never summoned to controvert

the assertion signed acknowledging the commissioning. This fact has also been reflected in paragraph 10 (d) of the written statement of defence, whereby the defendant admitted being issued with the commissioning certificate. The assertion confirmed by both PW1 and DW3 and exhibit P_3, particularly clause B20.5.

More so, the generators were never rejected and the warranty period of 16, 000 hours had been exceeded, and the generators were still operational, confirmed DW3. The defendant's actions of retaining the goods and doing things inconsistent with the ownership of the seller and starting using the warranty under sale agreement, instead of returning them confirmed acceptance, the fact reinforced by PW1, PW2, PW3 and PW4, submitted Mr. Masumbuko. The defendant was therefore prevented from the *principle of estoppel* denouncing effectiveness of the generators. Fortifying his submission, the counsel referred the Court to the book by **Goode on Commercial Law, 4th Edition, Penguin Books, 2010, p. 368.**

According to the counsel all witnesses have failed to lead evidence that there were quality issues.

Submitting on the second issue, on whether the plaintiff was in breach of the Equipment Sale Agreement, by supplying generators contrary to the agreement, the counsel started by cautioning that parties were bound by their pleadings, citing the case of **Astepro Investment Co. Ltd v Jawinga Company Ltd, Civil Appeaal**

No. 8 of 2015, CAT-DSM (unreported) p.17. He went on submitting that all defects as displayed in the written statement of defence/counter-claim, namely shutdowns and failure to reach the requisite capacity of 2000KW, as per paragraphs 10 (e), 11 (b) and 12 (b) of the written statement of defence and paragraph 23 of the counter-claim on different source of origin, were not proved as no single document was produced to prove, even those annexed ones. Buttressing his submission, he cited the case of **Puma Energy Tanzania Ltd v Spec-Check Enterprises Ltd, Commercial Case No. 19 of 2014 (unreported) p.12.** The provisions of sections 110 and 111 of the Tanzania Evidence Act, Cap. 6 R.E. 2002, and the cases of **In re B (Children) [2009] 1 AC II** and **Pauline Samson Ndawavya v Theresia Thomasi Madaha, Civil Appeal No. 45 of 2017, CAT at Mwanza (unreported),** were also referred strengthening the submission, that the defendant has failed to prove her claim.

Mr. Masumbuko further submitted that had the generators been defective they could not sustain the factory to-date or even the warranty period of 2 years. Aside from the fact that the generators with 8,000KW could not support 12,600KW, he as well submitted that, the causes of shutdowns and its causes were not disclosed. Reasons leading to shutdowns were many such as lack of expertise, as testified by

PW1, argued the counsel. Additionally, there was no independent testing requested from an independent third party, to counter the commissioning certificate issued.

On the relief aspect, it was Mr. Masumbuko's submission that since the first issue has been answered in affirmative, the defendant could not escape liability. And under section 50 (1) and 50 (2) of the Sale of Goods, the plaintiff can recover the price of goods supplied as well as maintain an action for damages. The outstanding amount of USD. 984,000, claimed was a proof that the plaintiff suffered specific damages, the fact which was never disputed.

Expounding on reliefs, it was the counsel's submission that the plaintiff was equally entitled to interest at 15% per month from the date when the balance amount was due to end of May, 2017 up to the date of judgment/decree. The relief should also include taxes paid for the machines and money which the plaintiff had to borrow from the bank to be able to run its the business and considering that sale of goods was mercantile practice which attracted interest. The plaintiff also requested for 12% interest from the date of judgment/decree till full payment and punitive interest to deter any future tendency and lack of good faith in business transactions. The plaintiff prayed for award of general damages to be assessed by the Court and costs of the suit taking into account the matter has been pending since 2017, for not less than USD 200,000.

The plaintiff prayed for costs of the suit and at the same time urging the Court to dismiss the counter-claim with costs. The defendant having failed to prove the claim put forward including the defects alleged existed in the four generators and the loss purported to have been incurred.

The defendant's final submissions were to the effect that after the installation of the 4 generators, the commissioning process was initiated as exhibited by exhibit P_3 but was not completed and no certificate of acceptance in the contractually agreed form set out in the Agreement and described as "Exhibit C' was issued. Describing on the commissioning process, he submitted that the process involved starting and running the generators, ascertaining the electricity generation rating and determining constant uninterrupted power generation. This piece of evidence besides featuring in paragraph 9 of the PW4's witness statement, the assertion was also confirmed by the witness during cross-examination, submitted Mr. Kapinga.

The repeated failure to generate the required electricity impacted the defendant's tile production plant; this account was given by DW1 and DW3 in their oral testimony and also by PW4 in cross-examination. Five (5) engineers were commissioned by the plaintiff to attend to various technical issues raised by the defendant, as evidenced by PW3, PW4, in their witness testimonies as well as oral evidence of DW1 and DW3. The exercise ran from February 2017 to June, 2017

and August 2017 as accounted for by DW1 and DW3, yet the technical issues were not resolved.

The extended unresolved technical issues compelled the defendant on 11th April, 2017 to notify the plaintiff as reflected in exhibit P_{11}, reminding her that the commissioning was overdue as it was to be completed by 31st March, 2017. Controverting the account that the defendant lacked sufficient load to reach the maximum capacity of 8 megawatts, Mr. Kapinga, apart from contending that the assertion was unsubstantiated as no evidence was led in that regard, he as well submitted that the plaintiff could not ascertain defendant's load capacity. He as well submitted giving account of the generators cumulative load which was about 12, 000KW distributed as per the following: kiln-1649KW, glaze line workshop-823KW, raw material workshop-5443KW, polishing line -1695KW, press workshop-1054KW, crusher 323KW, small ball mill-663KW, and air conditioners-290KW. This was as per the oral testimony of DW1.

Mr. Kapinga, further submitted that the allegation that the defendant made use of the warranty were unsubstantiated as no evidence was tendered. During cross-examination of DW3, he underscored that fact, that no use of warranty was ever initiated.

Addressing the framed issue, in particular the first, Mr. Kapinga invited the Court to answer that issue in negative. Assigning the reasons, he submitted that clause 3.3 of the Agreement was what governed the agreement subject of this suit. The defendant's non-payment was simply that the plaintiff has not fulfilled her contractual obligation, which included non-commissioning of the generators due to quality issues as a result of which no commissioning certificate was issued. Therefore, based on clauses 8 and 9 of the Agreement the generators were never commissioned as required. Exhibit P_3 - the commission checklist was issued to the defendant by the plaintiff, but the document only provided for the required verification, whereas compliance to clause 9 of the Agreement was what would have obligated the defendant to pay the plaintiff. Otherwise in the absence of a final certificate of acceptance, the plaintiff cannot claim to have commissioned the equipment to the defendant or that the defendant accepted the equipment in the absence of the stated certificate of acceptance. Mr. Kapinga, went on submitting that the commissioning checklist report issued on 28th March 2017, should not be allowed to be substituted for an acceptance certificate whose format and manner of issue were as prescribed in the Agreement.

He further submitted that, the commissioning was punctuated with numerous shutdowns of the generators which compelled calling of a number of both foreign

and local engineers to attend to the various technical issues as well as notifying the plaintiff. Inviting the Court to interpret the parties' terms of Agreement to what it has reasonably implied where no terms were provided, Mr. Kapinga referred the Court to the case of **Merali Hirji & Sons v General Tyre (E.A) Limited [1983] T. L. R. 175**, in which the English case of **Martin-Baker Aircraft Co. Ltd & Another v Canadian Flight Equipment, Ltd. [1955] 2 All E.R. 722** was referred.

Furthering his submission, Mr. Kapinga submitted that the terms in the parties' Agreement were unambiguous, the Court's duty was therefore to interpret the agreement to reflect the parties' intention and not to make reasonable terms. He continued submitting that given the countless unresolved technical issues, the generators did not operate continuously. Final acceptance could therefore not occur since the defendant never executed and return to the plaintiff the signed final acceptance. The situation therefore could not have allowed the defendant made use of his entitled warranty under the Agreement. Fortifying his submission, he referred this Court to the scholarly works of engineers covering procedures for commissioning of equipment, machinery, plants and various construction project as per **Keith Harker, Power System Commissioning Maintenance Practice, IEE, London, 1998, p.1-11.**

Stressing on the warranty issue, Mr. Kapinga further submitted that the defendant's entitled warranty was not in operation as per the Agreement and particularly clause 11 of the Agreement. Despite the technical issues experienced, the defendant could not return the generators as questioned by the plaintiff, due to two reasons: one, that the plaintiff was cooperative and promised to fix the problem, though failed, and two, as engineers were working to resolve the problems the defendant found no reason to halt the production to wait for five (5) months for new generators to arrive, underscored the counsel. Also, that the defendant relied on good faith that the plaintiff will successfully resolve the technical issues and commission the equipment with the execution of the acceptance certificate as per the Agreement.

Discussing on application of section 37 of the Sale of Goods Act, Mr. Kapinga submitted that at no point in time did the defendant indicate to the plaintiff on acceptance of the generators. Along the same line he pointed on application of section 29, which stipulates the obligation of the parties, namely the seller who has a duty to supply goods and the buyer obligated to accept and pay for the goods. The parties in present suit were bound by their Agreement and specifically signing of exhibit "C" submitted the counsel. Otherwise, he refuted the claim that the defendant breached the Agreement by not paying the outstanding amount claimed by the plaintiff.

On the second issue, from the outset Mr. Kapinga maintained that the plaintiff who was required to supervise the generators installation and ensure that the generators were operational and in conformance with the specification and Agreement, was in breach of the Agreement by supplying defective generators and failing to resolve the technical issues which was contrary to the terms of the Agreement. On top of that the plaintiff discontinued correspondence with the defendant which was different from what was illustrated under clause 13 of the Agreement. As a result of the breach the defendant has suffered loss and was therefore entitled to compensation in the form of general damages.

Submitting on the last issue on reliefs, it was his submission that since the plaintiff was in breach of the Agreement, he was thus not entitled to any relief and proceeded to urge the Court to dismiss the suit with costs and award the defendant general damages for the loss suffered.

In determining the three framed and agreed issues, this Court will answer them as they appear.

The first issue being whether the defendant is in breach of the Agreement by failing to pay the outstanding purchase price.

The first issue being whether the defendant is in breach of the Agreement by failing to pay the outstanding purchase price.

In order to understand and answer this issue it was important and necessary for this Court, to closely examine exhibit P_7-Equipment Sale Agreement entered between the parties on 25th July, 2016, which is the basis of the claim and counter-claim. The purchase price and all the payment related to the purchase of the ordered four (4) generators was provided for under clause 2 for purchase price and 3 providing for payment schedule. Clause 3.1 and 3.2 are simply on payments, which were to be made after signing the agreement and before the shipping date. Likewise, clause 3.4 was in respect of 5% of the purchase price in the form of a bank guarantee. Whilst all the other clauses under clause 3 related to payment had no issues, clause 3.3 which provided for final payment upon commissioning of the equipment/generators is contested. For ease of reference the clause is reproduced below:

> "*That a sum of United States Dollars Nine Hundred Eighty Four Thousand (USD 984, 000) being thirty percent of the Purchase* ***shall be payable by the buyer to the vendor within 60 days of after the commissioning date OR 120 days from the date of arrival of the equipment at Dar Es Salaam port***

***whichever comes first**; yet the period to deal with quality issues shall be excluded, if any."*[Emphasis mine]

Tracing what transpired, it was evident from the evidence and documents furnished to Court, that after delivery of the equipment/generators which is not disputed, what followed was their commissioning. The plaintiff absolving herself from liability contended that, as per clause 7 of the agreement the plaintiff's obligation was only to supervise the installation process, and that was done as exhibited by P_3, the commissioning checklist. This assertion was nonetheless, refuted by the defendant who described exhibit P_3, as a document to be issued in compliance to clause 8 of the agreement, and which covered installation and testing of the generators, while the actual commissioning being governed by clause 9.

I, have closely examined exhibit P_3 and P_7, and gathered the following: **one**, to commission the 4 generators means to carry out all necessary tests and procedures required as per the contract condition to evaluate if the generators are able to deliver the results for which it was installed or in other words commissioning can be said is a process entailing installation, testing and certification. Pursuant to clause 8 of the agreement, which states as follows:

"Upon completion of installation of the equipment, the vendor shall perform prescribed tests to determine that the equipment

is operating in conformance with Vendor's stated performance specifications for the equipment and ....."

And based on exhibit P_3 commissioning check list, installation occurred, whereby starting and running of generators and establish uninterrupted electricity flow, was to be determined. PW3 who is the Application Sales Engineer with the plaintiff since 2006, and responsible for installation supervision, testified on the commissioning of the generators and the defendant's start of using the warranty.

Whilst the commissioning of the generators to some extent is not disputed, but there is dispute as to whether the exercise carried out attained the intended results and was finalized. Close scrutiny of exhibit P_3, relied heavily by the plaintiff, does not give the sense that the exercise attained the anticipated outcome and was completed, since the document was mere check list of the commissioning process for each generator which does not guarantee commissioning went through in light of the reported technical issues and in the absence of a signed Final Acceptance Certificate returned to the plaintiff. The Check list exercise which was run on 15th March, 2017 for engine with number 2213200; on 25th March, 2017 for engine with number 2213199; on 28th March, 2017 for engine with number 2213178; and 31st March, 2017 for engine with number 2213180, if these documents were to be to be taken to mean final acceptance, which is not, still the documents lacked a lot

as some of the blocks were not checked. To mention just one, the block (in all checklist documents) which required some members of staff who took part in the familiarization of operations of the generators to be mentioned, which was a requirement, to confirm their participation was not filled. So even if these documents were their final acceptance certificate as would the plaintiff want this Court to believe, the documents would be sort of what the contract stipulated.

PW1 in his testimony alleged commissioning exercise to have occurred and that is confirmed in exhibit P_3, and that it was not controverted DW3. And both these two signed on exhibit P_3. But while the plaintiff considered exhibit P_3 to be Commissioning Certificate, the defendant disputes the assertion, by referring this Court to clause 9 of the Agreement. For ease of reference the clause contents are reproduced below:

> *"Acceptance" of the Equipment shall be deemed to occur on the date, in the reasonable opinion of Buyer, the Equipment conforms to the Specifications, and has continuously operated in compliance with the Specification for sixty (60) days after Equipment Turnover.* ***The Vendor shall present Buyer with a Final Certificate of Acceptance (attached hereto as Exhibit C, and incorporated herein by reference) immediately prior***

to the expiration of the 60th day. Final acceptance occurs when Buyer executes and returns to Vendor the signed Final Certificate of Acceptance ..... "[Empahsis mine]

This according to the evidence furnished to Court, never occurred. Meaning the commissioning process was not completed. And this is substantiated by two things: ***one,*** complaint raised on the technical issues pertaining to the generators, which resulted into five (5) both local and foreign engineers to be present to attend to the technical issues raised, as evidenced by the testimonies of PW1, PW2, PW3 and DW3, and *two,* exhibit P_{11}, a letter with reference: AA/GCTL/MTL/2017/11/04 dated 11th April, 2017, in reference to none completion of the commissioning process. Also the communication between the two parties that the technical issues complained off attended to between March,2017 –August, 2017, were never resolved.

The fact that there was no compliance to clause 9 of the Agreement, as I could not get hold of any document intuiting acceptance of the 4 generators by the buyer from the seller was achieved. Likewise, there is no Final Acceptance Certificate released by the buyer to the seller and that the generators were permanently handed over to the buyer. Since I could not find any evidence signifying that the buyer acted unfairly for not releasing the Final Acceptance Certificate for the Court to

requirement that a certificate ought properly to have been issued and that the failure to issue one was unfair. The plaintiff cannot thus claim fully that commissioning was completed and the generators handed to the defendant. In the same vein the outcome which would have triggered start of the warranty operation after sixty (60) days. As it is not known when the commissioning was finalized for the counting of sixty (60) days to kick in, as illustrated under clause 11 of exhibit P_7, the contention by PW1, PW2, PW3 and PW4 that the attendance by various engineers was in fulfillment of warranty services entitled to the defendant is in my view not correct. On this aspect I am in agreement with Mr. Kapinga that the engineers' attendance was due to the technical issues raised leading to failure to fully commission the generators and issue Certificate of Acceptance as per clause 9 of the exhibit P_7.

Two, the provision of section 29 of the Sale of Goods, though relevant as far as the agreement between the parties is concerned, but in the context of their agreement it was not supposed to be read in isolation of terms of the contract. The provision has admittedly placed duties on each party. In this instance it has obligated the seller to deliver the goods and buyer to accept and pay for them. But also Section 29, has clearly stipulated that the obligations of each party has to be in accordance with the

terms of the contract of sale, which in this case is the Equipment Sale Agreement – exhibit P_7 and in particularly clause 9.

Section 37 of the Sale of Goods, though valid but cannot be applied under the circumstances as the commissioning process warranting the acceptance of the commissioning as complete upon issuance and return of Certificate of Commissioning Acceptance, has not been issued to conclude the process. Mr. Masumbuko, inviting the Court to examine the evidence in the light of the estoppel principle, whilst, I agree the argument in referencing to the book by Goode on Commercial Law (supra) p. 368 which pointed out that:

> *"The **buyer may reject the goods either** by declining to receive them when delivery is tendered or by giving notice of rejection before a tender of delivery or **after receipt of the goods and before acceptance**....."*[Emphasis mine]

though persuasive, but slippery, since parties in this instance are governed by their signed agreement as exhibited in P_7, specifically clauses 8, 9 and 11 and exhibit C to the agreement. My stance is supported by the cited case of **Merali Hirji and Sons** (supra), and since the terms of the agreement were clear, then the duty of the Court is only to interpret the agreement to reflect the parties' intention and not to make reasonable terms. This position was echoed in the English case of **Martin-**

Baker (supra) cited by Mr. Kapinga, as to what is exactly the Court's duty in interpreting contract entered between parties.

Practically the generators running and operational, but considering the commissioning process was incomplete, the effectiveness of the generators cannot be assessed properly, as up to 19th December, 2017 there were still issues during site visit, as exhibited by P_4.

Three, reliance on exhibit P_3, by the plaintiff through the testimonies of PW1 that there was commissioning acceptance, the fact alleged confirmed by DW3 who read through clause B20.5 of exhibit P_3, which indicated the following:

> *"Acceptance*
>
> *The described system was handed over ready for operation and in an orderly condition.*
>
> *The commissioning report covers ALL pages.*
>
> *The complete scope of delivery was checked according to the order receipt.....*
>
> *The warranty also begins at the latest with today's date."*
>
> *The system was accepted by me/us on*

If Part B – Commissioning check list was it, there would not have been reasons of having clauses 8 and 9 in the agreement. As pointed out earlier clause 8 was dealing with testing and certification for each generator. Unlike clause 9 which was dealing with acceptance, whereby a Final Certificate of Acceptance was to be issued by the vendor which was to be signed by the buyer and returned to the vendor to complete the circle, and conclude the commissioning of the 4 generators altogether which could have made sure they function correctly and produce the expected results. Similarly, there would not have been any reason of yet having exhibit C, namely "Form of Certificate of Acceptance – Final Certificate Acceptance" as reflected at page 15 of the agreement. Although both companies affixed their stamps on the form but was without any dates, names, signatures or postal address, contrary to what features in exhibit P_3. Since these are specific part of the agreement instructions, adhering to it is, in my view, a must. Any slight change would have interfered with the execution of the agreement and no wonder the parties are before the Court with claim and counter-claim.

Rejection of the generators, though would have been a wise thing to do, which was unfortunately not done for the reasons that the plaintiff was cooperative and indeed took charge of resolving the technical problem, which ultimately could not be resolved, but since the transaction was not concluded yet, and already there was an

effort which by standard looked reasonable and in good faith, sensibly the possibility of one refraining from rejecting the generators, cannot be ruled out. Of course this was done at the defendant's own peril. So going by the provision of section 37 of the Sale of Goods, point of rejecting the generators has not been arrived at, despite the fact they could, if they wished to reject them.

After the above analysis and evaluation of the evidence, I am convinced that there was no breach of Agreement by the defendant by not paying the plaintiff the outstanding amount, since the commissioning process is incomplete and no Final Certificate of Acceptance has been issued, received, signed by the defendant and returned to the plaintiff as stipulated under clause 9 and exhibit C to the exhibit $P_{7.}$, and no unfairness on part of the defendant was observed.

This issue is thus answered in negative.

The second issue whether the plaintiff is in breach of the Agreement by supplying generators contrary to the Sale Agreement; the initial report that the generators had technical issues was made on 11th April, 2017 which was only about eleven (11) days after an incomplete commissioning process of the fourth generator which took place on 31st March, 2017, as per exhibit P_3. This was followed by engineers both local and foreign numbering five (5) coming to unsuccessfully resolve of the problem. The challenge extended to April, May, June and August of 2017. This

account was banked on by the defendant through DW3 and was never controverted by the plaintiffs' witnesses to wit PW1, PW2, PW3 and PW4. Even in December, 2017, as exhibited by P_4, when a site visit was conducted by the defendant' representative and Mohamed Shosha on behalf of the plaintiff, on 19th December, 2017, there were still some issues regarding the generators and which were also not controverted.

The defendant enumerated in their written statement of defence in paragraphs 10 (e) on shutdowns due to quality problems; paragraph 11 (b) shutdowns due to technical/mechanical issues and failure to reach the requisite power capacity of 2000KW as pleaded in paragraph 12 (b). All these claims are contested by the plaintiff as not been proved, as no single document was produced in support. I, completely concur with the plaintiff's stance that in principle parties are bound by their pleadings and have to discharge the burden, the account which the defendant has to a certain extent failed to accomplish. The cases of **Astrepo Investment and Puma Energy Tanzania** (supra), while relevant to support the assertion by Mr. Masumbuko, and which as intimated agree to faces challenge, simply because there was no proof that the commissioning process was ever finalized, to rule out shutdowns due to quality problems and technical issues.

The second issue is answered in affirmative that the plaintiff was in breach by supplying generators with defects which could not be remedied by engineers who attended to the 4 generators.

The third issue as to what relief (s) are the parties entitled to, this will not detain me long.

Usually the claim for specific damages has to be pleaded and proved. There is a long list of authority on this aspect. To point out a few such as **Zuberi Augustino v Anicet Mugabe [1992] T.L.R 137** at page **139**, in which the Court had this to say on proving specific claim:

> *"It was stated that special damages must be specifically pleaded and proved"*

The plaintiff has indeed pleaded the specific damages which in essence are not disputed. The only dispute and which has hindered this Court to honour the claim is there is no evidence led to prove that there was compliance to clause 9 of the Equipment Sales Agreement – exhibit P_7, which governed parties to the agreement. Naturally, under the circumstances the Court could not grant the reliefs sought of USD. 984,000. This also affects other reliefs sought.

Whilst the defendant does not dispute the amount of USD 984,000.0 to have been outstanding and that the balance has not been paid, giving the reasons that the generators were not commissioned as per the agreement and the technical issues raised had not been resolved up to this moment, which based on the adduced evidence this Court agrees, this makes this Court refrain from granting any relief except dismiss the suit.

Also on the balance of probabilities the defendant has equally completely failed to prove her counter-claim. There was no proof at all furnished to this Court on the claims placed on the plaintiff. The defendant apart from proving breach of agreement for failure to complete commissioning of the generators and issue Final Certificate of Commissioning as stipulated under clause 9,11 and exhibit C to the Equipment Sale Agreement – P $_7$, has not been able to prove losses incurred and damages suffered which were directly caused by the breach of the contract.

In light of the above, both the claim and counter-claim are dismissed. Each party to bear its own costs. It is so ordered.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

P. S. FIKIRINI

JUDGE

11th JUNE, 2020