

**IN THE HIGH COURT OF UNITED REPUBLIC
OF THE TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM**

COMMERCIAL CASE NO.63 OF 2020

SOLVOCHEM HOLLAND B.V.....PLAINTIFF

VERSUS

**CHANG QUING INTERNATIONAL
INVESTMENT CO. LTD.....DEFENDANT**

DECISION

Date of Last Order: 23/04/2021

Date of Judgement: 15/06/2021

NANGELA, J.:

The Plaintiff in herein prays for judgement and decree against the Defendant as follows:

1. An order for immediate payment of **US-(\$)** **141,810.00/-** being the purchasing price of 97,800 MT of Poly S10 in bulk in 4 flexi-tanks in 3x20ft containers, supplied to the Defendant by the Plaintiff.
2. An order for an immediate payment of **US-(\$)** **95,745.00/-** being the purchasing price

of 63,830 MT of CARDO; SP44-10 in bulk in 3 flexi-tanks in 3x20ft containers, supplied to the Defendant by the Plaintiff.

3. An Order for immediate payment of **US-(\$)** **4,751.1/-** being the interest accrued from the date of maturity of the invoices raised against the defendant to May 27th, 2020.
4. An Order for immediate payment of **US-(\$)** **22,693.9/-** being specific damages for the loss and costs incurred in the pursuit of recovering in favour of the defendant's account.
5. An Order for payment of interest at 2% per month on the principal price of the goods from 27th May 2020 to the date of the Judgement of the Court.
6. An Order for payment of interest at 9% per annum on the decretal amount from the date of the Judgement of the Court to the date of full satisfaction of the Court's decretal sum.
7. An order for payment of Costs of this suit to the Plaintiff and the Plaintiff's Advocate.
8. Any other relief(s) (sic) that this Court deems fit and just to grant.

The facts of this case are briefly as follows: The Plaintiff, a body corporate trading across Europe, Asia, and East and Central Africa entered into supply arrangements with the Defendant, whereby the Plaintiff supplied, on credit to the latter, various chemical materials totalling **US-(\$)** **265,000.00/-**.

It is averred that, on 19th December 2019, vide a Bill of Lading issued on Rotterdam on the material date, the Plaintiff supplied the Defendant with 97.800 MT of a Chemical material known as POLYOL S10 in bulk in flexi-tanks in 4x20ft containers. The Defendant was to pay the Plaintiff **US-(\$)** **141,810.00**.

Subsequently, the Plaintiff did supply another Chemical in the name of CARADOL SP44-10 to the Defendant vide a Bill of Lading No. DXBAP802 dated 25th December, 2019. The supply was valued at **US-(\$)** **95,745.00/-**

The supplies were all duly delivered in two different consignments to the Defendant, well within the agreed time of delivery. Since the supplies were made on credit, the credit was to set to mature for payments in ninety (90) days from the invoice date. On each supply, an invoice was also raised. It is alleged that, any failure to pay and delayed payment following the lapse of the 90 days period was to attract an interest charge of 2%.

It was the Plaintiff's averment that invoices No.20190695 dated 19th December 2019 and No.20190191 dated 25th December 2019 were respectively issued to the Defendant billing the latter with payment of **US-(\$)** **141,810.00/-** and **US-(\$)** **95,745.00/-** respectively.

On 25th April 2020, Plaintiff sent a Demand Notice to the Defendant which was responded to by the Defendant on 29th April 2020 expressing willingness to settle the outstanding debt. However, as the Defendant failed, neglected or refused to pay for the consignments, supplied, the Plaintiff preferred this case.

On 29th July 2020, the Defendant filed a Written Statement of Defence (**WSD**). In paragraph 2 of the **WSD**, the Plaintiff took note of the facts stated in paragraph 3 of the Plaintiff which was to the effect that, the Plaintiff supplied goods worth of **US-(\$)** 237,555/-. The Defendant denied that as of 27th May 2020, the price of goods supplied attracted interest of **US-(\$)** 4,751.1/-

Besides, the Defendant filed a notice of Preliminary objection challenging the propriety of Plaintiff filed in this Court. The objection was, however, overruled. On 13th October 2020, the learned counsel for the Defendant Mr Julius Nkirya requested this Court to grant the parties time to consult as they had an intention to have the matter settled amicably. I granted the prayer. The matter was adjourned several times on same reasons as parties had exchanged settled proposals.

On 22nd December, 2020 the parties appeared before me. Mr Dennis Tumaini, learned counsel, appeared for the Plaintiff while Mr Julius Nkirya appeared for the

Defendant. He informed this Court that the Parties had tentatively agreed to settle the matter and that; they were to file a Deed of Settlement on 30th December 2020. This Court made an order that, the Deed of Settlement once drawn should be filed not later than 30th December 2020.

However, by 30th December 2020 no Deed of settlement was filed. Instead, on 23rd March, 2021, when the parties appeared before me, Mr Tumaini informed this Court that, the Deed could not be finalised as the parties were on its final touches. This Court was lenient and allowed the parties to finalise their discussions and consequently, I adjourned the case up 23rd April 2021.

On the material date, when the parties appeared Mr Tumaini represented the Plaintiff while Mr Deogratias Lyimo Kiritta, Advocate, appeared for the Defendant. The parties told this Court that they have failed to reach a consensus. They prayed to proceed with the next stage of the hearing of this case.

As the Court set itself for orders regarding proceeding with the next stages of pre-trial conferences, Mr Tumaini made an oral application to the Court under Order 12 rule 4 of the Civil Procedure Code, Cap.33 R.E 2021. He submitted that, according to the Defendant's **WSD**, the Defendant is essential not disputing the claims

that he is indebted to the Plaintiff for having been supplied with the Chemical materials and that there has never been paid. He thus asked that, this Court should be pleased to enter judgment on admission. He also prayed that, the Court should use its discretionary powers to penalise the Defendant for the delays of over 365 days that had been occasioned by the Defendant.

Mr Tumaini relied on Annex.AHBV-3 attached to the Plaintiff, which is the demand letter, dated 7th May 2020, Ref. No. LA/SHBV/CQIICL/01/20/04/25 dated 25th April 2020 and a letter dated 29th April 2020. He submitted that, the Plaintiff is also asking for penalties because the Plaintiff has suffered loss. He contended that, the Defendant is not disputing that he received the tax invoices from the Plaintiff. He argued that, under the invoices it was clearly indicated that, should there be delay in payment, the customer (Defendant) was to suffer 2% for each month of delay.

For his part, Mr Kiritta objected to the application for default judgement. He argued that, for the Court to grant such, the Defendant must have admitted the claims unequivocally. He stated, however, that, the claim contains several prayers including the prayer on the goods supplied and interest in the tune of **US-\$**

4751.1/- and prayers for costs and general damages and a 2% interest per month as well as 9%.

Mr Kiritta contended that, the Defendant has filed a defence disputing the Plaintiff's claims. He submitted that, indeed the Defendant admits that goods were supplied but payments could not be made due to the outbreak of Covid-19 pandemic, which he termed as a force majeure event. He argued that, such a defence cannot amount to an admission but needs evidence to be tendered.

He submitted further that, the Defendant has objected to the claim of interest as well, as there was nowhere was it agreed that, a 2% interest was to be paid. He cited paragraph 2 and 7 of the WSD stating that these paragraphs have categorically denied those facts.

As such, he argued that, the Court cannot invoke Order XII Rule 4 of the CPC as requested as the Court cannot consider the issue of interest unless it was part of the contract and has been accepted in the defence. He stated that, there was nothing in the WSD to suggest any admission on all of the prayers made in the Plaint. In view of that, he argued that there is certainly a need to call for evidence from either side so that the court decides. He therefore prayed that this Court should refuse the application.

In a brief rejoinder submission, Mr Dennis Tumaini submitted that, generally, the Defendant, through its learned counsel Mr Kiritta, has not been able to state clearly and specifically the amount she has paid, either partially or in full to the Plaintiff. He stated that, on the contrary, the record shows that the Defendant received the goods, a fact which has the implication that she has to pay for the goods. He further reiterated the Defendant's own admission that, the payments were made impossible due to outbreak of Covid -19, meaning that; there was no payment s done to-date.

Referring to Order 8 Rue 5 of the CPC, Mr Tumaini was of the view that, that rule in Order VIII requires a defendant to make specific denials in its pleadings. He reiterated his submission and stated, as regard the issue of payment of interests, that, **annex SBV-2** to the Plaint has a link which required the Defendant to make payments within 90 days and the consequences of not paying in time. As regards the issue of damages prayed for, Mr Tumaini rejoined that, these are matter within the discretion of the Court and not the parties.

I have heard submissions from the learned counsels for both sides herein. The issue I am called upon to address is whether the Plaintiff is entitled to a judgement

on admission under **Order XII rule 4 of the Civil Procedure Code, Cap.33 R.E 2019.**

Essentially, the law on the scope of Order XII Rule 4 of the Civil Procedure Code, Cap.33 R.E 2019 is well settled. Looking at the said provision, it is clear that, the powers conferred under Order XII Rule 4 of the Civil Procedure Code, Cap.33 R.E 2019 are discretionary powers and relief cannot be claimed under it as a matter of right. The said provision is reproduced below for a ready reference. This provision provides as follows:

"Any party may at any stage of a suit, where admissions of fact have been made either on the pleading, or otherwise, apply to the court for such judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the court may upon such application make such order, or give such judgment, as the court may think just."

As it may be noted in this case, the Plaintiff's learned counsel has made an instantaneous application under the above cited Order XII rule 4 of the CPC, for a judgment on admission contending, *inter alia*, that, the Defendant admitted that the Plaintiff supplied her with goods and, that, such goods have not been paid for.

As a matter of legal principle, where a claim is admitted, the court has jurisdiction to enter a judgment

for the plaintiff and to pass a decree on admitted claims. The rationale for such a rule is not farfetched. It is to facilitate a speedier delivery of justice to the affected party who need to obtain a speedy judgment at least to the extent of relief to which according to the admission of the defendants, the plaintiff is entitled.

Whether a party makes an admission or not is an issue which depends on whether the party has done so expressly or by necessary implication from non-traverse of a material fact in the statement of claim? It is a cardinal principle of law, therefore, that, for an admission to be characterised as an admission, it has to be unequivocal and, must admit the claim in the plaint. This was so held in **John Peter Nazareth v. Barclays Bank International Ltd., [1976] E.A.C.A. 39 (UR)**. The Court was of the view that, for judgment to be entered on admission, such an admission must be explicit and not open to doubt.

From the foregoing discussion, the question that follows, therefore, is whether there is such an admission by the Defendant. As I stated herein above, to be able to ascertain that, one has to look at the Defendant's Written Statement of Defence (**WSD**), and any annexure to it, filed in this Court. I have taken the liberty of doing that.

Essentially, the Defendant is not disputing that there was a supply of goods (chemicals) by the Plaintiff and that, such supply has not been met with commensurate payments. This is clearly apparent from the Defendant's **WSD** and also the annex TA-1 which forms part of the **WSD**. In that Annex.TA-1, for instance, the Defendant acknowledges that she was at fault for delaying payments of the transaction and was embarrassed or ashamed for that eventuality.

However, what I observe from the Defendant's **WSD** is that, while not disputing the main claim for payment of the amount constituting the price for the goods supplied, the Defendant disputing is the alleged payment of interest to a tune of **USD 4,751.1**. It was a further submission of the learned counsel for the Plaintiff that, the Plaintiff is entitled to a 2% interest on the sum claimed which is to be paid for each month of delay.

He contended that, the invoices, attached to the Plaintiff as SHBV-2 contained a link incorporated by reference which indicated the consequences of delayed payments which was a 2% interest charge for each month of delay.

I have looked at the said link which is: www.solvechem.com/terms-conditions/. Under Article 4 it provides inter alia that:

"If Buyer fails to pay any amount when due, then, without prejudice to any other right Seller may have:

- (a) a default interest of 1,5% per month on the amount outstanding shall become due;
- (b) all costs, including judicial, made in order to obtain payment by Seller of the amount or amounts due, shall be for account of Buyer."

As I stated, Mr Kiritta counteracted such assertions and demands by Mr Tumaini as issues that waters down the prayer for judgment on admission and warranting this Court to go for the full hearing of the case. He also submitted that, there are other prayers for costs which he is disputing as well. However, as I understand the law, costs, are granted at the discretion of the Court. Section 30 of the CPC, Cap.33 R.E 2019 is alive to that fact, stating, inter alia, that, the costs of, and incidental to, all suits shall be in the discretion of the court and the court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid.

Mr Kiritta has contended as well, that, the Court cannot consider the issue of interest unless such issue was part of the contract and admitted in the defence. With all that in mind, the immediate question that follows is: *can the issue of interest be a reason for not granting the prayer for judgement on admission?* In other words,

does that issue deny the fact that the Defendant has admitted the Plaintiff's claim?

Before I proceed further to deal with the questions I have raised herein, I find it appropriate to refer to what the concept of interest is all about, as explained in various authoritative references. As per **Black's Law Dictionary (7th Edn.)**, at page 816, for instance, the term "interest" is defined as:

"**compensation** fixed by agreement or allowed by law for use or detention of money or **for the loss of money of one who is entitled to its use**, especially, the amount owned to a lender in return for the use of the borrowed money."

(Emphasis added).

According to **Stroud's Judicial Dictionary of Words and Phrases (6th edn.)**; the term "interest" (on money) means, *inter alia*:

"Compensation paid by the borrower to the lender for **deprivation of the use of his money**." *Riches v Westminster Bank [1947] 1 W.L.R 479.* (Emphasis added).

What is expressly discernible from the above definition is that, a person who is unjustifiably deprived of opportunity to use his monies may be entitled to payment of interest. In that, I am fortified and indeed persuaded by the decision of the Supreme Court of India in the case of **Secretary, Irrigation Department, Government of Orissa Vs. G.C. Roy, 1992, (1) SCC**

508, where the Constitution Bench of the Supreme Court held a view that:

"A person deprived of use of money to which he is legitimately entitled has a right to be compensated for the deprivation, call it by any name. It may be called interest, compensation or damages."

In another Indian case of **Sham Lal Narula (Dr.) Vs. CIT AIR 1964 SC 1878**, the Court was also of the firm view that, *interest is paid for the deprivation of the use of the money*. In the case of **Riches vs Westminster Bank Ltd 1947 (1) ALL ER 469**, Lord Right, held, at page 472, that, the essence of interest it is a payment, which becomes due, because the creditor has not had his money at the due date. That amount may be recorded either as representing the profit, he might have made if he had use of the money, or conversely, the loss he suffered because he had not that use.

From the discussion herein above, it will be taken pretty clear that interest is not a penalty or punishment but an entitlement. I Mr X had to pay a certain sum of money to Mr Y, at a particular time, but he pays it after a delay of several years or months, the inevitable conclusions are that had the Money been in the hands of Mr Y and he would have earned interest thereon by investing it somewhere. Or else, had Mr X paid the amount at the time when it should have been made

payable, then Mr Y would have invested that amount somewhere else and earned interest or profit thereon.

From the above analogy, it follows that; if a person has illegally retained someone's amount of money, he should ordinarily be directed to pay, not only the principal amount, but also the interest earned thereon. This is what the whole concept of interest is all about in a nutshell. Deprivation of one's use of his monies, to which, he is legitimately entitled to as a matter of right, has with it a duty to be compensate such a person for the deprivation.

Under section 29 and 30 (3) of the Civil Procedure Code, Cap.33 R.E, 2019, Courts are also empowered to exercise their discretion to grant interest to a decree holder. In some way, these provisions do recognize the principles I have discussed herein above. They provide as follows:

"29. The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and, **without prejudice to the power of the court to order interest to be paid upon to date of judgment at such rates as it may deem reasonable,** every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied.

30 (3) The court may give **interest on costs at any rate not exceeding seven percent per annum** and such interest shall be added to the costs and shall be recoverable as such." (**Emphasis added**).

It follows, therefore, that, once there is the admission of the main claims, the issue of interest cannot be a detaining factor from granting the prayer for judgment on admission. Interest, if it is to be paid, is a matter of right once it is established that monies which ought to have been paid to the Plaintiff, following the supply of goods by the Plaintiff to the Defendant, were illegally withheld by the Defendant.

In the case at hand, that is the situation. The Plaintiff supplied the respective goods to the Defendant as per their agreement. The Defendant received the goods but has given evasive denials in the Written Statement of Defence while admitting that, to date, she has not paid the Plaintiff the commensurate price agreed for the supply of the goods.

According to Order VII rule 4 CPC, it is provided; and that:

"Where a defendant denies an allegation of fact in the plaint, he must not do so evasively, but answer the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be

sufficient to deny that he received that particular amount, but he must deny that he received that sum or any part thereof or else set out how much he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances."

Evasive denials, therefore, do not help the Defendant. In a scenario of that like nature, there is no doubt that, the Plaintiff will be rightly entitled to judgement on admission.

In view of the above, and having looked at the claims made by the Plaintiff and the Defendants written statement of defence, I do hereby make a finding that, the Defendant has materially admitted the Plaintiff's primary claim and, for that matter, the Plaintiff is entitled to judgement on admission.

Secondly, since the monies claimed as price for goods supplied ought to have been paid within 90 days after the delivery of the goods, and since the same were not paid to date, that is a pure breach of the agreement and the Plaintiff will be entitled to damages, including interest on the unpaid sum as per the terms and conditions incorporated by reference in the invoice which was duly accepted by the Defendant.

Section 73(1) of the Law of Contract, Cap.345 R.E 2019 is clear that a party who suffers in contract as a

result of breach by the other party is entitled to compensation. The law provides as follows:

"73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it."

Further, under section 74(1) and (2) of the Law of Contract Act, Cap.345 R.E 2019, the law stipulates that:

"74.-(1) Where a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated.

(2) A stipulation for increased interest from the date of default may be a stipulation by way of penalty." (Emphasis added).

As it may be noted in the above provisions, payment of exemplary damages is punitive nature and is outside the realm of compensatory damages paid under section 73(1) of the Law of Contract Act. As section 74(1) of that Act indicates, such must be contained or

stipulated in the contract itself and, the party complaining about the breach is entitled to be paid such kind of damages.

Section 74 (2) of the Act further states that if the contract has stipulated for an increased interest from the date of default, that stipulation will, as well, be a penalty. As I indicated herein above, in this case, the terms and conditions incorporated in the contract by reference did make such a stipulation under article 4 (a) to the effect that, if the buyer fails to pay any amount when due, then, without prejudice to any other right Seller may have: (a) a default interest of 1.5% per month on the amount outstanding shall become due.

Thirdly, since costs are granted at the discretion of the Court, and since it is clear that costs will follow the events, there being an admission on the part of the Defendant that the goods supplied were received and monies claimed were not paid, it goes without saying that costs incurred must be paid. These will include costs incurred to follow-up the matter with the Defendant, including those associated with the conduct of this matter in Court.

Fourthly, since the Plaintiff has prayed for specific damages worth **US-(\$)** 22,693.9/, such prayers cannot be considered at this juncture, because, the law in our

jurisdiction, as pronounced in various decisions of this Court and the Court of Appeal, is that, as a matter of principle, once pleaded, specific damages call for strict proof thereof. **See: Zuberi Augustino Mugabe v Anicet Mugabe [1992] T.L.R. 137 at p.139.**

In view of that, what the Plaintiff only needs, as of now, is to address this court on that issue of specific damages and demonstrate as to whether the same were pleaded and strictly prove them as required by the law. A supplementary decision on that aspect may follow.

All said and done, I hereby proceed to grant judgment on admission as prayed and order as follows, that:

1. The Defendant is hereby ordered to immediately pay the Plaintiff a sum of **US-(\$) 141,810.00/-** being the purchasing price of 97,800 MT of Poly S10 in bulk in 4 flexi-tanks in 3x20ft containers, supplied to the Defendant by the Plaintiff.
2. The Defendant is hereby ordered to immediately pay the Plaintiff a sum of **US-(\$) 95,745.00/-** being the purchasing price of 63,830 MT of CARDO; SP44-10 in bulk in 3 flexi-tanks in 3x20ft containers, supplied to the Defendant by the Plaintiff.
3. The Defendant is hereby ordered to immediately pay the Plaintiff a sum


of **US-(\$)** 4.751.1/- being the interest accrued from the date of maturity of the invoices raised against the defendant to May 27th, 2020.

4. The Defendant is hereby ordered to immediately pay the Plaintiff the agreed interest at **2%** per month on the principal price of the goods from 27th May 2020 to the date of the Judgement of the Court.
5. The Defendant is hereby ordered to immediately pay the Plaintiff interest at 7% per annum on the decretal amount from the date of the Judgement of the Court to the date of full satisfaction of the Court's decretal sum.
6. The Defendant is hereby ordered to immediately pay the Plaintiff Costs of this suit, including costs incurred for the Plaintiff's Advocate.

It is so ordered.

DATED at DAR-ES-SALAAM 15th JUNE, 2021.




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DEO JOHN NANGELA
JUDGE,