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

COMMERCIAL CASE NO.80 OF 2020

SAO HILL INDUSTRIES LTD.....PLAINTIFF

VERSUS

NIPO GROUP LTD.....DEFENDANT

DEFAULT JUDGMENT

Date of Last Order: 3/05/2021
Date of Judgement: 18/06/2021

NANGELA, J.:

The Plaintiff herein sued the Defendant claiming from the latter, a total of **TZS 940,554,800/-** being outstanding purchase amount due and owed to the Plaintiff, inclusive of CESS paid on behalf of the Defendant, on account of the Plaintiff's supply of treated wooden poles to the Defendant.

For better clarity, I find it pertinent to reproduce the facts of this case. It is the Plaintiff's averment that, sometime in November 2019, the Plaintiff and the Defendant executed an agreement for supply of treated wooden poles. The Plaintiff was to supply such poles to the Defendant, a registered contractor under the Rural Energy Agency (REA) for rural electrification project managed under the Tanzania Energy Supply Company (TANESCO).

Under the parties' Agreement, the following was agreed, that:

(i) TANESCO was to issue acceptance Certificates from which the Defendant issued the Plaintiff with a Local Purchase Order indicating the quantity of poles needed and 5% CESS Agreed.

(ii) The Plaintiff would then issue a Pro-forma Invoice for value of poles and CESS payable within 30 days of issuance.

(iii) The Plaintiff would then deliver the poles through road way transportation to the indicated destinations by the Defendant, make payment of CESS on behalf of the Defendant to the local

district council which would then be reimbursed by the Defendant to the Plaintiff.

(iv) Upon delivery, the Defendant was to initiate payment of the poles and reimbursement of CESS to the Plaintiff.

(v) The Defendant had obtained guarantee within payment in form of Letters of Credit with numbers 241TBBL192390001 and 241TBBL19211001 issued by the National Microfinance Bank.

It has been averred that the Plaintiff performed its contractual obligations on various dates between November 2019 and March 2020 by supplying the required poles and paying the requisite CEES payments to Mafinga Town Council, which payments amounted to **TZS 56,738,000/=**.

When all was done, the Plaintiff proceeded to issue the Defendant with invoices for the poles supplied. The invoices issued and their numbers were as follows:

- SHI/2019 /November /NIPO/001, issued on 26th November 2019.
- SHI/2019/December/NIPO/002, issued on 04th December 2019.

- SHI/2020/March/NIPO/01, issued on 27th March 2020; and
- SHI/2020/FEBRUARY/CESS/001, issued on 12th February 2020.

The above issued invoices were for a sum of **TZS 1,395,754,800/=** (including reimbursement of CESS amount which was paid on behalf of the Defendant.)

On 13th January 2020 and 28th April 2020 the Defendant made part-payment of **TZS 455,200,000/=**. These payments, it is said, ought to have been made since October 13th, 2019 and November 20th, 2019. It is stated that, as of 19th August 2020, the balance, which is a sum of **TZS 940,554,800/-** remained outstanding.

On 25th March 2020, the Plaintiff and Defendant executed an Agreement whereupon the latter committed to pay, within sixty (60) days, a sum of **TZS 472,000,000** in full with 17% interest per annum, being an outstanding amount for treated wooden poles supplied to Mwanza Region on the order of the Defendant.

However, the Defendant failed to honour his obligations under the agreement as well.

On 26th March 2020, the Defendant sent a letter to the NMB directing the Bank to cancel the **Letter of Credit No.241TBBL 192390001**. The Defendant informed the Bankers that, the Defendant has concluded an agreement with the Plaintiff and the effect of that agreement was that, the Defendant was going to pay an outstanding sum of **TZS 472,000,000/-** for supply of treated wooden poles – contract No.AE/008/2016-17/HQ/G/10LOT 6 Mwanza region for Rural Electrification Project.

On 17th June 2020, the Plaintiff wrote a letter to the Defendant Ref.SHI/2020/May/REA/02 to the Defendant providing a summary of the outstanding balance as being a total of **TZS 940,554,800/**. Several e-mail correspondences were initiated to follow-up the claims, but with no meaningful responses. Moreover, the Plaintiff

served on the Defendant several demand letters, as well without success.

Seeing that the Defendant has failed, refused or neglected to pay the outstanding balance, the Plaintiff instituted this case praying for judgement and decree as follows:

(i) A declaration that the Defendant has breached the terms of the Purchase Agreement executed between the two parties.

(ii) An order for payment of TZS **940,554,800/-** as at 20th Aug.2020, being the outstanding amount due and owing to the Plaintiff for the purchase of Poles supplied by the Plaintiff to the Defendant and refund of payment of CESS for poles supplied.

(iii) An order for payment of an interest at commercial rate of 17% per annum on the principal amount from the date of default until the date of judgement.

(iv) An order that the Defendant pay general damages to be assessed by the Court for breach of contract.

(v) An order that the Defendant pay interest on the decretal amount at court rate of 12% per

annum from the date of judgement to the date of full satisfaction.

(vi) Costs of this suit.

(vii) Interest on costs at Court's rate of 12% from the date of judgement until payment in full.

(viii) Any other order and relief as this honourable court may deem fit and just to grant.

When the suit was called on for mention on 15th October 2020, Ms Sumaey Jaffer, learned Advocate appeared for the Plaintiff. The Defendant was absent. Ms Jaffer informed this Court that, when the Defendant was served with the Plaint, the Defendant refused to receive the documents. An affidavit sworn by the process server was filed in court as well.

However, since the Defendant was within the twenty one (21) days in which a written statement of defence was to be filed, a prayer was made and granted to have the matter adjourned. I adjourned the suit and fixed it for mention in chambers on 3rd of December 2020.

On the appointed date, i.e., 3rd December 2020, Ms Jaffer appeared in Court. Since the Defendant was absent and no written statement of defence was filed in court, Ms Jaffer prayed to serve the Plaint to the Defendant by way of substituted service. She opted to do so despite the fact that earlier the process server had filed an affidavit proving that, when the document was handed over to the Defendant at first, the Defendant refused to receive it.

I granted her prayer and, a notice of appearance was published on Daily News Newspaper and Nipashe Newspaper dated 10th December 2020.

Even so, when the suit was called on 24th February 2021, the Defendant was absent and no defence was file in Court. That being the case, Ms Jaffer prayed to proceed under Rule 22 (1) of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012 (as amended by GN 107 of 2019). I granted her prayer ordering that Form No.1should be filed in Court.

Basically, if no defence is entered after the Defendant has been duly notified of the case pending in Court and fails to act, Rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019) gives a right to the Plaintiff to apply for a default judgement.

Rule 22(1) provides as follows:

> "(1) Where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub-rule (2) of rule 20, within the period of such extension, the Court may, upon proof of service and on application by the plaintiff in Form No.1 set out in the Schedule to these Rules accompanied by an affidavit in proof of the claim, enter judgment in favour of the plaintiff."

On 9th March 2021, the Plaintiff filed Form No.1 in accordance with the requirements of Rule 22 (1) High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019). The Form No. 1 filed in this Court was

filed together with an affidavit of one Godlisten Minja in support of the application for default judgement.

As I stated earlier herein, there was sufficient proof that the Defendant was served, refused to acknowledge service and failed to appear in Court, even after the summons had been served on the Defendant by way of a substituted service mode.

On 23rd March 2021, the Court, through a letter signed by Mr Godlisten Minja, was availed with all supporting original documents mentioned in the supporting affidavit. I have gone through the Form No.1, the affidavit and the original documents availed to the Court for its scrutiny and satisfaction in proof of the Plaintiff's claims.

As once stated by this Court in the case of **Nitro Explosives (T) Ltd v Tanzanite One Mining Ltd, Comm. Case No.118 of 2018 (unreported)**, the grant of a default judgement is made possible upon proof of the following, that:

(a) there is proof of service to the Defendant and that, such Defendant has failed to file written statement of defence and appear in Court;

(b) the Plaintiff had made an application to the Court in the prescribed **Form No.1** to the 1st Schedule to the Rules;

(c) the said **Form No.1** is accompanied by an affidavit in proof of the claim.

In the above cited authority, this Court emphasized that:

> "the affidavit in proof must be self-explanatory proving every claim in the plaint and the exhibits must as well be authenticated and, that, the three ingredients must co-exist for the judgement in favour of the plaintiff to be given."

I have no hesitations whatsoever, that, the Plaintiff in this case has satisfied the above requirements. There are, indeed, all justifications for that. For instance, looking at the available evidence on record, as per the annexure to the affidavits which accompany Form No.1, which are also annexed to the Plaint, I find what the Plaintiff claims from the Defendant as an outstanding amount is **TZS 940,554,800/**.

As I look at the annexure to the affidavit, the original copies having been availed to me, I find no dispute that the Plaintiff did supply the wooden treated poles to the Defendant.

There is also no dispute that the Plaintiff demanded from the Defendant payment of the said amount and the Defendant has failed, refused or neglected to honour the demands. The demand letters and e-mails attached to the affidavit also make it clear that such demands were made. Since the Defendant has not filed any defence, the claims remain to be what they are.

In view of the above, it is my findings that the Plaintiff has proved its case to the required standards and, hence, is entitled to a default judgement, as well as some of the prayers sought in Form-No.1. This is to say that; the Defendant is in breach of the agreement for supply of treated wooden poles which the Defendant executed sometime in November 2019.

In the prayers made by the Plaintiff, there is also a prayer for recovery of general damages from the Defendant for the breach of contract the parties executed sometime in November 2019.

In our law, once it is established that there was a breach of a contract, the law has stipulated for the consequences that are to follow as a result of that breach. In particular, section 73 of the Law of Contract Act, Cap 345 RE 2019 does stipulate that, a party who suffers by such breach is entitled to payment of damages or compensation. The relevant provision 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.

(2) The compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

(3) Where an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge is entitled to receive the same compensation from the party in default as if such person had contracted to discharge it and had broken his contract.

(4) In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account."

As it may be noted from section 73(1) of Cap.345 RE 2019, a party who suffered as a result of a breach of an agreement is entitled to be compensated. These are such damages which naturally arose in the usual course of things from such breach.

Legally speaking, the award of general damages may be made as a result of inconvenience suffered by the Plaintiff in the hands of the Defendant. In particular, for

the Plaintiff to be eligible for payment of general damages, the Plaintiff must have suffered loss or inconvenience to justify such an award.

It is also worth noting, as a settled legal position as well, that, substantial physical inconvenience, or an inconvenience which is not strictly physical and discomfort caused by breach of contract will entitle the plaintiff to damages. See for instance the case of **UCB vs Kigozi [2002] EA 305**.

With that position in mind, however, the question that follows is: *how much should be paid as general damages?*

Essentially, it is trite that, the quantum of damages to be paid is a matter for the discretion of the Court, which discretion, as it was stated in the case of **Southern Engineering Company Ltd Vs Mulia [1986-1989] EA 541**; has to be exercised judiciously.

Looking at the evidence on record and the entire factual circumstances surrounding this suit, there is no

doubt that the Plaintiff suffered inconvenience as a result of the Defendant's breach of the agreement earlier executed by the parties. This means, therefore, that, the Plaintiff is entitled to be paid general damages. In my view, and taking into account the evidence on record and the factual circumstances of the case as a whole, a payment of **TZS 5,000,000/-** as general damages will be reasonable and, hence, justifiable. I will proceed to grant such an amount as general damages.

It follows, therefore, in terms of Rule 22(1) of the *High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019)*, this Court do hereby enters judgement in default and decree in favour of the Plaintiff as follows, that:

(i) This Court declares that the Defendant has breached the terms of the Purchase Agreement executed between the two parties.

(ii) The Defendant is hereby ordered to immediately pay the Plaintiff a total of **TZS 940,554,800/-**, being the

outstanding amount due and owing to the Plaintiff for the purchase of Poles supplied by the Plaintiff to the Defendant and refund of payment of CESS for poles supplied.

(iii) That, the Defendant is ordered to pay the Plaintiff interest at commercial rate of 14% per annum on the principal amount from the date of default until the date of judgement.

(iv) The Defendant is hereby ordered to pay general damages to a tune of **TZS 5,000,000** for breach of contract.

(v) The Defendant is hereby ordered to pay interest on the decretal amount at court rate of 7% per annum from the date of judgement to the date of full satisfaction.

(vi) Costs of this suit.

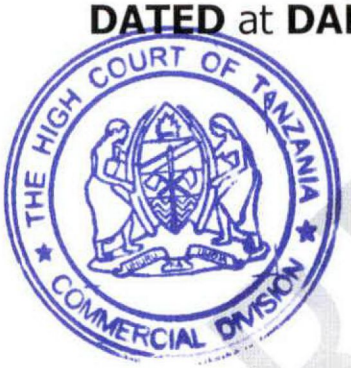
Further orders:

(vii) That, in terms of Rule 22 (2) (a) and (b) High Court (Commercial Division) Procedure Rules, 2012 (as amended, 2019), the Court makes further orders that the decree emanating from this suit shall not be executed unless the

decree holder has, within a period of ten (10) days from the date of this default judgement, publish a copy of it (the decree) in at least two (2) widely circulated newspapers in the country and after a period of twenty one days (21), from the date of expiry of the said ten (10) days, has elapsed.

It is so ordered.

DATED at **DAR-ES-SALAAM 18th JUNE, 2021.**



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DEO JOHN NANGELA
JUDGE,