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

COMMERCIAL CASE NO.24 OF 2020

PETROLUBE (T) LIMITED.....PLAINTIFF

VERSUS

TANZANIA INTERNATIONAL CONTAINERS TERMINAL SERVICES LTD.....DEFENDANT

Last Order: 06th Sept. 2021
Judgement: 23rd Nov. 2021

JUDGEMENT

NANGELA, J.:

In his suit, the Plaintiff is praying for judgement and decree against the Defendant as follows:

1. A declaration that the Defendant breached the terms of the agreement between her and the Plaintiff by failure to render services as agreed in the agreement.
2. An order that the Defendant pay the Plaintiff a total of USD ($) 45,033.00, being the outstanding principal amount.
3. An order that the Defendant pay interest at the contractual rate of

10.42% compounded monthly, together with VAT hereon, for the 16th day of September 2015 to the date of the judgement.

4. An order that the Defendant pay general damages.
5. An order that the Defendant pay interest on the decretal amount at the court rate of 12% per annum from the date of judgement to the date of full satisfaction.
6. An order for costs.
7. Interest on costs from the date of judgment until full payment.
8. Any other order or relief as the Honourable Court may find just to grant.

To appreciate the gist of the dispute between the parties, I will set out the facts of this case as they may be gathered from the pleadings, albeit briefly.

On 9th August 2015, the Plaintiff, who is said to have been the Defendant's client at all material times did, placed an order and imported from the *GS Cartex Corporation*, a Company based in South Korea, *Base Oil KixxLUBO 150N*, numbering **350,636 litres** in total and weighing **299.05** MTs. The supplier, *GS Cartex Corporation*, issued the Plaintiff with a *Commercial Invoice No.20150809OJ*, dated 9th August 2015 and, the cargo was

safely transported to the Dar-Es-Salaam Port without any damages whatsoever.

Upon arrival of the cargo at Dar-es-Salaam Port, the Defendant cleared it from the Shipping line, Hanjin Shipping Co. Ltd. The Plaintiff alleges that, under an implied term of their agreement, all stripped containers were to be kept at the Defendant's warehouse. The Plaintiff alleges further, that, as a matter of commercial practice, and per the expressed terms and condition, the cargo was to be offloaded from the shipping line and managed with the correct skills, efficient workmanship and tools, and without negligence, so as to preserve it in good condition without any damages whatsoever.

On 16th September 2015, the Plaintiff was informed by one clearing agent, **SAMI Agencies Ltd**, that, one container bearing **Number TRHU 3007409** on the Bill of Lading **(BL) No.HJSCSEL585794400**, was severely damaged, when the cargo was being offloaded by the Defendant on 14th September, 2015. As a result, the Plaintiff alleges to have suffered loss as the cargo was of no commercial value anymore. Subsequently, the Plaintiff served the Defendant with a demand claiming to be paid a total of **US$ 45,033.00.** The demand was, nevertheless, not honoured.

On 28th November 2019, the Plaintiff, through its attorneys, Hallmark Attorneys, issued the Defendant with a

final demand note asking to be paid a total of **US$ 60,003.00** (being the value of the damaged cargo (**US$ 45,033.00**), collection fees paid thereof **(US$ 5,000.00)** and specific damages on account of loss of the Client's cargo **(US$ 10,000.00).**

It was the Plaintiff's averments that, although the Defendant had asked for a thirty days' period, as the claim was being handled by its insurers, the period sought expired without amicable settlement, and, hence, this suit. On 20th April, 2020, the Defendant filed a Written Statement of Defence (**WSD**) as required by the law.

Initially there were raised preliminary objections which were overruled by this Court. When this suit came for a final pre-trial conference, on the 18th day of May 2021, it was scheduled for hearing, and the following were matters agreed by both parties as forming the issues in need of proof:

(i) Whether there was an agreement between the parties and if so, what were the terms and conditions of that agreement?

(ii) Whether the alleged damage to the Plaintiff's cargo was caused by the acts or omission of the Defendant.

(iii) What loss if any has been suffered by the Plaintiff in respect of the alleged damage to the cargo?

(iv) Whether the Plaintiff was insured for its alleged loss and, if so, the outcome of any insurance claim made by the Plaintiff for its loss.

(v) To what relief(s) are the parties entitled.

On 14th July 2021, the hearing of this case commenced. On the material date, the Plaintiff enjoyed the services of Mr Jovinson Kagirwa, learned advocate, while the Defendant was represented Mr Zacharia Daudi and Ms Jasbir Mankoo, learned Advocates. At the opening of the the Plaintiff's case, the Plaintiff called two witnesses who testified a Pw-1 and Pw-2 and tendered in Court eleven (11) exhibits to prove its case.

In his testimony, PW-1 testified that, sometimes on 9th August 2015, the Plaintiff imported from Korea, 350,636 of Base Oil KixxLUBO 150N weighing 299.05 MT. The Cargo was safely transported to the Dar-es-Salaam Port. Pw-1 tendered in Court an Invoice Number 20150890J and its packing list which together formed Exhibits P.1 and P.2 respectively. He also tendered a Bill of Lading No.HJSCSEL5857944400 dated 09th Aug 2015. The same was admitted as Exh. P3.

Pw-1 testified that, the Cargo was offloaded by the Defendant and it was express term and condition that the cargo was to be offloaded in good conditions without damages whatsoever. Pw-1 went on to state that, on 16th

September 2015, the Plaintiff was informed by her clearing and forwarding agent that one container Number TRHU 3007409 was damaged by the Defendant in the course of offloading it from the shipping line, causing leakage of oil from its flex tank, hence causing a total loss of USD ($) 45,033. He tendered in Court a picture of the damaged container as evidence and the same was received as Exh.P4.

Pw-1 further testified that, the incident and the loss/damages were communicated to the Defendant on 29th September 2015. In his testimony, however, Pw-1 acknowledged that, the parties had no direct written agreement but, asserted that, the Defendant was liable based on the nature of business operated by the Defendant. Pw-1 testified that, the relationship between the two parties was regulated by the Defendant's Terms of Business, published on 1st of July 2011. He tendered a copy as Exh.P5.

In that regard, Pw-1 relied on Section D Clause 12 and 13, section B-Clause 13 and section 16- clause (a) and (d) of Exh.P5 to justify that the Defendant was in breach and, hence, liable to remedy the losses suffered. It was further testimony of Pw-1 that, despite asking for compensation from the Defendant for the losses suffered, the Defendant failed to act in line with what Exh.P5 provides. Pw-1 tendered in Court two demand letters which

were received as Exh.P-6 and P-7, as well as a letter from the Respondent in reply to the demand for payment of USD($) 43,033.00, which letter was admitted as Exh.P-8.

Upon being cross-examined, Pw-1 stated that, the claim is a result of negligence and that the Plaintiff did not have a written contract with the Defendant but the Terms of Business regulated the conduct of the parties. Pw-1 was emphatic that the Terms of Business was the basis for the parties' agreement. He referred to Section D Clause 12 and 13 of Exh.P5 stating that, the terms of business bind the parties and that, the Plaintiff is a consignee. Pw-1 admitted that there is limitation of liability under Clause 16 of Exh.P5.

For his part, Pw-2, one Mr Amirali Kara, testified to this Court, that, the Plaintiff was insured by Alliance Insurance Corporation Ltd at the time when an incident involving container No. TRHU3007409 took place.

He stated that, it was sometime on September 2015 when he was requested to visit the site to assess damage to the respective container which got accident at TICTS premises. Pw-2 testified further that, the insurer appointed *Transeuropa Tanzania Ltd Insurance Surveyors and Loss Adjusters* to investigate about the matter. Pw-2 tendered letter from *Alliance Insurance Corporation Ltd,* the Plaintiff's insurer regarding appointment. The letter was received in Court and was marked as Exh.P-9.

Besides, Pw-2 tendered a joint inspection report by *Transeuropa Tanzania Ltd,* involving the Defendant's officials, TRA, the C & F Agent as well as the Plaintiff, dated 21st September 2015, which was received as Exh.P10. The exhibit P10 proved that the value of the goods assessed was **USD ($) 14,324.** Pw-2 stated that, the report had established a total leakage of the oils from the flex tank with nothing to salvage.

Pw-2 testified further that, on the 22nd day of February 2016, the insurer received a letter from the Plaintiff about the latter's action of withdrawing the claim from the insurer and, instead, directly claiming for compensation from the Defendant. The letter was received as Exh.P.11.

Upon being cross-examined, Pw-2 confirmed to the Court that, the consignee's representatives together with TICTS (Defendant's officials) were present when the inspection of the damage to the container was being carried out. He told this Court, while being cross-examined, that, although the Plaintiff did not state the reasons of withdrawal of the claim from the insurer, the Plaintiff was incurring a lot more expenses such as demurrage and storage fees than what was claimed as value of the goods, hence, the decision to withdraw the claims.

So far, that is what may be summarised from the testimony of the Plaintiff's witness and the Plaintiff's case

came to a closure paving way for the defence case to open.

As for the Defendant's case, the Defendant called one witness, Dw-1, (Mr Leonard Chiwango). Dw-1 tendered three exhibits (Exh.D-1 to D3). In his testimony in chief, he denied to have entered into a contract with the Plaintiff, be it oral or written. Dw-1 told this Court that, as a matter of practice, whenever an accident occurs leading to damage to a particular container or cargo, and upon notice by the C & F Agent or the customer, the Defendant will inform the Tanzania Revenue Authority (TRA) and jointly (TICTS, TRA and the C & F Agent and/or the Customer) would verify the matter on a fixed day and ascertain the damage caused during the offloading of the container and all parties sign a verification form having verified the extent of the damages and or losses if any.

Dw-1 stated that, in the absence of the verification of the container(s) damaged and the signing by all parties involved, the customer cannot be entitled to any damages or be paid losses caused by TICTS. Dw-1 stated that, the Defendant (TICTS) had never taken part in any process of verification of Plaintiff's container involved in the 14th September 2015 incident, when the same was being offloaded.

Dw-1 stated, however, that, the Plaintiff's containers were under the container yard to container yard, (CY/CY –

House to House) in which the Plaintiff's containers were insured from the premises to the seller or manufacturer to the customer point of destination.

During cross-examination, Dw-1 told this Court that, he was well aware of the claims by the Plaintiff, the demand letters and, the fact that, on the month of September 2015 there was an accident involving one of the Defendant's machines and the Plaintiff's container. He stated, however, that, since he joined the Defendant as an employee in the year 2016 the Plaintiff was silent over the matter.

Dw-1 stressed that, at the time of the accident the Defendant would have paid the Plaintiff for the losses if substantiated, but, by now, that cannot be done. He maintained that, the Plaintiff failed to substantiate the claims and declined to have received Exh.P 10. However, he acknowledged that, there have been incidents where the Defendant paid customers for similar incident as the one claimed by the Plaintiff.

Dw-1 stated further on cross-examination that, under Exh.P5 the Plaintiff is a consignee or client but the Defendant deals directly with the Shipping lines or the C & F Agents as per the terms under Exh.P5. He maintained that, the Terms of Business (Exh.P5) do not apply to the Plaintiff as the Defendant has no contract with the Plaintiff. He stated further that, where a customer's cargo is

damaged, the Defendant informs the Shipping line to inform the customer or client and establish the extent of the damage and, it is the customer who gets paid for the cargo damaged. Dw-1 acknowledged that, in this case there was a cargo which was damaged by the Defendant and, the Defendant notified the insurer.

On further cross-examination by Mr Kagirwa, Dw-1 told this Court that, under Clause 16 (a) of Exh.P5, there is a limit of liability on the part of the Defendant and, further that, the Plaintiff is covered under that clause. Later he, however, reiterated that the Plaintiff was not covered by the terms of business because the Plaintiff had no contract with the Defendant as the latter has a contract with the C&F Agent and the Shipping line only.

Dw-1 told the Court further that, in case of an accident, as long as it is proved that the Defendant caused and damaged goods belonging to the client, the Defendant will be liable to pay for the loss. He stated, however, that, the claim by the Plaintiff was time-barred. When this Court sought clarification regarding the accident which affected the Plaintiff's goods, Dw-1 confirmed the following, that:

- there was such accident, the damaged container belonged to the shipping line and the cargo belonged to the Plaintiff,

- the cargo was damaged, it was the Defendant's machines which caused the accident and the damage/loss, and, that,
- the Plaintiff was not compensated for failure to substantiate the damage with documentation, in particular a verification form.

Dw-1 told this Court that, the requisite verification exercise could as well be done by the Defendant herself and the Defendant will pay on the basis of the damage so far assessed. On being re-examined by Mr. Zacharia, Dw-1 stated that, the Plaintiff failed to substantiate the claim as she ought to have submitted all vital documents proving their claim to the Defendant. These were the verification form issued by the Defendant which was to be signed by all parties involved, as well as documents regarding the value of the cargo.

He confirmed, however, that, the Defendant had all documents concerning the cargo they handled from the shipping line. He further confirmed that, the Plaintiff brought a claim to the attention of the Defendant and that, under Clause 16(a) of Exh.P5; the Plaintiff could be paid but must substantiate the claims.

He, however, qualified his statement further by stating that, the Defendant does not engage with the Client directly but through the Shipping line or the C& F Agent who in turn can deal with the Client.

As for the reasons why the Defendant notified the insurer about the incident, Dw-1 told this Court during re-examination that, they did so as per Exh.P5 because, the insurer ought to have been informed within 24 hours of the incident, and that, the insurer was to appoint an assessor who should have been part of the inspection team, should the client elected that an inspection be carried out.

When further asked by the Court regarding whether the Plaintiff was covered under Clause 16 (a) of Exh.P5, Dw-1 responded that, the Plaintiff was indirectly covered. However, he maintained that, if the shipping line or the C& F Agents takes no action, the Plaintiff cannot since she has no contract with the Defendant. However, Dw-1 did acknowledge that, it was the Defendant who was the handler of the Cargo from the shipping line to its storage area before the C& F Agents comes in.

Dw-1 also reaffirmed his admission that it was the Defendant who caused the damage to the Plaintiff's container but declined that the Defendant should shoulder the liability as she has no agreement with the Plaintiff. He also reaffirmed that, where the shipping line and the C& F are not interested to bring a claim, the Plaintiff could still bring it and, that; the verification form, which the Plaintiff was to submit to the Defendant, is issued by the Defendant.

However, upon being further asked by this Court, Dw-1 told the Court that, in this particular incident there was no verification form issued to the Plaintiff by the Defendant, no inspection team formed, and that, it was the Defendant who was to initiate meeting to compose the inspection team. That, in a nutshell, was the defence case.

As both the Plaintiff's and the Defendant's cases came to the closure, the learned advocates for both parties prayed to file closing submissions, a prayer which I granted and the same were duly filed in time. In the course of my deliberations, I will consider them, along with the testimonies given by the witnesses for each party.

Ordinarily, the law places the burden of proof on the party who alleges as to the existence of a particular fact or facts. This evidential burden is embodied in our law of Evidence Act, Cap.6 R.E 2019, specifically under section 110 (1) and (2). As firmly stated by the Court of Appeal in the case of **The Registered Trustees of Joy in the Harvest vs. Hamza K. Kasungura**, Civil Appeal No.149 of 2017, (unreported), that general concept is part of our jurisprudence.

Concerning the standard of proof in civil cases, the applicable principle is that an alleged fact is to be proved on the balance of probability. The case of **Manager, NBC Tarime vs. Enock M. Chacha** [1993] TLR 228 is relevant and suffices to be cited here.

Moreover, under the law of contract it is a well acknowledged position that, parties to a contract are bound by its terms. See the case of **Miriam Maro vs. Bank of Tanzania**, Civil Appeal No.22/2017 (unreported), and the decision of this Court in the case of **Yukos Enterprises E.A Ltd vs. Regional Administrative Secretary of Mwanza Region & Another (Revision No.06 of 2019)** [2020] TZHC 162; (26 February 2020).

In the present case at hand, the Plaintiff has alleged that there was a contract between her and the Defendant and, that; the Defendant has breached such a contract. The Defendant has denied that fact. The first issue agreed by all parties, therefore, is: *whether there was an agreement between the parties and if so, what were the terms and conditions of that agreement?*

Before I directly tackle the first issue, I find it apposite, in my view, that, a sound takeoff position would be to respond first to the question: *when would it be said that there is a contract?*

As per the general principles of contract law, a contract will arise when one party makes an offer or proposal and the other party reciprocates that offer by an acceptance. Such acceptance strikes what in law is referred to as *consensus ad idem* and, section 10 of the Law of Contract, Act, Cap.345 R.E 2019, is all about that. It is also clear, according to section 7(a) and (b) of Cap.345 R.E

2019 that, acceptance must be an unequivocal acceptance. If an *offeree* adopts different mode of acceptance other than the one envisaged by the *offeror*, there will be no acceptance. See **Hotel Travertine Ltd and 2 Others vs. National Bank of Commerce**, [2006] TLR 133.

The above scenario, however, is relevant for contracts which assume a bilateral nature as opposed to those which assumes unilateral nature. The latter type of contracts or agreements, are more onerous on the part of the *offeror.* Acceptance in such kind of contract may be in the nature of conduct of the *offeree* or is by way of performing the terms of the offer. An example of a unilateral contract which may be cited here is the celebrated English case of **Carrlill vs. Carbolic Smoke Ball** (1892) EWCA Civ.1 where it was stated that, at some time acceptance can be by way of conduct.

Reverting to the suit hat hand and the first issue agreed by both parties, it is worth noting, as I stated in my earlier ruling on the preliminary objection which was raised by the Defendant herein, that, if the Plaintiff is to succeed in her claim, proof regarding the existence of such a contract between the Plaintiff and the Defendant, and which the Plaintiff so far alleges to have been breached by the Defendant, must be provided. The question that follows, therefore, is *whether the Plaintiff has been able to discharge that burden.*

According to the testimony in chief of Pw-1 (Mr Yasin Bharadia), the parties had no direct written agreement. However, Pw-1 testified that, the business relations between the parties were regulated by the **"Terms of Business"** published by the Defendant, whose revised edition was of 1st July 2011. According to Pw-1, such Terms of Business were readily accessible from https://ticts.net/wpcontent/uploads/2016/03/TICTS_terms_of_business. He tendered a copy of such terms in Court, and the same was admitted without objection as **Exh.P5**.

Upon being cross-examined by the learned counsel for the Defendant, Pw-1 did acknowledge that, the Plaintiff does not have a direct written agreement with the Defendant. However, the Pw-1 relied on Section D, Clause 13 of **Exh.P-5** which provides that:

> "Every contractual obligation entered into with the Company shall, in so far as the same are applicable, be governed by these Terms of Business and any ancillary conditions and provisions as in force for the time being. The Terms of Business set out herein are in force and applicable at the time of publication and the Company reserves the right without notice to alter such Terms from time to time and such amendment shall be immediately operative upon publication, which will be circulated to the Lines

and/or Operators by e-mail message, fax message or hand delivery"

Pw-1 also referred on Clause 12 of D-Section of Exh.P5. That respective clause provides as here below, that:

> "The Company shall not be under any liability or responsibility whatsoever unless (but subject always to the other provisions of these Terms of Business and any Contract with the Company), it is established that the company or its employees acting within the scope of their duties, have acted with negligence."

One among the questions that comes into my mind as I endeavour to respond to the first issue is whether the respective **"Terms of Business"** (Exh.P5) can be said to be governing the business relationship between the Plaintiff and the Defendant. In other words, what is the value of Exh.P5 in as far as the business venture of the Defendant is concerned *vis-a-viz* the Plaintiff as a Consignee of the container alleged to have been damaged by the Defendant?

According to Exh.P5, the term "Company" refers to the Defendant (*Tanzania International Container Terminal Services Limited*); while a "Consignee" refers to any company or person(s) entitled to receive Container or Break-Bulk Cargo. A "Consignor" is referred to as any

company or person(s) who delivers Containers or Break-Bulk Cargo.

Agreeably, even if the Plaintiff did not directly sign a contract with the Defendant, looking at Exh.P5 and the nature of the Defendant's business operations, and, taking into account the fact that under Exh.P5 the Plaintiff is recognized as a consignee, I find that Exh.P5 is a central document in this matter and in gauging the business relations between the two, especially where the Plaintiff is affected by negligent conduct of the Defendant.

In essence, Exh.P5 is, in my considered view, in the form of a unilateral contract. As I stated earlier, under such kind of an agreement, one party promises to perform (e.g., pay some money) after the occurrence of a specified act, and he is the only party with a contractual obligation. I hold that Exh.P5 has that nature because, much as there was no any bilateral agreement signed by the parties, the Defendant did bind himself under Exh.P5 to perform certain obligations once certain conditions are fulfilled.

In the case of **Australian Woollen Mills Pty Ltd vs. The Commonwealth** (1954) 92 CLR 424, the High Court of Australia held that, for a unilateral contract to arise, the promise must be made "in return for" the doing of the act.

In this present suit, for instance, Clause 12 under section D (*Conditions Applicable to All Services Provided by*

the Company) of Exh.P.5, (cited herein above) creates a unilateral duty or obligation on the part of the Defendant to shoulder all liability or be responsible where it is established that, the Defendant or her employees acting within the scope of their duties, have acted with negligence. Once established that the Defendant acts were negligent acts then the Defendant cannot escape.

In the course of his testimony and while under cross-examination, Dw-1 did admit, that, an accident involving container **Number TRHU 3007409,** (Exh.P4) which belongs to the shipping line did occur, and, that, the cargo it carried belonged to the Plaintiff.

Furthermore, Dw-1 told this Court that, the cargo was damaged, and it was the Defendant's machines which caused the accident and the resultant damage/loss to the cargo. Dw-1 did confirm to this Court that, the Plaintiff was not compensated for the loss.

From the testimony of Dw-1, however, where a customer's cargo is damaged, the Defendant would inform the Shipping line to inform the customer about the damage and once the extent of the damage is established, it is the customer who gets paid for the cargo damaged. Dw-1 did not tell whether the Defendant ever took such steps. Instead, Dw-1 blamed the Plaintiff stating that, the reason why the Plaintiff was not paid was that, the Plaintiff was time-barred and, further, that did not substantiate his

claims. As I stated in my earlier ruling overruling the preliminary objections raised by the Defendant, the claims by the Plaintiff are not time barred as contended, but ever valid because they are not based on tort but on contract.

It is also worth noting that, while under cross-examination, Dw-1, admitted that Clause 16 (d) of Section D of Exh.P5 covered the Plaintiff, albeit indirectly. He maintained, however, that, under that Clause, if the shipping line or the C & F Agents takes no action, the Plaintiff cannot be paid for the loss since she has no contract with the Defendant. Be that as it may, as I stated here above, even if the Plaintiff did not sign a contract, still Exh.P5 was sufficient to be relied upon to establish that the Defendant had an obligation towards the Plaintiff the moment the latter's container got damaged and the Plaintiff's cargo suffered loss.

During cross-examination, Dw-1 did acknowledge that, where the shipping line or the C& F are not interested to bring a claim, the Plaintiff could still bring one. He however stated that, the Plaintiff did not submit the requisite verification documents to substantiate her claims. Even so, when this Court asked Dw-1 regarding who should have issued such a verification form and compose the verification team, Dw-1 stated that, it was the Defendant.

In my view, if it was the Defendant and since Dw-1 acknowledged that, no verification form was issued to the Plaintiff by the Defendant, and since Dw-1 did also acknowledge that the Defendant had all necessary information regarding the Cargo, it does not enter into my mind why on earth should the Defendant heap all the blames on the Plaintiff. It means, therefore, the Defendant cannot refuse to discharge her obligation towards the Plaintiff on the ground that the latter failed to substantiate her claims.

In fact, Exh.P 10 does show that there was a joint survey carried out on 18th Sept. 2015 at the Defendant's premises regarding the incident, and which involved the Defendant, one Dipesh Dhanak (a Surveyor from Transeuropa Insurance Surveyors & loss adjusters), TRA, the C&F Agent, the Plaintiff (Consignee), the Shipping agent. Nowhere the Defendant disputed the evidence of Exh.P10.

In my view, and taking into account Exh.P5 and what I have stated here above as gather from the testimonies of Pw-1, Pw-2 and Dw-1, I find, without a flicker of doubt, that, Exh.P5 created a contractual obligation on the part of the Defendant towards the Plaintiff. In other words, Exh.P5 did create a unilateral contract and its applicable terms are in particular, Clauses 12, 13 and 16 (d) of Section D of Exh.P5.

Failure on the part of the Defendant to compensate the Plaintiff despite the fact that it was clearly known to the Defendant that the Plaintiff's container and cargo were damaged due to the Defendant's negligent handling of the same, amounted to breach of duty arising out of the obligations undertaken by the Defendant under Exh.P5. For such a reason, the first issue raised earlier here above is responded to in the affirmative.

Having disposed of the first issue, the second issue is:

> 'whether the alleged damage to the Plaintiff's cargo was caused by the acts or omission of the Defendant.'

As well acknowledged by Dw-1 during cross-examination, and taking what Exh.P10 states, the damage to the Plaintiff's cargo was caused by the Defendant. In fact, Exh.P10, attests to the fact that, the ship discharge tally had showed that the container was discharged in apparently good condition, meaning that, the carrier had no hand in its damaging but rather, the damage was sustained in the course of its handling by the Defendant.

Moreover, there was also the evidence of Exh.P8, which was a letter from the Defendant to the lawyers representing the Plaintiff. In that letter, the Defendant acknowledged to have put her Insurers under instructions regarding the Plaintiff's claims and, for that matter, she requested for a 30 days extension of time within which her

Insurers were to report to her. As such, the second issue is responded to affirmatively as well.

The third issue was:

> 'what loss if any has been suffered by the Plaintiff in respect of the alleged damage to the cargo?'

There is no dispute that the Plaintiff suffered loss of the cargo. According to Exh.P1 and P2 the cargo was in total of **350,636 litres** weighing **299.05** MT worth CFR USD ($) 217,211.50. However, from Exh.P10, since it was only one container and its flex tank which got severely damaged and a leakage ensued, the amount of oil leakage as per Exh.P10 was a total of 19,920Kgs. Exh.P.10 reported a total loss of both the container and its cargo. According to Exh.P10, based on the Invoice (Exh.P1) the oil loss in respect of the container in question was valued at USD ($) 14,468.69, (CFR Value) and an adjusted loss was found to be USD ($) 14,324.02. From the above, it is clear, therefore, that, the third issue is responded to in the affirmative.

The fourth issue is:

> 'Whether the Plaintiff was insured for its alleged loss and, if so, the outcome of any insurance claim made by the Plaintiff for its loss.'

From the evidence of Pw-2 it was indeed true that as per Exh.P9 and Exh.P10, the Plaintiff was insured.

However, according to Exh.P11, the Plaintiff decided to withdraw the claim from her insurer and pursued the same directly with the Defendant. As such, there were no positive developments regarding the Plaintiff's loss. That fact disposes of the fourth issue as well.

The final issue for determination as agreed by both parties is:

> "To what relief(s) are the parties entitled."

From the four issues I have addressed here above, it is clear that the Plaintiff has been able on the preponderances of probabilities to discharge her burden of proving her case. As such the Plaintiff and not the Defendant, is entitled to reliefs. The issue now is what are the reliefs which the Plaintiff is entitled to get?

In her Plaint, filed in this Court, the Plaintiff has prayed for the following reliefs:

> 1. A declaration that the Defendant was in breach of the terms of the Agreement between her and the Plaintiff by failure to render services as agreed in the agreement.

In my view, and as held herein above, the Defendant was indeed in breach of the obligation created under Exh.P5 which would have entitled the Plaintiff to be compensated for the losses suffered owing to negligent act

of the Defendant in handling the Plaintiff's cargo when being offloaded from the Shipping line. I therefore grant that prayer though on a different reasoning other than the one held by the Plaintiff, which is based on there being a bilateral contract between the parties.

2. An order that the Defendant pay the Plaintiff the total of USD ($) 45,033.00, being the outstanding principal amount.

According to Pw-1's testimony and the Plaint, the amount of **USD 45,033.00** claimed by the Plaintiff constitute loss suffered as the cargo was substantially damaged and rendered of no commercial value. Pw-1 did compute such losses in his testimony, including establishing the value of the oil that leaked out of the flex tank following the accident. As such I would grant such and make an order that the Defendant should pay to the Plaintiff the claimed amount without failure.

3. An order that the Defendant pay interest at the contractual rate of 10.42% compounded monthly, together with VAT thereon, from the 16th September 2015 to the date of Judgement.

Much as the Plaintiff has made such a prayer in the Plaint and Pw-1 reiterated it in his testimony, the Plaintiff

has not been able to provide any justification for this prayer. I thus decline the said prayer.

4. An order for payment of general damages.

The position of the law concerning payment of general damages is that, such may be awarded for inconvenience caused by the Defendant and to be eligible for general damages the Plaintiff should have suffered loss or inconvenience to justify award of general damages.

In the cases of **Saidi Kibwana and General Tyre E.A. Ltd vs Rose Jumbe** [1993] TLR 175 as well as **Tanzania-China Friendship Textile Co. Ltd v Our Lady of Usambara Sisters** [2006] TLR 70, it was held that a Plaintiff will be entitled to a claim of general damages if he has claimed it in the pleadings and must leave it for the Court to quantify it.

In this present suit, it is true that the Plaintiff has pleaded for payment of general damages and has suffered loss. There is no quantum of general damages pleaded and, that is appropriate given that, measurement of the quantum of damages is a matter for the discretion of the individual judge which of course has to be exercised judiciously (see the case of **Tanzania-China Friendship Textile Co. Ltd** (supra) and **Southern Engineering Company Ltd Vs Mulia** [1986-1989] EA 541] .

In this suit, the evidence on record does indicate that the Plaintiff clearly suffered loss and inconvenience as a result of the Defendant's conduct. It is also on record that, the loss suffered by the Plaintiff was never made good by the Defendant. On the basis of the available evidence, therefore, I am inclined to award the Plaintiff **TZS 5,000,000** as general damages.

5. An order that the Defendant pay interest on the decretal sum at the court rate of 12% per annum from the date of judgement to the date of full satisfaction.

On interest, as shown here above, I consider an award of 12% p.a, from date of judgment until payment in full appropriate. I thus grant that prayer.

6. An order for Costs.

As regards the prayer for costs, it is a common saying that, *'costs follow the event'*. Accordingly, the Plaintiff is entitled to the costs of the suit and, such are hereby awarded.

In the upshot, having stated that the Plaintiff has succeeded to prove its case to the required standards, the same is entitled to the following reliefs/orders:

1. THAT, the Defendant is to pay the Plaintiff a total of **USD ($) 45,033.00**, being the outstanding principal amount.

2. THAT, the Defendant is to pay the Plaintiff **TZS 5,000,000** as general damages.
3. THAT, the Defendant shall pay interest on the decretal sum at the court rate of 12% per annum from the date of judgement to the date of full satisfaction.
4. Costs follow the event.

It is so ordered.

Right of Appeal Explained.

DATED at **DAR-ES-SALAAM**, this 23RD NOVEMBER 2021

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HON. DEO JOHN NANGELA
JUDGE,