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

COMMERCIAL CASE NO. 9 OF 2020

IBM TANZANIA LIMITED .....PLAINTIFF

VERSUS

SUNHERALEX CONSULTING CO. LTD .....DEFENDANT

Last order: 10th September 2021
Judgment: 02nd December 2021

JUDGEMENT

NANGELA, J:.,

The hearing of this case took longer than expected due to the raging Covid-19 pandemic. Even so, thanks to the Virtual-Court technology that, at last the witnesses could testify while away from the Court's vicinity. The sole Plaintiff's witness testified while in Kenya, and the Defendant's witness testified while in Nigeria.

In this suit, the Plaintiff herein prays, for judgement and decree against the Defendant as follows, that:

1. a declaration be made to the effect that the Defendant is in breach of the terms of the agreement between the Plaintiff and the Defendant.
2. An order be made requiring the Defendant to pay USD

507,603.03 or its equivalent in TZS, being the sum for unpaid invoices.

3. Interest be imposed at a commercial rate of 25% on the outstanding amount stated in (no. 2) above, from the date of filing this suit to the date of judgement.
4. Interest be imposed on the decretal amount at the rate of 12% from the date of judgement to the date of full satisfaction.
5. General damages to be assessed by this honourable court.
6. Cost of this suit and,
7. Any other relief as the Court may find just to grant.

The brief facts leading to the filing of this suit, as ascertained from the pleadings, are as follows: the parties herein are limited liability companies duly registered and incorporated under the laws of the United Republic of Tanzania. The Plaintiff is suing the Defendant, claiming from the latter, a sum of United States Dollars **(US$) 507,602.03**, being a sum for outstanding invoices in respect of hardware and software support services supplied by the Plaintiff to the Defendant.

From the year 2016, the Plaintiff and the Defendant entered into a business relationship which was governed by a contract – **numbered TA0183**. Under that contract, the

Plaintiff supplied to the Defendant hardware and software support services. In consideration, thereto, the Defendant used to pay for such services.

In their arrangement, it was one of the agreed terms that, invoices for such services were to be due upon receipt. It is averred, however, that, while such an express term applied to their relationship, the Defendant contravened it, by defaulting payment demands for the services rendered, leaving a number of invoices ranging as far back as August, 2017, unpaid.

On the 26th of July 2019 the Plaintiff issued a Demand Notice to the Defendant. The Defendant responded to the Demand Note on the 9th day of August 2019 promising to issue a payment plan to the Plaintiff. However, the Defendant failed to issue such a plan to the Plaintiff. The Plaintiff lost its patience and could not wait any longer. On the 29th of August 2019, the Plaintiff issued a final Demand Notice to the Defendant.

On 2nd September, 2019, the Defendant responded to the final demand notice, but that response was in the form of a query and, thus, necessitating the Plaintiff to provide further clarifications. Despite the Plaintiff's efforts to engage with the Defendant and, having clarified its query on 10th September 2019, the Defendant took no steps to settle the claims.

According to the Plaintiff, the Defendant's conduct has occasioned damages on the Plaintiff, the particulars of which are as follows:

(a) Loss of business due to Defendant's failure to settle the outstanding invoices as agreed in the terms of the parties' agreement;

(b) Loss of profit from the outstanding interest due to the breach of the terms of the agreements entered between the Plaintiff and the Defendant.

Having been duly served with the Plaint, on 27th May 2020, the Defendant filed its written statement of defence and denied being in breach of contract. Furthermore, the Defendant averred that, she only signed contract agreement with the Plaintiff, at Dar-es-Salaam and Nairobi, was the one titled **No.TA0183** and dated 21st June 2019, valued **USD 381,595.10**. Other than that admission, the Defendant denied to be aware of three other contracts alleged to have been agreed upon by the two parties. The Defendant, therefore, disputed the Plaintiff's claims, arguing that, the Plaintiff is not entitled to any of the prayers sought.

Unfortunately, the parties could not resolve their dispute through mediation. Consequently, on the 23rd February 2021, they appeared before me for a final Pre-trial Conference. On the material date, the Plaintiff enjoyed the services of Mr Philip Irungu, learned advocate, while Mr Adolf Francis, as well learned advocate, represented the Defendant.

On that date, this Court, in agreement with the learned counsels for the parties, drew up the following, as issues to be proved in this Case:

1. Whether the Defendant was aware of the three disputed agreements alleged to be entered between the Plaintiff and the Defendant.
2. If the 1st issue is in the affirmative, whether there was any breach of the said agreements.
3. Whether the Plaintiff owes the Defendant USD 507, 603.03 as alleged.
4. Whether the Plaintiff is entitled to interest on late payment of invoices served on the Defendant.
5. To what relief if any are the parties entitled.

As I stated earlier, the hearing of this case was assisted by technology since some of the witness were outside the country and unable to travel due to the ravaging Covid-19 pandemic. The Plaintiff had only one witness who testified while in Kenya. Equally, the Defendant had one defence witness who testified while in Nigeria.

At the end of the hearing of the witnesses, both parties filed their closing submissions. I will, along with the testimonies of their witnesses, take into account such closing

submissions filed by the learned counsel for the parties as I address the issues raised in this case and render my verdict on each of them.

To begin with, the first issue which I am called upon to tackle is:

> Whether the Defendant was aware of the three disputed agreements alleged to be entered into between the Plaintiff and the Defendant.

In her testimony in support of the Plaintiff's case, **Ms Doroth Matovu**, who testified as **Pw-1,** told this Court that she works with the IBM (the Plaintiff) as IBM East Africa Business Leader. She produced and was admitted as **Exhibit.P-1**, a contract **No.TA0183** dated 1st September 2016, and duly signed by both parties.

Pw-1 stated that, in the course of business, the Defendant requested for some changes in their agreement and the Plaintiff consented to such changes coming up with three replacement contract(s) - numbered **TA0266**. These were tendered and admitted as **Exhibit P-2.**

According to **Pw-1**, although the replacement contracts were not signed by both parties as they were only a confirmation of the original contract, they maintained the same initial terms and conditions of the original agreement and, the parties continued with their business whereby the services originally contracted were billed though invoices sent to the Defendant under the replacement contracts for

smooth administration. She tender into Court as exhibits invoices raised pursuant to services rendered and the same were admitted as **Exhibit-P.3**.

I have had a careful look at **Exhibits P.1, 2** and **3.** Although the Defendant's witness, **Dw-1**, denies to have any knowledge of **Exhibit P-2** and that, the same was not disclosed to the Defendant, and, even if such replacement contracts were not signed by both parties, there is no dispute that the Plaintiff continued to render services to the Defendant and invoices were raised under **Exhibit P-2** and sent to the Defendant.

Besides, in his testimony and while also under cross-examination, **Dw-1** did not dispute that invoices were sent to the Defendant. He even acknowledged and identified four of them. It is also the testimony of **Dw-1** that the Plaintiff supplied products and rendered services to the Plaintiff, and, that, some invoices were not settled. There is, as well, **Exhibit P4** which was a letter by the Defendant which acknowledged an outstanding amount of **USD 255,075.25** (VAT exclusive) in respect of **Invoices No.6813400003** and **681340006**. The letter was dated 13th July 2018. In that letter, the Defendant was regretting for being unable to settle the Plaintiff's invoices.

Furthermore, **Exh.P-5** was another letter from the Defendant concerning settlement of the invoices with an assurance that the Defendant was going to make good its commitments to pay. **Exhibit P4** is further supported by **Exh.P7** and **Exh.P-8,** which are e-mails and demand letters

received in Court without objection, regarding payment of the outstanding amounts and responses from **Dw-1** which, in totality, indicates that the Defendant was well aware of the Plaintiff's claims. All these exhibits were received without objection.

As it may be seen from **Exh.P.6**, the Defendant did also make a partial payment of **TZS 114,200,000.00** as part of settlement of claims under **Invoice No. 6813400003.** During cross-examination, **Dw-1** admitted as well, that, the Defendant paid partial payments to the Plaintiff amounting to **USD 50,000.00** for goods and services supplied.

With all such facts which are not disputed, I find it difficult to agree with the Defendant that the replacement contracts, under which all such transactions and claims were being premised, were unknown to them. I quite agree with the Plaintiff's counsel's submission that, under section 123 of the Evidence Act Cap.6 R.E 2019, the conduct of the Defendant are sufficient to prevent the Defendant from denying any knowledge of the replacement contracts.

Dw-1 did admit that the terms and conditions under those contracts **(Exh.P-2)** are same as those under **Exh.P-1** and, never disputed the fact that the Defendant was the one who had asked for the changes in the original contract **(Exh.P-1).** I noted, in his closing submission, the learned counsel for the Defendant has tried to controvert the admissibility of **Exhibit P-2** on the ground that it was in

breach of Rule 50 (1) (d). However, this remains an afterthought and I cannot entertain it either.

Perhaps what may need to be answered is whether not signing **Exh.P-2** but proceeding to transact under it had any effect. Essentially, the lack of a signature would suggest that the parties had not yet reached the point where they wished to be bound. But that is not always the case where there is evidence to the contrary. Courts do not just look at one aspect but look at all the evidence relating to the intention of the parties, including their conduct. Several cases within and outside our jurisdiction have discussed such situations.

In the English case of **Brogden v Metropolitan Railway Company** (1876–77) L.R. 2 App. Cas. 666, for instance, the House of Lords was of the firm view that, in circumstances where the parties had acted in accordance with a draft unsigned contract for the delivery of consignments of coal, there was a contract on the basis of that draft.

In **G Percy Trentham Ltd. vs. Archital Luxfer Ltd. And Others** [1993] 1 Lloyd's Rep. 25, Lord Justice Steyn was of the view that, where the contract had been fully or substantially performed, it may be implausible to suggest that there was no binding contract, unless there was an express term requiring the contract to be binding upon execution. The Court was of the view, therefore, that:

> "the fact that a transaction was performed on both sides will

> often make it unrealistic to argue that there was no intention to enter into legal relations."

Likewise, in the case of **Wananchi Group Tanzania Ltd vs. Maxcom Africa Ltd**, Commercial case No.120 of 2019 (unreported), this Court, Phillip, J, held that,

> "a contract is not only established by presence of a written and signed document but can be established from the conduct of the parties...."

Perhaps the more relevant and binding decision on this Court is the Court of Appeal decision in the case of **Zanzibar Telcom Ltd vs. Petrofuel Tanzania Ltd**, Civil Appeal No.69 of 2014 (unreported). This later case of **Zanzibar Telcom's case** (supra) seems to be directly responding to the question I had raised here above regarding unsigned contract and the effect of acting upon it.

In that case, the Court of Appeal considered the "issue of acceptance by conduct", and, citing the case of **Reville Independent LCC vs. Anotech International (UK) Ltd** [2015] EWHC (Comm) observed as hereunder regarding the facts of that English case:

> "the claimant, a US-based television company, had entered into a "deal memorandum" with the defendant cookware distributor, pursuant to which the former was to licence to the latter certain intellectual property

rights pertaining primarily to the Master-Chef US brand, and promote the defendant's products in its television series. It was expressed in the "deal memorandum" that, that understanding was not binding until signed by both parties, also that it was intended to be replaced by a long form agreement which in fact, was never concluded because negotiations broke down. When the matter was in court, the defendant claimed that it was not bound by the terms of the "deal memorandum" because they did not sign that document, therefore that the terms therein were not accepted. The question for consideration by the court was whether the claimant's conduct was sufficient to amount to waiver of requirement for signature, and whether acceptance by conduct had occurred. At the end of its deliberations, that court ruled that even where a contract clearly contains completion formality requirements, the conduct of the parties amounted

> to a waiver of those requirements, and that it constituted acceptance. We are convinced that this is a sound principle, which we accordingly approve. "

I am fully convinced that, the decision of the Court of Appeal does squarely apply to the situation at hand. The Defendant herein was supplied with goods and services on the basis of the replacement contracts (**Exh.P-2**) which he seems to deny knowledge of and alleges that were never signed by the parties. However, invoices and demand letters based on the services rendered were acknowledged, with commitments to settle the claims being given as per **Exh. P4** to **Exh.P8**.

As noted in the **Zanzibar Telcom case** (supra) at page 23, evidence was advanced to show that products were received and, some of the invoices were paid for. The Court held that:

> "In our firm stand, therefore, that conduct constituted sufficient acceptance ..., hence that, there was a binding contract capable of being enforced."

The above holding by the Court, equally applies in this case where evidence has been led to show that goods and services were supplied and acknowledged by the Defendant's witness (**Dw-1**) and, some invoices were paid. The rest of invoices were also acknowledged by **Dw-1** as still

constituting outstanding claims. In view of all these, the first issue is proved in the affirmative.

The second issue is predicated on the first issue being responded to affirmatively or not. If the first is respondent to affirmatively, then the next is: **whether there was any breach of the said agreements.** I think that I need not be detained by this issue.

The response to it is in the affirmative. The evidence indicates that the products were supplied and services were rendered, invoices were billed to the Defendant and the defendant did not pay for all that in full. **Exhibit P-6** only indicates a partial payment and **Dw-1** did acknowledge while being cross-examined, that some of the invoices (**Exh.P3**) were not settled.

In paragraph 6 of his testimony in chief, **Dw-1** did admit services having been supplied and in paragraph 10 of the same testimony, it is admitted that the Defendant owes the Plaintiff. I am convinced; therefore, that there was breach of the agreement because, it was the condition under Clauses 2 of **Exh.P1** that payments were to be effected immediately upon receipt of invoices. Clause 3 of **Exh.P-2** was also express that the terms and conditions of **Exh.P.1** remained intact. Failure to settle the invoices constituted a breach. And, since any breach of contract will attract damages, the Plaintiff is also entitled to damages as prayed by the Plaintiff.

In law, where breach of agreement has been established, it goes with the award of damages. Section 73

(1) of the Law of Contract is very instructive on payment of damages resulting from breach o a contract. It states that:

> "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."

In law, damages may be specific or general in nature. In this case the Plaintiff has prayed to be paid general damages to be assessed by the Court. Unlike specific damages which need to be pleaded and proved (see **Zuberi Augustino Mugabe vs. Anicet Mugabe** [1992] T.L.R. 137), general damages need not be proved. This particular principle is well supported by numerous decisions of this Court and the Court of Appeal. (See the cases of **Cooper Motor Corporation Ltd vs. Moshi/Arusha Occupation Health Services** [1990] TLR 96 and **Fredrick Wanjara, M/S Akamba Public Road Service Limited A.K.A Akamba Bus Service vs. Zawadi Juma Mruma**, Civil Appeal No. 80 of 2009 CAT (Unreported).

Since general damages are assessed by the Court as compensation for losses which would naturally flow in the

usual course of things from such breach, taking into account the testimony of Pw-1 as well as the exhibits tendered and relied upon by the Plaintiff in proof of her case, all supported the claims by the Plaintiff that, the Defendant was in breach of the contracts for having failed to honour its obligations there under.

As a matter of principle, an obligation to honour what was agreed by the parties to a contract is a fundamental or cardinal principle in the law of contract. This was also emphasized by the Court of Appeal in the case of **Simon Kichele Chacha vs. Aveline M. Kilawe,** Civil Appeal No.160 of 2018 (unreported). In that case, the Court of Appeal of Tanzania was of an emphatic view that:

> "... Parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in *Abualy Alibhai Azizi v. Bhatia Brothers Ltd* [2000] T.L.R 288 at page 289 thus: - 'The principle o f sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."

Since it has been established that the Defendant was in breach of her obligations, the Plaintiff suffered and was entitled to general damages, it is my considered views, based on the evidence available that, payment of **TZS 10,000,000** as damages would bring justice to the Plaintiff.

The third and fourth issues agreed upon by both parties and drawn by this Court for determination are:

> "Whether the Plaintiff owes the Defendant *USD 507, 603.03* as alleged"
>
> *and,*
>
> "Whether the Plaintiff is entitled to interest on late payment of invoices served on the Defendant."

In my considered view, these two issues can and should be discussed and disposed of together. It is undoubted that, Dw-1 expressly admitted in his testimony in chief that, the Defendant owes the Plaintiff USD ($) 330,461.25. However, according to paragraph 17 of Pw-1's testimony, under Exh.P3 (the four invoices tendered and which were not disputed), amounts to USD ($) 399,792.85.

Furthermore, according to the testimony of Pw-1, a 2% interest charge was also levied on late payment in respect of *Invoice No.100304* (amounting to USD ($) 60,379) and *Invoice No.100374,* dated 17/5/2019, (amounting to USD ($) 47,431.18) which, together with the undisputed invoices brings one to the sum of USD ($) 507, 603.03.

However, in paragraph 7 of Dw-1 testimony in chief, Dw-1 disputed invoice No.100304 amounting to USD ($) 60,379 and Invoice No.100374, dated 17/5/2019, amounting to USD ($) 47,431.18 on the ground that the parties had not agreed on whether interest should be charged or not. However, what Dw-1 admitted to have paid was the USD ($) 50,000, which was part-payment in respect of *Invoice No.6813400003*, and whose original amount was USD ($) 167,071.01.

It is clear from the invoices (**Exh.P.3**), however, that, a clear stipulation was made on them to the effect that, in case of a late payment, late payment interest could apply. The invoices read as hereunder:

> *"Payment Term: Payment as per contract. Late Payment interest/fees may apply to this invoice."*

Dw-1's argument is that there was no agreement on that fact. In my view, I do not think that averment has any merit. In business realm overdue or unpaid invoices can frustrate the business normalcy or create cash flow inconsistencies with a potential to threaten business sustainability. It is no secret, therefore, that, as an incentive to ensure that invoices are paid on time, some businesses include measures such as charging on interest on overdue invoices.

In **Greenwood Trust Co. v. Massachusetts**, 971 F.2d 818 (1st Cir.1992), cert. denied, 506 U.S. 1052, 113 S. Ct. 974, 122 L. Ed. 2d 129 (1993), the United State First

Circuit Court of Appeals considered an issue relating to payment of late charges and sated that,

> "late fee is sufficiently related to the use and forbearance of money or damages **for its detention** that it can appropriately be classified as interest." (Emphasis added).

From the above case, it is also my finding, therefore, that, since the stipulation that late payment would attract interest/fees, was very clear on the invoices submitted to the Defendant, and given that the Defendant "detained" the monies which ought to have been paid promptly upon receipt of the invoices, the interest charged whether agreed or not, was appropriate. Otherwise, the Defendant ought to have heeded to the requirement to pay promptly. The 3rd and 4th issues are, therefore, responded to affirmatively.

The last issue is in regard to the relief, if any, which the parties are entitled to. The party entitled to relief is the Plaintiff who, has managed to prove its case on the preponderance of probability. In that regard, judgement is entered in favour of the Plaintiff as follows:

1. That, the Defendant is hereby ordered to pay USD 507,603.03 or its equivalent in TZS, being the sum for unpaid invoices to the Plaintiff.
2. That, the Defendant shall pay interest be imposed at a commercial rate of 14% on the

outstanding amount stated in (no. 1) above, from the date of filing this suit to the date of judgement.

3. That, the Defendant shall pay interest at the rate of 7% on the decretal amount from the date of judgement to the date of full satisfaction.
4. That, the defendant shall General damages amounting to **TZS 10,000,000**.
5. Cost of this suit follows the event.

It is so ordered

DATED at DAR-ES-SALAAM, this 02TH Day of DECEMBER 2021

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HON. DEO JOHN NANGELA

JUDGE

Right of Appeal Explained.