IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
COMMERCIAL CASE NO.3 OF 2020

SIKEM REAL ESTATE DEVELOPERS LTD.....PLAINTIFF

VERSUS

SERENGETI BREWERIES LIMITED .....DEFENDANT

Last order: 19/05/2022
Judgment: 11/07/2022

JUDGEMENT

NANGELA, J.:

This suit arose from an alleged breach of contract. The Plaintiff and the Defendant are private limited liability companies duly incorporated under the laws of the United Republic of Tanzania. Whereas the Plaintiff deals with the sale and distribution of all kinds of drinks and beverages, the Defendant deals with brewing, distillation, packaging and distribution of beers, wines and spirits.

The Plaintiff is suing the Defendant and claims for payment of TZS 4,491,887.91 arising from the Defendant's breach of contractual terms agreed between the two sometimes in 2011. For clarity purposes, I will set out the facts the case here below.

Sometime in June 2011, the Defendant, through its agent and consultant, one Alan G. Jackson, solicited the Plaintiff to enter into a yearly key distributorship agreement. Through that proposed agreement the Plaintiff was to become an exclusive

distributor of the Defendant's products in Mbeya, Tunduma, Makambako, Sumbawanga, Mpanda, Songea, Chunya, Kyela, Mafinga, Ludewa and Mbinga.

Having had various bilateral consultations and communications, the Plaintiff's Managing Director, one, Simon Gatuna, accepted the Defendant's offer. Subsequently, the Defendant delivered to the Plaintiff the Key Distributorship Agreement (KDA) for execution. The Plaintiff duly signed and returned KDA to the Defendant for the latter's signature as well.

The Plaintiff alleges that, the terms agreed by the parties were *inter alia*, that:

(i) The Defendant would retain the sole right to appoint stockists to which the Plaintiff was contractually required to sell the Defendant's products on credit basis.

(ii) The Plaintiff would secure a bank guarantee of TZS 600,000,000/=.

(iii) The Defendant would supply the Plaintiff's products valued at TZS 600,000,000/= so that the Plaintiff's stock-holding would be worth TZS 1,200,000,000/= and selling a minimum of 72,000 crates of beers per month.

(iv) The Plaintiff would be refunded the value of expired products/stocks and refund for in-transit breakages of products.

(v) The Plaintiff would recover primary and secondary transport costs for transporting the Defendant's products.

(vi) The Plaintiff would be given incentives allowable by the Defendant to customers.

(vii) The bank guarantee would be the key and important component of the contract to secure payments of products by the Plaintiff to the Defendant.

It is alleged, that, although the Plaintiff was able to secure a Bank Guarantee from the CRDB for TZS 600,000,000 this being one of the agreed preconditions for the KDA, the Defendant never returned a signed copy of the duly executed contract to the Plaintiff. Even so, the Plaintiff has alleged, that, as soon as the parties' business took effect, later the Defendant started breaching the parties' agreed terms, specifically with regard to the product pricing, whereby the Defendant started to sell products directly to stockists and, at the Defendant's ex-factory prices, instead of selling them through the Plaintiff.

According to the Plaintiff, further Defendant's acts of breach included the non-remittance of payments of the products taken by Defendant's staff from the Plaintiff thereby affecting the Plaintiff's cash flow; Defendant's Staff's directives to the Plaintiff to supply products on credit to stockists while the said stockist never paid the Plaintiff, the Defendant's failure to refund the Plaintiff transport expenses and offloading costs, as well as non-payment /refund of transport claims and expired stocks.

In view of all those acts, the Plaintiff raised issues with the Defendant and, through various email communications, complained about pricing which resulted into the Plaintiff not getting the agreed margins of sale, and, about the Defendant's

promises to rectify the situation. Since the Plaintiff's financial standing continued to be affected, on 1st December 2014, the Plaintiff, communicated to the Defendant, requesting for a joint reconciliation meeting with the Defendant so as to ascertain the status of Plaintiff's account held by the Defendant, the stocks supplied, financials, and all other related matters.

On 28th January, 2015, a joint reconciliation for the year 2013/2014 (and partly 2012) was done with the Defendant being represented by one, Erasto Ngamilaga. Prior to the reconciliation, however, the Plaintiff's opening balance as per the Defendant's records against the Plaintiff, stood at TZS 986,103, 589/=. However, after the said reconciliation, the alleged outstanding sum dropped to TZS 707,157,837.46.

Even with such reconciliation, the Plaintiff still requested for more data from the Defendant in respect of part of the year 2011/2012 as well as another round of reconciliation meeting which both parties had agreed to. However, the later the Defendant refused and remained non-responsive and, from September 2014 to March 2015, the Defendant stopped supply of goods to the Plaintiff who suffered a loss amounting to TZS 168,000,000/=. The Plaintiff faced as well the Defendant's threat to recall the bank guarantee if the TZS 707,157,837.46 were not settled.

In view of the refusal by the Defendant to embark on a second/final reconciliation meeting, the Plaintiff embarked on a unilateral audit initiative by commissioning an audit of all documents and all transactions in connection with the contract for the period of June 2011 to March 2015. The audit revealed

that, the Plaintiff is entitled to recover from the Defendant TZS 743,264, 136.94.

On 2nd March 2015, the Plaintiff issued a demand notice to the Defendant, requesting for a joint reconciliation and a refund of TZS 652,729,741.22 as well as a request for non-recall of the bank guarantee. In reply, the Defendant denied the existence of the contract between herself and the Plaintiff and threatened to recall the existing bank guarantee and raised an unsupported claim of TZS 320,400,638.30 from the Plaintiff. Eventually, on 25th June 2015, the Defendant recalled the Bank Guarantee despite the non-settlement of the still-pending joint reconciliation issues between the parties.

Following the recall of the guarantee, the Defendant was credited with TZS 600,000,000/= and, immediately the Plaintiff's account was debited with the same figure, thereby creating an overdraft facility obligating the Plaintiff to pay the Bank penal interests. The Plaintiff alleged that, as of January 2020, the Plaintiff had paid the bank TZS 456,000,000/- as penal interests arising from the Defendant's decision to unreasonably recall the bank guarantee.

The Plaintiff alleges that, from such factual background, including the Defendant's refusal to conduct the joint reconciliation, the Plaintiff's Company was financially stifled and effectively pushed out of business. Convinced that the Defendant's conduct amounted to breach of the *Distribution Agreement* and, subjected the Plaintiff to suffer huge business losses, the Plaintiff instituted this suit praying for the judgement and decree as follows:

(i) A declaration that the Defendant/Plaintiff is in breach of the contractual terms between itself and the Plaintiff/Defendant.

(ii) Payment of TZS 1,191,566,812.36 being specific damages suffered by the Plaintiff/Defendant as further expounded in Para 10 of the Plaint.

(iii) Payment of TZS 1,056,000,000/= being specific damages suffered by the Plaintiff/Defendant in terms of the bank guarantee, plus its penal interest, as pleaded under Para 14 of the Plaint.

(iv) Payment of TZS 2,244,320,315.55 being accrued interest before the filing of this suit.

(v) Interest on the outstanding sum at the commercial rate of 21% per annum from the date of filing the suit until judgement.

(vi) General damages for breach of contract and plaintiff's suffering arising out of the Plaintiff/Defendant acts as shall be assessed by this court.

(vii) Interest on the decretal amount at the court's rate of 7% from the date of judgement until full payment.

(viii) Costs of this suit.

Upon service of the Plaint, the Defendant filed her written statement of defence and denied the Plaintiff's claims. Besides,

the Defendant raised counterclaims against the Plaintiff, seeking for the following orders of the Court:

(i) a declaration that the Defendant breached the general condition of sale between the parties herein;
(ii) an order requiring the Defendant to pay TZS 276,017,844/= being an outstanding debt; interests on that sum at a commercial rate of 25% from the time when the debt became due to the date of judgment;
(iii) interest on the decretal amount from the date of judgement to the date of full settlement of the outstanding debt;
(iv) Payment of general damages and costs of this suit.

On the 21st September 2020 the parties herein convened for a final pre-trial conference and the following issues were agreed and drawn by the Court for determination:

(i) What were the terms governing the business relationship between the Plaintiff and the Defendant and whether the terms were breached by the Plaintiff or the Defendant?
(ii) Whether the Defendant's act of recalling the bank guarantee was appropriate.

(iii)Who among the parties is indebted to the other?

(iv)To what reliefs are the parties entitled.

On the 23rd of March 2021, the Plaintiff's case commenced. The Plaintiff called one witness, Mr Simon Gatuna who testified as Pw-1. His witness statement was received in Court as his testimony in chief and, apart from testifying in Court; he tendered a total of 37 documents, (Exh.P1 to Exh.P36) and Exh.D-1 which was tendered during cross examination, all in support of the Plaintiff's case.

In his testimony, Pw-1 told this Court that, being the Managing Director of the Plaintiff, he was solicited by the Defendant to enter in a Key Distributorship Agreement (KDA) in which the Plaintiff would be the Defendant's on key distributor of her products in Songea, Mafinga Iringa, Kyela, Tukuyu, Mbinga, Ludewa, Njombe, Sumbawanga and Mpanda, Namenyele and Tunduma.

According to Pw-1, the execution of the KDA necessitated there being an initial bank guarantee issued to the Defendant by the Plaintiff's bankers. The same was to be renewed so long as the parties' business relationship was on-going. He told this Court, therefore, that, having secured the bank guarantee, the parties proceeded to execute the KDA which, initially, was sent to the Plaintiff for signature by Pw-1 on behalf of the Plaintiff, and having signed it, Pw-1 returned the KDA to the Defendant for the latter's signature as well.

Pw-1 told the Court that, the Defendant's legal manager in the name of Abu Asana confirmed to one Alan Jackson in her email dated 21/06/2011, that, the KDA was indeed signed. In Court, Pw-1 tendered email communications, including one dated 6/6/2011 from one Mr Allan, and which communications were admitted as Exh.P-1, and one dated 19th June 2011 which was received in Court as Exh.P-2.

He, as well, tendered two copies of a letter of intent dated 8/8/2011, collectively admitted as Exh.P-3, an email dated 15th June 2011 and its three annexure, admitted as Exh.P-4, a letter titled *"Payment Security Bank Guarantee No. CRDB 12GT615"* (dated 21st December 2012) and, admitted as Exh.P-5, as well as an email dated 22nd June 2011, by one, Mr Musyangi, an employee of the Defendant. The email was admitted in Court as Exh.P-6. He also tendered a photocopy of the KDA which, after an assessment regarding its admissibility, was readily admitted in Court as Exh.P-7.

Pw-1 told this Court that, the copies of the KDA (Exh.P-7) which he signed in 2011 by then were to be sent to SBL's Head Quarter for signature and presentation to the Plaintiff's bankers (CRDB), hence, one copy went to bank and one copy was left with SBL. He stated further that, after sending the KDA on 30th June, 2011, he was granted the bank guarantee and business rolled on as it was SBL who sent the KDA to the CRDB because, when Pw-1 was given the KDA to present it at Mbeya CRDB branch, it could not be processed since SBL had not signed it. He stated, therefore, that, he had to send it back so that SBL could

sign it and presents it to the CRDB and, as a result, the Plaintiff was given the bank guarantee.

Pw-1 told this Court that, according to Clause 10.1 of Exh.P-7, the agreement was for an indefinite duration unless the Defendant utilizes her rights under Clause 10.2 which rights were never utilized and no notice was ever given in line with Clause 10, hence, the overriding terms and conditions in the Exh.P-7 remained in force until when they were put on a halt in the year 2015.

Pw-1 told this Court that, it was on the basis of Exh.P-7 that the Plaintiff was able to secure a bank guarantee since, one of the conditions set by the Defendant was that, the Plaintiff must have a bank guarantee and, to get the guarantee, the Plaintiff needed to have had an agreement with the Defendant. Pw-1 testified, therefore, that, the KDA (Exh.P-7) between the Plaintiff and Defendant was signed and sets out all governing conditions regarding how the business was to be conducted. He testified further that, the bankers also needed to have a copy of the KDA (Exh.P-7) so that they could issue the requisite bank guarantee.

Pw-1 told this Court further that, under Clause 6 of Exh.P-7, the Defendant was supposed to refund the Plaintiff whenever the latter uses his own means of transport to distribute the products. He told this Court that, the Plaintiff's understanding of Clause 2 of Exh.P-7 was that, she was appointed to sale the Defendant's products as per the agreement (Exh.P-7), and, that, Exh.P-7 was a 20 paged document which Pw-1 signed, at page

20 and there was no page about general condition of sales (GCS) by the Defendant.

Pw-1 testified that, the Plaintiff used to receive the products from the Defendant on credit basis to sale and deposit the sales proceeds into the Defendant's bank account. He stated that, in the course of business, it was the Defendant who maintained all records, books of accounts and customer statement of account of which the Plaintiff was supplied on regular basis, its statement, but the Defendant was using two accounting systems for transaction record keeping, namely the TALLY System and SAP.

In the Course of his testimony to the Court, Pw-1 tendered a letter dated 5th March, 2013, from SBL regarding how the Plaintiff was to increase sales in her territory. He told this Court that, he was required to sign and return the original while retaining a copy. The copy of the said letter was tendered in Court and was admitted as Exh.P-8. Pw-1 told this Court that, Exh.P-8 had spelt out a new procedure whereby the Defendant was to inject money into the Plaintiff's account directly to help push up sales to her customers where she supplies the Defendant's product.

According to Pw-1, the Defendant trusted the Plaintiff and deposited the amount in her account because of the agreement between the two. Pw-1 tendered in Court, as well, a copy of a letter to Mr. Gatuna (Pw1) dated 13/11/2013 concerning re-defined Territory for distribution of SBL products. This letter was admitted as Exh.P-9. He told the Court that, the letter had explained to the Plaintiff why the territory was re-defined and

tried to convince the Plaintiff that, that decision was to be more profitable to her.

Further, Pw-1 testified as that, the Defendant used to require the Plaintiff to provide products to the Defendant's appointed stockists on credit basis and no proceeds of sale were paid back to the Plaintiff. He tendered in Court an e-mail dated 30/11/2011 from Mr. Avinash M Aggirawar, an SBL employee, asking Pw-1 to assist a customer with a 7 days credit. The email was admitted as Exh.P-10.

According to Pw-1, Mr Avinash's email had required him to transfer a customer able to purchase 500 beer crates to a class of customer able to buy crates 720 of beer and provide him with a credit purchase without minding as to whether the customer settled the credit or not. Besides, Pw-1 tendered in Court an email dated 19th September, 2011 from one Mr. Ileo (an SBL employee) instructing the Plaintiff (Pw-1) to deliver various beer consignment cargoes to various customers for purpose of increasing sales regardless of whether they had paid or not. The email was admitted as Exh.P-11.

Pw-1 did also testify that, the Defendant used to supply expired or near expiry products. He tendered in Court a letter signed by one of the stockists (customers) and Mr. James Mzena (an employee of SBL), which was admitted as Exh.P-12. Pw-1 tendered as well an email dated 13/8/2012 about Pw-1 regular meetings with SBL workers at Mbeya, in which the main issue was expired stocks which were in Pw-1 (Plaintiff's) warehouse together with information about exchange program labelled:

"Bottles but retain the crates". Emails dated August 13/2012 were admitted as Exh.P-13.

In Court Pw-1 tendered as well, an email concerning the Plaintiff's complaints raised with the Defendant (SBL) concerning a supply of an expired consignment of beer and the selling by way of promotion "Buy-2 get one free" beer whose shelf life was about to expire. The email dated 19th November, 2011 was admitted as Exhibit P-14. Pw-1 told this Court that, the remaining consignment was left with the Plaintiff and no refund was made her to date and, that, even the cash which was realized from the promotion of (buy 2 get 1 free) was never remitted to the Plaintiff.

Pw-1 tendered in Court several emails dated, 12th August 2012, 17th April 2013, 08th May 2013, 17th September 2013, 08th May 2013, and 03rd April 2014 and these were collectively admitted as Exh.P-15. He told this Court that Exh.P-15 were communications about debts which were yet to be settled. He stated that, the email dated 3rd April, 2014 was about a reminder to return 271 empty crates which were sent to Ludewa and the crates were not returned, by the order of Mr Bucher.

This Court admitted, as well, an email dated 12th November, 2013, admitted as Exh.P-16 as well as '*a names list*' admitted as Exh.P-17 and 3 letters collectively admitted as Exh.P18. According to Pw-1, Exhibits P-17 and P-18 relate to list of name of SBL Employees who were indebted to the Plaintiff following various stocks taken but no cash was remitted to the Plaintiff. He told this Court that, the SBL employees signed the letters acknowledging being indebted to about TZS

209,418,000.00 and, that, Exh.P-18 was a balance of confirmation as of 19th December, 2013.

Pw-1 tendered as well a letter seeking for an original copy of the off balance facility letter from CRDB as well as a certified copy of the said off balance facility letter and these were collectively admitted as Exh.P-19. He told the Court that, Exh.P-19 gave the Plaintiff the bank guarantee of facility of TZS 600,000,000 and that, paragraph 2 of it refers to the KDA (Exh.P-7) signed by the borrower and paragraph 3 indicated the expiry date of the guarantee as being August 2015. Pw-1 told this Court that, at all material time from 2011 till 2015 when the Defendant stopped supplying stocks to the Plaintiff; it was Exh.P-7 which remained in force.

He stated, however, that, in May 2014 the Defendant unsuccessfully wanted to change Exh.P-7 by incorporating Defendant's General Conditions of Sales (GCS) but the Plaintiff did not agree to it as the GCS were not applicable to their business relations nor made a part in Exh.P-7. He tendered in Court an email dated 15th May 2014 concerning communications which the Plaintiff and the Defendant had with reference to an agreement which the two were contemplating to sign.

The Email dated 15th May 2014 was admitted as Exh.P-20 and the copy of the unexecuted agreement between SBL and SIKEM Estate (Distributorship Agreement) dated 1st February, 2014 was admitted as Exh.P-21. Pw-1 told this Court that, the Plaintiff did not sign this agreement because the Plaintiff realized that the agreement was different from the earlier contract the parties had since 2011 (Exh.P-7).

According to Pw-1, the differences were that, Exh.P-21 had, inserted in it, a schedule containing SBL general conditions of sales (at – page 23 – 24 of Exh.P21) and was also bearing a different duration, which was specified to be two years and, above all, the Plaintiff's earlier agreed territory areas were reduced. He told this Court that, under Exh.P-21, the Plaintiff would have supplied products in Mbeya region only while earlier on, as per Exh.P-7, she used to serve Rukwa, Iringa, Songea & Mbinga & (Ruvuma) regions. Moreover, he told this Court that, although the renewal clause in Exh.P-21 was similar to the one in Exh.P-7, (i.e., termination could be possible provided that a 3 months' notice is given); Exh.P-21 had 25 pages while Exh.P-7 had only 20 pages, meaning that, Exh.P-21 was a complete new version of Exh.P7.

Pw-1 tendered in Court an email dated 23rd October, 2014 and this was admitted as Exh.P-22. This email was about claims of offloading cargo into the Plaintiff's godown. He also tendered attachment to it titled: "loading and offloading VOMI stock QUANTITIES" admitted collectively as Exh.P-23. Pw-1 told this Court that, Exh.P23 contains claims for labourers who offloaded cargo of beer to the Plaintiff's godown. He told this Court that, ordinarily, a cargo from the Defendant to the Plaintiff's godown was offloaded by the Plaintiff's labourers and the offloading charges are claimed from the supplier (SBL).

He also told this Court that, the Plaintiff's other claims were for empties (crates) which needed also to be loaded to be sent to the Defendant. He told this Court that, the total was TZS

10,767,420 and this ended up in September, 2014, and, that, that amount was never paid to the Plaintiff.

Further still, Pw-1 tendered in Court emails dated 10th October, 2014 and 11th October, 2014. He told this Court that, these were a reminder of an earlier email which requested the Plaintiff to fill the expenses form for refund. He state further that, the emails came with instructions from SBL employee to the Plaintiff, reminding the Plaintiff to fulfil or follow all procedures which were given to her concerning the claims and when ready, the Plaintiff should send back her documents for purpose of payments.

The two emails were admitted as Exh.P-24. Other emails tendered in Court and received as Exh.P-25 were emails dated March, 9th 2013, and September 26th 2013 to September, 28, 2013, and all were about unpaid transport costs amounting to TZS 11,051,859.23 which Pw-1 stated that the Defendant neglected/refused or failed to pay.

Pw-1 tendered in Court a letter from SBL concerning verification of empty bottles that are in the market as well as empty crates which were in the Plaintiff's possession and which belong to the Defendant. Pw-1 told this Court that, the Plaintiff has in her custody, filled bottles and crates that belongs to the Defendant but are still in the Plaintiff's godown while they belong to the Defendant. He told this Court that, these have been with the Plaintiff since March, 2015, when the Defendant stopped the distributorship status of the Plaintiff and never collected the bottles and crates to date.

According to Pw-1, the Plaintiff is still keeping the bottles and crates in her godown and occupies space which could have been used for other things. He stated that, the bottles and crates being valued to the tune of TZS 88,000,000/=, necessitated the Plaintiff to incurred expense to set up a guard of the godown. He stated that, this value is also related to the Plaintiff because the Plaintiff paid for the bottles and the crates at the beginning and ought to have been refunded. He tendered a letter dated 22/1/2014 from SBL which was admitted as Exh.P-26.

Pw-1 tendered in Court as evidence, a letter the Plaintiff sent to the Defendant, dated 24 January, 2018. The letter, which was admitted as Exh.P-27, had asked the Defendant to pick up her empty crates and bottles and, since the Defendant had rescinded the contract since March, 2015, the letter as well called upon the Defendant to pay TZS 1,000,000/= from the time till when the crates were collected, that amount being charges for the godown where the crates and bottles are kept and for the services of guarding the godown. He told this Court that the number of crates still in the Plaintiff's godown is 7,780 crates and the Plaintiff had paid Tshs. 12,000 per crate.

Pw-1 testified that, the parties had a partial joint reconciliation meeting. He tendered in Court as evidence, a document dated 29/1/2015 evidencing a reconciliation carried out between SIKEM (the Plaintiff) and SBL (the Defendant). The document named "SIKEM RECONCILIATION:" was admitted as Exh.P-28. According to Pw-1, Exh.P-28 was a partial reconciliation as it focused on few areas while others were yet to be dealt with.

He testified that, the parties did not conclude on the empty bottles and their crates and, that, reconciliation in respect of the Tally system of accounting which the parties were relying on for the years 2011, 2012 and 2013 was not completed, and, as such, finalization of the debts amounting to TZS 278,945,751.68 was yet to be verified at the time.

He testified that, the un-reconciled TALLY system contained most of the transactions at issue and its completion was necessary to portray the true affairs of the statement of account of which the Defendant's team could have been tasked to account for unsupported entries in the Plaintiff's statement. He told the Court that, since the Defendant refused to proceed with reconciliation, after the initial reconciliation, the parties continued with business for a while till March, 2015 when SBL stopped the business with the Plaintiff.

It was a further testimony of Pw-1 that, the parties embarked on reconciliation because the Plaintiff noted that, her debt was swelling while she used to pay to the Defendant within 14 to 21days of being supplied with a consignment and the Defendant was supposed to deduct the debt after each payment. He told this Court, as well, that, the Plaintiff was entitled to be paid for every breakage where a cargo gets damaged.

Pw-1 told this Court that, the empty crates were valued and invoiced as per their value and, thus, their amount had to be deducted from the Plaintiff's debt because the Plaintiff returned the crates. Pw-1 stated, however, that, the Defendant was not doing so. He stated that, since the Plaintiff realized that the Defendant was trying to kick her out of business claiming having

sent to the Plaintiff a demand note for TZS 986,103,589, the Plaintiff requested for a reconciliation meeting so as to know what the source of the Defendant's claim was.

He told this Court, that, as a result when the reconciliation was carried out, their claim came down to TZS 707,157,837.46 after realizing that there were other claims which they made which ought not to be claimed from the Plaintiff. A demand note dated 2nd March, 2015, therefore, was admitted as Exh.P-29.

Pw-1 told this Court further that, the Plaintiff's demand was for TZS 1,359,887,578.68 for which he requested for a second reconciliation meeting more than three times. He told the Court that, in the Plaintiff's letter the Plaintiff reminded the Defendant that the remaining debt was TZS 1, 267,354,839.62 as up to 31st October, 2012 which came down to TZS 707,157,837.46 and, that, in the 1st reconciliation there were things yet to be finalized but the Defendant refused to meet for reconciliation of their transaction accounts.

He told this Court that, the Plaintiff's complaint all through was for a reconciliation meeting to find out who was actually indebted to whom and for what. Pw-1 tendered a Demand letter dated 26th March, 2015 requesting for a second reconciliation and it was admitted as Exh.P-31.

Pw-1 tendered in Court a letter dated 18th March, 2015 from the Defendant to Epic Law Partners, who were the Plaintiff's lawyers. In the letter, admitted as Exh.P-30, it was alleged that, SBL and SIKEM have been trading under SBL's *Standard General Condition of Sale* because SIKEM refused to sign an agreement with the Defendant (SBL).

In principle, Pw-1 denied the allegations that the Plaintiff did not sign a contract with the Defendant in 2011. He insisted, however, that the Plaintiff got the contract from SBL and, on the basis of it; a bank guarantee was issued to the Plaintiff by CRDB Bank in 2011. Pw-1 stated further, that, in Exh.P-30, the Defendant threatened to recall the Bank Guarantee if the Plaintiff was not settling her debts.

He told this Court that, since the Defendant refused to have a second reconciliation and had threatened to recall the bank guarantee, the Plaintiff engaged an independent auditor – BPC (Brain Power Consultants) to review all relevant transactions for the period, between June 2011 and March 2015, and establish the truth about SBL claims against the Plaintiff. He tendered in Court a letter to CRDB from SIKEM Real Estate dated 03/11/2020 which was admitted as Exh.P-32 and the letter from SBL to CRDB dated 23rd June, 2015 which was admitted as Exh.P-33.

According to Pw-1, the Plaintiff's written contract with the Defendant (Exh.P-7) was the main source of the Bank Guarantee and it was the same contract which the Defendant referred to when recalling the Bank Guarantee and demanded the TZS 600,000,0000/=. As regards Exhibit P-32, Pw-1 told this Court he had asked the CRDB for it because the Plaintiff did not have a copy of that letter which was needed for this case.

This Court received from Pw-1, an audit report which was admitted with its addendum as Exh.P-34. According to Pw-1, Exh.P-34 uncovered and indicated serious issues including un-received stocks but recorded by the Defendant as having been

received, non-payments of incentives, non-refund of loading and off-loading expenses to the Plaintiff, unpaid Defendant's staff and stockists debts, all of which had affected the Plaintiff's business and working capital in connection with the Exh.P-7.

Pw-1 told this Court that, within Exh.P-34, he noted that, TZS 3,258,000/= which were in respect of breakages were unpaid to the Plaintiff while breakages were agreed to be refunded. He also noted that, there were bottles and empties (crates) valued at TZS 2,520,000/= which were returned to SBL and which ought to be paid for b SBL but were not paid for. He also observed that, there TZS 88,080,000/= being the value of returned crates equal to the same crates the Plaintiff had received which, instead of there being a deduction, the Defendant added them as a debt on the part of the Plaintiff.

According to Pw-1, it was also noted in Exh.P-34, that, the Plaintiff used to get 2 invoices whenever she receives a consignment - one invoice is in relation to the beer drink and the 2nd invoice is about value of the crates supplied (empty crates) and empty bottle). He stated, however, that, when the Plaintiff returned the empty crates, the Defendant was required to cancel the invoice sent to the Plaintiff as it was indicating that the Plaintiff was still indebted.

He told the Court further that, there was, therefore, TZS 48,240,000/ in relation to crates and its empty bottle which were returned to the Defendant but these were not posted in the ledger account to show that the Plaintiff was no longer indebted to that amount. He stated that, the whole total on that item was

TZS 142,098,000/- a debt which the Plaintiff disputed as being not true.

Pw-1 did also told the Court that, Exh.P34 pointed out the issue of "unpaid incentive" as the Plaintiff used to send a daily report to SBL for all transactions, and that, by so doing there was incentive paid by SBL for which the Plaintiff deserved, at the time, to be paid TZS 22,050,000/= on the basis of fulfilment of conditions set out and agreed under Exh.P-7.

Pw-1 told this Court that, the Plaintiff deserved to be paid both reporting incentive as well as monthly sales incentive which in total amounted to TZS 69,070,000/=. He told this Court that, since the Defendant never deposited that amount in the Plaintiff account with SBL- the Plaintiff was seen to be indebted to SBL.

Pw-1 stated further that, there were invoices which were claimed to be unpaid for but the cargo and its invoices were never received by the Plaintiff. Some of the invoices noted were Invoice No. 14719 dated 10/8/2012 which in the Statement of Account it is for TZS 40,635,005.05. The second one is Invoice dated 29/8/2012 which is No. 14811, which, in the Statement of Account it reads the same amount TZS 16,799,997.48, while the third Invoice was dated 29/8/2012 No. 14813.

Pw1 told this Court that, one invoice cannot have two different values as in the invoice shown in the statement and, the actual invoice itself indicates there was an error which could have been resolved if reconciliation was done, and since it could not be done, the Plaintiff remained indebted to the Defendant.

Pw-1 testified further that, as per Exh.P-34, there were also staff debts not settled which arose out of the procedures set

out by the Defendant. He stated that, it was a practice that, when SBL Staff wanted to do product promotion in outlet bars, or when they are promoting a new product in the market, they would borrow beers from the Plaintiff for such promotional purposes. He told the Court that, after promotion, the SBL' Staff were supposed to remit the monies obtained to the Plaintiff so that the Plaintiff can deposit such amount in SBL's account. Pw-1 told this Court, however, that, on the contrary, the SBL Staff did not remit the amount in the total of TZS 24,845,219.00 and the Plaintiff submitted evidence to that effect which was Exh.P-18.

Pw-1 testified as well on the issue of stockists pointed out in Exh.P-34, who did not remit a total of TZS 143,945,940. Pw-1 told this Court that, these stockists were appointed by SBL and identified to the Plaintiff. He stated that, at the time of selling their products, the brand that was moving fast was the Serengeti lager, but when left with one brand only, the Plaintiff was given directives by the SBL area manager to send to them the missing fast mixing brand.

He told this Court that, the duty to collect the monies thereafter was left with the Defendant's Area manager, but in the ledger statement, the consignment was reading that the cargo was still with the Plaintiff and, therefore, the amount was being claimed from the Plaintiff while in the actual fact, the Defendant's Area Manager of Defendant were the ones supposed to have collected and remitted the monies to the Plaintiff.

Pw-1 further pointed out that, Exh.P-34 indicated there was un-refunded claims regarding loading /offloading of Defendant's consignments amounting to TZS 19,767,420/= as

labour costs which the Plaintiff paid on behalf of the Defendant. He told his Court that, there was also transport charges regarding beer distributed to various places as the Plaintiff used to prepare invoices which would be submitted to SBL for the latter to prepare payments due to the Plaintiff.

According to Pw-1, the Plaintiff was never paid for all months to a tune of TZS 117,870,000/= and TZS 3,868,664.00 which was in respect of expired stocks returned to SBL for which the Defendant was supposed to pay back to the Plaintiff by giving the latter a fresh consignment. As such, Pw-1 stated that, there was a total of TZS 141,506,084.00, which amount continued to increase the debt in the Plaintiff's statement.

Pw-1 told this Court further that, when he says there was double posted invoices he meant that one invoice was posted twice in the Plaintiff's account (client's account) kept by the Defendant. He stated that, the invoice No. 9870030099/100 worth TZS 16,764,000 was for empty crates sent to SBL. He stated that, these were empty stocks returned but only those with liquid were recorded and the empties were not recorded.

He also told this Court that, the invoice in the SBL statement, identified by its delivery note or its control numbers in the SBL statement, has a delivery note number 004048243. Pw-1 informed this Court, therefore, that, as a matter of procedure – one invoice has one delivery note and, that; it is not possible or proper to use 2 invoices for one delivery note number. He stated, however, that, in this case, the Defendant used one delivery note number to post invoices twice.

As per Pw-1, the effect of doing so was that, the Defendant debited that invoice twice and so the Plaintiff was indebted twice while she received a consignment once and returned the empties once and not twice. Pw-1 stated that, according to Exh.P-34 – SBL's posted on 31/12/2013, 1400 crates of beer in the Plaintiff's client account and these were for TZS 42,000,001.96/=. However, in the same statement they also posted 1400 crates of beer using the same delivery note for TZS 17,324,707.07, meaning that, two invoices were posted using same delivery note and the Plaintiff was debited twice during the 1st entry and also the last entry.

Pw-1 did point to the Court as well an invoice No. 9870032419/20 dated 21/11/2013 valued at TZS 15,576,000/= which was also double posted. This invoice is found in the SBL statement dated 31/12/2013 and its delivery note number is 0042212127. He told this Court that, the invoice was for 1300 empties (crates) –which were returned to SBL but the Defendant did not debited the client's account as if the empties were not returned and, for that matter, the Defendant increased the Plaintiff's debt by TZS 15,599,997.66/=.

Pw-1 did also refer this Court to Invoice No. 987003296/97 worth TZS 15,564,000/=. This shows expired stocks but it was empties stock returned but only liquid was recorded and the empties were not. He testified that, this invoice is found posted in the SBL's client statement – dated 31//12/2013 page 3 of 10 pages and its delivery note No. 0042218499, indicating that, the Defendant is claiming a total of 1300 empty crates worth TZS 15,599,997.66/=.

However, Pw-1 maintained that, the Plaintiff had already returned the said empties (crates) to the Defendant revealed in per Exh.P-34, at page 3 of the SBL statement dated 31/12/2012. Another invoice pointed out by Pw-1 was Invoice No. 9870018594 which is for TZS 16,152,000, for empties which were returned to the Defendant and is posted in the SBL statement of client's account dated 30/8/2013 at page 1 of 8 pages, and Invoice No. 9870027056 for empty crates returned but not posted and valued at TZS 16,752,000/= and is reflected in the SBL statement dated 29/8/2013.

Pw-1 stated that, the invoice with delivery note number is 0041837893, carries two invoices: No. 9870027056 – which is for beer crates and No. 9870027057 for empty crates and is found in the SBL statement dated 23/9/2013 at page 7 of 8 with a delivery note No. 0041703951.He told this Court that, in this invoice, SBL debited 1380 crates in the Plaintiff's account showing that the Defendant was claiming TZS 16,559,997.52. He stated, however, that, such empties had already been returned and, as such, the Plaintiff's debt was added up by it while she had already returned the crates.

He noted that, while in the same statement SBL debited 1350 beer crates worth TZS 39,258,992/= and properly credited beer which were rejected 4 crates of beer worth TZS 116,800.00, the Defendant did not credit returned empties worth TZS 16,152,000/=, which means that, the Plaintiff was shown to be still indebted to the Defendant.

Pw-1 stated further that, the respective invoice is posted in the SBL statement dated 30/9/2013 at page 1 of 8 and increased

the Plaintiff's debt as the Defendant was supposed to have credited it.

Pw-1 pointed to the Court as well invoice No. 9870031095 which is for TZS 16,752,000/= for empties returned but not credited (reflected) and, hence, debited to the Plaintiff's client's account wrongly as a debt to the Defendant. He told this Court that the particular problematic invoice was Invoice No. 987002757 and was about empties which were not credited when returned as shown in Exh.P-34. He told this Court that, therefore, that, in the dispatch note from SBL – it was clearly shown that the Plaintiff received 1397 crates and returned 3 rejects, and, that, the Plaintiff signed the dispatch indicating that she returned the 1397 empties. He stated, however, that, since the two parties were carrying out reconciliation some of (delivery note) documents were handed over to the Defendant to cross check with what was in her office.

Further still, Pw-1 refereed to Invoice No. 9870028038/39. Valued for TZS 16,752,000/= with a dispatch note and delivery note No. 0041901872 reflected in SBL'S statement dated 30/9/2013 at page 6 of 8 for crates which were returned but the Defendant debited 1400 crates worth TZS 16,799,997.48 increasing the Plaintiff's debt as reflected in the client's account held by the Defendant. PW1 referred to another invoice No. 9870030099/100 for TZS 16,764,000/= for 1400 crates of beer. He stated that, out of them 3 crates were returned as rejects and, thus a total of 1,397 crates were the actual crates of beer received.

According to Pw-1, the Plaintiff signed in the invoice and prepared a delivery note to return 1397empty crates. The delivery note was signed by the SBL driver as well there was a 'goods received advice' for the said 1397 crates and the driver also signed it. He stated, however, that, the Defendant continued to add up to the Plaintiff's debt because the Defendant's client's statement did not indicate that the 1,397 crates (empties) which were returned by Plaintiff.

It was also the testimony of Pw-1 that, through invoice No. 9870028034/35 the Plaintiff received 1400 crates of beer (drink), whereby 3 crates were reject products, leaving the actual cargo received to be 1397 beer crates. He stated that, the Plaintiff did sign the invoice to indicate receipt of the consignment together with a document from the transporter (Road Control Sheet). He stated that, the Plaintiff prepared a delivery note showing a return of 1397 empties to the Defendant. However, Pw-1 stated that, the 1397 empties returned to the Defendant were not credited but debited to show that the Plaintiff was still indebted to the Defendant in respect of the empty crates.

Pw-1 told this Court further that, the Plaintiff did prepare the document called goods received advice showing that the Plaintiff accepted only 1397 crates. He observed, however, what was posted in SBL statement dated 30/9/2013 at page 6 of 8, in respect of Invoice No. 9870028034/35, shows the empties regarding delivery note 0041901902, and the Defendant debited 1400 crates (empties) worth TZS 16,799,997.48, the Plaintiff had returned as per the delivery notes.

He stated further, that, even the 3 crates which the Defendant ought to have been credited in the Plaintiff's account were and not replenished either as the Plaintiff ought to have been be given beer creates (drinks). He stated that, at time a crate of beer was worth TZS 36,500.

The second other claim was for empty crates valued at TZS 12,000/= and, Pw-1 referred to Invoice No. 9870028054/55 whose delivery note was No. 0041901972. He told this Court that, its supporting dispatch Note was signed for 1400crates, three (3) rejects and cleared 1397 crates of beer. He told this Court that, he did sign the dispatch note to indicate that 1397 crates were returned to the Defendant as empties and, that, such facts are indicated in the SBL's statement dated 30/9/2013 page 6 of 8. That statement shows that, such crates were returned but the Defendant debited the Plaintiff with same 1400 empties (crates) worth TZS 16,796,007.48 and never made any adjustments in respect of the 3 crates which were rejected by the Plaintiff and these did not feature anywhere.

Another Invoice which Pw-1 complained about is Invoice No. 9870030533/34 for empties not reflected in the SBL statement although they were returned. Pw-1 stated that, this invoice was signed by the Plaintiff indicating that 1395 crates of beer were received and the Plaintiff returned equal number (1395) of empties (crates) to the Defendant.

He told this Court, however, that, the Defendant's client statement showed a debit of 1400 crates (empties) and, that, even the 3 crates returned as rejected by the Plaintiff were not credited. However, in the SBL statement, there was no

statement which indicated that the Plaintiff had returned these empties.

Pw-1 pointed out Invoice No.9870018594 which appears in SBL statement dated 30th September, 2013 at page 1 of 8, and its delivery note number 0041703951. He told this Court that, the invoice should have read No. 9870018594/95, (to mean that, No. 94 is for beer (liquid) and 95 is for empties (crates). He testified that, in the SBL statements, there is no indication that the Plaintiff returned 1396 crates worth TZS 16,152,000/=.

He told this Court that, all supporting documents were given to SBL in December, 2014 and January, 2015 when the parties were carrying out their first reconciliation. He stated that, the invoice No. 9870030533/34 was for TZS 16,740,000/=. According to Pw-1, although the Defendant debited the empties in the Plaintiff's client account held with SBL and showed the invoices which the Defendant claims were unpaid, the fact was that the Plaintiff did not receive that consignment.

Pw-1 stated that, the respective invoice is found in the **Tally Report** sent to the Plaintiff by SBL -dated 16/12/2011. It is on page 13 of the Tally Report which involves invoice No. DHLHO-INV No. 6367 worth TZS 4,500,000.80; invoice is DHLHO – INV/06522 worth TZS 131,500,005.60; Invoice No. DHLHO - INV/ 0654 worth TZS 31,500,005.60, Invoice No. DHLHO-INV/ 06526 – worth TZS 31, 500,005.60. The total is 97,032,000.00. Pw-1 stated, therefore, that, the Plaintiff's claim due to double posting is TZS 345,623,992.44.

Pw-1 told this Court, there are invoices of beer and empties in Exh. P-34 claimed to have been received by the

Plaintiff but which the Plaintiff never received them even if they are shown in the SBL statement account to be claims against the Plaintiff. The particular Invoices are: invoice serial number 3 which is an invoice of 6th July, 2011 – this is Invoice No. DHLHO – INV/02712 worth TZS 16,799,997.48 which is not shown in the statement; the other is serial number 5 – Invoice NO. DHL-HO INV/14719 – which is in the statement dated 27/8/2012 page 3 of the Tally statement; Invoice No. DHLHO-INV.14811 for TZS 16,799,997.48, which is found in the statement dated 28/8/2012 page 5 of the Tally statement; Invoice No. DHLHO- INV 14813 for TZS 16,649,997.77, which is in statement of Tally of SBL at page 5, dated 29/8/2012.

Others are: Invoice No. DHLHO-INV/14778 for TZS 16,787,997.48, reflected in the SLB Tally Statement dated 28/8/2012 at page No. 4; Invoice No. DHL HO-INV/02711 for TZS 31,167,004.16, reflected in the SBL Tally Report Statement dated 16/7/2011 at page 1.; Invoice No. DHL HO – INV/ 02742- which is for TZS 31,500,005.60, reflected in the SBL Tally Statement dated 18/7/2011 at page 1; Invoice No. DHLHO – INV/15910 for TZS 37,800,006.72.

The said invoice is found in the SBL Tally statement dated 29/8/2012 at page 5; Invoice No. DHLHO-INV/14812- for TZS 38,038,005.88. This is reflected in the SBL Tally statement dated 29/8/2012 at page 5; Invoice No. DHLHO-INV/14810 for TZS 40,635,000.00. This is found at page 5 of SBL Tally statement of 29/8/2012; and Invoice No. DHLHO-INV/14779 for TZS 40,635,005.10 which is reflected in the SBL Tally Statement dated 28/8/2012 at page 4.

Pw-1 stated further, that, all these are invoices which were in the Tally Report and, that, the parties had only done a partial reconciliation of that System given that the Defendant maintained two accounting systems, the Tally and SAP system. He stated that, the Tally reconciliation was not fully done and, that, it was SBL who stalled it because the SBL employees knew what they did in the system's account which they are the ones who had control of it.

He maintained that, the Defendant could have accessed her system since she is the one who is supposed to keep records of her customers. He told this Court that, the total of the Defendant's claim is TZS 662,683,144.38 which the Defendant claims the Plaintiff received was erroneous as the Plaintiff has never received goods valued at such an amount.

Pw-1 told this Court that, as regards the general loss suffered, the same included the whole claims which the Plaintiff has and all costs and the bank guarantee of TZS 600 million and interest of TZS 456,000,000 paid to the bank. He stated that, the total loss was TZS 2,938,076,949.82 and, that, if TZS 707,157,837.46 (the figures of last reconciliation which the parties carried on 29th January, 2015 (Exh.P-28)) is to be deducted from it, what remains until the year 2020 was TZS 2,230,919,112.36.

In his testimony in chief, Pw-1 stated, however, that, by January 2020, it was the Defendant who was indebted to the Plaintiff to the tune of TZS 1,191,566,812.36 and, for that matter, had the Defendant agreed to the second reconciliation, he would not have stopped supplying goods to the Plaintiff and

recall the bank guarantee as per Exh.P-19. Pw-1 went on to testify, that, through Exh.P-33 the Defendant recalled the Bank Guarantee and were paid TZS 600,000,000/= as it was claimed that the Plaintiff had defaulted paying TZS 936,805,897.19.

Pw-1 told this Court that, the general loss of TZS 168,000,000/-was caused by the Defendant due to the fact that, in September 2014, the Plaintiff had informed the Defendant that, the latter's main competitor had reduced their brand's prices whereby 1 crate of beer went for TZS 33,600/= instead of TZS 36,800. He stated that, the Plaintiff requested for price reduction on the part of the Defendant's competing brands to march those of the competitor in the prevailing market competition and boost sales.

Pw-1 testified, therefore, that, instead of a favourable response from the Defendant, the request was meted out with a decisions to divide the Plaintiff's market distribution area where she had earlier enjoyed exclusive distributorship status, giving it to other new distributors appointed by the Defendant, and, that, finally, seven months later on March, 2015 the Defendant stopped doing business with the Plaintiff.

He stated, however, that, ironically, after stopping doing business with the Plaintiff and introducing new distributors, immediately the Defendant implemented the earlier Plaintiff's proposal to reduce prices of her competing brands. He stated, however, that, at that time the Plaintiff had already registered a loss of TZS 168,000,000/- which was income she could have earned from September 2014 to March 2015.

Pw-1 stated that, due to the unwarranted acts of the Defendant the Plaintiff was spectacularly affected. He narrated such acts as including: the recall of the bank guarantee which automatically created a loan of TZS 600,000,000 on the part of the Plaintiff, and which, up to the time of filing the suit had ballooned to TZS 1,056,000,000=; closure of his entire business due to unreasonable termination thereof, loss arising from stockists debts, expired stocks for which the Plaintiff is entitled to be paid back, uncollected emptied all lying or left in the Plaintiff's warehouse. Others include 5 special trucks which the Plaintiff had bought from the Defendant which, after termination lay idle and useless at the Plaintiff's premises as well as financial constraints.

Pw-1 relied on a demand letter requiring the Plaintiff to pay within 30 days a total of TZS 1,907,822,004.67. According to Pw-1, this Demand letter was after SBL withdraw the TZS 600 million Bank guarantee from the CRDB by their letter to the bank (Exh.P-33) asking for the monies on the ground that the Plaintiff (SIKEM) had defaulted the agreement between SBL and SIKEM.

Pw-1 did also tell this Court, that, the bank statement attached to Exh.P-34 is of the Plaintiff and covers the period from 1st April, 2015 up to 13th January, 2020 in respect of account No. 01J1066040500. According to him, in that bank statement the issue of bank guarantee features because, when the CRDB bank paid SBL the TZS 600,000,000 on 26th June, 2015, as shown in the bank statement, immediately after that payment, that amount was reflected as a debt in the Plaintiff's account, accounted as a loaned amount and interest continued

to be charged thereon, which was for 16% as per Exh.P-19, which after calculation up to the year 2020 brings a sum of TZS 456,000,000.

Pw-1 stated that, when the Plaintiff started business with the Defendant, one of the conditions was that, there should be n place a bank guarantee of TZS 600,000,000. He stated that, the Plaintiff was able to get it from CRDB as security and it was to expire on August, 2015. Pw-1 told this Court that, the Defendant were reluctant to continue with reconciliation on the ground that, the parties had performed a reconciliation exercise as per Exh.P28 and responded to all issues and the debt due to SBL from the Plaintiff amounting to of TZS 920,400,683.30 cannot be disputed.

Pw-1 tendered in Court an email form one, Lumuli Msoka, dated 05th March 2015.This email, admitted as Exh.P35. He also tender as Exh.P36, a certificate of authenticity of emails which was admitted as Exh.P36. Pw-1 told the Court that, in the email, the Plaintiff was insisting on continuing with the reconciliation exercise as the query was on the Tally's system for the year 2012/2013 and was responded to and referred to a teleconference held on the 26th February 2015. Pw-1 told the Court that; the Resolution No.3 out of the teleconference meeting was that reconciliation would be done once Mr. Erasto gets access to the tally system on March 2015, the first week.

He told the Court, however, that, during the teleconference meeting, agreement in the meeting was that if SIKEM fails to provide the payment plan, SBL will recall SIKEM bank guarantee as soon as possible but reconciliation was yet to be closed. He

stated that, from the date of the teleconference the Plaintiff was not told anything until when the parties' relations broke down.

As regards the Defendant's counter claim for TZS 276, 017,844/=, Pw-1 denied such a claim or any part thereof and prayed to be granted her claims against the Defendant including being paid interests as she is still suffering from the bank loan as a result of the recall of the bank guarantee and that, since the recall and breach of the agreement, the Plaintiff was put out of the market and her economy has declined. Above all, the bank has even contemplated selling her properties. The Plaintiff has asked for costs as well.

On being cross-examined, Pw-1 told this Court that, he was in full agreement that Exh.P1 was showing the intention to do business and was subject to further details and registration. He also admitted that Exh.P2 tells about a letter of intent sent to the Plaintiff with an intention to contract. He admitted that, the draft agreement had not been signed by SBL but, that, the Plaintiff signed it and sent it back to SBL.

He also admitted that there were key performance indicators on Exh.P7. He denied there being general condition of sale in Exh.P7. He maintained that Exh.P7 was sent to CRDB by the Defendant and the CRDB granted the Plaintiff the requisite bank guarantee even if he did not have evidence that the Defendant sent Exh.P7 to the CRDB. Pw-1 admitted as well that at some point he wrote a letter to CRDB requesting for the original bank guarantee.

Pw-1 admitted, as well, that, Exh.P9 reduced the Plaintiff's area of distribution of products. He told this Court that Exh.P10

was between him and Mr Avenishi from SBL and that, the Plaintiff was duty bound to supply stocks upon instruction from SBL to stockists, and, that, Avenish directed Pw-1 to release consignment on credit to one, Mr Yassin, a stockiest and that the Plaintiff is still claiming from Yassin. He told this Court that, although he recognize Exh.P11, the problem has been that, the area sales representative used to collect order from stockiest, without knowing whether the supplier were paid for or not. He denied that the Plaintiff was unable to supply to the entire territory earlier agreed stating that the Plaintiff had many trucks and that is why he was appointed a distributor.

Pw-1 did recognise Exh.P12 and stated that, it was communication from SBL to one Pauline who admitted the debt as she was an Area Sales Representative and that, SBL's sales representatives were allowed to go with products to the market as they had their own cars, used to supply to stockiest and collect monies which they were to bank or bring to the Plaintiff's office, that being the normal SBL practice. Pw-1 referred further to Exh.P15 noting that, it was about SBL worker's debts and that, emails from Mr Herbart and from Mr Alex were proof thereof. He told this Court that, the debts are not personal since these were SBL employees who were at work for SBL.

Referring to the letter dated November, 26/11/2012, he stated that, the same was showing amount that Freddy owes to SIKEM (the Plaintiff). He told this Court that, several emails correspondences were sent to SBL manager who wanted to get proof as they were aware of the practice and the Defendant never said she would pay not denied or rejected the claim.

As regards the applicability of the general conditions of sale (GCS) to the Plaintiff, Pw-1 denied their applicability as they were not part of Exh.P7 and only saw them in the 2014's agreement and never seen them before. He admitted, however, that, every transaction was supported by invoice and that, although invoices had a clause on application of GCS, what relates to the Plaintiff was the aspect of "unless otherwise agreed."

As regards the empties left at the Plaintiff' premises, Pw-1 stated that, when the contract (Exh.P7) was still alive, the Plaintiff was supposed to send the crates to authorized person but, since the Defendant had breached the agreement, the Defendant had a duty to pick them from the Plaintiff. He maintained that, the Plaintiff raised the issue with SBL several times in 2018 as the latter is still incurring costs of keeping the crates which belong to SBL and crates costs TZS 12,000.

Pw-1 admitted that, Exh.P28 was a reconciliation dated 29/1/2015 and that, the opening balance is TZS 986,103,589/=. He stated that, in it there was an issue of breakages, transport, and undertaking, unreceived goods (partially); empties (partially) reconciled and its coverage was for the SAP system only.

He admitted that, the total undisputed amount, as per the day of signing of Exh.P28, was TZS 707,157,837.46. He stated however, that, reconciliation was yet to be finalized and he would not have paid the amount as there was a need for further reconciliation since there was TZS 278,945,751.68 which were still being disputed and the earlier reconciliation excluded the TALLY SYSTEM. Pw-1 stated further during cross-examination,

that, there were 9,197 empties which the Plaintiff was claiming which, although SBL had said they were credited to the Plaintiff's account no proof was availed and have never done so to date, and, thus, he insisted that, the amount of TZS 707,157,837.46 needed further the reconciliation. He admitted that, as per Exh.P7 clause 8 (4), the distributor should pay within 14 days into the collective account.

He also admitted that, SBL asked the Plaintiff for a payment plan or else the Defendant was to withdrawn the bank guarantee, although Pw-1 insisted that, what was done was improper as reconciliation was still incomplete and they should not have concluded that the Plaintiff was indebted. He stated that, after SBL recalled the bank guarantee in June, CRDB turned it to be an overdraft on the part of the Plaintiff and, that; the latter had to suffer a 17% interest thereon. As regards Exh.D1/P34, Pw-1 told this Court that, the Defendant was not involved in its preparation for the sole reason that reconciliation between the Plaintiff and SBL had failed to proceed.

On re-examination, Pw-1 stated inter alia, that, the parties traded on the basis of Exh.P7 and that, through Exh.P34 the Plaintiff was able to notice the double posting and other noted problems which he could not have noticed earlier. He stated that, the background of Exhibit P7 was the letter titled intention to contract and, that, it had many other documents annexed to it.

Pw-1 stated that, Exh.P7 was brought to the Plaintiff so that the latter could sign it and sends to the CRDB bank as the CRDB had wanted to see the terms and condition governing the

parties' relations. He re-emphasized, therefore, that, the Plaintiff did sign Exh.P7 and sent it to SBL and, that, although Pw-1 did not see SBL signing it, at the end of the day, the Plaintiff was able to get the bank guarantee of TZS 600,000,000 (as per Exh.P19).

Pw-1 stated as well that, there are 7000 empties (crates) in the Plaintiff's hands valued at more than TZS 88 million and that, the godown is rented and the rent per months is about TZS 1.5 million. He stated that, the Plaintiff did not effect payment to SBL during the reconciliation because, after looking at her own documents, she discovered that she was the one to claim from SBL and not otherwise. He stated further that, the parties never had any stock taking regarding the empty bottles/crates which are at the centre of disputed because they parted ways without doing all that. That marked the end of the Plaintiff's case.

As for the Defence case, the Defendant called one witness, Mr. Justine Mollel, testifying as Dw-1. His witness statement was admitted in Court as his testimony in chief. In his testimony, Dw-1 told this Court that, he is currently working with SBL as the Director of finance, and has been at SBL since May 2011, overseeing the entire department of finance and other duties which deals with sales and procurement.

He told this Court that, from 2011 to 2015 he was involved in the management of all ordering processes and reconciliation of customer balances when there was a mismatch. According to Dw-1, sometimes in 2015, the Plaintiff instituted a case (Commercial Case No.79 of 2015) and that, in the course of dealing with the case, a box file containing most original

documents was lost from his office and he reported the matter to the Police on 31/1/2018. In Court, Dw-1 tendered a Police Report confirming that, he did inform the Police about the loss of documents which related to the business relationship between SBL and SIKEM in file No. 243/18. The said Police Report was admitted in Court as Exh.D-2.

In the course of his testimony, Dw-1 told this Court that, the Plaintiff was a distributor of the Defendant's products in the Southern region territory, placing orders from the Defendant from time to time. He stated that, upon delivery, the Plaintiff used to be issued with a dispatch notes and sales invoices which stipulated the period of payment. He also admitted that the Plaintiff provided a Bank Guarantee to the Defendant which was for TZS 600,000,000/= and, stated that, the same was valid until 30th June 2013 and extended to 30th June 2015.

Dw-1 told this Court that, the Plaintiff was availed with SBL's General Conditions of Sales which were recognised and referred to in the invoices. Dw-1 tendered in Court, the SBL's General Conditions of Sales and, this document was admitted as Exh.D-3. He clarified that, Exh.D-3 is a standard document raised by SBL to all distributors and, that, it has about 12 clauses which explain terms, rights, obligations, and how the relationship will be governed.

According to Dw-1, Exh.D-3 is referred to in every invoice and applies to all distributors for every sales transaction. Dw-1 told this Court further, that, before start of any trading relationship, every distributor is asked to comply with the company's general conditions of sales. Besides, Dw-1 told this

Court that, every distributor had a right to ask for this document from SBL at any time during the trading arrangement. As regards the trading arrangement between SIKEM and SBL from 2011 to 2015, Dw-1 told this Court that, it was Exh.D-3 which governed their relationship. Referring to Clause 3.1 of the Exh.D-3, Dw-1, told the Court that, as one of the agreed terms between SBL and SIKEM, payments were to be made upon delivery of consignment and, that; the Plaintiff was obligated to pay according to the invoices and the Exh.D-3.

Dw-1 did also tell this Court that, after being invoiced SIKEM was to pay with 21 days from the date of an invoice. As for deposits, he stated that, the agreed terms were for 30 days, for specific invoice of it to be settled. He clarified that, if an invoice is not paid within 21 days or 30 days, it becomes overdue. He told this Court, however, that, according to their practice, there would be correspondence from SBL reminding SIKEM to settle the overdue invoices.

Dw-1 testified that, for purposes of maintaining amicable operations with distributors, the Defendant maintains a practice of carrying out reconciliation of books of accounts with her customers/distributors which involves reviewing of documents, orders, delivery documents, sales invoices, outstanding debts etc. Dw-1 tendered in Court minutes of the reconciliation meeting dated 10/10/2013, which was between the Defendant and Plaintiff to reconcile certain disputed invoices. He stated that, under Clause 1.3 of Exh.D-3, the parties could enter into binding agreements. The minutes were admitted as Exh.D-4. He also tendered in Court an email dated 26/3/2013 accompanied

by a signed reconciliation between SIKEM & SBL as at 31/10/2012. The email was admitted as Exh.D5.

Dw-1 denounced the Plaintiff's claims stating that, since 2011 the parties have been carrying out reconciliation of books of accounts covering the year 2011 when the Plaintiff started transacting with the Defendant. He stated, in his testimony in chief, that, in March 2013 he had a meeting with the Plaintiff (Pw-1) to discuss a closing balance for the period from 1st June 2011 to 31st October 2012 and, that, the two parties managed to reach a conclusion that, the Plaintiff's closing balance as at 31st October 2012 after reconciliation was TZS 1,267,354,839.92/= as amount owed by the Plaintiff to the Defendant/Plaintiff in the Counterclaim.

However, when he appeared to tender documents in Court, Dw-1 told this Court that, as of 31st October, 2012 the SBL record showed a total of TZS 1,388,522,846.71 (this being an outstanding balance from 1st June 2011 to 31st October, 2012).

Dw-1 stated further that, from the reconciliation done on 25/3/2013, there were five (5) agreed action points; about 5 invoices for which proof needed to be provided in respect of delivery of those goods to SIKEM. First, it was agreed that, the Defendant was to provide proof of deliveries for the invoices which were outlined in the statement of reconciliation. The references of invoices were:-

(a) Invoice of 18/November 2011 reference DHL Ho-Inv/05 561 total amount of TZS 36,327,998.63.

(b) Invoice date 10/11/2011 with ref. MWZHO- inv/2972 with a value of TZS 31,500,005.60.

(c) the invoice date 26/6/2012 with Ref: DHL-HO Inv/12389 with an amount of TZS. 600,00.02.

(d) Invoice No. 4 dated 10/8/2012 Ref: DHL HO Inv/14250 with amount of TZS 17,970,002.53

(e) The last invoice date 10/8/2012 Ref: DHL-HO Inv/14252 for TZS 17,970,002.53.

That, as second point, the Plaintiff made deposit of TZS 60,000,000/= at end of October 2012 but was posted in the Defendant's customer's Account in November 2012; thirdly, that, the Plaintiff would undergo reconciliation with stockists in Songea, Makambako, Mafinga and Njombe to which direct deliveries were made by the Defendant on the Plaintiff's account; fourthly, that, the Plaintiff made empties' deposits worth TZS 36,000,000/- on 29th November 2011 which ought to be taken into account when doing reconciliation and the empties' invoices be categorized by the Defendant and analyzed in the Statement into empties' transactions. Fifthly, that, the Plaintiff would return the expired products worth TZS 40,195,000/- subject to Defendant's approval.

Dw-1 tendered in Court an email "marked 12" together with annexure to it. These were admitted in Court as Exh.D-6. He clarified to the Court that, the emails (Exh.D-6) were sent to the Plaintiff on 30/9/2013, in relation to 4 invoices which SIKEM wanted proof of deliveries. Dw-1 tendered in Court as well an

email dated 5th of April 2013 whose subject was "SIKEM Invoices Requiring PoDs" (proof of deliveries). The email had one tax invoices as its attachment and both were admitted collectively as Exh.D-7. Dw-1 told this Court that, Exh.D-7 was a follow-up of what was agreed under Exh.D-4 regarding PoDs.

He told the Court that, one of the agreed actions was for SBL to share the proof of deliveries for filed invoices; hence SBL retrieved 3 invoices that is Invoice No. DHL-HO-Inv/5561, and DHL-HO-Inv/14250 and 4251, and, that, since these three proof of deliveries were sent to SIKEM on 05th April 2013 and the attachment accompanied this mail, the Plaintiff never raised any issue in relation to them after the mail sent her, which confirms full closure of the claims.

In his testimony Dw-1, told this Court that, he is aware that, in 2013 both parties had discussions regarding expired stocks. He stated that, the Plaintiff was informed that, such were credited into the account and he tendered in Court an email dated 1st of October 2013 concerning "SIKEM's Expired Products". The same was admitted as Exh.D-8.

Dw-1 told this Court that, Exh.D-8 referred to the reconciliation dated 23/3/2013 (Exh.D-4). He told the Court that, the request was an exceptional one because, SBL sell products which are of high quality and with sufficient shelf life enough to allow their distributors to delete all the stocks before their expiry dates. He told this Court that, any risks and ownership of the product passed to the distributor from SBL at the first day when the goods are delivered and off loaded at the distributor's warehouse.

According to Dw-1, the Plaintiff's requests were considered by the SBL's authorized personnel and the approval was granted to receive the expired stocks which were available, at SIKEM's warehouse and give a credit for the same. He told the Court that, the email of 1st October, 2013, confirmed to the Plaintiff that the expired products which were returned at various dates between March and June 2013 were credited into the Defendant's accounts with specific credit note number (CRN) included in the email, hence, demonstrating a closure of agreed issues on reconciliation on SBL part. To support that fact, he tendered collectively, copies from the company mailing system which were collectively admitted as Exh.D-9.

He also relied on Exh.P-28 to show that the issues complained of by the Plaintiff were closed during the reconciliation exercise of 28th Jan 2015 and signed on 29/1/2015. Dw-1 told this Court that, Exh.P-28 was a reconciliation of SIKEM's account for all the transactions which happened up to the 28/1/2015 from November 2012 with an outcome that an amount equal to TZS 707,157,837.46 was duly accepted as the genuine outstanding amount from SIKEM as of that date.

He also told the Court that, after the reconciliation meeting of 29/1/2015, the Defendant went through her records to assess the disputed amount of TZS 278,945,751.68 which needed some clarifications and proof of additional information. He told this Court that, from the signed reconciliation of 29/1/2015 there were 4 invoices, which SBL needed to provide as proof of deliveries and, that, the debt was to increase to the tune of the

4 invoices. As such, the total debt as a result of that information increased by TZS 168,860,007.60 as of 4/3/2015.

In his later clarifications, Dw-1 clarified that, with that amount, the total debt increased and SBL shared the remaining documentation to the Plaintiff. He stated, however, that, the agreed outstanding amount equal to TZS 707,157,837.46 was meant to be settled by SIKEM without further delay.

Dw-1 stated further that, the Tally reconciliation was signed by both parties on the 23rd March 2013, and this wa a reconciliation which has been admitted as Exhibit D-4 and included all transaction between June 2011 and October 2012, and, that, the agreed balance then became an opening balance into the new system of SAP in November 2012, as SBL used the Tally account system until 31st October, 2012 when it migrated to SAP. He told this Court, therefore, that, by the time the reconciliation was done on 28th January 2015 it included all the transaction in the company's history.

In Court Dw-1 tendered an email dated 30/1/2015 sent to SBL. The subject of it was "SIKEM reconciliation". According to Dw-1, the emails, which were admitted as Exh.D-10 and Exh.D-11, referenced the position of reconciliation which was signed on 29/1/2015 and affirmed that, a debt of TZS 707,157,837.46 was duly accepted by SIKEM as outstanding while the remaining debt of TZS 287,597,752 (which includes both beer and empty) needed to be justified with provisioning of support documents by SBL.

He stated that, Exh.D-11 contains details and proof of deliveries for the four invoices plus invoices which were reversed.

Dw-1 tendered in Court as well an email dated 6/3/2015 and sent to SIKEM regarding the "**outstanding issues in Tally, Transport claims.**" According to Dw-1, the email, which was admitted as Exh.D-12, related to a query raised by the Plaintiff in relation to transport charges for the months of December 2011 to January, 2012, February 2012 and September 2012 which happened when the Defendant was in use of the Tally system and which were not credited into the Plaintiff's account. Dw-1 stated that, SBL referred to a proof from the Tally System with respective credit note numbers confirming that, indeed the transport charges which are also known as rural support incentives were posted to the Plaintiff's account.

He further told this Court that, on 26th February 2015, the parties had a teleconference meeting where it was agreed that the Plaintiff should provide a payment plan on the undisputed TZS 709,000,000/= failure of which the Defendant would recall the Bank Guarantee, and, that, the Defendant should answer to some queries by the Plaintiff regarding the Tally System. He tendered in Court an email dated 09/10/2015 and the same admitted as Exh.D-13.

Dw-1 clarified that, the Exh.D-13 refers to the discussion about the reconciliation and settlement of the existing debt. He pointed out to an email sent on 28/2/2015 by one, Lumuli Msika addressed to Simon MD of SIKEM referencing a teleconference meeting which happened on 26/2/2015 which was attended by both parties and, in which, one of the agreed action was for SIKEM to give a payment plan in respect of the undisputed

amount of TZS 707,157,837.46 by 6.00pm of the next Monday, failure of which SBL was to recall the Bank guarantee.

It was the testimony of Dw-1 that, the Bank Guarantee was to expire on June 30th 2015 and, thus, out of the claim of TZS 707,157,837.46/=, TZS 600,000,000/- was recovered through liquidating the Bank Guarantee leaving an outstanding balance of TZS 107,157,837/= and, that, together with the debt amounting to TZS 168,860,007.60, the Defendant was able to prove after the reconciliation meeting to date the total outstanding balance was TZS 276,017,844/=.

Dw-1 tendered in Court as well a document termed "Summary-5" and this was admitted as Exh.D-14. He told this Court that, Exh.D-14 shows that, by the time when the parties' relationship was not active, there was an outstanding balance to the tune of TZS 331,000,000. He stated that, a decision to recall the Bank guarantee was made after the Plaintiff failed to provide a payment plan. He tendered in Court, as well, a letter dated 11th June 2015 addressed to SIKEM with a reference of outstanding debt to SBL. The letter was admitted as Exh.D.15. He stated that, the letter reiterated the unpaid total debt as of the date of the letter which was TZS 920,400,683.03.

Besides, Dw-1 stated that, Exh.D.15 also reminds SIKEM that SBL is left with only one option of recalling the bank guarantee to the tune of TZS 600,000,000 leaving an outstanding amount of TZS 320,000,000 which SBL was open to discuss a repayment plan. He insisted that, the bank guarantee was properly recalled since the outstanding amount was overdue and unpaid. He stated in his testimony as well, that, due to the

Plaintiff's acts and omissions which amounts to breach of Exh.D-3 (the GCS), the Defendant has incurred huge losses and distress as her business is dependent on timely payments.

In view of the above, Dw-1 urged this Court to dismiss the Plaintiff's claim and declare that the Plaintiff/Defendant in the counterclaim is in breach of the GCS (Exh.D-3) and order the Plaintiff/ Defendant in the counterclaim to pay the Defendant (Plaintiff in the Counterclaim) TZS 276,017,844/- being specific damages, interest at commercial rate of 25%, interest on the dectretal amount, general damages and costs of this suit.

Dw-1 raised doubts as regards the accuracy of the Plaintiff's claims pointed out in Exh.P-34 stating that, Exh.P-34 is fraught with discrepancies as it was unilaterally prepared, was not in accordance with accounting principles, has contradictions, including items which are duplication or not backed by transactions between SBL and SIKEM.

He pointed out one such discrepancies as being the interest generated from bank guarantee amounting to TZS 456,000,000 and again from bank guarantee of TZS 600,000,000/= stating, that, it must surely must be in relation to an unpaid debt. He stated that, all incentive that SIKEM qualified to receive were posted in his account as evidenced by Exh.D-14. He maintained, therefore, that, an invoice cannot be posted twice.

During cross-examined, Dw-1 admitted *inter alia* that, Exh. P-7 was authored by SBL as a normal agreement with SBL distributors and was sent to SIKEM for review of its terms and all the details intended and sign it once satisfied with the terms. He

also admitted that, once signed it was to be returned to SBL for record keeping. He also admitted that, a bank guarantee is a requirement for any distributor to trade on credit basis with the Defendant.

At the end of cross-examination and re-examination of Dw-1, the case for the Defence side was brought to an end and the parties prayed to be allowed to file written submissions. They duly filed their submission and, in the course of addressing the relevant agreed issues, I will take them into account as well.

Before I embark on the issues, let me state, however, that, as a matter of principle, the burden of proving each allegation rest on the Plaintiff and must be discharged on the balance of probability. In this case, four issues were agreed and the first one was:

> 'What were the terms governing the business relationship between the Plaintiff and the Defendant and whether the terms were breached by the Plaintiff or the Defendant'?

In this case, there are two versions of the story regarding the applicable terms governing the parties' relationship. Whereas Pw-1 stated that the governing terms and conditions were those contained in Exh.P-7, Dw-1 stated that, Exh.P-7 was not binding and the relations were governed by the SLB's General Conditions of Sales (GCS) (Exh.D-3). From those two conflicting statements, which one is correct?

In the case of **Louis Dreyfuls Commodities Tanzania Ltd vs. Roko Investment Tanzania Ltd**, Civil Appeal No.4 of

2013 (unreported), the Court of Appeal discussed the general principle about contract, and succinctly stated that, such will arise where one party makes an offer or proposal and the other party accepts it to procure what in law is referred to as *consensus ad idem*. The Court made it clear that, a contract need not necessarily be signed by both parties in order to bind them. On the contrary, a contract may even, be inferred from the conduct of the parties.

See also the Case of **Zanzibar Telecom Ltd vs. Petrofuel Tanzania Ltd**, Civil Appeal No.69 of 2014 (Unreported) and **IBM Tanzania Limited vs. Sunheralex Consulting Co. Limited**, Commercial Case No.9 of 2020, DSM Registry, (Unreported),

With such understanding, it clear in this present case at hand, that, taking into account what Exh.P-1, Exh.P-2 and Exh.P-3, Exh.P4, Exh.P-5 and Exh.P-6, (all of which deal with the preparatory stages for the signing of Exh.P-7) and; taking into account Pw-1's testimony that the Defendant sent Exh.P-7 to the Plaintiff for signing and return to the former, (a fact which also seem to be a subject of discussion in Exh.P6), a deal was indeed struck between the parties, that intent being their intention all along.

In Exh.P4, for instance, the parties discussed the obligations of the Plaintiff as the Key Distributor and the investments needed prior to the commencement of the operations. One of the requirements was a bank guarantee worth 300 million to cover 14 days credit of 450 million. An annexed schedule forming part of Exh.P4, however, took into

account that initial guarantee and shows that the Plaintiff was to provide a bank guarantee of TZS 600,000,000/ in total and deposition TZS 231 Million in the collection account before 1st July 2011. Exh.P5 does confirm that, the requisite Bank guarantee was secured for TZS 600,000,000/-. Exh.P-6 which is a series of email exchanges between Abu Asana, and Alan Jackson does indicate that Exh.P-7 was signed by the Defendant.

In view of the above, it is clear to me that, as per the testimony of Pw-1, having signed Exh.P-7, the Plaintiff returned it to the Defendant for the latter to sign it, and that view is also supported by Dw-1's testimony while being cross-examined. Moreover, there is a support from the undeniable fact that, the Plaintiff was granted a Bank Guarantee by the CRDB. The existing evidence in the form of Exh.P-4, Exh.P-5 and Exh.P-19, is all sufficient to further support the validity of the fact that, Exh.P-7 was concluded as between the parties. The bank guarantee, as stated by Dw-1, was one of the pre-requisites for all distributors appointed by the Defendant, and, in no way could the CRDB issue Exh.P-5 if the Defendant did not send Exh.P-7 to the Bank.

There is a clear indication, therefore, that, Exh.P-7 was signed by the Defendant after it was sent to her by the Plaintiff and later availed to the CRDB who granted a bank guarantee to the Plaintiff and the rolling on of the Plaintiff's distributorship business with the Defendant. If it were not so, how possible that the Defendant was able to recall a bank guarantee if she did not have any issue with it? As it may be gathered from paragraph 2 of Exh.P-19, its purpose was "to provide Bank Guarantees to

Serengeti Breweries Ltd as **per Key Distributorship Agreement signed with the Borrower**".

In the case of **British America Tobacco Kenya Ltd vs. Mohan's Oyesterbay Drinks Ltd**, Civil Appeal No.209 of 2019 the Court of Appeal stated as follows:

> "We are settled that ours is a duty of construction of the parties' conduct and whether they amounted to conclusion of a contract. It is not an easy task as Cheshire, Law of Contract, 11th Edition, 1986, writes at pages 36to 37: "*Whatever the difficulties, however elastic their rules, judges must either upon oral evidence or by* the *construction of documents; find some form which can infer the offeree's intention to accept or they must refuse to admit the existence of an agreement. The intention, moreover, must be conclusive.*"

In view of the above, and, taking the whole circumstances under which Exh.P-7 was made as well as the testimony of Pw-1 and the admissions by Dw-1, I harbour no scintilla of doubt in my mind, that, Exh.P-7 validly constituted a binding agreement between the parties, and, hence, its terms were the ones governing the parties' relations and not the General Conditions of Sales contained in Exh.D-3 or anywhere else as the Defendant wants this Court to believe, not even in Exh.P-21.

With that in mind, it follows; therefore, that, all submissions by the Defendant counsel that, the governing document was Exh.D-3 are devoid of merits. Moreover, as demonstrated in the various decisions of the Court of Appeal cited herein above, even if one was to believe that Exh.P-7 was signed by only the Plaintiff, a fact which based on Exh.P-6 stands to be incorrect, still that would not have changed the position because the mere fact that an agreement was not signed by both parties does not necessarily make it non-binding.

Having stated so, the next part of the first issue which needs to be looked at is: what were the terms of Exh.P-7 and whether there was any breach of such terms by any of the parties herein. The answer to the first part is to be found in Exh.P-7 which provides for, among others, how appointment of a distributor was to be made, (Clause 2), what were the undertakings of the Plaintiff (SIKEM) (see Clause 3), what are the obligations of the Defendant (SBL) (Clause 4); how transport refunds were to be made where the Plaintiff uses her own means of transport (see Clause 6), how return of products or empties (crates) was to be effected (Clause 7) and how pricing and payments were to be effected (see Clause 8).

According to Clause 3 (a) distribution was only to be done in the agreed territory. The territory covered by Exh.P-7 was set out in the 2nd Schedule to it. It included Mbeya, Tunduma, Ludewa, Mbinga, Sumbawanga, Makambako, Mpanda, Songea, Kyela, Iringa,Njombe, Chunya and Mafinga. However, as per Exh.P-9, there is no doubt that in 2013 the Defendant re-defined Territory for distribution of SBL products. It is clear that Exh.P-7

did not have a clause granting the Defendant sole power to re-define the territory assigned to the Plaintiff.

Undoubtedly, I do agree with the Plaintiff's counsel's submission that, this conduct on the part of the Defendant amounted to a breach of Schedule 2 of Exh.P-7, and, had a financial implication on the part of the Plaintiff as well. In fact, nowhere was it demonstrated in evidence that the Plaintiff had been unable to meet her targets within her excusive area of distribution. Instead, Pw-1 told this Court that, the Plaintiff used to meet her targets and used to be paid incentives.

Another conduct which raises concern on the part of the Defendant is observed in respect of Exh.P-10 and Exh.P-11. Under Exh.P-10, it is clear that one, Mr. Avinash Maggirawar, an SBL employee, instructed the Plaintiff to **"give credit to Yasmin (a customer (stockist) in Kyela) of TZS 250 per crate and do the needful"**. The above fact needs to be read together with paragraph 3 (a) of Exh.P-30, where the Defendant does admit to have introduced the Plaintiff to various stockists to facilitate expansion of the latter's business.

In my view, such purported business expansion was not for the sole benefit of the Plaintiff but was rather beneficial to the Defendant as well. In whatever situation that may be, perhaps one question to ask is: **what were the implications of such instructions given by the Defendant to the Plaintiff, as evidenced by Exh.P10?**

According to Clause 9.1 of the Exh.P-7, the risk in the products passes to the Plaintiff upon delivery of a consignment to the Plaintiff's warehouse. The stock which was to be supplied

on credit as per the instructions in Exh.P-10 had already been in the Plaintiff's warehouse, meaning that, the instruction was issue in breach of Clause 9.1 and in event of default in payment; it is the Plaintiff who bears the burden of loss. Exh.P-11 does indicate, as well, how the Defendant was putting pressure on the Plaintiff to supply products to various other customers so as to increase the Defendant's sales, including instructions to hire trucks from: "**wherever it is necessary, without waiting for his own to come back.**"

In essence, and, as rightly submitted by Mr Ngudungi, the reasons given by the Defendant in support of the instructions or directives contained in Exh.P-10 and Exh.P-11 were in total disregard of Clause 9.1 of Exh.P-7 and had in turn the effect of pushing up the Plaintiff's debt liability. These were, hence, in contravention of the terms and conditions detailed in Exh.P-7.

It is also clear from Exh.P-12, Exh.P-15, Exh.P-16, Exh.P-17 and Exh.P-18, that, the Defendant's Staff used to take goods from the Plaintiff's warehouse on credit and supply them to the Defendant's Stockiest. That was in fact the testimony, Pw-1 testified and, as per Exh.P18, the SBL employees did signed Exh.P-18 acknowledging to be indebted to about **TZS 209,418,000.00**. Likewise, as Exh.P-12 indicates, there was a clear written admission by one of the Defendant's Staff, that, there was a no-payment of such debt, meaning that, the debt liabilities remained with the Plaintiff.

As clarified by Pw-1, these unsettled debts by the Defendant's staff, arose of out promotional activities used to be carried out by SBL's Staff, but using the Plaintiff's products

obtained from her warehouse but instead of remitting the proceeds of sale to the Plaintiff, so that the Plaintiff can deposit such amount in the Defendant's account, the respective Defendant's Staff never did that. As a result, all default payments became a liability on the part of the Plaintiff and remained as a debt in the Plaintiff's ledger account to date.

Unfortunately, the conducts by the Defendant's Staff, which must be squarely attributed to the Defendant, owing to the fact that the promotional activities were for her benefit and done by her own staff who seems to have usurped the roles of the distributor, were, however, done contrary to Clause 3.1(a), (b) and (k) of Exh.P-7 which had given the product promotion, supply coverage in the territory duty exclusively to the Plaintiff who would deposit the amounts into the Defendant's Collection Account.

Admittedly, it is settled law, as once stated in the case of **Vitus Lyamkuyu vs. Imalaseko Investment**, Civil Case No.169 of 2013 (unreported) (and citing the cases of **Nakana Trading Co. Limited vs. Coffee Marketing Board** [1990 - 1994] 1 EA 448 and **Legend Aviation (Pty) Limited t/a King Shaka Aviation vs. Whirlwind Aviation Limited**, Commercial Case No. 61 of 2013 High Court Commercial Division (unreported), that:

> "A breach occurs in contract when **one or both** parties fail to fulfil the obligations imposed by the terms....."

In this instant case, it is clear to me that, the losses suffered if any and the claims made by the Defendant against the Plaintiff, arose out of the Defendant Staff's conducts, and, as

such, being contributed by the Defendant who had all the powers to stop them from happening, cannot be shouldered by the Plaintiff alone. In fact, if the Defendant holds that the Plaintiff had failed to remit to the Defendant's account any amount arising from the sales she made and hence the claims against the Plaintiff, and, hence, raising a debt against the Plaintiff, the same was contributed by the Defendant' Staff (and, hence, the Defendant herself) since, it is the Defendant who had control of her own staff, should be the one to blame.

Indeed, in any case, as this Court stated in the case of **Chinese-Tanzania Joint Shipping Line (Sinotaship) vs. Karaka Enterprises Ltd**, Commercial Case No.140 of 2019 (unreported), which holding I find to be of relevance to the existing facts herein:

> "an affected party cannot recover damages for any loss (whether caused by a breach of contract or breach of duty) which could have been avoided by taking reasonable steps."

What the above principle tells me in regard to this instant case, is that, the Defendant had a duty to reign over her own staff and ensure that they remit all the monies they collected from the promotional activities sanctioned by the Defendant to the Plaintiff, who would have, in turn deposited them into the Defendant's account and, in doing so, the Plaintiff's debt in the Defendant's account if any, would have been lessened or cleared.

The contrary is; therefore, true, that, the Defendant's involvement, through her own Staff, in creating the loss on the

part of the Plaintiff disqualifies her from claiming anything from the Plaintiff, taking into account the breaches evidenced by Exh.P12, Exh.P.15, Exh.P16, Exh.P17 and Exh.P.18 as demonstrated here above.

I also tend to agree with the Plaintiff's counsel's submission that, the conduct of the SBL Staff was as well in breach of Clause 9.1 and 9.2 of Exh.P7 because; the title to the respective goods taken by the SBL's Staff had already passed to the Plaintiff. It means, therefore, that, since the Defendant's staff interfered with the duties of the Plaintiff under the terms and conditions under Exh.P-7, the Defendant has to shoulder any liability arising from such interferences or conduct of her own staff.

In his testimony, and as per Exh.P-13 and Exh.P-14, Pw-1 did also raise the issue of refund of value of expired stock which were in the Plaintiff's warehouse, a claim rejected by the Defendant. In my view, the Defendant's rejection of such a claim is unjustified. As evidenced by Exh.P-14, the email dated 11th March 2013 from one Lumuli Msika to Musyangi Kajeri, it does indicate that, a consignment supplied to the Plaintiff had a mix of expired stocks, near expiry stocks and fresh stocks. It was also noted that, it was not the first time such an incident was noted.

In my view and, as per Clause 7.1 of Exh.P-7, such expiry or near expiry stocks were returnable to the Defendant provided the bottles and crates were in good conditions. The Defendant's refusal to refund, does, therefore, amount to a flagrant breach of that clause 7.1, since such goods were supplied to the Plaintiff by the Defendant in such a state, and does so acknowledge in Exh.P-13 and Exh.P-14.

In the Defendant Counsel's submission, it has been sated that, the Plaintiff was in breach, not of Exh.P-7, but of the General Conditions of Sales and the Sale Invoices and other agreed aspects. Well, in the first place, and, as I stated herein, the document governing the parties' relations was Exh.P-7 and not Exh.D-3. For that reason, any argument premised on Exh.D-3 is misplaced. The Defendant has as well relied on Exh.P-20 and Exh.P-21. However, these documents cannot be relied upon since non-of the parties endorsed them.

In fact, Pw-1 was categorical that, the Plaintiff rejected them since it was not a replica of what was earlier agreed on (Exh.P-7) but was a new invention altogether as it contained the so-called General Conditions which were not part of Exh.P-7. Moreover, Exh.P-21 was brought to the scene in the fourth year of trading relations between the parties which had continued even after the expiry of Exh.P-7, since, as par Clause 10, its term was for a one year.

Legally speaking, since the parties continued to trade even after the lapse of the one year term as there was no notice of renewal or termination, the legal position would be established by looking at what the parties have said and done about extending the contract; and the extent to which their behaviour is consistent with the terms of the old contract.

For instance, in a first instance Scottish Court's case of SJD Group Ltd vs. KJM (Scotland) Ltd [2010], the Court made a finding that, in a situation where parties continued to do business even after the expiry of the contract, a reasonable detached observer would almost inevitably have assumed, from

their behaviour and in the absence of discussions, that the parties were continuing to do business, so far as possible, on the terms of their expired contract.

In essence, therefore, where the parties continue to carry on business in a manner consistent with the terms of the original expired contract; their conduct will support an argument that the terms of that Contract was still dictating their relationship. That is, in my view, what happened in respect of the case at hand, and, if one takes into account Clause 10.1 of Exh.P-7 and, pursuant to Section 5 of the Sales of Goods Act Cap.214, a contract of sale may also be implied from the conduct of parties.

On the other hand, it is also worth noting principally and in relation to the argument advanced by the Defendant regarding the applicability of Exh.D-3, that, although the last column in invoices in Exh.P-34 provides that: **"SBL General Conditions of Sale will apply"**, the same does provide an exception which says: **"unless otherwise agreed with SBL."** This last underlined phraseology, solidifies the view taken earlier by this Court which was to the effect that, having agreed on the basis of Exh.P-7, the parties were trading on the basis of Exh.P-7 and not on the basis of Exh.D-3 or Exh.P-21 which seem to embrace the so-called General Conditions of Sale.

Consequently, even if the invoices attached to Exh.D-6 or Exh.D-11 does refer to the SBL's "General Terms and Conditions" that fact does not remove from the scene the applicability of Exh.P-7 as the binding basic document upon which the Parties anchored their trading relations and the terms and conditions thereto are the ones that applied to the parties' transactions.

In view of the above, much as Dw-1 told this Court that, the Plaintiff failed to pay her debts to the Defendant within the agreed period and that, the terms between SBL and SIKEM were that, payments should be with 21 days for the sales of beer once invoiced and for deposits the agreed terms 30 days, i.e., a specific invoice of it has to be settled, the Defendant's claims that the Plaintiff failed to pay within the specified time are to be gauged within the lenses of Exh.P-7 and not Exh.D-3.

In his testimony, Pw-1 did admit, and indeed as per Exh.P-7, that, the credit period was 14 days and even more. Exhibit P-7 clause 8 (4) says the distributor should pay full amount invoiced within 14 days into the collective account. Clause 8.5 of Exh.P-7 did provide that, the Plaintiff may not withhold any amount, due to whatever deductions which were to be made from it in her favour. He testified, however, that, although the first reconciliation had established a debt of TZS 707,157,837.46, the parties did not complete the reconciliation exercise owing to the fact that, the statements in Tally System for the years 2011 and 2012 were not dealt with.

As shown in Exh.P-29, the Plaintiff had demanded a reconciliation of TZS 1,359,887,578.68. Paragraph 10 of Exh.P-29 itemised the areas that needed reconciliation from the Plaintiff's point of view. In her response to Exh.P-29, which is contained in Exh.P-30, the Defendant refused to carry out a reconciliation banking on the Exh.P28 which, as Pw-1 stated, was still inconclusive and, as Exh.P-30 suggests in para.6, that, the parties had: **"agreed that new challenges raised by SIKEM in respect of the period of 2011 to 2012 would be**

responded to by SBL in the week commencing Monday 2nd March (presumably 2015))".

However, by the time Exh.P-30 was being written, it was already March 18th 2015 and the Exh.P-29 was dated 2nd March 2015 calling upon the parties to clear up their differences. Perhaps one may pose to ask: **Was it proper for the Defendant to refuse the Plaintiff's plea for reconciliation?**

In essence, transparency among business partners is the key in building trust. On the other hand, trust is considered to be the social glue that holds business relationship together. In his submission, the Plaintiff's counsel has contended that, given the underlying circumstances in this case, it was difficult to determine with certainty as to whether the customer ledger payments recorded all payments made by the Plaintiff so as to justify the claims made against the Plaintiff.

By itself, since the parties had a business relationship since 2011 and, given that after the first reconciliation (Exh.P-28) the Plaintiff was made to believe that the transactions based on the Tally System for 2011 and 2012 were partially reconciled, and further, given that, there was a total of 9197 crates which were in need of clarification and TZS 278,945,751.68 which were still disputed, it was inappropriate on the part of the Defendant, to refuse to hold or continue with the proposed reconciliation exercise and press on with a demand for payment of the TZS 707,157,837.46 which, on the basis of what Exh.P-29 suggested, it was the Plaintiff who ought to have claimed from the Defendant.

As categorically stated by Pw-1, the parties had embarked on reconciliation because the Plaintiff was concerned that her debt was swelling while she used to pay to the Defendant within 14 to 21days of being supplied with a consignment and the Defendant was supposed to deduct the debt after each payment.

In view of the foregoing, and, taking into account the fact that the Plaintiff had no means whatsoever of accessing the Defendant's accounting system, I tend to be in agreement with Mr Ngudungi, the learned counsel for the Plaintiff, that, Exh.D-14 which the Defendant seems to be heavily relying on, would be of little or no relevance. It would have been of relevancy if the same was either disclosed to the Plaintiff previously during the reconciliation exercise or if the Defendant had agreed to the Plaintiff's proposed second reconciliation. If it had any decisive features, that could have been disclosed to the Plaintiff on such an occasion and the dusts would have been amicably settled for good.

The dark side of all this, however, was that, while the Defendant's claims seem to be based on Exh.D-14, that exhibit D-14 was, firstly, unknown to the Plaintiff, secondly, the Plaintiff had no access to the account ledgers kept by the Defendant, thirdly, the Plaintiff's plea for second reconciliation on the basis of what he disclosed on Exh.P-29 was rejected by the Defendant and, fourthly, the amount claimed as per Exh.D-14 stands at variance with what the Defendant claimed in her counter claim.

In view of all such shortcomings, no one could have been pretty sure to tell exactly how much or to the extent was the Plaintiff in arrears or whether what the Defendant claimed form

the Plaintiff was justified given that their transactional accounts were not conclusively reconciled.

In my humble view, therefore, the Plaintiff's demand for a second reconciliation was a justified demand and its refusal entitles any reasonable person to drawn an inference that, the Defendant knew or believed that the Plaintiff's demands were genuine. The Plaintiff cannot, therefore, be at fault having availed herself to the Defendant seeking for a conclusive reconciliation of their business undertakings. Had that been done, claims regarding transport refunds, empty bottles and crates returned but not debited in the client's account, unpaid incentives, refund based on expired stocks and breakages, refund of loading and off-loading expenses would have been properly addressed since they all find anchorage on the terms embodied in Exh.P-7.

From the totality of the foregone discussion, therefore, it is the finding of this Court that, the first issue is to the effect that, the terms governing the parties' relationship were the terms contained in Exh.P-7. In other words, it was Exh.P-7 which governed the relationship between the Plaintiff and the Defendant and, based on the evidence as analysed herein above, the Defendant was in breach of the terms of the agreement (Exh.P-7).

Besides, and as regards the Defendant's claims against, the Plaintiff, since Exh.P-7 was the governing document and not Exh.D-3, given the evidence adduced and its analysis done herein above, in no way can the Defendant hold the Plaintiff liable for breach on the latter's part. That position taken by this

Court flows from the fact, as I earlier stated herein, that, in one way or the other, taking into account the Defendant's conduct as evidenced by Exh.P-12, Exh.P-15, Exh.P-16, Exh.P-17 and Exh.P-18, and which were in breach of Exh.P-7, the Defendant's involvement through her own Staff in creating the loss on the part of the Plaintiff disqualifies her from claiming against the Plaintiff.

Having settled the stormy dust arising from the first issue, let me proceed to the second issue, which is:

> Whether the Defendant's act of recalling the bank guarantee was appropriate.

There is no doubt the parties herein operated their business affairs on credit basis and, in that regard, having a reconciliation of the transactions as understood by each of them was necessary. As I stated earlier herein, although the parties carried out a reconciliation as evidenced by Exh.P-28, it is clear, in their pretty acknowledgment as may be observed in their correspondences (see Exh.P-29 and P-30 earlier discussed here above), that, Exh.P-28 had left some matters un-resolved.

According to Exh.P-28, it was clearly an agreed position by the two parties that, a total of TZS 278,945,751.68 was disputed and in need of confirmation and there were a total of 9197 "cases" in need of clarification. Exh.P-28 was also very categorical. In note 1 thereon it is clearly stated as follows:

> "Today 28th January 2015, we have reviewed all entries in SAP Dr and Credit- the above is the findings (sic) whereby no

> dispute on the sum of 707,157,837.46 and 278,945,751.68 has been disputed requires confirmation." (Emphasis added).

As it may be seen from the above quoted words from Exh.P-28, what the parties dealt with in their reconciliation exercise was entries in the SAP Dr and Credit but, as it was agreed by Pw-1 and Dw-1, the Defendant operated two accounting systems, SAP and TALLY. As Exh.P-28 says, the Tally System was not involved.

In fact, according to Pw-1, the Tally entries for 2011 and 2012 were not reconciled. Exh.P-35 and Exh.D-13 (Teleconference) regarding promised access to the Tally System for 2011-2012 transactions and Exh.P-30 page 2, items 6-8 did also affirm to that. Those facts mean, therefore, that, the TZS 707,157,837.46 were only confined to SAP entries and, for that matter, conclusive in respect of that system alone. Exh.P-28, therefore, was not a conclusive or all encompassing reconciliation which would have established the true accounting state of affair of the parties.

From the above proposition, therefore, *was it appropriate on the part of the Defendant to recall the bank guarantee on the ground that the Plaintiff was in default?* In his submissions, the Plaintiff has contended that it was not proper. On the other hand, the Defendant has maintained a stance, based on Exh.P-4, Exh.P-7 (which she has as well rejected as binding), Exh.D-11 and Dw-1's testimony, insisting that, the Plaintiff failed to adhere to the 14 days payment period and never provided a payment

plan. The Defendant's submission was also pegged on Clause 8.5 of Exh.P-7 to the effect that, no defence of set-off was allowed.

I have looked at Exh.P-19, Exh.P-29, Exh.P-30, Exh.P-31, Exh.P-35, Exh.D-13 and Exh.D-15. In the first place, let me state that, it was erroneous on the part of the Defendant to hold (as Exh.D-15 shows), that the Bank Guarantee issued by CRDB to SBL was to expire on the 30th June 2015 if one reads what Exh.P-19 provides. The fact was that, the guarantee was to expire in August 2015 and not June.

Secondly, and, be that as it may, I am of the view, and, I tend to agree with the Plaintiff's submission, that, it was too early to have concluded that the Plaintiff had defaulted in payment, while the parties had agreed that there was still a need for carrying out a reconciliation exercise for the Tally transactions, and had not come into a conclusive position as I demonstrated earlier here above.

Thirdly, the issue of set-off raised by the Defendant's counsel in his submission was not the Plaintiff's first line of demands. The crux of what the Plaintiff was looking for was a conclusive reconciliation of all accounting systems to establish the true position of the debt which each party owed to the other. Once established, there is no doubt that a set-off would have been automatically triggered since the parties were still in business relations which, as Pw-1 testified, continued even after the first reconciliation.

Moreover, it is indeed clear to me, that, had the second reconciliation taken place taking into account what the Plaintiff raised in Exh.P-29, and had it been found to be correct, then if a

deduction of TZS 707,157,837.46 (as per Exh.P-28) would have been done from TZS 1,359,887,578.68 (as per Exh.P-29), the simple conclusion would have been that, a total TZS 652,729,741.22 would have been credit on the part of the Plaintiff. However, it was the Defendant who declined to carry out the second reconciliation in breach of her earlier position.

It follows, therefore, in the absence of a final conclusive reconciliation, which in fact was anticipated by both parties as demonstrated herein above, the Defendant was not justified to abruptly and onerously stop supplying stocks to the Plaintiff or recall the bank guarantee (Exh.P-19) as evidenced by Exh.P-33 thereby exposing the Plaintiff to a state of indebtedness to her bankers, a fact which contributed to the frustration and total derailment of the Plaintiff's business. All such were, in fact, acts done in breach of the earlier contract between the parties and totally unwarranted or uncalled for. That settles the second issue without further ado.

The third issue is: who among the parties is indebted to the other. The response to the third issue does depend on how the two earlier issues worked out. In the first issue, it was made clear that, several of the Defendant's conduct were unjustified and constituted a breach of Exh.P-7. As I stated herein earlier, taking into account the Defendant's conduct as evidenced by Exh.P-12, Exh.P-15, Exh.P-16, Exh.P-17 and Exh.P-18, and which constituted breach of Exh.P-7, the Defendant had disqualified herself from claiming against the Plaintiff.

By such a finding it means, that, the counter claim stands to be unjustified in the circumstance. Moreover, by all degrees of

fairness, the Defendant must bear the brunt for having acted in a manner that was in breach of the parties' agreement and agreed positions. Besides, and, as this Court pointed out here above, it is clear that, since it was the Defendant who refused to embark on the agreed path of reconciliation.

As demonstrated earlier here above, reconciliation would have addressed the issues of double posted invoices, transport refunds, empty bottles and crates returned but not debited in the client's account, unpaid incentives, refund based on expired stocks and breakages, refund of loading and off-loading expenses, rentals for safe keeping of empty crates, *etc.* all of which amounting to TZS 1,191,566,812.36. Pw-1 has relied on Exh.P34 and Exh.D1 to establish such claims.

In his submission, the learned counsel for the Defendant has challenged the reliability of Exh.P-34. In essence, an evidentiary reliability is all about trustworthiness. In his submission Mr Mkumbukwa has submitted that, since Pw-1 was not the person who prepared it then it cannot be relied on. In my view, however, I find that Exh.P-34 is a reliable document and, minor errors such as the period from June 2011 to March 2015 being regarded as totalling seventeen months are too trivial to affect reliability of it. As it is often stated, the law does not concern itself with trivial issues.

Moreover, I am also of the view that, Pw-1 was entitled to speak about it because, apart from having produced it, he also had knowledge of it. It means, therefore, that, it is not necessarily correct that, it is only those whom Pw-1 assigned the

audit work who should have testified and tender Exh.P-34 in Court or to speak about it.

As it was stated in the case of **DPP vs. Mirzai Pirbakhishi @Hadji and 3 Others**, Criminal Appeal No.493 of 2016, CAT, DSM (Unreported), the Court of Appeal stated, among other things, that:

> "a possessor or a custodian or actual owner or like are legally capable of tendering the intended exhibits in question provided he has knowledge of the thing in question."

As I stated here above, the Plaintiff was not ignorant of Exh.P-34 but had knowledge about it. Moreover, whatever was raised in Exh.P-34 was raised because the Defendant had reneged from the earlier agreed position which was to the effect that the parties were to embark on reconciliation since, as per Exh.P-28, Exh.P-30 page 2, items 6-8 and Exh.D-13/Exh.P-35, there was an agreement that the earlier reconciliation (as per Exh.P-28) was not final or conclusive.

In essence, as I demonstrated herein above, Exh.P-28 was only in relation to the SAP Dr and Credit and, that, at a later stage by 2nd March 2015, the parties were to address the remaining issues including the transactions in the Tally Accounting System for the year 2011-2012, a thing which never happened due to the Defendant's refusal. As such, the Defendant cannot question Exh.P-34 as being a unilateral product while it was the same Defendant who refused the bilateral approach which was earlier agreed upon by the two parties.

And, if I may be allowed to add, as I stated herein, above, the Defendant's refusal while there was that agreed position, entitles one to draw a negative inference that, either she knew that what the Plaintiff had raised in Exh.P-29 was correct or did not want to have it fully established. The Defendant's submissions which were meant to tear apart Exh.P-34, therefore, are of no good point in light of her own decision to reject the bilateral conciliatory approach earlier agreed by the parties.

It is also my considered view that, since it was the Defendant who, as well, embarked on an unjustified and premature withdrawal of the bank guarantee and, hence, exposing the Plaintiff to uncalled for liabilities to the tune of TZS 600,000,000/- plus interest of TZS 456,000,000, (equal to a total of TZS 1,056,000,000/=), including total derailment of the Plaintiff's business, fairness and justice would demand that the Defendant equally shoulder the liability of paying the Plaintiff for losses she has so far suffered because I am satisfied that the Plaintiff has proved her claims for specific damages and has ably established her case on the preponderance of probabilities. It follows, therefore, that, it is the Defendant who stands indebted to the Plaintiff and not otherwise.

The final issue is: to what reliefs are the parties entitled. In my view, since the Plaintiff has been able to discharge her burden of proof to the requisite standard which is on the balance of probability, it is clear that she is entitled to reliefs sought.

On the other hand, and as I stated herein above, the Defendant has not been able to discharge her burden of establishing that the Plaintiff was in breach or indebted to the

Defendant to the tune of TZS 276,017,844/= owing to the fact that, it was the Defendant's conduct of refusal to carry out the second conclusive reconciliation which would have sorted out all claims and establish the true state of affairs of the two parties.

The failure or refusal on the part of the Defendant, therefore, made it impossible to establish the true debt which the Plaintiff owes to the Defendant.

In principle, it is my view that, the demand for second reconciliation was a relevant fact which, under section 9 of the Evidence Act, Cap.6 R.E 2019, would have established the state of things under which the Defendant's or the Plaintiff's claims occurred. Moreover, as I stated herein earlier, the Defendant's conducts contributed to the Plaintiff's difficulties and, as such, the Defendant cannot shoulder the Plaintiff any liability for any debt of loss for which the Defendant could have avoided. By and large, the counter claim will fall and I herby dismiss it in its entirety and with costs.

From the foregone discussion and the reasons disclosed herein generally, this Court grants judgment and decree in favour of the Plaintiff and dismisses the counter claim in its entirety. In the upshot of all that, this Court settles for the following orders:

(i) That, the Defendant is hereby found to be in breach of the contractual terms between herself and the Plaintiff.

(ii) That, the Defendant is hereby ordered to pay the Plaintiff a total of TZS 1,191,566,812.36 being specific damages suffered by the Plaintiff.

(iii) That, the Defendant is hereby ordered to pay the Plaintiff a total of TZS 1,056,000,000/= being specific damages suffered by the Plaintiff in terms of the recalled bank guarantee, plus its accrued penal interest.

(iv) That, the Defendant is hereby ordered to pay the Plaintiff a total of TZS 2,244,320,315.55 being accrued interest before the filing of this suit.

(v) That, the Defendant is hereby ordered to pay the Plaintiff Interest on the outstanding sum at the commercial rate of 14% per annum from the date of filing the suit until judgement.

(vi) That, taking into account the whole evidence which has established the breach of contract on the part of the Defendant, and, considering the inconveniences suffered by the Plaintiff following the unwarranted recall of the bank guarantee, the Defendant is hereby ordered to pay the Plaintiff a total of TZS 200,000,000/- as general damages for breach of contract and Plaintiff's suffering arising out of the Defendant's acts.

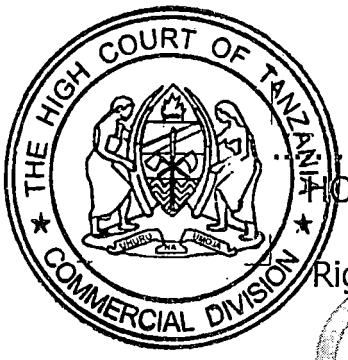
(vii) That, the Defendant is hereby ordered to pay the Plaintiff interest on the decretal amount at the Court's rate of 7% from the date of judgement until full payment.

(viii) That, the Counterclaim by the Defendant fails and is hereby dismissed in its entirety.

(ix) That, the Defendant is liable to pay costs of this suit and the counter claim.

It is so ordered

DATED AT DAR-ES-SALAAM, ON THIS 11TH DAY OF JULY 2022



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HON. DEO JOHN NANGELA

JUDGE

Right of Appeal Explained.