IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 126 OF 2022

BETWEEN

ALLIANCE INSURANCE CORPORATION LIMITED.....PLAINTIFF

VERSUS

PAN OCEANIC INSURANCE

BROKERS LIMITED .....1ST DEFENDANT

BASHIR GULAMMEHDI PIRMOHAMED.....2ND DEFENDANT

FAREED SHAABAN SEIF.....3RD DEFENDANT

JUDGMENT

Date of last order: 05/10/2023
Date of judgment:17/11/2023

AGATHO, J.:

The plaintiff Alliance Insurance Corporation filed the suit in this court against the Defendants. In her plaint the plaintiff is claiming for declaration and orders that the defendants have breached the contract for payment of outstanding premiums to the tune of TZS 485,883, 890/= being specific damages, general damages, costs and interest, and any other relief the court may deem just to grant.

Upon being served with the plaint the defendants filed their Written Statement of Defences denying the allegations and claims raised by the plaintiff. The suit proceeded to full trial. During the proceedings the

plaintiff was represented by Advocate Allen Nanyaro, and the defendants were under legal representation of Zidadi Mikidadi, learned counsel.

Brief facts of the case is that the plaintiff and the 1st defendant had a long relationship in the insurance industry. Whereby the 1st defendant procured some clients who required insurance covers. She collected insurance premium from them in respect of the of insurance covers issued by the plaintiff. But she is alleged to have not remitted the collected premium amount to the plaintiff as agreed. To secure the premium amount on 10th September 2020 the parties (the plaintiff and the 1st defendant) executed a contract for remittance of the outstanding premium amount that the 1st defendant failed to remit to the plaintiff.

Moreover, on the same date that is 10th September 2020 the 2nd and 3rd defendants each in his own capacity executed a personal guarantee and indemnity agreement as the first and second guarantors with the plaintiff to secure the liability of the 1st defendant to the plaintiff. It was the term of the agreement that should the 1st defendant default in payment of the outstanding sum of TZS 485,883,890/= then the 2nd and 3rd defendants shall be held liable to pay the whole amount owed to the plaintiff. Despite receiving the demand notices served upon them the defendants did not heed them. Hence the present suit.

Following the failure of mediation, the matter went for final Pre-Trial Conference where the following issues were framed to constitute the bone of the case.

1. Whether there was a contract between the plaintiff and the 1st defendant for remittance of premium amount to the tune of

Tanzania Shillings Four Hundred Eighty -Five Million Eight Hundred Eighty-three thousand, Eighty Hundred and Ninety (TZS 485, 883, 890/=).

2. Whether there are separate personal guarantee and indemnity agreement between plaintiff, 2nd defendant and 3rd defendant to secure the payment of outstanding sums of money amounting to Tanzania Shillings Four Hundred Eighty – Five Million Eighty Hundred Eighty -Three Thousand Eight Hundred Ninety (TZS 485, 883, 890/=).

3. If the two issues above are answered in affirmative, whether there was a breach of the said contracts.

4. To what relief are the parties entitled to.

In a bid to prove their case both parties summoned witnesses to testify before the court. But as the procedural rules at HCCD are the parties were obliged to file the witness statements which they did. At the trial the plaintiff summoned one witness PW1 (Jonas Joseph Rutabingwa) who on oath, and after tendering his witness statement adopted in these proceedings as his testimony in chief, he testified that he is a senior executive – legal and claims in the plaintiff company. He started working with the plaintiff since 2017. Among his duties is to handle insurance business and claims from policy holders, third parties, broker or agency, etc., to ensuring compliance with laws and regulations governing insurance business. PW1 tendered the plaintiff's special board resolution dated 01/07/2022 that was admitted as exhibit P1.

He also told the court that he knew the 1st defendant as a broker who had a business relationship with the Plaintiff for procuring customers who needed Insurance products and upon issuance of insurance cover, whereas by then the customer had to deposit the Insurance Premium to the 1st Defendant's Bank account and the 1st Defendant was to remit the same to the Plaintiff's Bank account (this was prior to the change of law that premium is now to be paid direct to the Insurer Bank Account). He also said he knows the 2nd and 3rd defendants as directors of the 1st defendant.

He further told the court that the Plaintiff's claim against the Defendants jointly and severally is for payment of Tanzania Shillings to the tune of Four Hundred Eighty-Five Million Eight Hundred Eighty-Three Thousand Eight Hundred Ninety (Tshs. 485,883,890.00/=) resulting from breach of Contract for payment of outstanding premiums remittances.

PW1 testified that the Plaintiff and the 1st Defendant herein had a longtime relationship on Insurance Industry, whereby the 1st Defendant procured some clients whom were in need of insurance covers and thereon proceeded to collect Insurance Premiums from the Clients in respect of Insurance Covers issued by the Plaintiff (this was before the law require that premium are to be direct paid to the Insurer); but for the reasons best known by the 1st Defendant herself, she did not remit the collected premium amount to the Plaintiff as the business required.

PW1 went on to testify that to secure the Outstanding premiums from the 1st Defendant by the Plaintiff, on 10th September 2020 the two [i.e. Plaintiff and the 1st Defendant] executed a Contract for remittance of the Outstanding premium Amounts which were not remitted to the

Plaintiff by the 1st Defendant which in total it amounted to the tune of Tanzania Shillings Four Hundred Eighty-Five Million Eight Hundred Eighty-Three Thousand Eight Hundred Ninety (TZS 485,883,890.00/=). He tendered the Agreement for payment of outstanding premium amounts to the tune of Tanzania Shillings Four Hundred Eighty-Five Million Eight Hundred Eighty- Three Thousand Eight Hundred Ninety (TZS 485,883,890.00/=) only between the Plaintiff and the 1st Defendant which was admitted in evidence as exhibit P2.

He went on stating that the 2nd and 3rd Defendants each in his personal capacity executed a personal guarantee and indemnity agreement as the First Guarantor and Second Guarantor respectively with the Plaintiff to secure the liability of the 1st Defendant to the Plaintiff, should there be any kind of default in payment of outstanding sums of money amounting to Tanzania Shillings Four Hundred Eighty-Five Million Eight Hundred Eighty-Three Thousand Eight Hundred Ninety (TZS 485,883,890.00/=) then the 2nd and 3rd Defendants to this Suit shall be held liable and responsible for paying the whole amount to the Plaintiff. He tendered copies of separate personal guarantee and indemnity agreement to secure the payment of outstanding sums of money amounting to Tanzania Shillings Four Hundred Eighty- Five Million Eight Hundred Eighty-Three Thousand Eight Hundred Ninety (TZS 485,883,890.00/=) only, being outstanding premium amounts payable to Alliance Insurance Corporation Limited by Pan Oceanic Insurance Brokers Limited by both 2nd Defendant and 3rd Defendant that were admitted as exhibit P3 collectively.

Moreover, PW1 testified that under the Agreement for payment of outstanding premium amounts between the Plaintiff and the 1st Defendant it was agreed that payment of the claimed amount shall commence on 15th September 2020 where among other things it was agreed in the said contract that the 1st Defendant shall pay to the Plaintiff at least an amount to the tune of Tanzania shillings Ninety Seven Million One Hundred Seventy Six Thousand Seven Hundred Seventy Eight (i.e. TZS 97,176,778/=) yearly for a period of five years for the sake of clearing the whole outstanding premium amount of Tanzania Shillings Four Hundred Eighty-Five Million Eight Hundred Eighty-Three Thousand Eight Hundred Ninety i.e. (TZS 485,883,890.00/=).

The plaintiff's witness told the court that the 1st Defendant failed to honour the terms and conditions of the Agreement for payment of outstanding premium amounts entered between her and the Plaintiff regardless of endless reminders from the Plaintiff. According to PW1 that forced the plaintiff to issue the defendants with demand notices notifying them about their default and the plaintiff's claim. He tendered in his testimony a copy of 14 days' notice to the 1st defendant, and a copy of 14 days' demand notice to the 2nd defendant (guarantor), and a copy of 14 days' demand notice to the 3rd defendant (guarantor) without any objection these were received and marked collectively as exhibit P4.

It was the testimony of PW1 that the Plaintiff tried for another bite issuing a legal demand notice through her lawyer to the Defendants for amicable settlement of the claim, but none was ready for meaningful amicable settlement of any magnitude. The latter demand notice issued to the 1st, 2nd and 3rd Defendants was admitted as exhibit P5.

During cross examination by Mikidadi Zidadi, counsel for the plaintiff, PW1 testified that he witnessed the signing of the agreement (exhibit P2) by the plaintiff and 1st defendant. But he admitted that he does not have any evidence to prove that he witnessed the signing of the agreement. He said since he is a custodian of legal documents in the plaintiff's company he knew the existence of the agreement.

Asked why there is neither stamp of the plaintiff company nor that of the 1st defendant on exhibit P2, PW1 testified that it was signed for the plaintiff by Dr Alex Nguluma and KVA Krishna. They both signed on behalf the plaintiff. He clarified that Dr Alex Nguluma signed as a witness. KVA Krishna signed as group managing director of the plaintiff's company.

Referring to personal guarantees (exhibit p3 collectively), he testified that it was signed by advocate Yusuph Mussa Issa, who he knows. He admitted that he is not the plaintiff's lawyer. He signed the guarantees at the defendant's office. He signed as witnessed the guarantors signing the guarantees. PW1 was also cross examined on exhibit P5 (demand notice and its annextures), the annextures in respect of 3rd defendant. He admitted that it was one Henry who identified the 3rd defendant to the advocate as per the personal guarantor. He admitted that the said Henry was the one who introduced Fareed Seif to advocate, Yusuph Mussa Issa.

Referring to exhibit P3 collectively, PW1 admitted that it was Yusuph Mussa Issa, advocate who witnessed Fareed signing the guarantee. But he pointed out that in the Fareed's guarantee there is nowhere showing Henry introduced/identified Fareed to advocate Yusuph Mussa Issa. He also admitted that there is nothing in the Fareed guarantee showing that

the advocate knew Fareed personally. He further conceded that all the words relating to identification or introduction of Fareed to the advocate have been crossed.

PW1 also admitted during cross examination that he does not know the duration of contract (exhibit P2) between the plaintiff and the 1st defendant. When PW1 was asked regarding a part below paragraph 2.6 of the exhibit P2 the words in bold, he said the duration of the contract is five years. He further admitted no to know the number of clients/customers from whom the premium was collected. But he emphasized that the defendants owe the plaintiff TZS 485,883,890/= after they have failed to remit that outstanding premium.

In re-examination by Allen Nanyaro, the plaintiff's counsel, PW1 testified on exhibit P2 that it does not bear company seal. But it was signed by two directors and that is what is required by Section 39(2) of Companies Act, Act No. 12 of 2002, which provides that the document is executed by a company if it is signed by the two directors, and that has the same effect as if executed under the company seal.

PW1 clarified about exhibit P2 that the documents were signed by Dr. Alex Nguluma and KVA Krishna. They witnessed the content document. They signed as company directors.

Referring to exhibit P3, there is nowhere the name Henry was mentioned. He said that was a human error because the content was the same. On that note the plaintiff's case was marked closed.

On the adversary side, the defendants called one witness, DW1 (Fareed Shaaban Seif) who upon affirmation, tendered witness statement

that was adopted in the proceedings as his testimony in chief, he told the court that he was responsible to dealing with all activities concerning the relation between Plaintiff and Defendants on Account issues, procuring of clients and overseeing booking of their clients' insurance to Plaintiff.

DW1 confirmed that the Defendants and Plaintiff started their business relation of insurance industry from 2003 where first Defendant procured clients, who needed insurance cover. He stated that there were some disputed accounts that were not remitted to the Plaintiff from 2014 to 2016.

It was his testimony that the Defendants knowing that non remittance was also due to their contributory negligence by not cancelling cover as required by law, they agreed that in order to solve the problem the plaintiff will give them extra commission of 12.50% to service the outstanding premium.

DW1 testified that due to the above problem they agreed to draft a 5 years agreement plan on modality of remittance based on understanding that the Plaintiff will pay extra 12.5% on commission. The agreement was signed by Defendants and sent to the Plaintiff for review and attestation before the defendants' lawyers.

It was the testimony of the DW1 that the Plaintiff did not return the said agreements back to the Defendants to be witnessed by their advocate. They made several calls and follow-up from the Plaintiff asking her to return all agreements to be reviewed and witnessed by the Defendants' advocate. But they did not manage to review and witness the same because the Plaintiff did not return the said agreements.

DW1 told the court that until now the Defendants do not have the original agreement signed by both parties and witnessed by their respective Advocate. He continued to testify that it was until July 25th ,2022 and August 18th ,2022 when they were served with Demand Notice. And he added that that is when they came to know of the existence of all agreements which was signed by the Plaintiff with their advocate who witness on their side on both personal guarantee for Fareed Shaaban Seif and for Bashir Gulammehdi Pirmohamed.

While being cross examined by advocate Allen Nanyaro, for the plaintiff, DW1 denied the claim that there is certain amount of money which is premium that was to be remitted from the 1st defendant to the plaintiff. However, when he was referred to paragraph 4 of his witness statement, he admitted that there were some disputed accounts that were not remitted to the plaintiff from 2014 to 2016.

When he was further asked to read exhibit P2, DW1 stated that the parties in this contract were Alliance Insurance Corporation Tanzania Limited and Pan Oceanic Insurance Brokers' Limited. On the recital B of exhibit P2, DW1 read "whereas part of the premium amounts from Broker's clients payable for insurance covers undertaken by insurer are yet to be remitted to the insurer..." He was thereafter asked to read recital C exhibit P2 showing that the outstanding net amount or outstanding premium is TZS 485,883,890/=.

DW1 read exhibit P2 item 1.0 stating that the recitals shall form part of this agreement. Along that he was asked to read the last page of exhibit P2, and he admitted that the 2nd and 3rd defendants are the directors of

the 1st defendant. He also admitted that as per exhibit P2 those who signed are Fareed S. Seif and Bashir G. Pirmohamed.

DW1 went on conceding that in his testimony here in court apart from his witness statement he has not tendered any other documents. He stressed that he has said in his testimony in chief that there were disputed accounts from 2014 – 2016 but that is not found anywhere in exhibit P2.

Referring to defendants' Written Statement of Defence (WSD), and his witness statement and exhibit P2, DW1 clarified that what he stated in paragraph 5 of his witness statement is partly reflected in the WSD paragraph 3 where he quoted the Insurance Regulations, regulation 35. Pursuant to Section 137 of Insurance Act. But he was quick to point that what he stated in paragraph 5 of his witness statement is not reflected in exhibit P2. He mumbled that it was gentlemen's agreement. And it was against the law. That is why he has not written it in his witness statement.

Referring to paragraph 8 of his witness statement DW1 said he made several calls. But he conceded that he has not tendered any call records.

When DW1 was asked to read the exhibit P3 (collectively), he stated that in that exhibit the parties were Alliance Insurance Corporation and Fareed S. Seif, chief executive officer and principal officer. The title of exhibit P3 is personal guarantee and indemnity agreement to secure outstanding sums of money amounting to TZS 485, 883,890/= only being outstanding premium amount payable to Alliance Insurance Corporation Tanzania Limited by Pan Oceanic Insurance Broker. He added that the second agreement was between Alliance Insurance Corporation Limited

and Bushir Gulammehdi Pirmohamed, director. The title was personal guarantee and indemnity agreement to secure payment of outstanding sums of money amounting to TZS 485, 883,890/=. When questioned further about paragraph 4 of WSD he testified that there are some agreements that were draft. He admitted that he has not tendered them because he did not have a copy.

In re-examination by Mikidadi Zidadi, the defence counsel, DW1 told the court regarding the claimed amount to be remitted is incorrect because that is outstanding premium from the clients. They defaulted. He clarified that before 2017 brokers were allowed to give insurance cover and receiving premium. He added that he was supposed to remit the said premium to the insurer within Seven (7) days otherwise insurance cover will be cancelled.

DW1 also clarified what he stated in paragraph 4 of his witness statement that there were disputed accounts as the insured (clients) did not pay them premium because there was premium warrant. But he admitted that he did not mention the premium warrant in his witness statement. On this point DW1 added that insurance could be insured on credit before 2017.

Asked about paragraph 5 of his witness statement DW1 said that non-remittance was due to contributory negligence. Referring to exhibit P2 (agreement between Alliance and Pan Oceanic) he said he mentioned the parties to that agreement. That marked the end of defence case.

Having revisited the testimonies of the parties' witnesses, it is high time the issues are restated and examined one after the other against the

evidence given by the parties to the suit. But there are sever uncontested issues. These are: that the 1st defendant was collecting insurance premium for the plaintiff, that the plaintiff was issuing insurance covers to the clients. It is equally hardly disputed that the 2nd and 3rd defendants executed guarantee and indemnity agreements (exhibit P3 collectively).

But before making headway, I feel compelled to say a word or two on the content of final closing submissions filed in the court by the parties' learned counsel. It is axiomatic that the final closing submissions ought to contain facts, evidence adduced by parties and the law. It should not contain new evidence. Moreover, the submission is meant to assist the court in the research, and forming opinion by persuading or convincing the court that what is submitted is the correct position of the law and hence the case should end in one's favour. Further the final closing submission must be objective, in the sense that it should not be biased on either party's case. It ought to capture evidence given by both sides. In the case at hand the court has observed that the learned advocates of the parties were biased in their submissions. They ignored or superficially treated the evidence given by the opposite party. This is a strange style of writing final closing submissions. Such style should not be preferred because it lacks objectivity.

Now, back to the case at hand the first and second issues are jointly examined. The PW1 tendered exhibits P2 (an agreement executed by the plaintiff and the 1st defendant on 10 September 2020) acknowledging that the 1st defendant is required to remit the premium to the tune of TZS 485,883, 890/= and she has failed to do so. Exhibit P3 collectively is personal guarantee and indemnity agreements executed by the 2nd and

3rd defendants and the plaintiff on 10 September 2020. The 2nd and 3rd defendants tied themselves to the said agreements that if the 1st defendant fails to pay the TZS 485,883, 890/= they will be held liable. It is clear that the said sum of money was never paid to the plaintiff.

Strange as it may seem the DW1 testified that the contract for remittance of premium was not finalized. It was sent to his office for review, which he did and later he sent back to the plaintiff for her to review. But to his surprise it was never returned to the defendants for attesting and company seal. The DW1 also testified that the guarantee and indemnity agreements were not attested by their advocate. It was rather testified by Yusuph Mussa Issa who they are not familiar with. The defence counsel argued that the said advocate was not called by the plaintiff to testify. What is clear is that the defence in my view did not dispute validity of guarantee and indemnity agreements (exhibit P3). The defendants never testified that there was fraud or forgery. The court is of the view that failure to call Yusuph Mussa Issa cannot be a ground to invalidate the guarantee and indemnity agreements (exhibit P3). Nor can adverse inference be drawn in such circumstance. Moreover, being a civilcase the parties are the masters of their case. They have a duty to investigate, collect evidence and prosecute their case.

Furthermore, neither the DW1 nor the defence counsel did say anything about the exhibit P2 and P3 or cross examine PW1 on the said exhibits. This court is of the view that the defendant cannot use the allegation that the premium remittance agreement was not finalized as an excuse to deny validity of agreements in exhibit P2, and P3 that solidify presence and existence of that contract. These exhibit P2 and P3 may

invariably or could have been regarded as novation had there been another agreement. But we do not have the agreement that the defendants are claiming not to have been finalized. Therefore, the allegation that the insurance premium remittance contract (exhibit P2) is invalid is without merit. It is rejected. By virtue of evidence of PW1 and exhibit P2 and P3 the issues one and two are answered in the affirmative. The law under Section 110 of the Evidence is loud that he who alleges must prove. The plaintiff has in the court's view proved her case on the balance of probability as required by Section 3(2)(b) of the Evidence Act [Cap 6 R.E. 2019].

Since the issues one and two have been answered in the affirmative, and because the defendants have failed to heed the demand notices that were sent to them following their failure to pay or remit the insurance premium to the tune of TZS 485, 883,890/= to the plaintiff, that constitutes a breach of contract. Section 37(1) of the law of contract Act [Cap 345 R.E. 2019] is very loud that the law is reluctant to admit the excuses by a party for failure to perform his obligation under the contract. That was amplified in **Abualy Alibhai Aziz v Bhatia Brothers Ltd [2000] T.L.R. 288**. The CAT reiterated that position of the law in **Simon Kichele Chacha v Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT at Mwanza**.

> *"the principal of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, nor fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement."*

The defence argument that the special damages was not proved and hence the plaintiff is not entitled to the TZS 485,883, 890/= is in the court's view misplaced. A reason being that the proof is the exhibit P2 and P3 as well as the demand notice. These exhibits were never challenged or contradicted. The validity of exhibits has never been disputed by the defendants. It is also true that these exhibits contain the said amount. It will be a misconception and far-fetched to require the plaintiff to list all the insured (clients) having been issued with the insurance cover. Besides, that was not an issue even at the trial.

As to the final issues, to what relief the parties are entitled to, the court considers the relief sought by the plaintiff as the issues have been answered in her favour. Th defendant prayed for the dismissal of the suit with costs. But since it is evident that there was a contract for remittance of insurance premium, and as the defendants have breached the contract (exhibits P2 and P3), the suit judgment is entered in favour of the plaintiff. The latter has sought the declaration and orders that the defendants have breached the insurance remittance agreement, that the court order payment of TZS 485,883,890/= being the insurance premium remittance the 1st defendant failed to remit to the plaintiff, general damages, interest, and costs of the suit.

Regarding a claim for general damages, much as the general damages is awarded under the discretion of the court, it is equally a matter of law. Section 73(1) of the Law of Contract Act [Cap 345 R.E. 2019] stipulates that a party who has not breached the contract it entitled to receive compensation from the party at fault, that is the party that

breached the said contract. In the case at hand the defendants have breached the contract. Considering the context of this case the defendants shall pay the plaintiff TZS 10,000,000 as general damages. The defendants agreed in September 2020 to pay the amount that ought to be remitted but until today nothing has been paid.

As for interest, these are of two kinds: interest at commercial rate from the date when the amount became due to the date of filing the case, and interest at court rate from the date of judgment to the date of payment in full. The former interest is drawn from the agreement. But here the agreement is silent on the same. We cannot therefore grant the interest at commercial rate. But the interest at court rate of 7% is granted from the date of judgement to the date of payment in full.

Regarding costs, it the general principle of civil litigation in our jurisdiction that costs is awarded to the winner in absence of mischievous conduct of the case by the party that emerged victorious. In the case at hand the parties conducted the case well, consequently the plaintiff is awarded costs of the suit.

In the end the court declares, and orders as follows:

1. That there was a contract for remittance of insurance premium between the plaintiff and the 1st defendant.

2. That there was a separate personal guarantee and indemnity agreement between the plaintiff and the 2nd and 3rd defendants.

3. That the defendants breached the said contracts.

4. The defendants shall pay the plaintiff TZS 485,883,890/= amount due as insurance premium that were unremitted to the plaintiff.

5. The defendants shall pay the plaintiff interest in (4) above at court rate of 7% from the date of judgment to the date of full payment.

6. The defendants shall pay the plaintiff TZS 10,000,000/= as general damages.

7. The defendants shall pay costs of this suit.

It is so ordered.

DATED at **DAR ES SALAAM** this 17th Day of November 2023.

U. J. AGATHO

JUDGE

17/11/2023

Date: 17/11/2023

Coram: Hon. U.J. Agatho J

For Plaintiff: Allen Nanyaro, Advocate.

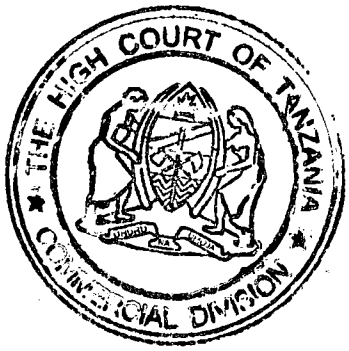
1st Defendant: Fareed Shaaban Seif, and Bashir Pirmohamed Directors).

2nd Defendant: Present in person.

3rd Defendant: Present in person

C/Clerk: Beatrice

Court: Judgment delivered today, this 17th November 2023 in the presence of Allen Nanyaro, advocate for the plaintiff, and Fareed Shaaban Seif, and Bashir Pirmohamed Directors of the 1srt defendants, 2nd and 3rd Defendants were also present in person.



U. J. AGATHO

JUDGE

17/11/2023