

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DARE ES SALAAM

COMMERCIAL CASE NO. 17 OF 2022

BETWEEN

TANZANIA CIGARETTE PUBLIC LIMITED COMPANY... PLAINTIFF

VERSUS

TEMA ENTERPRISES LIMITED.....DEFENDANT

JUDGMENT

A.A. MBAGWA, J.

The plaintiff is a limited liability company registered under the laws of Tanzania and it is licensed to produce and sell cigarettes whereas the defendant is a registered company which is dealing with sale of cigarettes, among other activities.

The plaintiff's substantive claim against the defendant is TZS 147, 214, 273.08 being outstanding payment for supply of cigarettes by the plaintiff. It is contended that the plaintiff and defendant entered into dealership agreement dated 12th April, 2021. According to the plaintiff, it was agreed between the two that the plaintiff would be supplying cigarettes to the



defendant on credit and the defendant would make payment upon delivery of the products and issuance of the invoices.

Following the said agreement, on 10th May, 2021 the plaintiff supplied consignment of cigarettes to the defendant and subsequently issued invoices indicating the amount worth the cigarettes supplied. The issued invoices were as follows;

1. Invoice No. CSDLRPG 09006501 worth TZS 45,619,912.944
2. Invoice No. CSDLRPG09006502 worth TZS 55,344,413.336
3. Invoice No. CSDLRPG09006503 worth TZS 41,179,952.700
4. Invoice No. CSDLRPG09006504 worth TZS 3,899,988.500
5. Invoice No. CSDLRPG 09006505 worth TZS 1, 169, 996.550

The plaintiff narrates that despite supply of the cigarettes worth the sum indicated in the invoice, the defendant did not effect payment as required under the agreement. The plaintiff stated that, on the very day of 10th May, 2021, the defendant issued three cheques but the same were returned by the bank on the ground of insufficient fund. As such, on 1st October, 2021 and 18th January, 2022, the plaintiff through the services of Top Attorneys served the defendant with demand notices reminding the defendant to settle



the debt but to no avail. The plaintiff further avers that owing to the breach of contract to wit, failure by the defendant to pay the purchase price, the plaintiff has suffered a huge loss including anticipated revenue. In the results, the plaintiff prays for judgment and decree against the defendant as follows;

- a) A declaration that the defendant is in breach of the dealership agreement.
- b) An order for the defendant to pay the plaintiff the sum of TZS 147, 214, 273.08 being outstanding payment for supply of cigarettes.
- c) An order for the defendant to pay a total sum of TZS 54,000,000/= as general damages for direct business for not doing business for period of nine (9) months.
- d) An order for the defendant to pay the plaintiff other general damages as assessed by the Court for the loss suffered by the plaintiff.
- e) An order for payment of interest on item (b) above at the commercial rate of 23% from the date the damage occurred to the date of judgment.
- f) An order for payment of interest at Court's rate of 12% from the date of judgment to the date of payment.

A handwritten signature in black ink, appearing to read 'Amrinda', with a horizontal line underneath it.

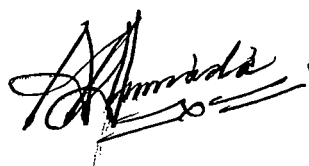
g) An order for the defendant to pay costs of the suit and,

h) Any other relief which the Court deems fit to grant.

Upon service of the plaint, the defendant vehemently contested the plaintiff's claims through a written statement of defence verified by Elizabeth Massawe, the defendant's principal officer and filed in this Court on 30th May, 2022. In essence, the defendant denies her knowledge and existence of the alleged dealership agreement between her and the plaintiff. The defendant further disputes issuing the alleged dishonoured cheques nor does she recognize the debt of TZS 147,214,273/= claimed by the plaintiff. In short, the defendant disputes all the claims and prays the court to dismiss the suit with costs.

Upon completion of the pleadings, on 5th September, 2022 this court, with consensus of the parties, framed two issues namely,

1. Whether the plaintiff and the defendant concluded a dealership agreement and if so whether the same was breached by the defendant.
2. To what reliefs are parties entitled.

A handwritten signature in black ink, appearing to read 'Aminda', with a horizontal line underneath.

When the matter was called on for hearing, the plaintiff was represented by Michael Mahende assisted by Julius Mkirya, learned advocates whilst the defendant enjoyed the services of Mussa Kioby, learned counsel.

In discharging its burden of proof, the plaintiff produced two witnesses namely, Mujuni Kiiza (PW1) and Faustine Danger (PW2). In addition, the plaintiff tendered six documentary exhibits to wit; dealership agreement (exhibit P1), five invoices (exhibit P2 collectively), three dishonoured cheques (exhibit P3 collectively), debt acknowledgement letter (P4), demand notice dated 18th January, 2022 (exhibit P5) and demand notice dated 1st October, 2021 (exhibit P6).

On the adversary, the defendant did not parade any witness nor did it tender any documentary exhibit to support its defence. The defendant's learned counsel, Mr. Mussa Kioby informed this court that the defendant's solo witness one Elizabeth Massawe had travelled to Mbeya to attend funeral ceremony. As such, the learned counsel prayed the court to admit the witness statement under rule 56 of the High Court (Commercial Division) Procedure Rules. Despite the objection from the plaintiff's counsel, this court deemed it proper to admit the statement and therefore the witness

A handwritten signature in black ink, appearing to be 'A. Amuda', with a horizontal line underneath.

statement of Elizabeth Massawe was admitted under the provisions of rule 56 (3) of the Rules.

PW1 Mujuni Kiiza, in his witness statement, recapitulated the contentions in the plaint. He stated that on 10th May, 2021 the defendant was supplied with cigarettes on credit following the entering into dealership agreement on 12th April, 2021. He continued that upon delivery of the said consignments of cigarettes, invoices were issued upon which the defendant drew three cheques (P3) but the said cheques could not be honoured due to insufficient fund in the defendant's bank account. PW1 tendered the signed dealership agreement, five invoices issued by the plaintiff and three cheques which were drawn by the defendant and the same were admitted and marked exhibit P1, P2 and P3 respectively. PW1 explained that on 13th July, 2021, the defendant through its director wrote a letter to the plaintiff acknowledging the existence of debt and committing itself to pay. PW1 tendered the said acknowledgement letter and it was admitted and marked exhibit P4. Mjuni Kiiza lamented that despite the acknowledgement letter, the defendant continued to default payment as such, the plaintiff served her with two demand notices at different times. The said demand notices were tendered and admitted as exhibit P5 and P6. In addition, the plaintiff's case



was further augmented by Faustine, Danger, the plaintiff's Branch Accounting Manager who stood as PW2.

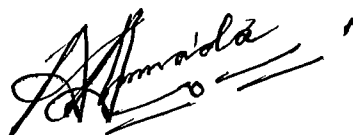
In rebuttal, the defendant through the statement of Elizabeth Massawe, the Managing Director of the defendant company disputed the claims. She denied to have ever traded with the plaintiff. She also claimed ignorance of the said three cheques (exhibit P3) and demand notices (exhibit P5 and P6). However, owing to the fact that the said Elizabeth Massawe did not appear before the court for cross examination, her statement (testimony) is accorded lesser weight in accordance with rule 56 (3) of the Rules.

Having summarized the evidence for both parties, let me proceed to determine the issues framed. It is noteworthy that upon completion of presenting evidence, counsel for both parties filed their final written submissions which I have considered in my deliberations.

Whether the plaintiff and the defendant concluded a dealership agreement and if so whether the same was breached by the defendant. In proving this issue, the plaintiff tendered the dealership agreement (exhibit P1). The agreement is dated 12th April, 2021 and it is written in both English and Kiswahili. On behalf of the plaintiff, it was signed by Mjuni Kiiza (Field Sales

A handwritten signature in black ink, appearing to read 'Amada', with a horizontal line underneath it.

Manager), Charles Mauya (Sales Director) and Thomas Hador (Finance Director) whilst on behalf of the defendant, it was signed by Elizabeth Paul Massawe (Director) and Daud Michael Mkonzi (Human Resource Officer). At clause 5 of the agreement, it is clear that defendant would pay by cheque within seven days after the delivery of cigarettes. Neither Elizabeth Massawe nor Daud Michael Mkonzi appeared in court to dispute their signatures appearing on the dealership agreement. The plaintiff's witness also told the court that upon delivery of the cigarettes, the plaintiff was issuing invoices which indicated the amount of money in respect of the cigarettes supplied. In that regard, the plaintiff tendered five invoices (exhibit P2) in respect of the claims. Exhibit P2 speaks louder that the indicated cigarettes were supplied to the defendant, Tema Enterprises. I have also scanned the three cheques (exhibit P3 collectively). They are all dated 10th May, 2021 and they all bear the name of TEMA ENTERPRISES LIMITED as the drawer of the cheques. Further, all the three cheques indicate that on 24th May, 2021 they were submitted to CRDB Bank Azikiwe Branch but they were returned due to insufficient fund. The three cheques that is to say cheque No. 001254 is for TZS50,000,000/=, cheque No. 01255 is for 50,000,000/= and cheque No. 01256 is for TZS 46,977,000/= make a total of TZS 146, 997,000/=

A handwritten signature in black ink, appearing to read 'A. Amadi', with a horizontal line underneath it.

which is commensurate to the value of cigarette supplied to the defendant on 10th May, 2021 as per the invoices (exhibit P2). Furthermore, in a bid to search for truth, I closely examined the documentary exhibits particularly the dealership agreement (exhibit P1), acknowledgement letter (exhibit P4), the three cheques (exhibit P3) and written statement of defence. In all the four documents mentioned above, the signatures purporting to have been written by Elizabeth Massawe, the Managing Director of the defendant company are apparently similar. This finding has also convinced me to believe the plaintiff's version. For clarity, it is noteworthy that this court is in law enjoined, to examine writings on documents and make findings. See also the case of **Amon Mwaipaja vs the Republic**, Criminal Appeal No. 69 of 1981, High Court of Tanzania at Dodoma.

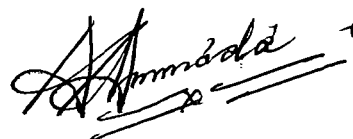
In law every witness is entitled to credence and must be believed unless there are good reasons not to be believed. See the case of **Goodluck Kyando vs the Republic** [2006] TLR 363 and **Alberto Mendes vs the Republic**, Criminal Appeal No. 273 of 2017 CAT at Dar es Salaam. The defendant's counsel submitted that the plaintiff's evidence should not be relied on because both witnesses narrated the same story. With due respect to the defendant's counsel, I do not see any wrong in giving similar account

A handwritten signature in black ink, appearing to read 'A. Mwaipaja', with a horizontal line underneath it.

especially where both witnesses are testifying on the same aspect. Ordinarily, it is the contradictions which dent witness' credibility and not similarities. In fact, witnesses from the one side are expected to give evidence which corroborates each other. I had an advantage of assessing the demenour of the plaintiff's witnesses during hearing and upon going through their evidence along with the documentary exhibits, it is my findings that their statements are in consonance with the documentary evidence as such, I am satisfied that they are witnesses of truth hence credible witness. In view of the above, it is my firm findings that the plaintiff and defendant concluded a dealership agreement (exhibit P1) and the defendant breached the agreement in particular clause 5 by its failure to pay for cigarettes supplied to it within seven days.

To what reliefs are parties entitled. It is a settled position of law that party who fails to perform his contractual obligation like the defendant in this case is deemed to have breached the contract and a party who suffers from such a breach is entitled to compensation. As submitted by the plaintiff's counsel, section 73 of the Law of Contract Act is quite clear on this aspect. It provides;

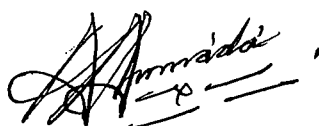
"73.-(1) Where a contract has been broken, the party who suffers by such breach is entitled to receive, from the



party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it"

This position was further reinforced in the case of **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam.

The plaintiff has, among other reliefs prayed for payment of TZS 54,000,000/= as general damages for not doing business for period of nine (9) months. Upon thoroughly examining this prayer, it is clear that the plaintiff is asking for loss of profit that she would have made had the breach of contract not occurred. According to law, loss of profit falls under the category of specific damage hence the plaintiff is required to strictly prove it. See **Puma Energy Tanzania Limited vs Ruby Roadways (T) LTD**, Civil Appeal No. 287 of 2020 CAT at Dodoma and **Reliance Insurance Company (T) LTD & 2 others vs Festo Mgomapayo**, Civil Appeal No. 23 of 2019, CAT at Dodoma. I have keenly canvassed the plaintiff's evidence but I found nowhere the plaintiff was able to strictly prove the alleged loss



of business in the sum of TZS 54,000,000/=. The plaintiff could not tell the court at all how she arrived at the claimed loss as such, the prayer crumbles.

Moreso, the plaintiff has prayed for general damages to be assessed by the court. Usually, general damages are granted at the discretion of the court.

It is also the law that general damage needs not be strictly proved. See

Anthony Ngoo and Another v. Kitinda Kimaro, Civil Appeal No.

25 of 2014. I have considered this prayer in relation to other reliefs requested

by the plaintiff such as, interest at commercial rate of 23% from the date of

instituting the case to the date of judgment. Considering the purpose for

which general damage serves, I find no reason to grant it along with the

commercial interest.

In sum, upon evaluation of the evidence in whole, I am satisfied that the

plaintiff has established its case on balance of probabilities. Consequently,

and in view of the above deliberations, I enter judgment and decree in favour

of the plaintiff with the following orders;

- a) It is hereby declared that the defendant, Tema Enterprises Limited is in breach of the dealership agreement.



- b) The defendant is hereby ordered to pay the plaintiff a sum of TZS 147, 214, 273.08 being outstanding payment for supply of cigarettes.
- c) The defendant is ordered to pay interest on the decretal sum under item (b) above at the commercial interest of 10 % from the date of filing this case to the date of judgment.
- d) The defendant is ordered to pay interest on the decretal sum under item (b) above at the Court's rate of 7% from the date of judgment to the date full payment.
- e) The defendant is ordered to pay costs of the suit.

It is so ordered

The right of appeal is fully explained.




A.A. Mbagwa

JUDGE

02/06/2023