IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DARE ES SALAAM

COMMERCIAL CASE NO. 01 OF 2022

BETWEEN

ACCLAIM CONSTRUCTION SUPPLIES LIMITED ..... PLAINTIFF

VERSUS

THE ARAB CONTRACTORS

(OSMAN AHMED OSMAN & CO.) LIMITED.....1st DEFENDANT

EL SEWEDY ELECTRIC COMPANY

AC-EE JOINT VENTURE ..... 2nd DEFENDANT

JUDGMENT

A.A. MBAGWA J.

The plaintiff is a limited liability company incorporated under the laws of Tanzania which deals with supply of construction materials whereas the defendants are foreign companies operating through a joint venture. The defendants are engaged in the construction of Julius Nyerere Hydropower Project.

By way of plaint, the plaintiff instituted the present suit praying for judgment and decree against the defendants for the following reliefs;

(i) A declaration that the defendant has breached the terms of the purchase orders dated 28th day of January, 2021 and 11th day of May, 2021

(ii) An order for payment of an amount of USD 1, 339,655.02.

(iii) Immediate return and or payment of 140 intermediate 140 bulk containers valued at USD 12,174.

(iv) Payment of USD 258,654.00 being expected profit had the defendants not cancelled the purchase orders

(v) Interest at commercial rate of 20% from the date of breach of contract to the date of judgment.

(vi) Interest at court rate of 12% from the date of judgement to the date of payment in full.

(vii) An order for payment of general damages as may be assessed by the court but not less than USD 12m.

(viii) Costs of the suit.

(ix) Any other and further relief that this honorable court may deem fit to grant.

The plaintiff's claims arise from the alleged breach of contract (purchase orders) entered into between the plaintiff and the defendants. It was the plaintiff's case that in 2019 the plaintiff won the tender to develop a formula and supply admixture to the defendants for construction works at Julius Nyerere Hydropower Project. As such, the defendants' joint venture entered into an agreement for supply of concrete superplasticizer (PCA-I-TZ9) SBT CO. (admixture) wherein it was agreed that the plaintiff would be supplying or delivering admixture to the defendants upon issuance of the purchase orders by the defendants. The plaintiff further contended that following their agreement, the defendants issued four purchase orders dated 26th June, 2020, 2nd November, 2020, 28th January, 2021 and 11th May, 2021. The plaintiff stated that on account of the purchase orders issued by the defendant, she applied for purchase order financing loan of USD 420,000 from CRDB and the same was confirmed by the defendants. The plaintiff tendered the facility letter (exhibit P8) to substantiate its claims.

The plaintiff proceeded that she honoured the two purchase orders dated 26th June, 2020 and 2nd November, 2020 without any issues and the same were duly paid by the defendant companies. However, the plaintiff lamented, on 6th day of December, 2021, while other orders were still pending, through

the email of the defendants' procurement manager one Ahmed Ali Sayed (DW1), cancelled purchase orders No. 2459 for 9,730 litres, No. 3207 for 785564 litres and No. 4103 for 235,210 litres. It was further averred that the plaintiff was importing raw materials from China as it has agreement with Sobute Company which was supplying the plaintiff raw materials as well as offering technical assistance in mixing the admixture here in Dar es Salaam. It was the plaintiff's averment that cancellation of purchase orders was a clear breach of the terms of the agreement (purchase orders) and for that reason the plaintiff incurred loss.

In rebuttal, the defendant filed a joint written statement of defence. Therein, the defendants admitted cancelling the purchase orders. However, they adamantly stated that the cancellation was according to the terms of the agreement (purchase orders). They further contended that the cancellation was due to low qualities of the material supplied. It was averred that complaints were raised on several occasions with regard to the quality of the admixture in particular separation but no solution was forthcoming from the plaintiff as such, they resolved to cancel the orders as the materials could be used in the permanent structures. In addition, the defendants denied confirmation of purchase order financing loan.

Upon completion of the pleadings, during final pre-trial conference, this court, with consensus of the parties, framed two issues namely;

1. Whether there is breach of terms of purchase orders
2. What are reliefs to the parties?

When the matter was called on for hearing, the plaintiff was represented by Abubakar Salim and Juma Nasoro, learned advocate whilst Mr. Anuary Katakweba appeared for the defendants.

In a bid to prove its case the plaintiff paraded three witnesses namely, Andrew John Todd (PW1), Isaack Alex Katanda (PW2) and Noel Joseph Ngonyani (PW3). Further, the plaintiff produced several documentary exhibits which were admitted and marked from P1 to P12. The plaintiff exhibits include purchase orders (P1), email and whatApp printouts (2), admixture purchase agreement (3), delivery notes EFD receipts and invoice documents(P4) and loan related documents from CRDB (P9)

On the adversary, the defendants brought two witnesses namely, Ali Elmelegy (DW1) and Ahmed Sayed (DW2). Further, they produced documentary exhibits which were admitted and marked D1 to D4. The

exhibits include email printouts and letters (correspondences) between the plaintiff and defendants.

Mr. Andrew Todd stated that having established business relationship, the plaintiff and defendants worked together and developed a special formula for admixture that were relevant for construction at Julius Nyerere Hydropower Project. He continued that Sobute New Materials Company LTD sent its expert who came at the site and developed a formula with the defendant that was to be used by the defendant. That after commencement of supply, in October, 2020 PW1 received a report on separation of the Intermediate Bulk Containers of admixture. As such, Sobute sent Mr. Ding who attended the site with the plaintiff and defendants' staff and upon a joint work he confirmed that the setting time was satisfactory. He claimed that between 2nd April, 2021 and 21st October, 2021, the plaintiff made deliveries of 466,100 litres without any complaints. He continued that the defendant issued new orders upon which the plaintiff ordered raw materials from Sobute in China. To his dismay, on 6th December, 2021 the defendant through Ahmed Ali Sayed sent him an email of cancellation of orders.

The plaintiff further testified through PW3 Noel Joseph Ngonyani that when the problem of separation was reported, the plaintiff took back 93,000 litres

worth USD 120,900 which was almost 9% of the supplied materials and replaced them at the plaintiff's costs. PW3 continued that the defendants confirmed the purchase order for the plaintiff to get purchase order financing loan from the banks. He clarified that the defendant confirmed the first purchase orders to CRDB as such, the plaintiff was granted loan and the same was successfully repaid. He further told the court that again in September, 2021 that is to say five months after separation problem was noted, the defendant confirmed purchase order financing loan. On the strength of the defendant's confirmation, the plaintiff was advanced another loan to purchase the raw materials but a few months later that is on 6th December, 2021, the defendant unexpectedly cancelled the orders.

The defendants, on their side, stated that the separation problem was persistent despite several reminders. DW1 and DW2 stated that the admixture supplied by the plaintiff had issues of separation and the setting time as such, the materials could not be reliably used for construction of permanent structure. DW2 stated that given the persisting separation and inappropriate setting time of the admixture, he decided to exercise their right, under Article 5 of the purchase orders, by cancelling the remaining orders namely, No. 2459, 3207, 4103.

Upon closure of evidence for both parties, learned advocates had an occasion to address the court through written submission. I commend counsel for both parties for their duly compliance with the filing schedule.

The plaintiff counsel strongly submitted that the plaintiff case was proved to the required standard. It was argued that the defendants admitted that all supplied materials were used and more worse they did not adduce any evidence to exhibit that the materials were only used for temporary structures. Further, the plaintiff counsel submitted that among the cancelled orders no single litre of admixture had been supplied to establish that the admixture was still having problems of separation. As such, the counsel concluded that the defendants cancelled the orders maliciously as there were no genuine reasons to warrant the cancellation.

In rebuttal, the defendants' counsel had it that the defendants arrived at the decision of cancelling the purchase orders due to separation problem and after several reminders to the plaintiff without improvement.

Further, it was in the defendants' submission that the defendants were forced to continue receiving admixture from the plaintiff even after communicating separation problem due lack of availability of another

supplier at that time. It was emphasized that the defendants cancelled the orders in terms of Article 5 of the contract (purchase orders) which entitles the defendants to reduce the quantities of admixture up to 100%. He thus concluded by beseeching the court to dismiss the claims for want of merits.

Having recounted the parties' evidence albeit in a nutshell and upon canvassing the rival submissions, it is apt to determine the issues framed.

To start with the 1st issue to wit, whether there is breach of terms of purchase orders, it is to be noted at the outset that parties are not in dispute that the defendant through the email of Ahmed Ali Sayed (DW2) dated 6th December, 2021(exhibit P2-B) cancelled three orders namely, No. 2459, 3207 and 4103. Whereas the plaintiff contends that by cancelling the said orders the defendant breached the terms of agreement (purchase orders), the defendants strongly claim that they exercised their right provided under Article 5 of the purchase orders.

The defendants stated that they arrived at the decision of cancelling the orders after the persistent problems of separation and time setting in the materials supplied by the plaintiff. They further alleged that they made several strides by engaging the plaintiff in order to have the problems solved

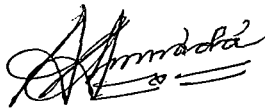
but to no avail as such, they resolved to cancel the orders. DW1 claimed that the supplied materials were not suitable for construction of permanent structures and that they used them for only temporary buildings.

The plaintiff, on its side, through PW1 Andrew Todd stated that they jointly with the defendants developed a special formula of admixture for the defendants' needs and whenever a technical problem arose, the same was attended and solved by the plaintiff upon being notified by the defendant. PW1 Andrew Todd admitted that there was separation problem and setting time but the same were worked upon after Sobute New Materials Company from China sent its expert to the country. PW1 insisted that at the time of cancellation of the orders, the separation and setting time were no longer there. To augment his contention, PW1 tendered printouts of WhatsApp message dated 2nd October 2021 (exhibit P2-B) from the defendants' Quality Control Engineer one Tarek which indicated that there was no longer any problem with regard to the supplied admixture. PW1 further testified that he requested the defendants to visit the site (at Julius Nyerere Hydropower Project) for observation of the alleged problem but he was denied cooperation by defendants' staff.

I have had time to go through the exhibits tendered in particular email and WhatsApp correspondences between the plaintiff and defendants' staff.

There is email from Ahmed Ali Sayed of 02/11/2021 as seen in exhibit P2-B which reads;

> ***'Dear Sirs,***
>
> ***Greetings***
>
> ***Referring to the a/m subject and with regard to PO 2459, PO 3207, PO 4103 to supply the required quantities of (PCA+TZ9) SBT CO) according to the preliminary time schedule of the project and in light of the updated project schedule according to the needs and requirements of implementing the various construction elements.***
>
> ***Kindly be inform (sic) that delivery of the materials shall be suspended because of the inappropriate setting time of concrete at the current construction stage which requires a longer setting time, which is more than the time provided by the material supplied by you.***
>
> ***You will be kept informed of any update on this matter.***
>
> ***For your kind attention and consideration.***
>
> ***Best regards.'***



Whereas Ahmed Ali Sayed (DW1) sent PW1 the above email, the defendants' Quality and Controller one Engineer Tarek had on 2nd October, 2021 written to Andrew Todd (PW1) telling him that there was no longer any problem.

Hardly had he sent the suspension email when on 6th December, 2021, Ahmed Ali Sayed sent Andy Todd a cancellation email. The said email dated 6th December, 2021 at 14:31 contained in exhibit P2-B was to the following effect;

> ***'Dear Mr. Andy Todd***
>
> ***Greetings,***
>
> ***Referring to the above-mentioned subject matter and with regard to the project's needs plan for additives according to the technical recommendations and to the design mixtures approved by the client. Since, the technical recommendations regarding the supplied material led to the refusal to supply additional quantities of it (Supplier's default), Kindly be informed to reduce/cancel quantities of purchase orders as follows'***

The above email is clear that the cancellation was due to supplier's default whereas in the suspension email it was indicated that there was separation problem. Further, supplier's default is provided under Article 7 of the

purchase order whose remedy is termination but during the hearing, the defendants' witness stated that the defendants invoked their right under Article 5 of the purchase orders (exhibits P1A to D).

I have scanned the provisions of the purchase orders (exhibits P1A to D). Article 5 relates to addition or deletion of quantities. It has nothing to do with cancellation as purportedly contended by the defendants. Further, supplier's default which the defendants indicated be the reason in the cancellation email is provided under Article 7 and not Article 5. I have read the grounds under which the purchaser can invoke the right to terminate the contract based on supplier's default provided under Article 7.1.1 to 7.1.4 but none of them occurred in this case. This tells it all that there was no supplier's default as allegedly contended by the defendants through Ahmed Ali (DW1).

Further, during hearing of the case, both defendants' witnesses admitted that all the materials supplied by the plaintiff were used and only 9% of the supplied admixture had separation problem. They further admitted that even the said 9% was replaced by the plaintiff without any charge. In other words, the defendants were supplied all what they ordered. Indeed, the defendants' evidence on the grounds for cancellation of orders is quite contradictory. It is not certain whether it was due to separation and setting time or supplier's

default. PW1 stated that the cancellation was calculated to destroy the plaintiff's reputation and business with a mission to award the supply tender to the International Company called SIKA. The plaintiff's contention finds support from the defendant's submission where it was conceded to that the defendants continued receiving the plaintiff's materials because they had no other supplier at the moment.

Having considered the above, it is my unfeigned findings that defendants breached the terms of agreement (purchase orders) by cancelling the orders without justifiable course. Had the plaintiff's materials been problematic as contended by the defendants, they would not have been used by the defendants. The defendants claimed that they used the materials for only construction of temporary structures but they could not prove this contention. The fact that the defendants admitted that they used all the supplied materials is against their own contention. The first issue is therefore answered in affirmative.

The findings in the 1st issue take me to consider the 2nd issue namely, reliefs which the parties are entitled to. PW1 stated that upon receipt of the purchase orders, the plaintiff ordered raw materials from Sobute New Materials Company in China, tripled the size of the factory and warehouse

on the advice of the defendants' Quality Control Manager one Mr. Moghazy, and hired more staff. He further claimed that at the time of cancellation, the defendants had in possession of 140 Intermediate Bulk Containers which, until the date of testifying in court, had not been returned. This fact was not disputed by the defendants. Moreover, Andrew Todd said that when the defendant suspended the orders, there were twelve (12) containers which were already on the way from China to Tanzania and until today, they have not been used.

The plaintiff further stated that they lost the remaining admixture sales to the project which they estimated at USD 2.5 million as they had reasonable expectation of doing business with the defendants up to the end of project. Moreover, it was also contended that they lost 5m USD in credit facilities with Sobute due to the defendants' act. Besides, the plaintiff testified that it took purchase order financing loan from CRDB Bank and the same was confirmed by the defendant but it failed to service it on account of the defendants' cancellation.

Based on the consequences allegedly caused by the defendants' act of breaching the terms of purchase orders, the plaintiff prayed for; a declaration that the defendant has breached the terms of the purchase

orders dated 28th day of January, 2021 and 11th day of May, 2021, an order for payment of an amount of USD 1, 339,655.02, immediate return and or payment of 140 intermediate bulk containers valued at USD 12,174, payment of USD 258,654.00 being expected profit had the defendants not cancelled the purchase orders, interest at commercial rate of 20% from the date of breach of contract to the date of judgment, interest at court rate of 12% from the date of judgement to the date of payment in full, an order for payment of general damages as may be assessed by the court but not less than USD 12m, costs of the suit and any other relief which this court may deem fit to grant.

I have considered the reliefs sought by the parties vis a vis the evidence adduced in support thereof. The plaintiff prayed for payment of USD 1, 339,655.02. However, upon appraisal of the evidence, it is not clear as to which specific damage this amount refers. PW3 Noel Joseph Ngonyani tendered importation documents, exhibit P12 collectively, in a bid to establish the claimed amount. Further, in the submission, the plaintiff's counsel argued that the said amount was proved through exhibit P12 collectively. I have thoroughly scrutinized exhibit P12 against the purchase orders issued by the defendants. The plaintiff's evidence speaks louder that

the first purchase order (exhibit P1A) was issued on 26th June, 2020. This explains that the transactions between the plaintiff and defendants started from this date onwards. However, among exhibits P12, there are documents relating for payments before even the first order was issued. For example, exhibit P12 (xxi) contains a document namely Commercial Invoice dated 03/03/2020. This is a clear expression that not all payments under exhibit P12 relates to the purchase orders in dispute. Moreover, the plaintiff stated very clearly that she supplied the materials requested through the first purchase order (exhibit P1A) and she was fully paid according to the terms. Yet, exhibit P12 does not specifically point the purchase order in respect of which the payment was made.

Furthermore, there is no sufficient evidence to prove that the materials indicated in exhibit P12 collectively were intended for the defendants only. The plaintiff's witnesses admitted that they were supplying admixture to other purchasers than the defendants. This is also found in the email by Andy Toddy (PW1) dated 3/11/2021 at 11:13 (exhibit D5) where he says;

> ***' we have enough stock to make you at least 300MT right now but that will reduce as other customers place order'***

Since this sum of USD 1, 339,655.02 was pleaded as specific damages, it was incumbent on the plaintiff to specifically and strictly prove it, a duty which, in my view, the plaintiff failed to discharge. The authorities on this position are without number including the cases of **Tanzania Electric Supply Limited vs Timber Enterprises Limited,** Civil Appeal No. 26 of 2000 (unreported) and **Reliance Insurance Company (T) LTD & 2 others vs Festo Mgomapayo**, Civil Appeal No. 23 of 23 of 2019, CAT at Dodoma. As such, I decline to grant the prayer for payment of USD 1, 339,655.02.

With regard to 140 intermediate bulk containers valued at USD 12,174, PW1 said it clearly that at the time of cancellation the said containers were in the possession of the defendants. He also stated that the plaintiff failed to collect them because of the cumbersome procedures to enter the premises. The defendants did not dispute this fact. I therefore, without much ado, grant the prayer.

In addition, the plaintiff prayed for an order for payment of USD 258,654.00 being expected profit had the defendants not cancelled the purchase orders. The plaintiff simply stated that she expected to make a profit of the said sum from the transactions with the defendants. The plaintiff further alleged that

she had expectation to supply the defendants up to the end of project. It is a settled position of law that expected profit falls under the category of specific damages as such, it should be specifically and strictly proved. See **Puma Energy Tanzania Limited vs Ruby Roadways (T) LTD,** Civil Appeal No. 287 of 2020, CAT at Dodoma and **Professional Paint Centre Limited vs Azania Bank Limited**, Commercial Case No. 53 of 2021, HC Commercial Division at Dar es Salaam. The plaintiff ought to specifically establish how she arrived at that figure but she simply evasively claimed the said sum. Owing to this shortfall in the plaintiff's evidence, I hold that the plaintiff failed to prove the expected profit.

Besides, the plaintiff sought for general damages as may be assessed by the court but not less than USD 12M. There is no dispute that the defendants cancelled three purchase orders. It was also established by the plaintiff that upon receipt of purchase orders, the plaintiff ordered raw materials from Sobute New Material Co. LTD in China although the plaintiff could not specifically establish as to the costs she exactly incurred for the materials ordered in respect of the cancelled orders. It was also sufficiently established by the plaintiff that on account of the purchase orders, the plaintiff applied for and was granted loan after the defendants, through Diana Rognass,

confirmed the orders to CRDB Bank as evidenced via exhibit P7(i). It is also established that following cancellation of the purchase orders, the plaintiff was incapable to service the loan as exhibited in the correspondences between the plaintiff and CRDB Bank (exhibit P9 (i) to (iii). Also, I have taken into account that the three cancelled orders had a total value of USD 1, 974, 328 in that Purchase Order No. 2459 was worth USD 476, 489, Order No. 3207 was worth USD 1, 192, 066.20 and Order No. 4103 was worth USD 305 773. I also considered the fact that despite cancellation of the orders, the plaintiff was doing business with other customers and therefore the plaintiff's business did not completely stop on account of the defendant's cancellation. It is a clear position of law that general damages need not to be specifically proved rather it suffices even to just aver that the damage was suffered. See **Reliance Insurance Company (T) LTD & 2 others** (supra). Having considered all the above, I am inclined to hold that the plaintiff suffered damages and therefore she is entitled to payment of general damages to a tune of USD 5,000,000.

That said and done, I enter judgment and decree in favour of the plaintiff and consequently issue the following orders;

(i) It is hereby declared that the defendants breached the terms of the purchase orders dated 2nd November, 2020, 28th day of January, 2021 and 11th day of May, 2021

(ii) The defendants are ordered to immediately return and or make payment of 140 intermediate bulk containers valued at USD 12,174.

(iii) The defendants are ordered to pay general damages to the tune of USD 5,000,000 say United States Dollars five million

(iv) The defendants are ordered to pay interest at court rate of 7% of the amount decreed under (iii) above from the date of judgement to the date of payment in full.

(v) Costs of the suit be borne by the defendants.

It is hereby ordered.

The right of appeal is fully explained.

Dated at Dar es Salaam this 24th day of February, 2023.

A.A. Mbagwa

JUDGE

24/02/2023