

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO.131 OF 2023**

**SIMBA PIPE INDUSTRIES LIMITED.....PLAINTIFF**

**VERSUS**

**NAJJA HARDWARE.....1<sup>ST</sup> DEFENDANT**

**RASHID MWINYIMKUU MBEGU.....2<sup>ND</sup> DEFENDANT**

**DEFAULT JUDGMENT**

**Date of Last order: 14/03/2024**

**Date of Judgment: 09/05/2024**

**GONZI, J.**

As stipulated under paragraphs 4 and 5 of the Plaint, the Plaintiff instituted the present case against the defendants claiming against them jointly and severally for payment of TZS. 275,500,732.11 (Tanzania Shillings Two Hundred Seventy-Five Million Five Hundred Thousand Seven Hundred and Thirty-two cents only) being the outstanding payment and interest for the supply of various goods ranging from pipes, fittings, sluice gate valve, rubber gasket etc. as of 21<sup>st</sup> September 2023 supplied to the 1<sup>st</sup> Defendant by the Plaintiff and guaranteed by the 2<sup>nd</sup> Defendant. The Plaintiff relied on the copies of Account Statements of Najja hardware, 1<sup>st</sup> defendant for the period

ranging from 1<sup>st</sup> December 2018 to 21<sup>st</sup> September 2023 which was annexed as Annexure SPIL-1 to the Plaint. Further, the Plaintiff claimed for payment of general damages as assessed by the court on account of the defendant's failure to make payments in time.

When the case was called in court on 4<sup>th</sup> December 2023, the Defendants defaulted to enter appearance and the Plaintiff's Counsel Ms. Ludigalda Mavika addressed the court that the Plaintiff had attempted to serve both Defendants through the court process server whose affidavit of service is in the court file. She stated that the personal service through the court process server had failed as the defendants had refused to accept service and thus the court Process Server had filed an affidavit of service. Ms. Mavika prayed for substituted service by publication in the newspaper. The Court granted the prayer for substituted service after being satisfied that there was evidence in the court file in the form of an affidavit dated 30<sup>th</sup> October 2023 deposed by the Court Process Server one Simbelte Lupogo. In the affidavit, the Court process server stated that he was sent to effect service of summons to file Written Statement of Defence to the Defendants place of business at Plot No.8, Kiungani/Kipande Street, Kariakoo, Gerezani, Ilala, Dar es salaam but the Defendants hid themselves and instructed the receptionist

to talk to the court process server and that when he introduced himself to the receptionist, still the Defendants refused to accept or sign the plaint and summons to file Written Statement of Defence which he had gone to serve them. On 4<sup>th</sup> December 2023, upon proof of refusal to accept service in person, the court ordered the defendants be served by way of substituted service by publication in the Mwananchi Newspaper and the Defendants were given up to 27<sup>th</sup> December 2023 to file their Written Statements of Defence.

On 14<sup>th</sup> February 2024, when the case was called, the Plaintiff's counsel Mr. Tarzan Mwaiteleke informed the court that the substituted service had been effective by way of publication in Mwananchi Newspaper dated 8<sup>th</sup> December 2023 at page 24. As no Written Statement of Defence was filed by either Defendant, He therefore prayed to use Rule 22(1) of the Commercial Court Rules to file form No.1 and an affidavit within 7 days applying for default Judgment.

The court granted the prayer and on 20<sup>th</sup> February 2023, the Plaintiff filed in Court an application for default judgment by way of Form No.1 and an affidavit of one Sanjay Kumar Agrawal, a Principal Officer of the Plaintiff. On 14<sup>th</sup> March 2024, the Court ordered that the Defendants be notified of the

date of delivery of default judgment against them by way off publication in  
1 Newspaper. On

The Plaintiff testified through the affidavit that the 1<sup>st</sup> Defendant is a legal entity registered as a business name and the 2<sup>nd</sup> Defendant is the Director in the 1<sup>st</sup> Defendant who also acted as a guarantor in the agreement between the Plaintiff and the 1<sup>st</sup> Defendant. He testified that the Defendants are business persons and that on 31<sup>st</sup> December 2018, the 2<sup>nd</sup> Defendant signed a Sale/Supply Agreement with the Plaintiff for the Plaintiff to supply and sell to the 1<sup>st</sup> defendant various goods and properties. He tendered the Sale/Supply Agreement as Exhibit P1. He testified further that under the sale/supply agreement, the Plaintiff supplied the 1<sup>st</sup> Defendant with various properties and materials including air valve, all flanged Tee DV250/250, ball valve Falange 6, Bend 90 Double Flanged DN 250, Bend 90 Double Flanged DN 300, Bend 90 Duck Foot DN 250, Bolts, Nuts and washers 24mm/75 mm (1) FBT, Brass ball valve  $\frac{3}{4}$ , CI sluice valve and others. The witness testified that it was agreed in the Pro Forma Invoices that payment would be through the bank account of the Plaintiff at Standard Chartered Bank Tanzania Limited. The Plaintiff tendered copies of Pro Forma Invoices dated 31<sup>st</sup> December 2018, Delivery Notes and Tax Invoices as Exhibit P2(a), (b), (c).

It was testified by the Plaintiff further that it was agreed by the parties that any outstanding payment would attract interest at 2% for every one month of the delay beyond 91 days. As a security for the goods supplied by the plaintiff to the 1<sup>st</sup> Defendant, the 2<sup>nd</sup> Defendant being the owner and director of the 1<sup>st</sup> defendant personally guaranteed full repayment thereof.

The Plaintiff testified further that the outstanding payments of the principal sums and interest for the goods supplied by the Plaintiff to the 1<sup>st</sup> Defendant, and guaranteed by the 2<sup>nd</sup> Defendant as, of 21<sup>st</sup> September 2023 was TZS 275,500,732.11 which the Plaintiff has repeatedly demanded from the Defendants in vain and therefore its board of directors has resolved to institute the present suit. The Plaintiff tendered exhibit P6 being a copy of the Account Statement of the 1<sup>st</sup> Defendant. He tendered Exhibit P-3(a) and (b) being copies of the demand letter to the defendants and the Board resolution for filing the present suit, respectively. The witness went on to testify that at the time of supply of goods to the 1<sup>st</sup> Defendant, the Plaintiff was known by its previous name of DPI Simba Limited but that on 24<sup>th</sup> May 2019 the Plaintiff changed its name to Simba Pipe Industries Limited. He tendered Exhibit P-4 being a certificate of change of name by the Plaintiff.

The witness for plaintiff testified further that the non-payment of the outstanding sum and interest by the Defendants has occasioned loss of revenue to the Plaintiff to use and re-invest the money, general disturbance and penalties for the Plaintiff failing or delaying to pay its supplies and TRA. He testified further that the plaintiff has suffered physical and mental anguish. That marked the end of the testimony of the only witness for the Plaintiff.

It goes without saying that the suit is one for breach of contract. The constituents of a cause of action founded on breach of contract are very familiar. The Plaintiff has to prove that there exists a valid contract with the Defendant and that the Defendant has unjustifiably breached the terms of that contract consequent to which the Plaintiff has suffered damages. I looked at Exhibit P-1 the Agreement for Sale dated 31<sup>st</sup> December 2018 which is the contractual basis for the Plaintiff's claims against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The agreement is tripartite, entered and signed by DPI Simba Limited which by virtue of Exhibit P-4 has changed name into the Plaintiff Company herein; the 1<sup>st</sup> defendant and the 2<sup>nd</sup> Defendant. The Plaintiff is described as the seller, the 1<sup>st</sup> Defendant as the purchaser and the 2<sup>nd</sup> Defendant as the Guarantor. The Plaintiff signed the agreement through its

manager named Mr. Sarat Chandra Sanka in the presence of Sanjay Agrawal, Manager. The 1<sup>st</sup> defendant signed the contract through Mr. Rashidi Mwinyimkuu Mbegu, the Director of Najja Hardware witnessed by one Ulimwengu Amili, Plumber. The 2<sup>nd</sup> Defendant signed the agreement in person as Mr. Rashidi Mwinyimkuu Mbegu, the Guarantor to Najja Hardware witnessed by one Ulimwengu Amili, Plumber. In the signature of the Plaintiff, there is affixed a Rubber Stamp of DPI Simba Limited while in the places where the 1<sup>st</sup> and 2<sup>nd</sup> Defendants signed there is affixed a rubber stamp of Najja Hardware.

It should be borne in mind that the 1<sup>st</sup> defendant is not a legal entity. The Plaintiff in his testimony and in the plaint stated that the 1<sup>st</sup> Defendant is a legal entity registered as a business name. Looking at the name of the 1<sup>st</sup> Defendant, there is no use of the word "Limited" attached to it. This means Najja Hardware is not a legal entity but rather a business name under which the 2<sup>nd</sup> Defendant, as the owner thereof, is doing business. Could a business name be sued on its own name as a legal entity? The answer is in the negative. whereas a business name cannot be sued as a legal entity, the person doing business under a business name can be sued using that name. The suit should be against the person.

Order XXIX Rule10 of the Civil Procedure Code provides that:

***"Any person carrying on business in a name or style other than his own name, may be sued in such name or style as if it were a firm name; and, so far as the nature of the case will permit, all rules under this Order shall apply."***

Therefore, essentially the current suit is against the 2<sup>nd</sup> defendant who also trades under the business name of Najja Hardware. It is allowed to sue a person under the business name but the liability under the suit shall lie upon the person doing business under the business name.

In the present case, the Plaintiff has sued the 1<sup>st</sup> and 2<sup>nd</sup> Defendants for breach of contract. A cause of action founded on breach of contract essentially involves ascertainment of whether or not there was a valid agreement between the Plaintiff and the Defendant and whether the Defendant has breached the terms of that agreement resulting into the Plaintiff suffering damages as a result of that breach. The pertinent question which arises therefore is whether or not there was a valid agreement between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants? Sections 10 and 11(2) of the Law of Contract Act of Tanzania, Cap 345 provide that:



***"10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void:***

***11.(2) An agreement by a person who is not hereby declared to be competent to contract is void."***

I examined the validity of the Agreement for Sale dated 31<sup>st</sup> December, 2018 between the Plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants which was tendered as Exhibit P-1. It is providing for the Plaintiff supplying the 1<sup>st</sup> defendant with various goods or property from the Plaintiff at the consideration of purchase price of TZS 130,000,000/= excluding VAT. The 2<sup>nd</sup> Defendant signed as the guarantor. The question that comes first is whether the 1<sup>st</sup> Defendant was competent to enter into a valid agreement in its own name? Although the Plaintiff has named the 2<sup>nd</sup> Defendant as the Director of the 1<sup>st</sup> defendant company, it is clear that in law that was not correct, as the plaintiff has stated that the 1<sup>st</sup> defendant is a business name, it is not a limited liability company. The second defendant cannot be a director in a non-legal entity. The 1<sup>st</sup> Defendant is actually the style or business name by which the 2<sup>nd</sup> Defendant himself is doing business. Thus

he shoulders all the attendant risks himself personally. Actually, when the 2<sup>nd</sup> Defendant stood as the guarantor for the contractual liability of the 1<sup>st</sup> Defendant, towards the Plaintiff, under the Agreement of sale dated 31<sup>st</sup> December 2018 (Exhibit P-1), he was in effect standing as a guarantor to himself, if a valid contract was entered between the Plaintiff and the 1<sup>st</sup> defendant. In the entire agreement of sale there is no clause that imposes any obligation upon the 2<sup>nd</sup> Defendant other than merely signing as the Director of the 1<sup>st</sup> Defendant and as the guarantor for the 1<sup>st</sup> Defendant. The obligations of the guarantor are not stipulated anywhere in the entire agreement. The agreement is exclusively between the Plaintiff and the 1<sup>st</sup> defendant. The 2<sup>nd</sup> Defendant as an individual, doing business in the business name styled as Najja Hardware, could be sued in a suit brought against that business name. On the business name itself could not competently enter into a valid agreement in its own name. Competence to enter into a contract is an entirely different issue from the appropriateness or otherwise of a person to sue and be sued in the business name under which he operates his business. The Plaintiff's witness testified under paragraphs 4 and 5 of the affidavits of proof that:

***"The 1<sup>st</sup> Defendant is a registered business name entity duly registered under the laws of Tanzania. That sometimes on 31<sup>st</sup> December 2018, the Plaintiff, the 1<sup>st</sup> and 2<sup>nd</sup> defendants herein by their free will, entered into Sale/Supply Agreement whereby the Plaintiff was to supply and sale to the 1<sup>st</sup> defendant with various goods/properties from the plaintiff..."***

The above evidence from the affidavit of proof by the sole Plaintiff's witness read together with the Agreement itself (Exhibit P-1) leave no doubt that the Agreement between the Plaintiff and the Defendants was signed by the 1<sup>st</sup> defendant as an equal party to the contract alongside the Plaintiff and the 2<sup>nd</sup> Defendant. Was the business name competent to enter into a valid agreement as an entity? My answer is in the negative. A business name is not a legal entity and as such it cannot enter into a valid agreement. The proprietors of the business name are the ones who can personally enter into contractual relationship. They may trade and ultimately be sued under the name of their business but the contractual obligation must be entered into by the individuals using the business name in their individual capacity.

In **NBC Limited & Another vs Bruno Vitus Swalo (Civil Appeal 331 of 2019) [2021] TZCA 122 (20 April 2021)**, decided by the Court of Appeal

of Tanzania at Mbeya, the legal capacity to enter into a valid agreement was stressed in the following words:

***"Looking at the nature of the transaction, it is evident that the parties entered into a legally recognized sale agreement. That contract was in accordance with section 10 of the Law of Contract Act, Cap. 345 R. E. 2002 (now Cap. 345 R. E. 2009) (the LCA) which provides, in part, that: - "10. All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void." The parties had the capacity to enter into a valid contract, for according to the pleadings, they are legal persons with capacity to sue or be sued. They were competent to contract in terms of section 11 of the LCA."***

For a legal entity to have the capacity to enter into a contract, it must be a legal person with capacity to sue and be sued. A business name or partnership has no legal capacity to sue or be sued as an entity. The individuals doing business under the business name as partners or proprietors thereof can sue or be sued in their business name. The partnership or business name cannot enter into a valid contract as if it were a legal entity. In the case at hand, it was the 2<sup>nd</sup> Defendant who was able to enter into an agreement with the plaintiff. In the case at hand there are two

separate agreements contained in one document. The first is the agreement for sale of goods on credit. This was between the plaintiff and the 1<sup>st</sup> Defendant. The primary obligation to pay was imposed upon the 1<sup>st</sup> defendant, Najja Hardware. There was the second agreement of guarantee whereby the 2<sup>nd</sup> Defendant stood as the guarantor to guarantee full repayment by the 1<sup>st</sup> defendant to the Plaintiff. The contract of guarantee is defined under section 78 of the Law of Contract Act thus:

***"78. A "contract of guarantee" is a contract to perform the promise or discharge the liability, of a third person in case of his default and the person who gives the guarantee is called the "surety"; the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor"; and guarantee may be either oral or written. "***

In order to have a valid contract of guarantee, there must have been a third party whose liability the Guarantor undertakes to indemnify the creditor. As the 1<sup>st</sup> Defendant is not a legal entity, there could not be any valid guarantee agreement in favour of a non-existent person. The obligation of the 2<sup>nd</sup> Defendant as guarantor would arise only if there was a valid guarantee agreement and upon the 1<sup>st</sup> defendant incurring a contractual obligation to

pay the Plaintiff and that the 1<sup>st</sup> defendant should have defaulted to pay the contract sums. Now, as the 1<sup>st</sup> defendant was not a legal entity, not a limited liability Company, there was no valid agreement between the plaintiff and the 1<sup>st</sup> Defendant. One could be tempted to think that the 2<sup>nd</sup> Defendant is actually the one liable for and on behalf of the 1<sup>st</sup> defendant, as the owner of the business name, but it must be remembered that the 2<sup>nd</sup> Defendant distanced himself as a separate person to the agreement, whose duty as a guarantor was only to repay the sums in case the 1<sup>st</sup> defendant defaulted and incurred liability to pay. Now, as the 1<sup>st</sup> Defendant is a non-existent person who could not enter into a valid agreement and as such no liability could ensue against the 1<sup>st</sup> defendant for being a non-existent person, the secondary obligation on the part of the 2<sup>nd</sup> Defendant to repay the amounts due for and on behalf of the 1<sup>st</sup> defendant does not arise.

What is the consequence of a contract that is entered into by a party not competent to enter into a contract? Section 11(2) provides that **an agreement by a person who is not hereby declared to be competent to contract is void.**

What is the remedy where the contract is void.? For a contract to be legally binding, the parties signing the agreement should be of legal capacity. Lack

of legal capacity makes a contract null and void. Null and void contracts become immediately invalid, making the terms and conditions unenforceable. This means neither party can compel the other to fulfill the obligations outlined in the contract. Courts will not uphold the terms of the contract or provide remedies for its breach. Rights and obligations cannot pass from one party to the other under a void agreement. Parties are restored to their original position. The law is clear under section 65 of the Law of Contract Act that **"when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it."**

Exhibit P-1 which is the purported sale agreement show that the purported contract price was Tshs. 130,000,000/= which is the agreed value of goods supplied by the Plaintiff to the 2<sup>nd</sup> Defendant trading under the name of the 1<sup>st</sup> Defendant. Paragraph 9 of the affidavit of proof of the claim, shows that the Plaintiff supplied the 1<sup>st</sup> Defendant with goods worth Tshs. 129,949,212.20 with the VAT thereon being Tshs. 23,390,858.20, making a total **Tshs.153,340,070.40/=**. This amount is not disputed as the

defendants have opted not to file any WSD. I order the second Defendant one **RASHID MWINYIMKUU MBEGU** who is the one trading under the name of the 1<sup>st</sup> Defendant, to pay the Plaintiff an amount of Tshs.130 million as a refund for the value of goods which were supplied to him under the void agreement. Having held that the agreement between the Plaintiff and the Defendants is void and unenforceable, it follows that the other elements of a cause of action for breach of contract are not applicable as one cannot be held liable to have breached a void agreement and damages are not recoverable under a void agreement. In fact, the terms and conditions of the agreement which would operate to give any benefits to either party do not exist as the very agreement in which they are contained, is void.

This case therefore fails save to the extent of the order for the 2<sup>nd</sup> Defendant **RASHID MWINYIMKUU MBEGU to refund Tshs.130 million to the Plaintiff.** It is so ordered.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

**A. H. GONZI**

**JUDGE**

**09/05/2024**



Judgment delivered in Court this 9<sup>th</sup> day of May, 2024 in the presence of Ludigalda Mavika and learned advocates for the Plaintiff and in the absence of the Defendants who were duly served.



A handwritten signature in black ink, appearing to read "A. H. Gonzi".

**A. H. GONZI**

**JUDGE**

**09/05/2024**