IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 141 OF 2014

HASH ENERGY TANZANIA LIMITED ..... **PLAINTIFF**

VERSUS

1. RIVA OILS (T) LIMITED	.....	**1st DEFENDANT**
2. TIMOTHY MAJOR MAGEGE	.....	**2nd DEFENDANT**
3. PAUL MAJOR MAGEGE	.....	**3rd DEFENDANT**
4. MOSES LIYUMBA (Administrator of the Estate of The late AMATUS LIYUMBA	.....	**4th DEFENDANT**

JUDGMENT

SEHEL, J.

This is a suit for the payment of TZS. 4,525,390,701.00 being a refund of the purchase price paid for the goods not delivered and fraudulently paid to the 1st defendant; for payment of TZS. 2,000,000,000.00 as general damages and interest at the rate of 25% per annum from March 2014 to the date of judgment. In the alternative, the plaintiff prays for an order of sale of the property

situate at Plot No. 487, Kawe Low Density Area, Kinondoni District, Dar es Salaam.

It is alleged by the plaintiff that in between March 2013 and April 2014 the plaintiff entered into several agreements with the 1st defendant for the supply of bulk quantities of petroleum products where the defendant issues a pro-forma invoice indicating the quantity of goods to be supplied, unit price and the total value of the goods. Upon receipt of the pro-forma invoice, the plaintiff pays the amount stated in it. It is alleged that the 1st defendant did not always deliver the exact quantities as indicated in the pro-forma invoice thus by the 10th April, 2014 there was an outstanding balance of TZS 1,224,908,084.00 on account of no deliveries and there was a sum of TZS 596,527,142.00 that the plaintiff had to pay the Tanzania Revenue Authority (TRA) on behalf of the 1st defendant for the release of MT. Nave Atropos vessel.

The plaintiff also alleged that the 2nd and 3rd defendants conspired with Mr. Moses Muturi, the plaintiff's finance manage to falsify accounts to show that the 1st defendant had supplied

petroleum products worth TZS. 2,649,840,000.00 while it was not true; in March, 2014 the plaintiff paid for a consignment of 1,000 cubic meters of gasoil of which the plaintiff the full purchase price but such consignment was intercepted at HASS Petroleum (T) Ltd (the plaintiff's facility) by TRA on account of the 1st defendant's tax liabilities as such 261,000 litres of gasoil worth TZS 523,194,937.00 were auctioned by the TRA to clear the debt; due to the accumulation of debt, the 1st defendant requested the late Amatus Liyumba who agreed to secure the 1st defendant's repayment by depositing his title deed C.T No. 29587 Plot No. 487, Kawe Low Density Area, Kinondoni District, Dar es Salaam.

The suit was contested by the defendants. In their joint written statement of defence, the defendants categorically denied all liability to the plaintiff's claims. They averred that the plaintiff buys the bulk procurement directly from the supplier without tax thus the plaintiff had obligation to pay tax and it was the responsibility of the plaintiff to transfer the goods from the tanks of the supplier to any storage of its own choice and at its own costs. Regarding Title Deed,

the defendants averred that it was handed to the plaintiff for securing a loan from NIC Bank but that loan was never taken.

The dispute passed through mediation but it was not amicably settled thus in compliance with Rule 49 (2) of the High Court (Commercial Division) Procedure Rules the Plaintiff filed one witness statement to establish her case while the defendants filed three witness statements. Out of the three witnesses only one witness was brought for cross examination and no explanation was provided for failure to parade other witnesses. Therefore in terms of Rule 56 (2) of the High Court (Commercial Division) Procedure Rules GN 250 of 20122 (hereinafter referred to as "the Rules") the witness statements of **Paul Major Magige** and **Moses Liyumba** are hereby strike out from the court records. We are thus left with the witness statement of **Timothy Major Magige (DW1)** whose witness statement was admitted to form part of DW1's testimony in chief and part of proceedings of this case. I will consider the evidence brought forward by the plaintiff and the defendant when determining each issue. Before going into determination of the issues, it is important at this stage to point out

that the counsel for the defendants did not file any final submissions despite being given several extensions. I fully appreciate the efforts taken by Crest Attorneys law firm for making sure that they file their final submissions despite the demise of their counsel who was handling the matter.

In order to properly determine the dispute, the Court framed the following issues:-

1. Whether the 1st defendant owes the Plaintiff TZS 1,224,908,084.00 being the value of petroleum products paid for by the Plaintiff but not supplied by the 1st defendant;

2. Whether the 1st ,2nd , 3rd, and 4th defendants owe the plaintiff the sum of TZS 2,649,840,000.00 being the value of petroleum products which the plaintiff's finance manager purposely omitted to record in the plaintiff's books as having been paid to the 1st defendant after conspiring with the 2nd and 3rd defendants and for which no supply was made by the 1st defendant;

3. Whether the 1st defendant is liable to refund to the plaintiff another sum of TZS 523,194,937.00 being the value of 261,000 liters of Gas oil which the plaintiff had purchased from the 1st defendant but later seized and auctioned by TRA to clear tax liabilities;

4. Whether the 1st, 2nd, and 3rd defendants ever acknowledged the 1st defendant's liability to the plaintiff in the sum of USD 2,006,897.00 as of 31st May, 2014;

5. Whether the 4th defendant guaranteed payment of the 1st defendant's liability to the plaintiff by depositing his title deed C.T No. 29587 Plot No. 487, Kawe Low Density Area, Kinondoni District, Dar es Salaam.

6. To what reliefs are the parties entitled.

Starting with the first issue whether the 1st defendant owes the Plaintiff TZS 1,224,908,084.00 being the value of petroleum products paid for by the Plaintiff but not supplied by the 1st defendant, the evidence of the plaintiff through its witness Dr. Asmahan Adan (PW1)

was that sometime in March, 2013 and April, 2014 the plaintiff entered into several agreements with the 1st defendant whereby the later agreed to sell different bulk quantities of petroleum products to the former. Further, that under the agreement, the 1st defendant would issue a pro-forma indicating the quantity intended to be supplied, the unit price and the total value of the goods to be sold, and in return the plaintiff would proceed to pay the amount of the pro-forma invoice by deposing the same into defendant's bank account. She said that the 1st defendant had always been not delivering the exact quantities appearing in the pro-forma invoice and the actual outturn quantities supplied by the 1st defendant were always less than the quantities on the pro-forma invoices in respect of each transaction. Further that as a result of the short deliveries of the petroleum products the 1st defendant was paid monies for which it did not deliver the petroleum products. She said up to 10th April, 2014 the plaintiff had paid the 1st defendant the sum of TZS 1,224,908,084.00 for which the 1st defendant made no deliveries of the petroleum products. The amount paid also includes TZS.

596,527,142.00 which the plaintiff had paid to TRA on behalf of the 1st defendant to release the MT. Nave Atropos vessel with the understanding that the 1st defendant would supply the same. PW1 tendered the pro-forma invoices, sale agreement and details of payments made in respect of each transaction and they were collectively admitted as Exhibit P1.

As hinted herein, the defendants in disputing this issue paraded one witness Timothy Major Magige (DW1) the Managing Director of the 1st defendant and also the 2nd defendant in the suit. He said he is a businessman by professional and that he knows the plaintiff that sometime in 2013/14 they had a contract for the supply of bulk fuel. He explained the procedure of handing over the bulk fuel from the supplier to the plaintiff that once the contract is concluded it was the duty of the plaintiff to transfer the bulk fuel from the tanks of the supplier to any storage or deport at its own costs and supervision. He said that since the bulk has been handed over to the plaintiff, the 1st defendant could not be responsible for any loss of the said fuel at the time of transfer. He further said that due to the nature of the

business itself the petroleum products can evaporate due to the availability of some conditions, and due to the problems of infrastructure as such the amount can be less than what has been stated in the pro-forma invoice, however, it cannot rise to and exceed 921.2 liters during the whole time of the transaction.

On the payment of tax to TRA regarding the vessel MV Novar, it was the defence of the defendants that they have neither imported the vessel nor authorized the plaintiff to pay tax on their behalf. DW1 said if the plaintiff paid then the 1st defendant could not be responsible.

When asked in cross examination how he can prove that the plaintiff received the ordered quantity, he explained that he was issuing Bill of lading to the plaintiff to confirm the quantity of the product the 1st defendant had in the SPM since the petroleum he was selling to the plaintiff was being pumped from SPM warehouse that had other seller's. He explained that any document issued to it by the owner of the depot, it would pass that document to the customer. He said after the plaintiff paid for the petroleum product,

ownership of the product pass to the plaintiff and therefore the 1st defendant could not question the owner of the storage depot about how much of the product had been delivered to the plaintiff.

The counsel for the plaintiff in his final submission attacked the testimony of DW1. He submitted that it is not true that Bill of lading proved delivery of goods. He said delivery of goods can only be proved by way of Delivery Notes or Bank Statements of which the defendants failed to tender. In any event, he submitted that the plaintiff never dealt directly with the shipper.

Both parties as shown herein acknowledged that they had a contract for supply of petroleum products. In order to adequately resolve this issue as to whether the 1st defendant is indebted to the plaintiff it is important to understand the chain of the supply and delivery of the petroleum products. That procedure had been well explained by PW1 when she was answering to the Court's question.

PW1 explained that the 1st defendant would order the petroleum products in bulk through bulk procurement system. The bulk product would arrive through vessel and would be received by

the Bulk Procurement System [BPS] Team. The product would come under the name of the 1st defendant.

Thereafter, the payment would be required to be made to the BPS by the 1st defendant but since at times the 1st defendant did not have funds to pay, the 1st defendant would approach the plaintiff with an offer to sell the product. The plaintiff would issue a Pro-forma Invoice on the said quantity and the price for the product, inclusive of taxes, together with a sale agreement. Once agreed, the Plaintiff would make payment to the 1st defendant who would in turn made payment to BPS. After payment, the product would be discharged to the depot of the client's choice and in this case, at the plaintiff's choice. Further, the volume of product that would be discharged into the hospitality depot as would be confirmed by the 3rd party (SGS or Intertec). And finally, the Plaintiff would start to sell the product to other parties.

From the above procedure, it discerns that the plaintiff depended upon the word of the 1st defendant on the quantity and value of the ordered products to which the plaintiff made payment

to. It is on evidence through the testimony of PW1 and tendered documents, namely; Pro-forma Invoices, Sale agreements and payments made, exhibit P1 collectively, the plaintiff made payment of Tshs. 1,224,908,084.00 to the 1st defendant for supply of petroleum products but the 1st defendant failed to deliver the same to the plaintiff. Issue number one is therefore answered in the affirmative.

I now turn to the second issue that is whether the 1st, 2nd, 3rd, and 4th defendants owe the plaintiff the sum of TZS 2,649,840,000.00 being the value of petroleum products which the plaintiff's finance manager purposely omitted to record in the plaintiff's books as having been paid to the 1st defendant after conspiring with the 2nd and 3rd defendants and for which no supply was made by the 1st defendant. It was the evidence of PW1 that the between October, 2013 and December, 2013, the 2nd and 3rd defendants conspired with one Mr. Moses Muturi who was the Plaintiff's Finance Manager to obtain a credit of TZS 2,649,840,000.00 into the 1st defendant's bank account contrary to the agreed procedure and without any intention of supplying the same petroleum products for the amount

received in consideration of paying the said Moses Muturi a bribe of USD 400,000. Copies of Bank statements from CRDB, Ecobank, NIC and Standard Chartered Banks were collectively admitted as Exhibit P2. Also a letter dated 2nd June, 2014 and 17th June, 2014 were collectively admitted as Exhibit P3.

DW1 on his part though acknowledged that he signed the letter dated 17th June, 2014 but it was his explanation that the said letter was prepared by PW1 and PW1 requested him to sign it so that she could arrest Moses Muturi through INTERPOL. He said PW1 being a business partner, he did not have any doubt to assist her but he insisted that there is no truth in that letter since no single coin had been transferred into the 1st defendant's account. DW1further stated that the matter was once reported at the Central Police Station by PW1 and she was requested to bring evidence as to how the said monies were transferred and that matter to his understanding is still at the police and PW1 failed to take any evidence to the police. He was thus surprised to see that PW1 had transferred the same issue to this Court.

From the evidence of PW1 it is clear that the plaintiff is complaining about criminal racketeering between Moses Muturi and 1st defendant. It is trite law that "a burden of proof lies upon a person *who desires a court to give judgment*" and the law requires such a person who "*asserts.....the existence of facts to prove that those facts exist*" (Section 110 (1) and (2) of the Evidence Act, Cap.6). In the case of **Rock Beach Hotel Limited Vs Tanzania Revenue Authority**, Civil Application No. 52 of 2003 (Unreported) Court of Appeal of Tanzania insisted that "the *provisions of Section 110 of the Evidence Act, Cap. 6 R.E 2002 places the burden of proof on him who alleged*".

In the matter at hand, the plaintiff is under obligation to prove its case on the balance of probabilities that the 1st defendant bribed one Moses Muturi in order to falsify the accounts of the plaintiff to the tune of Tshs. 2,649,840,000.00. Since the allegation on this issue involves criminality on part of the 1st defendant and Moses Muturi then proof has to be established that the 1st defendant and one Moses Muturi indeed did commit the said criminal offence. The

plaintiff tendered a letter dated 17th June, 2014. I have scrutinized that letter and noted that it was addressed to the Directot of Criminal Investigation. It is titled "Report on Fraud by Moses Muturi against Oils Tz Ltd and Hashi Energy (T) Ltd". It thus clear from this letter that the main purpose of it was to report the criminal offence committed by one Moses Muturi against the plaintiff and 1st defendant. It was thus expected for the investigation to be conducted. Unfortunately, neither PW1 nor the pleadings established that there was either criminal investigation or prosecution pursued against the 1st defendant and Moses Muturi by the plaintiff. There is no such evidence. There being no evidence advanced by the plaintiff to establish the same over the alleged criminal act then issue number two is answered in the negative.

The third issue is whether the 1st defendant is liable to refund to the plaintiff another sum of TZS 523,194,937.00 being the value of 261,000 liters of Gas oil which the plaintiff had purchased from the 1st defendant but later seized and auctioned by TRA to clear tax liabilities.

PW1 testified that in March, 2014 the plaintiff purchased a consignment of 1,000 cubic metres of gasoil which was delivered from the 1st defendant's storage facility at Hass Petroleum (T) Ltd. She said the plaintiff paid the full purchase price but upon delivery of the product at Hass Petroleum (T) Ltd, the same was seized on account of tax liabilities, which PW1 said, the 1st defendant owed the TRA. She further testified that the 1st defendant did not take any steps to clear the debt such that TRA had to auction 261,000 litres of gasoil worth TZS 523,194,937.00 out of 1,000 cubic metres bought by the plaintiff. Fuel sale agreement dated 21st March, 2014, Hospitality agreement between Hass Terminal Limited and Hash Energy Tanzania Limited, letter dated 9th September, 2014, TRA's letter dated 9th September, 2014 and email correspondences of 3rd June 2014 and 21st October, 2014 were collectively admitted as Exhibit P4.

DW1 on his part admitted to have sold the consignment to the plaintiff but it was his evidence that that sale was with less tax thus he said the plaintiff was under obligation to pay the tax and not the 1st defendant.

Exhibits P4 and P7 deal with the issue of tax. The fuel sale agreement which is part of exhibit P4, Clauses 2 and 3 provide:

"***2. Product Quantity***

2.1 The quantity of Products required by the Cutomer shall be of a total of 1,000M³.

2.2 The final quantity invoiced will be based on Outturn Report.

2.3 All loses will be borne by the seller.

3. Price

3.1 The price to be paid by the Customer for the Products is TZS 1,830 per litre of PMS includes government taxes and all levies or Pay government duties directly to the authorities."

It discerns from the above that the volume of the product sold was 1,000M³ at a price of TZS 1,830 per litre that price was inclusive of taxes and levies. In other words, the plaintiff paid the 1st defendant monies for the supply of gasoil which is inclusive of all taxes and levies as such the 1st defendant was under obligation to remit the

paid taxes and levies to the Government. But it seems that the 1st defendant failed to do so. And this is evidenced by an email dated 21st October, 2014 which is part of Exhibit P4. In that email, one George Meo, the General Manager of the 1st defendant confirmed to TRA that the gasoil was sold by Riva Oils to the plaintiff thus he requested for the consignment to be released to the plaintiff while the 1st defendant was sorting out its tax obligation to TRA. That consignment was not released instead it was auctioned by TRA as evidenced by the letters dated 8th and 9th September, 2014, part of Exhibit P4. With these clear evidence, issue number three is answered in the affirmative that the 1st defendant is liable to refund to the plaintiff the sum of TZS 523,194,937.00 being the value of 261,000 liters of Gas oil which the plaintiff had purchased from the 1st defendant but later seized and auctioned by TRA to clear tax liabilities.

I will turn now to issues number four and five of which I will combine them because they are intertwined. On these two issues it was the evidence of PW1 that the 1st defendant accumulated a huge liability that prompted the plaintiff to meet and discuss with the

1st defendant. Following that discussion, it was the evidence of PW1 that the 1st defendant not only acknowledged its liability of USD 2,006,897.18 as of 31st May, 2014 but also requested the 4th defendant who agreed to secure and guarantee the repayment of the 1st defendant's liability to the plaintiff by depositing its Title Deed over Plot No. 487 Kawe Low Density Area, Kinondoni District Dar es Salaam held under Title Deed No. 29587. Copies of a letter dated 2nd June, 2014 and Title Deed in the name of the 4th defendant were collectively admitted as Exhibit P5. It was further the evidence of PW1 that the 1st defendant also issued to the plaintiff three cheques in the sum of TZS 200,000,000.00 which they bounced after being presented to the bank for payment.

DW1 did not dispute the facts that three cheques were issued and that Title Deed was deposited to the Plaintiff. However, his explaination was such that the cheques were paid as security so as to proceed with the business with condition that payments of the alleged debt shall be done after verification of the actual debt and

that the Title was deposited to the plaintiff in order to secure a loan from NIC Bank but that loan never materialized.

The acknowledgment which the plaintiff is referring here is part of exhibit P3. It is dated 2nd June, 2014. It is signed by PW1 and DW1. In that letter, the 2nd defendant who was the Managing Director of the 1st defendant signed on behalf of the 1st defendant to acknowledge the debt of USD 2,006,897.18 as outstanding as at 31st May, 2014.

It is trite law that a company is a legal person independent and distinct from its shareholders and its manager (See the case of **Salomon v A. Salomon & Co Ltd** [1897] AC 22). Therefore any function of a company has to be made through board resolution and not by a single director. In the case of **Morogoro Hunting Safaris Limited Vs Halima Mohamed Mamunya,** Civil Appeal No. 117 of 2011 (Unreported) the Court of Appeal of Tanzania emphasized the importance of holding board meetings and that the directors in a company should always act collectively through Board Resolution, it stated:

".....we would like to seize this opportunity to expound the point that Board Meetings are an integral part of the business of the company, as they inform the Board Members about the condition, strategy and/or failures of the company."

It further stated:

"...any particular company carries out its management functions by its directors, and that the directors must act collectively that is, by resolution, unless provided otherwise in the Articles."

In the matter at hand, the acknowledgment was done by a single director. Therefore, in the eyes of law such acknowledgement cannot be held on part of the 1st defendant rather it was on the 2nd defendant himself.

Regarding the Title Deed although section 113 (5) (b) (i) recognized a lien by deposit of documents made by the borrower to the lender in order to secure payment of either existing or a future or a contingent debt or other money or money's worth or the fulfillment

of a conditions but I have held that the 1st defendant did not acknowledge the debt. Consequently, there was no lender and borrower relationship upon which an interest of lien could be created. Thus the deposit which the 2nd defendant placed to the plaintiff cannot be sustained.

In the end, I find that only the 2nd defendant acknowledged the debt of USD 2,006,897.18 and the deposit of the Title Deed to the plaintiff was not proper.

Lastly, is on reliefs. From the above holding, the plaintiff is entitled for judgment which is entered and the following reliefs are granted:

1. The 1st, 2nd, and 3rd defendants shall jointly and severally pay the Plaintiff the outstanding amount of TZS. 1,224,908,084.00 being the value of products paid for by the plaintiff but not supplied by the 1st defendant;

2. The 1st, 2nd, and 3rd defendants shall jointly and severally pay the plaintiff the sum of TZS 523,194,937.00 being the value of

261,000 liters of Gas oil which the plaintiff had purchased from the 1st defendant but later seized and auctioned by TRA to clear tax liabilities;

3. The 1st, 2nd and 3rd defendants shall jointly and severally pay the plaintiff interest on (1) and (2) above at the Bank of Tanzania lending rate as at March, 2014 per annum from March, 2014 till date of judgment;

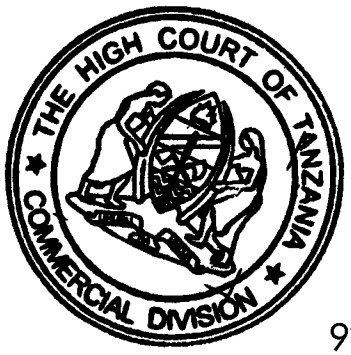
4. The 1st, 2nd and 3rd defendants shall jointly and severally pay the plaintiff interest on decretal sum at court's rate of 7% per annum from the date of judgment to the date of full payment; and

5. Costs of the suit.

For avoidance of doubt the prayer for general damages is not awarded because the order for the payment of interest suffices to cover any inconvenience caused to the plaintiff. Further, the prayer for sale of Plot No. 487 situate at Kawe Low Density Area,

within Kinondoni District in Dare es Salaam region is also declined because I have held that the deposit of it was not proper.

Dated at Dar es Salaam this 9th day of August, 2019.



B.M.A Sehel

JUDGE

9th day of August, 2019