

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 155 OF 2012

TANZANIA LIQUID STORAGE

COMPANY LIMITED.....1ST PLAINTIFF

SOUTHCOMM EAST AFRICA LIMITED.....2ND PLAINTIFF

VERSUS

BEST TIGRA INDUSTRIES LIMITED.....DEFENDANT

JUDGMENT

Mansoor, J:

Date of Judgement- 16TH OCTOBER 2015

The 1st plaintiff is the owner and operator of bonded warehouses in the form of storage facilities for liquid materials and other related products. The 1st plaintiff is also the partner with the 2nd plaintiff for provision of ancillary and related services. In this case, the 1st plaintiff shall be referred to as "Tanzania Liquid Storage."

The 2nd plaintiff is an agent in Tanzania of Wilmar Trading (Mauritius) Limited, formerly known as South Island Trading co. Limited and a dealer in liquids and other similar products, herein shall be referred to as "SouthComm East Africa".

It is alleged by the plaintiffs that Best Tigra Industries Limited, herein shall be referred to as "Best Tigra" ordered through SouthComm East Africa for various types of vegetable oils, and asked for, and was granted storage facilities in the Tanzania Liquids Storage bonded warehouses. Best Tigra failed to pay for the storage charges and by December 2011, Best Tigra was in arrears of United States Dollars 474,296.06. Out of this amount USD 124,792.93 was an amount outstanding on

storage facilities, and USD 349,503.13 was the value of the goods ordered by Best Tigra through SouthComm East Africa. The plaintiffs, thus filed a suit demanding payments of the above mentioned outstanding balances, interests and costs of the suit.

Best Tigra denies the claims and stated that it has never ordered through SouthComm East Africa the vegetable oils and it never asked for storage facilities in the bonded warehouse of Tanzania Liquids Storage. The Defendant denied to be in arrears of USD 472,296.06.

The Court, in Consultation with the Counsels for the Parties had framed the following issues:

1. Whether or not the 2nd plaintiff had locus standi or cause of action against the Defendant;
2. Whether the defendant is indebted to the plaintiffs and to what extent;

3. What reliefs are the parties entitled to;

Whether or not the 2nd plaintiff had locus standi or cause of action against the Defendant

SouthComm East Africa states at paragraph 4 of the plaint that it is an agent in Tanzania of Wilmar Trading (Mauritius) Limited, formerly known as South Island Trading Co. Limited. There was admitted as Exh p2, an Agency Agreement between Southcomm Africa (Pty) Limited on behalf of South Island Trading Limited and Southcomm East Africa Limited dated 08th November 2000. Southcomm Africa (PTY) Limited is registered in Mauritius while Southcomm East Africa Limited is registered in Tanzania.

Clause 1 of this Agreement is on Scope of Work of the appointed Agent, it states as follows:

“1.1. *The Agent shall, upon written instructions of the Principal, forwarded to the Agent at its offices (as designated by it from time to time), conduct the Principal’s Selling Business, as the Principal ‘s Agent, in the Territories as herein after referred to and on the Terms and Conditions herein contained.*”

And the Territories to be covered by the Agent included Tanzania.

The Last sentence of Clause 5.1 of the Agreement, on the Obligation of the Agent states and I quote:

“.....further, the Agent shall at all times, act only with the express authority or upon the instructions of the Principal.”

Clause 5.2 of the Agreement provides that, “*the Agent shall disclose its status as Agent for the Principal to any Third Party*”, and Clause 5.2 of the Agreement the Agent was authorised by the Principal to issue invoices on the headed paper of the Principal.

Annexure PTS6 to the Complaint are minutes of the Meeting of the Board of Directors of Southcomm East Africa Limited held at Dar es Salaam on 27th November 2012, in which it was Resolved that Southcomm East Africa Limited, Acting as an Agent for Wilmar Trading Mauritius Limited initiates appropriate legal action against Best Tigras Industries Limited for recovery of USD 349,503.13.

In its arguments Best Tigras referred to the case of **MIC (T) Limited vs Tanzania Telecommunications Company Limited**, Commercial Case No. 146 of 2002, where Mr Justice Bwana had talked about disclosing the cause of action in the pleadings, that *“the question whether the pleadings disclose a cause of action must be determined upon perusal of that pleading alone together with anything attached so as to form part of it and the assumption that any express or implied allegations of fact in it are true.”*

The Defendant stated in its closing submissions that Best Tigra did not know the terms of the contract between Southcomm East Africa and Wilmar South Island Trading Co. Limited, and that Best Tigra is not a party to a contract between Southcomm East Africa and Wilmar South Island Trading Co. Limited and it has never been disclosed to them the Terms of that Contract.

The Counsel for Best Tigra referred to Section 182 of the Law of Contract Act, Cap 345 which states that an Agent cannot be bound by or be liable for contracts entered by or on behalf of the Principal, and that *the Agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.*

He said, the Contract of Sale was entered between South Island Trading/Wilmar Trading (Mauritius) Limited and Best Tigra (Exh P7), and the present dispute was over this Agreement in which Southcomm East Africa is not a party, and cannot enforce it or be bound by it on behalf of South

Island Trading/Wilmar Trading (Mauritius) Limited. The Counsel submitted that Southcomm East Africa has no locus standi to sue Best Tigra for enforcement of a contract between South Island Trading/Wilmar Trading (Mauritius) Limited and Best Tigra.

The Counsel for Best Tigra also referred me to the Indian Law of Contract and Specific Reliefs Act 11th Edition, commenting on section 230 of the Indian Law of Contract Act, which is in *pari material* with Section 182 of Tanzania Law of Contract Act, which states that, *‘where the plaintiff in a suit, against a foreignship owner and its agents in India, did not show that by an express contract the agent made itself liable for the contract of carriage, the Court allowed the deletion of the Agent’s name from the title of the plaint.’*

He submitted that in the present case, the Principal identity is disclosed in paragraph 4 of the plaint but there is no express contract between Southcomm East Africa and Best Tigra making Southcomm East Africa liable for the contract as agent

of the disclosed Principal, thus the suit against Best Tigra by Southcomm East Africa cannot be maintained.

The Counsel for Best Tigra also submitted that Clause 5.1 of the Agency Agreement between Southcomm East Africa and its Principal states that *“the Agent shall not be authorised to bind the Principal to any contracts, agreements or other obligations.”*

And that *“further, the Agent shall at all times, act only with the express authority or upon the instructions of the principal.”*

In support of these submissions, the Counsel referred me to the case of **Friendship Container Manufacturers Limited vs Mitchell Cotts (K) Limited** (2001) 2 EA 338, in which it was held that *“a person who acts as an agent of a disclosed principal cannot be liable to the plaintiff in respect of that particular transaction.”*

The Counsel for Best Tigra also referred me to a case of **Printo Wrappings Limited vs Safmarine Tanzania Limited,**

Commercial Case No. 35 of 2009 (unreported), where this Court confirmed the principle that, *as long as the principal is known and disclosed and the contracting party with the plaintiff, then the Defendant as agent cannot be made liable. The plaintiff has therefore not been able to establish a cause of action against the Defendant.*”

The Counsel buttressed his arguments by quoting Pollock & Mulla at page 50, that *“no one but parties to a contract can be bound by it or be entitled under it. The doctrine which prevents a third party to enforce a contract applies with equal logic to forbid the contracting parties to enforce obligations against a stranger.”*

The Counsel submitted further that there was a contract of sale between South Island Trading/Wilmar Trading (Mauritius) Limited and Best Tigra, to which Southcomm East Africa was not a party, and also there is no express authority from Willmar Trading (Mauritius) Limited to institute these proceedings on its behalf.

In Court, Southcomm East Africa tendered Bills of Lading in respect to a consignment from South Island Trading/Wilmar Trading (Mauritius) Limited to Best Tigra Industries Limited (Exh P6), Contract of Sale between South Island Trading/Wilmar Trading (Mauritius) Limited and Best Tigra Industries Limited (Exh P7), Commercial Invoices issued by South Island Trading/Wilmar Trading (Mauritius) Limited (Exh P9), and Wilmar Trading Mauritius Limited to Best Tigra, Statement of Accounts of South Island Trading/Wilmar Trading (Mauritius) Limited as at 31st December 2010 (Exh P12). There were also various correspondences from and between Southcomm East Africa and Best Tigra demanding payments of these outstanding invoices.

The Counsel for Southcomm East Africa submits that it has an express authority from South Island Trading Limited/Wilmar Trading (Mauritius) Limited as the Agent, as created by the Agency Agreement (Exh P2). And that the said Agreement made it clear that Southcomm East Africa is the

Agent of South Island Trading/Wilmar Trading (Mauritius) Limited in Tanzania., and that Southcomm East Africa disclosed its status to Best Tigra as the Agent of South Island Trading/Wilmar Trading (Mauritius) Limited, and that the Contract of Sale (Exh p7) was signed by the officers of Southcom East Africa on behalf of South Island Trading/Wilmar Trading (Mauritius) Limited.

The Counsel submitted further that Southcomm East Africa's status of Agency was also confirmed by Letters on Confirmation of Sale (Exh p8). The Letters were from Southcom East Africa to Best Tigra confirming sale of products to the defendant, and that those letters were signed by the officers of Southcomm East Africa on behalf of South Island Trading/Wilmar Trading (Mauritius) Limited.

On this I would say that it is not disputed that there is an Agency Agreement between Southcomm East Africa and South Island Trading/Wilmar Trading (Mauritius) Limited entered to on 08th November 2000 and Southcomm East Africa Limited

was appointed the Agent of South Island Trading/Wilmar Trading (Mauritius) Limited. The Scope of Work or Authority of the Agent is expressly given under Clause 1.1 of the Agreement, which states that:

1.1. *“the Agent shall, upon written instructions of the Principal, forwarded to the agent at its offices (as designated by it from time to time), conduct the Principal’s Selling Business, as the Principal’s Agent, in the territories as hereinafter referred to and on the Terms and Conditions herein contained.”*

Clause 5 of the Agreement is on the Agent’s obligations, and it is expressly provided that *“the Agent shall not be authorised to bind the Principal to any contracts, agreements or obligations.”*, and that *“Further, the Agent shall at all times, act only with the express authority or upon the instructions of the Principal.”*

It is therefore clear that in the absence of any express authority, the Bills of Ladings issued by the Principal, the

Contract of Sale entered to between South Island Trading/Wilmar Trading (Mauritius) Limited and Best Tigra, and the invoices issued by South Island Trading/Wilmar Trading (Mauritius) Limited directly to Best Tigra cannot and did not bind Southcomm East Africa Limited, and Southcomm East Africa Limited cannot be entitled under these documents. The parties to the Agreement of Sale, the Bills of Lading and the invoices tendered in Court were Best Tigra and South Island Trading/Wilmar Trading (Mauritius) Limited and the doctrine of privity to contracts as stated by Pollock & Mulla (supra) prevents a Third Party to enforce a contract to which it is not a party.

Again, as required by Clause 5.1 of the Agency Agreement between Southcomm East Africa Limited and South Island Trading/Wilmar Trading (Mauritius) Limited, Southcomm East Africa as an Agent is required to provide to Court and to the Defendant an express authority or instructions from the Principal, authorising it, firstly, to enforce the terms of the Sale Agreement against Best Tigra, and secondly, to institute

this suit on behalf of the Principal. There was no such express authority or instructions provided.

Again, there is no Board Resolution from South Island Trading/Wilmar Trading (Mauritius) Limited authorising Southcomm East Africa Limited to institute this suit on its behalf. As stated in Clause 5.1 of the Agency Agreement, the Agent can *act only with the express authority or upon the instructions of the Principal*. The only available minutes attached to the plaint are minutes of the meeting of the Board of Directors of Southcomm East Africa Limited authorising itself from instituting this suit as an Agent of South Island Trading/Wilmar Trading (Mauritius) Limited. What is actually required is the minutes of South Island Trading/Wilmar Trading (Mauritius) Limited authorising Southcomm East Africa Limited as an Agent to institute this suit on its behalf.

Again, there is no express provision in the Agency Agreement expressly authorising Southcomm East Africa Limited to enforce the contracts entered between South Island

Trading/Wilmar Trading (Mauritius) Limited and Third Parties or in particular the Business Agreement entered between South Island Trading/Wilmar Trading (Mauritius) Limited as and Best Tigra Industries Limited as required in paragraph 5.1 of the Agency Agreement which states *"the Agent shall not be authorised to bind the Principal to any contracts, agreements or other obligations, unless otherwise requested by the Principal.*

In this case there is no such request or authority from the Principal making Southcomm East Africa limited bound by the Sales or Business Agreements entered to by South Island Trading/Wilmar Trading (Mauritius) Limited and Best Tigra Industries Limited.

In answer to the first issue,therefore, Southcomm East Africa Limited has no express authority from the Principal to institute this suit in its own name on behalf of South Island Trading/Wilmar Trading (Mauritius) Limited. Also, Southcomm East Africa Limited has no express authority either in the Sales Agreement, or in the Agency Agreement or

in the form of a Board Resolution authorising it to enforce any right under the Sales Agreement, Bills of Lading or Invoices entered to or issued by or in the name of South Island Trading/Wilmar Trading (Mauritius) Limited, as Southcomm East Africa Limited is not a party to any of the instruments submitted in court in support of the 2nd plaintiff's case.

Whether the Defendant is indebted to the Plaintiff and to what extent;

Having held that Southcomm East Africa Trading Limited has no locus standi to institute this case on behalf of South Island Trading/Wilmar Trading (Mauritius) Limited, now the entire case and the documents produced by the plaintiff and admitted in Court as evidence bears the name of South Island Trading/Wilmar Trading (Mauritius) Limited. The Bills of Lading (Exh P8), the Sales Agreement (Exh P7), and all the invoices produced in Court shows that South Island Trading/Wilmar Trading (Mauritius) Limited is the Seller and Best Tigra Industries Limited is the Buyer, thus this is the case of a Buyer and a Seller, and it is the Seller who alleges

that it sold the Goods to the Buyer, delivered the Goods to the Buyer, but the Buyer has neglected or refused to pay for the Goods supplied. It is the case of South Island Trading/Wilmar Trading (Mauritius) Limited not the Southcomm East Africa Limited against Best Tigra Industries Limited. I shall therefore refrain from making any scrutiny or evaluations of all the Bills of Lading, the Agreements and the Commercial invoices or any other documents produced by Southcomm East Africa Limited on behalf of South Island Trading/Wilmar Trading (Mauritius) Limited as South Island Trading/Wilmar Trading (Mauritius) Limited purporting to be its Agent and to which South Island Trading/Wilmar Trading (Mauritius) Limited is not a party to this suit. Whether or not the documents produced by the 2nd plaintiff to make out its case are true or genuine or are documents worth to be relied upon by South Island Trading/Wilmar Trading (Mauritius) Limited to entitle it to a judgement shall not be considered as they were presented by a party who has no locus standi to institute a case against the defendant thus not entitled to a judgement.

As stated by the Counsel for the Defendant, indeed, Southcomm East Africa Limited and South Island Trading/Wilmar Trading (Mauritius) Limited could be sister companies, but, South Island Trading/Wilmar Trading (Mauritius) Limited is an independent entity registered in Mauritius and Southcomm East Africa Limited is also an independent entity registered in Tanzania, and an act or omission done by one cannot bind another, and this is why these two separate entities signed an Agency Agreement authorising one to represent the other in this Country. Since there is no express authority for representing South Island Trading/Wilmar Trading (Mauritius) Limited in this suit, either in the Agency Agreement or in the form of a Board Resolution or any other instrument, the documents made or executed or issued by South Island Trading/Wilmar Trading (Mauritius) Limited cannot be used by a person who has no locus standi in this suit to make out a case for another party not a party to the suit. The case of the 2nd plaintiff against Best Tigra Industries Limited must fail on the foregoing stated reasons.

On the part of the 1st plaintiff, Tanzania Liquids Storage Company Limited whose claims against Best Tigra is USD 124,792 being an amount of charges for receiving and storing Best Tigra liquids/oils imported from South Island Trading/Wilmar Trading (Mauritius) Limited, I would say that PW1 Mr Abhinandya Sengupta testified that it stored the Defendant's oils and dispatched the same to Best Tigra when needed or instructed. PW1 made references to Product Deliveries Control Sheets signed by the Defendant's Officers acknowledging Réceipt of the consignment (EXh p11). PW1 also testified that Best Tigra was invoiced for the storage facilities rendered by Tanzania Liquid Storage (Exh P4). PW1 also produced a Despatch Book (Exhibit P5) proving that invoices were delivered to Best Tigra and Best Tigra acknowledge receipt of the invoices. PW1 also testified that the said invoices were not settled and remained outstanding. Tanzania Liquids Storage also produced its statement of Account/Legder (Exh P13), which shows that the outstanding charges for storage services rendered to Best Tigra by Tanzania Liquid Storage were US\$ 124,792.93.

Best Tigra did not challenge the 1st plaintiff's invoices or the statement of account or the delivery notes either during cross examination of PW1 or in its closing submissions. Best Tigra has tried to make a general denial of the officers who signed on the deliveries Control Sheet that they are not the officers of the Best Tigra or their representatives, and that the 1st defendant has released the goods to unknown people. This is an absurd denial. There is proof adduced by the 1st Plaintiff that the Delivery Sheets and the Invoices were delivered to Best Tigra and a Dispatch Book was signed by the Officers of Best Tigra. There is proof that the products were delivered at Best Tigra's premises and that Best Tigra has paid some of the invoices. Best Tigra does not deny having a relationship with Tanzania Liquid Storage and has not denied having made some payments shown in the Statement of Account produced in Court by Tanzania Liquid storage. Best Tigra also did not produce any document showing that it did not use the storage facilities of Tanzania Liquids at Tanzania Liquid Storage Bonded Warehouse to store its products received either from

the 2nd plaintiff or from South Island Trading/Wilmar Trading (Mauritius) Limited. Best Tigra did not show any proof that the invoices were not received by it or its officers apart from the general denial, or the Product Delivery Control Sheet produced by the witness of the 1st plaintiff were not real or does not relate to a consignment to which it was the consignee. The Defendant also did not challenge that it signed the Deliveries Control Sheets acknowledging receipt of the consignment. Best Tigra did not provide any proof against the documents tendered by the 1st plaintiff showing that it made payments of US\$ 124,792.93 towards footing the storage bills with the 1st plaintiff. The 1st plaintiff was therefore able to prove its case on the required standards of proving civil cases i.e. on the balance of probabilities, and thus entitled to payments of its outstanding invoices to the tune of US\$ 124,792.93.

Thus, to answer issue No. 2, I would say that Tanzania Liquids Storage Company Limited is entitled to be paid USD124,792.93 by Best Tigra Industries Limited being an

outstanding balance for Storing Best Tigrá's Products in its Bonded Warehouses.

Best Tigrá, however, is not indebted to Southcomm East Africa Limited since Southcomm East Africa Limited has been held to have had no locus standi to institute a case against Best Tigrá Industries Limited in the transactions involving Best Tigrá Industries Limited and South Island Trading/Wilmar Trading (Mauritius) Limited;

What reliefs are the parties entitled;

1. Southcomm East Africa Limited has no locus standi to institute a case against Best Tigrá Industries Limited, thus its claims of USD 349,503.13 being outstanding purchase price for the goods supplied to Best Tigrá Industries Limited by South Island Trading/Wilmar Trading (Mauritius) Limited are dismissed with costs;

2. Best Tigra Industries Limited shall pay Tanzania Liquids Storage Company Limited USD 124,792.93 being the outstanding storage charges;
3. Best Tigra Industries Limited shall pay Tanzania Liquids Storage Company Limited interest on the principle amount at the rate of 12% per annum from the date the amount fell due to the date of judgement;
4. Best Tigra Industries Limited shall pay Tanzania Liquids Storage Company Limited interests on the decretal sum at the court's rate of 12% per annum from the date of judgement to the date the payments are made in full;
5. Best Tigra Industries Limited shall bear the costs of this Suit, as against Tanzania Liquids Storage Company Limited.

It is so ordered.

DATED at DAR ES SALAAM this 16th day of October, 2015

MANSOOR

JUDGE

16TH OCTOBER 2015