

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 22 OF 2017

MOEZ NATHOO t/a R & S INTERTRADE

PLAINTIFF

VERSUS

TSN SUPERMARKET LTD

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DEFENDANT

JUDGMENT

Date of the Last Order: 17/04/2018

Date of the Judgment 23/04/2018

SEHEL, J.

The present suit is based on a contract for supply and delivery of goods. It is alleged by the plaintiff that sometime in July, 2016 the plaintiff had entered into an oral agreement with the defendant and they had a business arrangement for the supply of goods such as Cad Roses, Flake Cad Drink Choco, Dove Shampoo, and Dove Soap to the defendant. It is further alleged that at all material times the plaintiff performed his obligation to supply goods to the defendant as

ordered and on diverse dates from July to September, 2016 the plaintiff had supplied goods worth Tanzanian Shillings One Hundred Ninety Nine Million Three Hundred Eighty Two Thousand Six Hundred and Nine and Thirty Four Cents (Tshs. 199,382,609.34). The plaintiff also alleges that the defendant has paid a total amount of Tanzanian Shillings One Hundred One Million Nine Hundred and Forty Four Thousand and Eight and Seventy Four Cents (Tshs. 101,944,008.74) leaving a balance of Tanzanian Shillings Ninety Seven Million Four Hundred Thirty Eight Thousand Six Hundred and Sixty Cents (Tshs. 97,438,600.60) which the plaintiff is alleging that it is still outstanding. It is for this reason that prompted the plaintiff first to issue a demand notice and as there was no response from the defendant, the plaintiff proceeded to institute the present suit praying for judgment and decree against the defendant for:-

- 1) Declaration that the defendant is in breach of the oral agreement

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- 2) Payment of Tanzanian Shillings Ninety Seven Million Four Hundred Thirty Eight Thousand Six Hundred and Sixty Cents (Tshs. 97,438,600.60) being special damages,
- 3) Payment of general damages as may be ascertained by this Court,
- 4) Interest on Tshs. 97,438,600.60 at the commercial rate of 22% from July, 2016 until the date of judgment
- 5) Interest on the decretal amount from the date of judgment until payment in full,
- 6) Costs, and
- 7) Any other relief(s) as may deem fit to grant.

The defendant upon being served with the plaintiff's plaint filed her written statement of defence acknowledging that there was an oral agreement whereby goods were supplied, received and paid in accordance with goods actually delivered and not based on plaintiff's invoices. It denied all other allegation especially on the outstanding balance of Tshs. 97,438,600.60 of which it said the

defendant was to cross check into his books of account for any balance for the plaintiff but there was no such amount as claimed by the plaintiff.

At the trial three issues were framed. These issues are:

1. Whether there was a breach of oral agreement done by the defendant by not making full payment of the goods supplied;
2. To what extent was the oral agreement between the parties breached; and
3. To what reliefs are parties entitled.

In this case, fortunately all plaintiff's witnesses; namely Moez Nathoo (PW1) and Zuberi Hadji (PW2) together with the defendant's witness namely Devis Lewis Msechu (DW1); Haggy Mwatonoka (DW2); and Zainab Mburi (DW3) testified that for several years there was a relationship between the plaintiff and defendant whereby the plaintiff was one of the plaintiff's suppliers. They said the plaintiff has been supplying goods to the defendant and the defendant was paying for goods supplied. It is further acknowledged by DW1; DW2 and DW3

that in July to September, 2016 the plaintiff supplied the defendant goods valued at Tshs. 145,743,298.01. DW2 who is an accountant of the defendant in his witness statement stated that their records shows that a total of Tshs. 101,944,008.74 out of the total amount of Tshs. 145,743,298.01 was paid and Tshs. 43,799,289.27 remains unpaid and they were processing payments when the plaintiff brought a demand which was not acceptable, they stopped payment in order to reconcile the difference. The defendant also in its written statement of defence does not specifically deny the allegation of there being outstanding balance. I have pointed herein the defendant averred in its written statement of defence that it wishes to cross check cross check into his books of account for any balance for the plaintiff. From these evidences it is obvious that there is outstanding balance which has not yet been paid by the defendant. In that respect, I do hereby hold that the defendant breached the oral agreement by not making full payment of the goods supplied.

Having found out that the defendant breached the oral agreement then the next issue is to what extent. PW1 in his witness

statement stated that the plaintiff suffered special damages of Tshs. 97,438,600.60 for the goods supplied to the defendant but not paid for. He has also tendered various Tax Invoices as Exhibit P1 collectively detailing the items, quantity and total price of the goods supplied to the defendant. He also tendered R & S Intertrade's ledger account regarding transaction done by the plaintiff and defendant as Exhibit P3. Exhibit P3 details transactions running from 1st July, 2016 to 31st December, 2016 showing date, sales invoice number, amount debited and credited to the account of the defendant. PW1 also said the plaintiff suffered general damages and it incurred loss of profit of Tshs. 37,806,186 as the defendant failed to settle the debt in time. In that regard, PW1 also said the plaintiff is entitled for payment of Tshs. 4,725,772 for every month from July, 2016; court fees of Tshs. 2,068,772 and legal fees of Tshs. 14,602,500. The same amount has also been testified by Zuberi Hadji (PW2) as damages entitled to be paid to the plaintiff for losses suffered due to the breach of contract done by the defendant. PW2 tendered collectively three credit notes dated 19th September, 2016; 22nd September, 2016; and 22nd August, 2016 as

Exhibit P5 that show the goods returned to the plaintiff, that is, goods not received by the defendant.

The defendant on the other hand through DW1 and DW2 acknowledged that the plaintiff is one of their suppliers of variety of goods. DW2 testified that she is responsible for receiving, recording and storing of goods in warehouse ready for cording and sending them to TSN supermarkets. She said sometime in July to September, 2016 the plaintiff supplied goods to the defendant valued at Tshs. 145,743,298.01. DW3 in his statement said out of Tshs. 145,743,298.01 the defendant paid Tshs. 101,944,008.74 and remained with a balance of Tshs. 43,799,289.27 unpaid. He said the balance could not be paid in time because the plaintiff claimed more than the actual amount to which the defendant was supposed to pay.


Counsel for the plaintiff argued pursuant to Section 73 (1) of the Law of Contract the defendant is liable to compensate the plaintiff for the loss suffered. The counsel contended that in order to ascertain damages caused by the defendant, the court must invoke the rule of remoteness of damages as established in **Hadley Vs Baxendale** (1854)

9 Exch.34 that "there should be a direct connection between the loss and the breach of contract in order damages to be granted." He said the case of Hadley set two principles which are:

1. Only losses naturally and directly arising from the ordinary course of things from the breach are recoverable; and
2. Only such losses that parties to a contract would have reasonably contemplated at the time of contract was made as the probable result of the breach are recoverable.

The counsel contended that at all times the defendant had been enjoying the plaintiff's monies without paying the balanced amount as per contract as such the defendant has caused damages to the plaintiff as he could not have been able to use the amount of money its other forms of business and generate more income as testified by PW1.

The counsel for defendant insisted that the defendant was willing to pay but the plaintiff made it difficult by claiming an extra amount contrary to the actual supply and deliveries.



Let me start with the claim of specific damages. It is trite law that specific damages have to be specifically pleaded and proved, as held in the cases of **Mtali Vs. Mtali [2008] 2 EA 229; Kiptoo Vs. Attorney General [2010] 1 EA 200; Zuberi Augustino Vs. Anicet Mugabe [1992] TLR 137; and Masole General Agencies Vs. African Inland Church Tanzania [1994] 192**. For instance in **Masolele** (Supra) the Court of Appeal of Tanzania held:

"Once a claim for specific item is made, that claim must be strictly proved, else there would be no difference between specific claim and general one. The trial judge rightly dismissed the claim for loss of profit because it was not proved."

I have shown herein that the plaintiff in its pleadings pleaded the loss of Tanzanian Shillings Ninety Seven Million Four Hundred Thirty Eight Thousand Six Hundred and Sixty Cents (Tshs. 97,438,600.60) as being special damages and prayed for it to be paid for.

The evidence of PW1 proves that the plaintiff suffered special damages of Tshs. 97,438,600.60 for the goods supplied to the defendant but not paid for. Exhibit P1 collectively indicates the goods

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supplied to the defendant from 28th July, 2016 to 18th November, 2016 were of total value of Tshs. 199,382,609.34. Further Exhibit P3 summarizes the sales invoiced to the defendants and the credit note for returned goods. Exhibit P3 indicates that a total of Tshs. 101,944,008.74 was paid for. The amount of Tshs. 101,944,008.74 is inclusive of credit notes of Tshs. 421,805.16; 6,520,066.40; and 342,006.48 which were collectively tendered as Exhibit P5 by PW1. All these documentary evidences prove that the total goods supplied to the defendant valued at Tshs. 199,382,609.34 as testified by PW1 and PW2. Total amount paid for is Tshs. 101,944,008.74 which amount is also acknowledged by DW1; DW2; and DW3 that was paid to the plaintiff. Therefore, deducting Tshs. 101,944,008.74 from 199,382,609.34 the outstanding balance is Tshs. 97,438,600.60. This is the exact amount claimed for by the plaintiff. I thus proceed to award this amount of Tshs. 97,438,600.60 to the plaintiff as specific damages that have been pleaded, proved and established by the plaintiff.

The testimonies of PW1 and PW2 show that the plaintiff is claiming payment of Tshs. 37,806,176.00 as additional profit if the

outstanding amount would have been paid in time. This claim is specific which has to be pleaded and proved. Unfortunately, it was not pleaded in the plaint. As such I decline to award this amount. Through the testimony of PW1 and PW2 the plaintiff is also claiming Tshs. 4,725,772.00 for every month beyond July, 2017 until date of judgment. This amount is not stated it is for which loss. Be as it may it was not pleaded in the plaint as such I decline to award it. Further the plaintiff is claiming Tshs. 2,068,772 and Tshs. 14,602,500 being costs of the suit. As a general rule, costs follow the event; unless the awarding court in its discretion, finds good reasons for ordering otherwise. (See **Njoro Furniture Mart Ltd v Tanesco** [1995] .TL.R 205). The plaintiff managed to prove its case on the balance of probabilities. Therefore, the plaintiff is entitled to its costs which shall be taxed by Taxing Officer.

In its plaint the plaintiff is also praying to be paid general damages to be assessed by the court. In the case of **Tanzania Saruji Corporation Vs. African Marble Company Ltd** [2004] T.L.R 155 the Court of Appeal held that general damages are such as the law will

presume to be the direct, natural or probable consequence of the act complained of; the defendant's wrong doing must, therefore, have been a cause, if not the sole, or a particularly significant, cause of damage.

PW1 simply stated in his witness statement that it suffered general damages but failed to explain the kind of general damages it suffered due to the defendant's failure to pay it in time as such I proceed to decline this claim.

Lastly, the plaintiff is claiming for interest both on outstanding amount and on decretal amount. Since I have found herein that the defendant delayed to make payments to the plaintiff, a business entity, then the obviously the plaintiff is entitled to its interest on the principal sum as the money could have been utilized to generate other profits. I therefore proceed to award the plaintiff interest on Tshs. 97,438,600.60 at the commercial rate of 22% from July, 2016 until the date of judgment. Interest on the decretal amount is governed by Order XX rule 21 of the Civil Procedure Act, Cap.33 which provides for an interest rate of seven per cent per annum or such other rate not

exceeding twelve per cent, to be chargeable on every judgment debt from the date of delivery of the judgment until full satisfaction. In **Fredrick Wanjara and Another Vs Zawadi Juma Mruma**, Civil Appeal No. 80 of 2009 (Unreported-CAT) the Court Appeal of Tanzania while interpreting Order XX Rule 12 of CPC stated:

"The way the provision is couched, especially the use of the term "shall" and the phrase "or such other rate, not exceeding twelve per centum per annum, as the parties may expressly agree in writing" enjoins a court to impose a 7% interest unless the parties agree to a higher rate, but which must not exceed 12%. As there was no agreement between the parties for the imposition of a higher interest rate, the trial court was duty bound to impose a 7% interest on the decreed sum."

Consequently, as there was no agreement between the parties for the imposition of a higher rate then I award the plaintiff interest rate of 7% per annum on decretal amount from the date of judgment to the date of final and full satisfaction.

In the final analysis, the last issue is to what reliefs are parties entitled. I have found hereto that the defendant breached the oral agreement by failing to pay the plaintiff its due amount in time. Consequently, I proceed to declare that the defendant is in breach of the oral agreement and the judgment and decree is hereby entered in favour of the plaintiff as follows:-

1. Defendant shall pay the plaintiff Tanzanian Shillings Ninety Seven Million Four Hundred Thirty Eight Thousand Six Hundred and Sixty Cents (Tshs. 97,438,600.60) being special damages,
2. Defendant shall pay the plaintiff interest on Tshs. 97,438,600.60 at the commercial rate of 22% from July, 2016 until the date of judgment;
3. Defendant shall pay the plaintiff interest on the decretal amount at a rate of 7% per annum from the date of judgment until payment in full; and
4. Plaintiff shall have its costs which shall be taxed.

It is so ordered.

DATED at Dar es Salaam this 23rd day of April, 2018.



A handwritten signature in blue ink, appearing to read "B.M.A Sehel".

B.M.A Sehel

JUDGE

23rd day of April, 2018.