IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 36 OF 2016

BETWEEN

INSIGNIA LIMITED.....PLAINTIFF

Versus

CMA CMG (T) LIMITED.....DEFENDANT

JUDGMENT

MRUMA, J.

The Plaintiff Insignia Limited has filed this suit against the Defendant CMA CGM (T) Limited claiming a sum of US$ 52,080.00 being penalties paid to the Tanzania Revenue Authority by the Plaintiff at the request of the Defendant. The Plaintiff is also claiming for general damages of not less that USD$ 50,000.00 costs and interest.

The Defendant filed defence admitting that the Shipper an Egyptian company delivered Plaintiff's goods to it for shipping to Tanzania and it shipped them accordingly. It denied any liability resulting from the carriage of the Plaintiff's goods. The Defendant averred that in this case it remitted empty containers and seals to the Plaintiff's Shipper. The Shipper stuffed the containers closed and sealed and returned them to

the Defendant therefore it was not in a position to check the contents therein.

The Defendant stated further that although it paid penalties for wrong declaration of the commodities in the Bill of Lading and the Manifest, they did so as matter of no choice with regards to Customs/State Authorities and not as an acknowledgment of legal liabilities on its part.

The Defendant's defence is that it was an agent of a disclosed principal. This was an Egyptian company a foreign principal, and therefore the plaintiff should look to the foreign principal for redress.

At the final pre-trial conference, six issues were framed and recorded by the court.

The first issue is whether or not the Defendant was in a position to check the contents of the Containers. Without wasting much time in dealing with this issue, admittedly from the evidence adduced the Shipping Agent has no room of seeing the contents of the containers she ships. Both PW1 and DW1 testified to the effect that it is the shipper who loads the goods in the container and deliver the same to the shipping agent for shipping while closed under seal. The contents of the goods in the container are described in the clearing documents which are handed over the shipping agent. Thus the first issue is answered in the negative. That is to say the Defendant was not in a position of checking the contents of the containers.

The second issue is whether or not the Bill of Lading was prepared by the Defendant in acknowledging the amendment of the first draft of Bill

of Lading. Again this issue will not detain me much. It is in the undisputed evidence of DW1 that both the draft bill of lading and the final bill of lading are prepared by the Defendant, the Shipping line. According to this witness, it is the business practice that after preparing the documents the shipping line submits the same to the shipper who confirms them and issue there from a non-negotiable Bill of Lading. In both drafted and final bill of lading it were indicated that the consignment was Calcium Carbonate. This answers the second issue in the affirmative. That is to say the Bill of Lading was prepared by the Defendant in acknowledging of the first draft of bill of lading.

Moving to the fourth issue, as correctly submitted by the Plaintiff's counsel this issue should not detain us much as it is interwoven with the second issue which has already been answered in the affirmative. It has been admitted that it is the shipping line or the carrier in this case the Defendant who prepares the manifest and keep it her custody until such time she delivers the good. Before delivery, the buyer cannot have possession of the documents. It is clear law that the ship-owner delivers the consignment together with the bill of lading which is the document of title to the goods in the consignment.

The third issue is whether or not by paying the penalty the Defendant was expressly acknowledging her liability of ensuring that declaration of goods imported in the bill of lading conforms with manifest. I would answer this issue in the affirmative. DW1 admitted during cross-examination that details in the bill of lading must tally with the details in the manifest failure of which goods cannot be cleared. He also admitted that there was wrong declaration of the goods in the consignment and

that she paid the penalty imposed. Thus, on the evidence on record by paying the penalty the Defendant was acknowledging her responsibility of ensuring that declaration of goods imported in the bill of lading conform the details in the manifest.

The fifth issue is about remedies available to the parties. It asks whether the Plaintiff suffered any damages.

As a matter of law a contract between the consignee and the carrier or shipping line is privy to the parties thereto and as the consignor is not a party. Accordingly the consignor is not entitled to have access to any documents prior to delivery. Under the shipping and marketing trade practices, the Shipping Line or carrier is an agent of the Shipper. In Halsbury Laws of England 4th Edition paragraph 825 it is stated

> *"Where a contract is made by an agent on behalf of a foreign principal there is no presumption that the agent necessarily incurs personal liability and has no authority to establish privy of contract between the principal and third party. Where the intention of the parties is not clear or the terms of the contract are in dispute, the fact that the principal is a foreigner is a factor to be taken into account in determining whether in the circumstances the contract is enforceable by or against the foreign principal or whether the agent is personally liable"*

In the present case the defendant was a shipping agent and it undertook to transmit the container containing goods to Dar Es Salaam. The consignment shipped on board by Hansa Navik on 27th October,

2014 were found to be manifested wrongly by indicating that the materials shipped was Cement instead of Calcium Carbonate. This attracted some penalties to be imposed by the customs department.

Looking at paragraph 713 Halsburys' Laws of England (supra) it would seem there is a custom of trade that a Carrier or Shipping Agent incurs personal liability for freight and other charges whether transmission of goods is by sea or air. In our case therefore the Plaintiff has the right to claim directly from the agent. She does not need to bring her within the exception of the General rule that a principal is responsible for all acts of his agent within the authority of the agent whether the responsibility is contractual or tortuous.

Evidence has been adduced through Exhibit P3, showing that the Defendant did pay USD 10,000.00 (equivalent to T.shs 17,360,500.00) for wrong declaration. In rebuttal of this, the defendant has stated in the witness statement of Focus Damas Isango (DW1), that it paid the said penalty for and on behalf of the Plaintiff to avoid delays in delivery of the goods to the Plaintiff. According to DW1 after the payment the Plaintiff is liable to the Defendant for the refund of the said sum to the Defendant. This statement on oath contradicts the Defendant assertions under paragraph 7 of the Defendant's written statement of defence where it is stated that the Defendant paid the penalty as a matter of no choice with regard to Customs/State Authorities. No explanation has been offered clarify what constitutes "a matter of no choice". But construing the word casually, it means the Defendant had no option but to pay the penalty as demanded by the Customs Department and it can conveniently be said that under the Custom norms and practice it was

the responsibility of the Defendant to pay the penalty imposed for wrong declaration no wonder the Defendant didn't set up a counter claim to claim for its refund.

It is clear as stated above that a party can elect to recover from the agent alone in which case the liability of the principal is discharged or from both the principal and the agent. The Plaintiff tendered the Defendant's letter to the Clearing Agent, (Exhibit P8). This letter clearly authorized **Clear Services Tanzania Limited** (the clearing agent of the Plaintiff) to make payments and "claim afterwards", reading this in together with Exhibit P3 "the Reversal of wrong Posting and Payment for Penalty Receipt which was admittedly done by the Defendant and the Defendant's letter (Exhibit P5) in which it responded to the Plaintiff's claims for refund of USD 24,080.00 and T.shs 19,809,027.00, in which it stated that it was "investigating the matter" , it is clear that the Defendant assumed responsibilities on behalf of the Shipper, the Egyptian company.

In the circumstances I find that the Defendant must be held liable for freight and other charges as stated above particularly so where the principal is a foreigner and the Defendant have chosen to be responsible for some liabilities of her principal. The penalty for wrong declaration of goods and all incidentals thereto must form part of freight charges. As the plaintiff has chosen to sue the agent only he has made election to discharge the principal and as the Defendant opted not to join her principal by way of third party notice, I see no reason why the Defendant cannot be held liable personally. Not only did the defendant undertake to pay penalty for wrong declarations, but she went further

and authorized the clearing agent to make some payments and claim refunds (Exhibit P8). This is a clear admission of liability in the entire transaction and it answers the 5th issue in the affirmative.

As regards to damages suffered by the Plaintiff, there is unchallenged evidence both oral and documentary to the effect that through the clearing agent the Plaintiff paid USD 42,080 and T.shs 19,809,007.00 being storage and Rent for 15 X 20' Short Landed Containers EX- BELLA BL NO. EG. 3254199. These are special damages. They were specifically pleaded and they have been proved. I would allow the plaintiff's prayer of USD$ 52,080.00 being the amount paid by the plaintiff the Customs authority as storage and custom rents for short landed containers.

As regards the claim for general damages, without proof of actual loss or damage, courts usually award nominal damages. Damages are said to be "at large", that is to say the Court, taking all the relevant circumstances into account, will reach an intuitive assessment of the loss which it considers the plaintiff has sustained. The award of general damages is in the discretion of court in respect of what the law presumes to be the natural and probable consequence of the defendant's act or omission. The Court is alive to the requirement that a plaintiff who suffers damage due to the wrongful act of the defendant must be put in the position he or she would have been if she or he had not suffered the wrong (See *Hadley v. Baxendale (1894) 9 Exch 341.*

General damages are the direct natural or probable consequence of the wrongful act complained of and include damages for pain, suffering, inconvenience and anticipated future loss. At common law, the plaintiff

had a duty to take all reasonable steps to mitigate the loss sustained (see *African Highland Produce Ltd v. Kisorio [2001] 1 EA 1*). Here the plaintiff attempted to mitigate her loss by paying the charges claimed and claimed for refunds. However, no evidence was led as to the magnitude of the loss (if any) suffered by the Plaintiff. In view of the refund ordered, I am of the view that no general damage is awardable in this case as the Plaintiff has failed to prove any wrong suffered. I accordingly dismiss the claims of general damages.

On the question of the claim for interest by the Plaintiff the relevant law is found under section 29 of the Civil Procedure Code which provides that:

> *"The Chief Justice may make rules prescribing the rate of interest which shall be carried by judgment debts and without prejudice to the power of the court to order interest to be paid upon date of judgment at such rates as it may deem reasonable, every judgment debt shall carry interest at the rate prescribed from the date of the delivery of the judgment until the same shall be satisfied"*

Thus, I find that Plaintiff is entitled to interest from the date of the filing suit to the date of the decree at the rate of 4% per annum on the basis of commercial bank interest rates for USD currency.

Under section 30 (1) of the Civil Procedure Code, costs shall follow the event unless otherwise ordered by the judge. To refuse to award costs has to be based on justifiable grounds which have to be considered by

the court. In this case, the Plaintiff having succeeded in the suit, costs shall follow the event and therefore costs are awarded to the Plaintiff.

Order accordingly,

A. R. Mruma,

Judge.

DATED at Dar Es Salaam this 2nd Day of April 2019.