IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

COMMERCIAL CASE NO. 01 OF 2018

MANTRAC TANZANIA LIMITED .....PLAINTIFF

Versus

PALEMON CONSTRUCTION CO. LTD. .....DEFENDANT

JUDGMENT

MRUMA, J.

The Plaintiff a Limited Liability Company incorporated in Tanzania filed this suit against the Defendant also a limited liability company incorporated in Tanzania for breach of contractual obligations and for an order for payment of USD 58,770.73 being the outstaying balance amount of the rental proceeds from Equipment Rental Agreement, general damages, interest at the commercial rate of 15% per annum from 2nd March 2017 which the contract ended to the date of judgment and further interest on commercial rate of 12% per annum on the decretal sum from the date of judgment to full satisfaction of the decree and costs of the suit.

It is the Plaintiff's case that parties entered into an Equipment Rental Agreement (exhibit P1) for renting of a Hydraulic Excavator 320 LD. The agreement was signed on 1st August 2016 and the Defendant took the equipment as per agreed terms of that contract. According to the terms and conditions of their agreement the Defendant was required to pay a monthly rent of USD 7,670.00 for a period of seven (7) months making a total of USD 53,690.00 and extra hour charges of USD 35.00 payable for Earth Moving Equipment rental.

The rental agreement ended on 2nd March 2017. The Plaintiff alleges that the Defendant failed to honour her obligations according to the terms and conditions agreed by the parties and she didn't pay a single cent. The Plaintiff further alleges that due to the Defendant's breach she has suffered, delays, loss of profits and business frustrations. She is now praying to compensated for that.

The Defendant filed a written statement of defence vehemently disputing any breach and denying liabilities as alleged by the Plaintiff. The Defendant averred in her written statement of defence that the Excavator operated effectively for three months only namely August, September and October 2016. According to the Defendant the excavator stopped working

as from 10th October 2016. He stated that the Plaintiff serviced the excavator on 30th December 2016 which was beyond the service period and was contrary to article 7 clause 7-10 of the agreement. The Defendant further states that prior to 29th December 2016 she informed the Plaintiff that the batteries of the equipment was very low and unable to start the machine but the Plaintiff took no action to remedy the defect and the machine/equipment remained idle throughout and by 20th February 2017. the Plaintiff had already taken it.

The Defendant contends further that as the equipment was under utilized for seven (7) solid months following the remedied defects, the Plaintiff's claims are amply unjustifiable.

At the commencement of trial three issues were framed by the court. The issues are:

1. Whether or not the Defendant took and used the equipment in accordance with the terms and conditions of the Agreement ;
2. Whether or not during the rental period the equipment operated for three (3) months only and if yes, whether or

not the Plaintiff was informed about the defects but did nothing to rectify them;

3. To what reliefs are the parties entitled.

Three witnesses testified for the Plaintiff while one witness testified for the Defendant. The witnesses are **Eutachius Katiti (PW1)**, **Pendo Sarah Msusa (PW2)** and **Butwa Goodluck Sanga (PW3)** for the Plaintiff and **Mr. Isaac Ntale Mongeta (DW1)** for the Defendant. Parties do not dispute the existence of the contract (Exhibit P1) and its terms and conditions.

Regarding the Plaintiff's claims, it is the evidence of **PW1 Eutachius Katiti (PW1)** that it was the terms and conditions of the agreement (exhibit P1) that the Defendant is bound to pay a monthly rent of USD 7,670 for period of seven (7) months making a total of USD 53,690 and extra charges USD 35.00 therefore the total amount payable was USD 58,770.73. According to PW1, the Defendant took the equipment and used it but never made any single payment despite being issued with several invoices. The evidence of PW1 was not contradicted by any defence evidence particularly in relation non-payment of the rental sum.

In his evidence **Isaac Ntale (DW1)** admitted that his company had an agreement with the Defendant's company. He also admits that it was a seven (7) months contact. Under paragraph 2.7.1 of his witness statement the witness stated that the equipment operated effectively for three (3) months only. He said that on 10.11.2016 he informed the Plaintiff's officer one Malya about the defect and that he did that through an e-mail but Mr. Malya did not respond, which amounted to breach of the Plaintiff's contractual obligations. He acknowledged receiving invoices from the Plaintiff in October 2016 and February 2017 trying to enforce payments of USD 58,770.73. He said that after receiving them he made some efforts to persuade the Plaintiff to have the amount reconciled due to the fact that the equipment didn't work for the whole rental but his effort did not yield any positive result as the Plaintiff remained adamant. He therefore said that the Plaintiff is not entitled to the reliefs sought from this court because her claims are not genuine and/or realistic as they do not tally with actual period the equipment was effectively used. He prayed the court to dismiss the Plaintiff's suit.

The Plaintiff on the other hand denied ever being informed by the Defendant about any defect in the equipment. Giving testimony on this

issue through Butwa Good luck (DW3), the plaintiff said that modes of communication between the parties was clearly provided for under Article 10-9 of the Agreement(exhibit P1) which states clear that:

" All notices, requests, contents demands waivers or other communications under or in connection with this agreement shall be in writing in the English language and shall be sent by hand delivery or by pre-paid first class registered air mail or prepaid cable telex or telefax to the addresses set forth below:

In the case of the owner to:

"Mantrac Tanzania Limited

Plot 4A Nyerere Road

P.O. Box 9262

DAR ES SALAAM – TANZANIA

Att: Managing Director

Tel. +255222860160-2

Direct Line: +255222864284

The totality of the evidence of PW1, Katiti and that of PW3 Butwa Goodluck Sanga is to the effect that there were no communication whatsoever regarding defects in the equipment because had there being any defect DW1 who is an engineer by profession ought to have had communicated with the Managing Director in accordance with the requirements of the agreement.

As stated at the outset of this judgment it is not disputed that there was an agreement between the Plaintiff and the Defendant for the rental of Earth moving Equipment (exhibit P1). The minimum rental period stated in the agreement is seven (7) months. The commencing date was from 1st March 2017. The Defendant took the equipment as per contract. Exhibit P1 shows that the Defendant took the equipment as agreed and in terms of clause 10-9 of that agreement in the event there was any defect in the equipment the Defendant ought to have reported in writing to the Managing Director of the Plaintiff. The evidence tendered shows that no notice or communication was ever addressed to the Managing Director as agreed in the contract and allegations that there was communication between the Defendant and one Malya of the Plaintiff have also not been proved. In terms of Section 110 of the Evidence Act [Cap 6 R.E.2002],

whoever wants court to give judgment in his favour on the existence of any fact the burden is on him to prove that those fact do actually exist. In the case at hand the Defendant has not discharged that burden.

For all those reasons court finds that there was a contract between the Plaintiff and the Defendant for rental of excavator, that the Defendant took the excavator and used it as per terms of the contract and that there is no evidence that the equipment was defective and that it operated properly for three (3) months only. If there was any defect in the equipment the Defendant ought to have had reported in writing to the Managing Director of the Plaintiff. He did not do that and the allegations that he so reported to one Malya had not been substantiated. These findings answer the first issue in the affirmative and the second issue in the negative.

As regards the breach in totality of the evidence adduced in this case it is apparent that the Defendant breached the contract when he failed to pay even for those three months which she plainly admits that the equipment worked properly. The evidence shows that the Defendant did not pay even a single cent of rental charge agreed. This was a violation of contractual obligations by failing to pay rental charges and thereof

depriving the Plaintiff substantially of the benefit she intended to obtain from the contract.

The argument that he didn't pay because he didn't receive invoices from the Defendant or that the invoices received didn't reflect the correct amount he was obliged to pay is not sustainable. Under the agreement (Exhibit P1), there is no clause which subjects payment on invoices. Although it may true that some of the invoices tendered by PW2 are problematic, but it would appear from the evidence of both PW2 and PW3 that invoices are more relevant to internal affairs and procedures of the Plaintiff. No wonder they were not referred in the agreement (exhibit P1).

As to the reliefs the plaintiff sought to recover special damages and general damages interest and costs.

The principle of law is that special damages must be specifically pleaded and proved. In this case it was specifically pleaded and now on the evidence adduced it has been proved. As clearly pointed out the Plaintiff has been able to avail to the court both oral and documentary evidence to show that rental charges amounting to USD 58,770 had not been paid. In the circumstance court finds that the Plaintiff discharged the burden placed

upon her by law and is entitled to special damages of USD 58,770.73 claimed in the suit

The Plaintiff also seeks general damages as shall be assessed by the court. It is trite law that a Plaintiff who suffers damage due to wrongful act of the Defendant must be put in a position he would have been if he had not suffered the wrong **[see Hardly Versus Baxendale (1894)] 9,** Exch. 341.

The law of contract Act is also borne in mind. The law allows court to award compensation for any loss caused to one party due to another's breach of the contract and in estimating the loss court has to consider the means of remedying the inconveniences caused by non-performance of the contract. It has already been held by this court that the Defendant breached the contract. The fact that both parties are profit oriented business companies cannot be disputed. The Plaintiff has been deprived of the use of her money for about two years, but considering that the Plaintiff has also sought interest on the special damages which is also a form of compensation, I find that a figure of USD 6000 which around Ten Percent of the special damages claimed and awarded will suffice as general damages and that is what is allowed to the Plaintiff.

The Plaintiff sought commercial interest at the rate of 15% per annum and court's interest at the rate of 12% per annum. Taking into account that the Plaintiff's claims are based on the strong currency of United States of America Dollar I find that the sought interests of 15% and 12% are on the higher side. In my opinion commercial interest at the rate of 2% per annum on the special damages from the date of filing the suit to the date of judgment and further court's interest at rate of 0.5% per annum from the date of judgment to satisfaction the decree will be appropriate and they are so awarded. The Plaintiff will have her costs of the suit.

A.R Mruma

JUDGE

15/02/2019