IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

COMMERCIAL CASE NO.03 OF 2019

MASWI DRILLING CO. LIMITED.....PLAINTIFF

VERSUS

SENGEREMA DISTRICT COUNCIL..... DEFENDANT

JUDGEMENT

Date of the Last Order: 08/07/2020

Date of the Ruling: 10/07/2020

NANGELA, J.:

The Plaintiff, a private company registered under the laws of the United Republic of Tanzania, is suing the Defendant Sengerema District Council, a local government established under the Local Government (District Authorities) Act, Cap. 287, [R.E.2002]. The Plaintiff prays for judgement and decree for the following:

1. An order of the court requiring the Defendant to pay the Plaintiff a principal sum of TZS 82,174,304.29, being part-payment of Certificate No.1 issued in respect of various works of drilling of boreholes carried out by the Defendant; the costs of the preliminary and general activities, and the costs of geographical survey carried out in relation to the project;

2. An Order that the Defendant pay the Plaintiff general damages amounting to TZS 50,000,000/- arising from the Plaintiff's failure to apply and compete in other activities/projects due to lack of funds;
3. That, the Defendant be compelled to pay interest on the decretal amount at court rate from the date of judgment till when the decree is fully satisfied;
4. Costs of this suit
5. Any other relief(s) this honourable court may deem just and fit to grant.

I will briefly state the facts constituting this case as may be gathered from the pleadings filed in Court by the parties. It all started on 10th July 2017, when the Defendant awarded the Plaintiff a contract No. LGA/094/WSP/W/2016-2017/Q/02. The contract was for the purposes of executing works of drilling boreholes, the completion of which was estimated to be on 23rd September 2017.

It is alleged that, the Plaintiff managed to execute the said works within the prescribed time and handed it over to the Defendant, who issued the Plaintiff with an approved *Interim Certificate No.1*, amounting to **TZS 107,440,000.00/=.** The Plaintiff alleges, however, that, the Defendant made only a partial payment of **TZS 74,104,170.50/=** and refused or neglected, without any reasons, to pay the remaining balance of **TZS 33,333,829.59/=,** a fact which was contrary to the requirement of the Special and General Condition of the Contract. The Plaintiff alleges that, due to such refusal to pay the whole amount claimed within 14/28 days, the same has accrued interest amounting to **TZS 18,840,474.79**/=, which, together with other costs, constitute a total claim of **TZS. 82,174,304.29**. On 31st March 2018, the Plaintiff sent a demand note to the Defendant demanding for payment of the

claimed amount within 30 days, but the Defendant failed to honour the demand, hence a Plaintiff Board's resolution was passed to institute this suit.

On 18th April 2019, the Defendant filed its written statement of defence. In her defence the Defendant denied the claims, although admitted that there were changes made to the original contract, which, nevertheless were of no effect to the original contract price. With such denial of the claim by the Plaintiff, the Defendant prays for the dismissal of the Plaint with costs. It is unfortunate that the parties could not mediate or settle their grievances amicably. As such, the same had to go to trial.

On 04th October 2019, in agreement with the parties during the final pre-trial conference, the Court settled for the following issues:

1. *Whether the Plaintiff owes the Defendant the sum of TZS* ***82,174,304.29/-***
2. *Whether there was a breach of the Contract between the Parties.*
3. *What reliefs are the Parties entitled to.*

Initially, the speed track of this case was set for 10 months, which means that the case ought to have ended, on 8th April 2020, the latest. However, for reasons which may be gathered from the record, the same could not be finalized as planned. Consequently, on 29th June 2020, when this suit was called on for its hearing, the Court, upon an oral application supported by all parties, extended the lifespan of this case to a further three months.

During the hearing of the suit, the Plaintiff was represented by Mr. Maligisa Sakila, learned advocate, and Mr. Serapian Matiku, learned counsel/solicitor, represented the Defendant. When the Plaintiff's case opened, the Plaintiff called one witness, *Mr. Payeka, Hajji Kibou* who testified as **PW1. PW 1's** statement filed in this Court in line with the requirements of Rule 50 (1) ad (2) of GN.250 (as amended) was adopted and admitted as constituting his testimony in chief. In

his testimony in chief, **PW1** told the Court that, he holds a bachelor of science degree in environmental engineering and joined the Plaintiff Company in 2017.

PW1 testified that, on 7th October 2017, the Defendant awarded the Plaintiff a contract *No. LGA/094/WSP/W/2016-2017/Q/02,* to execute works of drilling boreholes in Nyamililo and Kanyerere Villages which works were estimated to come to an end on 23rd September 2017. **PW1** sought to be admitted into evidence the document constituting the contract and the same was admitted as **Exh.P.1.**

PW1 told the Court that, the agreed contract sum was TZS **107,197,000,000 (VAT exclusive).** According to **PW1,** the Plaintiff did not receive any advance payment from the Defendant but had a loan facility sourced from the KCB Bank. **PW1** tendered into Court a certified copy of the loan facility which was processed and issued to the Plaintiff since 2015. The learned counsel for the Defendant sought to challenge it admissibility but the Court overruled his objection, since the document tendered was a certified true copy whose original was said to be left with the Bank. The loan facility between the Plaintiff and the Defendant was admitted as **Exh.P-2.**

PW1 further testified that having executed the works to their completion, the Plaintiff informed the Defendant and attached the requisite claims to the respective notice of completion of works. The claims concerned the works completed and the sum claimed was **TZS 131,670,000.00. PW1** sought to be admitted into evidence the notice of completion and the amount claimed (which was a letter with Ref.No.MSW/SNGRM/01-08/2017) and the same was admitted as **Exh.P.3.**

PW1 told the Court that, on 18th August 2017, the Defendant approved a payment of **TZS 107,440,000/-** to be paid to the Plaintiff *vide* an *Interim Certificate No.1.* The said Certificate was tendered into evidence and admitted as **Exh. P4.** It was a further testimony of **PW1** that, there was an inspection

carried out on the works executed and a report to that effect was produced with recommendations that the performed works were acceptable.

PW1 sought to be admitted into evidence the inspection report, which was admitted and marked as **Exh.P-5. PW1** told the Court that, after the report was issued, the Defendant, on 14th September 2017, varied the original work sites and directed the Plaintiff to relocate the drilling activities from the original drilling site in Nyamahona Village and implement such in Kasungamile Village.

PW1 sought to be admitted into evidence a letter, *Ref. No.CA.370/121/88*, dated 14th September 2017, and which was admitted and marked as **Exh.P.6.** The reasons for such site relocation were the changes introduced by the Defendant, some of the designated sites during the survey activities were found to lack enough yield and, hence, not recommended for drilling. In his testimony in chief, **PW1** testified that, the Defendant's instruction to shift sites from Nyamililo, Nyamahona, and Nyamatongo Villages to Kasungamile village, caused extra-costs for preliminaries and general activities to implement the same, which costs were not honoured by the Defendant although the same were communicated to the Defendant.

PW1 further told this Court that, on 28th December 2017, the Plaintiff received a part-payment in respect of the earlier approved payments for *Interim Certificate No.1*, amounting to **TZS 74,104,170.50/. PW1** stated that the sum paid was less than the earlier approved sum of **TZS 107,440,000/- (less by TZS 33,335,829.50).** Following such part-payment, **PW1** told the Court that, on 03rd March, 2018, the Plaintiff wrote to the Defendant claiming for the balance, *together with the additional costs incurred as a result of the site relocation exercise*, all amounting to **TZS 40,607,000/=.**

Further that, on 31st March 2018, the Plaintiff sent a demand note to the Defendant in respect of the claimed balance. **PW1** sought to be admitted into evidence a letter from the Plaintiff to the Defendant demanding for such

amount. The letter *Ref.MDC/SDC/02/2018,* dated 03rd of March 2018 and the Demand Notice, both requesting for a balance of **TZS 40,607,000/=** were admitted as **Exh.P.7** and **Exh.P.8** respectively.

PW1 told the Court that, on 29th April 2018, the Plaintiff Company's Board of Directors resolved that a suit be filed against the Defendant claiming a total of **TZS 74,500,750.56,** which sum included the principal amount equal to **TZS 40,607,000/=**and its accrued interest. **PW1** sought to be admitted into evidence the Board Resolution, and, there being no objection from the Defendant, the Resolution was admitted into evidence and marked as **Exh.P9.**

PW1 told the Court that, in total, therefore, the Plaintiff claims from the Defendant a sum of ***TZS 82,174,304/.*** According to **PW1**'s testimony in Chief, this claim constitutes *specific damages* which are accounted for as follows:

1. Principal amount .....TZS 33,333,829.50/=
2. Costs for surveying two (2) boreholes.....TZS 14,000,000.00/=
3. Preliminary and General costs at:
    - Nyamahona Village to Kasungamile...TZS 8,000,000/=
    - Nyamatongo.....TZS 8000,000/=
    - Accrued Interest for late payment....TZS 18,840,479.79/=
    - The total amount claimed.....**TZS 82,174,304.29/=.**

PW1 stated further, that, the Plaintiff claims for general damages amounting to TZS 50,000,000/- and costs of the suit.

Upon being cross-examined by Mr. Matiku, learned counsel for the Defendant, **PW1** maintained that the amount claimed is **TZS 82,174,304.29/.** He told the Court that, what was claimed in the demand note was **TZS 40,607,000/=** which claim arose from the pending unpaid amount for Certificate No.1, which was for **TZS 33,333,829.50/=** and **TZS 7,000,000/-** which were amount spent as costs of surveying for the boreholes drilling activities at Nyamahona.

PW1 further maintained that, up to *January* there was accrued interest, which made the total amount claimed to be TZS **82,174,304.29/.** When cross-examined by the learned counsel for the Defendant, **PW1** told this Court that, **TZS 25 million (plus)** were spent on the Nyamatongo borehole and the same were not paid to the Plaintiff on the ground that the borehole was unproductive as it was not yielding enough water.

When asked whether it was proper to pay such amount contrary to the existing water policies implemented by the government, **PW1** told the Court that the government water policies are never constant and what matters and governing the parties is the contract they signed and of which, the water policy has never part of. **PW1** further stated, while under cross-examination, that, borehole yields are never constant, and the contract entered into between the parties was silent regarding unproductive borehole. He told the Court that a hydrological survey report sent to the Defendant by the Plaintiff had indicated that the yield of the drilled borehole was *800litres /hr.*

PW1 acknowledged that the Plaintiff did conduct a hydrological survey before drilling the boreholes, but denied to have conducted pumping tests which are vital in ascertaining the available quantity (volume) of water. Referring to *Exh.P1*, **PW1** acknowledged that, the document attached and forming *Exh.P1* had made an assurance that the available quantity (volume) of water from the boreholes was *800lt/hr.* He insisted that even if no such amount was obtained, the Defendant has to pay the Plaintiff as per the contract. As regards **Exh.P6**, upon being cross-examined, **PW1** told the court that, the Plaintiff filed a response to *Exh.P.6* as they were being relocated to Kasungamile Village from Nyamahoma where one borehole was found to be dry. Although **PW1** acknowledged that *Exh.P.6* has made it clear that the shift was to be carried out without altering the contract sum, he stated that, the Plaintiff considered that, if there was variation in the contract, it is expected that the agreed rates would also change, and that is why the Plaintiff claimed what is his paragraph 10 of the Plaint.

With regard to **Exh.P.2**, **PW1** stated, while under cross-examination, that, the monies were borrowed in 2015, and were afterwards spent in 2017, as the Defendant did not give the Plaintiff any advance payment to execute the contracted works. **PW1** maintained that, delayed payments, is what attracted the accrued interest.

During re-examination, **PW1** told the court that, the agreement signed by the parties did not have a clause regarding the volume of water (yield) per one borehole. **PW1** clarified that, that, the Plaintiff submitted to the Defendant a completion report and not a letter of assurance and that, the parties did not discuss the relocation of sites as the letter from the Defendant had made it clear that the costs would offset each other. At this juncture, since the Plaintiff had only one witness, the Plaintiff's case came to a closure paving way for the defence case. However, the defence case could not proceed on the same day and the suit was adjourned till 8th of July 2020.

At the commencement of the hearing of **the defence case** on 8th July 2020, the parties were represented by the same learned counsel who appeared on 29th June 2020. Mr. Matiku took the floor and informed this Court that, the Defendant had only one witness, one Nicas Ligombi, who is currently the Geita Regional Manager for *Rural Water Supply Agency* (*RUWASA*). Testifying in Court as **DW1,** Mr. Ligombi, prayed to adopt his statement, earlier filed in this Court, as his testimony in chief, and, the Court proceeded to grant that prayer. **DW_1** informed the Court that, it was true that sometime in July 2017, the Plaintiff was contracted by the Sengerema District Council to carry out works which involved, among others, the drilling of productive boreholes in five villages, namely: Nyangalilo village, Nyamahona, Nyamatongo, Nyangalilo, Mulaga and Imalamawazo villages. The contract sum agreed, was **TZS 107,000,000/.**

DW_1 submitted, however, that, afterwards as a result of some variations to the initial contract, *an addendum* was added to the initial contract which was worthy of about **TZS 32,000,000/.** He tendered in court a letter,

Ref.No.CA.370/121/80, dated 6th July 2017, informing the Contractor (the Plaintiff) about the variations to the contract. This letter was admitted into evidence as *Exh.D1*.

DW_1 informed the Court that, the Plaintiff was only able to strike water in three villages of Mulago, Nyangalilo and Imalamawazo while in Nyamatongo Village, the borehole was found to be unproductive, and the borehole drilled in Nyamahona Village was found to be completely dry. **DW_1** informed the Court that, since the two boreholes were unproductive, the District Executive Director for Sengerema District Council sent a letter on 14th September 2017 and informed the Contractor to relocate activities to Kasungamile Village in Sengerema. The letter was clear that the costs for the Nyamahona Village were now to be imputed on Kasungamile drilling site. The letter was tendered in Court and admitted as ***Exh. D2 (a)***.

DW1 further told the Court that, on 23rd October 2017, the Defendant wrote a letter to the Plaintiff (Contractor) informing him about the unproductiveness of the Nyamatongo borehole. It was stated that, earlier the Plaintiff had indicated in the its *Hydrological Report* sent to the Defendant that, such a borehole had the capacity to pump *800 L /h*. **DW1** tendered, as an exhibit, the said letter which was admitted into evidence as ***Exh. D 2 (b)***. It was **DW1's** further testimony that, on 8th November 2017, the Defendant received a letter from the Plaintiff responding to the DED's letter which raised the issue of the unproductive boreholes and promised to send a team of engineers who would re-survey the two villages of Nyamahona and Nyamatongo. The letter from the Plaintiff, *Ref.No.MSW-SDC-2017-2018-001*, was tendered and received into evidence as ***Exh. D.3***. However, **DW1** stated that, to date the Contractor failed to carry out the re-surveying as earlier stated in *Exh.D3* and, instead, through a letter, Ref.MDC/SDC/02/2018, the Plaintiff submitted a claim of *TZS 40,607,000/* to the Defendant.

DW1 testified that the claim was problematic because it seemed to have included:

(a) *TZS 25,070,000/,* a claim in respect of the drilling of Nyamatongo borehole, payments which the Defendant disputed and withheld given that the government does not make payments for dry or unproductive boreholes.

(b) *TZS 15,000,000/* which the Defendant disputes as they include withholding taxes of *TZS 3,911,200/.*

(c) *TZS 4,118,500/* which amounted to retention sum, which amount is ordinarily made payable after the lapse of the defects liability period.

(d) *TZS 233,016 /-* which is an amount payable as service levy in accordance with the law and other charges which were yet to be settled.

DW1 informed the Court that, on 18th April 2018, through a letter Ref.No.370/121/86, the Defendant sent clarifications to the Plaintiff regarding why the claimed amount will not be considered given that the Nyamatongo borehole was unproductive contrary to the earlier *Process Drilling Report* submitted by the Plaintiff, which had indicated that, the yield capacity was 800L/h. **DW1** stated that, the Report was used for the preparation of the Interim Certificate for the purpose of preparing payments to the Contractor. **DW1** tendered in Court the *Process Drilling Report,* which was admitted into evidence and marked ***Exh. D 5.*** **DW1** testified that in that Report, the Plaintiff had convinced the Defendant that the Nyamatongo borehole had a yield capacity of *800 L/h,* meaning that the borehole was productive.

However, according to DW1, the borehole was below *400L/h* and hence the Plaintiff did not qualify to be paid as there would be no value for money. It was **DW1's** further testimony that, the basis of withholding the TZS 25,000,000/ was the *guidelines (Circular)* issued by the *Ministry of Water and Irrigation* to all Regional Administrative Secretaries, which, under *paragraph 4.1.4 (page 6-7)* it

directs that, payments for drilling of boreholes should be made only to productive boreholes. **DW1** tendered into this Court the particular Circular which was admitted into evidence as ***Exh. D 6.***

As regards the Plaintiff's total claim of **TZS 82,174,304.29**, **DW1** stated that such is not a correct claim because, it contains the 25,000,000/- and interest thereon, which should not be paid because the problem is not with the Defendant but the Plaintiff who did not honour his own promise of carrying out the re-surveying. Further, that, the claim also, contain the retention monies which the Plaintiff should to have claimed from the Defendant without filing this suit. **DW1** stated further that, the claim includes statutory amounts, such as service levy and withholding taxes.

DW1 admitted, however, that, the Plaintiff is entitled to **TZS 7,000,000/=** which is an amount covering the costs of carrying out hydrological surveys in **Kasungamile Village**. He prayed that the same be awarded to the Plaintiff while the rest (such as the retention amount) should be claimed as per the official procedures, otherwise the suit be dismissed. When cross-examined by Mr. Maligisa, **DW1** told this Court that, he was fully involved in preparing ***Exh. P.1***. He told the Court that, there is no a clause in ***Exh. P.1***, which adopted the *Government Circular* (guidelines (***Exh. D 6***)) as part of the Agreement (***Exh.P.1***). He stated furhter that, according to *Exh.P1*, payments to the contractor were to be effected within 14 days after the Interim Certificate was approved by the Engineer.

DW1 further told this Court that, he recognizes *Exh.P5* which was written on 28th August 2017 and that, the last paragraph refers to the drilling of five boreholes in the Villages of Nyamililo, Nyangalilo, Nyamatongo, Mulaga and Imalamawazo, and that, the boreholes were in use by the Community. He said, however, that, the withholding of the **TZS 25,000,000** for Nyamitongo was properly done as the borehole drilled there was a dry borehole, and, that, the

decision was reached after the Defendant conducted a physical testing (manual pumping).

DW1 told the Court that the *Interim Certificate* was provisional, and, hence, subject to some changes since the Contractor had triggered payment requests on the basis of the Process Drilling Report. **DW1** reiterated that the physical testing of the borehole, which was carried out a month after the drilling, indicated a yield capacity which was *less than 400L/h.*

DW1 stated further, that, the capacity or yielded volumes need not be stated in the contract since the Plaintiff (as a company) was contracted based on its skills and expertise as a *Class-1 contractor* and knows the standard output for a productive borehole, which is from *800L/h.* **DW1** stated that, that is the reason why the Plaintiff promised to rectify the situation at Nyamatongo unproductive boreholes but he did not honour the promise.

DW1 told the Court further that, according to standard operational data, productive boreholes such as those drilled by the Plaintiff, are supposed to serve up to 200-250 people. However, those found to be unproductive were able to ***serve 2 families only***. He reiterated his earlier testimony that the Contractor was informed of the changes in the contract and that the same did not affect the contract price. Further, that, the Nyamatongo borehole was part of the approved contract sum of TZS 107,000,000/=

Upon being re-examined by Mr. Matiku, **DW1** told this Court that, an interim certificate is only provisional and is subject to some changes, as it leaves a room for some adjustments. It is not a final certificate. He stated further that, the was a need to withhold the **TZS 25,000,000** as they were public funds, and, that, the interim certificate was only prepared to facilitate securing of funds from the Ministry. As regards the government circular (guidelines), **DW1** stated that all contractors are fully aware of it since they are registered by the Contractors Registration Board (CRB) and the Ministry of Water and Irrigation. Since there

was no other witness to be called for the defence, the defence case came to a closure.

Having summarized both the Plaintiff's and the Defence's case herein above, let me now turn to the analysis of the same in the light of the issues raised in this case and determine whether they have been addressed affirmatively in the light of the oral testimonies and documentary evidence tendered in this case. As stated earlier, the suit revolves around the three issues, the first issue being: *Whether the Plaintiff owes the Defendant the sum of TZS 82,174,304.29/-.* I will commence my analysis by looking at this issue.

Issue No.1: Whether the Plaintiff Owes the Defendant the Sum of TZS 82,174,304.29/-

As it might be seen herein above, there is no dispute that the Plaintiff and the Defendant concluded an Agreement, (Contract No. LGA/094/WSDP/2016-2017/Q/02 (*Exh.P1*) on the 10th of July 2017, following a successful tendering. The consideration payable was for **TZS 107,197,000/-.** From the evidence given in this case, there is no dispute that, following execution of the assignments, the Defendant approved and issued to the Plaintiff an *Interim Certificate No.1.*) (***Exh. P4***) for payment of **TZS 107,440,000/-** on 18th August 2017. It is also clear from the testimony of **PW1**, that, out of the approved amount only **TZS 74,104,170.50/** were paid to the Plaintiff on 28th December 2017.

With such information in mind, what then is the source of the claim for special damages amounting to TZS **82,174,304.29/-?** According to **PW1**, the source of that amount is as itemized hereunder:

(i) the unpaid balance (of the principle amount) which is equal to **TZS 33,333,829.50/=;**

(ii) Unpaid costs for surveying two (2) boreholes (Nyamahona and Kisungamile which is equal to TZS 14,000,000.00/=(@ 7,000,000/= for each Village).

(iii) Preliminary and General costs of TZS 16,000,000 (for shifting from Nyamahona Village to Kasungamile and Nyamatongo village TZS @TZS 8,000,000/= each).

(iv) Accrued Interest for late payment amounting to TZS 18,840,479.79/.

From the evidence on record, this Court takes note that the Plaintiff's claim for ***TZS 7,000,000/***, which as per the item **No.7** of **Exh.P.7** constitute costs of carrying out hydrological survey at Kasungamile Village, has been admitted by **DW1** as amounts which should be paid to the Plaintiff. As such the part of the claim (half of it) *under item No. (ii) above* is justified. What is disputed is *whole of item* ***No. (i),*** *part of item* ***No. (ii),*** *whole of item* ***No. (iii)*** and *whole of item* ***No. (iv).*** I will deal with each Item separately.

ITEM No. (I): **Claim In Respect of TZS 33,333,829.50**

PW1 testified that it arose from **Exh.P4** (*the Interim Certificate No.1*). It is clear that **Exh.P.4** was issued and approved by the Defendant on 18th August 2017, for payment of **TZS 107,440,000/-.** However, the Plaintiff was only paid TZS 74,104,170.50/, and this fact is not disputed. The claimed balance, which is **TZS 33,333,829.50/=** seem to be disputed by the Defendant on the ground that, out of it there is **TZS 25,000,000** which were earmarked for *Nyamitongo Village borehole*, and which borehole was found to be unproductive. For that reason, the amount was withheld by the Defendant. The question arising from this is: *was it appropriate to withhold such amount or deduct it from what the Plaintiff is entitled to be paid?*

In his testimony, **PW1** told the Court that, the amount should not have been withheld, and, must be paid as per the contract. **DW1** argued that, the same was properly withheld because the borehole at Nyamitongo was unproductive and, on the basis of existing government policy (***Exh.D6***) payments are to be made only to productive boreholes. **DW1** has anchored his argument on what is

provided on pages 6-7 of the *Government Circular/Guideline (Mwongozo Na.1/2016/17)*, (***i.e., Exh.D6***). According to these pages, the following policy statement or guideline which applies to the borehole drilling contracts is laid out as follows:

> "1.4.4 Maelekezo yafuatayo yatekelezwe wakati wa kutekeleza miradi mipya:
>
> (iii) Mikataba ya utafiti wa maji chini ya ardhi (*geophysical survey*) na uchimbaji visima (*exploratory drilling*) ufanyike katika Mkataba mmoja na kwamba atakayetafiti maji ndiye atakaye chimba kisima. **Suala la malipo lizingatie upatikanaji wa maji yanayoweza kutumika."**

PW1, however, argued in a clever manner, that, the said *Exh.D6* has never been part of the Agreement governing the parties. The argument by **PW1** has certainly exercised my mind a bit and I asked myself as to whether the Plaintiff was not supposed to take into account government directives, policies or circulars in the course of executing his contracted assignments. This brought me even to another thought provoking question: *what is the value of having such a policy?* I will look at this as I go along in my discussion.

It is indeed a well settled legal position, that, a government policy directive, guideline, circular or executive instruction, (whatever name it may be given), *can only supplement a statute or cover areas to which the statute does not extend*, but cannot run contrary to statutory provisions or whittle down their effect. (***See State Of Madhya Pradesh And Anr v. G.S. Dall And Flour Mills* [1991] AIR 772.**

Applied to this case, the above legal principle means that, although the *Government Circular/Guideline (Mwongozo Na.1/2016/17)*, (***Exh.D6***) was not part of *Exh.P.1* (as correctly argued by **PW1** in his testimony), that does not mean that the Defendant cannot rely on what it provides, if such reliance is in accordance with and supplements the law governing the underlying contractual relation of the parties.

As it may be noted, the parties' contractual relationship in this case is primarily governed by the law of contract, (although one should not lose sight of the fact that the *Procurement Act* may also apply to it, since the contract arises from an award of a tender). Be that as it may, even though this is a construction contract, it is still governed by the same contractual legal principles since, as McEwan, J., stated in *Smith v Mouton, 1977 (3) SA 9 @ 120 - 15C, "there is no special law different from the law relating generally to contracts and their interpretation that applies to building contracts and to [engineers'] certificates issued under them."*

The above discussion brings me now to the question I raised regarding whether it was appropriate to withhold the **TZS 25,000,000/-** earmarked for Nyamatongo borehole which turned out to be unproductive. The policy/guideline cited herein above, provides that, payments for any drilling work should be considered only for productive boreholes and not otherwise. As evidenced from the testimony of **DW1**, the withholding was in line with that stated government policy. Does this policy run contrary to the law? In my view the answer is no. I will elaborate this here below.

It is trite law that parties are to be bound by what they expressly consented to. Section 13 of the Law of Contract Act provides as follows, that:

> "Two or more persons are said to consent when they agree on the same thing in the same sense".

It is also a trite law that a contract should be read as it reads, as per its express terms. In other words, when a contract has been reduced to writing one must look only to that writing for ascertaining the terms of the agreement between the parties. (See the Supreme Court of India in ***Nabha Power Limited ("NPL") vs Punjab State Power Corporation Limited ("PSPCL") & another,*** Civil Appeal No.179 of 2017).

As far as the suit at hand is concerned, the consent of the parties is conspicuously expressed by their signatures endorsed on *Exh.P.1* suggesting their willingness and readiness to be bound by the provisions of their Agreement.

Paragraph 2 of the "*Agreement*" set out several documents which form part and parcel of the Agreement. One of such is the so-called "*General Conditions of Contract.*" Clauses 23 and sub-clause 23.1; 23.2.2 and 23.3 of the *General Conditions of Contract* reads as follows:

> **Clause 23: PAYMENTS**
>
> **23.1 OUT PUT**
>
> Payment will be done *with productive borehole*, after complying to set standards (engineering satisfaction). (**Emphasis added with an underline**).
>
> 23.2....
>
> **23.2.2 Interim Payments**
>
> Payments will be made to the Contractor through interim certificates *if the completed works are in compliance with the terms of the contract.* With each interim certificate, retention money of amounts stated in the Contract Data will be withheld up to a maximum of 5% of the contract price. *Such retention money will be released together with the final payment certificate*. The *amount due to the Contractor under any Interim certificate shall be paid by the Employer to the Contractor within 14 working days after approval of the Interim Certificate* by the Engineer." (**Emphasis added with an underline**).
>
> **23.3 Final Payments**
>
> The Final payment Certificate shall be effected within 28 working days after the date such document has been approved by the Employer, *provided that, all works, corrections, and repairs, if any, have been executed to the satisfaction of the Engineer.*" (**Emphasis added with an underline**).

Looking at **Clause 23.1**, here above, and taking into account what *section 13 of the Law of Contract Act, [Cap.345 R.E 2002],* provides, there is no doubt that the parties herein consented to be bound by such a Clause in the Contract. This brings me to the value of the *Government Circular/Guideline (Mwongozo*

Na.1/2016/17), (***Exh.D6***). In my view, even though the Guideline was not part of *Exh.P.1* (as correctly argued by **PW1** in his testimony), yet, since it supplements and does run contrary to the agreed contractual clause above and the cited statutory provision relating to the consent of the parties or whittle down their effect ***(See State Of Madhya Pradesh & Anr v. G.S. Dall And Flour Mills* (surpa)**, I find that the policy guideline bear relevance to the parties.

The above finding means, therefore, that, much as the Plaintiff ought to have taken into account **Clause 23.1of the Contract,** above all, he should have as well be informed by the *Government Circular/Guideline* (*Mwongozo Na.1/2016/17*), which in the similar vein requires payments to be made only to productive boreholes. This is what was agreed (consented to) in the Contract and this is what the policy guideline emphasizes.

In this case, **DW1** has demonstrated ***vide* Exh. D 2 (a)** and **Exh.D4** that, the Nyamatongo borehole was, according to a *physical pumping test* conducted only two months after its drilling, found to have insufficient discharge per hour, (between ***300 to 400L/hr*** (if one reads ***Exh. D 2 (a) and Exh.D 4***)) contrary to what the Plaintiff had stated in its Process Drilling Report, which was received into evidence as **Exh.D5**. The Plaintiff, *vide* **Exh.D3** seems to have acknowledged this fact.

According to Clause 12 of the *General Conditions of Contract,* the contract had stipulated as follows, that:

> "Works not in compliance with the requirements of the contract will be rejected. On the instruction of the Engineer, the Contractor shall, at his own cost repair or correct or re-execute such rejected work to the full satisfaction of the Engineer."

It is clear from the evidence of **DW1** that, the Plaintiff was informed of the unproductiveness of the Nyamatongo and Nyamahona village boreholes as per **Exh. D 3** and promised to look at the issue by doing a re-surveying. In principle, this was in accordance with the above cited *Clause 12 of the General*

Conditions of Contract, since, as it may be observed in **Exh. D 2 (b)**, it is clear that the Client (Employer) had rejected the work and proposed that the works be re-executed. As indicated in Clause 12 above, if such re-execution was to be carried out, the same would have been carried out, **"at the costs of the Contractor"**. Unfortunately, **DW1** testified that, to date, that has not been done. As noted in this case, the Plaintiff has complained against the withholding of the **TZS 25,000,000/** - by the Defendant as being unlawful, especially after there had been a release of an Interim Certificate of Payment. It is a cardinal rule, indeed, that in the absence of any of the factors to the contrary, the employer is bound to pay the sum certified. However, this is not sacrosanct principle, although at some point in time it seemed to be so.

For instance, in the cases of *S.A. Builders and Contractors v. Langeler, 1952 (3) S.A. 837 (N),* at pp. 841 H-842H and *Dawnays Ltd. v. F.G. Minter Ltd.,* (1971) 2 All E.R. 1389 (C.A.), it was considered that, once a certificate is raised in construction contracts, the said certificate create a debt due and that, it was regarded as the equivalent of cash. In *Dawnays Ltd. v. F.G. Minter Ltd.,* (supra) Lord DENNING, M.R., stated as follows, at p. 1393 b:

> "An interim certificate is to be regarded virtually as cash, like a bill of exchange. It must be honoured. Payment must not be withheld on account of cross-claims, whether good or bad - except so far as the contract specifically provides. Otherwise, any main contractor could always get out of payment"(i.e. to a sub-contractor) "by making all sorts of unfounded cross-claims."

However, much as the reasoning of his Lordship Denning, M.R has some jewels in it, in *Gilbert Ash (Northern) Ltd v. Modern Engineering (Bristol) Ltd.,* (1973) 3 All E.R. 1975, the House of Lords overruled the *Dawnays* case *(supra).* In essence, the House of Lords stated the English common law position (which I find to be persuasive) that, a defendant who is sued for payment for either work done by a contractor or materials supplied, is entitled to raise as a defence that the work or materials were defective and, therefore, that he is not

liable for the whole or part of the payment claims that may be raised in a certificate. That is a right which cannot be taken away.

In that case, Lord Diplock, summarized the general approach at p. 216c, when he stated as hereunder:

> "So when one is concerned with a building contract one starts with the presumption that each party is to be entitled to all those remedies for its breach as would arise by operation of law, including the remedy of setting up breach of warranty in diminution or extinction of the price of material supplied or work executed under contract. To rebut that presumption one must be able to find in the contract clear unequivocal words in which the parties have expressed in their agreement that this remedy shall not be available in respect of breaches of that particular contract."

In the same decision of the House of Lords, Viscount Dilhorne had the following to say, at p. 220h:

> "A great deal has been said in *Dawnays case* and the cases which have followed it, as well as in this case, as to the importance of a 'cash flow' in the building industry. I cannot think that the building industry is unique in this respect. It is, of course, true that the contract makes provision for payments as the work proceeds, ***but, it is to be observed, a fact to which I feel insufficient attention has been paid, that the contractor is only entitled to be paid for work properly executed. He is not entitled to be paid on interim certificates for work which is defective.*** The Architect should only value work executed properly, that is to say, to his reasonable satisfaction (clause 1); and no interim certificate is of itself conclusive evidence that the work was in accordance with the contract (clause 30 (8)." (Emphasis added).

Taking the cue from the above, I am fully convinced that the Defendant was and still is, entitled to withhold the payment of **TZS 25,000,00/-** from the interim certificate given that, the Nyamatongo borehole turned out to be unproductive. Payment of such sums to the Plaintiff, would not only be contrary to *Clause 23.1 of the General Contract Conditions*, but would also go contrary the established procurement principle, in particular the principle of Value for Money

as expressly stated in section 47 (c) of the *Public Procurement Act, [Cap.410 R.E.2019]*. Basically the section provides that:

> " Procuring entities shall, in the execution of their duties, strive to achieve the highest standards of equity, taking into account-
>
> (a) ....;
>
> (b) ....; and
>
> (c) the need to **obtain the best value for money in terms of price, quality and delivery having regard to set specifications and criteria.**

It follows, therefore, that, the claim regarding payment of **TZS 25,000,000/** for the works executed in Nyamatongo Village will fail and the same should be deducted from the Plaintiff's Claim of balance of **TZS 33,333, 829.50.** This is due to the reason that, as a contractor, the Plaintiff is only entitled to be paid for works properly executed and is not entitled to be paid on interim certificates for defective work. That will even go contrary to the principle of value for money taking into account that the monies paid for the works are public funds.

ITEM No. (II): *Claims in respect of Unpaid costs of surveying two (2) boreholes (Nyamahona and Kisungamile which is equal to TZS 14,000,000.00/- (@ 7,000,000/= for each Village).*

As it may be observed from the evidence tendered in this Court, the Plaintiff's claim of **TZS 7,000,000/** as costs for carrying out hydrological surveying at Kasungamile Village. This claim has not been disputed by **DW1**. The dispute is with regards to costs carrying out hydrological surveying at Nyamahona Village. **DW1** holds that the Nyamahona Village was found to be completely dry and, that, since that bore hole (and that of Nyamatongo Village) were unproductive, the Plaintiff was directed to relocate activities to Kasungamile Village. The letter was clear that the costs for the Nyamahona Village were now to be imputed on

Kasungamile drilling site. The letter was tendered in Court and admitted as **Exh. D2 (a).**

In my humble view, the same principles discussed earlier concerning the claims in respect of works executed in Nyamatongo boreholes which were found to be unproductive, will as well apply to Nyamahona. In particular, since as per **Exh. D2 (a)** and **Exh. D2 (b)**, the Nyamahona borehole, was unproductive, which fact was acknowledged by the Plaintiff as per **Exh. D3**, according to **Clause 23.1 of the General Contract Conditions**, as discussed earlier herein above, as well as the cases I have referred to, the Plaintiff is not entitled to the payments of **TZS 7,000,000/** as claimed in **Exh.P.7**. As I earlier stated, and in line with Clause 23 of the **General Contract Conditions,** the Plaintiff can only be entitled to payment for works properly executed and is not entitled to be paid on interim certificates for defective works. An unproductive borehole is equally defective.

Besides, it has been clearly established by virtue of **Exh. D2 (a)** that, the Contractor (Plaintiff) was instructed to relocate and carry out the hydrological drilling works in Kasungamile Village in *lieu* of Nyamahona Village where the borehole drilled were found to be unproductive. The Plaintiff, therefore, cannot claim for costs of doing so at Kasungamile and Nyamahona at the same time. In actual sense, even the Kasungamile costs ought to be borne by the Plaintiff if one is to follow what Clause 12 of the *General Conditions of Contract* stipulates. Be that as it may, I find that **Exh. D 2 (a)** was clear and in line with the provisions of the Contract that, the costs of implementing works in Nyamahona Village were now being replaced by the works executed in Kasungamile Village. As such, there can be no payment for double claims. The amount of **TZS 7,000,000/-** as costs for Nyamahona survey and drilling claimed as per **Exh.P.7** should also fail.

ITEM No. (III): Preliminary and General costs of TZS 16,000,000 (for shifting from Nyamahona Village to Kasungamile

and Nyamatongo village TZS @TZS 8,000,000/= each).

According to **PW1**, the Defendant varied the Agreement at some point necessitating the relocation of site activities from one place to another. **Exh.P.6** is relevant here in that respect. **PW1** even stated the reasons for such site relocation as being that, some of the designated sites during the survey activities were found to lack enough yield and, hence, not recommended for drilling. As it may be observed from **PW1's** testimony in chief, the Defendant's instruction to shift sites from **Nyamililo**, **Nyamahona**, and **Nyamatongo Villages** to **Kasungamile village**, caused extra-costs for preliminaries and general activities to implement the same, which costs were not honoured by the Defendant although the same were communicated to the Defendant.

In **Exh.P.7**, it is clearly stated that the costs for relocating from Nyamahona to Kasungamile for geophysical survey, which includes mobilization costs was TZS 1,600,000 per each village. It is stated, therefore, that, the costs for mobilization at Kasungamile were **TZS 1,600,000/.** However, **Exh.P.8** (demand letter) indicates that, the costs for the preliminaries/General works from Nyamahona to Kasungamile is **TZS 8,000,000/** as well as preliminaries/General works at Nyamatongo to be **8,000,000/-.**This brings a total of **TZS 16,000,000/=.**

With due respect, since **Exh.P.7** had categorically established the costs of relocation and mobilization as being **TZS 1,600,000** for each village, the basis of the claim amounting to **TZS 16,000,000/** is not established at all. While I agree that variations which led to site re-location will add costs on the side of the Plaintiff, I do not, however, find it correct to claim **TZS 16,000,000** as amount arising from such. The reason is clear. Even if one is to take the view stated by **PW1** that the Defendant's instruction to shift affected four village sites (i.e., from **Nyamililo**, **Nyamahona**, and **Nyamatongo Villages** to **Kasungamile village**), **Exh.P.7** has established the costs per one village to be **TZS**

1,600,000/=. This means that, in respect of 4 villages, the amount would have been (1,600,000 X 4) = **TZS 6,400,000** (as opposed to **TZS 16,000,000/=).**

However, **Exh.P3** (*Interim Certificate*) indicates that, the amount requested in respect of "*preliminaries and general*" activities for five (5) villages (Mulaga, Nyamatongo, Nyamililo, Nyamahona and Imalamawazo) was **TZS 8,000,000** only (*meaning that, costs for each village was TZS 1,600,000/ since (1,600,000 x5= 8,000,000/=).*

If such amount was not settled, still it cannot bring the total of **TZS 16,000,000** but rather a total of **TZS 8,000,000/-.** For such reasons, leaving aside the fact that **Exh.P.6** indicates that the instructions to shift were in respect of Nyamahona Village and Kasungamile Village only, it is clear to me, and I find and hold so, that, the costs which the Plaintiff should have claimed and is entitled to be reimbursed as mobilization or demobilization costs for all five villages where the project was implemented amounts to (***TZS 1,600,000 X 5***) = **TZS.8, 000,000/=** only. Consequently, as for the claims under **ITEM No. III** , the total will be **TZS 8,000,000** /- and **not 16,000,000/-.**

ITEM No.IV: *Accrued Interest for late payment amounting to TZS 18,840,479.79/ .*

Item No.IV above is the final item which the Plaintiff relied upon to build up the claim for **TZS 82,174,304.29/-.** According to the testimony of **PW1**, the amount claimed as interest results from the late payments of the balance of **TZS 33,333,829.59/= and TZS 7,000,000** which were amount spent as costs of surveying for the boreholes drilling activities at Nyamahona. PW1 stated that up to January (presumably 2020?), the total accrued interest was *TZS 18,840,479.79/.*

However, as stated in this Judgement, the claimed balance of **TZS 33,333,829.59/=** had included the **TZS 25,000,000/-** which were funds withheld from Nyamatongo Village. As I held earlier, taking into account the contract signed by the parties, the law of contract and supplementary government

guidelines/policy in respect of boreholes drilling activities and the Public Procurement Act, the Plaintiff was not entitled to be paid the **TZS 25,000,000/-.** As I said earlier, it should be deducted out of such balance. If that is worked out, then, the balance will be **TZS 8,333,829.50** / which should be what will remain, and, from that, interest for late payment may be made.

Furthermore, the **TZS 7,000,000/** which were labelled as costs of surveying for the boreholes drilling activities at Nyamahona Village, were shifted to Kasungamile village. As I said, this amount can only be claimed not from the Nyamahona village cost-based standpoint but from the Kasungamile point of view. Interest thereto, should also be claimed from what was spent at Kasungamile. As stated in the discussion in respect of **ITEM NO.III** above, such costs were included under that item.

On the other hand, issues regarding late payments were not left out in the Agreement signed by the parties. In particular, **Clause 23.4 of the General Conditions of Contract** provided as follows:

> If the Employer fails to make payments within the time stated, the Employer shall pay to the Contractor interest stated in the Contract data.

Besides, Clause 23.2.2 of the **of the General Conditions of Contract provided that,**

> **23.2.2 Interim Payments**
>
> Payments will be made to the Contractor through interim certificates if the completed works are in compliance with the terms of the contract. ...The amount due to the Contractor under any Interim certificate shall be paid by the Employer to the Contractor *within 14 working days after approval of the Interim Certificate* by the Engineer." (**Emphasis added with an underline**).

As it may be gathered herein above, it is clear that the contract had stipulated the payment time to be 14 days after approval of an interim certificate. As stated by **DW1**, it should be borne in mind that the interim certificate was not a "final certificate". The Agreement did recognize that fact, as **Clause 23.3 of General Conditions of Contrac** stipulates for that. However, there has been no evidence to the effect that a Final Certificate has ever been issued to date. Be that as it may, as PW1, testified the **Interim Certificate** (**Exh.P.4**) which was submitted to the Defendant, was submitted on 18th August 2017, and the Defendant approved a payment of **TZS 107,440,000/-.**

However, **it was not until** 28th December 2017, the Plaintiff received a part-payment in respect of the earlier approved payments for *Interim Certificate No.1*, amounting to **TZS 74,104,170.50/.** This means that there was 4 months delay to pay that amount and for sure there was an accrued interest which needs to be calculated.

According to the **Contract Data**, the prescribe interest rate for any unpaid amount was the *prevailing commercial bank interest* rate per month as published by the Bank of Tanzania (BOT) **on the date of Contracting.** According to **Exh.P.8,** the Plaintiff capped the interest rate at 21%. I will assume that such was the rate and proceed. Now, the question that arises is: *How much ought to have been charged interest rate?*

The general legal consensus is that a contractor should be able to recover interest on late payments. Essentially, such interest can be charged on an overdue payment from the day after the last day that it should have been paid. The interest charged, however, should not be punitive. Rather, it should have the goal of compensating the party who is deprived of the benefits of a prompt payment. ***See Landfast (Anglia) Ltd. v Cameron Taylor One Ltd. [2008] EWHC 343 (TCC) (26 February 2008***).

As regards the current suit, in my view, the amount from which interest accrued included the following:

(a) The **TZS 74,104,170.50/** of which, the interest should be calculated for the delayed period of 4 months at a rate of 21% per month, (i.e, from 19th August 2017 to 28th December 2017. The amount payable as interest would be TZS 1,296,770.48 x4= **TZS 5,187,087.92/-**

(b) **TZS 7,000,000** (which were costs for carrying out hydrological surveying at Kasungamile. The calculations should run from 19th August 2017 to 26th March 2019 when this suit was filed. The amount payable as interest would be TZS 122,500 x19 (months) =**TZS 2,327,500/-**

(c) **TZS 8,333,829.50** (which is the difference between the claimed balance of **TZS 33,333,829.59/= minus** the **TZS 25,000,000/-** which were withheld from the Nyamatongo unproductive borehole). The accrued interest from this should as well be calculated from 19th August 2017 to 26th March 2019 when the suit was filed. As such the amount payable as interest would be **TZS 145,842 x19** (months) =**TZS 2,770, 998/-**

(d) **TZS 8,000,000** (which were costs of demobilization and mobilization as discussed under ITEM No. III above). Similarly, accrued interest from this should as well be calculated from 19th August 2017 to 26th March 2019 when the suit was filed. The amount payable as interest would be **TZS 140,000 x19** (months) =**TZS 2,660,000/-**

In view of the above, the total (cumulative) interests from (a) + (b) + (c) + (d) above, which the Plaintiff is entitled to be paid at a rate of 21% per months is

TZS 12,945,585.92/- (say **Tanzanian Shillings Twelve Million, Nine Forty Five Thousand, Five Hundred Eighty Five, Ninety Two Cents Only**.)

On the other hand, the correct amount, which the Plaintiff should be paid as remaining balance is as follows:

(a) Tsh. **TZS 7,000,000 (**which were the undisputed costs for carrying out hydrological surveying at Kasungamile.

(b) **TZS 8,333,829.50** (which is the difference between the claimed balance of **TZS 33,333,829.59/= minus** the **TZS 25,000,000**/- which were withheld from the Nyamatongo unproductive borehole).

(c) **TZS 8,000,000** (which were costs of demobilization and mobilization as discussed under *ITEM No. III herein above*).

The total balance claimed, therefore, is (a) + (b) + (c) above which is equal to **TZS 23,333,829.5**/= (say **Twenty Three Milion,Three Hundred Thirty Three, Eight Twenty Nine and Five Cents Only**.) The overall balance, if one is to combine this with the interest payable is a total of **TZS 36, 279,415.42/- *(Thirty Six Million,Two Seventy Nine Thousand,Four Hundred Fifteen and Fourty Two Cents only).***

In the upshot, the first issue regarding: *Whether the Plaintiff Owes the Defendant the Sum of TZS 82,174,304.29/-*is only partially answered in the affirmative in the sense that, the correct amount, which the Plaintiff owes the Defendant, is **TZS 36, 279,415.42/- (Thirty Six Million,Two Seventy Nine Thousand, Four Hundred Fifteen and Fourty Two Cents only)** (including accrued interests from 19th August 2017 to 26th March 2019 when the suit was filed). Having disposed the first issue as shown herein above, let me now turn to the second issue.

SECOND ISSUE: ***Whether there was a breach of the Contract between the Parties.***

In simple terms a breach of contract occurs when a promise or agreement is broken by any of the parties to that Agreement. In the case at hand, the Plaintiff alleges that the on 10th July 2017 the Defendant awarded the Plaintiff a tender LGA/094/WSP/W/2016-2017/Q/02, ***(Exh.P.1)*** to execute works of drilling boreholes, the completion of which was estimated to be on 23rd September 2017. The Plaintiff alleges that the works were executed, but the defendant refused to pay the entire agreed contract price.

In the present suit, the validity of the contract (**Exh.P.1**) was not at issue. What has been at issue is that the Plaintiff was not paid timely. From that, the issue becomes: *whether the delayed payments constituted a breach of contract..*

As a general rule, the time of payment for services rendered or goods supplied is not generally of the essence of a commercial contract unless the parties have agreed (either expressly or by necessary implication) that it should be. That being the case, the requirement to pay on time (i.e., in accordance with the payment terms prescribed by the contract) is not a condition of the contract, breach of which would permit the innocent party to elect to accept the breach and to bring the contract to an end, but is widely classified as an "innominate term". See for instance the English cases of ***Decro-Wall International SA v Practitioners in Marketing Ltd [1971] 2 All ER 216*** and ***Valilas v Januzaj [2014] EWCA Civ 436.***

Although it is dependent on each facts of a case for the court to rule out whether delayed payments constitutes breach of a condition or amounts to breach of an "innominate term", there is no doubt that delayed payments may constitute a breach of contract if such delay is over a prolonged period, especially where such delay is way beyond what the contract has stipulated as payment period.

In the English case of of ***Spar Shipping AS v Grand China Logistics Holding (Group) Co. Ltd*** [2017] EWCA Civ 982, for instance, the Court of Appeal of England found that a shipowner was entitled to terminate for

repudiatory breach where the hirer was in persistent breach of an obligation for the punctual payment of hire. Briefly stated, the facts of that case were that, sometime in March 2010, the Defendant's subsidiary company (GCS) agreed to hire three vessels from the claimant. The charterparties were guaranteed by the defendant. The charterparties required payment of hire 15 days in advance, and gave the claimant an express right to withdraw the vessels from service "failing the punctual and regular payment of the hire". From April 2011 GCS was in arrears of payment of hire. That continued throughout the summer of 2011, with a chronology of missed and delayed payments. In September 2011, the claimant withdrew the vessels and terminated the charterparties. The Court ruled in favor of the shipowner.

As regards the current suit, it is trite in law that he who alleges must prove. Consequently, in a suit like the one at hand, the burden of proving each and every allegation in the plaint, including allegations of breach of contract, losses suffered, damages and any reliefs prayed for, rests on the plaintiff. Section 110 (1) and (2) of the Evidence Act, 1967, Cap 6 R.E. 2002 is alive to that. The section provides as hereunder, that:

> "110. (1) whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that, those facts exist.
> (2) When a person is bound to prove the existence of any fact, it is said that, the burden of proof lies on that, person.

The above cardinal principle was emphasized in the case of ***Wolfango Oourado v Tito DaCosta, ZNZ Civil Appeal No. 102 (CA)*** *(unreported),* where the court insisted that: "*whoever alleges a fact, unless it is unequivocally admitted by the adversary has to prove it, albeit on the balance of probability.*"

As stated earlier herein, PW1 testified that on 18th August 2017 the Plaintiff submitted an Interim Certificate No.1 (**Exh.P.4**) to the Defendant seeking to be paid for the works that were completed. PW1 stated that **Exh.P 1**

was no fully honoured and more so, the payments were delayed. I have laboured earlier here above to show that there was indeed a delayed payment of certain amount as ascertained herein above and which the Plaintiff was entitled to be paid.

Essentially, according to the Agreement governing the parties' relations, which agreement was tendered and admitted as **Exh.P1**, *Clause 23.2.2 of the General Conditions of Contract* provided that payments should be made within 14 working days after approval of the interim certificate. Moreover, *Clause 23.3 of the General Conditions of Contract* stipulated for a period of 28 days for effecting a final payment certificate. However, as I said earlier, such final certificate was never issued. **Clause 28.2** provides that, where the Employer fails to effect payments to the contractor within 60 days from the date when the Engineer's certificate was issued, the contract will terminate.

From the look of things, prolonged delayed payment in this contract constituted a breach of condition entitling the Plaintiff to terminate the contract. Since the Plaintiff established that the was a delayed payment, even if not to the extent of the amount claimed, the Plaintiff has proved to the required balance of probability that the Defendant was in breach of the Agreement, especially, **Clauses 23.2.2,** and **Clause 28.2** had to come into effect. This conclusion, therefore, establishes the second issue affirmatively, that, there was a breach of contract between the parties. Let us now look at the final issue.

THIRD ISSUE: *What reliefs are the Parties entitled to.*

Moving to the 3rd and last issue of what reliefs are parties entitled to, it is my finding that the Plaintiff claims regarding breach of contract by the Defendant due to the latter's non-payments as well as delayed payments for the works executed under the agreement, has been proved to the balance of probability and the contract was breached. However, the question that needs to be asked is whether the Plaintiff suffered loss as a result of the breach and if so what should follow.

Essentially, an award of damages for breach of contract has a different objective: compensation for financial loss suffered by a breach of contract, not compensation for injury to reputation. In our Jurisdiction, section 73 (1) of the Law of Contract Act, Cap.345 [R.E 2002] provides as follows, that:

> "(1).When a contract has been broken, the party who suffers by such breach, is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arise in the usual course of things from such breach or which the parties knew, when they made the contract to be likely to result from the breach."

The above cited provision requires that a party who suffer as a result of a breach of contract to be compensated for the loss suffered. As regards the case at hand, the Plaintiff has prayed to be warded **TZS 50,000,000** as general damages and **TZS 82,174,304.29** as specific damages. As discussed earlier in this judgement, the Plaintiff's claim for **TZS 82,174,304.29** as specific damages could not be strictly proved to the required standards. The law is settled that, special damages should, not only be pleaded, but the claimant should also strictly prove them. The case of ***Zuberi Augustino v Anicet Mugabe*** [1992] TLR 137 is a case in point. However, upon a fair evaluation of the claims, the Court settles for **TZS TZS 36, 279,415.42/-** as indicated earlier herein above.

As regards the claim for general damages, the Court of Appeal of Tanzania, in the case of **Maweni Limestone Limited v Damatico General Supply, Civil Case No.28 of 2018,** (unreported), held that award of general damages to the injured party is at the discretion of the trial Court, which discretion needs to be exercised judiciously and in accordance with the evidence in the record. The Court was of the view that, the award must be seen to be fair in the monetary terms to the suffered party and reasons must be assigned.

Guided by the above principle, I am of a settled view that the contract having been breached, the Plaintiff suffered damage. In the Plaintiff's pleadings, the

Plaintiff has alleged to have suffered economic loss, inconvenience, and other general damages as he had a loan which he was servicing. **PW1** tendered in Court a Credit Facility Agreement, which was received in Court as **Exh. P 2**. He submitted that, although the loan was advanced to the Plaintiff in 2015, he had used the funds in 2017 as well. According to **clause 3 of Exh. P 2**, the purpose of the loan was for partly settling Barclay's Bank Loan and supporting working capital requirements of the Plaintiff. Besides, it was also for the purposes of assisting the Plaintiff in drilling projects for its customers. **Exh. P 2** had a life span of 3 years and was therefore due to expire on March 2018.

In my view, although the above evidence and testimony by PW1 does indicate that the Plaintiff suffered loss and was inconvenienced, the amount of **TZS 50,000,000/** claimed by the Plaintiff, is rather excessive by all standards. This is due to the fact that, the Defendant paid the Plaintiff about 75% of the entire contract sum. The belated payments, nevertheless, attracted interest and the such interests has been awarded where I discussed the award for special damages claimed by the Plaintiff. In view of that, this Court finds that it since 75% of the contract sum was paid on 28th December 2017, it will not be fair to award TZS 50,000,000 to the Plaintiff as general damages. Instead, the Court settles for **TZS 7,000,000/** as general damages.

In the final analysis, the Court makes the following orders:

1. **That,** subject to deduction of any unpaid statutory deductions (tax/levies), the Defendant pay the Plaintiff **TZS TZS 36, 279,415.42/-** as special damages arising from the non-payment and delayed payments and interests therein, of the part of the agreed contract sum.
2. **That,** the Defendant pay the Plaintiff TZS 7,000,000/ as general damages for breach of Contract between the parties.

3. **That,** the Defendant pay the Plaintiff, interest at a rate of 7% on the decretal amount from the date of this judgement to the date of full payment.
4. **That,** the Defendant pay costs for the suit.

It is so ordered.

.....

DEO JOHN NANGELA
JUDGE,
High Court of Tanzania (Commercial Division)
10 / 07 /2020

Ruling delivered on this *10th day of July 2020*, in the virtual presence of Mr.Maligia, Advocate for the Plaintiff also holding the brief of Mr. Matiku, Advocate for the Defendant.

.....

DEO JOHN NANGELA
JUDGE,
High Court of Tanzania (Commercial Division)
10/ 07 /2020