IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM

COMMERCIAL CASE NO.125 OF 2019

ISAKA COMMERCIAL AGENCY LTD.....PLAINTIFF

V

PANGEA MINERALS LTD .....DEFENDANT

Last Order: 4th March 2021
Judgement: 7th May 2021

JUDGMENT

NANGELA, J.:

The Plaintiff and the Defendant are companies incorporated and operating their businesses in Tanzania. In this suit, Mr Armando Swenya, learned Advocate, represents the Plaintiff while the Defendant enjoys the services of Mr. Faustine Malongo and Miss Caroline Kivuyo, learned Advocates.

From this Court, the Plaintiff is seeking the following:

1. *A declaration that the Defendant unlawfully breached the Agreement entered with the Plaintiff via Direct Purchase Order No. BUZ 10012421.*
2. *Payment of specific damages to the tune of TZS 125,200,000/=being specific damages from loss directly resulting from the breach of contract*

occasioned by the Defendant's act of cancelling the Direct Purchase Order No. BUZ 10012421.

3. *Payment of TZS 276,674,000 – as total payable price of the wrongfully neglected remaining goods.*
4. *Payment of General damages to be assessed by the Court.*
5. *Interest on what is prayed for in No.2 and 3 above at court rate of 12% from the date of filing of this suit to the date of judgement.*
6. *Interest on what is prayed for in No.4 above at a commercial rate from the date of judgment to the date of full payment.*
7. *Cost of this suit.*
8. *Any other relief which the Court deems fit and just to grant.*

At the heart of this suit is an alleged breach of contract to supply rice. It is alleged that, the contract was concluded on 12th May 2018 through **Direct Purchase Order No. BUZ 10012421** and, the Plaintiff was to supply 121 tonnes of white polished rice, at a price of **TZS 304,400,000/-(VAT-Exclusive)**. It has been alleged that, the supply was for a period of 20 months, which were to run consecutively. During that period, the Plaintiff was to supply a total of **6,046 kilograms** of the preferred rice to the Defendant per month, at a price of **TZS 15,720,000/-** only.

However, it is alleged that, after supplying only 36 tonnes, on 25th October 2018, the Plaintiff received a phone call from the Defendant informing him to stop the supply with effect from 1st November 2018. Besides, on

24th January 2019, the Plaintiff received an e-mail communication terminating the agreement and, further, instructing the Plaintiff to communicate with a third party on the same deal.

The Plaintiff claims to have suffered loss owing to the cancellation of the contract, a loss, amounting to **TZS 401,874,000/=**. Expounding on how the loss came about, the Plaintiff alleged that, he secured a loan from Azania bank and, that, such funds were invested in the buying, processing and transporting the bulky stock, human labour, working tools and on leasing storage facilities for the sake of ensuring a steady and smooth supply of the quality rice contracted for by the Defendant. Further, that, the Plaintiff bought and stocked the required consignment of rice.

Due to the alleged cancellation of the contract, the Plaintiff, demanded from the Defendants payments of the remaining **TZS 276,674,000**, being the price payable for the unsupplied consignment, a demand which the Defendant neglected or refused to honour.

It is from such a background, therefore, that the Plaintiff's Board of Directors resolved to file this suit against the Defendant, having initially failed to sue the Defendant before the District Court of Kahama in Civil case No.8 of 2019.

On 6th December 2019, the Defendant filed a Written Statement of Defence. The Defendant denied the Plaintiff's claims and averred, instead, that, it was the Plaintiff who breached the contract of supply for not supplying the consignment of rice within the agreed time under the Direct Purchase Order. Besides, the Defendant raised an issue of unforeseen events which forced the Defendant to the cutback of its work force and outsource its catering activities to an independent contractor in the name of **NICE Catering Services**.

Following the Defendant's denial, this suit went through to the hearing stage. During the final pre-trial conference, this Court, in agreement with both parties, drew up five issues for determination. These issues were:

1. Whether there was a contract between the Plaintiff and the Defendant and, if so, what were the terms of such a contract?
2. Whether there was a breach of such a contract and if so, who was responsible for the breach?
3. Whether there was any unforeseen event which forced the Defendant to reduce its operations and, hence, impacting on the contract.
4. Whether the Plaintiff suffered damages/losses at the hands of the Defendant.
5. To what reliefs are the parties entitled.

At the hearing stage, the Plaintiff called two witnesses. These witnesses filed their witness statements

in line with the requirements of Rule 49 (1) of the Commercial Court Rules GN 250 of 2012 (as amended). Besides, the Plaintiff tendered into evidence six (6) exhibits to prove its case. On the other hand, the Defendant called three witnesses and tendered into the Court one (1) exhibit.

The gist of the witnesses' testimonies from both sides may be summarised as here below.

In his testimony, the first Plaintiff's witness, Mr Moses Wanankulya, a Shareholder and Managing Director of the Plaintiff, testified as **PW-1.** He told this Court, that, the business relationship between the Plaintiff and the Defendant begun on March 2015, when the parties entered into a two years contract. The said contract commenced from 1st April 2015 and ended on 31st March 2017. However, despite of the expiry of that agreement, the relationship between the two parties subsisted, and, the Plaintiff continued to supply rice up to April 2018.

PW-1 told this Court further that, on **12th May 2018,** the parties concluded yet another contract. In that new contract the Plaintiff was to supply **121 metric tonnes** of white polished rice. He tendered, as evidence to the Court, a **Direct Purchase Order No. BUZ 10012421**, which was admitted as **Exh.P.1.**

PW-1 further tendered before the Court **Exh.P.2**, a Bank Facility Letter from Azania Bank Ltd and, testified

that, due to the magnitude of the Defendant's order, the Plaintiff had to seek for a bank loan to facilitate the order. **PW-1** stated further that, the Plaintiff hired go-downs for as storage facilities.

It was **PW-1's** testimony that, on 25th October 2018, while the supply was on-going, the Defendant's company halted the supply with effect from 1st November 2018. However, **PW-1** told this Court that, on 6th November 2018, the Plaintiff received an expediting report from on Michael Kakiziba (Defendant's Commercial Manager). Although that report was not tendered in court as evidence, according to **PW-1**, the Plaintiff responded to the contents of the Report via an e-mail, and expressed its willingness to supply the whole remaining consignment. He contended, however, that, the Defendant never responded to Plaintiff's email.

It was **PW-1's** further testimony that, on 1st December 2018, the Plaintiff demanded specific performance of the contract of supply or compensation for its breach. **PW-1's** tendered as evidence, **Exh.P-3** a demand notice dated 1st December 2018 which was submitted to the Defendant but was ignored by the latter.

According to the testimony of **PW-1**, subsequent to the issuance of the Demand Notice, the parties convened a meeting on 10th January 2019. The aim of that meeting, as per **PW-1's** testimony, was to discuss the solution to

their stalemate following the termination of the supply contract. He told this Court that, a consensus was reached between the parties, but the same was subject to approval from the Defendant's Management. He tendered into evidence the Minutes of the parties' discussion which were received as **Exh.P-4**.

PW-1 told this Court that, on 24th January 2019, the Defendant's Commercial Manager sent to the Plaintiff an e-mail to terminate the Direct Purchase Order, and directed the Plaintiff to consign the supply to a third party. **PW-1** tendered into evidence that particular e-mail, date 24th January 2019, and, this was received as **Exh.P-5.**

PW-1 testified further that, after that e-mail, the Defendants cut-off all correspondences. **PW-1** informed the Court that, attempts were made to enforce the Plaintiff's rights in court through **Civil Case No. 8 of 2019**, which was filed at the Kahama District Court. He stated, however, that, the case was struck out, hence this suit. He tendered into this Court the proceedings of the Civil Case No.8 of 2019 at **Exh.P.6.**

On cross-examination, **PW-1** conceded that, there is no place where **Exh.P.1** says that the Plaintiff was to supply 121 tonnage of rice to the Defendant. He also acknowledged that, the delivery date was **14th May 2018** and, that; from **12th May 2018** to **14th May**

2018, the Plaintiff did not supply 120 tons of rice. He, however, denied to have been notified of any delayed supply of such an amount of rice by the Plaintiff.

As regards the bank loan, **PW-1** acknowledged that there was no bank statement filed in court to indicate the Plaintiff's failure to repay the loan, and, that, the loan was taken 5 months after receiving the purchase order. As regards the hiring of go-downs, **PW-1** stated that, he did not tender any document (agreement) regarding hiring the go-down. He told this Court that, in their January 2019 discussion, the parties had agreed that, the Plaintiff would supply a kilogram of rice for **TZS 2,400.**

Upon being further cross-examined, **PW-1** acknowledged that, the Defendant had told the Plaintiff to supply rice to **NICE Catering Services** but, that, the Plaintiff refused. It should be noted, however, that, this service provider was contracted by the Defendant to offer catering services to the Defendant after the Defendant scaled down its mining operations.

PW-1 told the Court that, the unit cost for 6 tonnes of rice supplied was **TZS 15,720,000/=** which included transport costs amounting to **TZS 120,000. PW-1** conceded that, between November 2018 and March 2019, the Plaintiff supplied 19,000 kilograms (19 tons) to **Nice Catering Services**, but argued that, the supply was upon separate arrangements.

In re-examination, **PW1** informed this Court that, per month, the Plaintiff was supposed to supply six (6) tons of white polished rice to the Defendant and, as per the Direct Purchase Order, the supply was for 120 tons and that, the supply was for 20 months.

The second Plaintiff's witness, Mr Maximine Mazula Emmanuel, testified as **PW-2.** He told this Court, that, he was an employee of the Plaintiff from 2015 to 2019. His duties were to coordinate and monitor rice purchase business transactions. As such, he testified that, from 2015, the Plaintiff used to supply ten (10) tonnes of white polished rice to "Buzwagi Gold mine" (the Defendant) every month. However, in May 2018, the Defendant decreased the number of tonnes to be supplied to six (6) tons per month.

PW-2 confirmed to the Court that, the Defendant had communicated with the Plaintiff informing the latter that, from the month of November 2018, the Defendant would no longer need to be supplied with a consignment of rice. **PW-2** testified further that, having terminated the contract, the Defendant never communicated with the Plaintiff until when the latter sent a Demand Notice, and a joint discussion with the Defendant's Management was held.

On being cross-examined by Advocate Malongo, **PW-2** told the Court that, he never saw the contract

between the two parties, but he was given directives that the Plaintiff was to supply **ten (10) tonnes** of white polished rice each month. He, however, told the court that, he could not remember how many tons were supplied between 12/05/2018 and 14/04/2018, and had no knowledge of **NICE Catering Services.**

Upon being re-examined by Advocate Swenya, **PW-2** stated that, the rice supply was up to May 2018 when the Plaintiff was told to supply six (6) tonnes per month and, that, in October 2018 the Plaintiff was told to halt the supply.

In its defence, the Defendant called three witnesses and tendered one (1) exhibit. In his testimony, the first Defence witness, **Mr Florian Walubela**, a Human Resource Leader of the Defendant, testified as **DW-1**. He told this Court that, the Plaintiff was contracted through a local purchase order (LPO) issued to the Defendant.

He stated further that, by a **Direct Purchase Order No.BUZ10012421** dated 12th May 2018, the Defendant contracted the Plaintiff to supply rice under the following terms and conditions:

(i) That, the Plaintiff was to make a bulky supply of 20 loads of white polished rice with less than 5% broken.
(ii) Each delivery load to carry 6 metric tons.
(iii) The unit cost of each delivery load was sold at **TZS 15,720,000/=.**

(iv) All consignment of rice and their delivery cost was **TZS 314,400,000** (VAT Exclusive) and **TZS 370,992,000.** (VAT inclusive).

(v) All the said 120 tons of rice were to be delivered to the Defendant **on 14th May 2018.**

DW-1 stated further that, the sum of **TZS 15,720,000/=** included a transport cost of **TZS 120,000/.** He told the Court that, the Plaintiff failed to supply the contracted quantity on the agreed date, and, to the contrary, supplied it on portions. He further told this Court that, from May 2018 to September 2018, the supply was only 36 tons of rice. He testified, therefore, that, it was the Plaintiff who breached the contract and not the Defendant.

The next Defence witness was one **Lumbu Kambula** who testified as **DW-2.** It was **DW-2's** testimony that, at the time of placing the order, the Defendant used to handle catering services through its own department. According to **DW-2,** the Defendant's activities and mining operations were later scaled down leading to retrenchment of its employees and outsourcing of some of some of its core and supporting services in June 2018, and, by October 2018, the Defendant's Facility Service Section was closed down, with 34 employees being laid-off. He submitted to the Court a list of employees who were laid-off by the Defendant. This was admitted as **Exh.D-1.**

DW-2 testified further that, due to the laying-off of the workers, the numbers of staff who were consuming rice supplied by the Plaintiff decreased and, by 1st November 2018, all catering services were outsourced to **NICE Catering Services** who was responsible for cooking, storage and mobilization of cooking supplies. **DW-2** told this Court that, the decision to outsource the catering services to **NICE Catering Services** was well and timely communicated to the Plaintiff. Even so, no evidence was tendered to prove such timely communication with the Plaintiff.

DW-2 testified further that, according to the agreement which the Defendant concluded with **NICE Catering Services** (referred hereafter as **"NICE"**), all goods connected with catering services, that formed part of the Defendant's stock at the time of outsourcing, were transferred and all purchases were to be made by **"NICE"**.

DW-2 further testified that, since the Plaintiff had breached the contract, as a way of helping the Plaintiff to mitigate its self-inflicted losses, the Defendant engaged **"NICE"** so that the Plaintiff could continue to supply rice to **"NICE"**. He testified further that, during a discussion meeting on 10th January 2019, the Defendant engaged the Plaintiff's Managing Director and it was proposed to

revise the price of rice to **TZS 2,400/-** per Kg from **TZS 2,600/-**.

DW-2 told the Court that, subsequent to the meeting of 10th January 2019, the Defendant noted that, it was only **15 tonnes** had been supplied. He told the Court; therefore, that, the Defendant notified the Plaintiff that the remaining supply would be made to **"NICE"** at a price of **TZS 2,400**, and, that, the order would be coming from **"NICE"** as the Defendant no longer runs catering operations.

It was the testimony of **DW-2** that, after the meeting of 10th January 2019 and other correspondences, the Plaintiff refused to supply rice at the agreed price of **TZS 2,400/-** and that the Plaintiff refused to continue supplying rice to **"NICE"**. **DW-2** brushed aside all claims made by the Plaintiff as being baseless, arguing that, the Direct Purchase Order was for a supply of rice for a specified date, and it was the Plaintiff who breached the contract.

It was also the testimony of **DW-2** that, the loan facility agreement dated **3/10/2018**, from Azania Bank, had nothing to do with the Defendant's Direct Purchase Order. He maintained that, the loan was issued past the agreement to supply rice to the Defendant, five (5) months past the delivery due date, and after the Plaintiff

had been told not to supply rice without an approved purchase order.

In cross-examination, **DW-2** told this Court that, a local purchase order (LPO) and a direct purchase order (DPO) was one and the same thing. He also clarified that, the word **"load"**, as used in his witness statement, signified a unit of measurement.

As regards the delivery time frame, **DW-2** reiterated his earlier statement that, as per the DPO, the time frame for delivery was **from 12th to 14th May 2018** and the measure was **twenty (20) loads**. He stated further that, the 120 tonnes was obtained by multiplying six (6) tonnes by 20 loads which is 120 tonnes.

DW-2 stated further that, the Plaintiff supplied 36 tons only from May, 2018 to October 2018, which is 6 months and, that, the supply was randomly carried out. He stated that, the rice supply at that time was received as part of helping the Plaintiff fulfil the 120 tons. Further, **DW2** stated that, the Defendants had approved **TZS 314,400,000/-** to be utilized only if the Plaintiff was to deliver the said 120 tons by 14th May 2018.

It was as well **DW-2's** testimony, while being cross-examined, that, the Defendants relations with the Plaintiff ended in October 2018 and the Plaintiff was informed about the takeover by **"NICE"**.

The third Defence witness **(DW-3),** was Mr Wilfred Tukiko Okech, a legal officer of **"NICE"**. He testified in Court that, he was employed in 2016. According to him, **"NICE"** was contracted effectively from November 2018, and, that, the Defendant had informed them that, previously the Defendant used to procure rice from the Plaintiff, thus the Plaintiff was introduced to **"NICE"** so the latter could procure such rice from the Plaintiff.

DW-3 testified further that, before November 2018 to March 2019, **"NICE"** procured 19,000 tons of rice from the Plaintiff and the same were consumed by the Defendant's employees at Buzwagi Mine. He stated that, formalization of the relationship between **"NICE"** and the Defendant took place in January 2019, whereupon it was agreed that, the Plaintiff shall be supplying rice to **"NICE"** for **TZS 2,400 per Kg**, and the placement of orders will be made by **"NICE"**. However, **DW-3** stated that, the Plaintiff rejected the arrangement.

Upon being cross-examined, **DW-3** admitted that, the Defendant and **"NICE"** were two distinct companies. He insisted, however, that **"NICE"** was introduced by the Defendant to the Plaintiff in November 2018, with an intent that the two should carry on the business relations earlier carried out by the Defendant. He clarified, that, as a result, from November 2018 to March 2019, the Plaintiff

supplied to "**NICE**" 19,000 kilograms (19 tonnes) of rice and not 19,000 tons.

DW-3 maintained that, the Plaintiff stopped the supplies due to a proposed new arrangement which would have changed the price per kilogram to be **TZS 2,400**. He also stated that, when the Plaintiff supplied the 19,000kgs the same were supplied on the basis of existing arrangements and not the proposed new arrangement with "**NICE**" which the Plaintiff rejected and stopped supply.

So far, that was the brief evidence of the Defendant and, at that juncture, the Defence case came to a closure. At the end, the learned counsels for the parties filed written submissions. I will analyse their submissions, together with the testimonies received in this Court, and respond to the issues which were earlier agreed upon and recorded by this Court. It is also worth noting that, the parties have tendered exhibits as documentary evidence some of which I have referred to herein above, and which need to be closely examined in the course on my analysis of the entire case.

Even so, before I start by examining the issues, I am alive to the evidential principle that, he who alleges must prove. Sections 111 and 112 of the law of Evidence Act, Cap. 6 [R.E 2019], are relevant to that fact as they place a burden on the Plaintiff to prove his case. Likewise,

sections 115 and 122 of the law of Evidence Act, Cap. 6 [R.E 2019] are also relevant to this case. While section 115 deals with facts within the knowledge of any person and that the burden is upon him to prove it, section 112 empowers to the Court to make inferences regarding existence of any fact.

It is also worth noting that, the standard of proof in civil cases is on the balance of probabilities. I will thus examine the evidence, both oral and documentary in light of the above principles when I seek to address the issues raised herein; which I am called upon to address, starting with the first issue which is:

> *Whether there was a contract between the Plaintiff and the Defendant and, if so, what were the terms of such a contract?*

In this case, the Plaintiff has relied upon **Exh.P.1**, a **Direct Purchase Order No.BUZ10012421**, dated 12th May 2018, as the key document constituting the contract of supply between the two parties. By definition, a purchase order refers to a document sent from a buyer to a seller of products with a request to order a particular product. Can it qualify as a contract? The answer is **YES**, it can, depending on the circumstances of each case.

In essence, a purchase order only qualifies as a legally binding contract when accepted by the seller by way of product transaction between the two. So, the circumstances pertaining to each case will determine

whether it constitutes a contract or not. This was stated in the case of **Sangijo Rice Millers Co. Ltd v SM Holdings Limited [2006] TLR 89**, where this Court held that, a purchase order, together with the conduct of the parties may constitute a contract.

Looking at **Exh.P.1** in the instant case, I am with no flicker of doubt that it was an offer accepted by the Plaintiff and acted upon, thus creating a binding agreement to sale between the Plaintiff and the Defendant.

According to section 3(2) of the Sale of Goods Act, Cap.214, the law states as follows:

> "Where in a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in goods is to take place at a future date or subject to some conditions to be fulfilled after the transfer, the contract is called an agreement to sell."

For that reason, the first issue is responded to affirmatively. Having responded to the first issue affirmatively, the next issue to resolve is:

> Whether there was a breach of such a contract and if so, who was responsible for the breach?

In law, a breach of contract occurs when one party in a binding agreement fails to deliver according to the terms of the agreement. Legally, also, each party in a contract is expected to fulfil its obligations under that contract. This is evident from section 37 (1) of the Law of

Contract Act, Cap.345 R.E 2019 which provides as follows, that:

> "The parties to a contract must perform their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law."

Since it is a legal requirement for each party to a contract to deliver as per its terms, failure of which will constitute an outright breach, the question that follows is: *was there any such failure on the part of the Defendant or Plaintiff as argued by both parties?*

To find out whether there was a breach or failure to perform; one should revisit or look at the terms of the contract and find out if at all there was any failure to fulfil any of such terms without a justifiable or a lawful excuse.

Exh.P.1 contains terms which are noticeable on the face of it. I notice, however, that there is a discrepancy between the quantity of rice to be supplied, as per **Exh.P1** and what the parties seem to indicate in their respective pleadings and submissions.

In particular, while the Plaintiff indicates the amount to be supplied was **121** Metric tonnes of white polished Tanzania rice and the Defendants indicates **120 Metric tonnes**, what I can observe as the quantity indicated in **Exh.P.1** is **200000 Metric Tonnes.** The rest of the terms are similar.

I should hasten to note, nonetheless, that, despite such variances in terms of the exact tonnages which were to be supplied, as I stated in response to the first issue, the bottom line is that there was a binding agreement to sale between the parties. Moreover, I will take it that, the amount to be supplied was **120 tonnages** seeing that **PW-1**, **DW-1** and **DW-2** are in agreement that the supply was for 120 tonnes. I will, thus, take it to be so and proceed.

One of the key terms in the contract of supply, that seems to generate a heating debate on both parties, is the date of delivery of the consignment, the subject of the contract. According to the Plaintiff, the consignment was for a **delivery of 120 tonnes for a period of 20 months** at an average of **six (6) metric tonnes** which costs **TZS 15,720,000/-(unit cost)** and, which was to run for 36 months, making a **total of TZS 314,400,000/-** for the whole consignment.

However, **DW-2** told this Court that, the consignment measure was **twenty (20)** loads of six tons each which, if multiplied translates to a total of **120 tonnes** to be delivered **on 14th May 2018**. Undoubtedly, it is discernible from **Exh.P-1**, that, delivery date of the consignment was on **14th May 2018,** and, the same was to be made to a "**freight forwarder**". A

freight forwarder is an agent who delivers a consignment to the customer.

However, according to **PW-1**'s testimony, the Plaintiff delivered the consignment directly to the Defendant. In my view, whether the consignment was to be delivered directly or not is not an important issue. What is the most important thing to note is the timing when the delivery was made. If the 120 tonnes were to be delivered on **14th May 2018**, were they delivered? If they were not, was the Plaintiff in breach of the agreement?

As I stated here above, the contract concluded between the Plaintiff and the Defendant was a contract for supply of goods (rice). As per **Exh.P.1** the delivery date is indicated as **14th May 2018**. The contract does not say whether this delivery is for the whole lot but one would presume so. But, what will be the legal position if the Plaintiff opted to deliver in batches instead of delivering the whole consignment and the Defendant received the goods?

Section 31 (1) of the Sale of Goods Act, Cap.214 [R.E 2002] provides us with a solution to such a legal quagmire. The provision is to the effect that:

> "Where the seller delivers to the buyer a quantity of goods less than contracted to sell the buyer may reject them, but if the buyer accepts

> the goods delivered, he must pay for them at the contract price."

Section 33 (1) of the Sale of Goods Act is also relevant in our discussion. The section provides explicitly that:

> "Unless otherwise **agreed**, the buyer of goods is not bound to accept delivery thereof by instalments."

In the case of **Sangijo (supra)** this Court noted, citing the case of **Brandt v Lawrance [1876]1QBD 344**, that, in the absence of an **express agreement** (as the one envisaged in section 33 of the Sale of Goods Act), "*the same may be inferred from the conduct of the parties and the circumstances of the case.*" This means we need to examine the conduct of the parties herein and deduce from them whether there was any agreement to the contrary.

In this instant case, and as per **Exh.P.1** and the testimony of **DW-1** and **DW-2**, the Plaintiff was contracted on 12th May 2018 to deliver the whole consignment of rice to the Defendant (whatever the exact amount) on **14th May 2018**. However, the goods were not delivered on the mentioned date. On that basis, in its Written Statement of Defence the Defendant stressed that it was the Plaintiff who breached the contract.

However, as rightly submitted by the Plaintiff's counsel, Mr Swenya, the Plaintiff accepted delivery of 36

tonnages of the same consignment from May to October 2018 without there being any claim against the Plaintiff. Considering that conduct in light of sections 31 (1) and 33 (1) of the Sale of Goods Act, cited herein above, one would safely arrive at a conclusion that, by conduct, the Defendant varied the earlier contract when he exercised the option of accepting the goods by instalment.

In **Sangijo's case (supra),** this Court was of the view that:

> "if any instalment [was] accepted by the Defendant, that [amounted] to acceptance by conduct, in which case the buyer would... [be] bound to pay for the price as dictated by section 32(1) of the Sale of Goods Act."

In view of the above, I find that, even though the contract of supply had intended the amount to be supplied to be delivered in one lot on **14th May 2018**, it is clear that, the Defendant's conduct of accepting the delivery by way of instalment, meant that, the Defendant acquiesced to the breach and, by conduct, accepted variation of the earlier terms, permitting delivery by way of instalment.

Now, that being said, the second issue is only partly answered in the sense that, even if the Plaintiff could have been said to be in breach of the initial term of the agreement, which had pressed that delivery was to be made on 14th May 2018, in light of section 32 (1) and 33

(1) of the Sale of Goods Act, the Defendant will be bound by those provisions having accepted delivery by way of instalment.

Having established that there was acceptance of delivery by way instalment, there still remains one question to be address. That question is: *was the Defendant still supposed to accept the whole agreed 120 tonnes?*

In my view, the answer to the above question is in the affirmative and, section 33 of (1) and (2)(b) of the Sale of Goods Act be an important section to consider in the course of analysing that response. I will reproduce the section here below:

> 33 (1)- "Unless otherwise **agreed**, the buyer of goods is not bound to accept delivery thereof by instalments.
> (2)Where there is a contract for sale of goods to be **delivered by stated instalments** which are to be separately paid for, **and**-
>
> (a).....
>
> (b)the buyer **neglects or refuses** to take **delivery** of or **pay for** one or more instalments,
>
> **it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of the contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation** but not a right to treat the

whole contract as repudiated." (**Emphasis added**).

Considering the circumstances of the case at hand in light of the above provision, and taking into account the fact that the Defendant had, by conduct, accepted delivery of the consignment by way of instalment from May 2018 to October 2018; and, further, considering that, the whole amount was for 120 tonnes, which by then only 36 tonnages were delivered leaving out about 84 tonnes yet to be delivered, (or 66 tonnes as **Exh.P-4** suggests); I find that, such remaining tonnages aptly fall under section 33(2)(b) of the Sale of Goods Act, such being goods for which **a claim for compensation** could have arisen.

However, it is in evidence that, the parties entered into negotiations and from November to January 2019, the Plaintiff (as an affected party, allowed the contractual relations to continue by supplying about 34 tonnes *(i.e., the 19 +15 tonnes as per **Exh.P.5**)*. This continued supply, which I will consider later here below, was surely tantamount to an affirmation of the revival or continuation of the parties' contractual relations, a fact which tell out that, technically, there cannot be a repudiatory breach.

In this case, it is **PW-1 and PW-2**'s testimonies that, the Defendant cancelled the on-going supply in the month of October 2018 when the Plaintiff was informed

to stop its supply to the Defendant, with effect from November 1, 2018.

However, according to the testimony of **DW-2,** what happened was a change of circumstances, whereby the catering services earlier carried out by the Defendant were contracted out to a 3rd party ("**NICE**") and, that, the Plaintiff was informed of the situation and was asked to continue supplying the agreed consignment to "**NICE**", but refused to do so.

In my view, what the testimonies of **DW-2** and **DW-3** insinuate, is that, there was no breach on the party of the Defendant, but rather, it is the Plaintiff who, following the discussions held by the parties on 10th January, 2019, as per **Exh.P-4**, refused to supply to "**NICE**", the third party contracted by the Defendant to provide catering services, and thus, to whom a continued supply by the Plaintiff ought to have been made. This means that, the question regarding who breached the contract may need to be explored further from this context.

To that effect, I have taken the liberty of examining **Exh.P.4** and **Exh.P5** alongside the testimonies of **PW-1, DW-1, DW-2** and **DW-3**. In principle, it is clear that after October 2018; still, between November 2018 and March 2019, the Plaintiff supplied 19,000 Kgs (19 tonnes) to "**NICE**".

DW-2- testified, and, **Exh.P5** does indicate, that, a further 15 tonnes had been supplied to the Defendant. It was also the testimony of **DW-2** that after the meeting of 10th January 2019, the Defendant notified the Plaintiff that, the remaining supply would be supplied to **"NICE"** at a price of **TZS 2,400. PW-1** conceded to this fact, although he contended that, such supply was based on a separate arrangement with **"NICE"**. Even so, no documentary evidence of any sort was tendered to support the Plaintiff's view. That assertion, therefore, is wanting.

On the contrary, the testimonies of **DW-2** and **DW-3**, were to the effect that, it was the Defendant who introduced the 3rd Party (**NICE**) to the Plaintiff, so that the Plaintiff should supply the remaining consignments of rice to **"NICE"**, the latter having been contracted to provide catering services to the Defendant. It is also evident that the Defendant underwent restructuring of its operations and laid-off some of its workforce as shown by **Exh.D.1** and the testimonies of **DW-2** as well as **DW-3**.

Besides, there is no dispute that, on 10th January 2019, the parties were engaged in a mutual discussion to resolve their differences. This is evident from **Exh.P.4, Exh.P-5**, and the testimonies of **PW1**, **DW-2** and **DW-3**. According to **Exh.P.4**, **DW-2** and **PW-1**'s testimony during cross-examination, the parties agreed that the

Plaintiff was to supply the rice consignment at a price of **TZS 2400/** and, that, the agreement was subject to approval by the Defendant's management.

In **Exh.P.5,** which was now the response which was being awaited for by the parties, the Defendant responded as follows, and hereunder I quote *in extenso* part of the **Exh.P-5**:

> *"Dear ISAKA COMMERCIAL AGENCY LTD,*
>
> *We are pleased to inform you that the company has completed a proposal on closing out a dispute for supply of polished rice through order No.BUZ10012421.*
>
> *Pangea Minerals will allow Isaka Commercial Agency to continue to supply the remaining quantity of order No. BUZ10012421 under the following terms:*
>
> - *Pangea Minerals will first cancel the remaining quantity of order No. BUZ10012421 and the same will be committed by Nice Catering Tanzania Ltd to Isaka Commercial Agency on behalf of Pangea Minerals.*
> - *The remaining quantity shall be 66,000kgs (120 tonnes less 36 tonnes supplied directly to Pangea Minerals from May 2018 to October 2018 and 15 tonnes supplied to Nice Catering for Acacia from November 2018 to January 2019).*
> - *The remaining quantity shall be supplied to Nice Catering at a price of TZS 2,400 per Kilogram as agreed between Pangea and Isaka Commercial Agency.*
>
> *This means Isaka Commercial Agency will continue to supply the quantity of rice that were agreed through order No. BUZ10012421 with only two notable differences:*
>
> *(i) The purchase order will come from Nice Catering instead of Pangea Minerals as Pangea does no longer run an in-house catering operation.*
>
> *(ii) Rice shall be supplied at an agreed price of TZS 2,400 per Kg.*
>
> *The Mine would like to thank you for your continued commitment to see that this dispute ends amicably to both parties.*
>
> *Many thanks.*

The above quoted e-mail which was admitted as **Exh.P-5** is quite accommodative and adjusted the initial contract. First, it allowed the Plaintiff to supplying the contracted 120 tonnes of rice. The price was adjusted as agreed on 10th January 2019 and **Exh.P-4** is evident on that.

Second, the recipient of the consignment, however, was no longer the Defendant but a third party who was contracted by the Defendant, and, as per **DW-2** and **DW-3** (and even **PW-1's** testimony while being cross-examined) the 3rd party was already introduced to the Plaintiff and, as per the testimonies of **DW-2** and **Exh. D-1,** the Plaintiff was aware of the reasons for engaging the 3rd party.

From the above scenario, and considering the efforts taken by the Defendant to ensure the dispute between the two parties is resolved amicably, it is clear to me that, the allegation that the Defendant had breached the contract cannot stand.

In my view, the intention of the Defendant which was to continue with the supply of the remaining tonnes as well as the reasons why there was a change of circumstances regarding delivery of what was contracted, are all relevant factors in determining whether there was an repudiatory breach on the part of the Defendant. A

buyer who had no intention to repudiate the contract cannot be said to be in breach of that contract.

That being said, I find, in response to the second issue, that, taking into account the circumstances of the case and **Exh.P-4** and **Exh.P-5**, the Defendant was not in breach of the existing contractual relationship, as there was a clear intention on the party of the Defendant to ensure that the supply of the initial 120 tonnes of white polished rice was successfully carried out to the end.

Having responded to the 2nd issue, I will briefly address the third issue which is:

> *Whether there was any unforeseen event which forced the Defendant to reduce its operations and, hence, impacting on the contract.*

Since the second issue was to the effect that the Defendant cannot be held to have breached the contract, I see no value in addressing this third issue at length. As **Exh.D-1** and the testimonies of **DW-2** and **DW-3** indicate, there was indeed a scaling down of Defendant's operation but this, in my view, did not have much effect on the parties' relations taking into account the Defendant's efforts to end the matter amicably as evidenced by **Exh.P-4** and **Exh.P-5**.

The fourth issue is *whether the Plaintiff suffered damages/losses at the hands of the Defendant.*

In light of the findings I have made in response to the 2nd issue, whether the Plaintiff has suffered any

damages/losses, such losses cannot be blamed on the Defendant. In my view, and, as correctly argued by the **DW-2**, and, further taking into account what **Exh.P.4** and **Exh.P-5** indicate, if any losses were incurred by the Plaintiff, those were self-inflicted and the Defendant cannot be on the erring side regarding such losses.

The Plaintiff's counsel has, in his submission made reference to section 51(2) of the Sale of Goods Act, Cap.214. Section 51(2) of Cap.214 provides that:

> "Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance."

However, since there was no repudiatory breach on the part of the Defendant, the Plaintiff's reference, to section 51(2) of the Sale of Goods Act, Cap. 214, is irrelevant. Its irrelevance comes to the light when one takes into account the efforts shown in **Exh.P.4** and **Exh.P.5.** In essence, as I demonstrated herein, it is clear that the Defendant, as a buyer, did not neglect or even refuse or repudiate supply or payments for goods supplied.

For that reason, no action against him can be maintained for damages for non-acceptance. It also follows, consequently, that, no losses incurred by the Plaintiff if any, can be legitimately be said to have been occasioned by the Defendant who was not in breach of

the contractual relationship with the Plaintiff in the context of what I have laboured to explained when I was addressing the 2nd issue.

The last issue is: *To what reliefs are the parties entitled.* Since I have ruled that there was no breach of contract as alleged by the Plaintiff, no party is entitled to any relief.

In the final analysis, it is the findings of this Court that the Plaintiff has not been able to sufficiently prove its case to the required standards. In view of that, the Plaintiff's suit is hereby dismissed in its entirety and with costs to the Defendant.

It is so ordered.

DATED at **DAR-ES-SALAAM**, this **07th May 2021**

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HON. DEO JOHN NANGELA
JUDGE
High Court of the United Republic of Tanzania
(Commercial Division)