

TANZANIA / JUDGMENT

dow agroscience export sas vs is m metals ltd 2010 tzhccomd 17 8 december 2010

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8 December 2010

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO.55 OF 2007 DOW AGROSCIENCES EXPORT S.A.S.....
PLAINTIFF VERSUS I.S & M (METALS) LIMITED..... DEFENDANT Date of
last order: 10/08/2010 Date of final submissions: 02/09/2010 Date of Judgment: 08/12/2010

JUDGMENT

MAKARAMBA, J: This is judgment on the suit the Plaintiff lodged in this Court against the Defendant on 13/08/2007. The Plaintiff is a foreign limited liability company incorporated in the United States of America, Europe (France, Switzerland, Spain) and United Kingdom and South Africa with corporate agents and representatives worldwide. As per the Plaintiff's Complaint, the company carries on among other businesses that of providing crop protection, pest and vegetation management, seed, and agricultural bio technology. The Defendant is a limited liability company registered and existing under the laws of the United Republic of Tanzania. In this suit the Plaintiff's claim is for the sum of USD 146,536.00, the Plaintiff claims to be the value of agrochemicals the Defendant ordered from the Plaintiff, and which the Plaintiff delivered to the Defendant on credit. The Plaintiff's contention is that in 2004 the Defendant sought from the Plaintiff and in reliance of the Defendant's representations, the Plaintiff gave the Defendant rebate on the amounts due in order to minimize the debt. The Plaintiff claims further that despite repeated demands from the Plaintiff, the Defendant has not settled the outstanding amounts. The Plaintiff claims further that around July 2001, the Plaintiff appointed the Defendant to be its distributor of agrochemicals and the Plaintiff entered into an agreement with the Defendant whereby the Defendant agreed to distribute and sell the Plaintiff's insecticides namely, Nurelle 18 ULV and Sanvalerate 200EC, both of which are the Plaintiff's trademarks (Annex Pl). The Plaintiff claims further that around the 4th of January 2002 the Plaintiff shipped and supplied to the Defendant containers of 5040 cartons (Litres 50,400) of NURELLE 18 ULV insecticides all weighing 52,114 kgs. (Annex 2 Bill of Lading, Annex 3 Import Declaration Form). The Plaintiff claims further that for the aforesaid transaction the Plaintiff issued to the Defendant invoice No. 27/43582666 for payment of USD 134,568.00 (One Hundred Thirty Four Thousand Five hundred

Sixty Eight) Annex P4 Invoice). The Plaintiff claims further that upon seeing no payment was forthcoming from the Defendant, on 22nd April 2002, the Plaintiff issued to the Defendant a reminder via email requiring the Defendant to pay the outstanding debt in the amount of USD 134,568.00 (Annex P5). The Plaintiff claims further that on 13th August 2002 the Defendant and Plaintiff agreed that the outstanding sum, which as of that date was USD 2 146,536.00, shall be paid by end of August, 2002. Despite the said agreement, the Plaintiff further claims, the Defendant refused or failed or ignored to pay the outstanding sum as covenanted or at all (Annex P5). Through its advocate, the Plaintiff claims further, they sent another reminder letter to the Defendant requiring the Defendant to settle the longstanding debt, but the Defendant ignored and refused to make good the claim. This is what prompted the Plaintiff to come to this Court and lodge this suit to claim the sums of money due from the Defendant. In this suit, the Plaintiff has prayed for judgment and Decree against the Defendant as follows:

1. Payment of USD 146,536.00 being the outstanding debt from the Defendant.
2. Interest on the decretal amount at the rate of 12%
3. Interest on the decretal amount at the Court's rate from the date of judgment till the date of full satisfaction of the decree.
4. Costs of the case.
5. Any other further relief as the Honourable Court shall deem fit and equitable to grant in favour of the Plaintiff. The Defendant has denied the claims set by the Plaintiff in the Plaint and denied to have made any representation to the Plaintiff on any outstanding amount. The Defendant denies ever been appointed distributor of the Plaintiff's agrochemicals as alleged or at all and deny to have entered into any agreement to distribute and sell the Plaintiff's insecticides. The Defendant contends further that the alleged goods which had a very 3 short expiry date were merely dumped on understanding that unless they are sold, they remain the property of the Plaintiff. The Defendant contends that the alleged Agreement (Annex P5) relates to a different transaction as evidenced by contradictions on order confirmation dated 6th February 2002; Bill of Lading of 4th January, 2002 and Import Declaration from 17th October, 2001 all attached to the Plaint by the Plaintiff. The Defendant contends further that the Plaintiff owes nothing to the Defendant as its goods remained unsold as they had short expiry period and on 24th June 2003, were seized by the Plaintiff's agent, one TEMU after negotiations with the Defendant for further keeping and selling on the Plaintiff's behalf failed. The Defendant prays the Plaintiff's case be dismissed with costs. The statements in the pleadings set the parties at issues. When the suit came for first hearing the parties agreed to the following issues which were accordingly recorded by this Court for the determination of the suit:
 1. Whether the Defendant was an agent of the Plaintiff for the distribution of the Plaintiff's Agroproducts.
 2. Whether the Defendant ever received any Agrochemicals from the Plaintiff.

3. What reliefs) are the parties entitled to? In support of its case, the Plaintiff summoned three witnesses. The Defendant on its part summoned only one witness. 4 In this suit, the Plaintiff was represented by Mr. Nyange, learned Counsel and the Defendant by Mr. Mushumba, learned Counsel. The testimony of PW1, one FELICIAN FRANCIS SANGAYA who was in the employment of the Defendant from 1999 to 2003, as a Personal Assistant of Mr. DESPON BALYAGATI, the Managing Director of the Defendant, used to type letters of the Directors, e mail and depositing as well as withdrawal of money from Banks and was also the custodian of all files of the company. PW1 testified further that their company email address was Baly@Interfrica.com and that the payment for the email tendered in this court was done by way of cheque issued by the company and its beneficiary, InterAfrica Company. PW1 testified further that the Defendant's Company was importing and selling agricultural and veterinary products. PW1 tendered in this Court a copy of email, which she acknowledged to have sent to the Plaintiff, to show AgroSciences being their former suppliers, which was admitted and marked as Exh.Pl. PW1 testified further the email was drafted by DESPON KAIZELEGE BALYAGATI and that she is the one who typed and sent it and she had the password and she had access and could send the email even when BALYAGATI was not in the office. PW1 testified further that she knew the transactions which were for payment of insecticides and fungicides. When cross examined by Mr. Mushumba, learned Counsel for the Defendant, PW1 stated under oath that there were problems in the Defendant's Company and she was relieved of her duties. PW1 testified further that Mr. DESPON KAIZELEGE BALYAGATI had complained about loss of funds of the company amounting to Tshs.200,000/= but PW1 testified 5 that she had never worked with either the Plaintiff's Company or their representatives. PW1 testified further that she was asked by the Plaintiff's representative, one ALPHONCE TEMU, to come and testify in this court and she was certain that ALPHONCE TEMU was the Plaintiff's representative. Mr. ALPHONCE BER.NAD TEMU, an Agronomist and businessman dealing with agricultural inputs testifying as PW2 stated that he was the Plaintiff's, (DOW AGROSCIENCES) agent responsible for registration, field trials and appointment of distributors of its products. PW2 testified further that in 1999, the Plaintiff inquired through the Internet information on whether the Defendant, [I.S. (METALS) LTD.], could be eligible to be appointed as distributors of the Plaintiff's products. PW2 testified further the Defendant accepted and furnished to PW2 the telephone number of Mr. BALYAGATI with instructions to follow him up. PW2 testified further that he inspected the Defendant's premises and was satisfied that the Defendant was capable to distribute their products. Mr. BALYAGATI as the director of the Defendant's Company, was appointed to be a distributor in 1999 on behalf of the Defendant. PW2 testified further that the procedure to import the products the subject matter in this suit, namely, Sanvalerate 200EC and Nurelle 18 ULV began in 2000 and that it is the Tanzania Cotton Marketing Board (TCMB) which issued a notice of tender for the products. PW2 testified further that the Defendant tendered but was not awarded. Nevertheless, the Defendant ordered the products in 2000, by way of Import Declaration Form which the Plaintiff supplied to the Defendant. PW2 explained that normally the process began with a request by a proforma invoice followed 6 with Letters of Credit (LC) and goods were supplied on credit with a grace period of 150 days from the date

of delivery. PW2 testified further that the value of the goods supplied to the Defendant was about USD 156,500, which amount has been paid for. PW2 testified further that he followed up payments from the Defendant but the Defendant did not respond, whereupon PW2 decided to communicate with Mr. DEPSON KAIZELEGE BALYAGATI and a person who identified himself as Administrative Manager by the name of FELICIAN, who told PW2 that one product Sanvalerate 200EC was delivered late. The product was sold in the next season, but the Plaintiff was never paid, PW2 further testified. PW2 testified further that he later informed the Defendant that he had some financial problems and Mr. BALYAGATI replied that he was expecting money from TANESCO and promised that he will use the amount to offset the debt. In cross examination PW2 testified that he did not remember the value of Nurelle 18 ULV and also of Sanvalerate 200EC because a long time has passed. In his testimony, PW3, one RICHARD STONEWIG a resident of Nairobi, and a businessman dealing with Agrochemicals who represents various Agrochemicals in East Africa, Central Africa and Southern Africa, testified that he knew the Plaintiff's Company, DOW AGROSCIENCES and that the Defendant was the major distributors of DOW AGROSCIENCE'S products in Tanzania. PW3 testified further that the Plaintiff was looking for a distributor of its export products in Tanzania and in 2000 he approached the Defendant. PW3 testified further that the Plaintiff's instructions for distributions were for specific products, which included Nurelle, Dithane and Dursbane (an insecticide for cotton). PW3 testified further that the Plaintiff was dealing with the Managing Director of the Defendant, Mr. BALYAGATI and that the Defendant agreed to distribute the products. PW3 testified further that once the Defendant requested the goods, the Plaintiff issued to them a proforma invoice. PW3 testified further that initially the Defendant paid cash in advance but later they used credit terms and that the terms were open of between 120 to 150 days depending on how they sold the products. PW3 testified further that the relationship between the Plaintiff and the Defendant ceased upon the Defendant failure to pay for the products delivered to them and tendered a copy of invoice which shows the value of the products, which was admitted and marked as Exh.P2. PW2 stated further that ALPHONCE TEMU was appointed as an agent of the Plaintiff in Tanzania. PW3 testified further that from then no goods were collected back from the Defendant and to this date the debt is still outstanding. In cross examination PW3 said that he does not have any position in DOW AGROSCIENCES LTD as he was merely involved in the transactions by negotiating the deal on behalf of the Plaintiff. PW3 testified further that the Defendant was appointed as distributor's agent in Tanzania however there was no formal agreement. PW3 testified further that he was aware of the quantum of the claim which is USD 134,568 as per Exh.P2 and that the said products were shipped in January 2001. In his testimony DW1, one DESPON KAIZELEGE BALYAGATI a director of I.S. METALS LTD, dealing with engineering equipments and agricultural machines. DW1 testified further that the company was established on 2nd November 1993. DW1 testified further that in 2000, he had ordered goods from AGROSCIENCES EXPORT S.A but they have never been an agent of the Plaintiff as supplier. DW1 testified further that their business was like dealing with any other company when ordering things. DW1 testified further that on 04/01/2002, the Plaintiff supplied to the Defendant 50,400 Litres of New Real 1.8 ULV insecticides which were ordered

by the Plaintiff. DW1 testified further that their transaction was by Letters of Credit and therefore if anything happened the Plaintiff would sue the Bank or the Bank and the Defendant jointly. DW1 testified further that generally the Import Declaration Form does not show the delivery of goods to the Defendant and further that the Declaration Form attached to the Plaintiff shows 50,000 litres of New Real 1.8 ULV and not 50,400 litres as claimed by the Plaintiff. DW1 testified further that the email, (Exh. P1) was addressed to a person and not a company and the person to whom the email was addressed was not summoned in this court to testify. DW1 testified further that the email provides claims for various invoices while the Plaintiff in his Plaintiff claimed for only one invoice. DW1 testified further that as if that is not enough his emails was always signed by him and thus the alleged email does not belong to him although the address on it belongs to him. DW1 testified further that may be FELISTA (PW1) created it because formerly she was working with them as a typist as sometimes he instructed his secretary one MOHIMI or FELICIAN if his secretary was not present to draft and send emails to their customers. DW1 testified further that the USD 146,536 the Plaintiff is claiming is not provided or proved in any invoice and that the invoice attached in the 9 Plaintiff is for only USD 134,000 and not for USD 146,000. DW1 testified further that the invoice tendered in this Court is dated 21 December 2001 while it is claimed the goods to have been delivered on January 2002 and the invoice attached in the Plaintiff shows that the consignment supplied on Bill of Lading in January 2002, which is to say one cannot issue invoice before shipment of the consignment since the invoices are always issued on the day of shipment. DW1 testified further that the Plaintiff always firstly supplied the Letter of Credit then the particular consignment were released, thus without Letter of Credit no shipment was conducted. DW1 wondered if the system used to supply goods was by using Letter of Credit then why the alleged consignment was supplied by open account. DW1 testified further that he was approached by Mr. Temu (PW2) in 2000 who introduced himself as an agent of Dow Agrosciences when requesting for a godown at Mwanza to put his consignment, whereby DW1 accepted. DW1 testified further that later PW2 requested the Defendant to sell the consignment but DW1 refused because the consignment brought to the Defendant was with short expiry date. DW1 testified further that PW2 came later to collect his consignment (insecticides) but he never endorsed in any written agreement. The first issue is whether the Defendant was agent of the Plaintiff for the distribution of the Plaintiff's Agroproducts. On the evidence adduced in Court it is without dispute that the Plaintiff and the Defendant had a business relationship dating back to 2001, whereby the Plaintiff being a global supplier was supplying to the Defendant agrochemicals for distribution and sale in the Tanzania market. io The controversy however is whether the Defendant was the only company that was appointed by the Plaintiff to distribute and sell the Plaintiff's agrochemical products in Tanzania. PW2 testified that in 1999 they inquired from Internet information whether the Defendant could be distributors of the Plaintiff's products. The Defendant informed PW2 about the request and the Defendant furnished to PW2 the telephone number of Mr. BALYAGATI and directed to follow him up. PW2 inspected the premises of the Defendant and he was satisfied that the Defendant was capable to distribute it. Then PW2 requested the Defendant to be a distributor where Mr. BALYAGATI accepted on behalf of the Defendant as

a Director of the Defendant's Company. Later PW2 informed by the Plaintiff that Mr. BALYAGATI was appointed to be a distributor in 1999 on behalf of the Defendant. In his closing submissions the Plaintiff's Counsel submitted that PW3 was the exemployee of the Defendant, being the Principal Officer of the Plaintiff responsible for distribution and sale of the goods in question for East and Central Africa. PW3 is aware of the Company called Dow Agro Science, the Plaintiff in this suit. The Defendant was the major distributors of Dow Agro Science products in Tanzania. The Plaintiff was looking for a distributor of their products in Tanzania and they approached the Defendant in 2000. The Defendant was appointed by the Plaintiff as distributor's agent in Tanzania, however there was no formal agreement. PW3 was dealing with the Managing Director of the Defendant, Mr. BALYAGATI. PW3 also knew ALPHONCE TEMU, who was appointed as an agent of the Plaintiff in Tanzania. ii The Defendant's Counsel on other side submitted that PW1 testimony was that, she was a Secretary and later Personal Assistant to the Managing Director of the Defendant. The email was drafted by BALYAGATI but she was the one who typed and sent it. She had access and could send the email even when BALYAGATI was not in the office. She tendered a photocopy of an email which was admitted by the court as Exh.PI. In cross-examination PW1 admitted to know the password of that email, she also admitted that she never seen any invoice from the Plaintiff corresponding to the figure mentioned in the email. She stated further that the Plaintiff supplied the insecticide and fungicide to the Defendant though she could not mention when and how the insecticide was supplied neither the value the goods. The Counsel proceeded to submit that during cross-examination PW2 failed to substantiate how he was appointed as an agent of the Plaintiff while DW1 stated that he knew Dow Agro science Export SA but had never been their agent. The defendant had business with the Plaintiff and sometimes the Defendant ordered goods from Plaintiff. In the light of the above submissions and evidence tendered in this court, let us examine whether a principal-agent relationship was created. The law guiding the relationship between Agent and Principal is found in the definition under section 134 of the Law of Contract Act, [Cap.345 R.E 2002] which provides as follows: "An "agent" is a person employed to do any act for another or to represent another in dealings with third persons and the person for whom such act is done, or who is so represented, is called the "principal." 12 Clearly, the evidence on record shows that there is a business relationship between the Plaintiff and the Defendant. DW1 stated that he had business deals with the Plaintiff. DW1 also submitted that in 2000, PW2 requested for a godown at Mwanza to keep his consignment which was brought to them with short expiry date. The Defendant acknowledged to receive the consignment from the Plaintiff as ordered but failed to prove that the business relationship between the Plaintiff and the Defendant was not that of the principal and agent. In terms of section 139 of the Law of Contract Act [Cap.345 R.E 2002] an authority of an agent is said to be implied when it is to be referred from the circumstances of the case or the ordinary course of dealing. Since the Plaintiff was in business relationship with the Defendant and there is no any evidence adduced to prove that the relationship between them was not that of principal and agent as alleged by the Plaintiff, this court finds that by the conduct of the parties impliedly the relationship was that of principal and agent. The second issue is whether the Defendant ever

received any Agro chemicals from the Plaintiff. The Plaintiff claims to have supplied to the Defendant various agrochemicals consignments in 2002. PW2 testified further that in 2001 the Defendant ordered from the Plaintiff two products namely, Sanvalerate and Nurelle 1.8 ULV through Letter of Credit at Stanbic Bank and made their order through what he called Import Declaration Form and that the said two products were supplied. PW2 mentioned the procedure that the Defendant requested the order was through Proforma Invoice followed with opening the Letter of Credit. The grace period of Letter of Credit was 150 days. The goods were supplied on 13 credit and the value of goods ordered was USD 146,536.00 which has not been paid. PW3 testified that the Defendant was indebted to the Plaintiff for only USD 134,568.00 and he tendered a photocopy of the invoice which marked and admitted as Exh.P2. Accordingly the Defendant vehemently denied the entire claim provided in the Plaintiff. However, the Defendant in paragraph 7 of the Written Statement of Defence pleaded that: "The alleged goods which has (sic) a very short expiry date was (sic) merely dumped on understanding that unless they are sold, remains (sic) the property of the Plaintiff" In his closing submissions, the Plaintiff's Counsel argued that the Defendant had failed to explain which of the Plaintiff's goods had short expiry date allegedly to have been dumped for sell by the Defendant. The Defendant has also failed to explain how the referred goods came to be in the possession of the Defendant from the Plaintiff and under what arrangement the said goods were handed over to the Plaintiff. The Plaintiff's Counsel submitted further that DW1 started to order goods from the Plaintiff since 2000. On 04/01/2002, the Plaintiff supplied 50,000 Litres of New Real 1.8 ULV which they had ordered and that all the transactions involving the Plaintiff were done through the letter of credit. The shipment of the said consignment was said to be done on 4th January 2002. In his closing submissions the Defendant's Counsel argued that there is a contradiction on the photocopy of the invoice, the photocopy of the email from PW1 and the allegation in the Plaintiff under paragraph 7 thereof. Paragraph 7 of the Plaintiff provides that the Plaintiff shipped and supplied to 14 the Defendant containers of 5040 cartons (Litres 50400) of Nurelle 18 ULV insecticides all weighing 52,114kgs. The Defendant's Counsel argued further that the invoice tendered in this court which were marked as Exh.P2, proves the shipment of goods valued to a total sum of USD 134,568.00 while in Plaintiff the Plaintiff is claiming for USD 146,536.00. As per PW2 testimony, the Plaintiff supplied the Defendant with 5040 cartons of Nurelle 18 ULV Insecticide, which was equivalent to 52,114 Kg. The Defendant however, has failed to prove how the referred goods with expiry date were found to be in the possession of the Plaintiff and under what arrangement they were handed to the Defendant's custody, and also under what arrangement the goods from the Defendant's custody were handed back to the Plaintiff. On the evidence on record, this Court finds that that the goods which were ordered by the Defendant from the Plaintiff were delivered and received by the Defendant. In light of the case of FUTURE CENTURY LTD V. TANESCO, Civil Appeal No. 102 of 2008 (unreported), the Court of Appeal of Tanzania held inter alia that valid invoices are sufficient evidence to prove the case. On the evidence adduced in this suit, this Court is satisfied that the Defendant had received goods from the Plaintiff and accordingly the Defendant is indebted to the Plaintiff for USD 134,568.00 as per the copy of invoice (Exh.P2). Accordingly, this Court

enters judgment and decree against the Defendant. The Plaintiff is entitled to the following reliefs: 15

- (a) The Defendant shall pay the Plaintiff USD 134,568.00 (Say One and Thirty Four Thousands Five Hundred and Sixty Eight) only being the outstanding debt from the Defendant.
- (b) Interest on the decretal amount at the rate of 12% per annum.
- (c) Interest on the decretal amount at the rate of 7% from the date of judgment till the date of full satisfaction of the decree.
- (d) Costs of the case It is accordingly ordered. JUDGE 08/12/2010 16 Judgment delivered this 08th day of December, 2010 in the presence of Mr. Nyange, Advocate for the Plaintiff and Mr. Nyange for Mr. Mushumba, Advocate for the Defendants: R.V. M AKA RAM BA JUDGE 08/12/2010. Words count: 4,088 17

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