

TANZANIA / JUDGMENT

20150318 TZHC Mbeya

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· IN THE HIGH COURT OF TANZANIA ATMBEYA. CIVIL CASE NO. 4 OF 2008 ~, ... !: ... ~, -.
IWBEYA :t)ISTRICT COUNCIL .. ~ PLAINTIFF VERSUS . CO. LIMITED DEFENDANT
MBEYA CEMENT

JUDGMENT

Date of fast· order: 05/02/2015 Dote of Judgme:ft': 18/03/2015 · AF "~~WALA t J ·

- •,;.. · -:_w:, In this suit, Mbeya District. Council, a Local Government Authory sued Mbeya Cement Company, a manufacturer of cernent kj1.own as Tembo Cement, whose factory is situated at Songvve I:::-:::h.,-;,strial area. The plaintiff is seeking for declaratory orders and injunctive reliefs regarding service levy. Th~ cr1..1X of the matter lies on the -interpretation of the provisions of Section '7 (1) (z) of the Local Government Finances Act [Cap.290 R. E. ·200~] whic_h reads:- «rhe revenues, funds and resources of a District ' ' 9o,uncil shall consist of all . monies desired from the service levy. payable by corporate entities at . \ -1. the rate not exceeding 3 per cent of the ium over net of the value added tax and the exercise duty". According to the plaintiff, the cited _provision .of the .law imposes a legal duty to the defendant to pay the plaintiff, monthly service levy at a tune_ of 0~ 3% of her tt;_r~over-o{ the defendant's products. This is so, for a simple :rea~pn _ that; the defendant's factory is located ~t ·so~gwe Industrial area: Vwithin the jurisdiction of the plaintiff. The area where the pr<?duct originates. The defendant denied to be obliged under law to pay· the said proportion of· servic~ levy to the_ plaintiff. In return he · counter claimed an amount of Tshs.145, I 70,258 / 62 ::.ai,q. to· - - ·, the Plaintiff. The background of this suit is that; It v,as first. fU.ed.·h-1 ·fh.is · court way back 1n 2008 by the plair..tiff. His Lcrd~!-iip, ~) - Lukelelwa, Judge on 20/5/2010 deiivered. a J:u.clg:nent· . in,, ' favour of the plaintiff. The defendant appealed· to tn(; Cbur:t.:of, ~-- Appeal of Tanzania. The Court ·of. ·Appeal of _Ta..!t"lzanian , . quashed the proceedings, Judgment and,Decree -of the· High _Co-urt a.11.d . . . ordered trial denovo on .the gro-unds that, the - J.ea.rnet Judge decided the case basing only'on the written submissions· by .the_ parties without hearing the . _case· as .. required . under the- provisions of Order XVIII of the Civil Procedure Code,· Cap. ,33 R.E. 2002. . ' , -2 . (_ ~ ,,,. ' .When 'this.....matter was set'for hearing denovo, the plaintiff I was ··represented: by Mr. Prosper Msivala Senior Legal Officer and Dist::~ict Solicitor, for the Plaintiff and Miss Kasheni learned . . advocate .. The defendant was repr,esen_ted by Mr.

Sinare from . Rex Attorneys.. The .respective learned counsels for the parties . ' prayed~to .adopt: the pleadings as •previo'4sly filed. The prayer . ~ras grai11.ted. . . •' "' . . .; 1. The parties .agreed triutually_on the fo11owing issues:-

1. Whether the defendant was/is liable to pay services levy to the plaintiff for sales of its products made outside the: plaintiffs jurisdiction. :2. Whether other Local Government are en titled to the . service levy for sales made in their jurisdiction.
3. If the answer to issue No.2 is in the affirmative whether the plaintiff demand "for payment of service levy was justified.
4. Whether the plaintiff was justified 1n with holding , . . service levy collected . from the defendant otherwise . •pay~ble to other local authorities. 5.-To-" ;--Jhat reliefs are the parties entitled to. Du.ring the hearing of this case, PW1, one . Kharist s/ o ' . . Michael- . ,uanda, the Director for Loc~l . Government in Tanzania; testified .that in 2007,- . -he was the Director for the . legal services in the office of the Prime Minister vested with the ,, 3 "--- duties of coordinating legal proce,edings . 1n -which . . local goverp.ments ~ . . were parti~s. In that •same. year, . . 2007, he received a letter from" .the plaintiff seel<i:qg ' . : ; for . clarific,ition.. on ' the law relating to paym~nt •of service . levy. Two i:~sm:cs:: ~~lere _ posed in the letter. 1 st , whetht:r the Defendant ' . ~ras s~;~Jc.sed ., - to pay service l~vy to the: plaintiff, •and the 2:lc. issue ~yas,~whe.tJ:ier . . the defendant's branches were ~upposed. to pay service levy. PW1, gave . his clarification_ . in accordance \vi.th 'the provisions of Section 7(1) (2) o~ the Local Government ?-inane~ . Act. [CAP. 210] R. E. 2092. P\IY,1 .clarified the issues raised to . the effect that the Defendc~it was liable tc pay se:rvic e levy to the plaintiff at the rate of 0.3°/o . of the turn over. He tendered a .- letter which was admitted by this court . as. Exhibit-PI. PW1 further testified. that, in that letter, Exb.ibit .PI it was . also indicated that, the defendan.t Viras paying sevice levy to Mbeya City Council, Sumbawanga IVlunicipal • Coun~H.. an_d Mtwara Municipal Council. When cross - examined.by-Mr; . . Sin'are, PW1 a.. "1s11,rerec..that, : h:~ _was not aware that other District.Councils . .ii"lc!~dir!g Mb~ya _City demanded. for service levyJr.cm . the, de:en•ca_~t. . . PW2, Hafidhu s/ o Ally Mgagi~ . the District.Treasurer qf"ITJ;;oya . District Council testified that _ibefore. 2006; the- def:elidan~ ~~1a.s paying service. levy.. . The defendant . t1sed .to 1 pay ~:~e ,4. : : ' , . ' service i~vy monthly at the tune - bf Tshs. 12,000,000/= per mont11..1n the year 2006;'the:amourt of payment was reduced to aJi~a:verage "of Tshs. 1,000,000/= . per month. PW2 averred. that, wheri:"they inquired from the defendant on the difference ' \ I • in payrnt~~they were told that the. service levy was being paid 'to' the othef Ccfuncils. 'The defendant told the Plaintiff, that they-were paying service levy to Kigoma Ujiji District Council, . • and Teineke Municipal . Council.. Seeing that, the plaintiff decided to s~ek clarification. from the Permanent Secretary for the Prime' l\Ai:nister's Office Local Government. Their letter to that resporisible office was replied vide Exhibit P1. Upon , receiving the said letter, Exhibit P1 the plaintiff wrote . to the defendant a letter with Ref. No. MDC/L/50/6VOL./V / dated 29 I l 1 / 2007 vvhich was received in :court as ID 1. In Defence, DW 1, Arina a/o Ka1~nga, an employee of the Defenda...."1. t, . -vWorking .

In depot Section 1n • the Finance . . . Department testified that payment-of-service levy started with the budget of 1999 /2000 .. Before the defendants 'were paying, . . . the so called Industrial Product Cess. Which was charged at 0.03% of the total turn over. However when the Defendant started receiving demands from the other areas where the Defendant sells cement they stopped paying the plaintiff. In the year: ' 20660, the plaintiff sent demand letter to the Defendant, demanding payments of the whole levy from May 5

2006. , Following that letter, the Defendant paid the whole service levy from May 2006 to July 2007. DW 1 tendered the payment vouchers that prove that they had stopped paying other local authorities by then, instead the whole service levy was paid to the plaintiff. The court admitted the payment vouchers collectively as Exhibits D1. From August, 2007 the other depots where the defendant sells cement claimed service levy. The Defendant at the time started paying them. DW 1 finalized her testimony by stating that, the Defendant shall pay the service levy to the plaintiff, with effect from the date of the order or decision of the court. Upon being cross-examined by MiBE Kasheni, counsel for the Plaintiff, DW 1, stressed that the defendant cannot pay the whole levy to the Plaintiff, because that amounts to double taxation. On the first issue whether the defendant is liable to pay service levy to the plaintiff for sales of its products outside the plaintiff's jurisdiction; in order to resolve this issue, it is pertinent that we examine the provisions of the law that form the core of the dispute. Section 7 (1) (2) of the Local Government Finance Act, reads:- "7 (1) The revenues, funds and resources of a District Council shall consist of:- (2) All monies desired from Service Levy payable by corporate entities at the rate not exceeding, . . . 0.3 percent of the turnover net of the value added Tax and the exercise duty". In my view, there are two catch words in the provision that must be properly construed. One is "corporate entity" and another is "turnover". "Corporate Entity" is defined by Law Dictionary of Central Law Agency as "forming a body politic. It basically comes from the word incorporation, which is defined by Law Dictionary of Central Agency as an intimate Union, the formation of a corporate body, the action of forming a body, corporate legally authorized to act as a single person, the merging of one thing in another so that the two form a single whole," I Black's Law Dictionary, Eight Edition, at page 573 defines

.. , , , - "corporate entity". as a corporation's status as an organization existing independently of its shareholders. As a separate entity, a corporation can in its own names sue and be sued, lend and borrow money, and buy, sell, lease and mortgage property. In 'Oxford Advanced Learners Dictionary 7th Edition at Page 1652 'turnover' is defined as the total amount of goods or services sold by a company during a particular period of time. Going back to Section 7(1.) (2) of the Act, it follows therefore that, the revenues, funds and resources of a District

- • ~ • , \ . ~ ! : • ... • Council shall consist of all monies derived from, repaid or received by a body corporate legally authorized to act as a single person at the rate not exceeding 0.3% of the total amount of goods or services sold by a company during a particular period of time of the value added, "Tax and" the exercise duty. Applying the first rule in construing Tax Statute, which states that, one must have regard to the exact words used in a taxing statute and not its purpose or any general principle underlying them and remaining unexpressed; which was emphasized in the case of CAPE BRANDY Stillington v. Zimphor vs. I.P.C. (1921) R.T.C, it means that; service levy as one of the sources of revenues that a District Council collects; so it comes from a body corporate. The case involves
- • • of goods or services, in this case sold by Mbeya Cement Company the defendant during the period: Going through the pleadings from both the Plaintiff and the Defendant, it is not disputed that, the Defendant sold cement to various local authorities. This was further cemented by DW 1 in her testimony, when she told the court that, they sold cement to various local authorities. The defendant has admitted throughout that, the service levy was paid to other local authorities where there were depots of the company and hence, the Plaintiff was not justified to pay the whole amount; - - - - - ; - - - - - . The question that arises here is whether a depot is a body corporate under the Act (Cap 29:1 R.E. 2002 the Local Government Authorities Finance Act). The answer is obvious, No. That being the case then, what was paid to other Councils through the depots supply of Cement, Service Levy? The answer is definitely Not in the affirmative. It is No. Service Levy is paid from the total amount of goods sold by JLS, the company during a particular period of time. When cement was transported from the Plaintiffs jurisdiction, to other areas where he defended had depots and later sold; It is my intention of the law that, the sales are deemed to have been done from the corporate entity which is Mbeya Cement Company and hence the sales made outside the plaintiffs jurisdiction are part of the turnover of the defendant's products. This is further qualified by Section 16 (6) of the Local Government Finance Act (Cap. 290 R.E. 2002 Section 16 9
- (6) of the Local Government Finance Act (Cap. 290 R.E.
- 2002) which states: - - - - - "The rate imposed in relation to the service levy shall
- • • • • , I be payable in lieu of the industry cess if the corporate entities paying service levy self-impose liability to pay the produce cess". {emphasis supplied} • • • • • , The import of this Section is that, service levy replaced Industry cess, and the Industry cess. As corporate entities, which our case involves hvilr, jlvoya rre-ri-

- a. ~-!- Company, the defendant. According to bw 1, Industry cess had been:rt :9s.id to the plaintiff till September 2007, v.rhen the defendant sto~pcd.: as per annexure "MCC7" and testimony of DW1. It is not kho""n under what justifications did the defendant d~c:.dc to splh:~ the~... . service .levy ,tq other Local Authorities i:1.ste2.d cf pa~.tig _the Plaintiff the full amount as she used to clo v;ritl-::I~z-6::tt!ltrv;,:e.s::: ~- ..;- . With the foregoing; . affirmative. The reason. . ~s. ~o~!';. ~tated. b.ei~g_1 ~ks::~ s;:-:~vJce.~ J;~v~, . must comprise of total sales of the p.toduct m.ade. ;, In the sec.on_d . ~ issu_e,. . o'n whether, . . . other. ...Locai~a~Dver.:~...ents ' . . . ~ Authorities are en tited to: setvi'ce. .Jevy.. .for >sal~s ~c:atl~ ~:n. ~h.eir ~, jurisdiction, the-answer.is ili ..the,_affirmative~ .. ,;:; . . District Councils are yested _=t.:vith power._ t(~; .Jmak.e by :-_- -!~vs _pursuant to the provisions of Sections ,13 and-.].5 . . (.1} of t'l'le ,Act. . ~ :10. l for administratio~rt of service levy. -However it is clear from . .Section 7 •{ 1} {2; of t~e Act; that service levy is charged from a corp"dr~te e~tity~n:a "r1~0.in, the- totai~turri~ver. - Now, :~i~,, th~ ,defeiciant's :~depots are part arid parcel of . . Mbeya:: c~2i,. Company: that, they .do not h~ve a~ separate.
- - 't.' .: ~-■ • ~ ! • • body i:>e~rson!ality, within the strict ~eaning_of Section 7 (1) (2) . . of .the-'Act, could pay service.. levy .apart .from . that paid. to the . plaintiff~wnich :~as t~ be. calculated_ from the produced total turn. o~er ~o(ifie. ~ales .of the cement.~ . The depots outside the Plaintiffs' jurisdiction are for distl~ibution~ arid .sale of the d~endant's products. . It follows_ therefor~ that, the Def~nd~ant wa,s carrying on business as_ a_ corporate. entity. This cannot . ' entitle •. the defendant to pay
 - I" . . I ~ .. I . .
 - : • • ' • • . service levy to those other areas. On.-the~authority of Section 7 ...
- (1) (2) of the Act, other District/Local authorities :were and are - not entitled. t6~ chzrrge service letnj. . : The :k:ieiVet tc t:~ ~- third .. is.sue' i's:~ again in the affirmative, . . . ~ "\ ,o ! : ~ ~ ~ • T • - : O ' O i : • " • • O in the se1"ls,-e~that al~the sales of 9ement done by the company lNwhich enjoys services :~f:orn the, Plaint_iffs jurisdiction form part of t.lte:. ~tlrno...,iei ~.lor "i-V:t.ith. the.. plaintiff i~ entitled to charge un.der ;Sect1cn "7 (1) -(2) of. the Local Government Authorities Finance Act, Cap . .290 R. E. 2002~ I . . • "As fegarcis.- is~ue ~No.4,, I am of-the firm view_ that, the .Plaintiff ~as jcstified .in ~ithholding ..serv1ce levy collected 'from 11-
- l. . th~ def~ndant otherwise. payable. to other local authorities. This is simply justified by _the fact that, the_ amount withheld. is part qf the total sales of th~ .company ,whic~h - if0rrns .a tq.rn.over to be ~harged at a rate not exceeding-0..03% as r-,il~Section? (1)
- (2) of t~e Act. - As for the SUi. issue,. the cou:rt do he~t~t0,. ~d;~s~J,ss the . Defendant's counter ~claim ,arid: . : order the Defcr:::~:~\$;,:--.i . to :j~y t!le r ~. plaintiff the service }evy... Th~ .Defen~::~t ~c~vv~t:-'j~;"_e~ :~:~11'::i,il:~r.f a debt of unpaid service levy as claime~ ba,sir:~g on ~l ~:1~.€ ss:J.e~ o~_ cement mad e ex~'lac "- t ory .pro'duc,,. . =d~ fro~'-, ' ~,, +h.P "i!" ,;~;~;~n -1:~;~,.i,~ ::w~v-, ""v t:~ --- .. ,Jcl~.----.. -1..- ,., •. . ~.c •. 1 factory.

In the -upshot. Ju,<ign"!e·nt· •and Dec1 ~e is· ~nte:..red in 4 favour of the. plaintiff. The costs,_ of the. si...dt tc ;~;e horn by the · Defendant, That is the Plaintiff "is also ~\varded-- ·J1.e ~vsts,-of · this suit. - dA~ A~ F.. 'G1\,.1.L...!t · JUDGE,- -18/()3/20i5 : . ' · ... : " ' ···· I···.· ·' · ... : . ~· ' :.., ·' ,. . (_ 18/03/2015 __ . . . Corai:.n:· A.F> Ngwala - J. 1 ····. ··' Plaintiff:" Mr: Msival:a (Solicitor) For Defendant?<Ahsent Mr. ?dsiva~'la:>: I-hold the brief of Mr. Sinare Advocate. Court: - ' .° ,:rught ·of Appeal to Court of Appeal of Tanzania

- . -,explained~- A~~-
- A~F~NGWALA - -. , --JUD.GE ,. ·· "-18/03/2015" .. 13

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