

TANZANIA / JUDGMENT

20150318 TZHC Dar es Salaam

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, - I. .., J ~, ..., ' IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL CASE NO. 198 OF 2004 RUMISHO ENTERPRISES PLAINTIFF V. THE PERMANENT SECRETARY MINISTRY OF DEFENCE & NATIONAL SERVICE 1 sT DEFENDANT THE CHIEF OF DEFENCE FORCES TANZANIA PEOPLES DEFENCE FORCES 2No DEFENDANT THE ATTORNEY GENERAL 3R0 DEFENDANT

JUDGMENT

Shangwa, J. The plaintiff RUMISHO ENTERPRISES 1s hereby claiming for a total sum of USD 984,739.00 from the 1 defendants. This sum is based on a detailed breakdown of claims namely:- "Refund of USD 76,500 being production risk deposit paid to the manufacturer of tyres, commercial interest at 35% on the said sum for a period of 7 to 8 years, USD 55,080 being penalty to loss of business, USD 13 9, 000 being Miscellaneous costs on follow up of the contract and USD 60,900 being general damages." The dispute between the parties arose out of the tender awarded by the 2 nd defendant namely the Chief of Defence Forces to the plaintiff for the supply of 300 tyres, Ural 325 type 370-508-1400-20 for BM21 type of military vehicles. 2 The back ground to this case is as follows:- On 30th August, 2000, the 2 nd defendant offered the aforementioned tender to the plaintiff. On 12 th September, 2000, the plain tiff gave the quotation for the tender to the 2nd defendant. On 25 th October, 2000, the plaintiff sent to the 2 nd defendant a Proforma Invoice in respect of the quotation for the tender which was valid up to 3 1st January, 2001. The plaintiff made some consultation with the 1 st defend ant, the Permanent Secretary Ministry of Defence and National Service. On 17 th November, 2000, the said secretary directed the plaintiff to contact the 2 nd defendant's Chief of Logistics and Engineering to discuss on how to accomplish the tender. The plaintiff did so between November, 2000 and March, 2001 but he was told that the 2 nd defendant was experiencing shortage of funds. In May, 2001 the plaintiff 3 placed an order for the tender material with the manufacturer and supplier of the material namely the tyres in accordance with the conditions spelt out in the proforma invoice. On 3 rd January, 2001, the plaintiff deposited USD 36,500 to the manufacturer and supplier of tyres called Voncramm & Company of Germany. This amount was deposited as production risk in respect of 150 tyres which were delivered to the defendants. Between 8 th November, 2001 and 2 nd October, 2002, the defendants paid the plaintiff a total sum of Tshs 99,705, 168/= for the 150 tyres which were delivered by him. On 12 th August, 2002, the plaintiff deposited to the manufacturer a sum of USD 40,000 as production risk for the remaining 150 tyres making a total of the production risk deposit

to USD 76,500. On 21 st August, 2003, the manufacturer notified the plaintiff that his production risk deposit of USD 76,500 had been forfeited on account of the defendants' failure to 4 establish a letter of credit for the supply of the final consignment of 150 tyres as per con tract. At the beginning of hearing this case, seven issues were framed for determination by the court. They are as follows:

1. Was there a contract between the parties.
2. If yes was it duly performed.
3. Whether the award of the tender to the plaintiff was a conditional one to be fulfilled subject to the year 2001 and 2002 budget approval.
4. Whether the defendants are liable for the contract entered between the plaintiff and the manufacturer in January, 2001. 5 ,.
5. Whether the plaintiff was entitled to vary the terms of contract and increase the purchase price.
6. Whether the defend ants are entitled to damages for loss incurred by them for the plaintiff's failure to honour its contractual obligation under the tender award for supply of 300 tyres.
7. To what reliefs are the parties entitled thereto. Counsel for the plain tiff Mr. Mauggo, Advocate presented this case very well before this court. He called one witness to prove this case namely P.W.1 Costa Shiwar Yael Mushi. During his testimony, Costa Shiwar Yael Mushi tendered twenty two documentary exhibits in evidence. On the other side, the learned State Attorney, Mr. 6 Mwitasi called two witnesses to defend the case. These are D.W. 1 William Nyangasa and D.W.2 Brigadier General Aloyce Damian Mwanjile. During his testimony, William Nyangasa tendered in evidence five documentary exhibits. The issues to be determined by this court are very simple. On the first issue, the court is called upon to decide as to whether or not there was a contract between the parties. To the best of my understanding there was no con tract between the parties. First of all, there is no evidence to show that both the plain tiff and the defend an ts entered any express agreement signed by them. Had there been such an agreement, it would have been tendered in court. Secondly, the dispute between the parties does not arise out of breach of contract. As already stated at the beginning of this judgment, the dispute between them arose out of the tender awarded by the 2 nd defend ant to the 7 plaintiff for the supply of 300 types. Therefore, I will only deal with the issues arising out of the tender and nothing more. This means that issues no 2 and 5 relating to contract between the parties will not be dealt with. Thus, I go straight to the third issue. On the third issue, the court is called upon to decide as to whether or not the award of the tender to the plain tiff was a conditional one to be fulfilled subject to th~ year 2001 and 2002 budget approval. As far as I know, tenders are never conditional. They are always unconditional. One party to the tender offers and another one accepts the offer. As a matter of fact, the fulfillment of the tender awarded by the 2 nd defend ant to the plain tiff in this case was not subject to the year 2001 and 2002

budget approval. However, there occurred financial problems. which faced the country during the. said period. This occurrence 8 • -incapacitated the 2 nd defendant from paying full amount for the purchase of 300 tyres from outside the country as per the invoice issued by the plaintiff to the 2nd defendant. Instead of paying full amount, the 2 nd defendant paid the plaintiff an amount of money which was sufficient to import 150 tyres only. On the fourth issue, the Court is called upon to decide as to whether or not the defendants are liable for the con tract entered between the plain tiff and the manufacturer of tyres in January, 2001. In my opinion, the defend an ts are not liable for the con tract entered between the plaintiff and the manufacturer of tyres because they were not parties to the said contract. The 2 nd defendant offered the Tender for being supplied 300 tyres. The plaintiff accepted it. After accepting it, the plaintiff entered into contract with the Company which manufactures the 9 tyres namely Voncramm in Germany. The said Company manufactured the tyres which were ordered by the plaintiff . from it at an agreed price. The refore, anything wrong arising from the said con tract between the plain tiff and the manufacturer, the defendants cannot be made liable. I now proceed to determine the sixth issue on which the court is asked to determine as to whether or not the defendants are entitled to damages for loss incurred by them for the plaintiffs failure to honour its obligation under the tender award for the supply of 300 tyres to the 2 nd defendant. In order to be entitled to damages, the defendants had to prove the loss suffered by them. They did not to do so. In their respective testimonies, D.W. 1 William Nyangasa and D.W.2 brigadier General Aloyce Damian Mwajile told the Court that the plaintiff Company did not fulfill the terms of the tender award and that as a 10 result, it caused damage to the defendants' military goals and operations. However, these witnesses did not specify which military goals were affected and which military operations were affected as a result of the plain tiff's conduct. In my opinion, if there was any damage suffered by the defend an ts at the hands of the plain tiff this damage was self-inflicted as they delayed payment to the plaintiff for securing the 300 tyres at ago during the financial year 2000/2001. In law, the damage which is self-inflicted is irrecoverable. The last issue to be determined is the seventh one. On this issue, the court is required to decide as to what reliefs are the parties entitled to. There is no dispute in this case that the defendants paid for 150 tyres which were supplied by the plaintiff to them. The tender award was for the supply of 300 tyres but out of 300 tyres, the plaintiff 11 managed to supply 150 tyres only. The plaintiff claims to be entitled to the refund by the defendants of USD 76,500 which were forfeited by the manufacturer of the tyres after being deposited with them as production risk. In his testimony, P. W. 1 told the court that on 3rd January, 2001, he deposited· USD 36,500 with the manufacturer of tyres for the first consignment of 150 tyres and that on 12 th August, 2002, he deposited USD 40,000 with them for the rema1n1ng 150 tyres. That the 2 nd defendant did not establish a letter of credit for the remaining tyres. That on 21 st July, 2003, the plaintiff was issued a 30 days notice by the manufacturer of tyres for payment of the remaining 150 tyres failure to which they would forfeit the production risk deposit of USD 76,500. That the defendants were informed about this but that they did not care. That on 12 th August, 2003, the plaintiff 12 received a letter from the manufacturer that the amount-of money deposited as production risk had been forfeited. The learned State Attorney, Mr.

Mwitasi submitted that the defendants do not recognize the plaintiff's claim of the aforesaid amount of deposit which was forfeited on grounds that they were not a party to the contract entered between the Plaintiff and the manufacturer of tyres. The learned State Attorney strenuously argued at page 7 of his written final submissions that the plaintiff cannot in law shift his burden of obligation in the contract he entered with the manufacturer to the non-party as he tried to do in this case. That the contract was supposed to be performed on credit and that the plaintiff had to use his own money to procure the tyres and thereafter he would receive the money from the defendants after the delivery of tyres. 13. On this point, I agree with the learned State Attorney that the plaintiff is not entitled to the refund of USD 76,500 which was forfeited by the manufacturer of the tyres. I agree with him due to the fact that the defendants were not parties to the contract entered into between the plaintiff and the manufacturer. In fact, it was correct for the State Attorney to argue that as the defendants were not parties to the said contract, they had no obligation to perform on matters arising from it. The defendants were not even required to establish the so called letter of credit. Requiring the defendants to establish a letter of credit to the manufacturer amounted to the change of the terms of the tender. The delay by the defendants to pay the plaintiff according to its invoice issued during the financial year 2000/2001 does not oblige the defendants to pay the plaintiff the sum of USD 76,500 which were forfeited by the 14 manufacturers of tyres as production risk agreed upon between the plaintiff and the manufacturer. Apart from that, under the tender award, the defendants were not supposed to pay the amount which was required by the manufacturer as production risk which was forfeited. As to whether or not the plaintiff is entitled for payment from the defendants of USD 59,080 claimed as penalty for loss of business, I hold that the plaintiff is not entitled to the said payment. This is because the plaintiff never gave evidence of how much loss of business that he incurred. Moreover, he was paid by the defendants for first consignment of 150 tyres which were delivered to them. However, it is undeniable in this case that the plaintiff incurred a lot of expenses in corresponding with the 1st and 15th defendants and the manufacturer of tyres abroad for the purposes of performing the tender in issue. The plaintiff claimed USD 139,400 for such expenses. In my view, the amount claimed is too excessive. Therefore, I reduce it from USD 139,400 to USD 5,000. The plaintiff claimed for general damages of USD 60,900 as well. In order to determine this claim, it is important to know the injury if any that the plaintiff suffered at the hands of the defendants. In this case, the plaintiff was offered a tender by the defendants. Thereafter, difficulties arose to the plaintiff in accomplishing the tender as the defendants did not pay him money during the financial year 2000/2001. The prices of the tyres were increased by the manufacturer. The plaintiff's USD 76,500 which were deposited with the manufacturer as production risk were forfeited. Had the defendants paid the plaintiff USD 76,500 within time, the plaintiff could not have suffered forfeiture of his money deposited with the manufacturer. For this reason, I hold that the plaintiff is entitled to general damages. Now what is general damages? The words general damages have been described at page 194 of MITRA'S Legal and Commercial Dictionary 5th Edition to relate to damage whether pecuniary or non-pecuniary. In this case, the plaintiff suffered pecuniary damage as a result of the delay by the defendants to honour his bill in time. The damage

suffered by him is the forfeiture of his USD 76,500 by the manufacturer of tyres which were deposited by him in the manufacturer's Bank Account. In general, I do award the plaintiff general damages of USD 15,000. As the plaintiff is not entitled to the claim of USD 76,500 which were forfeited by the 17 • manufacturer, I make no order with regard to his claim of interest on the said sum. I so decide. Finally, I enter judgment in favour of the plaintiff to the extent mentioned herein. I do so with costs. ~ A.Shangwa presence of the plaintiff and the learned State Attorney for the defendants. ~ A.Shangwa JUDGE 18/3/2015 18

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