

TANZANIA / JUDGMENT

# SULTAN JAVER FILLING STATION

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IN THE COURT OF APPEAL OF TANZANIA AT MWANZA ( CORAM: MKUYE. J.A., KITUSI. J.A..  
And ISSA. J.A.1 CIVIL APPEAL NO. 330 OF 2021 SULTANALI JAVERT/S MWALONI FILLING  
STATION..... APPELLANT VERSUS NSK OIL & GAS

LIMITED..... RESPONDENT (Appeal from the decision of the High  
Court of Tanzania at Mwanza) (Mqevewa, J.1 dated the 30th day of April, 2020 in Civil Case No. 40  
of 2017 JUDGMENT OF THE COURT 6th & 15th August, 2024 KITUSI, 3.A.: The appellant sued the  
respondent alleging breach of an oral contract under which he claimed payment of TZS  
292,073,489/= that the respondent ought to have paid him but did not. The respondent admitted  
existence of the oral contract but denied the alleged breach and the indebtedness of TZS  
292,073,489/=. In turn, based on the same oral agreement, the respondent raised a counterclaim  
demanding payment of TZS 429,012,100/=. The High Court dismissed both the suit and the  
counterclaim for want of proof. The appellant has appealed against that judgment and decree  
while on the other hand the respondent has cross

- appealed against the dismissal of the counterclaim. By way of background, the parties had a common interest in the business of fuel in that the appellant owned a filling station which he operated under a trade name of Mwaloni Filling Station in Mwanza City. The respondent was a dealer in fuels and was the main supplier of those fuels to the appellant, under that oral contract. The undisputed evidence shows that the contractual relationship started in about the year 2010, and all went well for a considerable number of years of the contractual relationship. It is however alleged that in 2016 the respondent breached the contract by failing to perform its obligation of supplying fuels. The appellant's contention was that he had made advance payment of TZS 500,200,000 into the respondent's bank accounts and had a legitimate expectation that the said respondent would supply him with fuels equivalent to that money. The nature of the alleged breach is that the respondent only supplied fuels worth TZS 259,126,511 and promised to refund the balance of TZS 292,073, 489. 00 in cash. The essence of the suit was that the respondent did not refund the money, hence the monetary claim of TZS 292,073,439.00 with interests and general damages. The respondent denied being in breach as already intimated, and demanded proof of the allegation. It raised the counterclaim of TZS 429,012,100 as already alluded to also, alleging it to be the value of the fuels it had over supplied to the appellant. There were two substantive issues at the beginning of the trial, one whether the plaintiff (appellant) was entitled to the amount of

TZS 292,073,489 which he claimed, and the other being, whether the defendant (respondent) was entitled to the amount of TZS 429,012,100. This was a case of appellant's word against that of the respondent, and there was one witness for each side. The sole witness for the appellant repeated the fact that from 3rd to 14th June, 2016 a total of TZS 500,200,000/= was deposited by the appellant into the respondent's bank accounts expecting to be supplied with litres of fuel commensurate with that amount. However, the respondent supplied some quantities of fuel but left 1,230 litres of petrol and 3,700 litres of diesel worth TZS 292,073,489, undelivered. On the other hand, the respondent's lone witness described how the fuels were being collected from the respondent's depots by identified drivers employed by the appellant, using his trucks and that the relevant documents, that is, delivery notes and invoices would be given to the drivers for onward delivery to the appellant along with the fuels. It was the respondent's case that the appellant had custody of the relevant documents. According to the respondent, efforts to reconcile the accounts failed because the appellant did not cooperate despite receiving a letter from the respondent (exhibit P3) suggesting reconciliation. When this failed, he said, the respondent decided to do its own reconciliation by using copies of delivery notes and invoices. In doing so, it prepared a document known as Movement Summary, which looks to us like what would be called balance sheet. At the end of this exercise the respondent discovered that the appellant owed it TZS 429,012,100, the money raised in the counter claim. In resolving the first issue, the learned Judge made herself aware of the evidential burden of proof cast upon he who alleges, the plaintiff (appellant) in this case, and concluded that the appellant had not discharged his burden of proof. She cited this Court's previous decision in Lamshore Limited and Another v. Bizanje K.U.D.K [1999] T.L.R. 330 and that of East African Road Services Ltd V. J.S. Davis & Co. Ltd

[1968] EA 676, for the principle that it is the duty of the plaintiff to make out a *prima facie* case against the defendant. She dismissed the suit for want of such *prima facie* proof. As regards the second issue, that is, the respondent's entitlement to payment of the amount claimed in the counterclaim, the learned Judge referred to the Movement Summary (exhibit D3), the Trucks detail movement (exhibit D5), the Notice of Special Resolution (exhibit D6) as well as the bank statements tendered as exhibit D4. The learned Judge went on to observe that those documents were insufficient to prove what stood unpaid by the appellant. Consequently, the counterclaim was also dismissed. This appeal and the cross appeal question the soundness of that decision. To begin with the appeal, it raises the following one ground : -

1. That the Trial Court erred in law and fact in holding the plaintiff's claim of TZS 292,073,489 was not specifically proved. The cross - appeal is couched in the following terms:
1. That, the trial Court erred in law and in fact by holding that the above-named Respondent failed to prove her counter-claim of TZS 429,012,100/= against the Appellant while the claimed amount of TZS 429,012,100/= was proved to the standard required in civil cases. 5 Before us, the parties enjoyed the same services of Mr. Erick Katemi, learned advocate for the

appellant and Mr. Gwakisa Sambo, learned advocate for the respondent, both of whom had featured for the respective parties during the trial. Counsel had earlier filed written submissions for and in opposition of the appeal. These written arguments will be considered along with the oral addresses made by counsel. Mr. Katemi was emphatic, in his submissions, that the suit from which this appeal arises was not for specific performance of the respondent's contractual obligation of supply of fuel. Rather it was for refund of money deposited by the appellant in the respondent's bank accounts. He cited basically two instances establishing that the respondent was indebted to the appellant. These are that, the respondent issued to the appellant a cheque of TZS 80 million (exhibit P2) which however was dishonoured. He posed a question that if the respondent was not indebted, why did it draw the cheque in favour of the appellant? The other instance is the respondent's letter, (exhibit P3) instructing the appellant to make no more deposits in their bank accounts and suggesting a reconciliation of the parties' accounts. He argued that since the contract was oral, based on trust, the above was sufficient proof of the claim and it renders the decision of the High Court faulty. He prayed for the appeal to be allowed. At our instance and probing, Mr. Katemi submitted that to establish the amount that stood outstanding, one has to look at the amount of money deposited by the appellant deducting from it the quantities of fuels supplied by the respondent. Further, Mr. Katemi submitted that the alleged counter claim is the respondent's clever way of avoiding liability, wondering again, why would the respondent issue the cheque of TZS 80 million to a person who owed it TZS 429,012,100. The learned counsel prayed for the appeal to be allowed and the dismissal of the cross appeal. On the other hand, Mr. Sambo reiterated the principle that specific damages must be specifically pleaded and strictly proved, and argued that the appellant failed in both. Counsel drew our attention to page 599 of the record where PW1 admitted under cross - examination that no quantities of fuel were elaborated in the pleadings and went on to admit that the invoices and delivery notes which the appellant had possession of, were not tendered in court. Mr. Sambo proceeded to make arguments in relation to the exhibits that were tendered by the appellant. He submitted that the pay in slips (Exhibit PI) which did not indicate the purpose for the payments were of no evidential value because the possibility that they were payments for other previous debts would not be overruled given the parties mode of operation. With regard to exhibit P3, the letter inviting the appellant to do joint reconciliation with the respondent, Mr. Sambo submitted that it was written by the respondent even before the demand letter and submitted further that even the respondent's reply to the demand letter still called for reconciliation. He wondered why did the appellant not respond to the letter and chose to go to court instead. As regards the bounced cheque, Mr. Sambo submitted that it was explained by DW1 (page 617) that the payment was in response to the appellant's oral pressure for payment and that nowhere did the respondent say that the amount was part payment of a debt. According to the learned counsel, when the respondent realized that the appellant owed them more money than that on the cheque, they instructed that payment be withheld. Mr. Sambo prayed for the appeal to be dismissed and the cross appeal to be allowed. In a short rejoinder Mr. Katemi reiterated the submission that since the appellant's claim was not for specific performance, there was no

need to substantiate the quantities of fuel that were received by the appellant. He also argued that the respondent had not adequately explained the issue of the dishonoured cheque and invited us to conclude that it was part payment towards refunding the moneys deposited in the respondent's bank accounts. It is common ground, in our view, that the suit from which this appeal arises, is on specific damages. Mr Katemi's argument that only in seeking specific performance would the appellant be needed to lead evidence that would make the claim ascertainable is, with respect, not correct. Special damages have been defined in *Stroms Brucks Aktie Bolag & Others*

- v. 3 & P Hutchison [1950] AC 515 whose relevant paragraph was reproduced in *Sanlam General Insurance Tanzania Ltd (formerly known as NIKO Insurance Tanzania Ltd) v. Dennis Charles & 2 Others* Civil Appeal No. 51 of 2021 [2024] TZCA105 (23 February 2024). The latter case had, earlier, cited *Stanbic Bank Tanzania Limited v. Albercrombie & Kent (T) Limited*, Civil Appeal No. 21 of 2001 [2006] TZCA 7 (3 August 2006) : - "Special damages...are such as the law will not infer from the nature of the act. They do not follow in the ordinary course. They are exceptional in their character, and therefore, they must be claimed specifically and proved strictly". Beginning with pleadings and in line with the settled principle reproduced above, it can be said that special damages are those claims that can be ascertained and must be specifically pleaded. See also *Zuberi Augustino v. Anicet Mugabe* [1992] T.L.R 137. In this case, the appellant gave no more than a global figure of TZS 292,073,489 without itemizing how he came about this figure. The quantities of fuels testified on by PW1 were not mentioned in the plaint so as for the respondent to admit or dispute each item. During the trial, PW1, the appellant's own witness admitted that the plaint did not disclose the quantities of fuel received. He also stated that the prices were not fixed. We are in agreement with the learned trial Judge who wondered how was she expected to resolve the issue without the pleadings being specific on the quantities so as for one to be able to conclude the amount which remained unpaid. She stated, in part: - "Moreover, the plaintiff was required to authenticate the claimed amount possibly by tendering cogent evidence such as goods received Notes to show the total quantities of fuel received that matches the payments made by the plaintiff to the defendant". What the learned Judge stated above resonates with what Mr. Katemi stated when probed, that to ascertain the amount claimed, one needs to arithmetically subtract the value of the supplied fuels from the amount deposited. As it is clear that the plaint did not specify the quantities of fuels received, a fact which is also in the evidence of PW1, further that the relevant invoices and delivery notes were not tendered, also admitted by PW1, there is no basis for holding the judgment of the High Court faulty. We wish to further express our agreement with the learned trial Judge by referring to the following decisions on the duty of proof in civil cases: (1) *Anthony M. Masanga v. Penina (Mama Mgesi) and Another* (Civil Appeal No. 118 of 2014) [2015] TZCA 556 (18 March 2015);

- (2) Paulina Samson Ndawavya v. Theresia Thomas Madaha (Civil Appeal No. 45 of 2017 [2019] TZCA 453 (11 December 2019). In Paulina Samson Ndawavya, (supra) citing the case of James Funke Gwagilo
- v. Attorney General [2004] T.L.R 161, the Court made the following statement on the rationale of pleadings: - "...w e underscored the function o fpleadings being to put notice o f the case which the opponent has to make lest he is taken by surprise". When those principles are applied to our case, it is evident that the appellant failed, both in the pleadings and evidence, to establish a prima facie case in his favour. Take two aspects for demonstration, one being the fact that the prices of the fuels were not fixed, and the other being PWL's admission that the relevant documents were not tendered, there would be no way of ascertaining the claim. Consequently, the appeal by the appellant challenging the decision of the High Court has no merit and stands dismissed. We are now going to consider the respondent's cross appeal challenging the dismissal of the counter claim. The leaned trial Judge took the view that the respondent had not led cogent evidence to substantiate ii the claim. She subjected to analysis the documents that had been tendered by the respondent, that is the Movement Summary (exhibit D3), the Trucks detail movement (exhibit D5) and the Notice of Special Resolution (exhibit D6), as well as exhibit D4, then concluded as follows at pages 864 to 865: 'In my view these documents cannot support the claim s o f outstanding balance before this court. The way I see the said documents, they do not prove the actual supply as they do not speak fo r them selves to show that the truck and truck drivers were the p lain tiff's employees". We shall start with the pleadings raising the counterclaim, the same way we did in dealing with the appeal. In our view this is just another side of the same coin because the respondent's claim was also specific in nature and needed to be specifically pleaded and strictly proved. We shall reproduce paragraphs; 20,21, 22 and 24 of the Counter Claim in order to ascertain whether the pleadings conform to the norms discussed in relation to special damages: -
20. That from 3CP day o f November, 2015 to end o f July, 2016 the p la in tiffin this counter claim supplied variety o ffuels plus payments to the defendant in this counterclaim in value TZS. 1,939,366,000/- 12
  21. That after supplying the said fuels to the defendant in this counter claim the p la in tiff usually issues an invoice to the defendant for his payments. Copies o f the Delivery Notes and Invoices in regards to a ll fuels supplied to the Defendant in this Counter Claim including and up to the end o fJuly 2016 are attached hereto and marked NSK
  - 2 Collectively and leave o f this court is craved fo r It to form part o f this counter claim .
  22. The Defendant in this counter claim s in his endeavour to pay the fuels supplied to him : he has only deposited with the p la in tiff account TZS. 1,510,353,900/= copies o f the bank statem ents o f the p la in tiff in this counter claim evidencing the paym ent which has been deposited by the defendant in this counter claim is attached hereto and marked NSK - 3 Collectively and leave o f this court is craved fo r it to form part o f this counter claim .

24. That sum of TZS 429,012,100/= being an outstanding balance of fuels supplied and payments made to the defendants this counter claim remains unpaid to the plaintiff in this counter claim by the defendant in the counter claim. A copy of Mwatoni filling station - Mwanza; Leger Account Ending 31st December, 2016 is attached hereto and marked NSK - 4 and leave of this Court is craved for it to form part of this counter claim. The respondent's pleadings in the counter claim supplied what appear to be better and somehow specific details. However, upon scrutinizing those paragraphs, it dawns on us that they are not verifiable and therefore lack the necessary qualification of being specific claims. We have glanced at Annexure NKS -2 from page 142 to 147, for instance, and according to those delivery notes, a total of 224,000 litres of fuel was supplied. Assuming that all these litres were delivered to the appellant and considering the varying prices as stated by PW1, there is no suggestion as to how much those litres of fuel were worth so as to gauge what remained unpaid after the payment of TZS 1,510,353,900/= by the appellant. This is because as the learned Judge correctly held, the documents do not speak for themselves and the bank statements are of no assistance. For instance, going by the bank statement, NSK- 3 at page 148, there is mention of only one item involving Mwaloni Gas Station, the appellant, so that the information is too scanty to support the contentions raised by the respondent. As the definition of specific damages goes, we cannot assume these claims without specificity and strict proof. In our further consideration of this matter, we took into account our decision in *Daniel Thomas @ Yusuph @ Mgeni & Another v. Republic* Criminal Appeal No. 120 of 2022 [2024] TZCA 103 23 February
- 2024) where the Court reproduced the following paragraph from a persuasive case of Alicia O. Fernandes, Anthony Joey S.Tan, Reynaldo V. Cesa and Edgar V. Martinez vs. People of the Philippines, G.R. No. 249606, quoted from an article titled BURDEN OF PROOF VS BURDEN OF EVIDENCE September 24, 2022, by Atty 14 Eduardo. We find it relevant to the prevailing circumstances of this case: "The burden of evidence is defined as that logical necessity which rests on a party at any particular time during a trial to create a prima facie case in his favour, or to overthrow one created against him. It is determined by the progress of the trial, and shifts to one party when the other party has produced sufficient evidence to be entitled as a matter of law to a ruling in his favour..." Did the counter claim live up to the requirements set out above? We are afraid not because not only did it not specify the claims for ascertainment, but also the evidence did not shift the burden on the appellant, the reason primarily being the documents not speaking for themselves, as held by the learned trial Judge. But then the counter claim is also self defeating, in our view. According to exhibit P3, the respondent invited the appellant to a reconciliation of the accounts. Since the appellant ignored that invitation, no joint reconciliation was done and this begs the question, what then is the basis of the respondent's claim, the same question may be put across to the appellant, for since he did not turn up for the reconciliation how did he unilaterally conclude that the respondent owed him the money? 15 In the event we find no merit in the cross appeal and dismiss it too. Given our conclusion on the two appeals, we order each party to bear own costs. DATED at MWANZA this 14th day of

August, 2024. R. K. MKUYE JUSTICE OF APPEAL I. P. KTTUSI JUSTICE OF APPEAL A. A. ISSA JUSTICE OF APPEAL The Judgment delivered this 15th day of August, 2024 in the presence of Mr. Erick Katemi, learned counsel for the Appellant also holding brief for Mr. Gwakisa Kakusulo Sambo learned counsel for the Respondent, certified as a true copy of the original. Loila' A. S. CHIYGULU DEPUTY REGISTRAR COURT OF APPEAL 16

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