

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

COMMERCIAL CASE NO. 84 OF 2022

BETWEEN

SOMOCHEM LIMITED.....PLAINTIFF

VERSUS

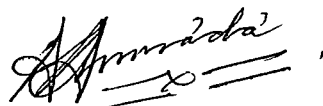
SUPER SIP LIMITEDDEFENDANT

JUDGMENT

A.A. MBAGWA J.

The plaintiff is a duly registered company dealing in supply and distribution of chemicals in particular polymers whilst the defendant is a registered company licensed to carry on business of production and sale of soft drinks. The plaintiff, **Somochem Limited**, by way of plaint, instituted the instant suit against the above-named defendant praying for judgment and decree in the following orders, namely: -


- (i) Declaration that the defendant breached the supply of goods agreements she had with the plaintiff.
- (ii) Payments of TZS 146,583,509.62 (Tanzania shillings One Hundred Forty-Six Million, Five Hundred Eighty-Three Thousand, Five Hundred and Nine and Sixty-Two Cents being an outstanding unpaid debt.



- (iii) Compound interest on (ii) above at the prevailing commercial bank's rate of 28% per month from the date of the cause of action to the date of judgment
- (iv) General damages as may be assessed by the Court
- (v) An order for payment of interest on the decretal amount above according to the court rate per annum from the date of judgment to the date of satisfaction.
- (vi) Costs of the suit and
- (vii) Any other compensation or payment as this Court may deem fit and just to grant.

On being served with the plaint, the defendant, on 30th day of August, 2022 filed a written statement of defence disputing the plaintiff's claims on the ground that all chemical compounds supplied and delivered were paid sometimes between March and October 2020. On that note, the defendant urged this Court to dismiss the instant suit with costs for want of merit.

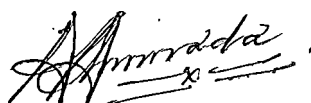
In a nutshell, the facts of this suit may be summarized as follows; It is the plaintiff's contention that on 22nd July, 2019 the defendant entered into oral agreement with the plaintiff for supply of chemical compounds on credit. According to the plaint, the parties agreed, among other things,

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that after the supply of chemicals, the plaintiff was to issue invoice for goods delivered and the defendant would make payment for supplied goods within 60 days after receipt of the invoice. The plaintiff further contends that she supplied the chemical on credit to the tune of TZS 1,881,520,558.43 but defendant managed to pay only TZS 1,734,937,048.81 thereby leaving an outstanding amount of TZS 146,583,509.62. The plaintiff lamented that despite several reminders for payment through phones, email and demand notices, the defendant failed, neglected and ignored to repay the said outstanding balance. It was against this background, the plaintiff instituted the instant suit claiming for reliefs as contained in the plaint.

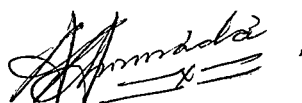
The plaintiff at all material was in the legal services of Mr. Jimmy Mrosso, learned advocate whereas the defendant was represented by Mr. Seleman Almas, learned advocate. Before hearing started, during final pre trial conference, the following issues were framed, recorded and agreed between the parties for determination of this suit, namely; -

1. Whether the plaintiff supplied the agreed amount of chemical compounds to the defendant as ordered and if not whether there was breach of the agreement between two parties.



2. Whether the defendant is indebted to the plaintiff and to what extent.
3. To what reliefs are parties entitled.

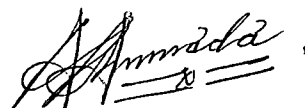
In a bid to prove the case, the plaintiff called two witnesses namely, **Meetal Modi (PW1) and Venkata Uppuluri (PW2)**. Further, the plaintiff tendered several documents which were admitted in evidence and marked **exhibit P1 to P8**. PW1 under affirmation and through her witness statement which was received by this Court and adopted as her testimony in chief told the Court that, she is financial officer of the plaintiff hence conversant with this suit. It was the testimony of PW1 that sometimes in July 2019, the plaintiff entered into oral agreement with the defendant whereby the plaintiff agreed to supply chemical compounds on credit to the defendant. PW1 further stated that, it was agreed, among others, that after the the supply of chemicals, the plaintiff was to issue invoice for goods delivered and the defendant was to make payment for supplied goods within 60 days after receipt of the invoice. PW1 went on telling the court that, on deferent dates and at the request of defendant, the plaintiff supplied chemical compounds and concomitantly issued invoices along with delivery notes to the defendant. PW1 tendered in evidence, sixteen (16) invoices and delivery notes dated 22/07/2019, 22/10/2019, 24/10/2019, 02/11/2019, 04/11/2019, 09/11/2019,



18/11/2019, 20/03/2020, 23/03/2020, 22/06/2020, 21/07/2020, 17/08/2020, 17/08/2020, 04/09/2020, 17/09/2020 and 02/10/2020 which were admitted in evidence and marked **exhibit P1**. Further, PW1 tendered copies of balance confirmation from Somochem to Super Sip dated 2nd May, 2018 and reply to balance confirmation from Somochem to Super Sip dated 1st June, 2019 which were admitted in evidence and marked as **exhibit P2**.

Testifying on the outstanding balance, PW1 tendered in evidence bank statement of Somochem which was admitted as **exhibit P3**. PW1 added that, apart from polite reminders through phone calls and messages, the defendant refused, rejected or ignored to honour its contractual obligations. PW1 tendered in evidence email dated 29th December, 2019 at 11.45, and email dated 7th January, 2019 and the same were admitted as **exhibit P4**. On the basis of the above testimony, PW1 prayed the Court to enter judgement and decree against defendant as prayed in the plaint.

During cross examination, PW1 told the Court that the business relationship between the parties started sometimes in July, 2019. PW1 when pressed with question from Mr. Almas, she told the Court that, exhibit P2 relates to this case and it is among the documents which form

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the basis of this suit. She also admitted that there is invoice No. 7300009518 with the sum of TZS 19,805,769.87 dated 22, July 2019 but its correspondent delivery note does not bear the defendant's received stamp. When referred to invoice No. 730012789 dated 22/10/2020, PW1 told the Court that it bears only signature but it ought to have been stamped.

In re – examination, PW1 told the Court that, the difference in figures observed in exhibit P1 indicates that either new invoice was raised or some payments were made. Further, PW1 said that, the machines from which invoices were printed were linked with TRA system as such, EFD was automatically generated. She clarified that the said EFD is indicated at the bottom of invoice starting with TIN.

Further, the plaintiff paraded **Venkata Uppuluri** (PW2) whose evidence was substantially similar to that of PW1. PW2, the chief financial officer stated that the plaintiff and defendant had business relationship for quite sometimes. He said that after the defendant's default, the plaintiff issued the demand notice to defendant reminding her to clear the outstanding balance but to no avail. PW2 tendered in evidence demand notice dated 29th January, 2021, Stanic account bank statement of Somochem, CRDB Bank statement of Somochem and BRELA search report which were



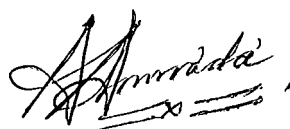
admitted and marked **exhibit P5, exhibit P6, exhibit P7 and exhibit P8** respectively.

During cross examination, PW2 stated that, the purpose of exhibit P6 and exhibit P7 is to show whatever amount received from the defendant. He also confirmed that according to exhibit P6, on 19th March, 2019 TZS 4,000,000 was paid and on 24th March, 2020 TZS 1,100,000 was paid. PW1 further admitted that as per exhibit P7, the following payments were made; TZS 3,300,000 on 20th March, 2020, TZS 945,500 on 23rd March, 2020, TZS 16,810,200 on 20th June, 2020, TZS 5,928,225 on 15th August, 2021, TZS 708,100 on 4th September, 2020, TZS 708,000 on 17th September, 2020 and TZS 708,000 on 1st October, 2020.

When referred to paragraph 6 of his witness statement, PW2 read it and told the Court the he was not the one who approved the credit. This answer was contrary to what he stated in his witness statement. Further, PW2 admitted that they did not tender ledge account nor did they produce the statement of account of the defendant.

In re – examination, PW2 clarified that, the difference of figures in exhibit P2 indicates that either new invoice was raised or some payments were made.

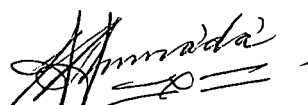
In defence, the defendant paraded one witness namely, **Adil Jetha (DW 1)**. DW1, the defendant's director and principal officer told the Court that,



the plaintiff and defendant had long standing business relationship as such, on 22nd July, 2019 they entered into oral agreement for supply of chemical compound on credit. DW1 expounded that, it was agreed, among other things, that chemicals would be supplied upon issuance of local purchase request either physically or by email. DW1 further testified that although the agreement was made in July, 2019, the plaintiff started to supply chemicals sometimes in October, 2019. He stated that, the plaintiff supplied chemical compounds with total value of TZS 37,828,440. Elaborating on the amount received, Adili Jetha PW1 told the court that, the defendant received chemicals delivered on 24 /10/2019, 2/11/2019, 09/11/2019, 18/11/2019 and 22/07/2020. He further said that the payments in respect of supplied chemicals were made between March to October, 2020. He stressed that the plaintiff did not supply chemicals on 20/3/2020 and 23/3/2020.

DW1 told the court that, the defendant paid the plaintiff through its bank account held at CRDB Bank as follows; TZS 4,000,000 on 19/03/2020 TZS 3,300,000 on 19 /03/2020, TZS 945,500 on 10/3/2020, TZS 168, 102,200 on 23/03/2020, TZS 5,928,225 on 20/6/2020.

DW1 tendered in evidence invoices and delivery notes from Somochem which were admitted and marked as **exhibit D1** collectively. DW1 added that the defendant paid the plaintiff more than what she was entitled to



because the chemicals which were delivered are those whose invoices and delivery notes were endorsed by the defendant. Finally, DW1 urged the Court to dismiss the suit with costs.

During cross examination, DW1 firmly stated that the defendant does not owe the plaintiff. Further, he denied the delivery notes with no defendant's received stamp.

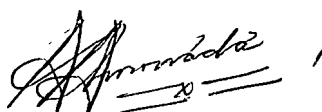
At the conclusion of hearing, parties were allowed to file final written submissions pursuant to rule 66(1) of the High Court (Commercial Division) Procedure Rules. I am grateful that both parties complied with the filing schedule. I have keenly read and considered the rival submissions.

The first issue is whether the plaintiff supplied the agreed amount of chemical compounds to the defendant as ordered and if not whether there was breach of the agreement between two parties. I am alive that the chemical supply agreement was in form of oral agreement. The agreement, even though was oral, it did not stop the parties to perform the contract as agreed. Under section 29 of the Sale of Goods Act, it was the duty of the parties for each to fulfill its obligation in accordance with the terms of the contract. It is unfortunate that the Court was never furnished with the exact amount and price agreed. The only evidence availed to the Court was that at the request of the defendant, the plaintiff

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would supply the chemical compounds and defendant would pay the purchase price of chemicals within 60 days from the date of delivery. In the circumstances of this agreement, the plaintiff was required to prove that she had fulfilled her obligations as agreed in the oral agreement by showing that she supplied the goods and the same were received by the defendant.

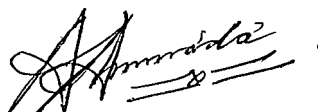
One would expect the plaintiff to bring forth the the evidence to prove that there was an order from defendant and the plaintiff acted on that order by supplying chemicals which were delivered to defendant. Nevertheless, for some obscure reasons, the plaintiff did not bring the local purchase order made by the defendant nor was the ledger account adduced in evidence. The plaintiff tendered sixteen invoices. However, of all the invoices, it is only seven invoices which bear the defendant's received stamps. Indeed, it was upon the plaintiff to prove on balance of probabilities that the alleged chemicals were delivered to the defendant. This could be proved through tendering of delivery notes and invoices with the defendant's endorsement (received stamp). The requirement for the plaintiff to prove its case on the required standard has been restated in several decisions including the case of **Engen Petroleum (T) Limited vs Tanganyika Investment Oil and Transport Limited, Civil Appeal No. 103, CAT at Dar es Salaam.**

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DW1 stated, at paragraph 13 of his witness statement that the plaintiff was paid for the chemicals which were supplied and delivered to her as indicated in the invoices and delivery notes. The plaintiff could not counter this evidence. In the event, based on the evidence presented, I am satisfied that the plaintiff was paid for the chemicals which were delivered to the defendant as evidenced in exhibit D1. As such, it is my findings that there was no breach of agreement.

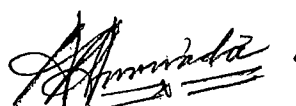
The 2nd issue is whether the defendant is indebted to the plaintiff and to what extent. The learned counsel for plaintiff had it that, plaintiff supplied chemical compounds on credit to the tune of TZS. 1,881,520,558.43 but defendant managed to pay TZS 1,734,937,048.81 hence TZS 146,583,509.62 remained unpaid. On the other hand, the defendant admitted to have received chemical compounds to the tune of TZS 37,828,440 as shown in exhibit D1 and disputed nine invoices together with delivery notes for the reason that they were unstamped and signed by an unknown person. According to defendant, there was no delivery in respect of unstamped invoices and delivery notes.

Before answering the second issue, I wish to state that, is trite law in our jurisdiction that under the provisions of section 110 of the Tanzania Evidence Act, whoever wishes the court to decide in his favour has burden

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of proof, on balance of probabilities, that what he alleges exists. The burden shifts only when he discharges that duty for the other party to rebut also on balance of probabilities. See the case of **Wolfgang Dourado vs Tito Da Costa, ZNZ, Civil Appeal No. 102, CAT - (unreported)**.

Now back to the case at hand. Having carefully considered the rivalling pleadings, evidence including exhibits tendered and final written submissions, I am inclined to find the second issue in the negative on the following reasons. One, the proof of the outstanding amount of of TZS 146,583,509.62 was based on exhibit P1, exhibit P2, exhibit P3, exhibit P4, Exhibit P5, exhibit P6, exhibit P7 and exhibit P8. However, upon a careful perusal of the exhibit P1, I have noted that, out of sixteen invoices and delivery notes, there are nine (9) invoices together with delivery notes which were unstamped and signed by unknown person. To crown it all, none of the plaintiff's witnesses explained to court why these invoices and delivery notes were not stamped. Much as these invoices and delivery notes were meant to prove the outstanding amount of TZS 146,583,509.62 which was strongly disputed by defendant, this Court was expecting the plaintiff to led evidence which would support or corroborate exhibit P1 to substantiate the fact that, defendant is indebted to plaintiff to the tune of TZS. 146,583,509.62. Unfortunately, all exhibits tendered



by plaintiff could not prove the plaintiff's claim. For example, exhibit P2 is debt confirmation which is not relevant to this case because it is dated 31st May, 2018 and refers to the transactions done in 2017. There is nowhere in the exhibit P2 the defendant is acknowledging the outstanding amount of TZS 146,583,509.62. In addition, exhibit P3 are bank statement showing payments made by the defendant. In fact, this exhibit P3 supports defendant's case that she was making payments. Likewise, exhibit P4, P5, P6, P7 and P8 do not provide any useful information to advance the plaintiff's case. One could expect the plaintiff to lead other corroborating evidence like local purchase order or ledger account to support exhibit P1 that the plaintiff supplied and delivered chemicals to the defendant worth TZS 146,583,509.62. Thus, in the absence of evidence proving delivery of chemicals in respect of nine invoices, it is my view that the claim was not proved.

Two, I have noted that there are discrepancies on the amount claimed by the plaintiff. Although the plaintiff states that she supplied chemical compounds on credit to the tune of TZS 1,881,520,558.43, my own summation of exhibit P1, gives me a total of TZS 245,945,154.75. This discrepancy was not cleared by the plaintiff. Worse enough the plaintiff did not state specifically which invoices specifically were not paid.



Since plaintiff was the one to prove her case on balance of probabilities that the defendant is indebted in the sum TZS 146,583,509.62, I completely agree with Mr. Almas, learned counsel for the defendant that the plaintiff has failed to prove its case to the required standard. I therefore hold that the defendant has no any pending liabilities to the plaintiff. That said and done, this issue is answered in negative.


As to what reliefs are parties entitled, I would hold that, based on the common principle that costs follow the event, the defendant is entitled to costs of this suit.

All the above considered and based on my findings hereinabove, this suit must be and is hereby dismissed with costs to the defendant.

It is so ordered.

Right of appeal is explained.




A.A. Mbagwa
JUDGE
08/09/2023