IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 43 OF 2023

TANZANIA LOCAL GOVERNMENT WORKERS UNION (TALGWU).....PLAINTIFF

VERSUS

CRISPIN RAPHAEL SANGA *T/A* SAVANA GENERAL MERCHANDISE .....DEFENDANT

AND

CRISPIN RAPHAEL SANGA *T/A* SAVANA GENERAL MERCHANDISE .....COUNTER CLAIMANT

VERSUS

TANZANIA LOCAL GOVERNMENT WORKERS UNION (TALGWU) .....COUNTER DEFENDANT

JUDGMENT

Feb 27th, 2024 & April 19th, 2024

Morris, J

The 2022 May Day celebrations were, allegedly, not jubilant and multicoloured to Tanzania Local Government Workers Union (TALGWU); no thanks to Mr. Crispin Raphael Sanga. It is claimed that Mr. Sanga failed to supply TALGWU with a requisite uniform for this august event as contracted. Armoured with such allegation, TALGWU sues him for breach of contract.

Nonetheless, the defendant-turn-counter claimant has a cross suit against the plaintiff for payment of the balance of the purchase price under the stated contract. The total sum involved in the contract is Tshs. 1,196,000,000. Whereas the plaintiff demands refund of Tshs. 700 million being part-payment thereof, the defendant (counter claimant) claims the balance of Tshs. 496 million. Other remedies sought are auxiliary to the two rivalry demands. However, each side denies the opposite party's allegations constituting the reliefs.

The history of this matter is easy to decrypt. On September 15th, 2021 the plaintiff floated Tender No. TALG/PROC/021/2021 for printing and supplying of 80,000 pairs of Polo T-shirts and Caps (exhibit P7). The defendant (counter claimant) emerged a successful bidder. Parties signed the main and addendum agreements (exhibit P1/D5) on February 4th, 2022 and March 29th, 2022 respectively. The total contract price stated above was payable to the seller in instalments. By May 5th, 2022; Tshs. 700 million had been paid to the defendant per the EFD receipt (exhibit P8) leaving the balance (debt) of Tshs. 496 million.

The defendant supplied the contracted quantity of T-shirts and caps to the plaintiff. Allegedly, however, the delivered goods did not conform with the covenanted quality, design, colour and size. Consequently, the plaintiff-counter defendant contended that the defendant-counter claimant breached the contract; and was, thus, liable to refund the amount paid to him. The latter, however, asserted that he fully performed his part of the covenants and was entitled to the outstanding balance of the purchase price.

In order to adjudicate the parties' rival claims, the Court framed five (5) issues listed below.

i) Whether the plaintiff and defendant had a contract for printing, supply and distribution of customized Polo T-shirts and caps.

ii) If the 1st issue is in the affirmative, whether the defendant breached the terms of the contract.

iii) If the 2nd issue is in the affirmative, whether the plaintiff suffered damages as a result.

iv) If the 2nd issue is in the negative, whether the defendant in the counter claim breached the contract due to the non-payment of

the balance of the agreed contractual sum to the plaintiff in the counter claim.

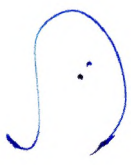
v) To what reliefs are parties entitled.

Parties to this case were represented. The plaintiff had advocate Odhiambo Kobas on his side. Messrs. George Mushumba, Omega Myeya and Ms. Hilda Msanya, learned advocates, teamed up acted for the defendant. The plaintiff paraded three witnesses while the defendant called and relied on testimonies of two witnesses. Emmanuel Egbert, Athumani Kayumba and Rashid Mtima testified as PW1, PW2 and PW3 respectively. Correspondingly, Crispin Sanga and Thugha Magambo appeared for the defence as DW1 and DW2. Further, all the witnesses had their respective statements lodged in and adopted by the Court as evidence in chief pursuant to rules 48, 49 and 50 of ***the High Court (Commercial Division) Procedure Rules***, 2012. In addition, all witnesses from both sides were subjected to cross and re-examination sessions per the law. Out of the subject sessions, the plaintiff tendered a total of twelve (12) exhibits; while the defence caused five (5) exhibits to be admitted in evidence. That is, exhibits P1-P12 and D1-D5

respectively. Herein, the Court refers to the relevant ones as it analyzes respective parties' evidence in due course.

Generally, each witness reiterated his avowals in the witness statement. They were also consistent during cross and re-examination sessions that own side of the case deserved to emerge the victor. PW1 (plaintiff's accountant) and PW2 (plaintiff's Tanga Region Secretary) and PW3 (Plaintiff's General Secretary) maintained, *inter alia*, that; the defendant was fully aware of the goods which the plaintiff required in specific quantity, quality and standards. They testified further that, such knowledge on his part notwithstanding, the defendant supplied goods which; upon the plaintiff's inspection, about 99% thereof was found to be way far against the agreed specifications in the contract.

Moreover, the *trio* stated that consequent to the foregoing non-compliance, the plaintiff returned the supplied cloths to the defendant for rectification of the apparent defects. It was testified further by the prosecution witnesses that the plaintiff's inspection of the goods was done at different locations across the country. Furthermore, both PW1 and PW3 stated that the plaintiff's inspection committee was formed and carried out



the inspection exercise at Kibada-Kigamboni. Further, according to PW1 the subject verification was done by the committee he chaired between July 28th, 2023 and September 14th, 2023 (paras 4 & 7 of his statement) in the presence of several people including the defendant. The findings were that, out of 80,000 T-shirts, only 808 were per the agreed specifications. Further, the entire lot of caps was defective.

Nevertheless, PW2 maintained that he received the consignment of 1,550 pieces of T-shirts and caps each from the defendant on April 22nd, 2022 (paragraph 3 of his statement) and that, the inspection/verification was done at Tanga on April 24th, 2022 (paragraph 4). PW2 also testified that the defendant collected the alleged defective T-shirts from him for rectification of errors on July 1st, 2022. In addition, all plaintiff's witnesses attested that the defendant's alleged breach of contract caused loss to the plaintiff; subjected him the substantial inconvenience; exposed him to great ridicule; and that his members threatened to deregister from the plaintiff-union. They also contended that the money paid to the defendant should be reimbursed to the plaintiff because the former breached the contract between parties.

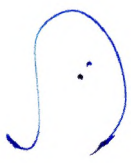
On the part of both defence and counter claim, DW1 (proprietor-defendant) acknowledged existence of contract between him and the plaintiff (exhibit P1/D5) under which he was required to print and deliver/distribute 80,000 customized Polo T-shirts and 80,000 caps. He further admitted being paid Tshs. 700m/= as part of contract price with which he managed to import the said goods from India and distribute the goods to specified destinations all over the country. Moreover, he stated that goods arrived in Dar es Salaam on April 16th, 2022 and were wholly delivered to the plaintiff's headquarters. Thereafter, the plaintiff inspected and approved them for onward distribution by the defendant to his regional offices effective April 19th, 2022 onwards. He also testified that despite supplying him with the defect-free goods, the plaintiff has unjustifiably withheld the outstanding contract price. He reiterated his entitlement to the outstanding consideration tune of Tshs. 496m/=.

DW1, as well, stated that so long as the plaintiff did not formally reject the goods upon satisfying himself of their genuineness and conformity with the agreed specifications; the outstanding sum should be paid to him together with auxiliary reliefs, as claimed. On his part, DW2 largely reiterated

DW1's testimony. However, he added that he personally participated in the delivery and distribution of the T-shirts and caps to the plaintiff's headquarters and later to the plaintiff's designated regional centres.

In addition to the testimonies above, on February 27th, 2024; parties secured the Court's leave to file respective written closing speeches. Nevertheless, whereas the defendant-counter claimant complied with the filing schedule, the plaintiff-counter defendant did not lodge his submissions. The Court, thus, refers to the solo submissions where necessary. Predictably, the subject submissions summarised strengths of own case and highlighted weaknesses in the opposite side's suit theory. Dispassionately, I have considered the parties evidence and the one-side submissions while resolving the framed issues. Each issue is determined below on the strength of evidence and supporting arguments.

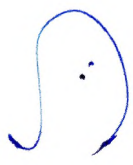
Under the **first issue**, the Court is moved to interrogate existence or otherwise, of the contract for printing, supplying and distributing customised Polo T-shirts and caps executed by the parties. In this regard, the basis of each party's assertions and/or arguments is bonded in the major and addendum agreements dated February 4th, 2022 and March 29th, 2022



respectively. The two agreements were collectively tendered and admitted as exhibit P1/D5. From the outset, the said agreements comprise of all attributes of a valid contract. That is, both meet the minimum legal threshold in this regard. Moreover, the parties to this suit are not at loggerheads in respect of concluding a binding contract between them.

The defendant-counter claimant submitted, in this connection, that parties do not dispute about existence of the contract between them. Further to that, it was argued that terms in both main and addendum contracts were not contested by the parties. Hence, to the defendant-counter claimant the first issue should be answered in the affirmative.

Going through the pleadings, evidence and submissions in this matter, one is left with no doubt that each party herein admits that the two litigants executed the contract under discussion. In fact, paragraphs 5, 7 and 8 of the plaint; paragraphs 1, 3 and 20 of the amended written statement of defence (WSD); and paragraph 1 of the reply to the WSD are categorical hereof. Indeed, parties mutually acknowledge that the contractual relationship between them was created by the two agreements which were signed on the stated respective dates. The entire evidence from both sides



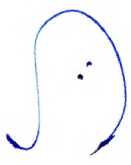
is equally endorsing such legal relationship. The submissions of the defendant-counter claimant re-echo the stated legal bond.

Without overemphasis, law makes it a specific principle that parties are bound by own pleadings. Reference is made to ***Salim Said Mtomekela v Mohamed Abdallah Mohamed***, CoA Civil Appeal No. 149 of 2019; ***Scan Tan Tour v The Catholic Diocese of Mbulu***, CoA Civil Appeal No. 78 of 2012; ***Lawrance Surumbu Tara v The Hon. Attorney General and 2 Others***, CoA Civil Appeal No. 56 of 2012; (all unreported); and ***James Funke Ngwagilo v Attorney General*** [2004] TLR 161.

Further, a close evaluation of exhibit P1, it is apparent that the same has all the attributes of a valid contract under section 10 of ***the Law of Contract Act***, Cap 345 R.E. 2019; and cases of ***Merali Hirji and Sons v General Tyre*** (E.A) Ltd [1983] TLR 175; and ***Humphrey Siliyo Pallangyo and Outdoor Expeditions Africa v Haruna Idd Mwiru***, HC Civil Appeal No. 3 of 2020 (unreported). Consequently, the first issue is answered positively. That is, the plaintiff and defendant executed the contract for printing, supplying and distributing customised Polo T-shirts and caps.

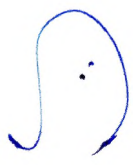
Having answered the first one in the affirmative, I now steer the Court towards determining the **second issue**. The current issue examines whether or not the defendant breached the terms of contract above. I will start with related aspects that are not in dispute. **One**, parties herein are at per that the subject matter of the contract was printing and distribution of 80,000 pairs of T-shirts and caps. **Two**, that the plaintiff paid to the defendant advance payment of Tshs. 700m/-. **Three**, the outstanding money for the latter stood at Tshs. 496m/-. **Four**, that the defendant supplied the plaintiff with customised 80,000 pieces of T-shirts and 80,000 pieces of caps. **Five**, that the defendant covenanted to deliver the said goods to the plaintiff's headquarters and regional offices.

The above undisputed facts notwithstanding, the parties herein are locking the horns over a couple of things including: the conformity of the supplied goods in terms of the contract specifications; reimbursability of the part-paid consideration to the plaintiff; and justification for payment or otherwise of the outstanding contract price. These *trio* aspects can be fully determined after resolving the kernel of the present issue – if or not the defendant breached the contract between parties herein.



Reading the relevant parts of the contract (exhibit P1/D5) to this issue; three critical duties for the defendant come to the fore. **First**, to supply the agreed T-shirts and caps per specifications in the tender document (clause 1). **Second**, to deliver the first batch of production to the plaintiff for inspection of the goods' conformity with the contracted specifications (clause 13). **Third**, on his costs, the defendant to deliver the goods to the plaintiff's General Secretary and regional offices (Arusha, Dar es Salaam, Mbeya, Dodoma and Mwanza) not later than April 20th, 2022 (clauses 9-10). Below, I analyze the defendant's performance of each of these duties.

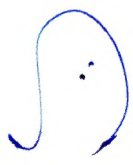
Manifestly, the gist of the first duty above is twofold: supplying the contract goods both in agreed quantity and observing the contractual specifications. This suit is hinged on the latter limb. That is, the plaintiff claims that the supplied goods did not conform with the specifications in the tender document and/or contract. Further, the plaintiff's evidence was consistent that the goods had various defects, namely; T-shirts not of agreed color, size and style; some with no pockets or round necks; not bearing embroidered logo or no logo at all; and some made of two different materials of dissimilar quality each. Unsurprisingly, the defendant contended that he



supplied plaintiff with goods that were in good order and condition; and which were in conformity with contractual terms. Further from him, are assertions and arguments that the goods were received, approved and retained by the plaintiff after satisfying himself with the contracted compliance(s).

From the foregoing rival contest, the Court should answer one apposite question: can the defendant be adjudged that he supplied T-shirts and caps which were in nonconformity with the contractual specifications? The answer, in my view, depends on conclusions of several other disputations. The contention hereof relates to goods' inspection; approval; time and specificity of rejection, if any; and retention or retrieval or repossession. I undertake to discuss the basic ones right away.

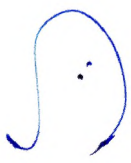
Firstly, the contract provided that the goods were to be subjected to the plaintiff's inspection upon delivery at his headquarters prior to being distributed to specified destinations across the country. Precisely, the defendant was required to deliver the first batch of production to the plaintiff for such inspection. However, DW1 testified (paragraph 14 of his statement and on being cross examined) that, the defendant "delivered the whole



consignment (80,000 T-shirts and 80,000 caps) to the plaintiff headquarters at Dar es Salaam which were received by their General Secretary Mr. RASHID M. MTIMA and waited for their inspection and approval..."

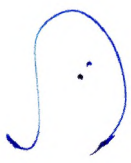
Indeed, the plaintiff does not allege breach of contract on the basis of the defendant's failure to deliver the subject batch for inspection. If anything, PW3 testified during cross and re-examination sessions that the plaintiff's team inspected the samples supplied by the defendant in April 2022. Nonetheless, in the absence of corresponding contentious pleadings, this aspect (inspecting the whole consignment or first batch) rests here. The overriding conclusion is that goods were inspected by the plaintiff upon arrival from India in April 2022. In the same vein, PW3 testified, on cross examination and thereafter, that the inspected goods (in April 2022) were in conformity with the contractual specification.

Secondly, the evidence led by the defence was that after inspection, the plaintiff gave the defendant a list of contact of Regional Secretaries (exhibit D2) for onward delivery of apportioned part of the cargo to such destinations. Moreover, according to PW2 and per the Delivery Notes (exhibit D4); T-shirts and caps were received at the plaintiff's regional centres



between April 22nd, and 24th, 2022. Up to that moment, the plaintiff had not instructed such centres to reject the goods for want of prior inspections. **Thirdly**, the plaintiff was well aware that the goods were being distributed to the regional centres by the defendant. No evidence was advanced to prove to the Court that such defendant's move was contested by the plaintiff howsoever. Nonetheless, PW3 confirmed further that, the plaintiff authorised the goods to be distributed to regional destinations because, so far, he had not seen any defects on the inspected goods prior to such distribution.

Fourthly, the plaintiff's evidence is that its General Secretary (PW3) instructed Regional Secretaries to inspect the T-shirts (for instance, see paragraphs 4 and 12 of PW2 and PW3's witness statements;). This undertaking (at regional centres) was not covenanted by the parties in the contract. Too, PW3 confirmed this position during cross examination. That is, parties did not contract to have inspections carried on upon delivery of the cargo to the regional destinations. **Fifthly**, delivery notes (exhibit D4) indicate that the goods were received at the plaintiff's regional centres in good conditions. Exactly, at the foot of each delivery note are the conspicuous words/phrase in bold ink: "received the above goods in good



order and condition". Immediately below such sentence, the names and signatures of recipients are hand-inscribed.

My investigation on a couple of related aspects is necessary here. The plaintiff did not lead evidence that the recipients or a section of them did not receive the goods; or if they did, they did not sign the respective delivery notes; or that the affixed acknowledgements are forged; and or if they signed, none of the recipients understood the language used or the connotation of what the recipients were ratifying, or both. To the contrary, PW2 testified to opposite extent. During cross examination by the opposite party and upon interrogation by the Court, PW2 boldly declared that he signed the respective delivery note at Tanga after receiving the intact consignment and goods in good condition. Furthermore, the plaintiff did not contest the admission of the same or cross examine on the subject phrase. In law, the respective content is deemed admitted by the party [***Emmanuel Saguda @Sulukuka & Another v R***, Crim. Appeal No. 422B of 2013; and ***Paulina Samson Ndawavya v Theresia Thomas Madaha***, Civ. Appeal No. 45 of 2017 (both unreported)].

Sixthly, there is plentiful evidence that the plaintiff commissioned inspection of goods (see, the Inspection/Verification Committee's Report, exhibit P3 and PW1 & PW3's statements). This purported exercise was carried out post-May Day (alias, *"Mei Mosi")* celebrations. Indeed, this was not the envisaged type of inspection in the contract. Pleadings and evidence have it in conclusion of the covenant that inspection was a precondition upon delivery of goods (first batch) at the plaintiff's headquarters not at regional centres and/or thereafter. The plaint (paragraph 10); the contracts-exhibit P1 (paragraph 13); witness statement of PW3 (paragraph 9); and witness statement of DW1 (paragraph 14) suffice to buttress my reasoning in this regard.

Seventhly and equally important, is the question - if the goods were timely and specifically rejected by the plaintiff. Herein, the goods were ostensibly rejected by the plaintiff on November 17th, 2022 vide Notice No. TALG/5/UGV/104/V.1/14 (paragraph 14 of the plaint and exhibit P10). However, another set of plaintiff's evidence suggests that the purported defective goods were handed back to the defendant for rectification in July 2022. The two steps (returning the goods for rectification and formal

rejection in November 2022), though strongly contested by the defendant, are also verified by testimonies of PW1-PW3. Working on the assumption that the subject steps were taken, there are serious flaws capping or obscuring the envisaged legitimacy thereof.

Vividly, the so-called return of goods and rejection were done about three (3) and seven (7) months after the defendant's delivery of the goods to the plaintiff respectively. On being asked by the Court regarding retention of the goods at Tanga, PW2 testified that he stayed with or retained the consignment for 80 days. In addition, PW3 confirmed that the plaintiff formally rejected the goods in November 2022 on the basis of the conclusive recommendations by the inspection team. More so and perhaps weirdly, PW1's testimony (paragraph 7 of his statement) is irrefutable that the goods were rejected almost a year earlier before being inspected or verified by the team. He asserts as follows:

> *"That on or about **14th September, 2023** we completed our Verification Report and submitted it to the General Secretary of the Plaintiff with **recommendation that he should not take delivery/accept delivery** of the T-shirts which were 99% defective and the caps which are 100% not conforming to the*

samples availed by the Defendant during bidding" (bolding rendered for emphasis).

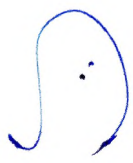
Furthermore, if I take it the finding that the plaintiff satisfactorily proved the defendant's repossession of the goods; the balance of justice still tilts against the interests of the former party. That is, after retaining the goods for so long (about 7 months), the plaintiff should be deemed to had accepted the goods. I am inspired by the wording of my learned brother, Honourable Mrema, J in ***Jackson Mussetti v Blue Star Service Station*** **[1997] TLR 114** that a party's conduct regarding the otherwise refusable goods may imply that he accepted the liability.

Eighthly, another crucial feature in this suit relates to retention or repossession of the subject goods by the plaintiff or the defendant respectively. The rivalry evidence of the parties in this regard point that each side denies having the alleged defective goods. Whereas the plaintiff asserts that the defendant repossessed them, the defendant contends that the goods were never collected by him from the destinations to which they were delivered. In determining this aspect, I am led by a few fundamentals. I will

state them. It is evident that the Court was not made to receive conclusive evidence of the defendant's repossession of goods from all the destinations to which he had supplied them.

Whereas, the defendant delivered the goods to such regional destinations by proof of uncontested delivery notes (exhibit D4); no similar and/or credible credentials were used by the plaintiff to prove that the supplier repossessed them back, if at all that step was taken. Nevertheless, the purported plaintiff's handing-over/delivery notes (exhibits P6 and P11) were not only contested by the defendant but none of them was signed by the defendant or his duly authorised or legal representative. For instance, for all names appearing therein, no matching power of attorney or deed of legal representation from the defendant was tendered to knit the transaction squarely together. More so, PW3 testified that none of such names appeared in the list of defendant's key personnel under the Tender Documents (exhibit P7).

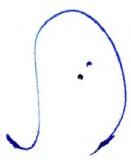
Further, no testimonies were made by officials from destinations other than Tanga to prove that the goods received by their respective zones were handed back to the defendant (personally or through his competent legal



representative). As Monday follows Sunday, it is now the established /clear principle/norm in our jurisdiction that a party's failure to call the material witness equals courting adverse inference from the adjudicator. This position was augmented in ***Hemedi Saidi v Mohamedi Mbilu*** [1984] TLR 113; and ***Simon Kamoga v SHANTA Mining Co. Limited***, High Court Labour Revision No. 08 of 2020 (unreported).

Moreover, exhibits P6 and P11 are documents that were received from four (4) stations out of about 32 centres to which the goods were delivered by the defendant in April 2022. By candid stretch of imagination, in the absence of evidence from 28 regional centres; the Court cannot justly find that the entire consignment supplied by the defendant to the plaintiff was returned to/repossessed by the defendant as portrayed by TALGWU.

Ninthly, further evidence by the plaintiff in this connection is that the defendant attended two meetings with the plaintiff in order to agree on the best way to remedy the alleged defects. Exhibit P9 (minutes) was tendered hereof to buttress the plaintiff's assertions that the defendant not only acknowledged the defects in the supplied goods but also, he repossessed them. On his part, DW1 testified denying all assertions in this regard. That



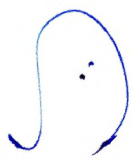
is, he denied causing to be convened and/or attending the purported meetings. Further, he denied receiving the complaints from the plaintiff about the alleged defects or committing himself to rectify such defects. Similarly, he denied being served with the notice of rejection of goods and/or termination of contract.

In my unflustered evaluation of the foregoing parties' rival claims, the line of defence by the defendant is more plausible than that of the plaintiff. For instance, it was testified by PW3 that the said meetings were convened at the instance of the defendant's oral (phone-call) request. Nonetheless, bizarre as it may sound for the defendant to cause the plaintiff's meeting(s) through a mere phone call; and the former to so convene without a formal notice or invitation letter to him; the plaintiff did not tender the phone call conversation printout or suitable document to establish such communication between parties hereof.

Moreover, the minutes of June 22nd, 2022 meeting were allegedly signed (and unilaterally dated) by the defendant three (3) months later – on September 21st, 2022. Under elementary and logical *modus operandi*, minutes of meetings are confirmed during the subsequent meeting or

another date upon authorisation of the very meeting for which the minutes relate on dictates of compelling circumstances. The philosophy for such position is forthright. Confirmation of minutes represents the official authentication by members of what really transpired in the previous meeting. Further, the confirmed minutes become official record upon members who attended subscribing thereto. Literally, each member therein cannot disassociate with them thereafter. Moreover, when signed by another person on behalf of the members who attended, authenticity thereof is determined on the basis of legality of authorisation. In the present case, however, it was not exhibited that confirmation was subject to either of the above requisites. That is, no evidence was led to prove that the parties held another meeting; or establish the date, place and circumstances under which the defendant certified the correctness of the so-called minutes, if at all he did.

Further, whereas it is indicated in the said June 2022 meeting's minutes [page 3, para 3(ii)] that, the plaintiff formed the inspection/verification committee which reported 834 item-pair (not 808 alleged elsewhere) of 80,000 pairs to be per the specifications in the contract; PW1 testified that he was appointed the chairperson of the subject



verification committee more than a year later: on July 19th, 2023 (paras 2 and 7 of his statement). Besides, the meetings supposedly resolved that the defendant was enjoined to write a letter reclaiming the defective goods for rectifications/repairs. Hence, the plaintiff tendered exhibit P12 in such connection. However, the said evidence is far from enriching his case theory.

To begin with, the purported letter (exhibit P12) is not addressed to the plaintiff or anyone for that matter. Further, apart from the plaintiff's stamp and signature affixed on the claimed author's logo section, no manifest proof that the same was meant to be received by/served upon the plaintiff. In this connection, PW3 also testified (during cross examination) that, he was unaware of the modality under which the said letter reached the plaintiff. In addition, the purported letter dated June 24th, 2022 is entitled "Intention to reclaim the T-shirts from TALGWU stations"; and the most relevant text therefrom reads as:

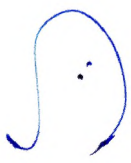
> *"We SAVANA GENERAL MERCHANDISE are **intending to collect** all T-shirts from your stores for the sake of doing rectification to the required standards as per clause 18.4 of general conditions of contract (GCC) stipulated in TALGWU*

tender document. ***Waiting*** *for your quick response"* (bolding rendered for emphasis).

Reasoning from the excerpt above, the defendant, if at all, indicated his intention to collect all T-shirts (not caps) from the plaintiff. But such signification was non-committal and/or inconclusive. It was subject to the plaintiff's sanction. That is, he sought authorisation of the plaintiff. In essence, that request signifies that the goods were out of the defendant's mandate; and could only be repossessed by him with necessary formal certification or permission of the former. Though PW3 stated that the plaintiff responded to the defendant's alleged letter, the Court was not privileged with the proof of the same. In other words, the plaintiff did not exhibit how he formally communicated his approval to the defendant for the latter to reclaim the subject goods. Likewise, the plaintiff's zonal offices allegedly handed back the goods to the defendant. But the plaintiff did not produce credential(s) which were shown/produced to those offices by the defendant's alleged representatives which proved that they were sanctioned by the plaintiff to repossess the goods.

Furthermore, the defendant objected to had been notified of the alleged defects or termination of contract. The plaintiff tendered the "*notisi ya kumaliza mgogoro wa kutowasilisha sare za Mei Mosi 2022 kwa mujibu wa mkataba*" (exhibit P10). The alleged notice of termination of contract was written on November 11th, 2022. However, the same is not showing the proof of service or when it was given to the defendant. During the cross-examination session, PW3 testified that before the purported November 2022 notice; the plaintiff had not served the defendant with any written default notice or formal/written complaint. Not even in April 2022 or soon thereafter, while the plaintiff claims that he discovered that the defendant supplied the wrong goods around that time. Hence, it is improbable or specious that the defendant endeavoured to rectify the alleged defects which had not been formally communicated to him, attending any of the supposed meetings inclusive.

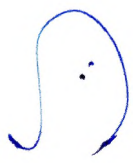
Tenthly, it was testified on behalf of the plaintiff that out of 80,000 T-shirts, 808 (elsewhere 834) pieces thereof were according to the contract specifications. However, the fate of the 808/834 T-shirts remains unclear (if they were also returned to the defendant or not; and if so, from which



plaintiff's station in particular or their respective numbers/quantity). Further, though some pieces of evidence from the plaintiff are to the effect that all caps (80,000 pieces) were not in conformity with the specifications [PW2-3 witness statements, their testimonies during cross examination and pages 4-5 of the report (exhibit P3)]; not a single cap (whether defective or specimen approved at tendering stage) was tendered or admitted in Court.

In addition, there is no corresponding averments in the plaintiff's pleadings as to the specific defects regarding the caps (as was the case for details regarding the T-shirts). The rational conclusion hereof is, thus, an orthodox one: unless the fact is expressly pleaded, the alleged defect regarding the caps never existed prior to the filing of this suit. That is, the caps were not manifestly contrary to the contract specifications for want of the supporting express pleadings. That is the acceptable principle. According to Order VI Rule 4 of ***the Civil Procedure Code***, Cap 33 R.E. 2019, necessary particulars should be disclosed in the appropriate pleadings.

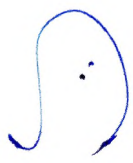
Perchance, let me expound the justifications for the foregoing principle. **One**, pleadings demarcate the existence and extent of disputes. **Two**, pleadings assist courts to gauge if they are seized with requisite



jurisdiction. **Three**, through pleadings, the courts draw issues for determination. Thus, contentions in the evidence and/or submissions cannot override the parties' pleadings. **Four**, pleadings are, per the law, supposed to be free of extraneous matters. That is, afterthoughts and inessentials that may be included in the evidence or submissions are weeded at the earliest. **Five**, pleadings lead to ascertainable evidence. It is not the other way round.

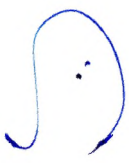
Eleventhly, according to section 32(3) of the ***Sale of Goods Act***, Cap 214 (*the Act*) the buyer retains the liberty to accept the goods which are in accordance with the contract and reject the rest, or he may reject the whole consignment where the seller delivers to him contracted goods that are mixed with goods of a different description. Footing the analysis on such basis, in the present matter, the plaintiff was under no obligation to retain 808/834 T-shirts or the whole of caps if the goods or section of them were contrary to the contract. However, as alluded to earlier, the series of evidence before the Court remain irresolute in respect of rejection of the goods by the plaintiff.

Twelfthly, in purview of sections 36 and 37 of **the Act**, acceptance of goods sold by the buyer is dependent on his reasonable



examination/inspection of the goods; his express intimation of acceptance of the goods; his acting in the manner which is inconsistent with the seller's ownership of the property; his overly retention of the goods without intimating rejection to the seller. Applying such litmus tests to the present matter, almost all elements therein are in the plaintiff's disfavour. I have elucidated above that the plaintiff inspected and verifies the goods in April 2022 and approved them for issue/distribution to upcountry section; and goods were in his custody for a long time without notice of defects to the defendant, to state the least. I thus subscribe to the submissions of Advocate Mushumba for the defendant - counter claimant that plaintiff accepted the goods under the law.

With the above explanation, evaluation, analysis and reasoning; hence, it would be a misplacement of the Court's legal scrutiny to determine the breach of contract by the defendant on such basis. In other words, the Court holds, as I hereby express, that the plaintiff inspected and verified the goods herein before distribution of the same upcountry by the defendant was approved; retained them even after discovering the alleged defects; did not or purported to repudiate subsequent to acceptance; and based his decision



to repudiate on a post-distribution inspection which was beyond the terms of the contract. The second issue, is thus, an obvious disaffirmation.

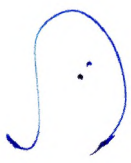
The **third issue** treads on the outcome of the previous issue. That is, now that the latter has been answered negatively, the current issue will not detain me for long. If the plaintiff suffered any damages, as asserted herein or otherwise, the same cannot be legitimately adjudged on the defendant involvement hereof howsoever. The third is accordingly determined. The plaintiff did not suffer damage because the defendant did not breach the contract between them.

In view of the position taken in resolving the second issue, I now set the Court to determine whether the defendant in the counter claim breached the contract due to the non-payment of the balance of the agreed contractual sum to the plaintiff in the counter claim. In so doing, the Court will determine the **fourth issue** herein. From the outset, having concluded that the defendant did not breach the contract between parties, the remaining issue relates to the defendant's counter claim. It is securely on record, the hefty and unequivocal evidence from both parties that to the present, the plaintiff has not paid the outstanding portion of the contract

purchase price. To avoid any doubt, for instance, on being cross examined; PW3 testified that the plaintiff has not paid the subject balance due to non-performance of contract by the defendant.

Now, therefore, the germane question remains to be; if the plaintiff is required to pay the balance of the purchase price. The answer is, in view of section 32 of ***the Act***, a straightforward one. The subject law mandates that accepted goods by the buyer must be paid for. Consequently, in line with the findings of the Court regarding the second issue, parties were required to honour respective terms of the contract. In other words, by failing to pay the defendant, the plaintiff is in contravention of clause 3 of the main contract as amended by clause 4 of the addendum agreement (exhibit P1).

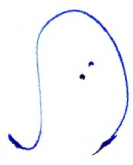
Aligning myself with the pronouncements in ***Simon Kichele v Aveline M. Kilawe***, Civ. App. No. 160 of 2018; and ***Joseph Mbwiliza v Kobwa Mohamed Lyeseelo Msukuma & Others***, Civ. App. No. 227 of 2019; ***Unilever Tanzania Ltd v Benedict Mkasa t/a Bema Enterprises***, Civ. App. No. 41 of 2009; and ***Philipo Joseph Lukonde v Faraja Ally Said***, Civ. App. No. 74 of 2019 (all unreported); I find it valuable to restate that parties to a contract remain bound by what is contained therein; and



that, written contractual terms cannot be superseded by subsequent oral agreements. The plaintiff is, consequently, adjudged that he breached the contract between parties by unjustly withholding the outstanding purchase price. On that point, I rest the Court's determination of the fourth issue.

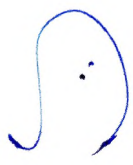
To conclude, the Court is left with the **fifth issue**, namely, the reliefs which parties are entitled to. Confidently, this one is highly dependent on the findings of the preceding issues. Clear from the findings above, are conclusions that the first and second issues were determined in the plaintiff's disfavour. Further, the last-but-one issue relate to establishment of rights and liabilities of parties in the counter claim. The Court has already adjudged it affirmatively in favour of the defendant-counter claimant. Definitely, the plaintiff's plight under the fourth issue has already been sounded. Technically put, the difference between 1,196,000,000/- total purchase price and Tshs. 700,000,000/- part payment by the plaintiff; is Tshs. 496,000,000/-. This balance is, thus, payable to the defendant-counter claimant.

The foregoing observation notwithstanding, both parties craved for more reliefs. For want of establishment of defendant's liability herein, as determined above; the remedies sought by the plaintiff will not be



considered under this issue. Nevertheless, the counter claimant's position is different in view of the Court's findings under the fourth issue. By way of recap, in addition to the dismissal order against the plaintiff's suit and claim for refund of Tshs. 496m/-; the defendant-counter claimant demanded the following: interest at 18% per annum with effect from April 23rd, 2023 to the date of judgement; court-rate interest of 12% per annum on decretal sum from the date of judgement to full settlement thereof; general damages; costs of the suit; and discretionary reliefs by the Court.

The Court will, briefly, determine the foregoing remedies. The first one is the 18% interest. I have gone through the entire documents by the defendant counter claimant to find the basis of this claim. Principally, apart from stating it in the pleadings and DW1's statement, the counter claimant did not give adequate details of how such interest is justifiably earnable. Primarily, law prescribes that claims for interest must be pleaded, particularised and proved for them to pass. See, for instance, ***National Insurance Corporation (T) Limited v China Civil Engineering Construction Corporation***, Civil Appeal No. 119 of 2004; ***Zanzibar Telecom Ltd v. Petrofuel Tanzania Ltd***, Civil Appeal No. 69 of 2014;



Alfred Fundi v. Geled Mango and Two Others, Civil Appeal No. 49 of 2017; and ***Ami Tanzania Limited v Prosper Joseph Msele***, Civ. App. No. 159 of 2020 (all unreported).

I am also cognisant of the principles laid down in cases like ***Yara Tanzania Limited v Ikuwo General Enterprises Limited***, Civil Appeal No.309 of 2019; and ***Amani Safari Adventure Limited v Petrofuel (T) Limited***, Civil Appeal No. 67 OF 2023 (both unreported) that, on the basis of mercantile practices, interest may be granted to the winning litigant even where he has not proved it specifically.

However, in this particular matter, the defendant counter claimant greatly contributed to the money herein remaining in the plaintiff counter defendant's hand. Despite tendering invoice no. 0283 of April 23rd 2022 (exhibit D3), the defendant-counter claimant has not proved the date on which the same was served upon the plaintiff counter defendant. That is, manifestly, there is no sign that the latter received it. For instance, it is not signed by the recipient nor stamped or sealed by the addressee. Henceforward, as the counter claimant is found to have contributed to his plight herein, the Court disallows this prayer. This disallowance

notwithstanding, the defendant counter claimant is entitled to 7% interest on the decretal sum from the date of this judgement to full payment.

In respect of general damages, from the outset, I retell the operating rule. Principally, such damages are awardable judiciously. Factors to consider before awarding the subject damages include: the directness of the defendant's wrong doing in causing the damages to the opposite party; consequences to the latter being the natural or probable result of the wrong complained of; whether or not, the defendant is the sole or particularly significant contributor to the established consequences; and the remarkableness of magnitude of the damages (see, ***Tanzania Saruji Corporation v African Marble Company Limited*** [2004] T.L.R 155).

Regarding the matter at hand, as it was the case for the claim of interest at 18%; the defendant-counter claimant, cannot avoid being blamed for what befell him. In line with findings of the Court that there is no weighty evidence to the effect that he actively pursued payment of the outstanding balance; the claim for general damages lacks the requisite axis. On such basis, I will deny such relief as I hereby do. Nevertheless, the defendant-counter claimant is awarded costs.

In the fine and for avoidance of doubt, on the one hand, the plaintiff's suit is dismissed for want of merit with costs; the counter claim is partly allowed to the extent explained above. Consequently, the defendant-counter claimant is granted the following reliefs: payment of Tshs. 496,000,000/- as outstanding purchase price; interest at 7% from the day of this judgment to full settlement of the decree; and costs of this matter.

It is so ordered. The right of appeal is explained to parties.

C.K.K. Morris

Judge

April 19th, 2024

Judgement delivered this 19th day of April 2024 in the presence of Advocates Lulu Mbinga for the plaintiff; and Omega Myeya and Hilda Msanya for the defendant.

C.K.K. Morris

Judge

April 19th, 2024