IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., LILA, J.A. And WAMBALI, J.A.)

CIVIL APPEAL NO. 69 OF 2014

ZANZIBAR TELECOM LTD..... APPELLANT

VERSUS

PETROFUEL TANZANIA LTD ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania (Commercial Division) at Dar es Salaam)

(Makaramba, J.)

Dated the 31st day of July, 2012

in

Commercial Case No. 139 of 2012

JUDGMENT OF THE COURT

6th November, 2018 & 11th February, 2019

MMILLA, J.A.:

This appeal arises from the judgment and decree of the High Court of Tanzania (Commercial Division) dated 31.7.2012 in Commercial Case No. 139 of 2012. In that case, Petrofuel Tanzania Ltd. (the respondent), sued Zanzibar Telecom Ltd. (the appellant), for payment of a sum of Tzs 133,306,579.00 on account of the outstanding invoices in respect of the diesel she supplied to the appellant's different identified stations, and Tzs 433, 844,159.00 being

accrued interest as at 31.12.2012. At the end, the trial High Court allowed the claim of Tzs 133,306,579.00, but dismissed that of Tzs 433, 844,159.00. This decision aggrieved both parties; while the appellant is contesting that there was no evidence before the trial High Court to support the claim of the outstanding sum of Tzs 133,306,579.00; the respondent has likewise filed a cross appeal challenging that that court ought to have allowed as well its claim of Tzs 433, 844,159.00 being accrued interest as it defended it.

The background facts of the case were clearly set out in the judgment of the trial High Court. Briefly revisited the facts were that; Zanzibar Telecom Ltd. and Petrofuel Tanzania Ltd. were local limited liability companies registered and carrying on business in Tanzania. Evidence was led in the trial High Court to establish that the business acquaintances between the two companies was sparked by an expression of intent contained in a document titled "Letter of Intent" (LoI) dated 19.3.2008. Through that letter, the appellant signified to buy from the respondent automotive gas oil (diesel) at the price which was indicated in the tabulation which was provided in clause 1 to that letter, that is Mean Plats at the end of proceding month + ($

0.02745/Ltr for 1 million Ltr and above, $ 0.03245/Ltr between 500k and 1 million, $ 0.03745 for less than 500k, plus Tzs 0.15 per km per litre as delivery charges). It was an express term of the agreement that payment for each consignment was to be made within two weeks (14 days) of receipt of invoice(s), further that the respondent was to forward the invoices twice a month. The appellant instructed the respondent *"to proceed with the execution of the said work in accordance with the contract documents."* The appellant added that in the meantime she was finalizing the contract and would notify the respondent when ready for signature.

On the basis of that stipulation, the respondent made various supplies to the appellant's designated locations in the country, to wit; Dar es Salaam, Coast, Mtwara, Lindi, Morogoro, Dodoma, Singida, Tabora, Kigoma, Shinyanga, Mwanza, Kagera, Mara, Manyara, Arusha, Kilimanjaro, Tanga, Iringa, Ruvuma, Mbeya and Rukwa. The respondent raised invoices correspondent to the supplies and the appellant accepted them. However, the latter made part payment but several other invoices dated between 26.3.2008, 2009 and 2010 amounting to Tzs 133,306,579/= remained outstanding. Though not

covered in the Letter of Intent, **the plaint** quipped that any delay in payment of the invoices was agreed to attract interest at the rate of 03%. Refusal to pay for the outstanding amount led to institution of that case in the High Court whose decision is, as aforesaid, the subject of this appeal and the cross appeal.

On the other hand, the appellant filed a written statement of defence in which she strongly disputed the respondent's claims. Though she admitted the existence of the Letter of Intent, a document which she said expressed an intention to enter into an agreement, the appellant was eloquent that there was no any formal contractual obligation for the respondent to supply her with automotive gas oil (diesel) as was alleged by the respondent. She similarly admitted that the respondent had supplied fuel to her for a period of six months, but that all the supplied fuel was paid for. She denied that there were any outstanding claims. Unfortunately however, she did not lead evidence in the High Court to challenge that which was given by the respondent's side.

The memorandum of appeal has raised four grounds as follows:-

1. That the learned trial judge erred in law and in fact in holding that the letter of intent was binding on the parties.
2. That the learned trial judge erred in law and in fact in granting judgment for the whole principal amount claimed in the plaint despite the absence of evidence and or proof of supply as per the letter of intent.
3. The learned High Court judge erred in law and in fact in granting the respondent the reliefs for the alleged undertaking which were made beyond the agreed period of supply of goods.
4. That the learned High Court judge erred generally in entering judgment for the respondent.

As already pointed out, the respondent too filed a cross appeal in which she likewise raised four grounds. In essence, those grounds boil down to a broad complaint that having found that the appellant defaulted in paying the principal sum, the trial High Court erred in law

and fact in failing to grant interest of 3% per month on the principal sum from the date the respondent defaulted to pay the outstanding amount, to the date of judgment (31.7.2014) as was pleaded in prayers (b) and (c) of the plaint.

On the date when this appeal was slated for hearing before us, Mr. Julius Kalolo Bundala, learned advocate, represented the appellant; whereas the respondent enjoyed the services of Dr. Masumbuko Roman Lamwai, learned advocate.

At the commencement of the hearing, Dr. Lamwai drew the attention of the Court to the point that the proceedings of the trial High Court were wrongly recorded in a point-form instead of a narrative-form as directed under Order XVIII rule 5 of the Civil Procedure Code Cap. 33 of the Revised Edition, 2002 (the CPC). He also asserted that the trial judge did not append his signature at the end of the evidence recorded as required by law. He submitted that those pitfalls constituted serious defects, rendering the record defective liable to be struck out. He urged the Court to strike out the record of appeal, but he did not press for costs.

On his part, Mr. Bundala submitted that the trial in the High Court (Commercial Division) is governed by the High Court (Commercial Division) Procedure Rules, and that some of the provisions of the CPC were rendered inapplicable, including Order XVIII rule 5 of that Code. He also submitted that a careful perusal of the Record of Appeal shows that the trial judge appended his signature at the end of the evidence he recorded. He asked the Court to proceed with the hearing of the appeal on merits.

After hearing counsel for the parties on those points, we convinced them to submit as well on the merits of the appeal so that if at the end we may find that the alert does not merit, we could be in the position to proceed with the determination of the appeal on merits. They unhesitatingly agreed.

On our part, we have deemed it convenient to firstly dispose of the matters raised by learned counsel Dr. Lamwai.

Our starting point concerning the above observation made by the counsel for parties was on the High Court (Commercial Division) Procedure Rules GN No. 250 of 13.7.2012 (the Commercial Division

Procedure Rules), particularly rule 2 thereof. **That rule stipulates that trial of cases in that court is governed by those Rules.** It is expressly provided under rule 2 (2) of those Rules that the fall back to the CPC is only in those circumstances where there may be a *lacuna* in those Rules.

Instructions on how the evidence is to be recorded in the High Court (Commercial Division) is covered under rule 59 thereof. Rule 59 (1) of the said Rules provide that:-

> *"59 :(1) An official record shall be made of every hearing and such record shall consist of the following:-*
>
> *(a) in a hearing where an electronic recording system approved and managed by the Court or any other person appointed by the Court is used, the audio recording; and*
>
> *(b) in a hearing where an electronic recording system is not used, the notes*

of hearing recorded is such manner as the Court may determine."

Since the Rules are instructive that the proceedings may be In such manner as that Court may determine where an electronic recording system is not used, it is a misconception to think that the proceedings are required to be recorded in a narrative form in terms of Order XVIII rule 5 of the CPC as submitted by Dr. Lamwai.

Apart from what we have just pointed out, we similarly have satisfied ourselves that the trial judge appended his signature at the end of his hand-written notes of evidence. We add that, even where it was to be said that he did not so append his signature, we could still decline to find fault on this aspect on account that it is the electronically recorded evidence which matters, and not the hand-written notes, therefore that in terms of the above cited rule, there is no requirement to append a signature under hand-recorded evidence.

We think it is opportune for us to point out in passing that the requirement to append a signature at the end of the proceedings conducted according to Order XVIII rule 5 of the CPC is primarily

intended to vouch authenticity and/or to provide safe-guards. As far as the safe-guard to the authenticity, correctness or otherwise of the proceedings under the High Court Commercial Division Rules is concerned, rule 60 of those Rules has enjoined parties to make verifications. That rule provides that:-

> *"60: (1) The Court shall, after the conclusion of the case and upon request of a party, produce an official transcript of the hearing to be provided to the parties simultaneously in soft copy at the parties' costs.*
>
> *(2) The parties shall proof read the transcript and make necessary corrections which shall be tracked or highlighted without altering the content of the proceedings.*
>
> *(3) The parties shall submit their corrected transcripts to the registrar and serve each other within a period of twenty-one days from receipt of the Registrar's transcript.*

(4) Where any dispute arises as to the correctness of the transcripts verified by the parties, the aggrieved party shall notify the Registrar within a period of seven (7) days from receipt of the corrected transcript.

(5) The Registrar shall upon receipt of notification under sub rule (4) or suo motu invite the parties to resolve any dispute by making reference to the official audio recording and his decision on such dispute shall be final.

(6) On receipt of the corrected transcripts from the parties; or upon resolving any dispute in terms of sub rule (4), or upon failure to comply with sub rules (3) and (4), the registrar shall certify the authenticity of a transcript of the official record of hearing."

In a nutshell, for reasons we have assigned, we find no fault in the proceedings of the trial High Court. This paves way for us to proceed with the determination of the appeal on merit.

In his submission on the merits of the appeal, Mr. Bundala discussed the four grounds they raised generally, so also the grounds in respect of the cross appeal. Dr. Lamwai followed suit. We hasten to say that we have no quarrel with that approach.

To begin with, Mr. Bundala contended that the High Court judge erred in law and in fact in holding that the Letter of Intent was binding on the parties. The thrust of his argument is that there was no any formal agreement signed by the parties, a fact which he said, was admitted by PW1, Satish Kumar. In the circumstances, he argued, the said document did not qualify to be a contract capable of binding the parties. At any rate, Mr. Bundala maintained, the stipulated time in the said Letter of Intent, if at all, was six months, supplies in respect of which the due amount was paid in full.

On another point in that regard, Mr. Bundala contended that even, the Letter of Intent was wrongly held to be an agreement and relied

upon because it was not stamped as envisaged by section 47 (1) of the Stamp Duty Act Cap. 189 of the Revised Edition, 2009 (the SDA). For that reason, he went on to submit, that document was bad evidence because it was wrongly admitted and relied upon. He relied on the cases of **Zakaria Bura v. Theresia M.J. Mubiru** [1995] T.L.R. 211 and **Joseph Lugaimukamu v. Father Kanuti** [1986] T.L.R. 69. Mr. Bundala concluded in this respect that if the evidence constituted in the Letter of Intent will be removed, and because that was the only vital evidence in the case, it becomes plain and certain that the respondent did not prove her case against the appellant on the required standard. This is particularly so when it is taken into account that there was nothing to establish that the names and signatures on the delivery notes were those of the appellant's officers. He urged the Court to allow this ground of appeal.

In the alternative, Mr. Bundala submitted that should the Court find and hold that the Letter of Intent was properly admitted and relied upon, it should find however, that the said document did not provide for interest, but provided for penalty. Reference was made to clause 4 of the said Letter of Intent. He added that looking

at the plaint which appears at pages 7 to 10 of the Record of Appeal, the respondent did not ask for penalty, instead she asked for interest which was, as aforesaid, not covered in the Letter of Intent, nor in any way proved. He relied on the case of **National Insurance Corporation (T) Limited & Another v. China Engineering Construction Corporation**, Civil Appeal No. 11 of 2004, CAT (unreported). He held the view that since the respondent asked for interest which was not contemplated by the parties, the trial High Court was justified in declining to grant that relief in the circumstances of this case. On the basis of these arguments, Mr. Bundala prayed for the appeal to be allowed, and the cross-appeal to be dismissed; both with costs.

On his part, Dr. Lamwai submitted that there was a valid contract between the appellant and the respondent; firstly in terms of the Letter of Intent, and secondly basing on the conduct of parties. He added that the trial High Court's decision was based similarly on the only evidence it received from PW1 Satish Kumar, whom it found to be a credible witness. That witness, he went on to submit, tendered in Court a heap of invoices, all of which established that diesel was

supplied and received, but unpaid for. He contended therefore that the assertion that there was no evidence to prove the claim is misleading.

As regards the query that the Letter of Intent was not stamped, therefore that it was wrongly received as evidence, Dr. Lamwai argued that stamp duty is payable in respect of the documents specified under that Act, and that the Letter of Intent did not fall under the category of documents envisaged by the SDA in so far as that document (Exh. P1) was titled "A Letter of Intent". He added that the said document comprised of instructions given to the respondent by the appellant to supply the fuel, and that the respondent performed according to instructions. He also contended that in consideration, the appellant effected payment in respect of some of the invoices. In such a state of things, Dr. Lamwai charged, there was a binding contract between the parties.

Dr. Lamwai emphasized as well that the appellant's contention that there was no evidence to establish that the respondent supplied the said diesel to the appellant is baseless because the appellant's employees signed those invoices. At any rate, he went on to submit,

the appellant ought to have led evidence to contradict the respondent's claim that she supplied the diesel to them, something which she did not. Besides, he said, the fact that the appellant paid for some of the invoices constituted sufficient evidence that they were supplied the said diesel.

Dr. Lamwai submitted likewise that the general denials made by the appellant in paragraph 5 of the written statement of defence translate into admissions. He added that at any rate, going by what the trial judge said at page 478 of the Record of Appeal, several pieces of evidence was considered and held to establish that there was a binding contract between the parties.

On the other hand, while appreciating that the trial High Court granted the respondent interest at the rate of 7% per annum on the principal amount from the date of judgment onwards, Dr. Lamwai submitted nevertheless that his client was wrongly denied interest at the rate of 3% on that amount from 26.3.2008 when she defaulted payment as was prayed in paragraph 12 (b) of the plaint, bringing the total to Tzs 433,844,159.00. It was submitted that that claim was either on the basis of the agreement of the parties or the prevailing

commercial rate. The Court was referred to the case of **Tanzania Saruji Corporation v. African Marble Company Ltd**, Civil Appeal No. 5 of 1997, CAT (unreported). We were urged to allow the cross appeal on the basis of the grounds they raised.

After carefully going through the competing submissions of counsel for the parties, we desire, as earlier on hinted, to follow the approach they adopted of discussing those grounds generally. The focus however, will be to see to it that at the end, all the grounds of appeal raised are perfectly answered.

There is no serious controversy, and the parties are agreed, that their business relationship in this matter was triggered by the Letter of Intent (Exht. P1). The only dispute is on whether or not that document constituted an agreement.

Under our law, all agreements are contracts if they are made by free consent of the parties who are competent to contract, for a lawful consideration and with a lawful object and are not on the verge of being declared void. That is the essence of section 10 of the Law of Contract Act, Cap. 345 of the Revised Edition, 2002 (the Contract Act).

It is crucial to point out however, that contracts begin by an expression of a proposal/offer, and that in terms of section 7 of the Contract Act; for such a proposal by the offeror to become a binding promise it must be absolutely accepted by the offeree. Under section 8 of the said Act, **performance** is amongst the modes of acceptance.

As already pointed out, Mr. Bundala contends that the Letter of Intent was not a binding contract in that there was no any formal agreement signed by the parties. He asserts that PW1 Satish Kumar admitted this point. Surely, Mr. Bundala is partly right, but we have some reservations on this general assertion for reasons which will unfold in the course.

While we agree with Mr. Bundala that the Letter of Intent was not signed by the parties to qualify to be a contact in itself, we nonetheless hurry to point out that that document was central in this matter because the subject transactions which transpired between the parties were based on it. While referring to the respondent's proposal dated 14.2.2008 (it was not availed), the Letter of Intent **(Ref: FUEL/LOI/18/03/08 of 19.3.2008)** which came from Noel Herity who was the Chief Executive Officer of the appellant company, bore

fundamental instructions to the respondent. Part of that document read as follows:-

"Dear Sir,

FUEL SUPPLY AND DELIVERY TO ZANTEL SITES IN THE COUNTRY

Subject: Letter of Intent (LoI)

This is to notify you that your proposal dated 14th February, 2008 for supply and delivery of fuel to Zantel Cell sites in the country has been accepted as per the terms given below. . ."

In the last but one paragraph of that document, the appellant instructed the respondent **to proceed with the execution of the said work in accordance with the contract documents**, and the former signified that she was finalizing the contract, and promised to notify the respondent when ready. Unfortunately, the appellant did not keep the promise and no contract was offered to the respondent for signing. Therefore, because the Letter of Intent was not signed by the parties, it is obvious that by itself it did not qualify, taken alone, as a

contract. The truth remains however, that the terms contained in it were the basis for the transactions which were carried out between them, therefore that in a way, it formed part of the agreement. We will illustrate.

Before we may offer the illustration however, we desire to point out that having said the Letter of Intent did not in itself qualify to be a contract, therefore that it could not stand alone as evidence, it means it did not fall under the documents required to be stamped as envisaged by section 47 (1) of the SDA. That section instructs that no instrument chargeable with duty shall be admitted in evidence unless such instrument is duly stamped, except under conditions stipulated in clauses (a) to (e) thereof – See also the cases of **Zakaria Bura v. Theresia M.J. Mubiru** and **Joseph Lugaimukamu v. Father Kanuti** (supra).

Notwithstanding what we have just said however, we observe that despite the fact that the Letter of Intent was not a contract by itself; it nonetheless formed part of a series of factors which, when viewed together with the instructions in that document and the conduct of the parties, leave no doubt that together they comprised of

the offer, acceptance, performance and consideration. Those factors include supply of diesel and issuance of receipts by the respondent to the appellant, and acceptance by the latter of the said fuel and effecting part payment to the former as reflected in paragraph 6 of the written statement of defence. In our assessment, that translated into a binding contract between them - See the recent English case of **Reveille Independent LLC v. Anotech International (UK) Ltd.** [2015] EWHC (Comm.) in which the High Court (Commercial Division) in that jurisdiction was faced with a situation similar to this.

The facts in **Reveille Independent** (supra) were briefly that the claimant, a US-based television company, had entered into a "deal memorandum" with the defendant cookware distributor, pursuant to which the former was to licence to the latter certain intellectual property rights pertaining primarily to the Master-Chef US brand, and promote the defendant's products in its television series. It was expressed in the "deal memorandum" that that understanding was not binding until signed by both parties, also that it was intended to be replaced by a long form agreement which in fact, was never concluded because negotiations broke down. When the matter was in court, the

defendant claimed that it was not bound by the terms of the "deal memorandum" because they did not sign that document, therefore that the terms therein were not accepted.

The question for consideration by the court was whether the claimant's conduct was sufficient to amount to waiver of requirement for signature, and **whether acceptance by conduct had occurred.**

At the end of its deliberations, that court ruled that even where a contract clearly contains completion formality requirements, **the conduct of the parties amounted to a waiver of those requirements, and that it constituted acceptance.** We are convinced that this is a sound principle, which we according approve.

In the present case, going by the evidence of PW1 Satish Kumar, upon being given instructions through the Letter of Intent, the respondent went ahead to supply the diesel to the appellant's designated locations already mentioned herein. Also, the appellant had signified that she was finalizing the contract, and promised to notify the respondent when ready. As already pointed out, that promise was not fulfilled. Nevertheless, on making the supply the respondent

company would prepare invoices and send them to the appellant. Evidence was advanced by the respondent to show that the appellant received the product, and some of the invoices were paid for. In our firm stand therefore, that conduct constituted sufficient acceptance as strongly argued by Dr. Lamwai, hence that there was a binding contract capable of being enforced.

We have similarly considered the contention by Mr. Bundala that the appellant paid for all the fuel which was supplied to them which was limited to the period of six months as stipulated in the Letter of Intent, and that there was no evidence to prove the respondent's outstanding claims. With great respect to the learned advocate, we do not agree with him.

We have carefully considered the evidence constituted in the annextures to the plaint and the testimony of PW1. That evidence includes a pile of invoices which were tendered before the trial High Court. Those Invoices were served to and received by the employees of the appellant company, and were the subject of the outstanding claims. Unfortunately, the appellant company did not line up witnesses to contradict/disprove the evidence against them, thus leaving the trial

High Court with no better option but to rely on the evidence of PW1 which it had. In the circumstances, the learned trial judge was justified to find that the respondent's evidence proved that an amount of Tzs 133,306,579/= remained outstanding from the several other invoices dated between 26.3.2008, 2009 and 2010. We are further satisfied that since the appellant's servants continued to receive the supplies after the first six months, and considering the conduct of the parties generally as earlier on pointed out, it is baseless to complain that the trial judge improperly granted the relief in respect of the undertakings which were made beyond the allegedly agreed period of supply of goods. In the circumstances, grounds 1, 2, 3 and 4 lack merit and are dismissed.

We now come to the aspect touching on the question of interest, which is indeed the major concern of the grounds in the cross appeal. In this regard, we need to look at the contents of the Letter of Intent, a document in which important terms were specified, as well as the plaint itself.

We have scrutinized the Letter of Intent with a view of satisfying ourselves on whether or not the aspect of interest was contemplated

therein. We are satisfied that the said document (Exhibit P1) did not envisage the aspect of interest, but it considered the issue of penalty. We are also satisfied that interest and penalty are two different things. Interest refers to **money paid in addition to loaned money or upon delay to effect payment**; while penalty entails a sum **specified in a contract as payable on its breach** but not constituting a genuine estimate of the likely loss. Also, we have found that interest was not pleaded in the plaint, nor was it proved.

We would like to emphasize at this stage that as a matter of substantive law, the court cannot grant interest in a case where such interest was not pleaded and proved – See the case of **National Insurance Corporation (T) Limited & Another v. China Engineering Construction Corporation** (supra). In that case the Court observed that:-

> *"Upon scrutiny of the pleadings in their totality, we would agree with Mr. Mbamba that the claim for interest in controversy . . . was not particularized in the body of the plaint. The pleadings did not contain any material facts on which the respondent relied*

upon for claiming that interest as a relief. Moreover . . . the foundation on which the claim for interest ought to have stood was also not laid down in the pleadings. Mere reference to it in the Demand Note . . . could not have validly constituted the basis on which it was claimable in law . . .

When a precise amount of a particular item has become clear before trial, either because it has already occurred or so become crystalized or because it can be measured with complete accuracy, ***this exact loss must be pleaded as special damages.***"

See also the case of **Kombo Hamis Hassan v. Paraskeyoulous Angelo**, Civil Appeal No. 14 of 2008, CAT (unreported).

In the present appeal, apart from the fact that the Letter of Intent did not envisage the aspect of interest, it is clear from the plaint appearing at pages 7 to 10 of the Record of Appeal that this fact was not pleaded, but was merely mentioned in passing in paragraph 3 of

the plaint as being amongst the reliefs sought. We are firm that it was improper to bring such a claim in the nature of a sought relief in paragraph 12 (b) of the plaint.

We also hasten to point out that the case of **Tanzania Saruji Corporation** (supra), in terms of which the respondent's advocate submitted that the trial High Court ought to have granted the sought interest on the ground that it was **sort of special damages,** does not bail out their client because as already pointed out there was nothing in the plaint to show that special damages were specifically claimed and strictly proved. This is so because such damages are such as the law will infer from the nature of the act and do not follow in the ordinary course of things, but are exceptional in character – See the case of **Registrar of Buildings v. Bwogi** [1986 – 1989] E.A. 487 (CAT) and **Stroms Bruks Aktie Bolag v. John and Peter Hutchingson** [1905] AC 515.

For reasons we have assigned, the trial High Court was justified in disallowing that relief. We therefore find no merit in all the four grounds in the cross appeal. Thus, the cross appeal is dismissed.

Since both the appeal and the cross appeal are dismissed, we order that each party bears own costs before the Court.

Order accordingly.

DATED at **DAR ES SALAAM** this 6th day of February, 2019.

B. M. MMILLA
JUSTICE OF APPEAL

S. A. LILA
JUSTICE OF APPEAL

F. L. K. WAMBALI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

B.A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL