IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MKUYE, J.A., KENTE, J.A. And KIHWELO, J.A.)

CIVIL APPEAL NO. 134 OF 2019

SERENGETI BREWERIES LIMITED..... APPELLANT

VERSUS

BREAKPOINT OUTDOOR CATERERS LIMITED ..... RESPONDENT

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

(Sehel, J.)

dated the 5th day of March, 2019
in
Commercial Case No. 132 of 2014

JUDGMENT OF THE COURT

23rd September, 2022 & 7th February, 2023

KENTE, J.A.:

Locking horns in this appeal are Serengeti Breweries Limited, the appellant, and Breakpoint Outdoor Caterers Limited, the respondent. As can be gleaned from the record of appeal, for about ten years, the two companies have been constantly at each other's throats litigating in respect of a dispute over an alleged breach of contract and non-payment by the respondent of an outstanding balance of TZS.1,085,532,232.30 allegedly being the purchase price for the goods (beers and spirits) supplied by the appellant and received by the respondent.

The primary issue in this appeal which emanates from the decision of the Commercial Division of the High court (the trial court) in Commercial Case No. 132 of 2014 dismissing the claim by the appellant against the respondent, is whether the trial court was correct in finding that the respondent, was neither in breach of a contract between her and the appellant nor indebted to the appellant.

The facts giving rise to this appeal as found by the trial court were briefly that, between 2012-2013 the appellant had a contract with the respondent to supply it with beers and spirits on what was termed as *"transactions on empty beer crates".* However, as we shall hereinafter demonstrate, their journey ahead was not without bumps and potholes. After a series of peaceful sale transactions, the appellant felt aggrieved by the respondent's mode of performance of its contractual obligations. Specifically, after conducting reconciliation, the appellant could not get her math right. She claimed that, she had established a financial haemorrhage with the transactions and that the culprit was none other than the respondent. She accordingly instituted a claim against her in the trial court seeking the following substantive reliefs and orders:

> *1. A declaration that the defendant (respondent) was in breach of the contractual terms, as set*

out in the general conditions of sale between the two parties;

2. *Payment of TZS.1,085,523,232.30;*
3. *Interest the commercial rate (25%) from the date when the debt became due to the date of judgment;*
4. *Interest on the decretal amount from the date of judgment to the date of payment in full satisfaction of the decree; and*
5. *General damages for breach of contract.*

In her defence, the respondent denied the claim by the appellant and further pleaded that she was neither in breach of any of the contractual terms nor indebted to the appellant to the tune above mentioned nor to any other amount. She also raised a counter-claim totaling to TZS.439,072,966.69 allegedly being the amount of money overpaid to the appellant in the course of executing their contractual obligations.

After hearing the parties, the trial judge in the High Court did not find any merit in the appellant's claim which she consequently dismissed. The respondent's counter claim was likewise dismissed for want of merit. Specifically, the trial judge was of the view and she accordingly held that, there was no evidence to establish that the respondent was indebted to

the appellant or that the respondent had made any overpayment as to be entitled to any monetary refund from the appellant.

Dissatisfied, the appellant is now challenging the decision by the learned trial judge raising the following grounds:

1. *That the trial court erred in fact and in law in not finding that exhibits P4 and P5 which were undisputed proved the debt in issue or some part hereof;*
2. *That the trial court erred both in fact and in law in not finding that exhibit P3 the contents of which were admitted by the respondent had proved the respondent's indebtedness;*
3. *That the trial court erred in fact and in law by failing to consider the evidence on record that was tendered by the parties and duly admitted by the court;*
4. *That the trial court erred in fact and in law in holding that the postdated cheques (exhibit D1, D2, D3 and D4) had proved payments allegedly made by the respondent to the appellant;*
5. *That the trial court erred in fact and in law by wrongly analyzing the evidence before it, specifically disregarding exhibit P6 that showed all payments and reversals of telegraphic transfers made by the respondent;*

6. *That the trial court erred both in fact and in law by deciding that the appellant had failed to establish existence of a debt amounting to TZS.1,085,532,232.30 by providing specific invoices, load control sheets and dispatch notices while the same were tendered as exhibit P4 and P5 read together with the summary contained in exhibit P4 that showed the volume of the products, the type of the product ordered, priced amount and the date of supply.*

Moreover, immediately before commencement of hearing of the appeal, Ms. Elizabeth Mlemeta learned counsel who appeared along with her learned brother Mr. Reuben Robert to represent the appellant, prayed in terms of rule 113 (1) of the Tanzania Court of Appeal Rules, 2009 (hereinafter the Rules) to argue an additional ground of appeal challenging the trial court for directing PW1 and counsel for the appellant to change the modality of tendering the sales invoices, goods received notes, delivery notes or dispatch notes that were subsequently admitted in evidence as exhibit P4 and P5.

On the basis of the foregoing grounds, the appellant prayed that, the appeal be allowed and the proceedings and decision of the trial court be nullified. Instead, seemingly confident of her client's win before the

trial court, and according to her, in order to bring sanity to the whole process, the appellant's counsel implored us to remit the case to the trial court for retrial, ostensibly to give the appellant a second chance.

As stated earlier, at the hearing of the appeal, whereas the appellant was represented by advocates Elizabeth Mlemeta and Reuben Robert, Mr. Mafuru Mafuru learned advocate appeared for the respondent. Both counsel had earlier on filed written submissions in terms of rule 106 (1) and (7) of the Rules which they respectively adopted and orally highlighted before the Court on the hearing day.

However, in view of what we have identified as the central question upon which the final outcome of this appeal seems to depend, we will not canvass each of the grounds of appeal raised by the appellant. For, it appears to us, as it were before the trial court that, the issues in this appeal are essentially defined by the following two pertinent questions: What were the terms of the contract between the appellant and respondent, and, whether the respondent was in breach of any of the said terms as to be indebted to the appellant? Certainly, the answers to the grounds of complaint raised by the appellant in this appeal would flow from the answers to the above-posed questions. This being a first appeal in which we are not precluded from re-evaluating the evidence and

making our own findings, our ultimate aim is to determine, on the basis of the evidence on record, whether the respondent is truly indebted to the appellant either to the tune of TZS.1,085,532,232.30 as alleged or to any extent. To answer the above-posed question, we start with the terms and conditions of the contract between the appellant and respondent and the modalities of its performance.

It was common grounds during the trial that, the appellant used to supply beers and spirits to the respondent by deferred payment. In view of what will soon become apparent, we might also say that, the contract between the appellant and respondent was a sales contract outlining the terms of the transactions between them with the view to ensuring that each transaction went smoothly. With regard to the mode of payment, the appellant's document titled "General Conditions of Sale" (Exhibit P1) appears to be startlingly silent. It only stipulates specifically and respectively under clause 3.1 and 3.2 that, payment shall be by way of such method as the appellant (seller) may specify from time to time and that, time shall be of the essence in respect of all payments due by the customer (respondent). **Nolens volens**, the silence of the appellant's general conditions of sale necessitates the making of a brief statement on how each sale transaction was carried out to its completion.

Whenever the respondent wanted to purchase any amount of beers and spirits from the appellant, he would start by placing an order for the required amount. According to the arrangement between the two parties, the respondent would thereafter write a postdated cheque in favour of the appellant to cater for security of payment for the requested beers and spirits. Upon receipt of the postdated cheque, the appellant would then deliver the requested goods to the respondent and proceed to invoice her accordingly. On being supplied with the goods, the respondent had to sign a delivery note as proof of receipt. Furthermore, after being invoiced and, in order to make sure that the payment and invoice amount matched, the respondent would make payment of the amount reflected on the invoice by way of telegraphic transfer. For its part, after the telegraphic transfer was cleared, the appellant would return the postdated cheque to the respondent to mark the end of the transaction. Thus far is axiomatic and there is no dispute.

The gist of the contention by the appellant's counsel is that, the decision by the trial court was erroneous because it was contrary to the evidence showing that, indeed the respondent was indebted to the appellant to the tune of TZS.1,085,532,232.30. In support of this claim Ms. Mlemeta relied mainly on the delivery notes, the sales invoices and

load control sheets (Exh. P4 and P5) which she said were the basis of establishing the appellant's claim. Elaborating, the learned counsel had a toilsome moment contending but without lucidity that, if the allegedly ignored exhibits had been factored in during evaluation of the evidence by the trial judge, her client might have won the case.

Mr. Mafuru for the respondent on the other hand, supported the decision of the trial court as the correct determination of the dispute between the parties, in view of the evidence on the record. The main plank of his argument was, as it were before the trial court that, it was upon the appellant to prove that it was still in possession of some of the postdated cheques issued by the respondent and that, to achieve this, the appellant was saddled with a duty to tender the said cheques as exhibit. Had these documents been tendered and admitted in evidence, Mr. Mafuru strenuously argued, then one would have said with some degree of certitude that, indeed the respondent is indebted to the appellant. Otherwise, according to Mr. Mafuru, in the absence of such crucial evidence, the appellant's claim appears to be founded on evidential quicksand. The learned counsel accordingly prayed that the appeal be dismissed with costs for lack of merit.

For our part, before everything, it is our duty to be categorical and observe at this juncture that, in determining this appeal, we shall not lose sight of first and foremost, the fact that, for every sale transaction between the appellant and respondent, payment was secured by the respondent's issuance of a postdated cheque which remained under the appellant's custody and was only returnable to the respondent after payment which was evidenced by clearance of the telegraphic transfer. In other words, as correctly submitted by Mr. Mafuru, in order to prove its claim, it was incumbent upon the appellant to lead evidence showing that, as proof of the respondent's indebtedness, she was still in possession of some of the postdated cheques issued by the respondent. But if, to the contrary, the appellant had returned all the postdated cheques to the respondent as it seems to be the case, thus demonstrating that she was paid whatever was due to her, she can not be heard today to raise a novel claim in the circumstances when even the time-frame to raise such a claim may be said to have lapsed.

Dealing with the appellant's evidence of which she could not be convinced, the learned trial judge reasoned thus:

> *"Further exhibit P6 a computer print out generated by the plaintiff is not cogent evidence to establish*

the claim. I am alive that the plaintiff through exhibit P6 is trying to show payments made by the defendant and reversals of payments and it is relying on this document to prove that the defendant made a total payment of Tshs.5,806,429,020.20. For the plaintiff to prove that the defendant paid the alleged amount of Tshs.5,806,429.020.20, the plaintiff ought to bring either a bank statement showing the crediting and debiting of the defendant's account leading the defendant to be in debt or some more other cogent evidence in terms of ***postdated cheques placed as security;*** *the date the telegraphic transfer was made and the amount cleared or uncleared which has to be shown in the bank statement.* ***It is not enough to show the total amount paid by the defendant through self-made computer generated documents by making comparison between the total payments made with the reversals."***

[Emphasis added)

It behooves us to emphasize here that, we find neither rational argument nor evidence on the record which we can use to find fault with the learned trial judge's reasoning to which we respectfully subscribe.

In short therefore, like the trial judge, and as opposed to Ms. Mlemeta's submissions, we are confidently of the view that, the postdated cheques were of much evidential importance than the bundle of sales invoices, delivery notes and load control sheets which were generated by the appellant from its own computer systems sometimes after the sale transactions were completed and the parties having called it a day. It is also important to note here that, we have ignored the submissions made by counsel for the appellant regarding the trial judge's direction on the modality of tendering the sales invoices, the goods received notes and the delivery notes which were eventually admitted as exhibit P4 and P5. We have done so advisedly and not because of disrespect to the learned counsel but rather because, as amply demonstrated, the said documents could not have advanced the appellant's case any further. In contrast to the impactful postdated cheques, the above-mentioned documents were ineffective in this respect and therefore too inconsequential to mar the respondent's case which is otherwise well-grounded.

Because of the appellant's failure to bridge the yawning chasm between her claim and the evidence on record, we are unable to fault the learned trial judge. Having reviewed the evidence and in view of what we have already stated, we think on the whole that, there is no merit in the

appellant's case and therefore we have no convincing reason to differ with the trial court. As we have shown, the appellant had not even a single postdated cheque in her possession issued by the respondent as would have created the impression that indeed the respondent is still indebted to her. The documents she used to prove her claim were, to say the least, questionable, in so far as they were generated by her from her own computer systems long after the sale transactions were accomplished and without involving the respondent.

Going forward, it is noteworthy to observe here that, by questioning the authenticity of the appellant's evidence, we are not sailing in unchartered waters. A similar reservation was expressed by the learned trial judge (on page 224 of the typewritten judgment) where she observed that, the total value of the outstanding amount as shown on exhibits P4 and P5 was more than the claimed amount. Once again, as we are nearing the end of this judgment, we must admittedly state that, we have no convincing reason to differ with the trial judge regarding her grave misgivings about the genuiness of the appellant's documentary evidence. Indeed, they are questionable in the highest degree.

All said and done, we are satisfied that, in view of the evidence on the record, the learned trial judge made the right decision. The

respondent was neither in breach of the contract between her and the appellant nor indebted at all to the appellant. Thus, at odds with the appellant's stance, we finally uphold the decision of the trial court and simultaneously dismiss the appeal with costs.

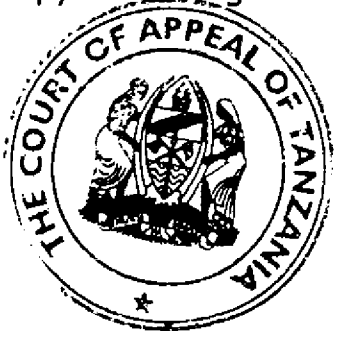
DATED at **DAR ES SALAAM** this 27th day of January, 2023.

R. K. MKUYE
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

The judgment delivered this 7th day of February, 2023 in the presence of Mr. Reuben Robert, learned counsel for the appellant and Ms. Sia Ngowi, learned counsel for the respondent is hereby certified as true copy of the original.



G. H. HERBERT
DEPUTY REGISTRAR
COURT OF APPEAL