

IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERICAL CASE NO. 48 OF 2021

AL-AZIZIA (T) LTD.....PLAINTIFF

VERSUS

INDIAN OCEAN HOTELS LTD.....DEFENDANT

JUDGMENT.

Date Last Order: 13/09/2022.

Date of Judgment: 23/11/2022.

Z.A MARUMA J.

The Plaintiff's claim against the Defendant occasioned by the defendant's breach of contract for foodstuffs entered into orally between them from the year 2017 to February 2019 for the Plaintiff to supply various goods, including the foodstuffs, to the Defendant's offices for the purposes of its hotel business. The Plaintiff alleged that the goods were supplied by his employees' staffs to the Defendant offices on different occasions, and delivery notices or tax invoices were signed by the Defendant's staffs at the defendant's office premises, indicating the receipt of the supplied

goods worth TZS 99,387,750.00/= which is the remaining substantially unpaid amount to date.

The Plaintiff before this Court is praying for the following orders: -

1. A declaration order that the defendant has breached the contract for supply of goods.
2. An order for payment of TZS 99,387,750/= being unpaid purchase price of goods supplied.
3. An order for payment of interest on decretal sum TZS 99,387,750/= at the commercial rate of 21% per month from February 2019 to the date of judgement and final payment.
4. Payment of interest at court rate of 12% per month on the decretal amount from the date of judgement and decree to the date of full and final satisfaction thereof;
5. General damages.
6. Costs of the suit.
7. Any other relief that court deems fit to grant.

To determine the Plaintiff's claim the Court framed four issues to wit;

1. Whether there was a contract for supply of goods between plaintiff and defendant.
2. If the First issue is answered in affirmative, whether there was a breach of such contract or not.
3. Whether the defendant is indebted by the plaintiff due to the goods supplied and to what extent.
4. What reliefs that parties are entitled to?

To establish its case the Plaintiff's side summoned three witnessed include Mr. Ramesh Babu Nimmaguda, Business-Director (PW1) who tendered the following exhibits the business license showing details of the company (exhibit P1) tax invoice and tax invoice of different dates (exhibit P2 collectively), Posted cheques issued on the name of the FNB Bank (exhibit P3 collectively), the demand notice to Indian Ocean Hotel LTD and Board resolution (exhibit P4 collectively) and the demand notes (Exhibit P-5). Srinivasulu Dacherla (PW2) Lucas Daniel, Buguruni PW3. On the Defendant's side, it was intended to call one witness

however, the said witness failed to appear and the efforts to substitute the witness as prayed by the Defendant went futile hence the filed witness statement be considered by the Court on the basis of a lesser weight.

At the hearing of the suit, the Plaintiff was represented by Mr. Almas Selemani, learned advocate, and the Defendant has the service of Mr. Sisty Bernard, learned advocate.

Starting with the first issue, the Plaintiff and Defendant had a contract for the supply of goods. PW1's evidence established that, sometime in 2017, the Plaintiff and the Defendant entered into an oral agreement for the supply of various goods on monthly credit, including various types of foodstuffs, for the purposes of its hotel business. PW1 testified that he was introduced to the principal officer of the Defendant by the name of JAYA PRAKASH, the financial controller, to negotiate on the business. Upon the oral agreement, an arrangement was made for the Plaintiff company to issue tax invoices or delivery notes directly to the defendant upon supply of the goods. PW1 testified that from 2017 to 2019, the Plaintiff was supplied various goods on credit, including food staff

valued at TZS 127,763,700/=, and upon delivery of the said goods, tax invoices and delivery notes were signed by the Defendant's staff (Exhibit P2 collectively). PW1 added that the Defendant attempted to pay the outstanding amount by issuing postdated cheques (Exhibit P3 collectively). However, all of them were not honored, as the controller's manager informed the Plaintiff not to deposit the said cheques because the account had no money and promised to pay through other means. Despite several meetings held between July 2018 and early 2019, the promise was never fulfilled, and the Defendant only managed to pay TZS 28,375,950/= as a result, leaving an unresolved amount of TZS 99,387,750/= before filing the case. The evidence was supported by PW2, who testified to collecting cheques on several dates and cash money from the Defendant's office.

This evidence was opposed by the Defendant through the witness statement of one Carol Philomena, the general manager, under paragraphs 7 and 12. They discovered that the Plaintiff's invoices to supply goods to the Defendant were fake, and the Defendant has no liability to the Plaintiff as no goods were supplied

to the Defendant's hotel. Assessing the evidence of PW1 and PW2 confirmed that there was an oral agreement between the Plaintiff and the Defendant entered into in 2017 for the supply of various goods on credit. This is based on the evidence of PW1 that the Plaintiff was dealing with the supply of the goods as evidenced by business licences (Exhibit P1) relating to hotel uses subject to the dispute at hand. The evidence of PW1 that they agreed orally with the Defendant who introduced him to one of his officers and negotiated into the agreement, which has been followed by the supply of goods since 2017 as is evident by the several invoices signed by the Defendant accepting to receive the goods (Exhibit P2 collectively).

Having the evidence above and taking into account that contract law permits oral agreements, as specified in Section 2(e), read together with Section 9 of the Law of Contract Act, Cap 345 of 2018. The law recognises oral agreements. Relating this position to the present case, since there were promises of the supply of goods between the Plaintiff and the Defendant which were fulfilled as evidenced by the several invoices (Exhibit P2), this impliedly

confirmed there was an agreement. Also, under **Section 5 (1) of the Sale of Goods Act [Cap 214 R.E. 2002]** which provides that:

"...Subject to the provisions of this Act and of any other written law in that behalf a contract of sale may be made in writing (either with or without seal) or by word of mouth, or partly in writing and partly by word of mouth, or may be implied from the conduct of the parties... "

Based on the evidence and the position of the law which was also considered in the authority of the Court of Appeal of Tanzania cited by the Plaintiff in the case of **Robert Scheltens vs. Sudesh Kumarivarma (As an Administratrix of the estate of BALDEV NORATARAM VARMA, the deceased) & Two Others**, Civil Appeal No. 203 of 2019 (unreported). At page 23, the Court clearly referred Section 5 (1) of the Act (Supra) to recognize a contract of sale can be made in writing or by word of mouth.

Responding to this issue, the available evidence from the Defendant is a general denial under paragraphs 7 and 12 of the witness statement of the intended witness. PW1 and PW2 also

testified on the cheques (Exhibit P3 collectively) that were issued from the Defendant's office and showed there was an agreement between the Plaintiff and the Defendant. Apart from being asked who signed the checks, the defendant did not challenge this during cross examination. This lends weight to the Plaintiff's evidence that the Defendant was aware of the supply of good transactions and the cheques issued by his office. The position of the law on the failure to cross examine a witness is known as it has been guided in the case of **Damian Ruhele vs Republic**, Criminal Appeal No. 501 of 2007 (unreported), Though it is a criminal case, I see no harm in borrowing the principle established thereon where the Court observed that,

"... It is a trite law that failure to cross – examine a witness on an important matter ordinarily implies the acceptance of the truth of the witness evidence..."

Based on the stand above and the factual evidence, at the end I find the 1st issue answered in the affirmative, which leads to the second issue.

The next issue is whether there was a breach of such a contract or not. Since the finding of the first issue is answered in the affirmative, there was a contract between the Plaintiff and the Defendant. The failure of the Defendant to pay the unsettled amount of the supplied goods amounts to a breach of contract. This is evidenced by the evidence of PW1 and PW2 that the outstanding amount of TZS. 99,387,750/= resulted from the supply of food supplies to the Defendant as evidenced by (Exhibit P2 collectively). Therefore, the second issue is also answered in the affirmative.

On the issue whether the defendant is indebted by the plaintiff due to the goods supplied and to what extent. Going by the evidence in PW1 and PW2 witness statements, the outstanding amount to be paid by the Defendant was TZS. 99,387,750/= which was supported by the invoices and delivery notice (Exhibit P2 collectively) issued to the Defendant. However, during cross examination, PW1 and PW2 admitted some of the items marked "return" during the receiving of goods were not received on the material date but were replaced later on. This evidence was not supported by any evidence that the returned goods were replaced.

Invoices Nos.18845, 19031, 19347, 19335, 20331, 20498, 24347 and Nos. 20667,20720,24175 and 24510 Moreover, during cross examination, it was discovered there was an invoice no. 24067 issued in the name of Anna International restaurant that was not issued to the Defendant. Despite the clarification given, there is no proof that goods were received by the Defendant. Therefore, apart from those invoices indicated above, the Defendant is liable for the breach to the extent of the amount remaining after the exclusion of the mentioned invoices/delivery notes.

Finally, as to the issue of relief, as it has transpired and as the finding in the issues above indicates, the Plaintiff is entitled to compensation for the breach of the contract to the extent of the outstanding amount of TZS 97,804,175.05/= after the deduction of TZS 1,583,574.95/= for the items indicated in the invoices mentioned above. However, I find no sufficient basis to exercise the Court's discretion to award general damages.

In the end, I find the Plaintiff has successful established a case against the Defendant and I proceed to enter judgment as follows:

1. That the Defendant has breached the contract for supply of goods entered between the Plaintiff and the Defendant.
2. That the Defendant shall pay TZS 97,804,175.05/= being unpaid amount of the goods supplied to the Hotel.
3. That the Defendant shall pay interest on decretal sum of TZS 97,804,175.05/= at the commercial rate of 21% per month from February 2019 to the date of judgment and final payment.
4. That the Defendant shall pay of interest at court rate of 7% per month on the decretal amount from the date of judgment and decree to the date of full and final satisfaction thereof.
5. Costs of the suit.

Dated at Dar Es Salaam on this **23rd day of November, 2022**



Z.A.Maruma.
JUDGE