

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 82 OF 2022**

**REHEMA HAMZA CHEGEKA**

**T/A IBONIKE ENTERPRISES.....PLAINTIFF**

**VERSUS**

**GROSS INVESTMENTS LIMITED.....DEFENDANT**

**JUDGMENT**

*Date of last order: 31/10/2023*

*Date of Ruling: 15/12/2023*

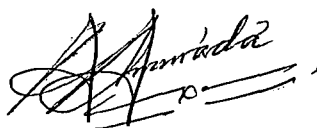
**A.A. MBAGWA, J.**

The plaintiff is a natural person trading as Ibonike Enterprises. It deals with the sale and supply of building materials. On the other hand, the defendant is a limited liability company carrying out construction works. The central dispute in this suit stems from the alleged breach of settlement deed dated 17<sup>th</sup> September, 2021. It is alleged that the duo entered into supply agreements whereby the plaintiff duly supplied the defendant with building materials worth TZS 955,921,572 but the defendant failed to pay the purchase price as per the agreement. As



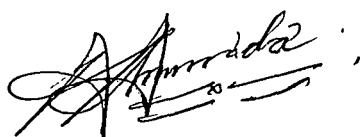
such, after persistent reminders to no avail, the defendant sought for amicable means to liquidate the debt which ultimately resulted into the signing of settlement deed whereby the defendant agreed to pay the outstanding debt in instalments. Nonetheless, the defendant still failed to honour the terms of the said deed of settlement. In consequence thereof, the plaintiff instituted the present suit against the defendant praying for judgment and decree in the following orders;

- (i) A declaration that the defendant has breached the Deed of Settlement Agreement dated 17<sup>th</sup> September, 2021.
- (ii) Payment of specific damages of TZS 955,921,572 being outstanding purchase price of the building materials.
- (iii) Interests at commercial rate of 20% from the date of breach to the date of judgment.
- (iv) Interests at Court rate of 12% from date of Judgment to the date of full payment.
- (v) Payment of TZ 50,000,000/= as general damages arising from long term ongoing breach of deed of settlement.
- (vi) Costs of the suit; and
- (vii) Any other relief(s) that the Honourable Court may deem fit and just to grant.

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According to the plaint, the plaintiff and defendant entered into agreements for supply of building materials. It is contended that on 07/06/2018 and 2/08/2018 the plaintiff supplied the defendant building materials worth TZS 628,437,676 and TZS 89,073,400 respectively, in respect of construction project of the Cashew Board Warehouse at Mkinga in Tanga region. Furthermore, the plaintiff states that the defendant had another construction project with the National Audit Office at Musomahence on 22/09/2018 the plaintiff supplied the materials worth TZS 328, 620,000 thereby making a total of TZS 955,921,572 being the outstanding purchase price of the building materials supplied to the defendants for two construction projects mentioned above. Subsequently, the plaintiff issued invoice to the defendant but the latter defaulted payment. Thus, the plaintiff served the defendant with a demand notice which triggered the defendant to seek for amicable means to settle the debt. In the results, the parties signed a settlement deed dated 17<sup>th</sup> September, 2021.

It was the plaintiff's contention that, in the deed of settlement, the defendant committed herself to pay the balance in quarterly instalments of TZS 100,000,000/= within a period of two years. Nevertheless, the defendant failed or neglected to pay the purchase price as per the

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settlement deed dated 17<sup>th</sup> September 2021 hence the plaintiff resorted to institute the present suit.

In rebuttal, the defendant refuted the plaintiff's allegations through a written statement of defence. Although the defendant does not dispute the settlement deed, she vehemently stated that it was the agreement term that the payment to the plaintiff would be made upon the defendant being paid by its clients to wit, Cashew Board of Tanzania and the National Audit Office. Since the defendant has not been paid by its clients, it was the defendant's averment that no agreement term has been breached and therefore the suit was brought prematurely. The defendant prayed for dismissal of the suit for want of merits.

Upon completion of pleadings, this court, with consensus of both parties, framed and recorded two issues namely;

1. Whether the defendant breached the terms and conditions of the deed of settlement dated 17<sup>th</sup> September, 2021 by its failure to pay the plaintiff.
2. To what reliefs are parties entitled?

During the hearing, the plaintiff had the services of Mr. Edward Mwakingwe, learned advocate whereas the defendant was represented

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by Mr. Elisa Abel Msuya assisted by Ms Ndehorio Ndesamburo, learned advocates.

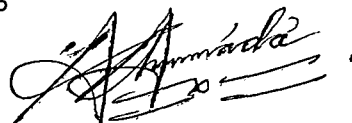
In the strides to prove its case, the plaintiff paraded one witness namely, Michael Scheuchzer (PW1) and tendered five documentary exhibits to wit, five supply agreements between the plaintiff and defendant dated 22/10/2018, 02/08/2018, 07/06/2018, 7/06/2018 and 11/06/2018 (exhibit P1), statement of account in respect of goods supplied titled 'Project: Construction of Cashewnut Warehouse Site: Mkinga Tanga' (exhibit P2), demand notice from KKB Attorneys to Gross Investment dated 31/05/2021 (exhibit P3), deed of settlement between Ibonike Enterprise and Gross Investment dated 17<sup>th</sup> September, 2021 (exhibit P4). PW1, the Manager of the plaintiff, in essence, recapitulated the contentions in the plaint. He told the court that after the defendant's failure to pay the purchase price of the supplied materials, the duo entered into a settlement deed to set the relaxed and more affordable payment terms for the defendant. He lamented that despite the settlement, the defendant still failed or neglected to honour the agreement terms contained in the deed of settlement dated 17<sup>th</sup> September, 2021. PW1 tendered the settlement deed (exhibit P4), among other documents to establish the allegedly breached payment



terms. Finally, Mr. Michael Scheuchzer prayed the court to grant the prayers sought in the plaint.

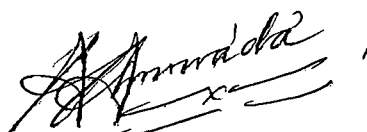
On the adversary side, the defendant called one witness namely, Mlau Abrahaman Mashombo, the defendant's Managing Director (DW1) and produced seven documentary exhibits. DW1 adamantly refuted the plaintiff's claims saying that there was no violation of the terms of the settlement deed. Mr. Mashombo firmly stated that the settlement deed is clear that the payment for the outstanding purchase price was to be made after the defendant is paid by its clients. DW1 produced evidence to prove that the Cashew Board of Tanzania and the National Audit Office still owe the defendant. Whereas the defendant admits being indebted to the plaintiff in the sum of TZS 955,921,572, she strongly stated that the same would be settled once she is paid by her clients. The defendant put much reliance on clauses No. 7 and 8 stating that the payment was subject to the defendant being paid by his clients. In fine, DW1 prayed the Court to dismiss the suit with costs.

To start with the 1<sup>st</sup> issue namely, whether the defendant breached the terms and conditions of the deed of settlement dated 17<sup>th</sup> September, 2021 by its failure to pay the plaintiff. It is apposite to note, at the outset, that there is no dispute that the defendant is indebted to the



plaintiff in the sum of TZS 955,921,572 being the purchase price of the building materials supplied in respect of the construction projects of a warehouse at Mkinga in Tanga and the National Audit Office at Musoma. It is also common cause that failure to pay the purchase price as provided under the supply agreements (exhibit P1) resulted into execution of the deed of settlement (exhibit P4).

I have dispassionately scanned the provisions of the settlement deed in dispute (exhibit P4) along with the testimonies of the parties. The settlement deed is quite elaborate particularly from Clause No. 1 to 5 that the defendant agreed to pay the balance in quarterly installments of TZS 100,000,000 for two years starting from 30<sup>th</sup> November 2021 to 30<sup>th</sup> November 2023. Further, under clause No. 6, it was clearly stated that failure to pay as per agreed schedule would warrant the plaintiff to institute the case. In addition, upon holistic appraisal of the settlement deed, it is clear that both parties agreed under clause No. 8 that in the event the defendant is paid by its clients during the contract period, the defendant would have to pay the outstanding amount in lump sum. That means the defendant had to pay the plaintiff by instalments but in case its clients paid her then she had to pay the outstanding debt in lump sum. For sake of clarity, I find it desirable to reproduce the relevant

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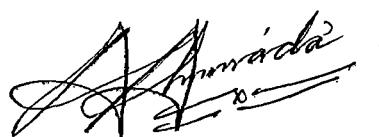
part of the settlement deed, albeit at the expense of making the judgment tedious.

**WHEREAS:** *Sometimes between June, August and October the parties above-mentioned entered into the following agreements.*

- a. *Supply agreement dated 7<sup>th</sup> June 2018, valued **TZS 628,437,676/=** regarding the construction of the Cashew Board Warehouse- Mkinga, Tanga (Addendum dated 11<sup>th</sup> June 2018).*
- b. *Supply Agreement dated 2<sup>nd</sup> August 2018, valued **TZS 89,073,400/=** regarding the construction of the Cashew Board warehouse- Mkinga, Tanga.*
- c. *Supply Agreement dated 22<sup>nd</sup> October 2018, valued **TZS 266,020,000/=** regarding the Construction of the National Audit Office-Musoma.*

**WHEREAS** *on the 31/11/2021 the supplier raised demands of being paid an outstanding total amount of **TZS 955,921,572/=** by the contractor because of invoices for payment of agreed total price of **TZS 328,620,000/=** regarding construction of the National Audit Officer- Musoma and **TZS 627,301,571.75/=** for regarding the construction of the Cashew Board Warehouse- Mkinga, Tanga. (hereinafter referred to as "The Outstanding Amount")*

**WHEREAS** *despite the several claims advanced towards the contractor, the contractor was adamant to fulfil his duty of paying the supplier the outstanding amount basing on the sole ground that payments from his*



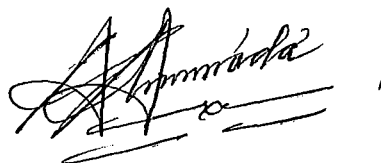


*requisite Clients (hereinafter referred to as "The Client") have been delayed.*

***AND WHEREAS*** pursuant to various meetings and correspondences the parties herein signified their intention to reach an amicable settlement of this dispute.

***WHEREFORE*** the parties herein have finally agreed that it is in the best interest of both parties that the matter should be settled under this Deed of Settlement as follows:

1. *That, the contractor has acknowledged and agreed to settle the matter as mentioned above by applying the supplier an outstanding of Tanzania the outstanding balance of **TZS 955,921,572/=**.*
2. *That, the said purchase price shall be remitted into designated Bank Account **No. 01J2099837300** owned by **Rehema Hamza Chegeka**.*
3. *That, the outstanding amount shall be paid within 2 years installments as indicated in this settlement deed.*
4. *That the outstanding amount shall be paid in installments of not less than **TZS 100,000,000/=** that is to be paid within every three months.*
5. *That in total, the amount agreed shall be paid in nine installments as follows;*
  - 3.1 *The 1<sup>st</sup> Installment which is TZS 100,000,000/= shall be deposited on the 30<sup>th</sup> of November 2021*

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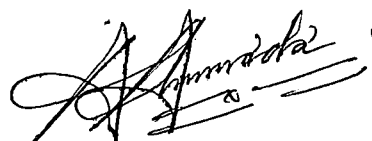
- 3.2 *The 2<sup>nd</sup> installment which is TZS 100,000,000/= shall be deposited on 28<sup>th</sup> of February 2022*
- 3.3 *The 3<sup>rd</sup> installment which is TZS 100,000,000/= shall be deposited on 31<sup>st</sup> of May 2022*
- 3.4 *The 4<sup>th</sup> installment which is TZS 100,000,000/= shall be deposited on 31<sup>st</sup> of August 2022*
- 3.5 *The 5<sup>th</sup> installment which is TZS 100,000,000/= shall be deposited on 30<sup>th</sup> November 2022.*
- 3.6 *The 6<sup>th</sup> installment which is TZS 100,000,000/= shall be deposited on 28<sup>th</sup> of February 2023*
- 3.7 *The 7<sup>th</sup> installment which is TZS 100,000,000/= shall be deposited on 31<sup>st</sup> of May 2023*
- 3.8 *The 8<sup>th</sup> installment which is TZS 100,000,000/= shall be deposited on 31<sup>st</sup> of August 2023*
- 3.9 *The 9<sup>th</sup> installment which is TZS 100,000,000/= shall be deposited on 30<sup>th</sup> of November 2023*
6. *That, in case of Default of payment as agreed in paragraph 1 of this Settlement Deed, the supplier shall have the power to proceed to file the case in the court with competent jurisdiction against Gross Investments Limited.*
7. *That upon being paid by the Client, the Contractor is to notify the Supplier on the same*

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8. *That upon payment by the Clients to the Contractor, the contractor shall proceed to pay all the remaining outstanding balance in lumpsum to the supplier.*
9. *In the case of non-disclosure as agreed in paragraph 7 of this Settlement Deed, the contractor shall have to pay the accrued interest and all financial losses accrued from the unnecessary delay in payments.*
10. *That, the contractor shall promptly pay 18% of the outstanding balance as tax, contrary to this, the contractor will have to bear all penalties and the accrued interests from the non- payments of the tax mentioned herein above.*

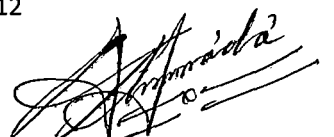
On scanning the provisions of the settlement deed in whole, I agree with the plaintiff that payment of quarterly instalments was neither subject nor dependent on the payments from the defendant' clients. The defendant's contention that she had to be paid by her clients first in order to pay the quarterly instalments of TZS 100,000,000 is not backed up by the settlement deed hence untenable.

According to the evidence, there is no dispute that the defendant has not paid a single cent since they entered into settlement deed (exhibit P1). This is a clear proof that the defendant has breached the agreement terms which required her to pay TZS 100,000,000 after every three months from 30<sup>th</sup> November, 2021 up to 30<sup>th</sup> November 2023. The

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law is settled that parties are bound by the terms of agreement which they free entered. See the cases of **Miriam E. Maro vs. Bank of Tanzania**, Civil Appeal No. 22/2017, CAT at Dar es Salaam, **Unilever Tanzania Ltd vs. Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal No. 41 of 2009, CAT at Dar es Salaam, **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019, CAT at Dodoma, **Simon Kichele Chacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, CAT at Mwanza, **and Kilanya General Supplies Ltd and Another vs CRDB Bank Limited and Two others**, Civil Appeal No. 1 of 2018, CAT at Dar es Salaam.

Since the defendant freely entered into the settlement deed and committed itself to settle the debt through payment of the quarterly instalments of TZS 100,000,000, it goes without saying that its failure to pay the instalments constituted a breach of agreement. See the cases of **Simba Motors Limited vs John Achelis & Sohne GMBH and Another**, Civil Appeal No. 72 of 2020, CAT at Dar es Salaam and **Mirambo Mabulav vs Yohana Maiko Sengasu and Another**, Civil Appeal No. 71 of 2020, CAT at Dar es Salaam.

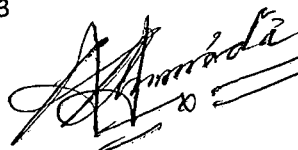
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In view of the foregoing deliberations, I answer the 1<sup>st</sup> issue affirmatively to wit, that the defendant breached the terms and conditions of the deed of settlement dated 17<sup>th</sup>September, 2021 by its failure to pay the plaintiff.

Now, the next issue for consideration is the reliefs which parties are entitled to. It is a settled principle of law that a party who breaches the terms of contract is, in law, bound to compensate the wronged party. See the case of **Simba Motors Limited** (supra). In that regard, I hold that the plaintiff is entitled to the reliefs sought in the plaint. However, given that general damages are awarded at the discretion of the Court, I decline to grant it because after assessing the prayers sought by the plaintiff, I am satisfied that the commercial interests and costs of the case are sufficient to cater for inconveniences that the plaintiff might have suffered.

On the above account, it is my considered findings that the plaintiff has established her case on the balance of probabilities. As such, I enter judgment and decree against the defendant in the following orders;

- (i) It is hereby declared that the defendant has breached the Deed of Settlement Agreement dated 17<sup>th</sup> September, 2021.

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- (ii) The defendant is ordered to pay specific damages of TZS 955,921,572 being outstanding purchase price of the supplied building materials.
- (iii) The defendant is ordered to pay interests at commercial rate of 20% from the date of instituting the case to the date of judgment.
- (iv) The defendant is ordered to pay interests at Court rate of 7% from date of judgment to the date of full payment.
- (v) The defendant is ordered to pay costs of the suit.

It is so ordered.

The right of appeal is explained.



**A.A. Mbagwa**

**JUDGE**

**15/12/2023**