IN THE COURT OF APPEAL OF TANZANIA

AT MOSHI

(CORAM: NDIKA, J.A., KITUSI, J.A. And MAKUNGU, J.A.)

CIVIL APPEAL NO. 64 OF 2018

BYTRADE TANZANIA LIMITED ..... APPELLANT

VERSUS

ASSENGA AGROVET COMPANY LIMITED .....1ST RESPONDENT
ISMAIL A. MALLYA ..... 2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania at Moshi)

(Sumari, J.)

dated the 31st day of October, 2018

in

Civil Case No. 12 of 2016

.....

JUDGMENT OF THE COURT

3rd & 7th October, 2022

KITUSI, J.A.:

The appellant was a third party in the proceedings before the High Court sitting in its original jurisdiction. It is the second respondent who impleaded the third party upon being sued by the first respondent. There was no dispute that the appellant was importing seeds and other agricultural inputs. The respondents were traders dealing with, among others, agricultural inputs including those that were being supplied by the appellant. They had an arrangement in which the second

respondent would buy those inputs and supply them to the first respondent. The relevant supply the subject of this appeal is maize seeds known as Pioneer, solely imported and supplied by the appellant.

The first respondent's case was that she paid a total of TZS. 87,000,000/= to the second respondent for him to deliver to her tonnes of Pioneer seeds, which she in turn sold to farmers including members of Lower Moshi Irrigation Scheme. Between the respondents there was no dispute that the second respondent delivered the seeds as per order. However, the first respondent's complaint at the trial was that the delivered seeds did not germinate.

After complaints from the second respondent and farmers, germination tests were conducted by Veneranda Mtobesya (PW3), a Certification Officer of seeds in the Northern Zone working with Tanzania Official Seed Certification Institute (TOSCI). PW3's conclusion was that the maize seeds supplied by the appellant did not meet the threshold of germination.

The appellant's defence through one Shamte Nyambega (DW4) an employee of that company was that the respondents' contention that the seeds did not germinate is a lie born out of their conspiracy to

tarnish the appellant's business reputation. However, on the evidence of Rose Joseph (PW1) the Director of the first respondent and that of PW3 as well as the second respondent's own admission, the High Court was satisfied that the contention had been proved. As this formed the first issue, the trial court answered it in the affirmative. This finding is still being assailed as we shall see in due course.

The second issue was whether the Pioneer maize seeds were sold by the third party, the present appellant.

Ismail Alfan Mallya (DW1) testified that he was a dealer of the appellant's products for a long time and tendered a tax invoices issued to him by the appellant to prove the transactions, the subject of this case. He stated that immediately on receipt of the seeds as per tax invoices he delivered them to the first respondent. He tendered tax invoices (Exhibits D3, D4, D5 and D6) to prove the transactions.

Farida Abas Karimjee (DW5) attested to the fact that in February 2016 the appellant sold to the second respondent Pioneer maize seeds of different varieties. The appellant tendered exhibits D1 and D2 to prove that the seeds sold by her were certified as being of germination quality.

The High Court accepted the version offered by the respondents and rejected the defence on the ground that exhibits D1 and D2 represented amounts of seeds smaller than those sold to the second respondent. The learned judge answered the second issue in the affirmative too. She also answered affirmatively the third issue whether the second respondent was an authorized dealer of the maize seeds who could sell them to the first respondent. She held that although there was no documentary proof of that fact, there is enough oral evidence to prove that the second respondent was an authorized dealer.

The last issue was on the reliefs. The learned judge awarded the respondents reliefs as against the appellant. We shall come to the issue of reliefs last.

The appellant has raised seven grounds of appeal to challenge the decision. At the hearing Mr. Duncan Joel Oola, learned advocate represented the appellant whereas the first respondent appeared through Mr. Sheck Mfinanga, learned advocate. The second respondent did not enter appearance. There was in the record, a death certificate indicating that he had passed on since 5th March, 2021. Since no interested person had applied to be joined in the proceedings

in terms of rule 105(1) of the Court of Appeal Rules, 2009 (the Rules), and as twelve months had elapsed since his death, we proceeded in the second respondent's absence as per rule 105(2) of the Rules. The parties, including the 2nd respondent had earlier filed written submissions, all of which shall be considered.

We shall consider the sixth ground of appeal first which states: -

> *6. That had it been that the trial Judge correctly and properly directed herself in the said case, she would have decided that the 2nd Respondent herein was not permitted by the law to trade in and or sell the pioneer maize seeds (of varieties) to the 1st Respondent.*

The appellant submitted on this ground referring to the testimony of PW3 that her office had never issued a licence to the second respondent. Reference was also made to provisions of section 16 of the Seed Act, 2003 and Regulation 3(1) (2) and (3), of the seeds Regulations, 2007, Government Notice No. 37 of 2007.

The respondents' submissions on this ground were almost identical. With respect, they did not quite address the point rather tended to justify the conclusion drawn by PW3 after taking samples from farmers who received supplies from the first respondent.

First of all, we agree with the learned trial judge that this is a matter of fact not one of law. We refer to the very testimony of PW3 which the appellant referred to in her submissions. She stated:

> *"Even farmers are (sic) sold seeds by Bytrade (T) Ltd. TOSCI is not involved in business".*

It is not easy to sustain the argument that TOSCI would issue licences to all the retailers of seeds, so the regulations requiring such a licence must, in our view, be relevant to dealers like the appellant. Besides, the appellant having agreed to deal with the second respondent, and having made him believe that the seeds were in good quality, is estopped from turning around and demanding proof of licence by him.

In the case of **Trade Union Congress of Tanzania (TUCTA) v. Engineering Systems Consultants Ltd & 2 Others**, Civil Appeal No. 51 of 2016 (unreported) our decision was based on the doctrine of promissory estoppel. We reproduce the following passage from it:

> *"The true principle of promissory estoppel is where one party has by his words or conduct made to the other a clear and unequivocal promise which is intended to create legal relations or effect a legal relationship to arise in the future, knowing or*

intending that it would be acted upon by the other party, the promise would be binding on the party making it and he would not be entitled to go back upon it."

In addition, we agree with the respondents' submissions that the appellant had a duty of care towards all users of the seeds.

Our conclusion on the sixth issue therefore is that as held by the learned trial judge, there was ample oral evidence to prove that the second respondent was a dealer in the appellant's products including Pioneer maize seeds. As stated above, having conducted herself in the way she did, and the second respondent acted upon it, the appellant is estopped from reneging that promise.

The seventh ground of appeal was argued as an alternative to the sixth ground. It states:

7. That in altenative to ground No. 6 the learned trial Judge erred in law in assuming that the Pioneer maize seeds which were allegedly found in the 1st respondents' store/godown were supplied by the Appellant.

The appellant's argument on this ground was that the respondents had a duty to prove the fact that the maize seeds found in the first respondent's godown came from the appellant. The learned

trial judge was satisfied that the plaintiff (first respondent) had proved this fact.

It must be recalled that the second respondent who was the defendant at the trial admitted the fact and it has been submitted on his behalf that Order XII rule 1 of the Civil Procedure Code (CPC) provides for such admission.

On this we would simply observe that as between the second respondent who supplied the seeds and the first respondent to whom the seeds were supplied, there was no issue. The second respondent admitted that fact and he was entitled to do so under Order XII rule 1 of the CPC. The appellant cannot be privy to the agreement between the respondents. See **Austack Alphonce Mushi v. Bank of Africa Tanzania Ltd & Another**, Civil Appeal No. 373 of 2020 (unreported). Thus, the seventh ground of appeal has no merit, we dismiss it.

It is convenient at this point to address the first ground of appeal too. It raises the following complaint:

> *1. That the trial Judge erred in law and in fact in holding that the 2nd Respondent herein sold the maize seeds (pioneer of various varieties) to the 1st Respondent in absence of proof on the alleged*

transaction of selling and buying as between the 1st respondent and the 2nd Respondent.

We will not be overly held on this ground because its theme is the same as that of the seventh ground of appeal. The appellant's demand for proof of business transactions between the respondents is totally off the mark because as between them there was no controversy over that. We dismiss the first ground of appeal.

The third ground of appeal which we propose to consider next, raises a somewhat novel issue in civil cases. It seeks to fault the learned trial judge for not holding that the second respondent had an interest to serve in the suit. This argument is common in criminal cases where it is mainly raised to attack credibility of a witness who could possibly tell a lie to serve his skin. See **The Director of Public Prosecutions v. Justice Lumima Katiti & 3 Others,** Criminal Appeal No. 15 of 2018 (unreported).

In his written and oral submissions, Mr. Oola insinuated fraud on the second respondent by supporting the first respondent's claim and leaving the appellant to carry the whole burden of paying the reliefs.

Mr. Mfinanga submitted in response that the first respondent had a duty to prove her case but the second respondent offered an

admission. He further argued that the first respondent had no duty to prove her case against the appellant, a third party. The second respondent's written submissions addressed this point by wondering if the appellant wanted him to lie under oath so as to cover up for her wrongs.

First of all, the rationale for discrediting a witness because he has an interest to serve only makes sense in criminal cases as we have said a while ago, where threat of penal sanction looms large against such a witness. It is in inconceivable how that principle may apply in civil cases like the instant.

Secondly, in order for the appellant to succeed in doubting the respondent's motive, she should also cast stones on PW3, an independent witness who, in our view, rendered an unbiased opinion of the matter. This complaint is misconceived and we join Mr. Mfinanga in wondering; did the appellant want the second respondent to lie? We dismiss the third ground of appeal.

The fourth and fifth grounds of appeal attack the trial judge for not properly evaluating the evidence. They complain: -

4. That the learned Trial Judge failed to take into consideration the thrust of the 3rd Party's defence

and evidence hence she ended up in erroneous decision.

5. *That the Trial Judge failed to depict versions of variance and contradictions in the respondents' pleadings and testimonies and consequently she failed to decide that there were no maize seeds which were sold to the 2nd Respondent by the Appellant herein and purchased by the 1st Respondent from the 2nd Respondent which failed to germinate.*

In the written submissions in support of the fourth ground of appeal, counsel referred to exhibits D1 and D2, which are certificates showing that the seeds were of good quality for germination, and faulted the learned judge for ignoring them. The respondents' reaction to those submissions was that the evidence of PW3 was credible on the issue of germination test.

We agree with the submissions made by the respondents. Although there is no cross appeal challenging the admissibility of exhibits D1 and D2, which we note were not earlier annexed to the pleadings, the credibility and reliability of those documents cannot match that of PW3. On a balance of probabilities, the learned judge was justified in finding PW3's account more credible and attaching less

evidential value to exhibits D1 and D2. The contention that the defence case was not considered has no support from the record. Earlier we made reference to the judgment of the High Court showing how the learned judge resolved the issues after evaluating the evidence. The fourth ground of appeal is dismissed for want of merit.

In the fifth ground of appeal the appellant complains against the trial court for its failure to appreciate the evidence and thereby failing to note that the respondents did not do any business involving Pioneer maize seeds. To this, the respondents repeated their submissions that there was an admission on the point, but also drew our attention to the evidence of PW3 who stated that the appellant was the only company granted a certificate to deal with Pioneer maize seeds. This means that there could not be any source of these seeds other than the appellant.

Order XII rule I of the CPC provides as follows:-

> *"Any party to a suit may give notice, by his pleadings or otherwise in writing that he admits the truth of the whole or any part of the case of any other party."*

In our conclusion, the second respondent acted within the law as provided above and the trial court was justified to consider those facts

as admitted. There is no merit in the fifth ground of appeal and it is dismissed.

Last, we are going to consider the second ground of appeal challenging the reliefs. It states: -

> *2. That the trial judge erred in law when she awarded and ordered the appellant to pay the 1st respondent a total of Tshs.86,050,000 and Tshs.52,750,000 to the 2nd respondent respectively the sum of money which was not specifically proved.*
>
> ***Alternatively;*** *The Trial Court erred in law for awarding the Respondents some reliefs and monies which were not specifically pleaded and proved.*

Mr. Oola submitted passionately on the principle that special damages must be specifically pleaded and strictly proved, citing the case of **Zuberi Augustino v. Anicet Mugabe** [1992] TLR 137. Even when counsel's attention was drawn to paragraph 16 of the plaint detailing the particulars of the loss, he maintained that they were not specific enough.

On the other hand, Mr. Mfinanga submitted that the second respondent tendered in court many documents to prove his business

transactions with the first respondent, therefore, he argued, there was proof of the reliefs.

We agree with Mr. Oola, that a party who wishes the court to order specific damages in his favour has a duty to plead them specifically and to prove them strictly. See **Anthony Ngoo and Another v. Kitinda Kimaro,** Civil Appeal No. 25 of 2014 (unreported).

There is in the plaint a statement of pleading loss of TZS. 87,000,000/= being the amount spent in purchasing seeds supplied by the appellant. This statement alleges in paragraph 6 of the plaint that the purchases were done between January and March, 2018. Then paragraph 16 of the plaint is categorical with the sub heading: -

"Particulars of the loss."

Paragraph 16(i) refers to the same loss that was earlier pleaded in paragraph 6.

When all that is considered it is our conclusion that the first respondent's plaint substantially complied with the legal requirements in raising claims of specific damages. But that only applies to the claim of TZS. 87,000,000/=, because the amount of TZS. 52, 750,000/=

awarded to the second respondent was neither specifically pleaded nor strictly proved as required.

The decisive question now is whether the first respondent strictly proved the amount of TZS. 87,000,000/=. The trial court awarded her TZS. 86,050,000/=.

Evidence on the claimed amount of TZS. 87,000,000/= came from DW1 who was buying from the appellant and selling to the first respondent. As alluded to earlier, he tendered exhibits D3, D4, D5 and D6, and the High Court held that those documents constituted proof of payment amounting to TZS. 86,050,000/=. These documents are fund transfer request forms and tax invoices. They support payments of the following sums of money to the appellant: -

Exhibit D3	-	TZS. 11,050,000.00
Exhibit D4	-	TZS. 25,300,000.00
Exhibit D5	-	TZS. 25,000,000.00
Exhibit D6	-	TZS. 18,450,000.00
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Total		**79,800,000.00**

Going by that evidence, the amount that has been strictly proved as having been paid for the seeds is TZS. 79,800,000/=. The High

Court erred in awarding TZS 86,050,000 instead of that amount and as we have concluded above, there was no basis for awarding TZS. 52,750,000/= to the second respondent.

The end result is that we allow the appeal to the extent that we vacate the award of TZS. 52,750,000/= to the second Respondent and vary the award of TZS. 86,050,000/= to the first respondent to TZS 79,800,000/=. The appellant shall have half the costs in this Court because the appeal has been partly allowed.

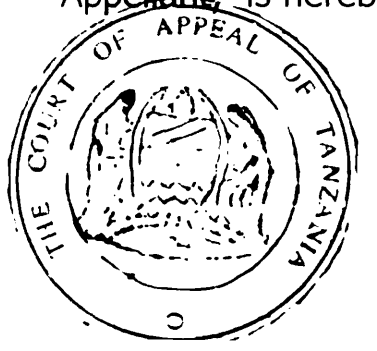
DATED at **MOSHI** this 7th day of October, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

O. O. MAKUNGU
JUSTICE OF APPEAL

The Judgment delivered this 7th day of October, 2022 in the presence of Rose Joseph, Director of the first Respondent Company and Salim Ismail son of the second Respondent and in absence of the Appellant, is hereby certified as a true copy of the original.



C. M. MAGESA
DEPUTY REGISTRAR
COURT OF APPEAL