IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWAMBEGELE, J.A., LEVIRA, J.A. And MAIGE, J.A.)

CIVIL APPEAL NO. 125 OF 2018

1. SYLIVESTER LWEGIRA BANDIO
2. HILDA KARABARUGA BANDIO .....**APPELLANTS**
(Both t/a Mwanza Textile Enterprises)

VERSUS

NATIONAL BANK OF COMMERCE LIMITED .....RESPONDENT

(Appeal from the decision of the High Court of Tanzania (Commercial Division) at Dar es salaam)

(Sehel, J.)

Dated the 16th day of February, 2018
in
Commercial Case No. 171 of 2002
.....

JUDGMENT OF THE COURT

22nd September, & 13th October, 2021

MAIGE, J.A.:

The Respondent, the National Bank of Commerce Limited, is a commercial bank duly licensed under the laws of Tanzania. It is indisputably the successor in title of the defunct National Bank of Commerce which was dissolved, by operation of law, in 1997. The appellants are individuals trading under the name of M/S Mwanza Textile Enterprises.

On 13th March 1992, the appellants and the predecessor Bank entered into an agreement under which the latter undertook to, subject to the terms and conditions thereof, make available to the appellants "a term loan up to an aggregate amount of Tanzania Shillings 16,050,000/=". It was express in the term loan which was admitted as exhibit P1 that, the loan was to be repaid in 20 equal instalments of TZS 877,500 each, commencing six months after execution of the contract. It was further express that, the last and final repayment would be due on 30th June, 1997. Under clause 4 of exhibit P1, the loan attracted interest of 27.5 % per annum. The loan was secured by a mortgage on the Right of Occupancy on Plot No. 166 Block "D" with CT No. 033O11/29 and a chattel mortgage on a marine vessel.

Parties are not in dispute that, until 2nd May, 1994, the respondent had, out of the total agreed term loan, released the sum of TZS 10,212, 440/= only and has never disbursed any amount subsequent thereto. Equally not in dispute is the fact that, of the undisputed disbursed amount as aforestated, the appellants have not made any repayment. The controversy is two fold. First, whether non-payment of the appellants of the disbursed loan amounts to an event

of default in terms of exhibit P1. Two, whether failure to disburse the total term loan by the respondent amounts to a breach of exhibit P1.These two issues in essence were the main themes in the main suit by the respondent herein and the counter claim by the appellants adjudicated upon in the impugned judgment.

The main claim by the respondent in her suit was for payment of TZS 76,083,979/= being the principal outstanding loan and accruing interest together with interest at the discounted rate of 26% per year from July 2001 to the date of Judgment. She also prayed for interest on decretal sum at the court rate, from the date of judgment to the date of full settlement of the debt. In the alternative, she prayed for the attachment and sale of the securities pledged.

In their Joint Amended Written Statement of Defence and Counter Claim, the appellants though admitted receipt of TZS 10,212,440 as part of the agreed loan amount, denied breach of any terms of exhibit P1. They instead blamed the respondent for failure to perform part of her bargain in so far as she did not disburse the full loan amount. By way of counter claim, the appellants prayed for

payment of 156,592,000/= as loss of projected earnings and a general damages of TZS 100,000,000/= among others.

In determining the controversy, the trial judge framed four issues. First, whether the plaintiff granted the term loan of TZS 16,050,000/= to the defendant in 1992. Second, whether the defendant defaulted in repaying the loan. Third, whether the plaintiff breached the terms of the loan agreement. Fourth, to what reliefs are the parties entitled.

Before commencement of the hearing, the appellants successfully applied, under order XI rule 15 (2) of the Civil Procedure Code, Cap. 33, R.E., 2019 ("the CPC"), for inspection of some documents which in their view were relevant in the fact in issue. Despite the application being not opposed, the inspection order was never complied with. As a result, the appellants applied, in terms of order XI rule 18 of the CPC, for dismissal of the respondent's suit for want of prosecution, the application which was refused . As we shall see, the refusal of such application has turned out to be one of the grounds of this appeal.

In her judgment, the trial judge established as a fact that, both parties were in breach of exhibit P1. In relation to the main suit, it was

the opinion of the trial judge that, though the respondent did not adduce sufficient evidence to establish her claim, there was an express admission by the appellants of receipts of TZS 10,212,440 which has never been repaid. The trial Judge further treated the delay to disburse the loan and to repay the same coupled with absolute silence of the parties as constructive variation of clause 3(1) of exhibit P1 which provided for disbursement and repayment schedules. In her own words, the trial judge stated as follows:-

> *"Even though there is no proof from the plaintiff, there is admission by the defendants through DW1 that the first disbursement of the loan of Tshs. 6,100,000/= was made on 20th April, 1993. The amount is acknowledged to have been received by the defendants. By that time, that is, on 20th April, 1993, which is after a lapse of one year and some months, none of the parties raised any issue concerning either delay in releasing the funds or failure by the defendants not making any repayment as agreed in the agreement. There is no evidence to suggest any party complained on the failure of strict compliance with Clause 3(i) of Exhibit P1. Furthermore, after lapse of almost four months from the date of first disbursement, another amount of Tshs. 828,260 as advanced by Exhibit D4 was disbursed to defendants which amount is also conceded by DW1 to*

have been received. Again there was no complaint either from the defendants or from the plaintiff as to why the defendants failed to make any instalments."

To the extent as afore-stated therefore, the first two issues which related to the suit by the respondent were answered affirmatively. On the third issue, which related to the counter-claim, the trial court held the respondent to have breached the contract in not disbursing the full loan amount. In her own words, the trial judge stated at page 802 of the record as follows:-

"On the other hand, the defendants are complaining that the plaintiff failed to release the remaining balance of Tshs. 5,837,560/= as such frustrated their fishing project. Exhibit D6 proves that the defendants did request for final disbursement of Tshs. 5,837,560/= but plaintiff remained numb. Further Exhibit P1 establishes that the plaintiff agreed to partly finance the project by erecting buildings and purchasing machinery and equipment as per Clause (i) of Exhibit P1 to the tune of Tshs. 16,050,000/=. Notwithstanding such undertaking, the plaintiff failed to release Tshs. 16,050,000/=."

On relief, the trial judge in the first place, dismissed the claim by the respondent of TZS 76,083,979 as specific performance of the contract for want of evidence. She however granted the undisputed

amount of TSZ 10,212,441/=. She further granted interest on the said amount at the rate of 26% per year from 2nd May, 1994 when the last disbursal was made to the date of judgment as well as interest at court rate from the date of judgment to the date of full settlement of the decretal sum. To the appellant, she awarded TZS 5,000,000/= as general damages and TZS 50,000,000/= as compensation for loss of projected earnings.

The appellants have been aggrieved by the judgment and by this appeal, they are challenging the said judgments on the following grounds:-

1. *The trial Judge having made a finding in an application for inspection and production (Misc. Commercial Application No. 66 of 2017 in the High Court of Tanzania (Commercial Division) , that the respondent was not willing to comply with the Court orders on production of documents, grossly misdirected herself in fact and law , when he moved in Miscellaneous Commercial Application No. 172 of 2017 in failing to dismiss the respondent's suit.*

2. *Having regard to the purpose of the loan, nature of the project and documents relied upon by the respondent in extending the said loan, the Honourable trial Judge grossly*

misdirected herself in fact and law in holding that the repayment of the loan was independent from the operations for which the loan was granted and ending up with a conclusion that the appellants were in breach of the loan agreement.

3. *The trial Judge having found that the respondent was in breach of the agreement by failing to release the balance of the loan, grossly misdirected herself in fact and law in awarding the respondent simple interest of 26% per annum, a relief which was not prayed for and without justification for the award of such interests.*

4. *Having regards to the circumstances of the case and the evidence on the record, the trial Judge grossly misdirected herself in law on principles governing award of general damages and thus ending up awarding Tshs 5,000,000/= as general damages.*

5. *Having regard to the nature of the loan agreement, the nature of the project and the projection that had been brought to the attention of the respondent before the extension of the loan, the trial Judge, grossly misdirected herself in fact and law in awarding 10% of the amount claimed in the counterclaim.*

6. *Having regard to the totality of the evidence adduced at the trial and the pleadings filed by the parties, the trial*

Judge misdirected herself in fact and law in finding against the weight of evidence.

In the conduct of this appeal, the appellants had the service of Richard Rweyongeza, learned advocate whereas Mr. Makarios Tairo, also learned advocate, appeared for the respondent. As it is the procedure, before hearing date, parties had filed their written submissions which were fully adopted by each of them in their brief oral submissions. We have given the rival submissions due consideration. We shall therefore determine the merit or otherwise of the appeal hereunder.

We propose to start with the first ground wherein the trial Judge is faulted for her refusal to dismiss the suit for want of prosecution. It was submitted for the appellants that, since the trial Judge had established in her previous order that, the respondent was unwilling to comply with an order for inspection of documents, she ought, in terms of Order XI rule 18 of the CPC, to have dismissed the suit for want of prosecution. We were called upon to take into account the fact that, the documents sought to be inspected, were so crucial for the determination of the fact in issue that, non-compliance of the order led to failure of justice. We were, therefore, invited to set the order

refusing to dismiss the suit for want of prosecution aside and substitute it with an order dismissing the respondent's suit with costs.

In rebuttal, Mr. Tairo submitted with all forces that, the provision of order XI rule 18 applies as a last resort where there is deliberate intention to disobey the order. It does not, in his humble view, apply where, like in the instant case, there is inability to comply with such order. His contention was backed with the commentaries of the learned jurists Mulla and Sarkar in their books **Mulla, The Civil Procedure 17th Edition** at page 671-672 and **Sakar's, the Law of Civil Procedure, 8th Edition 1992**, respectively which are in support of that proposition. He submitted therefore that, since it was made clear through the counter affidavit that, the respondent would but for inability to locate the documents, give inspection of the documents to the appellants, an order for dismissal would be unfair. In his view therefore, the trial Judge was right in dismissing the application.

We have closely followed the counsel's debate on this issue and it is desirable to decide who is right and who is not. Order XI rule 18 under which the application for dismissal of the suit was made, provides as follows:-

"18. *When a party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution and if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the court for an order to that effect and an order may be made accordingly".*

It is clear from the above provision that, where the plaintiff fails to comply with an order to exhibit interrogatories or to make discovery of documents or to give the defendant inspection of documents, the appropriate way forward is to have his suit dismissed for want of prosecution. The complaint in this matter is that an order for inspection of document issued against the respondent was not complied with.

As we understand the law, for the documents to be available, for inspection, they have to be produced by a person in whose possession or power they are. Under order XI of the CPC, it would appear to us, there are two ways through which documents can be produced for inspection. The first one is by way of notice to produce which is envisaged in order XI rule 13. This relates to documents which

have been fully disclosed to the adverse party by way of pleadings or affidavit of documents deposed under rule 11. The second procedure which is relevant in this matter is by an order of the Court. It can be under order XI rule 12 or order XI rule 15. Under rule 15(1), the court may make an order for inspection, where there is an omission or objection by a party to which a notice to produce under rule 13 has been issued, to give inspection of the documents. Rule 12 provides as follows:-

> *"12. It shall be lawful for the court, at any time during the pendency of the suit to order the production, by any party thereto upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents when produced, in such manner as may appear just:"*

Production under the above provision relates to documents which are not disclosed by either pleadings or affidavit and is made on oath or affirmation. It is indeed one of the forms of discovery. As observed by the learned jurist Sarkar, in his **Sarkar Code of Civil Procedure** *(supra)* at page 1477 thereof, this order "can be made *at any time* either on application or *suo motu*". If it is on application, it

is our view that, rule 12 should be read together with rule 15(2) so that, the application for inspection is founded on affidavit. The respective provision provides as follows:-

> *"(2). Any application to inspect documents, except such as are referred to the pleadings, particulars, or affidavit of the party against whom the application is made or disclosed in his affidavit of documents, shall be found upon an affidavit showing of what documents inspection is sought , that the party applying is entitled to inspect them and that they are in the possession or power of the other party. The court shall not make such order for inspection of such documents when and so far as the court shall be of the opinion that that it is not necessary either for disposing fairly of the suit or for saving costs".*

In the instant case, it is apparent that, the application for inspection was founded on the joint affidavit of the appellants. Besides, it is not in dispute that, before hearing of the application, the respondent was allowed to file a counter affidavit through which she could explain on the relevancy of the documents and whether they are in her power or possession. She could also explain if any of the documents sought to be inspected are protected. As we said above,

the respondent conceded to the application and opted not to file an affidavit in opposition. As a result, the trial court ordered, on 4th day of May, 2017 that, the documents in question be inspected on 10th May, 2017 and the matter to come for orders on 12/05/2017. On the said date, it is on the record, the counsel for the appellants informed the court that, he had received a letter from the respondent to the effect that, they were still working on the documents and they would notify them on 26th May, 2017. The counsel for the respondent confirmed and informed the trial court that the documents might be traced by 20th May, 2017. The matter was adjourned to 26th May, 2017 with a remark that, if the documents would not be available to the appellants for inspection, the matter would proceed to the next stage. Therefore, on 26th May, 2017 when the matter came and the parties having informed the trial court that, the documents were yet to be traced, the trial Court made the following order:-

> *"Since the Respondent is seem not willing to comply with the court order then as prayed by the Applicants let the suit proceeds to the next stage".*

With the above order in hand, the appellants filed the relevant application to have the suit dismissed for want of prosecution. The trial

court having examined the affidavit, counter affidavit and rival submissions, was satisfied that, failure to make the documents available for inspection was not willful. He thus dismissed the application. The correctness of this decision is that which is at stake.

In our jurisdiction, this is not the first time an issue like this is addressed. The defunct East African Court of Appeal, which is the predecessor of this Court, happened to deal with a similar issue in the case of **Eastern Radio Service v. Tiny Tots** [1967] EA 392 (K) where the Court having made an order that the amount for general damages be adjusted, it remitted the matter to the trial court for retrial to the extent of the quantum of damages. In the process, the respondent successfully applied for discovery and eventually inspection of documents. The appellant was specifically directed to make the documents available to the respondent in chronological order for inspection. Despite several adjournments and an order for extension of time for the appellants to give the respondent inspection of documents in the manner as afore-stated, the order was never complied and therefore, on application, the High Court of Kenya dismissed the suit under order 10 rule 20 of the Kenyan Civil

Procedure Act which is worded similarly with the provision of order XI rule 8 of the CPC. The East African Court of Appeal held that, to the extent that it related to the issue remitted to the High Court for retrial, the provision of Order 10 rule 20 was properly applied. Remarking on the scope of the application of the rule, Sir Charles Newbold, P [as he then was] made the following observations at page 395 thereof, which we fully subscribe to :-

> *"It is not, I think, in dispute that a litigant who has failed to comply with an order for discovery should not be precluded from pursuing his claim or setting up his defence unless his failure to comply with an order for discovery was due to a willful disregard of the order of the Court. Nor is it, I think in dispute that willful means intentional as opposed to accidental."*

A further account on the scope of the application of the rule was made by His Lordship SPRY, JA [as he then was] at page 400 of the report, in the following words:-

> *"I am not aware of any East African authorities governing the exrcise of O. X r. 20, or the corresponding rules of other Territories. Rule 20, is however, derived from r. 21 of O. Xi of the Indian Code of Civil Procedure , 1903, the term of which is exactly follows, and the Indian rule was in turn*

derived from the English practice (now O. XXIV, r. 16, formerly O. XXXI r 21). It is well established that the power to dismiss a suit or strike out a defence is one only to be exercised in the last resort (Twycroft v. Grant (3) Republic of Liberia v. Imperial Bank (4)."

Guided by the above authorities therefore, like the trial Judge, we take it to be the law that, an order dismissing a suit or striking out a defence under order XI rule 18 can only be made as a last resort and where the Court satisfies itself that, the omission was willful.

Perhaps, the issue which we have to consider is whether failure on the part of the respondent to give inspection of the documents to the appellants was willful? This, we think, is a question of fact which has to be determined based on the factual depositions in the affidavit and counter affidavit in line with the surrounding circumstances. Mr. Rweyongeza submitted in the first place that, since the trial Judge had, before lodging the application for dismissal, remarked that, the respondent was unwilling to give inspection to the appellants, that alone would suffice to establish that, the omission was willful. With deepest respect to the counsel, we cannot accept this submission. An order under rule 18, it is apparent, is made upon a formal application founded on affidavit and after the party in default has been afforded

an opportunity to be heard by, among others, filing an affidavit in opposition. As the remark under discussion was made before an application for dismissal had been made, it could in no way be the basis for determination of the application for dismissal.

In his further submission, Mr. Rweyongeza urged the Court to imply willfulness from the failure of the respondent to give the appellants inspection notwithstanding an order extending time therefor. In refutation, it was submitted for the respondent that, as the respondent made it clear in the counter affidavit deposed on her behalf that, the failure resulted from inability to locate the documents, it could not be said that, the same was willful or negligent as to justify an order for dismissal.

We think, the trial Judge cannot be faulted on this. We have taken time to read the affidavit and counter affidavit in line with the proceedings subsequent to an order for inspection and we are unable to find any fact upon which we can infer willfulness in the failure of the respondent to give the appellants inspection of the documents. Failure to locate the documents had been made clear to the appellants and the trial court even before the date fixed for inspection. Indeed, on the first day when the matter came for mention after the order,

such fact was revealed to the trial court without any objection from the appellants. It was further repeated on the date when the Court ordered, at the instance of the appellants that, the matter should proceed to the next stage. In essence, that is what was deposed in the counter affidavit opposing the application.

It was further submitted that, because of the apparent confusion in paragraphs 6, 9, 10 and 12 of the plaint as to the disbursed amount, non-compliance of the order of inspection has led to failure of justice. We cannot agree with him for a simple reason that, the remedy for the claim in plaint being unclear is not an order for inspection but an order for further and better particulars under Order VI rule 5 of the CPC which read as follows:-

> *"5. A further and better statement of the nature of the claim or defence or further and better particulars of any matter stated in any pleading may in all cases be ordered, upon such terms, as to costs and otherwise as may be just".*

In our opinion therefore, the first ground of appeal is without merit and it is accordingly dismissed.

We now direct our mind to the second ground where the trial Judge is challenged in holding that, the repayment of loan was independent from the operation for which the loan was granted. It was submitted for the appellants that, since it was not in dispute that, the loan was sought for financing a project whose feasibility study report (exhibit D2) was attached to the application, it was an error for the trial court to hold that, the repayment of the loan did not depend on the revenue generated from the project. It was further submitted that, since the carrying out of the project failed as a result of default of the respondent to disburse the full loan amount, the appellants would have not been held liable to repay the loan. With all respects to the counsel, we are unable to agree with him for a number of reasons. First, exhibit P1 which constitutes the entire loan agreement, does not have any provision to the effect that the repayment of the loan would emanate from money generated from the project. Neither is there any express provision incorporating exhibit D2 into exhibit P1. Second, in accordance with the express provision of clause 3 (i) of exhibit P-1, repayment would commence six months after execution of exhibit P1. and the last installment would be in June 1997. Therefore, if the intention of the parties was that repayment should be after disbursal

of the full loan amount and the carrying out of the project, the first repayment instalment would have been after full disbursal.

We do not think that, the mere fact that a borrower expressed, during pre-contractual negotiation, that he was expecting to repay the loan through monies generated from the funded project, can by itself give the expectation a contractual status. P.J.M Fidler in **Sheldon and Fidler's Law and Practice of Banking** ,Eleventh Edition, Macdonald and Evance Ltd., London, 1982, commenting on a similar issue made at page 273 thereof, the following commentary which we full subscribe to:

> *"the mere fact that both the banker and the borrower consider it likely that the borrower will repay the loan out of a particular fund does not amount to a contractual term that repayment is to be made out of this fund and this fund alone, nor does it give rise to an obligation on the part of the bank to ensure that it does nothing to delay or impede repayment out of that fund"*

In the circumstance, we find the second ground devoid of any merit and it is accordingly dismissed.

We proceed with the third ground which relates to the award of a simple interest at the rate of 26% per year on the disbursed loan of

TZS 10,212,440/=. It is submitted for the appellants in the first place that, the trial court having dismissed the claim of interests for want of evidence, it was improper for it to award the un-pleaded 26% interest per annum from the date of accrual of cause of action to the date of judgment. In any event, it was added, the trial judge would have not granted interest to cover a period which is longer than that which is stated in the prayer's clause.

In reaction, it was contended for the respondent that, since the interest rate of 27.5 % per annum was pleaded and proved by a documentary evidence in exhibit P1, there was nothing wrong for the trial court to award the same at the discounted rate of 26% as that was, in his view, a good deal to the appellants.

We have considered the rival submissions on this issue and reviewed the record. The respondent's substantive claim according to paragraphs 3 read together with item (i) of the prayer's clause was TZS 76,083,979/=. It consisted of the principal loan of TZS 9,212,440/= and accrued interest of TZS 66,083,979/= as of 30th June, 2001. Yet in the same paragraph, the respondent pleaded interest accruing thereafter and costs. This was reflected in item (ii) of the prayer's clause wherein the respondent prayed interest of 26% per

annum on item (i). The first prayer was addressed by the trial court at page 804 of the record as follows:-

> *"In the matter at hand, there is no evidence to support the claim of specific damages of Tshs. 76,083,979/= apart from Exhibit P4 a mere bank statement that run from 30th September, 2017. The bank statement starts with an opening balance of Tshs. 64,243,738/= comprised of principal amount of Tshs. 9,212,440/= and outstanding interest of Tshs. 55,031,298/=. Exhibit P4 does not show as when the principal and interest amount start to run especially taken into account that the disbursement was not done immediately after signing the loan agreement. There being no concrete evidence to establish the claim I decline to order the repayment of the full amount claimed. However since it is acknowledged by the defendants that a total sum of Tshs. 10,212,441/= was granted to them then I will award the amount to the plaintiff."*

It is clear to us from the above extract that, the trial Judge while granting the undisputed principal loan of Tshs. 10,212,441/=, she declined to grant the alleged interest for want of evidence. In our view, this finding was conclusive in relation to the claim for interest from the date of the accrual of cause of action to June 2001 such that it could not be open for redetermination in the same judgment.

In respect to the second prayer, we have noted, the trial court awarded interest at the rate of 26% per annum on the undisputed amount from 2nd May, 1994 to the date of Judgment. In her own words, the trial judge stated as follows:-

> *"Secondly the plaintiff is claiming for payment of interest on the outstanding sum at the discounted rate of 26% per annum from 1st July 2001 to the date of judgment. I have shown herein that the defendants do not deny to have been advanced Tshs. 10,212,440/= and the last disbursement was made on 2nd May, 1994 then I will proceed to award the plaintiff 26% simple interest rate per annum on the outstanding amount of Tshs. 10,212,440/= from 2nd May, 1994 to the date of judgment."*

Since we have held herein above that, the claim for interest as of June 2001 was refused and the refusal finding was conclusive, we think that, the trial Judge was not right to grant interest at discounted rate or at all for the period which is covered by such finding. In the premise, the third ground of appeal is allowed to the extent of the interests from 1994 to June 2001.

This now takes us to the last three grounds which in essence pertain to assessment of damages. In his submissions, Mr.

Rweyongeza has consolidated them and argued them together under the proposition that, the reliefs granted to the parties was against the weight of evidence. He blamed the trial judge in not considering in his assessment of damages that, the failure of the respondent to release the full loan amount which was the cause of the appellants' failure to repay the loan, was not caused by the appellants. The trial court was further blamed for not seriously taking into account the amount of projected loan in exhibit D2 in awarding the claimed special damages. If the same was considered, it was submitted, the trial court would have not awarded the lesser amount of TZS 50,000,000/- without interest. The counsel further blamed the trial judge for not taking into account a pertinent principle of law that, the purpose behind an award of damages is to put the innocent party in the same position he would but for the wrong of the party in default. He thus urged the Court to step into the shoes of the trial court and re-asses the quantum of damages.

In refutation, Mr. Tairo did not agree with the counsel for the respondent that, the trial judge misdirected herself on point of law on assessment of evidence. He submitted that, the trial court awarded general damages based on the evidence and upon consideration of the

law and more particularly section 73(1) of the Law Contract Act which requires proof of causal connection between the wrong and the claimed loss. He submitted that, the respondent did not prove that, the alleged projected loss was directly caused by failure to release part of the loan amount. In any event, he submitted, it having been pleaded as special damages, it should have been strictly proved, which was not the case.

As we observed herein above, the damages awarded by the trial court, which is the subject of this complaint, consisted of a general damage of TZS 5,000,000/= and TZS 50,000,000/= as loss of projected earnings. Parties appear not to be in dispute on the settled position of law that, general damages are normally awarded at the discretion of the trial court. Equally not in dispute is the principle of law that, an appellate Court would not interfere with the assessment of damages by the trial court unless it is established that, the same was made based on a wrong principle or in disregard of the same. (See for instance, **Stanbic Bank Limited v. Abercrombie & Kent (T) Limited**, Civil Appeal No. 21 of 2001 (unreported).

There was a debate between the counsel as to whether or not the claim as to loss of projected earnings fall under special damages and if so, whether it was specifically pleaded and strictly proved as the law requires. For the appellant, it was contended that, through the documentary evidence in exhibit D2 which was within the contemplation of the parties since the negotiation process, the same was strictly proved. For the respondent, it was submitted, projected earnings being mere estimation, cannot constitute an actual loss as to fall within the purview of special damages. In any event, it was submitted, its causal connection with the breach in question was not proved as section 73 of the Law of Contract Act requires.

At the outset, we agree with Mr. Tairo that, loss of projected earnings is not actual but mere estimation. It cannot, therefore, fall within the purview of special damages which concerns with loss actually incurred by the plaintiff prior to the date of the trial and which is capable of being proved. Loss of profit, as we understand the law, can form part of special damages if only it was incurred down to the date of the trial and is generally capable of substantially exact calculation. On this, we are inspired by the decision of the House of

Lord in **British Transport Commission v. Courley** [1956] AC 185 at 206 where it was held:

> *In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as special damages, which has to be specifically pleaded and proved. This consists of out-of-pocket expenses and loss of earnings incurred down to the date of the trial and is generally capable of substantially exact calculation. Secondly, there is general damages which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such that as to lead continuing or permanent disability, compensation for loss of earning power in the future.*

In view of the above discussion, we have no hesitation to hold that, though pleaded as special damages, the claim as to loss of expected earnings was nothing but a claim for general damages which was within the discretion of the trial court. As the law requires therefore, we would be reluctant to disturb the exrcise of such discretion by the trial court. We can only do so if we establish non-

consideration of or omission to consider a pertinent principle of law. That should be the question to be addressed.

Mr. Rweyongeza submitted in relation to the award of general damages at the tune of TZS 5,000,000/= that, the trial judge did not take into account the rule that, the purpose behind the award of damages is to put the innocent party in the same position as money could do. With respect, the complaint is without merit. The said principle of law was seriously taken into account by the trial judge in assessing the damages. This can be found at page 809 of the record where the trial Judge remarked as follows:-

> *"While I agree that defendants suffered emotionally but as I said the purpose of awarding damages is to place the injured party in a same position as far as money can do, as if his right have been violated which is not an easy task. The Court has therefore to do its best and come out with a reasonable figure in awarding general damages, considering that the court's duty in civil case is not to punish the wrong doer but to compensate the victim. Having said that I award the defendants a total sum of Tshs. 5m as*

general damages since the claim of Tshs. 100,000,000/= is on the higher side."

As against the claim as to loss of projected earnings, the complaint by Mr. Rweyongeza was that, section 73 (1) of the Law of Contract Act, Cap. 345, R.E. 2002 was not considered in assessing damages. In order to separate the wheat from the chaff, we shall hereunder reproduce the relevant part of the Judgment dealing with this issue which appears at page 808 of the record. Thus:-

" *Section 73(1) of the Law of Contract Act, Cap. 345 stipulates that compensation is not to be given for any remote and indirect loss of damage. The doctrine aims at restoring the innocent party claiming damages for breach of Contract to the position he would have been if the breach of contract had not occurred . It restores him to his prior position and it is not intended to place him in a far better financial position than he was immediately before the breach of the Contract. Certainly, the defendants are entitled to claim compensation for the loss of future earnings but such compensation should not be for purposes of putting the defendants in a far better position than they would have been before the breach had*

occurred. The projected earnings enumerated in the feasibility study are estimates which had not taken into account other factors such as change of Government policy. They are just estimates and do not carry any certainty that they would have been fetched had the business run smoothly. As correctly submitted by the counsel for the plaintiff there is no guarantee that the defendants would have earned the amount claimed keeping in mind the limited chance of fetching the whole claimed amount , it would be just and fair to sum up the amount claimed and apportion it by 10%. In the end I will proceed to award the defendants a total sum of Tshs. 50 million being compensation for all losses arising from all projected earnings".

With the above analysis and reasoning, we are flabbergasted why is this correct assessment of damages by the trial court doubted. We have tried to read the above extract repeatedly and we find nothing wrong in principle in the way the trial Judge assessed the quantum of damages. Her decision on this aspect therefore, cannot be faulted. The 4th, 5th and 6th grounds of appeal are therefore dismissed.

In the final result, the appeal is partly allowed to the extent of the award of interest on the undisputed amount of TZS 10,212,440/=

at the rate of 26% from 2nd May, 1994 to June 2001 which is set aside and substituted with an award of interest at the same rate on the above undisputed amount from July 2001 to the date of Judgment. The rest of the grounds of appeal are dismissed. Since the appeal partly succeeds, each of the parties shall bear its own costs.

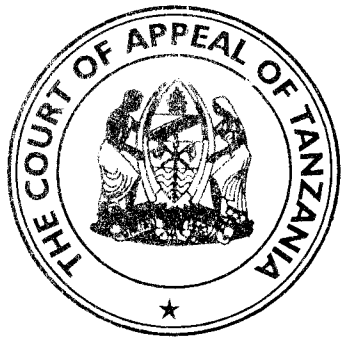
DATED at **DAR ES SALAAM** this 8th day of October, 2021.

J. C. M. MWAMBEGELE
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

I. J. MAIGE
JUSTICE OF APPEAL

The Judgment delivered this 13th day of October, 2021 in the presence of Mr. Theodor Primus, learned counsel for the Appellants and Mr. John Laswai, learned counsel for the respondent is hereby, certified as a true copy of the original.



E. G. Mrangu
DEPUTY REGISTRAR
COURT OF APPEAL