IN THE FAIR COMPETITION TRIBUNAL

AT DAR ES SALAAM

APPEAL NO. 7 OF 2017

FAIR COMPETITION TRIBUNAL
PUBLIC REGISTER

FASTJET AIRLINES LIMITED.....APPELLANT

Versus

FIKIRI LIGANGA.....1ST RESPONDENT
TANZANIA CIVIL AVIATION AUTHORITY (TCAA).....2ND RESPONDENT

(Appeal from the decision of the Committee of the Tanzania Civil Aviation Regulatory Authority on Consumer Complaint in Decision No. 4 of 2017 dated 26th day of May, 2017)

JUDGMENT

This is an appeal against the decision of the Committee of the 2nd respondent that awarded the 1st respondent full compensation of Tanzanian Shillings equivalent to USD 5000 as per Regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008.

The facts of the case can be canvassed as follows; the first respondent bought a ticket number 0002301520382/01 from the Appellant in order to travel on 23rd day of May, 2016 from Dar es Salaam to Mbeya with flight number FN 0121 and he was to return on 25th May, 2016 from Mbeya to Dar es Salaam by Flight number FN 0122 through ticket number 0002301520382/02. The purpose of his travel was to meet a client who

intended to retain him as an advocate for his company Kifaru Treads Mbeya. On the travelling date, the first respondent reached at the airport while in the queue for boarding he and other passengers were told that the system was in default thus their names cannot be seen. The first respondent therefore failed to travel on that date. The first respondent alleged at the trial that since he failed to travel on that day, his client cancelled the retainer business. He decided to issue a demand notice to the appellant but the appellant remained mute.

The first respondent consequently lodged his complaint to the second respondent claiming for specific damages of USD 55,000 arising from the anticipated deal with Kifaru Treads worth of USD 55,000 and general damages of USD 10,000. Upon receipt of the complaint, the second respondent issued a letter to the appellant with Ref no TCAA/0.10/350/Vol II/201 dated 14th December, 2016 giving the appellant 21 days to reply but failed to do so. Further, on 20th day of January, 2017 the second respondent issued summons to the appellant's representatives Eng. August Kowero, Christine Kauson and David Chacha in order to find out whether or not there was anything on record regarding the complaint but there was no response. Therefore, the matter was referred to the complaint Committee of the second respondent for decision. After hearing the complaint, the second respondent held:

> *"The Committee noted that FastJet did not provide justifiable reasons for the cancellation. It was further noted that, fastJet had no preparation for the complaint though they were required to do so by*

two letters by the Authority. FastJet has shown lack of seriousness to the Authority as could not completely defend itself. Therefore the complainant is entitled to full compensation of Tanzanian Shillings equivalent to USD 5000 as per Regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008."

Aggrieved with this decision, the appellant has come to this Tribunal with one main ground of appeal, namely; -

That, the Chairperson of the Committee of the Tanzania Civil Aviation Authority on the Consumer Complaint erred in law and facts by awarding an excessive quantum of general damages and compensation to the first respondent.

The Appellant, therefore, prayed for the following relief(s); -

1. That, this Hon. Tribunal be pleased to allow this appeal and set aside the award granted to the first Respondent by the Chairperson of the Committee of the Tanzania Civil Aviation Authority on the Consumer Complaint.
2. Costs of this Appeal to be borne by the Respondents.
3. Any other relief(s) that this Hon. Tribunal deems fit and proper to grant.

At the oral hearing of the appeal, Counsel Ntemi E. Masanja appeared to represent the appellant while the first respondent was present in person and second Respondent was dully represented by Counsel Martha Mumbuli.

Counsel Masanja told the Tribunal that the appellant appeals against the decision of the second respondent that awarded the first respondent damages of equivalent to USD 5000. He argued the second respondent in awarding the damages contravened the provisions of Section 73 (1) and (2) of the Law of Contract, Cap 345 (hereinafter referred to "LC"). He pointed out that Section 73 (1) of LC provides that loss/damages should had naturally arose from the usual course of things or which parties anticipated that they will likely result from the breach of the contract. He contended further that under sub-section 2, compensation should not be given for any remote loss.

Counsel Masanja exhibited various mischiefs that the counsel believed if taken into account singularly or in totality would have entitled the second respondent not to award the first respondent the damages. He said the decision of the second respondent clearly indicates that the first respondent was to travel to Mbeya in order to close a business deal. Thus, there was no deal yet concluded between the first respondent and Kifaru Treads. The first respondent at the time of buying his air ticket never stated the reasons for his travelling. Therefore, if there was cancellation of flight then the damages suffered did not naturally arise from the breach of the contract for carriage and at the time the contract of carriage was concluded.

He said according to FastJet General terms and conditions, the first respondent was well aware at the time he purchased his ticket that the flight might be cancelled or delayed depending on the reasons to be given. The counsel also argued that the terms and conditions further provide that in the event of cancellation the appellant would refund the first respondent of which he said the first respondent was offered two return tickets but he declined with a reason that he had no point of travelling as he has already lost his business deal.

Counsel Masanja also argued that the reason for cancellation of the retainer deal was due to too many cancellations of meetings done by the first respondent. As such the cancellation of flight done by the appellant was not the major cause of the termination of retainer agreement.

The Counsel for appellant contended that the retention was concluded on 15th May, 2016 as evidenced by Terms of Agreement. Thus, it is not true that the first respondent lost the retainer agreement. In any event, apart from oral evidence adduced at the trial, the 1st respondent failed to adduce any documentary evidence to prove his claim of loss of business.

Lastly, Counsel Masanja pointed out that the award of the second respondent based on Regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008 which says that damages caused by delay the liability of the carrier is limited to USD 5000. The Counsel argued the damage claimed by the first respondent was not caused by delay.

With all these, the Counsel for appellant was of the view that the amount awarded is too excessive and contravened the principle of awarding damages that is guided by the maxim "*restitum integrum*". That is, a person who suffers breach is to restore him to the original position as if the contract has been performed but not to put a person in a far better financial position than he would have been if the contract would be performed. He argued the award is not only punitive to the appellant but also placed the first respondent in a far better financial position. To cement his argument, the Counsel referred the Tribunal to the decisions in **Hadley vs Baxendale (1854) 9 Ex 354** and **Fast Jet Airlines Limited vs John Mnaku Mhozya Civil Appeal No. 96 of 2016 (unreported)**.

In rebuttal, the first respondent averred that the claim by the first respondent was about cancellation of flight and not delay of flight, as such item 10.2.2 of the FastJet General Terms and Conditions apply whereby the appellant was required to refund the first respondent with a return ticket or carry him to his destination in time. Regarding no deal in place, he said the engagement letter concluded the deal and his trip was for receiving the first payment of legal fees. On cancellation of flight, first respondent said even though there were some previous cancellations, it does not justify appellant's action of cancelling flight without notice or reason. He contended it is wrong for the appellant to introduce this kind of defence at this stage and that such a defence does not apply in breach of contract cases. To support his argument he cited the case of **Michael Astley Vs Austrust Limited (A65-1997) (1999) HCA 6** where it was

held that defence of contributory negligence only applies in tort. Regarding Section 73 (1) and (2) of LC, he said the first respondent met the first criteria as the first respondent's loss arose from the natural breach of contract of cancellation of flight. Finally, the first respondent pointed out to the Tribunal that the appellant is not challenging the award of damages rather it is challenging the quantum of it for being too excessive. He thus prayed for the appeal to be dismissed with costs.

Counsel for the second respondent on her part submitted that the second respondent upon receipt of the complaint tried to contact the appellant by issuing two letters to it. One letter required the appellant to file a reply/counter claim/set off within 21 days and the other letter required the appellant to bring all evidence regarding the complaint during the hearing. She said at the hearing though the appellant was represented by Eng. August Kowero and their advocate did not bring any evidence. The Counsel argued since the appellant did not respond to the letters nor did it file any defence then the second respondent had no other option than granting the first respondent what is required by the law. She argued in awarding damages, the second respondent did not just grant what the first respondent claimed. It adhered to Regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008 that sets a limit of liability to a sum of USD 5000. She therefore prayed for the Tribunal to uphold its decision and dismiss the appeal with costs.

In rejoinder, Counsel Masanja conceded that the appellant does not challenge the award of damages. It only challenges the excessive damages awarded to the first respondent. The Counsel insisted that the appellant did offer the first respondent with two return tickets and that the loss of USD 55,000 did not naturally arise and/ or not directly connected to the loss of breach of contract. It is too remote. He insisted that the termination of his engagement was not caused by the cancellation of the flight and this is the reason given by the appellant during the trial when the Counsel for appellant commented that cancellation of the first respondent's business deal was not caused only by appellant. On Regulation 25, the Counsel rejoined that the said Regulation only provides for a ceiling but it does not provide for a procedure of awarding it. He thus insisted that the appeal be allowed.

From the rival arguments, parties do agree that the appeal by the appellant is on quantum of damages and not the award of damages. It is therefore for this Tribunal to determine as to whether the compensation of Tanzanian shillings equivalent to USD 5000 was excessive or not. Counsel for appellant argued that the second respondent has not given any reason as to why it awarded such amount and that the circumstances of the case does not warrant for the first respondent to be awarded the said amount. The first respondent maintained that since the appellant cancelled his flight then he was entitled for compensation and second respondent said the amount awarded took into account Regulation 25 of the Civil Aviation

(Carriage by Air) Regulations, 2008 and the fact that the first respondent was inconvenient by cancellation of his flight with no prior notice.

As rightly pointed out by Counsel Masanja the principles for the assessment of quantum of damages for breach of Contract is deeply rooted in the 19th Century English case of **Hadley Vs Baxendale (1854) 9 Ex 354** that: -

> *"..the damages which the other party ought to receive in respect of..breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it."*

This principle is incorporated in our laws through Section 73 (1) and (2) of LC. The doctrine is aimed at restoring an innocent party claiming damages for breach of Contract to the position he would have been if the breach had not occurred. It restores him to his prior position as such he is not expected to recover damages which are too excessive or too remote. This position was well propounded by Mwandambo, J in the case of FastJet (Supra) when he stated:

> *"...whilst I appreciate the fact that the Respondent is indeed an advocate of this Court and thus the flight cancellation might have subjected him to some anxiety and stress, I do not find any*

justification in the amount awarded. For whatever reason, that award was not only punitive as against the Appellant but also it meant to put the Respondent in far better financial position than he was immediately before the breach of Contract contrary to the spirit behind the award of general damages namely; restitution in integrum. That award is accordingly set aside. I have considered the conduct of the appellant in cancelling the flight without notice prior to and after the date scheduled for the travel and subsequent thereto together with the degree of anxiety the Respondent was subjected to on the said date and I think a sum of Tshs 5,000,000/= will meet the justice of the case as general damages in the circumstances of the case...."

Applying the above principle to the matter at hand, it is not denied that the flight which the first respondent was supposed to travel with on 23rd May, 2016 was cancelled by the appellant. It is also on record that the first respondent came to know about cancellation of his flight at the time when he went to board it. There was no prior notice. It is further on record that the first respondent was offered return ticket after the matter reached the second respondent. All these facts were laid before the second respondent when it was hearing the complaint. The Tribunal further take note that the appellant was given a chance twice by the second respondent to respond but failed and even during the hearing the appellant did not have any information about the complaint despite being told to come with all relevant evidence relating to the complaint. We have succinctly reproduced

the second respondent's decision. It should be noted that the second respondent in reaching to its decision found that the appellant failed to provide reasons for the cancellation as such the second respondent proceeded to award the first respondent full compensation of Tanzanian shillings equivalent to USD 5000 in accordance with Regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008.

As correctly submitted by counsel Masanja, Regulation 25 of the Civil Aviation (Carriage by Air) Regulations, 2008 deals with delays and not cancellation of flights. In that regard, we find that the second respondent applied a wrong principle of law in awarding damages. However, the Tribunal takes note the surrounding circumstances of the case that in-deed there was a cancellation of the flight without notice thus obviously the cancellation caused inconvenience, anxiety and stress to the first respondent. Consequently, the award of USD 3000 would be just and equitable.

In the final analysis, we partly allow the appeal to the extent that the second respondent misapplied the law in awarding damages as such we substitute the award of USD 5000 with USD 3000. Since the appeal is partly allowed we make no order for costs. It is so ordered.

Judge Barke M.A. Sehel – Chairperson

Mr. Yose J. Mlyambina – Member

Mr. Mustapher Siyani – Member

12/04/2018

Pronounced this 12th day of April, 2018 in the presence of Beatrice Mpepo, Advocate for the Appellant also holding brief for Martha Mumbuli, Advocate for the 2nd Respondent and in the presence of 1st Respondent in person.

Judge Barke M.A. Sehel – Chairperson

Mr. Yose J. Mlyambina – Member

Mr. Mustapher Siyani – Member

12/04/2018