**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: LUBUVA, J.A., NSEKELA, J.A. AND KAJI, J.A.**

CIVIL APPEAL NO. 40 OF 2002

**1. R.S.R. (T) LIMITED )**
**2. ALHAJ SAID RASHID KILAHAMA ) . . . . APPELLANTS**

**VERSUS**

**THE LOANS AND ADVANCES REALIZATION TRUST . . . . . RESPONDENT**

**(Appeal from the judgment and decree of the LART Tribunal at Dar es Salaam)**

**(Msoffe, J.)**

dated the 14th day of December, 2001
in
Tribunal Case No. 34 of 1999

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**JUDGMENT OF THE COURT**

**NSEKELA, J.A.:**

In the LART Loans Recovery Tribunal (the Tribunal) the petitioner (now respondent) was the Loans and Advances Realization Trust; the first respondent was R.S.R. (T) Ltd (now first appellant) the second respondent (now second appellant) was Alhaj Said Rashid Kilahama, who was also Managing Director of the first appellant. The

third respondent was National Insurance Corporation (N.I.C.). It was alleged in the petition before the Tribunal that as at 31/7/1996, Tshs.450,019,000/= had been assigned and transferred to the respondent as a non-performing asset from the National Bank of Commerce (NBC). These funds had been advanced by NBC on divers dates to the first appellant and guaranteed jointly and severally by the second appellant and NIC. The first appellant defaulted in the repayment of the monies advanced to it. In a suit instituted by the respondent to recover the same, the Tribunal entered judgment in favour of the respondent. The appellants were aggrieved by the Tribunal's decision, hence this appeal to the Court.

At the hearing of the appeal, Mr. Rutabingwa, learned advocate, represented the appellants. Mr. Kilindu, learned advocate, represented the respondent assisted by Mr. Kamugisha, learned advocate. Mr. Rutabingwa challenged the decision of the Tribunal on five grounds, namely –

> "1. *That the learned Chairman erred in law and on the evidence by holding that the first appellant RSR(T) Ltd had admitted that the WFP/RSR contract was signed*

*whereas there was no such admission as regards contract number 2 and there was no proof of such contract.*

2. *That the learned Chairman erred in law and on evidence by holding that there was unchallenged evidence from the respondent that the account of the first appellant was credited with shillings 145 million and the said sum disbursed whereas there was no such evidence confirming crediting and disbursement in terms of a reasonable and prudent banker.*

3. *That the learned Chairman erred in law and on the evidence by holding that the appellants were liable for the entire amount claimed by the respondent simply because the said Tribunal had held that shs.140 million (and not shs.145 million as originally held) was*

*paid to the first appellant and not repaid whereas there was no proof of the alleged payment and no proof of how the sum of shs.450,019,000/= awarded was arrived at the figure which included the sum of shillings 100 million acknowledged to have been received by the Bank.*

4. *That the learned Chairman erred in law and on evidence by holding that the effect of the first NIC guarantee not extending to the alleged second contract was only to save NIC from the position of guarantor to LART whereas the guarantee was a condition precedent to the granting of the overdraft by the Bank and not LART who were mere transferee.*

5. *That the learned Chairman erred in law by awarding interest at the rate of 31%*

*up to the date of judgment and thereafter at the Tribunal rate without proof and specific prayer for that rate and without declaring the Tribunal rate awarded.*

Mr. Rutabingwa argued the first and 4 grounds together. He submitted that DW1, Alhaji Said Rashid Kilahama (the second appellant) stated in his evidence that the appellants did not receive shs.145,000,000/= despite the fact that all conditions were complied with except the World Food Programme contract. The learned advocate added that DW3, Joseph Sabas, testified that NIC did not issue any financial guarantee for the second contract. He also referred to the evidence of DW2, Obote Rubagumya, who stated in his evidence that no contract was signed with the World Food Programme. In view of this evidence, Mr. Rutabingwa submitted that conditions 2 and 6 of exhibit P3 were not complied with and therefore NBC was not obliged to release the funds. Furthermore, he submitted that there was no admission in the pleadings as suggested by the Tribunal.

As regards the second and third grounds of complaint, Mr. Rutabingwa strongly resisted the allegation that the account of the first appellant was credited with the sum of shs.145,000,000/=. He referred to the evidence of PW1, Gabriel John Uisso, who stated, *inter alia* –

> *"to the best of my knowledge the sum of shs.145,000,000/= was not paid".*

The learned advocate reverted to the evidence of DW2, Obote Rubagumya who testified that no funds were disbursed to the appellants. He strenuously submitted that there was no evidence before the Tribunal of disbursements by NBC and withdrawals by the first appellant. This rendered the conclusion by the Tribunal that there was unchallenged evidence that shs.145,000,000/= had been credited to the account of the first appellant, erroneous. Lastly, Mr. Rutabingwa disputed the award of interest at 31% since there was no evidence to that effect as well as the Tribunal rate of interest.

Mr. Kilindu, learned advocate, with equal force, countered Mr. Rutabingwa's submissions. On the first and fourth grounds of appeal, he submitted that items 2 and 6 in exhibit P3 were not

conditions precedent. The conditions were for NBC's benefit and could be waived. The learned advocate added that the first appellant in his letter to the respondent, exhibit P4 admitted that the respondent had granted to the first appellant shs.145,000,000/= and requested an additional overdraft facility of shs.130,000,000/=. As regards the amount claimed in the petition before the Tribunal, the learned advocate submitted that it included all outstanding amounts as pleaded in paragraphs 4 and 5 of the reply to the appellants' answer to the petition. Lastly, Mr. Kilindu submitted that the rate of interest at 31% had been pleaded in paragraph 5 of the petition and that the appellants' did not traverse the question of the rate of interest.

We start with the first and fourth grounds of appeal. The appellants essentially disputed the fact that there was any agreement between the World Food Programme (WFP) and the first appellant and secondly whether or not the financial guarantee executed by NIC under contract No. 1 was extended to contract No. 2. We would like to point out that NIC has not preferred an appeal against the decision of the Tribunal in so far as it affects it. Mr. Rutabingwa vigorously contended that conditions 2 and 6 in exhibit P3, a letter from NBC to

the Managing Director of the first appellant, were not complied with. In his terminology, these were conditions precedent which had to be satisfied first before any agreement between NBC and the first appellant could come into being.

The cornerstone of Mr. Rutabingwa's submissions was a letter from NBC to the first appellant dated 8/9/1993, exhibit P3. It reads in part as follows –

> *"We are pleased to advise you that the bank has granted a temporary overdraft facility of Tshs.145.0 million for three months until 6th January, 1994.*
>
> *The facility extended to you is subject to the following terms and condition*
>
> *1. . . . . .*
>
> *2. Guarantee by NIC to be taken to cover the facility granted with a 25% margin.*
>
> *3. . . . . .*
>
> *4. . . . . .*

*5. . . . . .*

*6. World Food Programme contract/offer with/to R.S.R. Tanzania Ltd for supply of maize/beans to be obtained before funds are disbursed.*

***If the foregoing terms and conditions are acceptable to you please sign and return the duplicate of this letter at this end.*** *(emphasis added).*

Mr. Rutabingwa forcefully submitted that since the two conditions were not fulfilled, NBC was not obliged to advance the funds to the first appellant. The first appellant and WFP did not sign an agreement and the NIC guarantee was not obtained. Consequently, NBC did not release shs.145,000,000/= to the first appellant. In effect, the learned advocate claimed that there was no agreement between NBC and the first appellant.

The question for consideration is whether there was an agreement between the first appellant and NBC? Our answer is in the affirmative! The agreement is the letter dated 8/9/1993, exhibit

P3. The first appellant signified his acceptance by signing the duplicate of that letter. This fact has not been challenged. In our iew the parties did not contemplate to enter into an agreement once all the six terms and conditions in exhibit P3 were complied with. It is important to note that Mr. Rutabingwa does not dispute the fact that exhibit P3 was accepted by the first appellant in the manner prescribed therein, that is, signing the duplicate copy of the letter At that point in time there was a concluded contract. Admittedly, exhibit P3 is inelegantly drafted, but as it stands, we do not read anything in it that there should be a ***signed*** agreement between the first appellant and WFP before NBC disbursed the money as eloquently contended by Mr. Rutabingwa, learned advocate.

We now come to the second and third grounds of appeal. With respect, we think Mr. Rutabingwa is certainly on firm ground that there was no evidence of withdrawals of shs.145,000,000/= from the first appellant's account. The respondent could easily have established this fact by tendering in evidence bankers' books under Section 77 and 78 of the Evidence Act, 1967 which provide as follows

*"77. Subject to this Act a copy of any entry in a banker's book shall in all legal proceedings be received as prima facie evidence of such entry and of all the matters, transactions and accounts therein recorded.*

*78 (1) A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank."*

We are in complete agreement with Mr. Rutabingwa, learned advocate, that there was no evidence before the Tribunal in terms of Sections 77 and 78 of the Evidence Act, 1967. These provisions enable banks to produce copies of their entries as long as those copies are certified by an officer of the bank within the meaning of Section 78 of the Evidence Act, 1967.

However we come now to exhibit P4 which was written by the second appellant, Managing Director of the first appellant, to NBC. It reads in part as follows –

> *"As you will refer, the overdraft you offered us of Tshs.145 million for crop stocking, we have already purchased 1070 metric tons and hence left with 1135 metric tons to complete the contract. We therefore request you an additional temporary facility of Tshs.130 million in order to complete this contract successfully."*

The letter was duly signed by the second appellant, Managing Director of the first appellant. We are of the settled view that this letter admits of no ambiguity. The first appellant was offered shs.145.0 million and used the money for the purchase of 1070 metric tons. The first appellant now required an additional shs.130.00 million for the remaining activities shown in the letter. Exhibit P4 is an admission of indebtedness by the first appellant to the extent mentioned therein to NBC. Sections 19 and 20 (1) of the Evidence Act, 1967 provide as follows –

*"19. An admission is a statement, oral or documentary, which suggests any inference to a fact in issue or relevant fact, and which is made by any of the persons in the circumstances hereinafter mentioned.*

*20 (1) Statements made by a party to the proceeding or by an agent to any such party, whom the court regards in the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions."*

The general rule is that admissions may be proved as against those who made them. An admission, if clearly and unequivocally made, is the best evidence and though not conclusive, shifts the onus on to the maker. (See: **Thiru Jon V. Returning Officer** A 1977 SC 1724) The author of exhibit P4 is the second appellant, Alhaj Said Rashid Kilahama, Managing Director of the first appellant. What he stated in this letter is very clear and unequivocal. It could not have been a lie against himself.

The fifth ground of complainant concerned the award of interest by the Tribunal at the rate of 31% per annum. This issue need not detain us. On our part, we find that the rate of interest was governed by exhibit P3 and it was 28% per annum.

In the result, the appeal partly succeeds to the extent that the liability of the appellants is reduced to Shs.145,000,000/= with interest at the rate of 28% per annum to the date of judgment. The appeal is otherwise dismissed with costs.

DATED at DAR ES SALAAM this 25th day of January, 2006

D. Z. LUBUVA
**JUSTICE OF APPEAL**

H. R. NSEKELA
**JUSTICE OF APPEAL**

S. N. KAJI
**JUSTICE OF APPEAL**

I certify that this is a true copy of the original.

(S. M. RUMANYIKA)
**DEPUTY REGISTRAR**