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

**(CORAM: MASSATI, J.A., ORIYO, J.A. And MWARIJA, J.A.)**

**CIVIL APPEAL NO. 92 OF 2009**

**EXIM BANK (TANZANIA) LIMITED .....APPELLANT**

**VERSUS**

**1. DASCAR LIMITED**
**2. JOHAN HARALD CHRISTER ABRAHMSSON ..... RESPONDENTS**

**(Appeal from the Judgment of the High Court of Tanzania Commercial Division, at Dar es Salaam)**

**(Werema, J.)**

**dated the 11th day of August, 2009**
**in**
**Commercial Case No. 51 of 2008**

.....

## JUDGMENT OF THE COURT

8th & 24th February, 2016

**MASSATI, J.A.:**

This is an appeal against the judgment of the High Court, Commercial Division (Werema, J.) dated 11th August, 2009.

The appellant had sued the respondents for the recovery of Tshs. 40,063,788/= being Tshs. 10,000,000/= as the principal sum advanced to the first respondent as an overdraft facility; recoverable in 6 months, and

the balance was interest and other accrued charges. The second respondent was sued as a guarantor of the first respondent. It so happened that as at 20th June, 2008, the first respondent had failed to repay the loan, which had by then accrued to the aforesaid shs. 40,063,788/=. And so, on 22nd July, 2008, the suit leading to this appeal was instituted.

After hearing the parties the trial court decreed that:-

> *"The claim by the Plaintiff's bank fails to the extent explained in this judgment. The plaintiff's bank is condemned to costs of the 1st and 2nd defendant*
>
> *Further:-*
>
> *The amount of shs. 5,000,000/= paid in to the Court be paid to the Guarantor's account to be provided to the Registrar of the Commercial Court by the Guarantor."*

The appellant is displeased by the judgment and decree, and has lodged the present appeal.

At the hearing of this appeal, Mr. Dilip Kesaria, learned counsel represented the appellant and Ms. Fatma Karume, learned counsel represented the second respondent; but the first respondent did not enter appearance despite service by substituted service through the Daily News of January, 19, 2016. So, the Court went on with the hearing of the appeal in his absence, under Rule 112 (2) of the Court of Appeal Rules, 2009.

Mr. Kesaria, had filed and argued six grounds of appeal. The four grounds are against the first respondent, so, as we shall see below, there was no response from him.

In the first ground of appeal, the complaint is that the trial court was wrong in deciding that the appellant was not entitled to interests and costs despite the first respondent's admission on the principal sum, and inspite of its finding that parties were governed by Exhibit P1, which was the bank facility.

Mr. Kesaria took us through the various paragraphs of the first respondent's written statement of defence and through the proceedings, to show that throughout, there was no dispute that the appellant was entitled to the recovery of the principal sum and interests, and so it was erroneous on the part of the trial court to have come to a different conclusion.

We think that it was sufficiently established, going by the parties' pleadings which are binding on them, and the evidence on record that the appellant was entitled to the recovery of the principal sum of Tshs. 10,000,000/= within 6 months. Going by Exhibit P1 there was an interest at 20% per year, as well as a penalty of 5% on any excesses created without prior arrangements. With these clear terms, we find it unreasonable on the part of the trial court to find that the appellant was not entitled to the agreed/anticipated damages. We therefore find that the first ground of appeal was meritorious and we allow it.

In the second ground, the appellant is challenging the trial court finding that the first respondent took steps to repay the overdraft amount referring to the amount of Tshs. 5,000,000/=.

Mr. Kesaria submitted that this finding was wrong because the payment was made after the suit had been filed, to wit, at the mediation stage.

We think that in this case it was a misdirection on the part of the trial court to have made findings outside the scope of Exhibit P1, a contract that created and governed the relationship between the parties. Section 37 (1) of the Law of Contract Act Cap 345 R.E. 2002 requires the parties to a contract to perform their respective promises unless such promises are dispensed with or excused under the Act or any other law.

According to Exhibit P1, the agreed period for the repayment of the facility was six months, and this put the latest date as 25th January, 2003. The first respondent was therefore obliged to perform his promise within that period, unless there was consent from the appellant bank to extend the period. If therefore, the Tshs. 5,000,000/= was paid after the institution of the suit; which is not disputed; this was outside the agreed period. The contract had already been breached. So, there was no legal basis for this finding made by the trial court. We accordingly also find that this ground is merited and we allow it.

The third and fourth grounds were argued together. Referring to exhibits P6 and P7, and the evidence on record, Mr. Kesaria argued that it was wrong for the trial court to have found that the appellant bank did not exercise due to diligence to mitigate the escalation of interests. The trial court's finding was based on the fact that the bank was informed that the loan was invested on a school project which had failed; and for that reason, the appellant bank should have realized that the loss was imminent. But the learned counsel submitted that in view of the first respondent's offer to repay Tshs. 20,000,000/= as full and final settlement of the liability in Exhibit P6, and its admission that it neglected to repay the loan in Exhibit P7 the trial court's finding was unfounded.

The trial court also based its decision on another factor, that the appellant bank did not promptly send a demand letter to the first respondent following the latter's default in repayment of the facility. It found that the omission adversely affected the appellant's right of claiming interest from the respondents. In arriving at that decision, the trial court was inspired by

a decision in the Kenyan case of **Prudential Bank Limited vs Jassi Holdings Limited and 2 Others** (2002) 1 KLR 221.

We do not, with respect, agree with that finding of the trial court. In the first place, like the issue concerning the purpose for which the overdraft was to be utilized, the time within which the appellant bank should issue a demand notice upon a default in repayment of the facility was not one of the terms of the parties contract. The appellant bank was for this reason, not bound to issue a demand notice within a specified period. In that respect, we agree with the position taken by the High Court of Uganda in the case of **The City Brewery Limited vs Chhaganlal Jeraj Ganarar & Odhavji Jeraj** (1959) 1 E.A. 1030. In that case, the court held that the liabilities of surety to a loan agreement would not be discharged because of the creditor's failure to issue a default notice to the principal debtor promptly unless the contract specifies the time within which the creditor in required to do so. Undoubtedly, the position equally applies to the principal debtor.

Secondly, the case which was relied upon by the trial court (the prudential case), is distinguishable. In that case, after having defaulted in repayment of the loan advanced to her by the plaintiff, the 3rd defendant did

in April, 1997, authorise the creditor (the plaintiff) to sell the property which had been offered as a security for the loan. The plaintiff did not however, sell the property whose value would have settled almost the whole debt. Even when the 3rd defendant attempted twice to sell the property to other persons, the plaintiff refused to give consent. It was not until late in 1998 that it sold the property. It was on that ground that the court declined to award the accrued interest to the plaintiff observing that the delay in selling the property was possibly a manipulation intended to increase the amount of interest. As intimated herein, the position in the present case is different.

The terms that bound the parties in this mater were embodied in Exhibit P1 (the overdraft facility). According to this exhibit, there is no indication on how the facility was going to be utilized. According to **INVESTOPEDIA** an "Overdraft" is defined as:-

> *"An extension of credit from a lending institution when an account reaches zero. An overdraft allows the individual to continue withdrawing money, even*

*if the account has no funds in it. Basically the bank allows people to borrow a set amount of money.*

*"As with any loan, you pay interest on the outstanding balance of an overdraft loan."*

Logically, this means, that an overdraft facility is extended to a customer of a bank to overdraw his current account. The bank need not know how the customer would use the money. If it was intended that the bank was to know the intention on which the money was to be used, it would have been stipulated as a term of the facility (Exhibit P1) which sets out the intention of the parties. As the Supreme Court of Uganda held in **MAGEZI AND ANOTHER VS RUPARELIA** (2005) 2 E.A 156, which we find persuasive:-

*"The intention of the parties to an agreement was to be determined from the words used in the agreement. However, in resolving an ambiguity, the court could look at its commercial purpose, and the factual background against which it had been made".*

In the present case, the terms of the credit facility are not ambiguous. It is clear from its wording that the parties did not intend to bring the school project as a term of the facility. Since the project was not anticipated by the parties in the agreement, it was difficult for the appellant bank to have mitigated the damages. In terms of section 73 (4) of the Law of Contract Act, without such knowledge, the appellant bank could not be said to have had the means of mitigating the damage resulting from the breach of contract.

Exhibit P6 and P7 do not improve matters on the 1st respondent's side. In Exhibit P6, the 2nd respondent offered to pay Tshs. 10,000,000/= interest over and above the principal sum of Tshs. 10,000,000/=. In Exhibit P7, the second respondent revealed to the appellant bank the reason for the 1st respondent's neglect to pay the money when she had the means to do so. In the light of all this evidence, it is difficult to see why the trial court reached the decision it did. We therefore also reverse that finding, and allow the third and fourth grounds of appeal.

The fifth ground of appeal is really against the second respondent. There, the trial court's finding discharging the second respondent from liability came under a heavy attack. It was contended that, having found that the second respondent was liable for the principal sum of Tshs. 10,000,000/= it was wrong for the trial court to have found that no interest and costs were due from him because he had paid back the overdrawn sum. It was submitted by Mr. Kesaria that the finding was wrong because the first Tshs. 5,000,000/= was paid on 17/12/2008 after the institution of the suit, and the next Tshs. 5,000,000/= was paid when the trial was going in on 11th May, 2009. But Ms. Karume resisted this ground. She submitted that her client had discharged his liability under the terms of the guarantee. She also submitted that her client did not know about the default until he she was served with the pleadings in 2008.

Her view was therefore that the second respondent had discharged his liability under the terms of the guarantee. She did not, however, refer to us, which "terms" or which provision of the law she was relying on.

In rebuttal, Mr. Kesaria submitted that there was circumstantial evidence on record that he might have been aware. For that he referred us

to DW1's testimony on page 152, where, when asked by Ms. Karume if the second respondent was informed that the first respondent was not servicing the loan, her answer was:-

"I am sure he was informed"

Questioned further DW1, clarified that although the 2nd respondent had ceased to be a member of the board of directors he was still participating in all the board meetings. Then the second respondent himself who testified as DW2 acknowledged in his testimony that as early as September, 2005, the appellant bank contacted him to know the where- abouts of the first respondent and explained what he did in connection with the loan recovery from the first respondent. So, with respect, with such evidence it cannot be reasonable to find that the 2nd respondent was not aware or had no notice of the first respondent's default in repaying the loan. We think that he was aware, long before he was served with a summons for the suit.

On the question of discharge of the terms of the guarantee, it is unfortunate that the Guarantee, which was initially annexed to the plaint was not produced as part of the evidence. According to Mr. Kesaria, this

was because it was not in issue, as judgment had already been entered on that.

According to the plaint, the Guarantee was pleaded in paragraph 5, and annexed as Annexure P2. In his written statement of defence the second respondent noted the contents of paragraph 5 of the plaint, but in paragraph 8, he specifically pleaded:-

> *"In the premises, save as to admit that the 2nd defendant's liability to the plaintiff is up to the amount stated in the Guarantee, it is denied..."*

From these, there is, in our view, no dispute that the second respondent guaranteed the repayment of the loan taken by the first respondent. But in the absence of the deed of Guarantee as part of the evidence and in the light of paragraph 8 of his statement of defence we discern that the second respondent's admission on the contents of the Guarantee was only partial. But we note in passing that the Guarantee contained more conditions and terms than those admitted by the second respondent. So, it was still important for the appellant and the second

respondent to whom the burden of proof now shifted to prove that under the Guarantee he was discharged, to ensure that the Guarantee was nevertheless admitted in evidence for the court to ascertain the intention of the parties. As it is now since it is not part of the evidence, even at this stage, we cannot refer to it to see which terms of the guarantee Ms. Karume is referring to in arguing that the second respondent was not only entitled to notice, but also, that, her client had discharged his obligations.

In the absence of the deed of guarantee the general law of the land on the subject must now apply to resolve this dispute. This is the Law of Contract Act (Cap 345 R.E. 2002) (the Act).

Section 80 of the Act stipulates that a surety's liability is coextensive with that of the principal debtor, unless, it is otherwise provided by the contract. According to Collins English Dictionary, the word "**coextensive**" means "**of the same limits or extent**". There is no evidence in this case which shows the contrary terms.

Section 80 of the Act is in pari-materia with section 128 of the Indian Contract Act, 1872 (which was then applicable in Tanganyika) before it was

replaced by the Act. Considering the scope of this provision, the Supreme Court of India in the case of **BANK OF BIHAR LTD vs DAMODAR PRASED,** IR 1969 SC 279 – held that, under this Act, save as provided in a contract the liability of the surety is co extensive with that of the principal debtor. The Court went on to say that this meant that the surety thus becomes liable to pay the entire amount. This liability is immediate. It is not deferred until the creditor exhausts his remedies against the principal debtor.

(See also **BANKING LAWS** by R.N. CHAUDHARY (2009) pg 259 – 261.

Under our Law of Contract Act, a surety can only be discharged from his liability under six conditions:-

i. When the terms of the contract between the principal debtor and the creditor are varied without the consent of the surety.
ii. When there is any contract between the creditor and the principal debtor, releasing the principal debtor; or where there is any act or omission on the part of the creditor, the legal consequence of which is to discharge the principal debtor.

iii. If it is a continuing guarantee, it is revoked by the surety by notice to the creditor, at any time, as to future transactions.

iv. If the surety dies, and in the absence of any contract to the contrary, it revokes the operation of a continuing guarantee as regards future transactions.

v. When the creditor enters into a composition with the principal debtor, or promises to give time to the principal debtor, or not to sue the principal debtor, unless the surety assents to such contract. and;

vi. If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired.

None of the above events has happened in the present case.

There is no dispute that in the present case, there was a default in the repayment of the guaranteed debt. There is also no dispute that the principal debt was paid in installments in December, 2008, and May, 2009. This was long after the expiry of the agreed time which was January, 2003.

So, although the principal debt was paid, it was paid in default. In the circumstances section 92 of the Act, comes into operation:-

> *92. "Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed debt has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor."*

This provision means that once a guaranteed debt is due and the principal debtor has failed to pay it, it is the duty of the surety to pay it together with all the attendant consequences arising from the breach. In terms of sections 80 and 92, of the Act; once a principal debtor defaults in the payment of the loan, the surety steps into or is placed into equal footing with that of the principal debtor. So, unless the principal debtor sooner discharges the liability, the guarantor is as liable as the principal debtor to the creditor and to the same extent under the terms of the overdraft facility (Exh P1). We therefore reject Ms. Karume's arguments on this ground and uphold those of Mr. Kesaria. We thus also allow this ground and find that

the second respondent is liable not only for the principal sum, but also for all the accrued charges and interests at 20% per annum, and the penalty of 5% thereon as agreed in the facility.

The last ground is against the trial court's order on costs. The trial court found that the appellant was liable for costs to the respondents. Mr. Kesaria has attacked this finding. He argued that it was unjustified.

On her part, Ms. Karume submitted that her client was entitled to costs because he was dragged to court even after paying the first Tshs. 5,000,000/= during mediation, and was kept on for the entire trial for no just cause. Besides the second respondent was only liable for the principal sum which he had already paid.

This ground should not detain us. The order on costs was made by the trial court following the finding that the appellant was at fault. On the principle that costs should follow the event that finding could not be faulted. (See **NJORO FURNITURE MART LDT vs TANZANIA ELECTRIC SUPPLY LTD** (1995) TLR, 205.

the evidence on record and the law, the judgment of the trial court, cannot be upheld. As there is no dispute that there was a loan agreement between the appellant bank and the first respondent, which the second respondent guaranteed; that there was a default in its repayment for over five years, in between which, the appellant bank kept on following up the repayment with the respondents, and that the respondents came in to pay only after the institution of the suit, it is difficult to understand and appreciate the reasons advanced by the learned trial judge on the whole but more so, on the question of costs. It is queerer indeed that those whom the trial court found were in default were awarded costs, and even stranger, that part of the money deposited by the second respondent was ordered to be reimbursed to him. We have no alternative but to reverse this finding, and hold that under the contract of guarantee and the overdraft facility, the liabilities of the respondents are co extensive and so both are equally liable for breach of the terms of the facility. This means that they are liable not only for the principal sum but also for all the accrued charges and interests.

For the above reasons, the judgment and decree of the trial court cannot be left to stand. It is reversed, and instead, judgment is entered for the appellant bank as directed herein with costs.

The appeal is therefore allowed.

**DATED** at **DAR ES SALAAM** this 19th day of February, 2016.

S. A. MASSATI
**JUSTICE OF APPEAL**

K. K. ORIYO
**JUSTICE OF APPEAL**

A. G. MWARIJA
**JUSTICE OF APPEAL**

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

J. R. KAHYOZA
**REGISTRAR**
**COURT OF APPEAL**