IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: SEHEL, J.A., KENTE, J.A., AND MASOUD, J.A.)

CIVIL APPEAL NO. 153 OF 2021

DIAMOND TRUST BANK TANZANIA LIMITED.....APPELLANT

VERSUS

GRANITECH (T) COMPANY LIMITED.....1ST RESPONDENT

SAFINA HOLDING COMPANY LIMITED.....2ND RESPONDENT

JOSEPH ANTHONY KARWIMA.....3RD RESPONDENT

JOHN KASSIM MSEMO.....4TH RESPONDENT

THOMAS MTEI LEBABU.....5TH RESPONDENT

(Appeal from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)
(Magoiga, J.)

dated the 18th day of December, 2020

in

Commercial Case No.44 of 2019

JUDGMENT OF THE COURT

6th & 23rd February, 2024

MASOUD, J.A.:

The appellant and the first respondent had, as a matter of common ground, a banker-customer relationship. The relationship was evident in several credit facilities that they entered in respect of which term loans were to be extended to the first respondent. The first facility was of 18th February, 2016 involving a sum of TZS. 2,000,000,000.00. There was a subsequent one which was concluded on 22nd May, 2017, involving a total

sum of TZS. 780,00,000.00. There was yet another one in the nature of overdraft facility for a total sum of TZS. 500,000,000.00, concluded on 22nd May,2018, which was followed on the same day by an agreement rescheduling by amalgamation the existing facilities to a single credit facility amounting to TZS. 2,300,000,000.00.

It is common knowledge that the loan was secured by a charge over the first respondent's plant and machinery. The charge was pursuant to a debenture dated 10th March,2016 between the first respondent and the appellant. There was, in addition, a corporate guarantee of the second respondent, and a third personal guarantee of the third, fourth and fifth respondents.

Believing that the first respondent was in default of her repayment obligations, as a result of which, the outstanding balance of TZS. 3,133,768,848.90 remained due as of 02nd May 2019, the appellant instituted a suit against the respondents jointly and severally. In the suit, the appellant claimed for the above-mentioned sum as well as a sum of USD 122,812.88, interest at the rate of 21% per annum on the claimed sum as from 03rd May, 2019, and interest at the court rate post-judgment. The first respondent was allegedly liable to the appellant as the principal

borrower, whilst the other respondents were being held liable as guarantors.

The appellant's main allegation was that the first respondent defaulted the terms of repayment. As such, the above-mentioned outstanding balance remained unpaid as of 2nd May, 2019. In support of the claim, the appellant pleaded a number of documents as annexures. They were, namely, Annexure P1 which is a true copy of a credit facility letter dated 18th February,2016; Annexure P2 which is a true copy of a credit facility letter dated 22nd May, 2017; Annexure P3 which is a true copy of a credit facility letter dated 22nd May, 2018; Annexure P4 which is a copy of a charge of the first respondent's plant and machinery dated 10th March, 2016; Annexure P5 which is a copy of a corporate guarantee of the second defendant; Annexure P6 which comprised copies of personal guarantees of the third, fourth, and fifth respondents; and Annexure P7 which consisted of true copies of first respondent's bank statements.

In their joint amended written statement of defence, the respondents denied the allegation of being indebted to such a huge amount of money. They did not however deny that they signed loan facilities for loans that were to be extended to the first respondent. They pleaded that the appellant had up to the date of filing the suit recovered

part of the loan amount which was disbursed to the first respondent's account, leaving only an outstanding balance of TZS. 750,903,881.94.

They also contended in their pleading against the appellant's claim that the financing for a sum of TZS. 3,173,469,000.00 was for the first respondent's stone crusher quarry plant project at Msata, Bagamoyo, Coast region, which project, after becoming operational, the proceeds were to be used in repaying the loan. However, it was the respondents' defence that the agreement was not honoured by the respondent as agreed.

In line with the above, the respondents referred to, first, a new term loan of TZS. 780,500,000.00 which they said that it was to be used to clear the first respondent's pending payment obligation for the purchase of equipment, an additional excavator and three trucks; and second, an overdraft amount of TZS. 500,000,000.00 which was to be used as a working capital. They pleaded that the above loans were all not disbursed as agreed. They maintained that the appellant's failure to disburse the agreed amount was contrary to the facility letter duly signed, which was in itself a total breach of the alleged amalgamation agreement of the term loan facilities executed.

From the pleadings, the trial court framed and recorded six issues for determination. They were, firstly, whether the terminal loan facility of TZS. 780,500,000.00 as per the appellant's credit facility letter dated 22nd May, 2017 was disbursed by the appellant to the first respondent as agreed by the parties; secondly, whether or not the overdraft facility of TZS. 500,000,000.00 as per the appellant's letter of 22nd May, 2018 was availed to and utilised by the first respondent as agreed by the parties; thirdly, what, if any, were the agreed securities availed by the respondents to the appellant to secure the credit facilities?; fourthly, what, if any, is the amount outstanding and due from the respondents to the appellant under the said credit facilities?; fifthly, what, if any, are the respondents' liability to the appellant?; and sixthly, what reliefs are parties entitled to.

Based on the pleadings, the evidence adduced and the submissions made, the trial court found and held in favour of the respondents in respect of the above issues. The trial court was satisfied that the appellant did not prove her case against the respondents on the balance of probabilities. In particular, the trial court was of the view that the appellant utterly failed to tender any documentary evidence, such as a bank statement, to prove the disbursements which were disputed by the respondents. However, since the trial court was satisfied that the

respondents admitted that they were indebted to an outstanding balance of TZS. 750,903,881.94, the court ordered the respondents to pay the said amount without interest within a period of six months from the date of the judgment, failure of which the appellant would exercise her rights of realising the debt through laid down procedures.

The appellant was aggrieved by the judgment and decree of the trial court. She thus preferred the instant appeal which was grounded on the following complaints:

1. *That the trial judge erred to ignore and not to consider exhibit P9 which was dully admitted by the trial court;*
2. *That the trial judge erred in concluding that the term loan facility of Tshs. 780,500,000 was not disbursed by the appellant to the 1st respondent as agreed;*
3. *That the trial judge erred to conclude that the term loan facility of Tshs. 500,000,000 was not disbursed to the 1st respondent;*
4. *That the trial judge erred to reject the admissibility of Exhibit P9(2) and Exhibit P9(3) annexed to the appellant's witness statement;*

IN THE ALTERNATIVE

5. *That the trial judge erred in law to reject the admissibility of Annexture P7 to the appellant's plaint;*
6. *That the trial judge erred in concluding that a statement not supported by documentary evidence is as good as no proof at all;*

7. *That the trial judge erred in concluding that the appellant failed to prove the outstanding amount due to it from the respondents;*
8. *That the trial judge erred in granting reliefs which were not pleaded and/or prayed for by the respondents;*

IN THE ALTERNATIVE

9. *The trial judge erred in granting six months stay of execution of the decree and waiver of interest without any sufficient reason.*

At the hearing of the appeal, the appellant was represented by Mr. Zacharia Daudi, assisted by Mr. Laurent Leonard, both learned advocates, and for the respondents was Dr. Alex Nguluma, learned advocate. In arguing the appeal, Mr. Daudi, adopted submissions lodged on behalf of the appellant earlier on in terms of rule 106(1) of the Tanzania Court of Appeal Rules (the Rules), and opted not to make any oral submissions to elaborate on any arguments made in the submissions already lodged. On the part of the respondents who did not lodge written submissions in terms of rule 106(7) of the Rules, Dr. Nguluma made on their behalf a lengthy oral submissions in reply to the appellant's written submission.

We considered the rival arguments emerging from the appellant's written submissions and Dr. Nguluma's oral submission in reply, together with Mr. Daudi's rejoinder to Dr. Nguluma's oral submission. It was clear to us that there is an overarching question arising from the arguments

concerning Exhibit P9 which consisted of a Tanzanian Shillings bank account Statement of the first respondent and PW1's affidavit as to accuracy and authenticity of the statement. Having been duly admitted by the trial court at the trial, the exhibit was, subsequently, ignored and therefore not considered by the learned trial judge when he was composing his judgment after raising an issue *suo motu* on the said exhibit and making a finding that the same was not admissible and was inadvertently admitted in evidence.

The overarching question concerns the first ground of appeal. It is on whether the trial court was entitled to raise the issue *suo motu* and as a result decide not consider Exhibit P9 which had already been admitted in evidence and formed part of the record. The ancillary question is on the propriety of the cause taken by the learned trial judge in deciding not to consider the exhibit without affording the parties an opportunity to be heard.

In relation to the above questions, Mr. Daudi referred us to the record of appeal from page 1514 up to page 1515 and from page 1767 up to page 1793. He argued that the record evidences that the exhibit was duly admitted in evidence after being objected by the appellant and eventually cleared for admission by the trial court. It was therefore, in his

submission, not open to the learned trial judge to raise the issue as to admissibility of the exhibit which had already been admitted in evidence and determine it against the appellant without affording the appellant the right to respond on the issue.

On the argument about violation of the right to be heard, reliance was made by Mr. Daudi on the case of **Salhina Mfaume and 7 Others v. Tanzania Breweries Co. Ltd**, Civil Appeal No. 11 of 2017 (unreported) and the case of **Hassan Kibasa v. Angelesia Chang'a**, Civil Application No. 405/13 of 2018. It was brought to our attention that in the latter case, this Court made the following pronouncement which is relevant to the situation we are facing. The Court said:

> *"Given the settled position of the law as discussed above, we find without hesitation that* ***the course taken by the learned High Court Judge to determine the application for leave on a point she raised suo motu in the course of composing her judgment without affording the applicant an opportunity to be heard constituted an incurable defect that went to the root of the matter rendering her decision and order null and void.*** *The same fate must befall the subsequent proceedings,*

ruling and order in the review application as they stemmed from a nullity". [Emphasis added]

It was also Mr. Daudi's submission that contrary to the finding of the learned trial judge on the issue he raised *suo motu* without affording the appellant right to be heard, the exhibit P9 was in fact referred to in PW1's witness statement and had not been previously tendered and rejected in the trial proceedings. In this respect, Mr. Daudi argued that there was no basis for the trial judge to ignore the exhibit on reasons that the exhibit was not referred in the witness statement and was previously in the trial tendered and rejected while he had himself admitted it after overruling the respondents' objection.

In the light of the above arguments, Mr. Daudi referred us to the record of appeal to fortify his standpoint. Firstly, from page 1767 up to 1793 and page 1477 of the record with a view to impress upon us that Exhibit P9 was different from documents which were previously tendered and rejected at the trial, and secondly, at page 497 of the record to fortify his argument that Exhibit P9 was indeed referred and identified in the witness statement of PW1.

From Dr. Nguluma's oral submission, we gathered that he was not disputing that Exhibit P9 was admitted in evidence at the trial. We however understood him as arguing that, since the trial judge was

satisfied as he was composing his judgment that the exhibit had earlier been tendered and rejected and had not been referred in the witness statement of PW1, he was at that stage entitled to ignore and therefore not consider it in his judgment. Dr. Nguluma maintained that the exhibit was not properly tendered and admitted in accordance with the law. He did not however avail us any case law in support of his proposition.

As to the complaint that the appellant was not afforded an opportunity to be heard on the point concerning Exhibit P9 that the learned trial judge raised *suo motu* when he was composing the impugned judgment, it was argued by Dr. Nguluma that the counsel for the appellant did not identify any specific issue on the point which the appellant was complaining of, and the stage of the trial proceedings the issue emerged. As to the cases relied on by the learned advocate for the appellant, he argued that they were of no relevance to the issues at stake.

Having given due consideration to the rival arguments on Exhibit P9, we went ahead to examine the record. We perused the record of appeal from page 1507 up to page 1515 covering the trial court's proceedings of 2nd September, 2020. We observed how the exhibit was introduced by PW1 along with an affidavit as to accuracy and authenticity of the bank statements, and how it was identified by PW1, and objected

by the appellant. We also observed that the parties were heard on the objection before the learned trial court overruled the objection and admitted the exhibit as Exhibit P9. Having considered the rival arguments on the admissibility of the exhibit at page 1514, the learned trial judge said at page 1515 of his ruling that:

> *"Having duly listened and considered the rival arguments on the admission of the sought documents, I am of the considered opinion that the same are admissible for now have complied with the law...the bank statement in dispute was annexed in the plaint and it was specifically referred in paragraph 9 as a bank statement in Tanzania shillings as correctly argued by Mr. Daudi. No surprises and I see no prejudice so long as it has an affidavit authenticating its contents".*
> *On the strength of the above reasons, I am not convinced by the arguments by the learned counsel for the defendants, I thus, hereby overrule the objection and proceed to admit the two documents as maintained by the plaintiffs as collectively admitted in evidence and marked as exhibit P.9".*

It is not without relevance to underline what happened on 24th August, 2020 before the said exhibit was tendered and admitted in

evidence on 2nd September, 2020. Going by the record of appeal, in particular between page 1471 and page 1476, it is clear that the previous attempt to tender for admission a bank statement in Tanzanian Shillings in respect of the first respondent's bank account was futile as the statement tendered was successfully objected to for being different from the statement that was pleaded in the plaint and annexed thereto. Whereas the statement pleaded in the plaint covered the period between 1st January, 2016 and 2nd May, 2019, the statement which was unsuccessfully sought to be admitted was of the period between 1st January, 2016 and 26th February, 2020 which is far beyond the date on which the suit was filed.

It appears from page 1148 up to page 1149 of the record of appeal that after Exhibit P9 was admitted on 2nd September, 2020, the respondents filed a memorandum of review (Review No. 8 of 2020) on 4th September, 2020. They sought a review of the learned trial judge's decision admitting the Exhibit P9 in evidence. The ground advanced but disputed by the appellant was mainly that Exhibit P9 was erroneously admitted because it comprised the same documents which were previously rejected by the court. After a hearing, the record of which are from page 1179 up to 1186, the learned trial judge overruled the

preliminary objection which was raised by the appellant to the effect that the trial court had no jurisdiction to determine the review preferred by the appellant and dismissed the review for lack of merit.

The issue of admissibility of the Exhibit P6 emerged once again when the learned trial judge was composing his judgment. At page 1363 of the record, the learned trial judge raised the issue *suo motu* and determined it against the admissibility of the exhibit. The trial judge said:

> *"Before going into the issues, I find apposite to determine the evidential value of exhibit P9 in these proceedings which was rejected and later inadvertently admitted. It should be noted that, the plaintiff in her plaint at paragraph 9 annexed two defendant's bank statements which were annexed as "annexure P7". In the witness statement of PW1 the said defendant's bank statements were referred as exhibit P9(I) and (2) and (3): Original TZS and USD Bank statement and loan repayment schedule. It should be equally noted that no list of documents was filed by both parties. So, basically it means parties were as matter of fact bound by their pleadings. See the case of PAULINA SAMSON NDAWAVYA v. THERESIA THOMAS MADAHA, CIVIL APPEAL NO.45 OF 2017(MWANZA) CAT (UNREPORTED)*

quoting the case of JAMES FUNKE GWAGILO v. ATTORNEY GENERAL [2004] TLR 161 both of which under scored the function of the pleadings is to avoid surprise and reiterated the importance of that principle that, parties are bound by their pleadings and no party should be allowed to depart from his pleadings thereby changing his case from which he had originally pleaded. Guided by the above, the plaintiff in her witness statement in prove of the case for plaintiff annexed quite different bank statements as opposed to those pleaded in the pleadings. Not only that but also same were tendered without complying with the law (as provided for under sections 78A and 79 of the Tanzania Evidence Act,[Cap 6 R.E 2019) being computer printer out. The learned advocate for the plaintiff despite asking for adjournments which were granted, this court delivered its rulings on the admissibility of exhibit P9(I)(-2) and (3) on 24/08/2020 and 25/08/2020, rejecting 'annexure P9(I), (2),(3).

Indeed that was the last documentary evidence for the plaintiff in this suit. However, on 02/09/2020 the plaintiff sought to tender another exhibit not referred in her witness statement as mandatorily required under Rule 50 (d) of the High Court (Commercial Division) Procedure Rules,

2012 vide GN. 250 of 2012 as amended by GN. 107 of 2019, which Rule provides as follows: Rule 50 (1) A witness statement shall:-

(a) NA

(b) (b)

(c) NA

(d) *Efficiently identify any documents to which the statement refers without repeating its contents unless this is necessary in order to identify the document.* ***Inadvertently, the court admitted exhibit P9 which had been formerly rejected and was not referred nor efficiently identified in the witness statement and annexed in the witness statement of PW1 nor was it listed as additional list of document to be relied upon. Since exhibit P9 was so admitted in abrogation of the law, this court hereby ignore it and will not consider it in analysis of evidence for parties in this suit".*** [emphasize added].

It is our considered view that the course taken by the learned trial judge to raise and decide on the issue he had raised once again *suo motu* in the course of composing the judgment and thereby, deciding it without affording the parties an opportunity to address him about it, was not proper. We agree with Mr. Daudi that the course taken is contrary to the

principles of natural justice, namely, the right to be heard, as the parties were condemned unheard. This Court has consistently taken that stance in a number of its decisions including, **Abbas Sherally and Another v. Abdul S.H.M. Fazalboy,** Civil Application No. 33 of 2002, **Director of Public Prosecutions v. Yassin Hassan @ Mrope,** Criminal Appeal No. 202 of 2019 and **Margwe Error and Two Other v. Moshi Bahalulu,** Civil Appeal No. 11 of 2014 (all unreported). In **Abbas Sherally and Another** (Supra) the Court held that:

> *"The right of a party to be heard before adverse action is taken against such party has been stated and emphasized by courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard,* ***because the violation is considered to be a breach of natural justice".***
> [Emphasis added].

Again, having admitted Exhibit P9 and parties examined the witness on the said exhibit, it was not open to the trial judge to turn around and challenge its admission on the pretext of determining its evidential value. We think the court was by then already *functus officio* to determine what

it had previously determined in that it ceased to have control over the matter and no longer had jurisdiction to alter or change it.

We say so because the trial court had already heard and made a final determination on the questions concerning the admissibility of Exhibit P9 in its ruling delivered on 2nd September, 2020 found at page 1514 and 1515 of the record. See, **Yusuf Ali Yusuf @ Shehe@ Mpemba & 5 Others v. Republic,** Criminal Appeal No. 81 of 2019 (unreported); **Leopold Mutembei v. Principal Assistant Registrar of Titles, Ministry of Lands, Housing and Urban Development and Another,** Civil Appeal No. 57 of 2017 (all unreported) and **Kamundi v. Republic** [1973] EA 540. Thus, the learned trial judge was functus officio when he raised once again the issue of admissibility of exhibit P.9 on the pretext of determining evidential value of the exhibit and thereby deciding not to consider the exhibit. In the case of **N.B.C Ltd & IMMMA Advocates v. Bruno Vitus Swalo**, Civil Appeal No. 331 of 2019 (unreported), the Court was faced with a more or less similar situation regarding application of the *functus officio* principle. From page 10 up to 11 of the typed judgment, the Court held in that case that:

> *The appellants fronted the objection [on limitation of time], before the matter was heard on merit and was overruled. As if that was not enough, the issue*

> *of limitation came up again in the appellants' final submissions whereupon the learned judge considered it again and maintained her earlier stance that it was not time barred.* ***With due respect, it was not right for the learned judge to entertain issues which she had already determined in a ruling overruling the preliminary objection. She was therefore functus officio****.....Fortunately, both counsel agreed and rightly so in our view, that it was improper to raise that issue twice before the same court. The right cause to be taken.....if aggrieved.....was to appeal.* [Emphasis added]

What we have deliberated upon favourably takes care of the first ground of appeal which we hereby allow. Since this ground of appeal is sufficient to dispose of the appeal, we find no pressing need to deal with the rest of the grounds of appeal argued by the parties.

In the end, for the reasons stated above, we find merit in the appeal and we allow it. Consequently, we quash and set aside the impugned judgment of the High Court in Commercial Case No. 44 of 2019. We order the case file to be remitted to the trial court before the learned trial judge for him to compose afresh a judgment that shall take into account all

exhibits admitted at the trial. We make no order as to costs having considered the circumstances of this matter.

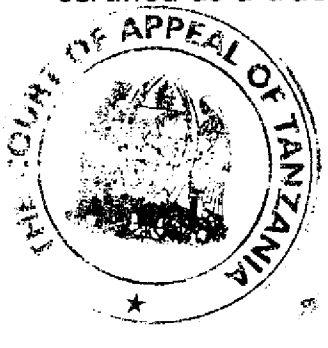
DATED at **DAR ES SALAAM** this 22nd day of February, 2024.

B. M. A. SEHEL
JUSTICE OF APPEAL

P. M. KENTE
JUSTICE OF APPEAL

B. S. MASOUD
JUSTICE OF APPEAL

The Judgment delivered this 23rd day of February, 2024 in the presence of Mr. Zacharia Daudi, learned advocate for the appellant and Ms. Neema Daudi, learned advocate for the respondents is hereby certified as a true copy of the original.



W. A. HAMZA
DEPUTY REGISTRAR
COURT OF APPEAL