

IN THE HIGH COURT OF TANZANIA**AT DAR ES SALAAM****CIVIL CASE NO. 20 OF 1997****HIGHLAND SOAP & ALLIED PRODUCTS LTDPLAINTIFF****v****CONSOLIDATED HOLDING CORPORATIONDEFENDANT****JUDGMENT****Shangwa, J**

This case was filed on 24th January, 1997. Since then to the present date, it is fifteen years and ten months or so ago. It goes without saying that it is one of the back log cases that this Court has all along been trying to resolve by our legal methods including mediation which failed. I agree with Mr. Bomani for the plaintiff that justice delayed is justice denied but in this case to no one justice will be denied because the Court's role is to do justice. There are so many factors that led to the delay in the finalization of

this case. One of them is that it was assigned to different judges who could not find it convenient for them to hear and determine it within its speed track. These judges are the late chipeta,J, the late Kaji,J, Ihema, J rtd and Mihayo, J rtd. Hon Mihayo, J partly recorded the evidence of P.W1 SHIRAZ LADHU JAFFER. The case was reassigned to me on 14th August, 2009 after Mihayo J's retirement. By then, it had been pending in Court for a period of twelve years and six months or so. What Mr. Bomani did upon re-assignment of this case to me is to pray for amendment of the plaint. I granted his prayer. Thereafter, he prayed for extension of time of the speed track of this case and for framing new issues. I granted his prayer. The speed track was extended for a period of two years from 21st March, 2012 and new issues were framed as follows:-

1. *Whether the plaintiff deposited any sum*

of money with NBC for the purpose of remittance to IFC (International Finance Corporation) of Washington D.C U.S.A between 1985 and 1989 and if so how much.

2. Whether there is any arrangement that the defendant NBC would promptly remit the payment to IFC.

3. Whether there was any delay in remitting the funds to IFC and if so who was responsible for such delay.

4. Whether IFC levied any penalty interest to the plaintiff, if so whether penalty interest was paid.

5. What reliefs are the parties entitled thereto.

Mr. Bomani called one witness to prove the plaintiff's case and led this witness to tender some documents to support

the plaintiff's case. At the close of the plaintiff's case, Mr. Mwandambo for the defendant prayed the Court to dismiss it on grounds that the defendant has no case to answer. He made lengthy submissions to that effect. However, his prayer was dismissed after finding that the defendant has a case to answer. The case was fixed for defence. Mr. Mwandambo called one witness on the defendant's side. Mr. Mustafa for the Third party also called one witness on the Third party's side.

The facts of this case are as follows:- On 27th June, 1978, International Finance Corporation at Washington D.C, U.S.A hereinafter to be referred to as IFC entered into an Investment Agreement with Highland Soap and Allied Products Co. Limited in Tanzania hereinafter to be referred to as the plaintiff. The said Agreement was for a loan of One Million Three Hundred and Seventy Five Thousand dollars (\$ 1,375,000). This amount was paid by IFC and

fully received by the plaintiff. The loan was approved by BOT by a letter with ref 6054/81 dated 28th June, 1978. The loan was for the purpose of financing the construction and equipment of a Laundry and Toilet soap plant at Mbeya, Tanzania. This loan had to be repaid in accordance with section 3.06 (a) of the Investment Agreement. It had to be repaid in (14) fourteen equal instalments as hereunder

Date of payment	Principal amount due
January 15, 1982	\$ 98, 215
July 15, 1982	\$ 98, 215
January 15, 1983	\$ 98, 215
July 15, 1983	\$ 89, 215
January 15, 1984	\$ 98, 215
July 15, 1984	\$ 98, 215
January 15, 1985	\$ 98, 215
July 15, 1985	\$ 98, 215
January 15, 1986	\$ 98, 215

July 15,1986	\$ 98, 215
January 15,1987	\$ 98, 215
July 15,1987	\$ 98, 215
January 15,1988	\$ 98, 215
July 15,1988	\$ 95, 205

The loan had to be repaid with interest of ten and a quarter percent (10 ¼) on each instalment. However, according to section 3.11 (a) (i) of the Investment Agreement, late payments of the loan had to be charged a higher rate of interest of twelve and a quarter percent (12 ¼ %).

At paragraphs 9 and 10 of the amended plaint, the plaintiff avers respectively that save for the deposit which was made on 22nd July, 1980, the defendant failed or neglected to make remittances on time which failure caused the plaintiff to be penalized by the IFC under the Investment Agreement and that by mid 1992 the penalty

amount had reached United States Dollars Five Hundred Ninety Nine Two Hundred and Seventy Six Thousand us \$ 599, 276 and that this penalty was finally paid by the plaintiff through a Japanese Associate Nihon Kabushiki Kaisha. At paragraph 12 of the amended plaint, the plaintiff is claiming for reimbursement by the defendant of \$ 599, 276 and interest on the said sum at the banking rate in force at the material times plus costs of the suit . This is the end of the facts.

As already indicated, there are five issues which this Court has been called upon to determine. As a whole this case is complex but the issues to be determined are very simple. I will consider them one after the other.

On the first issue, the Court is asked to determine as to whether or not the plaintiff deposited any sum of money with NBC for remittance to IFC between 1985 and 1989

and if so how much. There is no dispute that in 1978, the plaintiff obtained a loan of USD One Million Tree Hundred and Seventy Five Thousand dollars (\$1, 375, 000) for the purposes of constructing and purchasing equipments for a laundry and Toilet soap plant at Mbeya, Tanzania. As already mentioned the loan was obtained by the plaintiff from IFC after approval by BOT (Third Party). In his testimony, P.W1 Shiraz Ladhu Jaffer affirmed that the entire loan together with interest was deposited with NBC for remittance to IFC. The question as to whether or not USD 1, 375, 000, plus interest of 10 $\frac{1}{4}$ % was deposited with NBC by the plaintiff between 1985 and 1989 was not disputed by counsel for the defendant Mr. Mwandambo. I find therefore that between 1985 and 1989 the plaintiff did deposit with NBC USD 1, 375, 000 Plus interest of 10 $\frac{1}{4}$ % for remittance to IFC. This disposes of the fist issue which is answered in the affirmative.

On the second issue, the Court is asked to determine as to whether or not there was any arrangement that the defendant NBC would promptly remit the payment to IFC. The truth is that there was no such arrangement. But although there was no such arrangement, NBC had a duty to remit the plaintiff's money deposits to IFC promptly. The plaintiff was one of its big customers whose banking transactions had to be respected by NBC without delay. This disposes of the second issue which is answered in the affirmative.

On the third issue, the Court is asked to determine as to whether or not there was any delay in remitting the plaintiff's funds to IFC and if so who was responsible for such delay. This issue is a burning one. The first limb of this issue is very simple because the defendants do not at all dispute the fact that there was delay in doing so. Also, the plaintiff does not

dispute the fact that some delays were caused by its own failure to deposit some loan instalments with NBC on time. The second limb of this issue is complex and puzzling. Both the defendant and the third Party associates this delay with serious lack of foreign exchange in this country during the entire period when the plaintiff's loan deposits had to be remitted to IFC. That is between 1982 and 1988. During that period, there was depression in the economy. Lack of foreign exchange in Tanzania made it difficult to externalize the plaintiff's loan deposits to IFC on time. According to the defendant's witness namely Betseba Kilima and the Third Party's witness namely Wilbroad Barnabas Temba, externalization of funds had to be done upon approval by the Committee chaired by the Governor of Bank of Tanzania (Third Party) composed of members from the Treasury and NBC. These witnesses told the Court that there were many

applications for externalization of funds which were being granted on priorities.

The poor state of economy which existed in this country during that period makes me think that neither the defendant nor the Third Party should stand to blame for the delay in the remittance of the plaintiff's loan deposits to IFC. First of all, NBC. could not fulfill its duty of remitting the plaintiff's loan deposits to IFC on time without prompt approval from BOT (Third Party). According to Betseba Kilima who testified on behalf of the defendant, approval by BOT to externalize funds sometimes could even take more than two years because the Applicants were many and there was no sufficient forex. Secondly, BOT (Third Party) could not make prompt approval for remittance of funds to IFC or elsewhere in abroad or overseas because there was lack of foreign exchange.

However, although the defendant and the Third Party cannot be blamed for the delay in the remittance of the plaintiff's loan deposits to IFC, both of them cannot avoid being held responsible for such delays. This is because there is no one else to be held responsible for the delay except themselves.

At this juncture, it is important to identify the deposits which were made by the plaintiff and whose externalization was delayed. Fortunately, exhibit P2 tells it all. This is a letter written by NBC to the plaintiff copied to BOT dated 22nd July, 1992 with ref No. NBC /3/0.50/10. This letter shows in detail the amount of loan instalments paid or deposited by the plaintiff in its Account with NBC, the dates when deposited, BOT'S permit number and the number of delays by NBC to remit the money to IFC. As a result of the delay caused by NBC in remitting the plaintiff's loan deposits to IFC, the plaintiff suffered penalty

interest charged by IFC to the tune of USD 599, 276 out of the total deposits of USD 1, 172, 036. The plaintiff is now requesting this Court to order the defendant to reimburse the same. In actual fact, exhibit p2 was not controverted by the defendant or the Third Party. There is even an internal correspondence from the Director of International Banking (NBC) Headquarters to the Branch Director NBC Bank House with ref. No NBC/DL/ VOL VI/ B 30/2/23 dated 9th November, 1992 namely exhibit p3 which shows that NBC is not denying the plaintiff's claim of USD 599, 276 being compensation for the delay in externalizing its loan repayments to IFC Washington D.C, U.S.A, and which gives the reasons for the delay and directing that the plaintiff should approach BOT (Third Party) for its claim. I now categorically hold that NBC and BOT are both responsible for the delay. This disposes of the third issue which is answered in the affirmative.

On the fourth issue, the Court is asked to determine as to whether or not IFC levied any penalty interest to the plaintiff and if so whether penalty interest was paid. As already mentioned, section 3.11 (a) (i) of the Investment Agreement between IFC and the plaintiff provided for interest of 12 $\frac{1}{4}$ % on late payment of the loan. This provision was mandatory. It was binding upon the plaintiff. This means that IFC did levy penalty interest on late payments of the loan instalments. Now was the penalty interest paid? For me, I believe it was paid. In fact, P.W.1 shiraz Ladhu Jaffer told this Court in his testimony that the said interest was paid by the plaintiff's Japanese Associate known as Nihon K.J. Kabushiki Kaisha. I do not have any reason to doubt his testimony. At any rate, there is evidence to show that the penalty interest was paid on behalf of the plaintiff by Nihon K.J. Kabushiki Kaisha, Tokyo 162, Japan. This evidence is a letter by fax dated 17th September, 1996 (Exhibit p4) from IFC TO Nihon K.J.

Kabushiki Kaisha, which was written to acknowledge receipt of the same. It was copied to one Noorally K.J. Dhamani who was the plaintiff's chairman by then. This piece of evidence was not controverted by either counsel for the defendant or counsel for the Third Party. I hold therefore that penalty interest was levied and paid. This disposes of the fourth issue which is answered in the affirmative.

On the fifth issue, this Court is asked to determine as to what reliefs are the parties entitled thereto. In my opinion, the parties are entitled to the following reliefs:- First, the defendant should reimburse the plaintiff half of USD 599,276 that is USD 299, 638 because the delay to externalize the funds was partly caused by the plaintiff. Second, I make no order with regard to interest because the delay to externalize the plaintiff's funds to IFC was not caused by negligence of the defendants but it was because

of lack of forex in this country during that period. Third, I enter judgment in favour of the plaintiffs with Costs.




A. Shangwa

JUDGE

4/11/2013

Delivered in open Court this 4th day of November, 2013 in the presence of Mr. Bomani for plaintiff and Mr. Thomas Atito for 1st defendant and in the presence of Mr. Sikila for Mr. Mustafa for Third Party.


A. Shangwa

JUDGE

4/11/2013