IN THE HIGH COURT OF TANZANIA

MWANZA DISTICT REGISTRY

AT MWANZA

CIVIL CASE No. 01 OF 2016

EXIM BANK TANZANIA LIMITED ---------- PLAINTIFF

VERSUS

WTI INTERNATIONAL COMPANY LIMITED ------- 1ST DEFENDANT

WEMA HAMIS GILALA ---------- 2ND DEFENDANT

THERESIA KIMWAGA ---------- 3RD DEFENDANT

JUDGMENT

02th April, & 1st July, 2020

TIGANGA, J

In this judgment Exim Bank Tanzania Limited, a limited liability Company duly incorporated and operating under the laws of Tanzania, in banking business industry sued the three defendants namely WIT International Company Limited, also a limited liability company duly incorporated and operating under the laws of Tanzania, as well as the 2nd and 3rd defendants who are natural persons and directors of the 1st defendants, for the following reliefs.

a) A declaration that the 1st, 2nd and 3rd defendants are in breach of credit facility agreement and contract of guarantee and indemnity

respectively by their failure to discharge their duties and obligations, in accordance with the agreements.

b) That the defendants jointly and severally be ordered to immediately pay to the plaintiff the outstanding amount of Tshs. 184,913,265.40 say (Tanzania shillings one hundred eighty four millions nine hundred thirteen thousand two hundred sixty five and forty cents) only.

c) Payment of the default rate of interest charged from the date of breach of the terms and conditions of the credit facilities agreement to the date of full payment of the outstanding amount.

d) Payment of general damages to cover the loss, the plaintiff suffered for the defendants' failure to discharge their obligations under the said contract.

e) Payment of interest from the date due to the date of judgment thereof at the prevailing commercial rate.

f) Payment of interest on the decretal amount from the date of judgment to the date of full payment thereof at the prevailing commercial rate.

g) The Defendant pays the plaintiff costs of this suit.

h) Any other relief(s) that the honourable court may deem fit to grant.

The relationship between the parties which gave rise to this suit is a loan agreement between the plaintiff and the defendants which relationship commenced in the year 2011.

According to the plaint and the evidence of PW1 Ellygloria Zebedayo Mafuru, a credit recovery officer of the plaintiff is that on 06th July 2011 the 1st defendant applied for a loan of Tshs. 20,000,000/= an overdraft facility which application was granted, secured by a lien issued by the defendant in favour of the plaintiff to the tune of Tshs. 24,000,000/=.

Further to that, the overdraft facility was secured by a demand promissory note to the tune of Tshs. 20,000,000/= plus interest. The demand promissory note and lien were dated 12th July 2011 upon being requested by the 1st defendant.

On 17/07/2012, the plaintiff wrote a letter to the defendant to express its intention to consolidate and restructure the outstanding liabilities into term loan facility, in which the outstanding dues of Tshs. 93,144,705.64 which was to become payable in 24 months starting from August 2012 which arrangement was sanctioned by the Board resolution of the 1st Defendant on 24/08/2012.

The said term loan facility was secured by mortgage over property located on Plot No. 131 and 132 Block "A" at Kiseke Mwanza City in the name of Wema Hamis Jilala and personal guarantees and indemnities by the 2nd and 3rd defendants to secure an unspecified amount plus interest, costs and expenses in favour of the plaintiff and a demand promissory note. These were exhibited by the credit facility agreement, certificate of occupancies of the two plots, mortgage deed and spouse consent as well as a demand promissory note of August 2012.

That the 1st defendant failed or defaulted to pay both the loan and interest as per agreement which failure constituted the breach of the credit facility agreement.

It was also averred and testified that, according to the plaintiff that caused her to suffer numerous loss and considerable damage to the plaintiff's business. That the 2nd and 3rd defendants as the guarantor to the loan of the 1st defendant did not discharge their obligation under the guarantee. Also that despite several demands, made by the plaintiff to the defendants, they have failed to discharge their contractual obligation.

According to the plaintiff up to 30th November 2015, before commencing these proceedings the outstanding amount stood at Tshs. 184,913,265.40. That as the cause of action arose in Mwanza and the case is commercial in nature with pecuniary value of Tshs. 184, 913, 265. 40.

Upon being served with the plaint, the defendants filed a joint written statement of defence. In that joint written statement of defence, the defendants disputed to be endebted Tshs. 184,913,265.40 as alleged in the plaint. However, they admitted to have been in banking relationship with the plaintiff since January, 2011 and used to obtain overdraft facility without any laid down formalities. Moreover, later on 05/07/2011 they formalised their relationships.

They also admit for the 1st defendant to have on 17/07/2012 entered into new terms of arrangement of restructuring and consolidating the outstanding liability into term loan facilities, and that the term loan facility was to last for 24 months from August 2012 to September 2014. Further to

that, the 1st defendant had totally made withdrawals of Tshs. 365,260,000/= and deposit of Tshs. 361,999,861.69 making a difference of Tshs. 3,260,138.33 indebted to the plaintiff.

According to them, the 1st defendant maintained both the Tanzania shillings account and the dollar account. He withdrew USD 67,800/= and deposited USD 33,425/= making a difference of USD 34,375 equivalent to Tshs. 53,968,750/= at the exchange rate of Tshs. 1570 per one USD. That the determination of the exchange rate was one sided as the plaintiff did not involve the defendants. That in the term loan facility the interest was unreasonably raised from 9.5% to 19% that the 1st defendant had two accounts namely 0744 684665 and 0744684552. That the consolidated balance in account No. 0744 646665 was Ths. 28,623,546.04, while in that of USD, Account No. 0744 684552 the consolidated balance was USD 41, 096.28, however it is not reflected in the USD account.

That if the 1st defendant is indebted, it is to the tune of Tshs. 57,228,88.40 only the defendants blame the plaintiff to have never exercised due diligence to stop the escalation of the charges of interest leading to the quantum of the plaintiff claim to wit Tshs. 184,913,265.40.

The defendants further complain that the plaintiff has malafidely delayed the interest and charges up 30th November 2015. It is also the Defendant's complaint that the whole transaction between the parties smells fraud from the beginning, and the plaintiff did not advise the 1st defendant, on whole transaction and the plaintiff took advantage of the defendants' weakness as far as banking and financial affairs are concerned.

The defendant did not dispute, but noted the allegation of the facts which shows that the overdraft facility was charged as a term loan facility and that the same was secured by the guarantee by the 2nd and 3rd defendants. Further to that, the defendants disputed to have caused loss and damages to the plaintiff but instead they alleged that the plaintiff contributed by the adhering to the term of the loan term facility.

Also that the 2nd and 3rd defendant failed to discharge their obligation because of the confusion caused by the plaintiff by the escalated amount which the 2nd and 3rd defendant got confused and could not honour.

At last they prayed the claim to be dismissed and the judgment be against the plaintiff with costs.

As earlier on pointed out, at the hearing each side called one witness to prove or disprove the case. The plaintiff side called Elly Gloria Zebedayo Mafuru, a credit recovery officer of the plaintiff, while at the same time tendered a total of 11 eleven exhibits in proving their case. The tendered exhibits are.

i. An application letter dated 06th July 2011 Ref. No. WTI/2011/07/02 as exhibit P1.
ii. A board resolution letter dated 5/07/2011 exhibit P2.
iii. A letter of offer dated 07/07/2011 exhibit P3.
iv. A demand promissory note and a lien both dated 12/07/2011, exhibit P4.
v. A letter dated 17/07/2012 titled consolidation and restructuring of the outstanding liabilities into term loan facility as exhibit P5.

vi. Title deed in respect of plot No. 131 and 132 of Block "A" Kiseke, consent of spouse and mortgage deed exhibit P6 collectively.

vii. Guarantee and indemnity personal guarantee of Wema Jilala and Theresia Kimwaga exhibit P7.

viii. Demand promissory note dated on 24/08/2012, exhibit P8.

ix. Board Resolution letter dated 24/08/2012. Exhibit P9.

x. Credit facility agreement dated 24/08/2012 exhibit P10, and

xi. WTI (1st Defendant Bank Statement printed on 28/03/2019 and the Affidavit of Elly Gloria Z. Mafuru sworn on 08/04/2019, both admitted as exhibit P11 collectively.

According to all these exhibits and the testimony given by PW1, it is the plaintiff evidence that on 06/07/2011, the 1st defendant applied for an overdraft facility to the plaintiff, as per exhibit P1.

According to exhibit P2 the Board of the 1st defendant resolved to have a facilities from the plaintiff to the tune of Tshs. 20,000,000/= (twenty million). It is also evident that by exhibit P3 the plaintiff offered and sanctioned the requested overdraft facilities in exhibit P2, the same was of the tenure of 12 months from the date of availment. It is further evident that by exhibit P4 a promise to pay the said overdraft facility of Tshs. 20,000,000/= was made by both directors of the 1st defendant. That promise was accompanied by a lien of TDR No. EB/97/005034 issued on 06th July 2011, account No. 744684 for Tshs. 24,000,000/= also by the two directors of the 1st Defendant who are the 2nd and 3rd defendants.

It is also evident that the said overdraft facility was consolidated and restructured into a term loan by exhibit P5 executed by two principal officers of the plaintiff and accepted by both directors of the 1st Defendants who are also the 2nd and 3rd Defendants on 27/07/2012.

That new consolidated and restructured term loan agreement was secured by a landed property on Plot No. 131 and 132, in the name of the 2nd defendant as exhibited by the right of occupancy exhibit P6, and a spouse consent by 3rd defendant who also happen to be a spouse of the 2nd defendant was made and executed, in exhibit P6 collectively. That was also accompanied as part of security, the guarantee (personal Guarantee) by the 2nd and 3rd defendant as exhibited in exhibit P7. By a demand promissory note exhibit P8, both directors of the 1st defendant, who are also the 2nd and 3rd defendants promised to pay Tshs. 93,144,705.64 (say Tanzania shillings ninety three million, one hundred forty four thousand seven Hundred and Five, sixty four cents only) at the interest at the then rate which was 19% per annum, the minimum being Tshs. 18%. Which terms were accepted by the Board of the 1st defendant through the Board Resolution of 21/08/2012, both directors of the 1st defendant, who are also the 2nd and 3rd defendant as exhibited by exhibit P9 and by further credit facility agreement between the plaintiff and the 1st defendant, which was executed by the director of the 1st defendant who are also the 2nd and 3rd defendants, as exhibited by exhibit P10.

Last but not least, the evidence by PW1 and exhibit P11 collectedly, proves that at the time of filing the suit, the outstanding amount was 184,913,265.40/= say Tanzania shillings One hundred and eighty four

million, nine hundred thirteen thousands two hundred sixty five and forty cents only). He claimed interest as to per prayers in the plaint as well as damages and costs.

The defence also called one witness Wema Gilala who testified as DW1. In his testimony he said he is the director of the 1st defendant. His evidence went as far as when he commenced business when the plaintiff and when he registered the 1st defendant company. He admitted in his evidence to have requested for overdraft facility of Tshs. 20,000,000/=. He also admits that the overdraft facility was consolidated and restructured to a term loan facility.

Regarding the running of the two accounts, the evidence was supporting the written statement of defence. Generally he said that on the date when the loan term was ending in 2014, the claimed amount (principal loan balance was 28,000,000/=). However the same had already accrued interest and penalty of Tshs 58,000,000/=.

It was his evidence that before that time the plaintiff had already had a discussion and an agreement which was off record, that they in the restructuring which resulted into Tshs. 93,000,000/=, the plaintiff would render in account of the 1st defendant the credit of Tshs. 65, 000,000/= to be transferred in the account of the 1st defendant, but the plaintiff did not do so.

He said instead of demanding them to pay Tshs. 120,000,000/= which when the same was combined with Tshs. 65,000,000/= which was

not transferred to the 1st defendant's account, that is why they claim Tshs. 184,000,000/= plus millions which the defendants consider to be unjust.

He said they deposited Tshs. 362,000,000/= while the bank gave them Ths. 365,000,000/= which made the difference of Tshs. 3,000,000/=. He said the interest and penalty is bigger to the extent raising the amount. He said instead of charging only Tshs. 28,000,000/= they also charged Tshs. 65,000,000/=.

He said that they continued to charge them up to December 2015, while the contract ended in July 2014. He said the amount they recognise is Ths. 28,000,000/= which when computed should be Tshs. 57,000,000/=. He also complained about the interest which was charged at 19% which is much higher. He said the same was supposed to be 9%.

While he had no problem with exhibits P1, P2, P3 and P4 he complained about exhibit P5. He said that the same had some error as it was not made basing on banking practice as there was no appraisal between the 1st Defendant and the Bank (plaintiff). No business plan was demanded and evaluation report of the security.

However, he said he signed the document because the plaintiff officer told him that they just wanted to legalise the loan as previously the same did not follow procedure. Justifying the allegation that the loan was informal he said even the mortgage letter. He said normally the security was supposed to be furnished earlier. He did not dispute exhibit P7, he said that the balance in exhibit P8 had error as the amount of Tshs.

93,144,705.64 included Tshs. 65,000,00/= which was not supposed to be included.

He attacked exhibit P9 that it was not prepared by the 1st defendant but the plaintiff. He also disputed exhibit P10 as it combined a disputed Tshs. 65,000,000/=, he said they asked to be given a letter of offer in respect of that credit facility agreement but were not.

Regarding exhibit P11, the Bank statement, he said the statement is only of one account; it did not include Dollar Account.

He said the loan was supposed to end in July 2014, which was supposed to be Tshs. 120,000,000/= but the exhibit P11 claim up to 30/12/2015 which makes a total amount allegedly claimed to be Tshs. 188,751,507.98.

In the end, he said they recognise Tshs. 28,000,000/- as the debt without, interest, he asked the court not to charge interest and penalty as the same were escalated intentionally, as there was a chance of mitigating the amount but they did not do so. He said none bringing the dollar account insinuate that they were hiding something; he said the whole transaction is tainted by fraud and dishonesty from the plaintiff.

When he was cross examined by Mr. Tuguta learned counsel for the plaintiff he said, he is a graduate of MBA from Saint Augustine University. He said exhibit P5 show that the 1st defendant wrote asking for restructuring of overdraft to a term loan facility, which also changed from one year to two years.

DW1 said they signed the documents willingly and in that restructured term loan, the amount was 93,144,705.64, which was with 18% interest per annum while with a penalty of 27% for unpaid interest and the principal amount.

Also that they agreed that the offer letter with terms and conditions remained unchanged. However, in his evidence he disputed the said condition on the ground that there was no letter of offer as the former one had already expired. He said there was an oral promise that the plaintiff would give the letter of offer to the 1st defendant but the same was not given.

He said in exhibit P8, a demand promissory note, with Tshs. 65,000,000/= he did not know that it was also a security. He said although they were claiming from the plaintiff Tshs. 25,000,000/= in fixed deposit account but he did not plead it in the written statement of Defence.

Also that although in restructuring there was Tshs. 65,000,000/= which was to remain in their account, but he did not plead it in his written statement of defence. He said he did not know where that amount went but the then manager told him that the amount was recovering the dollar account even these facts were not pleaded in the written statement of defence.

He said that although there was a lot which he was promised off record, but he did not plead them in the written statement of defence and that although the procedures were not followed in granting and processing

the loan, but he did not plead the same in the written statement of defence.

He also said that under paragraph 12, he admitted the amount of Tshs. 57,228,888/= but he did not know that the judgment on admission was entered in respect of that amount.

He said the banking practice requires the mortgage to be signed after the security, however he said, he know no law to that effect. He said the mortgage was registered after a loan, but it was registered as required by the law. He admitted to guarantee the loan of Tshs. 93,744,065/= as evidenced in Exhibit P7, but in that guarantee, the guarantor undertook to be responsible.

He admitted that the 1st defendant did not for two years discharge or pay the entire amount, and so to the guarantor. He said Tshs. 65,000,000/= was not mentioned in the promissory note which promised to pay Tshs. 93,000,000/= that the said 65,000,000/= was not paid, and in the promissory note the minimum interest chargeable was 18%.

He did not dispute the exhibit P9, as it was the Board resolution, and that in exhibit P10, Tshs. 65,000,000/= was not mentioned and neither was it stated in the written statement of defence. He said at the time he was testifying he had not paid the unpaid amount. He said the Dollar account Bank statement was not tendered by the plaintiff, but himself did not do so as well.

He said up to 30/12/2015 the unpaid amount was 184,520,181. 98 and the case was filed on 05/01/2016. He also said that the interest of 18% and penalty were in the directors for the 1st defendant and as a guarantor. Last, he said, the court has a duty to respect the wishes of the parties to the contract.

In rejoinder he said exhibit P5 shows that the terms of the first overdraft facility remained unchanged. Also that the only amount which he accepted as unpaid was 28,000,000/= which when accumulated in interest and penalty reached Tshs. 57,000,000/=. He said although the amount of Tshs. 65,000,000/= was not in the joint written statement of defence, but it is in the bank statement which was annexed with the written statement of defence. That marked the defence case as well, hence this Judgment.

Before going into discussion of the issue, it is important to note that, on 12/02/2018 this court Hon. Siyani, J having been moved by Ms. Nasra Songoro counsel for the plaintiff to enter judgment on admission in respect of a claim of Tshs. 57,228,888.40 as shown under paragraph 2 (vi) and (xii) of the written statement of defence in terms of order XII Rule 4 of the Civil Procedure Code [Cap 33 RE 2019] a prayer which was conceded by Mr. Adam, Advocate who was representing the defendants. The court having been satisfied that the amount was really admitted entered a judgment on admission in terms of Order XII Rule 4 of Civil Procedure Code [Cap 33 RE 2002].

Following that finding and decision, the following issues were framed.

i. Whether the defendants still owe the plaintiff the sum of Tshs. 127,624,377 after admitting the amount of Tshs. 57,288,888.40/= of the claimed outstanding of Tsh. 184,913,265.45 as at 3rd November 2015.

ii. To what reliefs are parties entitled.

In this case from the pleadings and evidence, there is no dispute that the 1st Defendant applied for an overdraft facility from the plaintiff as per exhibit P1. According to the evidence, that was of Tshs. 20,000,000/=. That overdraft facility was restructured and consolidated to be term loan which upon consolidation and restructuring it became Tshs. 93,144,705.64 for the period of 24 months starting from August 2012 at the minimum interest of 18% per annum accruing on monthly basis.

That had a mode of payment of equal monthly installments and it was secured by the legal mortgage of Plot No. 131 and 132 Block "A" Kiseke, and by the personal guarantee of the 2nd and 3rd defendants who are also directors of the 1st defendant. It is also evident that the 1st defendant did not up to the expiration of the said contract term pay any amount in discharge of its contractual liability, while the guarantors have also never discharged theirs.

The 2nd and 3rd defendants promised to pay the contractual amount in the capacity of directors of the 1st defendant via exhibit P8. It is evident that up to 30/12/2015, the outstanding amount was Tshs. 184,520,181.98/=. This was reached at after computing the interest and penalty.

As indicated in the evidence, the defendant, through DW1 disputed the whole debt but accepted only Tshs. 28,000,000/=. To the surprise of this court he even disputed the amount of Tshs. 57,000,000/= for which the court had already entered judgment on admission following the fact that the amount was admitted in the written statement of defence and that even the prayers by the counsel for the plaintiff to have judgment on admission entered in respect of that amount were conceded by the counsel who was representing the defendants.

They also deny to have willingly signed all those under no space takings, though he does not say that they were forced to do so. That being the case, it was expected that all those allegations were supposed to be pleaded in the written statement of defence, not just to be raised in his oral testimony.

In law, the base of any right or liability in civil suit is the pleadings. The defendant for example is expected in his written statement of defence to reply to every fact given in the plaint. Denial of that fact or admission must be clear and express. In that written statement of defence, the defendant is expected to put his case if he has any additional plea and can put new facts if any to defeat the case of the plaintiff. The fact which remains answered by the defendant is presumed to have been admitted by him, and in law that fact is deemed to have been proved.

In this case, the allegations of facts which were given by DW1 in his testimony were not pleaded in the written statement of defence, therefore they have no base upon which they could be introduced in the defence.

That being the case, I thus find the evidence by DW1 is just an afterthought. Had it been genuine defence, they would have advanced the same in the written statement of defence. It is also important to note that parties are bound by their pleadings. See, **Aspetro Investment Company Limited vs Jawinga Company Limited,** Civil Appeal No.8/2015 and **Peter Ng'omango vs The Attorney General,** Civil Appeal No. 214 of 2011 as well as **James Funga Gwagilo vs The Attorney General** [2004] TLR 161. That said, I find the defence by DW1 in respect of new issues which were not pleaded in the written statement of defence untenable in law, and thus disregarded.

Further to that, it is important to note that almost all evidence by the plaintiff was built on documents which were prepared and executed by the maximum involvement of the defendants the fact which was not disputed. In evidence, DW1 emerged and disputed those documents orally, but without even first indicating the denial of the said documents in the pleadings. It is the principle of law as provided by section 63 of the Evidence Act [Cap 6 RE 2019] that; the contents of documents may be proved either by primary or secondary evidence.

Section 64 of the same law, defines the primary evidence of the document to be, a document itself produced for inspection of the court, while secondary evidence as defined by section 65 means the certified copy of the document or copies made from the original or copies made from or compared with the original, the counter parts of the document or oral account of the content of a document given by the person who has

himself seen it. Section 66 of the same law insists that documents must be proved by primary evidence except as otherwise provided by law.

The evidence by DW1 is neither primary nor secondary evidence of the contents of the documents tendered and admitted as exhibits P1 to P11, the same cannot by any means be taken to disprove the contents of the said documents. That said, I find that the plaintiff has proved the case at the required standard. The claim is granted, in that the 1st, 2nd and 3rd defendants are in breach of the credit facility agreement and contract of guarantee and indemnity respectively, by their failure to discharge their obligation in accordance with the loan agreement.

That being the findings of this court, they are jointly and severally ordered to pay to the plaintiff, the outstanding amount of Tsh. 184,913,265.40 which was the amount due on 30/12/2014. They are also condemned to pay the default rate interest charged from the date of breach of the term and condition of agreement to the date of full payment.

Since the amount is attracting both, the defaults rate interest and penalty as well as the interest on the outstanding amount, I find no base upon which to award general damage.

Further to that, all defendants are condemned to pay interest from when the case was instituted, which was not combined in the claimed amount, up to the date of this judgment.

They are also condemned to pay interest on the decretal amount from the date of judgment to the date of full payment at the prevailing commercial rate. The plaintiff also be paid costs of this suit.

It is so ordered.

DATED at **MWANZA** on 01st day of July 2020

J. C. Tiganga
Judge
01/07/2020

Judgment delivered in the presence Mr. Tuguta counsel for the plaintiff while in the presence of counsel for the defendants on line through tele conference. Right of appeal expressed and fully guaranteed.

THE HIGH COURT OF TANZANIA
MWANZA

J. C. Tiganga
Judge
01/07/2020