

**IN THE UNITED REPUBLIC OF TANZANIA
THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM**

CIVIL CASE No. 52 OF 2019

YAZA INVESTMENT COMPANY LIMITED.....PLAINTIFF

Versus

NMB BANK PUBLIC COMPANY.....DEFENDANT

JUDGMENT

5th August, 2021 – 21st January, 2022

J. A. DE - MELLO J;

The Plaintiff sued the Defendant for professional negligence and, prays for judgment and, decree as follows,

- I. A Declaration that the Defendant has in deed acted professionally negligent when dealing with the Plaintiff the act that has caused the plaintiff to suffer a business loss.**
- II. Order that, the Defendant to pay TZS 3,527,404,020 billion being Specific Damages suffered by the Plaintiff due to loss of profit and depreciation in value of a factory:**

- III. Interest on the (II) item above is at the rate of 22% from the date of the institution of this suit to the date of full payment.**
- IV. An order that the Defendant to share collaterals with any bank which is ready and willing to support the Plaintiff operations which will in turn will clear the outstanding loan facilities**
- V. Orders that the interest, charges, penalties and, other deductions arising from the Defendant professional negligence be removed in its totality.**
- VI. Order that the Defendant to pay General Damages to the tune of TZS 8,000,000,000/=**
- VII. Cost for the suit.**
- VIII. Any other relief(s) this honourable may deem fit to grant.**

The following exhibits were tendered and admitted for the Plaintiff;

- 1. Exhibit P1 - Memorandum and Articles of Association**
- 2. Exhibit P2 Board Resolution for applying a Loan to NMB...**
- 3. Exhibit P3 Application Letter for Loan to NMB...**
- 4. Exhibit P4 Valuation Report for the Project**
- 5. Exhibit P5 Term Loan and Overdraft Facility**
- 6. Exhibit P6 Bank Letter of Offer**

- 7. Exhibit P7 Overdraft TZS 1,700,000,000**
- 8. Exhibit P8 Overdraft TZS 1,100,000,000**
- 9. Exhibit P9 Internal Audit Report**
- 10. Exhibit P10 Collateral Management Agreement**
- 11. Exhibit P11 Letter registering challenges**
- 12. Exhibit P12 Bank Response on challenges**
- 13. Exhibit P13 Revaluation of the Mortgage**
- 14. Exhibit P14 Email correspondence for TADB advise**
- 15. Exhibit P15 Letter for 90 days grace period**
- 16. Exhibit P16 Letter to TADB for buy off loan**
- 17. Exhibit P17 TADB Letter to NMB for proposal**
- 18. Exhibit P18 Credit Reference Bureau to TADB**
- 19. Exhibit P19 Letter to TADB from NMB refusing offer**
- 20. Exhibit P20 Employment letter by PW3**
- 21. Exhibit P21 Credit Reference Bureau Report**

The Defendant tendered nothing other than making reference to some of exhibits coming from their side tendered by the Plaintiff.

Briefly, the Plaintiff is a limited liability company registered in Tanzania under the **Companies Act Cap. 212 RE 2002** of the laws of Tanzania, carrying out a sunflower and, edible oil processing as well as, distribution, whereas; the Defendant is a public company registered in Tanzania under

the **Companies Act Cap. 212 R.E 2002** of the laws of Tanzania carrying out carrying out banking and, financial business.

In course of the hearing, the Plaintiff paraded a total of four witnesses, namely; **PW1** was **Yusuphu Amiri Nalomba**, a forty (40) years, the Managing Director of Yaza Investment, a Muslim, who affirmed, to be the Director of the said company, thereby tendering a Memorandum and Articles of Association which was not objected hence admitted as **exhibit P1**. , He further stated that, in the year 2011 the company commenced Sunflower oil extraction and, on **2nd June, 2012** the company resolved and, deliberated to borrow from the bank, producing a resolution which was admitted and marked as **exhibit P2** whereas; on **9th June, 2012** National Micro-finance Bank (NMB) was requested a long term loan to the tune of two billion **TZS. 2,000,000,000/= billion** for capital investment, vide loan application letter admitted as **exhibit P3**. In year 2013, the bank officials visited the premises and, directed for submission of a valuation report, having found construction still ongoing, much as there was in place power, water well, a godown, which attracted almost **TZS 1,100,000,000/=** spending.. In adherence, the Plaintiff conducted a valuation report which was tendered and, admitted as **exhibit P4**. As a result the Bank released **TZS 440,000,000/=** to cover purchase of sunflower seeds and operational costs notwithstanding the ~~fact~~ that,

construction was yet to be accomplished. In due course an overdraft of **TZS 1, 540,000,000/=** was released comprising of two initial loans, as referred to **paragraph 13** of the amended Plaint. Between September and, October 2013, **PW1** testified further that, one **Wadini Chambera**, the **Chief Public Relation of NMB** paid another visit only to find out that, more capital was required as full scale production was still wanting, hence recommended for another amount which the Bank released to the tune of **TZS 900,000,000/=** payable in two installments, while issuing for another term loan and overdraft facility which was admitted and, marked as **exhibit P5**. In the Bank **Offer letter exhibit P6** interest was deduced directly from that same account while the Overdraft was admitted as **exhibit P8**. and bank offer letter was admitted as **exhibit P6**. As the **TZS 1,540,000,000** was exhausted, the bank again advanced **TZS 1,700,000,000/=** included on the overdraft but only **TZS 1,000,000,000/=** billion was received (**as reflected o paragraph 13 (b) of amended plaint**) and tendered and, admitted and marked as **exhibit P7**, whose security as collateral management agreement facility, was admitted and, marked **exhibit P10**, whose description was in terms of seeds that, farmers supplied hence attracting an approval from the Bank, upon which funds shall be released. This had a negative impact which lead to the collapse of the business as reflected in the ~~audit~~ report

reproduced and marked as **exhibit P9**, which depicted interest and, loss to the tune of **TZS 5,000,000,000/=** billion in total, out of which **TZS 3,000,000,000/=** was as a result of interest alone, as reflected on page 25 . That, upon such realization, the company requested the bank to convert the Overdraft loan into term loan, calling further for the Bank to undertake a verification process for payment prior to release of oil product, to address loss of customers in as far as a letter to NMB addressing the challenges from utilizing the **Collateral Management Agreement Facility (CMA)** which was admitted and, marked **exhibit P11**. Another intervention was to approach the Loan Department with a view of revisiting valuation in order to solve the challenges faced, with the bank promising to re visit the factory, as evidenced by letter which was marked as **exhibit P12**, and, re valuation report for mortgage purposes as **exhibit P13**. It was until the **4th December, 2018** when the bank conducted another inspection, which ultimately brought to light the decision not to continue supporting the project for what it termed as under performance. The Bank went further advising the Plaintiff to secure another bank facility for debt buy off, with a view of ensuring payments continue to be submitted to **NMB** as seen in email correspondence, admitted as **exhibit P14**, issuing a thirty 30 days ultimatum, failure to which the bank will conduct legal for recovery

measures . On the Plaintiff's part, thirty days was too limited hence requested for ninety (90) days via letter dated the **12th October, 2018** admitted and marked **exhibit P15**. Faced with these predicaments, **PW1** further stated that, they approached the **Tanzania Agricultural Development Bank Ltd (TADB)** vide letter dated 25th January 2019 which was tendered and, admitted, marked as **exhibit P16** which in turn lead Tanzania Agricultural Development Bank to intimate **NMB** in view of debt sharing proposal a letter which was admitted and, marked as **exhibit P17**, as well as **PASS** conformation letter of credit, guaranteeing amount of loan issued by NMB marked as **exhibit P19**, but, unexpectedly NMB refused to share loan with TADB sticking to retain 50% of the loan amounting to **TZS 5.1 billion** so as to dilute the security, as evidenced from a tendered a letter dated **18th April 2019** which was admitted and, marked as **exhibit P18**. As this was ongoing **PW1** testified further that, damages to the factory amounted **TZS 3,500,000,000/=**, while attracting General damages to the tune of **TZS 8,000,000,000** tendering **exhibit P9** for specific damages as reflected on page 12 of audited report, reflecting direct loss of **TZS 3,527,000,000/=**, Bank interest **3 billion**, **Yaza loss 2 billion**, maintenance costs 29 million, **Goodwill 1,997,000,000/=** making a total of **TZS 11,527,000,000/=**, let alone two thousands 2,000 employees at stake.

It is **PW1's** prayer therefore that, if not for the Bank, the company would have not suffered as above and therefore claiming compensation to the tune of **TZS 11, 527,000,000/=**, allow other banks to support Yaza, free from any conditions, remove all interests accrued and any other reliefs. Second came **PW2, Antigon Tratery Mrosso**, a thirty eight 38 years old, Deputy Director **of Yaza**, swearing and stating that, it was the bank which advised the company wrongly, hence acting unethical against the banking ethos and norms, by issuing a loan not featuring the objectives of the client. The company, through its application letter requested for **TZS two 2 billion** term loan, in **2012**, purely for construction but contrary, the bank issued an overdraft of **TZS 440,000,000/=** and **TZS 460,000,000/=** total **TZS 900,000,000/=**. **PW2** tendered an employment contract marked as **exhibit P20**, for proof that he was Yaza Director in that capacity. He further pointed out that, the loan was purely for construction as opposed to operations and, all in accordance with business plan. Instead and, on their own evil mind, the bank from the overdrafts advanced commenced deducting interest hence less money left for construction as shown in **exhibit P9**. He condemned the submission by the Bank of Yaza to the Credit Reference Bureau, the report which was tendered and, admitted as **exhibit P21**, dated the **3rd June 2019** depicting a scary picture of **YAZA's** financial

status with three (3) loans of **TZS. 8,214,000,000/=** referred to **exhibit 18**, which states it is **5.1 billion**, while in **4th June, 2019** the bank was called upon to reflect the true record as evidenced by **exhibit P22**. position which tarnished the image of the company. This notwithstanding, the Bank and, contrary to its own advised rejected the **TADB** take over ,for fear of diluting the securities. This horribly tarnished the image of the company. **PW3, Abbas Silver Masakia**, a forty two **42 years** old and serving the company as an auditor, testified on oath, to have conducted internal audit only to realize loss incurred as a result of stalled operations together with **NMB** loan amounting to **TZS 11,527,404,000/=** as per **exhibit P9**. The fact was brought to the management for their knowledge and prompt action. **PW4** was **Lawrence Martin** a forty nine 49 years old appearing as the, Managing Partner, corroborating what the other witnesses on the loan sought with a view of construction, a term one, to be precise, as opposed to overdraft, taking into account the time frame for accomplishment of the construction, production sales and re payment of loan, considering cash flows which will justify it all.. He found the Bank to have acted unprofessionally, by acting as it did, based on the fact that, clients approaches the banks with trust, confidence, expecting to be advised properly and, without greed. A term loan was the appropriate one as

opposed to the overdrafts advanced, which are short cuts many banks resorts to, with the intention of reaping quick benefits at the detriment of its customers. He too was baffled by the refusal of NMB to buy in the offer the agricultural bank pledged in '*pari pasu*' disregarding to be the ones who advised for sourcing other banks.

This suit was strenuously resisted by the Defendant who lined a total of two witnesses to include, **Wardin Babe Chembera**, a forty two 42 years old, currently a businessman, being a former NMB Relationship Manager, upon which he encountered the Plaintiff the time he served the **NMB** at Singida branch. On his affirmation he corroborated **exhibit P3** upon which the Plaintiff requested for a term loan of **TZS 2 billion**. He was the one who interviewed the customer and, personally visited the factory site at Singida, where he found an unfinished structural building, electrically fitted surrounded by a half fenced wall. From the interview, as well as the visit, it clearly came to his findings that the company is limited by nature being a family based as opposed to corporate. The initial advise was for a phase to phase approach, advancing funds to one item to the next, while assessing performance, before moving to the next stage. With this then, the first installment amounting to **TZS 460,000,000** for machinery purchase for four (4) years term with twelve (12) months grace period, before attracting interest was released. Then

was overdraft loan of **TZS 440,000,000/=** specifically for seed purchase and, operational costs , this too, was for twelve (12) months and, which Yaza performed well which attracted a total overdraft referring to **exhibit P6** totaling **TZS 1,100,000,000/=**. However and, on visiting, it was established that, the Plaintiff to be struggling, which attracted an advise for restructuring, as interest were standing un-paid. This was notwithstanding another overdraft for seeds purchase referred to **exhibit P7**, which on visiting, evidenced a new set of machinery with expansion of the factory and, now fully fenced. **DW1** informed the Court that, there was nothing evil behind as alleged but, rather embracing the client under the umbrella of the existing policy that of "grow with us" which sadly Yaza failed. It is **DW1** further observation that, if not for mis-management and diversion of funds, the business would have not reached where it is currently stands, whose problem was non compliance of the working capital diverted for other nonoperational activities. Despite all this and, optimistic of the recovery, the Bank extended another facility based on a **Collateral Management Arrangement (CMA)** whereby, the client had no access with the money, to the tune of. **TZS 1,100,000,000** billion as referred in **exhibit P10**, with another overdraft facility of **TZS 400,000,000** restructuring the entire loans into term loan including the overdraft facility for a longer period and, at lower monthly payments. Of

interest, the **CMA** contains a third party known as Collateral Manager, appointed by the bank, whose role and, duty is keep the bank posted on receipts of the seeds for oil extraction before the bank releases more money. This way, it was feasible to manage and control its purchases and use of funds, something which was operated for two months upon which the company on its own approached the bank with a request to restructure the arrangement, **(CMA)** into an overdraft and, opted to move from business department to special asset department. Valuation was hence done by approved valuer which Yaza mortgaged consist of the assets whose forced sale was **TZS 935,000,000/=** to cover the loan at **125%**, but established a mismatch. Second was **DW2 Joseph Manoni**, a thirty 30 years old, Relationship manager from NMB, specifically positioned to oversee the challenging customers, on a Special **Asset Management Department**, as per Bank Of Tanzania (BOT) regulations. His first assignment was to visit the factory at Singida but, only to find not operating. Another option for joint venture partnering was brought forward, considering huge interest rate accumulation which the Plaintiff declined. This then left the Bank with no other option than serving a demand notice for payment of the loan within sixty (60) days, alternatively advised for buy off of the entire loan by another bank which the Plaintiff heartily agreed, requesting for ninety (90) days. TAGD was

approached but, not ready to assume the entire debt unless it is shared '*pari pasu*'. The loan, still outstanding and, contrary to BOT regulations for maintaining 125% cover for the loan, it was obvious to be inadequate, considering the outstanding debt of **TZS 5 billion** and, if shared it will be below 125%. This then marked the end of defence case, praying for dismissal of the suit with costs.

In as far as record of is concerned, three issues for determination were framed as follows

- 1. Whether or not the defendant acted professionally negligent when dealing with the plaintiff.**
- 2. Whether or not the defendant may share collaterals with any development bank.**
- 3. To what reliefs are the parties entitled to.**

Listening well from the witnesses, it is apparent that, they both blamed each other. The Plaintiff believes that, the Bank acted violatively to reap money from customers through overdrafts as opposed to term loans, hence attracting huge interest and, quite exorbitant. On their side, the Bank is alleging non compliance and, mismanagement of funds by the Plaintiff. It is a professional negligence that, the Plaintiff accuses the Defendant which lead to all this mess and, hence the need to address the first issues by defining what negligence means. In simple terms it can be

defined as an **act or omission which constitutes a breach of a duty of care owed by another person who acts or fails to act and which causes that other person to suffer harm** Historically it can be traced from the **Donoghue vs. Stevenson (1932) AC 562**) An action for negligence will succeed if the claimant can prove; **a duty of care** is owed by the defendant to the claimant; **a breach** of that duty; and, its resulting **damage** which is not too remote (**See: Vivienne Harpwood, Principles of Tort law, Fourth Edition, Cavendish Publishing limited, London pg. 23**). Professionally therefore, negligence occurs when experts of certain fields, fail to perform their responsibilities to the required standard hence leading to breaches a duty of care. Such poor conduct, must result in a financial loss, physical damage or injury of their client or customer. An action for professional negligence can be instituted against anyone considered to have expertise in the services they provide. In the case at hand, it is undisputed that, the initial request for a loan by the Plaintiff was **TZS 2,000,000,000,000/=** billion in term loan for capital investment. This can be proved by **exhibit P3** which is the loan application letter. The visits paid by **DW1** evidenced the positive response by the Defendant and, following an analysis, funds in terms of overdraft were releases on several occasions. This then established a banker customer relationship in a contractual relationship. **Sections 10, 11** and

12 of the **Law of Contract Cap. 345 R. E. 2019** clearly defines what Agreements/Contracts as follows

Section 10 of the Law of Contract (*supra*) states that;

"All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void

Provided that nothing herein contained shall affect any law in force, and not hereby expressly repealed or misapplied, by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents."

Two minds met here, one; from a request by the Plaintiff and, two, the acceptance by the Defendant, hence an agreement. Further to that, **section 11 (1)** and, **(2)** and, of **12** of the **Act** (*supra*) refers to competency and, sound mind in the cause of contracting by the parties. Some of the agreements entered herein may be evidenced via exhibits **P6, P7, P8, P10**, as stipulated under paragraph 13 (a) to (c) of the amended plaint thus, I find no any void loan agreements between the parties. The only question here is whether the Defendant was professionally negligent for failing to perform his responsibilities to the

required standards or in breach of duty of care. It is the Plaintiff's claim that, his application was for the capital investment and, not commercial, anticipating for a long-term loan facility, attracting a long-term repayment period. From **exhibit P3**, the Plaintiff was clear for a term loan but, which after analysis following visits, the Defendant countered the offer with a commercial loan in terms of an overdraft and, which the Plaintiff never contested. The Plaintiff should have declined the counter offer if against his interest, at the outset as this was clearly contrary and, unsuitable for his project. As this was not enough, subsequent funds all against the Plaintiff's continued to overflow duly and, blindly accepted by him. Lastly, was the Collateral Management Arrangement, baring the Plaintiff to control and manage of which the client had no access to money, to the tune of **.TZS 1,100,000,000** billion as referred in **exhibit P10**. Putting in place a third party as a collateral manager, to oversee the activities of the Plaintiff operations before more money is released if suitable. It involved receiving seeds from farmers awaiting approval by this manager, as well as the selling of oil by cash only, which again discouraged vendors who used to supply and collect by credit. **Exhibit P11** is proof towards this registering concern by the Plaintiff. These challenges of CMA system was reported but never replied by the Defendant. Much as the Defendant was unhappy with the progress, the controlling of the Plaintiff's business

by dictating what to do and when to do, by ensuring returns on his part, without considering loss of business of part of the plaintiff especially customers, left much to be desired. It was undisputed of what, this Collateral Manager was doing, which the Plaintiff registered concern, especially the selling of oil by cash instead of credit which pushed customers away. This, by all standards injured the Plaintiff and, occasioned further loss. The fiduciary relationship and duty of care was affected and hence violated. It is also not controverted that, it is the Defendant who advised the Plaintiff to opt for another bank for take over the liability, which the Plaintiff duly complied. However, the deal never took off, following another setback brought forward by the Defendant who was not ready for 'pari pasu' towards the security(ies). In law of contract there is sanctity of contract which is a general idea that, once parties duly enter into a contract, they must honour their obligations under that, contract, binding them by their own terms and conditions. In the case of **Simon Kichele Chacha vs. Aveline M. Kilawe, Civil Appeal No. 160 of 2018, Court of Appeal of Tanzania, at Mwanza (unreported)** it was observed that;

"...parties are bound by the agreements they freely entered into and this is the cardinal principle of the law of contract. That is, there should be a sanctity of the contract as lucidly stated in

Abualy Alibhai Azizi vs. Bhatia Brothers Ltd [2000] T.L.R 288 at page 289 thus: - 'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"

In the case at hand, parties agreed to their own conditions one of them being on collateral and, other on securities. Rendering the contract entered between the parties to have all attributes of a valid contract. It was not prohibited by the public policy and, it is on record that, the Plaintiff was not complaining about his consent to the agreement, being obtained by coercion, undue influence, fraud or misrepresentation in order to make it voidable in terms of the provisions of **section 19 (1) of the Law of Contract Act, Cap. 345 (supra)**. Collaterals entered are for the specifics contracts and, they are protected. For collateral to be shared there must be a collateral sharing agreement of which parties agree on their own, ordering the parties to share collateral breaches sanctity of contract. The parties had none in this direction. The last issue is what reliefs are the parties entitled to? In the case at hand the Plaintiff prayed for order that, the Defendant pays **TZS 3,527,404,020,000 billion** being specific damages suffered by the Plaintiff due to loss of profit and, depreciation in

value of a factory and General Damages to the tune of **TZS 8,000,000,000/=** In the course of hearing, what had transpired is that, the Defendant breached his fiduciary duty that, the law demands between Banker and, Customer, fiduciary relationship, which as can be observed even after intervention by the Bank to put in place CMA, but nothing changed. Losses became order and part of the Plaintiff's venture. Instead of improving the business it became even worse. The entire loan was proved to have been spent in capital investments and, partly in production. The time the collateral manager was invoked even the customers shunned away as a result of stringent un favourable conditions. However and, in absence of authentic proof for specific damages, the Court can only consider general damages. The audit report internally generated and, not supported and certified by external one remains wanting. It has not been specifically pleaded and, proved. **See Peter Joseph Kilibika & Another vs. Patrick Aloyce Mlingi Civil Appeal No 7 of 2009, Court of Appeal of Tanzania at Tabora and Zuberi Augustino vs Anicet Mugabe [992] TLR.**

General damages however can not be granted in a blanket mode but. on established principles that were set in the case of **Davies vs. Powell Durffryn Associates Ltd [1942] AC 601** and that of **Nance vs.**

British Columbia Electric Railways Co. Ltd [1951] AC 601, on which the case of **Taylor vs. O’Conor [1971] AC 115** at page 14 as follows;

- 1. Estimate the lost earnings that is the sum which would have been earned but for fatal accident**
- 2. Estimate the lost benefit that is pecuniary which the dependents would have derived from the lost earning and to express the lost benefits as annual sum over the period of loss.**
- 3. To choose the appropriate multiplier which when applied to the lost benefit expresses annual sum gives the amount of damages which is a lump sum.**

The initial application from the Plaintiff was for two billion TZS 2,000,000,000/= which the Defendant and, for reasons known by themselves issued, **TZS 400,000,000/= and, TZS 460,000,000/= totaling TZS 1,000,000,000 billion.** but again through Collateral Management Agreement allegedly another **TZS 1,100,000,000/=** was released subject to approval which then makes a total of **TZS 1,960,000,000/=**, leaving a balance of **TZS 40,000,000** million. In upshot, the prayers in the suit is partly granted on the account that, Defendant is liable for breach of fiduciary relationship, which resulted the Plaintiff to incur loss and, I hereby grant Plaintiff the following reliefs,

based on the fact and truth that money advanced by the Defendant went into the Plaintiff's factory regardless of whether or not it was overdraft or else. I therefore exercise my discretion: judiciously by awarding general damages less from the claimed amount from what had been advance

i. General Damages in the sum of TZS. Fourty 40,000,000/=

ii. Each part bears its own costs.

I order.



A handwritten signature in blue ink, appearing to read "DeMello", is written over the printed name.

J. A. DE- MELLO

JUDGE

21st January, 2022