IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB-REGISTRY OF MWANZA

AT MWANZA

CIVIL CASE NO. 05 OF 2021

MAPENNA INVESTMENT CO. LTD.....1st PLAINTIFF

DEOGTRATIUS MODEST MTUI (as Administrator of the Estate of the Late MODEST URBAN MTUI) .....2nd PLAINTIFF

VERSUS

THE DEVELOPMENT BANK LTD.....1st DEFENDANT

THE ATTORNEY GENERAL.....2nd DEFENDANT

JUDGMENT

7th March -26th October & 1st November, 2023

ITEMBA, J.

The 1st plaintiff is a private liability company engaged in a business of bottled drinking water. She intended to finance completion of water bottling factory including acquisition of machinery, equipment and distribution trucks and on 15th September 2010, the 1st plaintiff entered into a loan agreement with the 1st defendant. The 1st defendant extended two credit facilities to the 1st plaintiff. The said facilities were a term loan of **USD 109,500** and **TZS 87,000,000/=** and an overdraft of **TZS 50,000,000/=** to the 1st plaintiff. The repayment was to be done in instalments of TZS 5,372,000/= in 48 months. The parties also agreed for a

grace period of 12 months from the first drawdown date. The credit facility was secured by landed properties in Plot no. 162, 163 and 164, Block A, Mkolani area, Mwanza owned by the 1st plaintiff and Plot no. 166 Block A Mkolani area Mwanza owned by the 2nd Plaintiff.

The plaintiffs alleged that the defendants have breached the loan facility agreement and they are unlawfully intending to undertake recovery measures including disposition of properties which were pledged as plaintiffs as security, hence this suit.

According to the plaint, the plaintiff prays for declaratory orders that:

a. *The 1st Defendant's calculations of the outstanding loan are unlawful and illegal.*
b. *The 1st Defendant's alleged debt of Tshs. 1,068,032,094.00 (Tanzanian Shillings One Billion Sixty Eight Million Thirty-Two Thousand Ninety Fourt) against the 1st plaintiff is unlawful and unfounded.*
c. *The alleged and intended recovery measures against including auction and/or disposition of any security owned by the plaintiffs are unlawful.*
d. *The 1st plaintiff is entitled to compensation by way of damage, of Tshs. 641,801,600.76 being loss of profit the 1st plaintiff would have earned between 2016 to 2020.*

e. Mutual calculation of the outstanding debt, if any and

f. Costs of this suit.

In their Written Statement of Defence, the defendants have denied all the claims stating that it was actually the 1st plaintiff who breached the credit facility agreement by defaulting repayment of the loan. They insisted that they had the right to recover the said loan through auction of the mortgaged properties and other securities.

At the final pretrial conference, parties agreed and the court framed five issues for determination, and before composing a judgement one issue was added to make them six, namely;

1. *What were the terms on the service facility agreement as amended.*
2. *Whether the terms were breached.*
3. *Whether there were miscalculations of the outstanding debt.*
4. *If so, what is the outstanding loan interest and penalties.*
5. *Whether there was damage suffered.*
6. *To what reliefs are parties entitled to.*

At the hearing, the plaintiff had the services of Mr. Nicolaus Majebele and Ms. Colin Andrew learned counsels while the respondents were represented by Ms. Subira Mwandambo learned senior state attorney, Ms. Tausi Swedi and Mr. Alen Mbuya learned state attorneys.

The plaintiffs had two witnesses **Christopher Modest Mtui (PW1**) who was working at the 1st plaintiff as an accountant and **Deogratias Modest Mtui (PW2)** who is an administrator of the estate representing the second plaintiff, who is deceased. Mainly, PW1 testified that he acknowledges the terms in the credit facility agreement which he produced as **Exhibit P1,** that the loan consisted of USD 109,500 and TZS 87,000,000/= and an overdraft of TZS 50,000,000/=. That, there was a grace period of 12 months and money was to be issued once the plaintiffs completed all the paperwork and registered with all relevant authorities like the Tanzania Bureau of Standards (TBA) and Tanzania Revenue Authority (TRA). That, the fund was to be paid directly to the suppliers. He told the court that, the main complaint was that the 1st defendant wanted to sell their properties which they pledged as security while the calculation regarding their principal loan, interest and penalty was not proper. He produced a loan statement summary (**Exhibit P2**) and specified that the 1st defendant disbursed money in different transactions amounting to a total of TZS 171,000,000/= which the 1st plaintiff did not request, an act which increased the principal amount, attracted interest and increased loan debt. PW1 stated that the 1st plaintiff started repayment early before the

grace period. Looking at only two transactions, on 4/5/2011 and 15/7/2011 there were deposits of TZS 1,500,000/= and 2,000,000 respectively

PW1 also told the court that payments which the 1st plaintiff made to service the loan were not acknowledged by the 1st defendant. He produced 50 bank pay-in slips (**Exhibit P3 collectively**) to that effect. PW1 explained that the aim of their payment was to reduce the amount of debt, to avoid penalties and to decrease interest but that did not happen. He added that on 26/3/2014 the 1st plaintiff got a statement from TIB with a loan and interest of TZS 72,000,000/= while they have already paid TZS 78,000,000 which could have cleared all the penalties and interest.

PW1 stated further that, the loan calculation was incorrect because, the 1st defendant did not consider the 12 months grace period by starting to deduct the interest from the 1st disbursement on 26/2/2011 and that is evidenced in Exhibit P2. The plaintiff explained that the loan was disbursed on 1/2/2011 so the grace period ended on 1/3/2013. With an extension of 6 months, the new grace period ended on 27/8/2013.

PW1 finalized his testimony by stating that the defendant delayed in issuing the money to the 1st plaintiff. That, in 2011 when the consignment

arrived at the port, the 1st plaintiff requested for TZS 50,000,000/= but the 1st defendant delayed to issue the same as a result the 1st plaintiff was charged storage costs of TZS 50,000,000, the charges which exhausted the money for paying raw materials. That, in 2019, PW1 and the Director had several meetings with the 1st defendant and addressed all the concerns. He produced the minutes of the said meeting (**Exhibit P4**) and the 1st defendant promised to reply but they did not until 2020 when PW1 saw an advert of the 1st defendant intending to sell the 1st plaintiff's properties by auction.

Deogratias Modest Mtui, PW2 who was once a director and shareholder of the 1st plaintiff corroborated PW1's testimony. He added that they had to close the business in 2017 because even after repaying TZS 153,000,000 to the 1st defendant, the loan did not decrease. That, the money which they did not request was later taken back by the 1st defendant but it already created an interest.

On the other side, the defendants had one witness, **Eugine Naftal Ingwe** (**DW1**) who is a loan principal officer of the 1st defendant. In his testimony, he acknowledges the credit facility between the 1st plaintiff and

the 1st defendant. He produced a credit facility letter offer issued by the 1st defendant to the 1st plaintiff (**Exhibit D1**) which had the same terms as explained by PW1 regarding the amount of loan, payment plan and collateral and extension of grace period. He produced the Credit Facility agreement (**Exhibit D2**) while admitting that PW1 has also produced the same (exhibit P1). That, the 1st plaintiff's factory failed in production because she had no working capital and the 1st defendant agreed to use TZS 50,000,000/= to clear the consignment due to delays at the port. DW2 also produced a credit facility amended letter offer issued to the 1st plaintiff by the 1st defendant **(Exhibit D3)** stating that the 1st plaintiff applied for an overdraft amount of TZS 6,640,000/= to pay the Chinese expert to install the machines and that an existing overdraft of TZS 50,000,000/= was converted to term loan. DW1 told the court that apart from the initial payments, after having no working capital, the 1st plaintiff applied for TZS 100,000,000/= but the 1st defendant issued only 80,000,000/=. In support of that, he produced a credit facility offer letter dated 17/7/2012 **(exhibit D4)**. This was an overdraft for financing working capital. That, following the said loan, repayment performance was not good as the 1st plaintiff was

paying 5,000,000/= and sometimes 2,000,000/=. That Exhibit P2 does not show loan repayment because it contains only penalties for 2011 and 2012.

He added that the 1st defendant required the 1st plaintiff to have competent management which the 1st defendant will vet. According to DW1, the plaintiff was supposed to pay the loan after a grace period up to 2021 but they started in 2014. DW1 went through exhibit P2 stating that by 16/2/2012 the 1st plaintiff had a det of TZS 254,000,000/= with an interest of TZS 77,374.49. Regarding credits which are wrongly done DW1 stated that everything done in the system is done as per the client's request and after communication with the client. That, the interest was charged on the drawn amount if unpaid it accrues and penalty increase. DW1 also produced a recalling 30 days' notice (**Exhibit D5**) stating that the 1st defendant issued a notice of recalling to the 1st plaintiff following her bad loan performance. DW1 explained that 1st plaintiff's repayment started in 2014. He tendered a loan statement issued by the 1st defendant to the 1st plaintiff (**Exhibit P6**). He further explained that according to Exhibit P6, up to 7/2/2023 the 1st plaintiff's outstanding loan was TZS 1,484,992,861.39.

Having heard the evidence of the parties, gone through the pleadings at hand and exhibits produced, I am now better positioned to determine the issues as here under.

The first issue was what were the terms of the credit facility agreement as amended. Parties are at one that, the credit facility included the term loan of USD 109,500 and TZS 87,000,000/= and an overdraft of TZS 50,000,000/=. That, the repayment was to be done by monthly instalments of TZS 5,372,000/= in 48 months. That, there was a grace period of 12 months from the first drawdown date, thus the credit facility was expiring in 60 months. That, the interest was 18% per annum and the facility will be available upon completion of the documents. That, a**ny failure to honor the terms of the credit facility amounted to breach**. Further, in February 2012, the 1st plaintiff applied for top up loan amounting to TZS. 6,640,000/= under the same conditions. The 1st defendant insists that the 1st plaintiff was obliged to ensure that he cover all the costs of the business which are not financed from the credit facility including complimentary of ancillary matters.

In the second issue, whether the terms were breached, each party accused the other of breaching the contract. Among others, the 1st plaintiff is claiming that the 1st defendant charged her interest and penalties before expiration of the 12 months grace period. While the 1st defendant is stating that the 1st plaintiff failed to repay the 48 monthly instalments as agreed, the 1st plaintiff claims that, they have not breached any contract because not every failure to perform, amounts to breach of contract. The defendant explains that prior to the expiry of grace period, the 1st plaintiff requested for an extension of grace period and restructuring of the loan issued in 2011. In another occasion, the plaintiff produced pay in slips, exhibit P3 showing that they repaid the loan by TZS 153,489,000/=, which would have reduced the loan, however, there were no explanation whatsoever to acknowledge such transaction on the part of the 1st defendant.

I have considered DW1's defence, according to Exhibit P4, he agrees that some of the money paid by the 1st plaintiff did not reflect in the 1st defendant's system but the 1st plaintiff visited the bank and that matter was rectified and the money was used to repay the loan. That, at first, the money did not reflect because the loan had an overdraft which is operated differently by the client and not by the bank. Regarding the delay of issuing

money through an overdraft of TZS 50,000,000, DW1 explained that, in business concept as per agreement, overrun was to be done by the 1st plaintiff, but the 1st plaintiff wanted all the costs to be catered by loan. Here, DW1 do not deny that there was a delay in issuing the said money, yet, he brings along new issues.

Regarding miscalculation which led to a loan interest amounting to TZS 72,000,000/=, DW1 explained that 'there is nothing like that', all deposit features in the statement. However, DW1 did not lead the court to the said relevant transactions which produced the said TZS 72,000,000/=.

DW1 also challenged the competency of PW1 as a witness stating that only having a degree in accounts, is not good enough to understand their bank system because it is a specialized system. I find that, this statement is rather uncommon because first, when there is a need for a serious explanation on suspicious transactions, one cannot give a blanket explanation by just blaming the 'system'. Secondly, I think, in any agreement, each person who is a party and who has basic competency in the relevant field must be able to understand the terms of the said contract in order to make informed decisions. If the operationalization of system is

made to be complex that, only one party, which is the owner of the system understands, how will the adverse party ensure the loan performance?

As regards the allegation that the 1st defendant unlawfully charged the 1st plaintiff interest and penalties, during cross-examination, DW1 explained that, interest and penalties are not seen in exhibit D6 (Bank loan statement) because they are in the offer letter which is the guidance. However, DW1 did not show the court the relevant transactions which led to such interests and penalties. There is an issue of the 1st defendant disbursing TZS 171,001,632.57 which was never requested by the 1st plaintiff, and, this amount accrued interest as well. The 1st defendant is not giving a reasonable explanation specific on the effect of this transaction on the 1st plaintiff's debt. DW1 produced a loan statement, exhibit D6 stating that the 1st plaintiff's repayment started in 2014. However, in the said loan statement, the first transaction is dated 30/4/2014, whereas, the dates of alleged unlawful transactions which start from February 2011 are not in the statement. Therefore, exhibit D6 does not address the claims by the 1st plaintiff in respect of repayment. Generally, most of the things which DW1 talked about were the one not in dispute because they were around the 1st plaintiff's loan and terms. DW1, however, did not address the concerns

raised by the plaintiff's case. All the questions raised by the defendant remain unanswered.

As night follows day, the defendants were expected to account for and show that all that the 1st defendant did in respect of the plaintiff's credit facility was rationalized. As I go through the evidence, I do not see the defendant doing that through her defence. These unexpected amounts featured in the credit facility transactions would obviously frustrate the 1st plaintiff's payment plan.

Back to the complaint of 1st plaintiff's repayment of the loan, and unlawful charging of interest and penalty, if I revisit the credit facility, it states as follows:

Clause 2.02.5 states as follows:

*'**Repayment**: The loan shall be paid in Forty-Eight (48) equal monthly instalments of TZZS 5,372,000/=. The first instalment shall fall due after a grace period of twelve (12) months counted from the first drawdown date.'*

The following question is, when was the expiry of the grace period? According to the loan statement (exhibit P2), it is evident that the first

disbursement which is the drawdown date was made on 1/1/2011 amounting to TZS 88,866,045.70. It means, the grace period would have ended 12 months later, on 1st March 2012. However, the loan statement shows that there was interest accruing as early as 26th February 2011 onwards. The loan facility agreement is silent on whether the grace period excluded interest. DW1 did not testify anything in support of that. Also, there is nowhere in the agreement showing that the loan restructuring affected the initial grace period of 12 months meaning that the 1st defendant could have deducted the monthly instalments earlier than agreed.

Therefore, it was not lawful for the 1st defendant to impose daily accruing interest before the end of the grace period. Even the penalty interests were not to be charged until the grace period is over but exhibit P2 shows there were a number of occasions where in different months where penalty interest was charged.

Therefore, the second issue is answered in affirmative that the terms of the credit facility were breached by the 1st defendant.

The 3rd issue is whether there was miscalculation of the outstanding debt. As it can be noted, the second issue responds to this issue as well. The 1st defendant explained about having different formalities for each loan. The plaintiff brought to court the loan statement reflecting the transactions which they are complaining against. If the client's statement for daily use was different from term loan statement, then the defendant would have brought before the court, the loan statement different from the one brought by the plaintiff, to show the overdraft process and transactions which were lawful. If the four loans were consolidated to 2 credit facilities and 2 overdrafts and a new payment schedule was issued, the defendants would have brought the said new payment schedule and prove that it was complied with, to justify the deductions made from the 1st plaintiff's account. By the 1st defendant failing to substantiate how lawful the calculations were, the court draw inference that there was a miscalculation of outstanding debt and there was nothing lawful to bring to court. Consequently, the 1st defendant is also not justified to proceed with any recovery measures because even the total outstanding debt is not yet established. The 3rd issue is answered is in affirmative because the

numbers brought up by the 1st defendant do not reflect the terms in the credit facilities.

The 4th issue regards the amount of the outstanding loan, interest and penalties. Considering the circumstances of the case and deliberations hereinabove, this issue cannot be ascertained at this stage. It directed that; parties should organize a recalculation of the of the 1st defendant's outstanding loan. This should include acknowledgement of TZS 153,489,000/= as part of 1st plaintiff's payment of the debt and all the unlawful penalties and interest to be omitted from the debt.

In respect of damages, the 1st plaintiff is claiming for compensation of **TZS. 641,801,600.76** being the loss of profit she would have earned between 2016 to 2020. It is in evidence that, the 1st plaintiff closed his business for 5 years from 2016 to 2020. As demonstrated hereinabove, there is no dispute that the business was closed following the 1st defendant frustrating the 1st plaintiff's business. However, the 1st plaintiff could not show how the claimed profit amounting to TZS 641,801,600.70 could have been reached if she had not closed the business. Under the circumstances, this court finds that, if the 1st plaintiff took a loan of a total of USD

109,500, TZS 87,000,000 and TZS 50,000,000 which is an average of TZS 300,000,000/= based on the exchange rate of the USD by then which was 1510. And, if and the 1st plaintiff had the capacity to return the said amount in 5 years, it means she had the capacity of making the same amount with exclusion of the running costs. This amount will guide the court to issue damages. Because the business was closed for 5 years, the damages to the 1st plaintiff will be Tanzanian Shillings Two Hundred Million (TZS 200,000,000/=).

Lastly, it is hereby ordered that;

i. The 1st defendant's calculations of the outstanding loan are unlawful.
ii. The 1st defendant's alleged breach of TZS 1,068,032,094 (Tanzanian Shillings One Billion Sixty-Eight Million Thirty-Two Thousand Ninety-Four) against the 1st plaintiff was unlawful.
iii. The intended recovery measures including auctioning of the plaintiff's properties is not legally justified.
iv. The 1st plaintiff is entitled to a compensation of Tanzanian Shillings Two Hundred Million (TZS 200,000,000/=) being loss of profit she would have earned between 2016 and 2020.

v. Parties should do a mutual calculation of the outstanding debt against the 1st defendant.

vi. Following mutual calculations, parties to agree on the new modality of payment of the said debt by the 1st plaintiff.

vii. As the suit is partly allowed, each party to bear its own costs.

DATED at **Mwanza** this 1st day of November 2023.

Right to appeal explained.

L. J. ITEMBA
JUDGE

Ruling delivered this 1st day of November 2023, via audio conference in the presence of Mr. Nicolaus Majebele Advocate, for the plaintiffs Ms. Subira Mwandambo learned Senior State Attorney for the defendants and Ms. Glady Mnjari RMA.

L. J. ITEMBA
JUDGE