

IN THE UNITED REPUBLIC OF TANZANIA

JUDICIARY

HIGH COURT OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL CASE NO. 05 OF 2022

CRDB BANK PLC.....PLAINTIFF

VERSUS

1. KILIMANJARO SAR LIMITED

2. AMOUR ALLY ABDALLAH

3. IVAN BRAUN

.....DEFENDANTS

EX PARTE JUDGEMENT

Date of Last Order: 14.12.2023

Date of Ruling :13.02.2024

MONGELLA, J.

The plaintiff herein is a limited liability company incorporated in Tanzania. The 1st defendant is also a limited liability company incorporated in Tanzania and the 2nd and 3rd defendants are her directors. The plaintiff claims a sum of USD 79,221.03 being outstanding amount of loan issued to the 1st defendant, but defaulted in February 2020.

The brief facts of the case are to the effect that: sometime in February 2020, the plaintiff and the 1st defendant entered into a loan facility agreement in which the plaintiff advanced a loan of

USD 70,000 to the 1st defendant. The said loan was secured by the 2nd and 3rd defendants who signed a Directors' Guarantee and Indemnity in which they were to be jointly and severally liable to undertake the obligations and liabilities assumed by the 1st defendant in the loan agreement. The conditions for such liability were on circumstances, if the 1st defendant fails, refuses or neglects to repay the loan in due dates, to pay to the plaintiff on-demand all monies and liabilities which have become due owing, or incurred by the 1st defendant in connection to the loan, to indemnify the plaintiff in full on demand against any losses, costs and expenses suffered or incurred by the plaintiff in connection to the failure of the 1st defendant to fully and promptly perform and discharge any of the obligations and liabilities under the loan. The plaintiff also retained the right to enforce the said rights against the 2nd and 3rd defendants in the circumstances and the right to take action against the 2nd and 3rd defendants.

Noting that the 1st defendant had, despite reminders and notices, failed to honour the obligations under the loan agreement and has defaulted to pay the loan while the 2nd and 3rd defendants have, despite reminders and notices, wilfully defaulted and neglected to honour the Directors' Guarantee and indemnity agreement by refusing to pay the outstanding debt, the plaintiff filed this case seeking for the following reliefs:

- a) *A declaration that the 1st defendant has defaulted in repaying the loan as per the loan agreement.*

- b) A declaration that the 2nd and 3rd defendants are jointly and severally liable to pay the outstanding loan defaulted by the 1st defendant as per the Directors' Guarantee and indemnity agreement.
- c) The 2nd and 3rd defendants, jointly and severally be compelled to pay the plaintiff a sum of the outstanding loan amounting to United States Dollars Seventy-Nine Thousand Two Hundred Twenty-One and Three Cents Only (USD 79,221.03).
- d) Interest on the claim amount from 13th May, 2022 to the date of the judgement.
- e) Interest on the decretal sum at commercial bank rate of 12% per annum from the date of judgment to the date of satisfaction of the decree.
- f) Any order of general damages as may be assessed by the Honourable Court.
- g) Defendants are ordered to pay the cost of the suit, and
- h) Any further order(s) or relief(s) that this Honourable Court may deem fit.

The court server's attempts to physically serve the defendants in their physical address was futile. He duly swore on the same in his affidavit of 15.11.2022. This court thus ordered substituted service vide two publications on widely circulating newspapers. The order was issued on 23.02.2023 whereby the summons to the defendants was published on page 18 of Nipashe Newspaper and page 23 of Mwananchi Newspaper. Still, the defendants did not enter appearance in any form. In the premises, on 18.07.2023 this court ordered the matter to proceed *ex parte*, requiring the plaintiff to provide *ex parte* proof. Prior to hearing of the plaintiff's case, the following matters were found in issue:

1. *Whether the plaintiff and the 1st defendant entered a loan facility agreement.*
2. *Whether the 1st defendant breached the loan facility agreement.*
3. *Whether the plaintiff and the 2nd and 3rd defendants entered into a Directors' Guarantee and Indemnity agreement.*
4. *Whether the 2nd and 3rd defendants are jointly and severally liable to pay the defaulted amount accruing from the loan facility agreement.*
5. *To what reliefs are the parties entitled to.*

The trial proceeded by witness statement whereby the plaintiff had one witness, Ambakisye Mwalugelo (PW1). PW1's statement was duly filed on 18.10.2023. It was duly adopted as part of his evidence and exhibits therein were tendered on 20.10.2023.

On the 1st issue as to whether the plaintiff and the 1st defendant entered a loan facility agreement; PW1, the principal officer of the plaintiff, first adopted the plaint and duly stated that on 06.02.2020, the 1st defendant entered into a loan facility agreement with the plaintiff to secure a temporary overdraft facility amounting to USD 70,000/= for a duration of three (3) Months. He added that the same secured first ranking debenture over all assets of the borrower and the directors' guarantee and indemnity by Ivam Braun and Amour Abdallah. To substantiate his assertion, he tendered the loan facility agreement which was admitted as exhibit P1.

As evident from his statement, indeed Exhibit P1 reflects at page 4 of the 7-page document that two of the plaintiff's agents including PW1 signed the Facility agreement on behalf of the plaintiff. At page 5 of the agreement, the 1st defendant was duly represented by the 2nd and 3rd defendants who annexed their signatures at the acceptance clause. The details of the agreement are also reflected therein whereby at page 2, Clause 2.1 it shows; the tenure which is 3 months, the purpose of the overdraft facility, the interest rate of 8.5% per annum and repayment terms. Clause 3 provides for security which is a first ranking debenture over all assets of the 1st defendant and the Directors' Guarantee and Indemnity executed

by Ivan Braun and Amour Ally Abdallah, the 3rd and 2nd defendants, respectively. Considering PW1's evidence, I find it duly proved that the plaintiff did enter into a loan facility agreement with the 1st defendant. The 1st issue is thus determined in the affirmative.

Owing to the nature of the evidence presented, I find the need to first address the 3rd issue, which is as to whether the plaintiff and the 2nd and 3rd defendants entered into a Directors' Guarantee and Indemnity Agreement. PW1 duly testified that the loan was secured by two items; first ranking debenture over all items of the borrower and Directors' Guarantee and Indemnity signed by the 2nd and 3rd defendants. I find it proved that the 2nd and 3rd defendants did enter into a directors' guarantee and indemnity agreement on 06.02.2020. This is well proved by the agreement which was tendered by PW1 and admitted as exhibit P2. In the agreement the names and signatures of the 2nd and 3rd defendants are appended. The 3rd issue is also determined in the affirmative.

Regarding the 2nd issue, that is, on whether the 1st defendant breached the facility agreement; as testified by PW1, the 1st defendant defaulted in repaying her loan despite several reminders and follow ups. He said that the plaintiff issued a default notice to 1st defendant on 02.01.2021 which was addressed to the 3rd defendant. This notice was admitted as exhibit P3. It showed that the 1st defendant had an outstanding balance of USD 72,215.91 by 02.01.2021 and the 1st defendant was given 60 days to rectify the default but no action was taken by him.

I have observed exhibit P3 which was duly issued according to Clause 2. 1 (d) of Exhibit P1 which provides:

“The Facility shall be repayable on demand. Without prejudice to the continuous right of the Bank to demand repayment of all amounts due under this Facility Letter at any time, the outstanding Overdraft Facility and any interest accrued thereon from time to time, shall be repaid by the date falling 3 months from the date of disbursement unless the Bank did grant in writing the renewal of the Overdraft Facility or extension thereof.”

Exhibit P3 reflects that the 1st defendant was in default and required to pay USD 72,215.91 which was the outstanding debt by 02.01.2021. It appears that this debt was never paid by then, clearly showing that the 1st defendant defaulted to pay the outstanding amount.

As to the 4th issue on whether the 2nd and 3rd Defendants are jointly and severally liable to pay the defaulted amount accruing from the facility agreement; PW1 has testified that the 2nd and 3rd defendants are liable for the payment of outstanding loan as guarantors. The two were individually written a letter on 13.05.2022 informing them of the default by the 1st defendant and requiring them to honour their indemnity agreement by settling the debt. The said letters addressed to the 3rd and 2nd defendants individually

carried the same contents. They were admitted as Exhibit P4-A and Exhibit P4-B, respectively.

However, physical service to the 2nd and 3rd defendants was unsuccessful since their registered offices located at NSSF building here in Moshi district were found locked. The plaintiff tried accessing the two by sending them the notices via Express Mail Service (EMS). The two EMS receipts for service to the 3rd and 2nd defendants which were admitted as exhibits P5- A and P5-B respectively, reflected that the letters were accepted by Tanzania Posts Corporation Office on 13.05.2022 and received by one Happy Soka, a staff of the 1st defendant on 25.06.2022. The letters showed that the outstanding loan and interest by then was USD 79,221.03/-. The outstanding balance is also reflected in the 1st defendant's bank statement admitted as exhibit P6.

According to exhibit P1, the security for the loan was the Directors' Indemnity Agreement, exhibit P3. Exhibit P3 duly signed by the 2nd and 3rd defendants provides that the two would be jointly and severally liable to undertake the obligations and liabilities assumed by the 1st defendant if the latter fails, refuses or neglects to repay the loan in due date. Further, the two were also liable for other losses and expenses as listed in Clause 2 of Exhibit P3. As provided under Clause 7 of Exhibit P3, the plaintiff has the right to enforce her rights against the guarantors in default of events under the loan agreement and the default by guarantors to pay the outstanding loan. The clause states:

- “7.1. The Guarantors jointly and severally agree that the Bank shall proceed to enforce its rights against them immediately upon the happening of any of the default events spelt out under the Loan Agreement.
- 7.2. If the Guarantors fail, neglect or refuse to pay within the period specified, the Bank shall have the right to take action against the Guarantors under this Guarantee without any further notice.”

Having made the observation as above, I now move to deliberate on the 5th issue, which concerns the reliefs the parties are entitled to. As already ruled out in the preceding issues, the 1st defendant did default to pay the loan as per the loan agreement. That renders the 2nd and 3rd defendants jointly and severally liable to repay the loan and respective monies owed to the plaintiff as per the Director's Guarantee and Indemnity Agreement. As evident from Exhibit P4-A and P4-B, the outstanding loan and interest was USD 79,221.03, the same amount is also reflected in the Plaint filed on 25.08.2022 by the plaintiff. In that respect, the 2nd and 3rd defendants are jointly and severally ordered to pay USD 79,221.03 as the outstanding loan owed to the 1st defendant. The amount shall be subjected to 8.5% interest per annum as agreed in their contract, Exhibit P1. The same shall be counted from 13.05.2022, the date of accrual of the cause of action, to the date of judgement.

Awarding of interests after delivery of judgment is governed by **Order XXI Rule 21 of the Civil Procedure Code** [Cap 33 RE 2019] which states:

"The rate of interest on every judgment debt from the date of delivery of judgment until satisfaction shall be seven per centum per annum or such other rate not exceeding twelve per centum per annum, as the parties may expressly agree in writing before or after the delivery of the judgment or as may be adjudged by consent."

This court therefore cannot grant interest at 12% where the parties are not in agreement on the same. This was well stated by the Court of Appeal in **Registered Trustees of St. Anita's Greenland Schools (T) & Others vs. AZANIA Bank Limited** (Civil Appeal No. 225 of 2019) [2023] TZCA 59 (TANZLII) in which the Court stated:

"Clearly, Order XXI rule 21 (1) of the CPC which Mr. Kahendaguza cited and argued with commendable efforts, sets the rate of interest on every judgment debt from the date of delivery of judgment until satisfaction and the limit is 7 per cent where there is no agreement but not more than 12 per cent where parties have agreed. Going by purposive approach of interpretation, Order XXI rule 21 (1) of the CPC is permissive, in that parties are free to agree any interest rate as they find appropriate, and, that interest rate will be applicable before judgment is pronounced unless

that interest rate does not exceed 12 per cent per annum which is within the limit set by the law."

In the foregoing, the interest on decretal sum at commercial rate of 12% per annum cannot be granted, the plaintiff is therefore hereby awarded an interest of 7% per annum at commercial bank rate from the date of Judgement to the date of satisfaction of the decree.

Considering that the 1st defendant failed to honour her contractual obligations and that the 2nd and 3rd defendants failed to adhere to the terms of their indemnity agreement; and considering further that the Plaintiff is a financial institution, whose major business is issuing of loans, it is obvious that the plaintiff has suffered loss in the three years the defendants defaulted to pay the outstanding loan and interest. As such, considering the loss encountered by the plaintiff and the measures she took to reach out to the defendants to no avail, I award the plaintiff a sum of 20,000 USD as general damages. The plaintiff is further awarded costs of this suit.

Dated and delivered at Moshi on this 13th day of February, 2024.



X

L. M. MONGELLA
JUDGE
Signed by: L. M. MONGELLA