

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 106 OF 2003

TANZANIA POSTAL BANK.....PLAINTIFF

VERSUS

D.N. BAHRAM & COMPANY LTD.....1<sup>ST</sup> DEFENDANT  
DADRAHMAN BURMOHAMED BAHRAM.....2<sup>ND</sup> DEFENDANT  
MERBIBI DADRAHMAN BAHRAM.....3<sup>RD</sup> DEFENDANT  
MATHEW THOMAS MBATTA.....4<sup>TH</sup> DEFENDANT  
JOSEPH SIMBILIGUNGA MWACHULLAH.....5<sup>TH</sup> DEFENDANT

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JUDGMENT

KALEGEYA, J:

The Plaintiffs sued the Defendants jointly and severally, praying for judgment and decree as follows:-

- “(a) *Payment of Tshs.171,685,507.74*
- (b) *Payment of interest on (a) above at the rate of 16% per annum from July 2003 until the date of judgment.*
- (c) *Payment of interest on (a) and (b) above at the rate of 3% per annum from July 2003 until the date of judgment.*
- (d) *Payment of interest at the rate of 19% per annum on the decretal sum from the date of judgement until full and final payment.*
- (e) *Costs of the suit.*
- (f) *Any other relief the court may deem fit and just to grant.”*

Mr. Kisarika, Advocate, appeared for Plaintiffs and Mr. Mkali, Advocate, appeared for 1<sup>st</sup> to 3<sup>rd</sup> Defendants. The 4<sup>th</sup> and 5<sup>th</sup> Defendants were on their own as Mr. Buberwa, Advocate, withdrew from the conduct of the case just before the trial begun, and one Mr. Bajana, Advocate, who is said to have been instructed after the closure of the Plaintiffs' case never made appearance and they finally opted to proceed undefended.

The Plaintiffs called a sole witness, one Michael Mwakyandile, their Director of Credit and Risk Management, and who tendered ten documentary Exhibits (Exh.P1 – 10).

Issues framed during the final pretrial and scheduling conference are,

- “1. *Whether the Defendants are in breach of the loan facility extended to them by the Plaintiff on or about 10<sup>th</sup> September, 2002?*
2. *If the answer is in the affirmative, whether due default and demand notices were served upon the 2<sup>nd</sup> – 5<sup>th</sup> Defendants.*
3. *If the answer is in the negative, whether the said 2<sup>nd</sup> – 5<sup>th</sup> Defendants are legally liable under the Agreement.*
4. *To what reliefs are parties entitled?”*

On 29/10/2004, when the matter came up for defence hearing, the 1<sup>st</sup> – 3<sup>rd</sup> Defendants admitted the claims and judgment on admission was entered accordingly. Trial then proceeded against the 4<sup>th</sup> and 5<sup>th</sup> Defendants.

Facts of this case are simple and straightforward. On 3/5/2002 the 1<sup>st</sup> Defendant took over a revolving Credit facility of shs.100 million earlier on extended by the Plaintiffs to the 2<sup>nd</sup> Defendant. They then applied to the Plaintiffs for a revolving Credit facility in the sum of shs.165 million inclusive of the shs.100 million. The application was granted subject to various conditions. Among the securities were,

- “(iii) *The existing First Legal Mortgage over Certificate of Title No. 41552, Land Officer No. 142273 for plot No. 796/1, block “A” Kimara Matangini, Dar es Salaam registered in the name of Mathew Thomas Mbatta to be upstamped.*
- (iv) *First Legal Mortgage over Certificate of Title No. 51436, Land Office No. 190831 for plot No. 17, block “W”, Magomeni are, Dar es Salaam registered in the name of Joseph Simbiligunga Mwachullah.*
- (v) .....
- (vi) *Personal Guarantee by Mathew Thomas Mbatta.*
- (vii) *Personal Guarantee by Joseph Simbiligunga Mwachullah.”*

The said facility was to expire on 3/12/2002. The lender and borrower executed an agreement (Exh.P1). The 4<sup>th</sup> and 5<sup>th</sup> Defendants, as did the other Defendants, executed personal guarantee Agreements – Exh.P4 and 5 respectively. Unfortunately, the 1<sup>st</sup> Defendants did not service the facility as required as exemplified by Exh.P6 – 10 (demand notices and related correspondences).

I have already indicated that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants admitted the liability. As for the 4<sup>th</sup> – 5<sup>th</sup> Defendants, although they put up a fight in that they opted for a full trial, in their defences they did nothing less than

admitting the liability. They admitted being guarantors and the existence of the liability. That being the case, there is indeed no element of defence that can stand in their favour. The liability of a surety (guarantors) is co – extensive with that of the principal debtor, unless it is otherwise provided by the contract (**s. 80 of the Law of Contract Ordinance**). Exh.P1, P4 and P5 do not provide otherwise. In their defences, the 4<sup>th</sup> and 5<sup>th</sup> Defendants lament on the borrower's failure to pay, wondering how the liability would be paid, but that is a none issue.

I should pose here and observe on an issue raised by the 4<sup>th</sup> Defendant – that shs.100 million had already been extended before Exh.P1 was executed. That may be true but it does not affect the liability they undertook. Exh.P1, is very clear – the 1<sup>st</sup> Defendant took over the 2<sup>nd</sup> Defendant's liability of shs.100 million, and the former applied for the facility which would include the said shs.100 million and the Plaintiffs obliged. And, the said 4<sup>th</sup> – 5<sup>th</sup> Defendants, vide Exh.P4 and 5 guaranteed the liability to the extent of the new figure – shs.165 million. It is as clear as daylight therefore that they stand liable as guarantors.

For reasons stated, judgment is hereby entered in favour of the Plaintiffs as against 4<sup>th</sup> – 5<sup>th</sup> Defendants – shs.171,685,507.74 as principal sum; interest at the rate of 16% p.a on the principal sum from July 2003 to 19/11/2004; interest at 7% p.a on the decretal sum from date of judgment till payment in full and costs. As the liability is co – extensive, though the Plaintiffs have in principle secured two judgments, the amounts recoverable are not separate, they are one.

**L.B. KALEGEYA**  
**JUDGE**

Delivered

**L.B. KALEGEYA**  
**JUDGE**  
**19/11/2004**

903 words

I Certify that this is a true and correct  
of the original order Judgement Rulling  
Sign *Hleemds*  
Registrar Commercial Court Dsm.  
Date 19/11/2004