

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

COMMERCIAL CASE NO.14 OF 2010

STANDARD CHARTERED BANK TANZANIA LTD.....PLAINTIFF

VERSUS

TAC TRADERS COMPANY LTD.....1ST DEFENDANT

ERIC TALEMWA LUGELEKA.....2ND DEFENDANT

Date of hearing: 21/07/2011

Date of final order: 21/07/2011

Date of judgment: 19/09/2011

JUDGMENT

MAKARAMBA, J.:

This is a judgment on the suit the Plaintiff lodged in this Court on the 5th day of March, 2010 claiming against the Defendants jointly for the following:-

- (a) Payment of USD 95,956.38 (United States Dollars Ninety Five Thousand, Nine Hundred Fifty Six and thirty Eight Cents.*
- (b) Interest on (a) above at the rate of 12% per annum from 1st February 2010 up to the date of judgment.*

(c) Interest on (a) and (b) at the rate of 12% from the date of judgment to the date of final settlement.

(d) Costs of the suit.

(e) Any other reliefs that this honourable Court may deem just to grant.

The Plaintiff in this suit is a limited liability company established under the laws of Tanzania, carrying on banking business in the country. The 1st Defendant is also a limited liability company established under the laws of Tanzania and was a customer of the Plaintiff's Bank. The 2nd Defendant is a natural person and Managing Director of the 1st Defendant.

The Defendants jointly disputed the Plaintiff's claim and avers that the Defendants' failure to repay the debt was not on the Defendants willingness, it was due to unavoidable constraints on the part of the Defendants.

Briefly, the facts of this suit as could be gathered from the Plaintiff's Complaint are that, in between January and February 2009, the 1st Defendant applied for Financing Facility of **USD 125,000** for purposes of financing importation of goods. The Plaintiff processed the facility and availed the same to the 1st Defendant. The overdraft was attracting 11% interest per annum floating calculated on the daily balances and payable monthly in arrears. The covenanted default rate is 1%. As security, the 2nd Defendant executed a personal guarantee by which he guaranteed repayment of the facility to the limit of **USD 125,000** plus interests, costs and other charges thereon. The Defendants also executed the letter of Set-Off and the foreign

currency facility agreement. The 1st Defendant accessed the money and failed to repay the debt within the covenanted 120 days of the drawdown. The 2nd Defendant equally failed to pay the debt despite his commitment under the guarantee. The 2nd Defendant had committed himself that **USD 40,000** would be paid by 31st December, 2009 and then the balance would be repaid fully by 31st January, 2010 liquidating the liability of the Defendants. Despite the issuance of the demand notices to the Defendants by the Plaintiff, the former have failed or neglected to heed them.

In this suit, the Plaintiff is being represented by Mr. Rwehumbiza, learned Counsel and the 1st Defendant is represented by Mr. ERIC TALEMWA LUGELEKA, the Principal Officer of the 1st Defendant, and who is also the 2nd Defendant in this suit. The Defendants however, having filed their jointly Written Statement of Defence despite being served with substituted service by way of publication in newspaper did not appear to defend the suit in its further stages whereupon the Plaintiff's Counsel prayed before this Court to proceed by way of *ex-parte proof*, which prayer this Court dully granted.

On the day set for ex-parte proof this Court recorded the following issues for determination of this suit, namely:

- 1. *Whether there was a loan contract between the Plaintiff and the Defendants;***
- 2. *Whether the Defendants breached the contract;***
- 3. *To what reliefs(s) are the parties entitled.***

The Plaintiff summoned only one witness, **MR. DAVID MWAKILEMBE** who testified as **PW1**. Testifying, **PW1 informed this Court** that he has been a Recovery Manager at Standard Chartered Bank since 2006 and that he holds an advanced Diploma in Accountancy. PW1 testified further that the 1st Defendant approached the Bank asking for a Credit Facility worth USD 125,000, which the Bank accepted and granted to the Defendants attracting interest of 11%. PW1 testified further that the 2nd Defendant guaranteed the 1st Defendant. PW1 tendered in evidence the banking facility letter dated 6th February 2009 from Standard Chartered Bank which this Court admitted and marked as **Exhibit P1**.

PW1 testified further that Mr. ERIC TALEMWA LUGELEKA as the director of the 1st Defendant's Company guaranteed the facility and a fixed deposit worth USD 35,000 was deposited in the Bank as security in case the Company fails to pay its loan. PW1 tendered in evidence a guarantee by TAC Traders Company Limited dated 9th February 2009 and letter of set off from TAC Traders Company Ltd to Standard Chartered Bank which this Court admitted and marked as **Exhibit P2** collectively.

PW1 testified further that the Defendants have only paid USD 35,000 being the fixed deposit. PW1 testified further that the Bank decided to convene several meetings with the 1st Defendant to discuss how the Defendants could pay the debt and that the 1st Defendant wrote a commitment letter to the Bank on how he can repay the loan, which letter headed "*Loan Repayment Account No. 8702021002000*" dated 3rd December 2009 from TAC Traders Co. Ltd to Standard Chartered Bank PW1 tendered in evidence and this Court admitted and marked it as

Exhibit P3. PW1 testified further that however, the Defendants did not pay as per their commitment whereupon the Bank wrote demand notice to the Defendants requiring them to pay the debt within seven days. PW1 testified further that even after the expiry of the seven days indicated in the demand notice the Defendants did not pay, whereupon the Bank instructed their lawyers, GRK Advocates, to take further legal steps against the Defendants. PW1 testified further that GRK Advocates wrote another demand notice to the Defendants asking them to pay the loan. PW1 tendered in evidence two demand notices from GRK to Mr. ERIC TALEMWA LUGELEKA of TAC Traders Company Ltd which this Court admitted and marked as **Exhibit P4.** PW1 testified further that the interest which was charged on the Defendant's account is still accruing. PW1 tendered in evidence a statement of account for TAC Traders Company Ltd showing that the balance from 2009 to 2011 is USD 110,262.75, which this Court admitted and marked as **Exhibit P5.**

The first issue is *whether there was a contract between the Plaintiff and the Defendants.* Mr. Rwehumbiza, learned Counsel for the Plaintiff in his closing submissions stated that the 1st Defendant took out a loan to the tune of USD 125,000 from the Plaintiff. It was the further submission of Mr. Rwehumbiza that Mr. ERIC TALEMWA LUGELEKA, the 2nd Defendant, who is the director and owner of the 1st Defendant's company, guaranteed repayment of the loan within the covenanted terms under the personal guarantee arrangement. Further, that the 2nd Defendant having signed the offer letter, personal guarantee instrument and the letter of set off in his

capacity as the Managing Director of the 1st Defendant, a contract is deemed to have been executed.

From the testimony of PW1 and as per **Exhibit P1**, the banking facility letter dated 6th February 2009 from Standard Chartered Bank, the Bank granted to the Defendants credit facility amounting to USD 125,000 which attracted interest of 11% per annum. It was also the further testimony of PW1 that Mr. ERIC TALEMWA LUGELEKA as the director of the 1st Defendant's Company guaranteed the facility and he also deposited in Bank a fixed deposit worth USD 35,000 as security in case the Company fails to pay its loan.

On the evidence on record, particularly **Exhibit P1**, the Banking Facility Letter and **Exhibit P2**, the Personal Guarantee and the Letter of Set-Off which were signed by the 2nd Defendant in his capacity as the Managing Director of the 1st Defendant and on behalf of the 1st Defendant, a contract, as submitted by Mr. Rwehumbiza and rightly so in my view, is deemed to have been executed between the Defendants and the Bank, the consideration being the loan facility by the Bank and the personal guarantee instrument and letter of set off by the 2nd Defendant as the Managing Director of the 1st Defendant. The first issue, *whether there was a contract between the Plaintiff and the Defendants* is therefore to be answered affirmatively.

The second issue is *whether the Defendants breached the terms of the contract*. In his closing submissions Mr. Rwehumbiza, learned Counsel for the Plaintiff submitted that the 1st Defendant having taken the loan facility from the Plaintiff, neither the 1st Defendant nor the 2nd Defendant

did fulfill their covenanted obligation to repay the loan on demand or at all. Mr. Rwehumbiza submitted further that the 1st Defendant committed himself and to fast track the repayment process through a proposed rescheduled payment, whereby the 1st Defendant undertook to pay USD 40,000 and pay the remaining amount by the end of January 2010. Despite that undertaking the Defendants did not pay any cent, Mr. Rwehumbiza further submitted. In his testimony, PW1 stated that the Defendants have only paid USD 35,000 being the fixed deposit.

On the basis of the evidence on record, particularly **Exhibit P3**, a commitment letter dated 3rd December 2009 the 1st Defendant wrote to the Bank undertaking how he was going to repay the loan which the 2nd Defendant signed as the Managing Director of the 1st Defendant, which proves that the Defendants have defaulted to heed to the terms and conditions stipulated in **Exhibit P1**. As per **Exhibit P1**, the Banking Facility Letter dated 6th February 2009 from Standard Chartered Bank, the Defendants were supposed to effect payment to the Plaintiff within 120 days.

I have examined paragraph 10 of the Written Statement of Defence, the Defendants duly filed in this Court, whereupon the Defendants jointly pleaded as follows:

"The failure of the Defendants to repay the debt was not on the Defendants willingness, it was due to unavoidable constraints on the part of the Defendant".

However, the "unavoidable constraints" the Defendants allude to in paragraph 10 of their joint written statement of defence were never

divulged to this Court and therefore they are unknown. It is my considered view that the Defendants by their own admission as stated in paragraph 10 of their joint defence the Defendants were admitting that they have failed to repay the debt to the Plaintiff for some reasons not yet known to this Court. The principle that parties are bound by their own pleadings has been well established, accepted and applied by courts in many cases to cite only the decision of Hon. Kalegeya of this Court (as he then was) in the case between **Small Holder Tractor Co.(EA) Ltd & 2 Others v. The National Bureau De Change Ltd & Others, Commercial Case No. 26 of 2000** (unreported). Since the Defendants in their pleadings have admitted that they have failed to repay the loan as covenanted, they are therefore jointly bound by their own pleadings. Furthermore, there is no evidence to prove any repayment which the Defendants might have effected to the Plaintiff as alleged in their joint Written Statement of Defence. In any event the 120 days covenanted have already elapsed. It is for the foregoing reasons that this Court finds that the Defendants are in breach of the contract. The second issue, *whether the Defendants breached the terms of the contract* is to be answered affirmatively.

The last issue is to *what reliefs the parties are entitled*. In his closing submissions, Mr. Rwehumbiza learned Counsel for the Plaintiff averred that as per the updated bank statement which was tendered in this Court by PW1, the total liability up to the 14th day of March 2011 amounted to **USD 110,262.75**, which debt is keeping growing due to accumulated interests. It was the further submission of Mr. Rwehumbiza that the bank statement shows clearly that apart from **USD 35,000** which was debited from the 1st

Defendant's fixed deposit account, the Defendants never paid anything towards settlement of their debt. Mr. Rwehumbiza submitted further that the 1st Defendant took out the loan of **USD 125,000** at the covenanted interest of 11% per annum floating calculated on daily balances and payable in monthly arrears, and a penal rate of 1% per month in the event of default, both before and after judgment. The Defendants have failed to pay up the debt except for the **USD 35,000** debited from the 1st Defendant's fixed deposit account, Mr. Rwehumbiza surmised.

On the closing submissions by Mr. Rwehumbiza and the strength of the evidence on record, this Court finds that the Defendants have paid only **USD 35,000**, debited from the 1st Defendant's fixed deposit account. The USD 35,000 is the amount PW1 alluded to in the course of his testimony that Mr. ERIC TALEMWA LUGELEKA as the director of the 1st Defendant's Company guaranteed the loan facility by depositing in a fixed deposit in the Bank as security for the loan in case the Company fails to repay it. The Defendants therefore are still liable to pay the Plaintiff the outstanding amount of the loan facility with accruing interest and costs of this suit.

Judgment and decree is hereby entered against the Defendants jointly and severally as follows:

- (a) ***Payment of USD 95,956.38 (Say United States Dollars Ninety Five Thousand, Nine Hundred Fifty Six and Thirty Eight Cents Only).***
- (b) ***Interest on (a) above at the rate of 12% per annum from the 5th day of March 2010 up to the date of judgment.***

(c) *Interest on (a) and (b) above at the court's rate of 7% from the date of judgment until payment in full.*

(d) *Costs of this suit.*

Order accordingly.


A handwritten signature in black ink, appearing to read 'R.V. Makaramba', is written over a horizontal dotted line.

R.V. MAKARAMBA

JUDGE

19/09/2011

Judgment delivered this 19th day of September, 2011 in the presence of Mr. Rwehumbiza, Advocate for the Plaintiff and Exparte for the Defendants.


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R.V. MAKARAMBA
JUDGE
19/09/2011.

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