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

COMMERCIAL CASE NO.44 OF 2012

STANDARD CHARTERED BANK TANZANIA LIMITED.....PLAINTIFF

VERSUS

PHARMACEUTICAL INVESTMENTS LIMITED.....1ST DEFENDANT

TANZANIA VENTURE INVESTMENTS FUND.....2ND DEFENDANT

RAMADHANI MADABIDA.....3RD DEFENDANT

Date of last Order: 06/11/2012

Date of final submissions: 07/12/2012

Date of Ruling: 05/02/2013

RULING

MAKARAMBA, J.:

This is a ruling on two points of preliminary objection the 1st and 3rd Defendants raised against the Plaintiff's suit that it is:

1. *Time-barred against both or either of the 1st and 3rd Defendants herein.*

2. *Incompetent because its commencement was not sanctioned by a resolution passed either at Company or Board of Directors meeting and nothing has been pleaded as to sanctioning of the institution of this suit.*

The two points of preliminary objection by consent were disposed of by way of written submissions. Mr. Msafiri, learned Counsel argued for the 1st and 3rd Defendants in support and Mr. Nyamgaruri, learned Counsel argued for the Plaintiff in rival.

On the first point of preliminary objection that the suit is time-barred against both or either of the 1st and 3rd Defendants, Mr. Msafiri argued that, this suit which was instituted on the 2nd May, 2012 arises from financial transactions and agreements that were entered into and utilized in the year 2001 and 2002. This is in terms of paragraph 6 of the Plaint and annextures "**SCB Plaint-1-A**" and **SCB Plaint-1-B.**" Mr. Msafiri submitted further that the term or duration of the facility was agreed to be ONE (1) DAY. According to Mr. Msafiri, in terms of Item No.7 under Part I of the Schedule to the Law of Limitation Act, Cap.89 R.E 2002, the period of limitation for instituting a suit founded on contract is six (6) years and therefore, the right of action to sue for repayment accrued in the same year, that is, 2001, when the Banking Facilities were utilized. As far as the 3rd Defendant is concerned the suit is hopelessly time-barred since the cause of action arose in June 2002 when the amounts utilized became repayable. The suit, according to Mr. Msafiri, by the latest, ought to have been instituted by 2008. The 3rd Defendant has neither pleaded nor annexed any document in respect of which the 3rd Defendant could be said to have acknowledged the debt after it became repayable so as to cause a fresh accrual of the right of action in terms of section 27(3) and 28 of the Law of Limitation Act, Cap.89 R.E 2002, Mr. Msafiri further submitted.

The Defendants are aware of the letter by the 3rd Defendant dated 3rd of September 2007 constituting annexture **"SCB Plaint-10",** and other subsequent correspondences, which are ineffective to make a valid acknowledgment of the debt sued in that the writings were made after expiry of the period of limitation of instituting the suit, Mr. Msafiri further argued. Likewise any payment or part payments made after expiration of the period of limitation are also without effect in extending the period of limitation or fresh accrual of such period in terms of section 28(4) of the Law of Limitation Act, Cap. 89 R.E 2002, Mr. Msafiri added. The suit is bound to be dismissed with costs by virtue of mandatory provisions of section 3(1) of the Law of Limitation Act, Cap. 89 R.E 2002, Mr. Msafiri prayed.

In buttressing his submissions on the point of time limit, Mr. Msafiri cited to this Court a number of case authorities including **JOHN CORNEL VERSUS GREVO (T)**

LTD, Civil Case No. 70 of 1998 (HC) at Dar es Salaam (Unreported) in which Kalegeya, J. as he then was had this to say on the fate of those who find themselves on the wrong side of the law of limitation period:

> *"However unfortunate it may be for the Plaintiff, the Law of Limitation knows no sympathy or equity. It is a merciless sword that cuts across and deep into all those who get caught in its web."*

Mr. Msafiri further referred this Court to the observations made by the learned author K.J. Rustomji in his treatise ***Rustomji on Limitation***, Eight Edition, edited by **S.P. SEN GUPTA in 2001**, at page 27 thus:

> *"After the prescribed period has lapsed, the door of justice is closed and no plea of poverty, ignorance or mistake can be of any avail..... The general good of the community requires that even a hard case should not be allowed to disturb the law. The rule must be enforced even at risk of hardship to a particular party. the judge cannot, on equitable grounds, enlarge the time allowed by the law, postpone its operation, or introduce exceptions not recognized by it....whatever sympathy a judge may feel for a litigant, and however dishonest and immoral the conduct of his opponent might have been in pleading the bar of limitation, the Courts are not warranted in introducing savings or exceptions which are not found in the statute."*

Mr. Msafiri argued further that irrespective of negotiations which could have been had between the parties when since the repayment of the moneys became due, such negotiations cannot suspend the statutory period of limitation prescribed under the Law of Limitation Act. In buttressing his submissions on the point that the statute of limitation is not defeated or its operation retarded by negotiations for a settlement

pending between the parties, Mr. Msafiri cited to this Court the case of **CONSOLIDATED HOLDING CORPORATION VERSUS RAJANI INDUSTRIES LIMITED AND BANK OF TANZANIA, Civil Appeal No. 2 of 2003 (unreported)**, (a copy of which was availed to this Court) in which the Court of Appeal of Tanzania had this to say:

> *"The statute is not defeated or its operation retarded by negotiations for a settlement pending between the parties..... It is common ground that the time within which rights may be enforced being fixed by the statute, it is not open to the parties by agreement to alter such time or to waive and contract out of the operation of the statute.....The period of limitation in this case was six years (6) as provided under the Law of Limitation Act, 1971. It could not be waived by consent of the parties. Consequently, the suit being time barred should have been dismissed."*

Mr. Nyamgaruri responded to the submissions of Mr. Msafiri on the first point of preliminary objection by submitting that upon default by the 1st Defendant to repay the facilities, the 1st Defendant sought an audience with the officers of the Plaintiff to discuss modality to reschedule repayment. Following negotiation and several requests by the 1st Defendant to the Plaintiff, the parties entered into a Debt Settlement Agreement dated 31st July 2006, under whose terms the Defendant agreed to repay the entire outstanding amount in three installments, as evidenced by the documents attached to the plaint as annexure "**SCB Plaint-7.**" Mr. Nyamgaruri submitted further that the Plaintiff accepted the restructuring proposal of the Defendant and agreed to extend the loan repayment schedule, and offered the 1st Defendant a discount amount of TZS 813.3 million to TZS 500 million as full and final settlement of the debt. The acknowledgment of the debt by the Defendant caused a fresh cause of action to accrue in terms of section 27(3) of the Law of Limitation Act, which provides as follows:

"Where a right of action has accrued to recover a debt or other pecuniary claim, or to recover any other movable property whatsoever, or to recover any sum of money or other property under a decree or order of a court and the person liable or accountable therefore acknowledges the claim or makes any payment in respect of it, the right of action in respect of such debt, pecuniary claim or movable property, or as the case may be, the right of action in respect of an application for the execution of the decree or the enforcement of the order, shall be deemed to have accrued on and not before the date of the acknowledgement or, as the case may be, the date of the last payment."

The right of action in respect to the debt according to Mr. Nyamgaruri, accrued on the date of the last payment and not on the date when the entire payment became due and payable. Apart from that, Mr. Nyamgaruri further submitted, on the 31st July, 2006, the parties agreed to vary the terms contained in the Debt Settlement Agreement by extending more time to the 1st Defendant to repay the debt. Mr. Nyamgaruri submitted further that the 1st Defendant acknowledged its indebtedness to the Plaintiff through two letters. The first one dated 30th August 2007 in which the 1st Defendant acknowledged its indebtedness to the Plaintiff and requested rescheduling of the repayment. The second one dated 3rd September 2007-annexure SCB-10 to the Plaint, in which the 1st Defendant, once again requested consideration for rescheduling of the loan. In the second letter the 1st Defendant enclosed two cheques, of TZS 10,000,000.00 (ten million shillings) each, post-dated to 14th and 28th September, 2007, respectively.

Mr. Nyamgaruri amplified on the effect of acknowledgment of a debt made after expiration of the period of limitation by referring this Court to the decision of the Court of Appeal of Tanzania in the case of **LAEMTHONG RICE CO. LTD VERSUS PRINCIPAL SECRETARY MINISTRY OF FINANCE, [2002] EA 119 at page 128** in which it was observed that:

"According to this provision, an acknowledgment of a debt made after expiration of the period of limitation would give rise to a fresh period of limitation if it is coupled with a promise to pay the debt. Chitaley and Rao (1938) Volume 1 at 640 note 9, makes this observation in comments on section 19 of the Indian Limitation Act of 1908 and says; Under this section an acknowledgment of liability in respect of a debt must be before the expiry of the period of limitation, in order to give fresh start of the limitation in respect of such debt. But by virtue of section 25 clause 3 of the Contract Act (equivalent of Zanzibar's Section 25(1) (c) cited above), a fresh period of limitation for a debt can be obtained even after the expiration of the original period, if there is a promise to pay the debt....We wish to kindly confirm that our letter of January 1996 is still valid and that the Government it committed to pay the debt. In this respect we wish to suggest the repayment period indicated in our previous letter be shifted to September or October subject to prior confirmation.....This letter is not a mere acknowledgment of liability; it is an express commitment to pay the debt as per the clause we have emphasized. Although the schedule of payment was subject to renegotiation, that did not take away from the promise to pay. This letter, in our view, was an acknowledgment coupled with a promise to pay within the meaning of section 25(1) (c) of the Contract Decree. It is therefore operated to give a fresh start to the period of Limitation from 15 July 1996, the date it was signed. Since the suit was instituted on 22nd January, 1997 that is six months later, we are satisfied, and so hold, that it was in time. We therefore proceed to the grounds of appeal."

Mr. Nyamgaruri buttressed further his argument that acknowledgment suffices to exclude the operation of the statute and to set time running again by referring this Court to the case of **CONSOLIDATED AGENCIES LTD VERSUS BERTRAM LTD, E.A.C.A, Civil Appeal, No.81 of 1961** and the book by the K.J Rustmji, titled ***The Law of Limitation and Adverse Possession*, Vol.I 1938**, at page 295 concerning

the Indian Law of Limitation, which is in *pari materia* with our Law of Limitation Act, wherein the learned author observes as follows:

> *"The former period, already running, is not enlarged but terminates and an entirely new period runs from the time of the acknowledgment, i.e. the acknowledgment suffices to exclude the operation of the statute and 'to set time running again' i.e. an acknowledgment vitalizes the old debt for another statutory period dating from the time of the acknowledgment. The acknowledgment does not extinguish the original cause of action. On the other hand, the basis of the suit is the original cause of action and the acknowledgment merely suffices to show that the right of action was then subsisting and unsatisfied...in England the law in this respect is different; the acknowledgment (or part payment) operates as a promise to pay and the suit is brought on such promise, which is a new cause of action."*

The present suit according to Mr. Nyamgaruri, is not barred because the Defendants have, on several occasions, admitted and acknowledged to have been indebted to the Plaintiff, and have also made a part payment in respect of their indebtedness to the Plaintiff. The right of action in respect to the recovery of the Defendants' indebtedness to the Plaintiff therefore accrued on the date of last acknowledgment of indebtedness or the date of last payment, whichever is later, Mr. Nyamgaruri surmised and made references to a decision by Bukuku, J. of this Court in the case of **STANDARD CHARTERED BANK OF TANZANIA LIMITED VERSUS BEST LINT LIMITED AND 2 OTHERS, Commercial Case No.54 of 2011 (Unreported)**.

Mr. Msafiri rejoined on the reply submissions by the Plaintiff's Counsel, Mr. Nyamgaruri, by submitting that, Mr. Nyamgaruri has strongly relied on the Debt Settlement Agreement allegedly made on 31st May 2006, pleaded as Annexture "SCB Plaint-6A" but not attached to the plaint, as signifying acknowledgment of the debt by

the 1st Defendant, and that in view of the provisions of section 27(3) of the Law of Limitation Act, 1971, a fresh period of limitation is deemed to have accrued from that date. An acknowledgment must be in writing but as the document constituting the purported written acknowledgment is nowhere to be seen, the Court cannot act on such verbal and unsubstantiated averment in favour of that party seeking exemption from the law of limitation, Mr. Msafiri cautioned. The Plaintiff by failing to attach the written acknowledgment of the debt by the 1st Defendant has therefore failed to claim benefit of the exemption from the law of limitation as required by the provisions of Rule 6 of Order VII of the Civil Procedure Code, Mr. Msafiri pointed out. The alleged Debt Settlement Agreement is a vital document that ought to have been filed with the Plaint as required by the provisions of Rule 14(1) of Order VII of the Civil Procedure Code, Mr. Msafiri further added.

I have carefully followed the submissions of learned Counsel both in support and rival. The Defendants have stated that, this suit arises from the agreements that were entered into and utilized in the year 2001 and 2002 as provided for under paragraph 6 of the plaint and annextures "**SCB Plaint-1-A**" and **SCB Plaint-1-B.**" It is clear from annextures "**SCB Plaint-1-A"** and "**SCB Plaint-1-B**" that the agreements were entered into on the 18th day of October, 2001. The Defendants aver further that, the letter of the 3rd Defendant dated 3rd of September 2007 constituting annexture **"SCB Plaint-10",** and the other subsequent correspondences are ineffective to make a valid acknowledgment of the debt sued on, since the writings were made after expiry of the period of limitation of instituting the suit, which is a period of six (6) years. In my considered view, if we calculate the difference in time between the 18th of October, 2001 when the agreements were entered into and the 3rd of September, 2007, the date of the letter by the 3rd Defendant, marked as annexture **"SCB Plaint-10",** it will clearly be reckoned that the writing of the letter was not made after the expiry of the limitation period as suggested by the Plaintiff.

I have also gone through annexture "**SCB Plaint-7**" which the Plaintiff referred this Court to, with a reference to the letter dated 17th May 2006 with regard to the

Debt Settlement Agreement on the outstanding loan. The purported **Debt Settlement Agreement** as Mr. Msafiri rightly submitted was not filed or attached in the Plaint. Two copies of cheques as identified in annexture **SCB Plaint 10** however, show that, the last payment was made on the 28th of September, 2007. Thus, if we calculate the difference in time from the date of the last payment, that is, the 28th of September, 2007 to the date of the institution of this suit, that is, the 2nd of May, 2012, clearly the Plaintiff's suit is still in time by virtue of Item No.7 under Part I of the Schedule to the Law of Limitation Act, Cap.89 R.E 2002.

Furthermore, I have also gone through annexture "**SCB Plaint 17**", which is a letter from the 1st Defendant acknowledging that, pursuant to the meeting dated 27th March, 2009 it was agreed that the 1st Defendant will pay USD 150,000 as full and final settlement of the debt owing to the Plaintiff. It is trite principle of law from the case authorities cited to this Court that a right of action is deemed to have accrued on the date of the acknowledgement or, as the case may be, on the date of the last payment by virtue of section 27 (3) of the Law of Limitation Act, Cap.89 R.E. 2002. In my considered view therefore this suit cannot be a proper candidate for dismissal under Item No.7 under Part I of the Schedule to the Law of Limitation Act, Cap.89 R.E. 2002 as suggested by the 1st and 3rd Defendants.

It is for the above reasons that the first point of the preliminary objection fails and it is hereby dismissed.

Submitting on the second point of preliminary objection Mr. Msafiri submitted that the Plaintiff has neither pleaded that the Plaintiff being a corporate body has passed any resolution sanctioning institution of this suit nor has any resolution to that effect been attached to the Plaint. Mr. Msafiri submitted further that it is now established law that in order for a limited liability company to institute a suit there must be a resolution passed to that effect either at a company meeting or at meeting of the board of directors of such company. In support of this argument, Mr. Msafiri referred this Court to the case of **BUGERERE COFFEE GROWERS LTD VERSUS SSEBADUKA AND ANOTHER [1970] EA 147** in which the suit was dismissed

because the action had been brought in the name of the company without there being a resolution or resolutions passed either at the Company or Board of Directors meeting authorizing its filling. Mr. Msafiri buttressed further this point by citing to this Court the case of **TANZANIA GLUE-LAM INDUSTRIES AND ANOTHER VERSUS BJORN AND OTHERS, Commercial Case No. 103 of 2003 at Dar es Salaam (Unreported)** and that of **ST. BERNARD'S HOSPITAL COMPANY LIMITED VERSUS DR. LINUS MAEMBA MLULA CHUWA, Commercial Case No. 57 of 2004 at Dar es Salaam (unreported)**.

Mr. Nyamgaruri responded to the submissions of Mr. Msafiri by submitting that, there is no law and none has been cited to support the view that a company must in each and every act produce a board resolution to institute a suit. In support of his argument, Mr. Nyamgaruri referred this Court to a chain of authorities including **NATIONAL OIL (T) LIMITED AND ANOTHER VERSUS STANDARD CHARTED BANK (T) LIMITED AND ANOTHER, Commercial Case No. 97 of 2005** (unreported) and **RESOLUTE (TANZANIA) LIMITED VERSUS LTA CONSTRUCTION (TANZANIA) LIMITED AND THREE OTHERS, Commercial Case No. 39 of 2010** (Unreported), wherein similar objection was raised and the Court overruled and rejected them both holding that objection grounded on lack of board resolution does not qualify to be an objection on point of law on the strength of the authority of **MUKISA BISCUIT MANUFACTURING CO. LTD VERSUS WEST END DISTRIBUTORS LTD [1969] EA 696**. Amplifying on the argument that a preliminary objection does not qualify to be so if it calls for evidence to establish Mr. Nyamgaruri referred this Court to the decision in the case of **ADDAX BV. GENEVA BRACH VERSUS KIGAMBONI OIL LIMITED, Commercial Case No. 72 of 2008 (Unreported)** in which it was held that:

> *"A preliminary objection does not qualify to be so if calls for evidence to establish. In the present suit, the fact of existence of a board resolution to institute the suit is being disputed. It therefore disqualifies the preliminary*

objection raised by the Defendant that the suit was instituted without a resolution of the board from being a preliminary objection as understood from the established case law."

It is now settled law, as Mr. Nyamgaruri rightly submitted, that the question of authority for a body corporate to institute a case is a matter which requires evidence to prove it and therefore does not qualify to be a preliminary point of law. The answer to the question whether there is a board meeting which passed a resolution to institute a suit or not entails examination of what has been filed together with the pleadings. As such since this calls for the examination of evidence, consideration of lack of a board resolution authorizing the institution of a suit cannot therefore be taken as a preliminary objection. This legal position has been clearly stated in a number of case authorities including **NATIONAL OIL (T) LIMITED AND ANOTHER VERSUS STANDARD CHARTED BANK (T) LIMITED AND ANOTHER, Commercial Case No. 97 of 2005** (unreported) and the case of **RESOLUTE (TANZANIA) LIMITED VERSUS LTA CONSTRUCTION (TANZANIA) LIMITED AND THREE OTHERS, Commercial Case No. 39 of 2010**.

It is for the above reasons that the second point of preliminary objection also fails and it must also be dismissed.

In the whole and for the foregoing reasons both two points of preliminary objection raised by the 1st and 3rd Defendant are hereby dismissed with costs, which costs shall be in the cause. It is accordingly so ordered.

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R.V. MAKARAMBA

JUDGE

05/02/2013

Ruling delivered this 05th day of February, 2013 in the presence of:

Mr. Mallya Advocate for the Plaintiff

Mr. Msafiri Advocate for the 1st Defendant

For the 2nd Defendant: Absent

Mr. Msafiri Advocate for the 3rd Defendant.

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R.V. MAKARAMBA

JUDGE

05/02/2013