

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 92 OF 2013

UNITED BANK FOR AFRICA
TANZANIA LIMITED..... PLAINTIFF

VERSUS

GABSONS (TANZANIA) LIMITED.....1ST DEFENDANT

JONATHAN GABONE.....2ND DEFENDANT

JUDGMENT

Mansoor, J:

Date of Judgment- 23RD DECEMBER 2015

The Plaintiff is the bank - registered under the Companies Act of the Tanzania, Cap 212 R: E 2002, having their principal place of business at Dar es Salaam.

The 1st Defendant is a company registered under the Companies Act , R: E 2002 having its registered office at Dar es Salaam. The 2nd Defendant is the Director and a Shareholder of the 1st Defendant.

It is stated that the Plaintiff, apart from providing banking services, also renders a financing solution that allows a client to convert its accounts receivables/invoices to cash, thereby enabling the client to raise instant cash against its invoices, this service is known as Invoice Discounting Facility.

The 1st Defendant is said to have entered into a contract with the Plaintiff- bank, dated 31st October 2012, entitling it to an Invoice Discounting Facility. The facility amount was THz 100,000,000. It is claimed that the Defendant committed default in repayment, in respect of which, the Plaintiff is said to have issued a legal notice dated 20.5.2013 demanding payment of a sum of THz 124,561,773.45 with interest thereon.

However, it is stated, that the Defendant had arrived at a settlement with the Plaintiff in respect of the above claim and a

Memorandum of Agreement dated 10th June 2013 is said to have been executed by the Defendant in favor of the Plaintiff. It is claimed that as the Defendant did not abide by the commitment, the Plaintiff had issued a statutory notice, calling upon the Defendant to repay a sum of 140,000,000, due as on 31 August, 2013. The Defendant is said to have issued four postdated cheques all of THz 10,000,000 each, all of the cheques were dated 31 June 2013.

It is hence contended that the Defendant having acknowledged the debt in terms of the memorandum of agreement dated 10th June 2013, has thereafter sought to raise untenable objections and it is it is no longer able to pay its debts and hence the present suit.

The Defendant has resisted the suit and contends that it was misled into entering into the contract with the Plaintiff's Agent. In that, it was understood by the Defendant that the plaintiff understood that the business of the defendant derailed and it would be given more time to repay the debt, that he was

compelled by the Agent of the plaintiff bank to issue the postdated cheques since he was told by the Agent that in order to make the commitment binding he should issue the postdated cheques, but he verbally agreed with the Agent of the Bank that the bank would only cash the cheques upon contacting him, to make sure that there is enough money in the account-. The defendant has testified that he knows he is indebted to the bank and he is willing to pay only THz 140,000,000 even now and he wants the charges, termed as interest, at the rate of 30% to be waived. It is contended that the facility was not a loan, but a transaction of business proceeds. And that there was a credit cover in the event of a default by the defendant, in terms of the Facility Agreement, the Plaintiff had a right to recourse in respect of business proceeds following non-payment of its debt and the amount would also be recovered from the Defendant, from his personal guarantee. It is admitted by the Defendant that on account of his business falling down, during November 2012, he defaulted paying the facility. notwithstanding the default on

the part of the defendant and when the debts mounted beyond manageable limits, pressure was brought on the Defendant by the plaintiff and compelled the Defendant to enter into the memorandum of Agreement to repay the loan in four instalments starting on June 2013 which he would have paid THz 40,000,000, on July 2013 he would have paid THz 50,000,000 and August 2013 he would have also paid THz 50,000,000. It is also contended that the Plaintiff - bank also compelled the Defendant to issue the postdated cheques.

It is therefore alleged by the Defendant that the Plaintiff had departed from the terms of the agreement and resorted to extra-legal methods in illegally demanding payment by the Defendant. It is stated that the Plaintiff, who had made a demand for payment of a sum of THz 140,000,000 but a sum of THz 10,000,00 is said to have already been paid,

It should be noted that the facility granted to the defendant by the plaintiff bank was not a normal loan or normal credit facility, it is a special invoice discounting facility. the Plaintiff –

bank was primarily obligated to recover the money from the customers of the Defendant - company, as the defendant was the dealer in Selling of Fire Protection and CCTV Systems and services, and recovery of the discounted amount was to be repaid out of the Business Proceeds, this means that the plaintiff bank have accepted the complete and exclusive responsibility of recovering the amounts from the Defendant - company's business proceeds, and the Plaintiff- bank , was to manage and make close follow up of the Defendant company's entire debt, which was assigned at a discount covered by the invoice.

Under the kind of Invoice Discounting Facility, the moment the Fire Protection and the CCTV System are sold, the invoices are also sold to the Plaintiff-bank and hence the plaintiff bank ought to have made sure that it has the list of the defendants' customers and the outstanding debts. The plaintiff bank ought to have made sure that the payments for the goods sold by the defendant are paid directly to the bank at the defendant's account, this is the essence of the Invoice Discounting Facility,

and it is not a normal credit facility where the bank does not monitor the business of the defendant. It is significant to note that this was an enhancement or an extension of the invoice discounting facility of Tshs.100 million, and that the balance sheet of the Defendant - company was scrutinized by the Plaintiff-bank, and he was performing well.

The Defendant has thus, in its pleadings, claimed that the Plaintiffs are supposed to have issued the facility against the invoices and make sure that the invoices are paid, and this was not done by the bank. The defendant also contends that his business went bad and faced financial difficulties and affected his capacity to repay and he did not expect this to happen, he requested to the bank to have the loan rescheduled. The defendant is requesting in his pleadings for more time to repay the outstanding sum, and that he is willing to pay only THz 5000,000 per month and up to THz 140,000,000 only.

In the above facts and circumstances, it is evident that the Defendant has seriously disputed its liability, only with reference

to any undertaking to pay a certain amount of money, in the face of other attendant circumstances and the negation of the very basis for any such liability in the first instance being in the nature of a debt.

It is well settled that a creditor may seek the assistance of the court under Order XXXV of the Civil Procedure Code, to compel payment of monies due to him. But, where a debt is not bona fide disputed and where the claim appears to the court as just, and where the debt are clearly admitted by the defendant as in the present case, it is not open to the court to refuse the prayers to recover the entire amount at once and allow the defendant to his proposed remedy of paying the monthly instalments of THz 5000,000 a month and up to THz 140,000,000 only.

Although the defense has raised an interesting issue that what as given to him was not a normal standard loan facility but a special invoice discounting facility specifically repayable by the business proceeds, the defendant has failed to establish

any regulations that prohibits the bank not to recover such credits in a normal loan recovery procedures but only to recover from the proceeds of the that particular invoice or business, and that when the business goes sour the bank is not entitled to recover the amount discounted from personal guarantees given by the defendant in favor of the bank.

In the present case on hand, this court is satisfied, prima facie, that the plaintiff proved its case on the required standard of proof in civil cases and the defense had failed to raise a bona fide defense , hence the prayers sought in the plaint are all granted.

DATED at DAR ES SALAAM this 23RD day of DECEMBER, 2015

MANSOOR

JUDGE

23RD DECEMBER 2015