

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE No. 108 OF 2017**

**BETWEEN**

**FIRST NATIONAL BANK (T) LIMITED.....PLAINTIFF**

**Versus**

**MILES SOLUTIONS CO. LTD.....1<sup>st</sup> DEFENDANT**

**ABDUKADIR ABDU MGHENI.....2<sup>nd</sup> DEFENDANT**

**FADHIL ANANIAS SEMBAGO.....3<sup>rd</sup> DEFENDANT**

**JUDGMENT**

**MRUMA, J.**

The Plaintiff's Bank advanced an Overdraft Facility of T.shs 2,300,000,000.00 and a Business Loan Facility of T.shs 1,180,000,000.00 to the First Defendant's company **Miles Solutions Co. Limited**. The company accepted the loans which were released and enjoyed by her.

It is the plaintiff's case that it were among the terms of the facilities that the Overdraft Facility would be enjoyed by the Defendants for 12 months and the Business Loan Facility would be spent for a period of 24 months. Both facilities were secured. Among other securities the Overdraft Facility was secured by a Debenture over the first Defendant's fixed and floating assets (General Debenture) while the Business Loan

Facility was secured by Legal Mortgage over Certificate of Title No. 61388 on Plot No. 244 Block 12 L.O. 210834 L.D. No. 209658 situated at Mbweni Mpiji area in Kinonondon Municipality within Dar Es Salaam City. The property is registered in the name of Abdulkadir Abdul Mgheni, the second Defendant herein.

It is also the case for the plaintiff that in further commitment towards execution of the facility agreement, the 2<sup>nd</sup> Defendant facilitated execution of a spousal consent of Leyla Mussa Shendulwa.

As further securities for the two securities the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants agreed to sign deeds of unlimited personal guarantee for the repayment of all sums that would be due to the Plaintiff inclusive of the principal amount, interest and other charges.

The Plaintiff further contends that for unknown reasons and without any justifiable cause the 1<sup>st</sup> Defendant neglected and/or refused to run his loan accounts as agreed in the facility letters as a result of which the outstanding amount in the Overdraft Facility and in the Business Loan Facility as at 16<sup>th</sup> June 2017 were at T.shs 3,585,002,434.00 and T.shs 444,641,097 respectively.

On 3<sup>rd</sup> August 2016 call up letters (Demand Notices) were sent to the Defendants to settle the outstanding debt with the Plaintiff within seven days but the Defendant could not repay.

Following failure by the Defendants to heed to the requirements in the demand and default notices the Plaintiff instructed MS Law Front Advocates to institute the present suit claiming breach of contract and other ensued remedies.

In their joint written statement of defence, the Defendants denied the Plaintiff's claim. They contended among other things that the delay to start repaying the loan and servicing the overdraft facility was caused by the delay in starting the TRA project of Cargo Tracking which was the basis of the loan facilities and the same was communicated to the Plaintiff.

At the commencement of the trial the following issues were framed by the court for determination. The issues are:-

1. Whether the Defendants breached the loan facility agreement.
2. If the answer to the first issue is in the affirmative, whether or not the Plaintiff contributed to the breach by frustrating the Defendants in repaying the loan
3. To what reliefs are the parties entitled.

As stated the first issue as about breach of the terms of the facilities by the Defendants.

The Plaintiff called one witness and the Defendant called two. The Plaintiff's bank testified through **Antony Silvanus Bwahama (PW1)** its Credit Manager who told the court that by a facility letter dated 26<sup>th</sup> November 2015 (Exhibit P1), the bank granted to the first Defendant an Overdraft Facility of T.shs 2,300,000,000 and a Business Loan of T.shs

1,180,000,000.00. He said that the Overdraft Facility was to be enjoyed by the Defendants for 12 months from the date of facility and the Business Loan Facility was to be repaid after 24 months.

It is the evidence of PW1 that as security for the loan the Overdraft and Business Loan Facilities were secured by a Debenture over fixed and floating assets of the 1<sup>st</sup> Defendant and mortgage of a property on Plot No. 244 Block 12 Mbweni Mpiji Area within Kinondoni District in Dar Es Salaam City which is registered in the name of Abdulkadir Mgheni (DW2). The Debenture instrument and the Mortgage Deed were tendered in evidence as Exhibit P2.

It is further evidence of PW1 that the second Defendant facilitated execution of the spouse consent for the property on Plot No. 244. The spouse consent was tendered and admitted as exhibit P3.

In addition to Debenture and Mortgage, the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants guaranteed the two facilities by executing a deed of unlimited personal guarantees which were tendered in evidence and were admitted as exhibit P4 collectively.

It is further evidence of this witness that the first Defendant defaulted in servicing the Overdraft Facility as she failed to pay on demand and on maturity as a result of which the Plaintiff did issue demand Notices to the Defendants on 3<sup>rd</sup> August 2016 (Exhibit P5). The Defendants didn't heed to the demand notices issued to them and this forced the Plaintiff to issue Statutory

Notice of Default (Exhibit P6) as required by law which the Defendants didn't not heed either.

According to PW1 by 16<sup>th</sup> June, 2017 the total liability of the first Defendant inclusive of principal amount interest and other charges stood was at T.shs 4,434,614,912.00 which the Plaintiff is now claiming in this suit.

In the alternative, the Plaintiff is asking the Defendants to hand over vacant possession and an order for sale of the mortgaged property. The Defendants are denying the Plaintiff's claims.

In his evidence in defence **Abdulkadir Abdul Mgheni (DW1)** the Director and Executive chairman of the first Defendant's company confirmed that the Bank did give an Overdraft Facility to his company to the tune of T.shs 2,300,000,000.00 and a Business Loan Facility of T.shs 1,180, 000,000.00 as stated by the Plaintiff. He said that the purpose of the Business Loan was to facilitate the implementation of Tanzania Revenue Authority Project of cargo tracking which was awarded to his company. He conceded that there was a delay to start servicing of the loan and the overdraft facility which according to him was due to the delay in implementation of the TRA project (the basis of the loan facilities) and that the same was communicated to the Plaintiff.

It is further evidence of DW1 that the delay notwithstanding the Defendants continued to service the loans up to date and on several occasions the 1<sup>st</sup> Defendant requested the Plaintiff to restructure it and cover the period of delay but the Plaintiff

has been adamant. He said that the Plaintiff started to frustrate the Defendants by using the overdraft facility account to discharge the business loan contrary to what was agreed. He said that to show her ill-motive the Plaintiff's bank has already debited the costs of this case in the First Defendant's account. Similar evidence was given by DW2 **FADHILI ANANIAS SEMBAGO**, the Managing Director of the Defendant's company.

At the conclusion of the trial counsel for the parties filed written submissions to support their respective cases.

In his submissions, Counsel for the Plaintiff urged Court to find that in view of the evidence adduced and the contents of Exhibits P5, P6 and P7 the Defendants have breached the terms of agreement in both facilities.

Regarding the second issue the learned counsel maintained that the Plaintiff didn't contribute to the Defendants' default and that no frustration has been established. He submitted that the breach was committed since 2015 while the complained frustration is alleged to have had occurred after the institution of the case. Moreover, it is the learned counsel's submission that the act of the Plaintiff using the Defendants' current account to service the loan is within the terms of the facility letter as it is permitted by condition 18.1 of the Business Loan Agreement (Exhibit P1)

In response, Counsel for the Defendants in a way conceded a breach. He submitted that the breach was unfortunate and was

due to the nature and requirement of the TRA project the basis of which the loan was secured. He said that there were delays in carrying out the project and the Plaintiff was informed about the delays and she actually offered further time for repayment.

Furthermore the learned counsel submitted that the 1<sup>st</sup> Defendant realized that it was very difficult to service two separate facilities separately with the same bank and requested the Plaintiff to combine (i.e. restructure) the two facilities and give her a single term loan facility and the bank's indication was that restructuring would not be possible due to the Central Bank of Tanzania Regulations.

From the pleadings, evidence and submissions of both parties it is clear that the fact that the Defendants didn't repay the facilities as agreed in the loan terms (Exhibit P1) is not in dispute. The Defendants admits that they didn't discharge the Overdraft Facility within the period of 12 months and the Business Loan within 24 months as agreed. To me this is a clear breach of the terms of their contract. The defendants' assertions that the breach was caused by the delay in the TRA project on the basis of which the loans were taken cannot avail them any viable defence for that breach.

Section 101 of the Evidence Act [Cap 6 R.E. 2002], excludes oral evidence from written agreement. The law is to the effect that when the terms of a contract have been proved according to Section 100 of the Act, no evidence of oral agreement or statement shall be admitted to controvert written contract.

In the case at hand the terms of the Overdraft Facility and Business Loan Agreement are contained in exhibit P1. According to the said terms the facilities were repayable in 12 and 24 months respectively. The Defendants admit to have failed to pay within the agreed period. They however attribute their failure to delay in TRA project. However repayment of the loan was not agreed to be incumbent upon commencement of their TRA project and therefore delay in that project cannot be pleaded as an excuse for the complained breach. If the parties had agreed to vary the terms agreed in the loan agreements and include the performance of TRA project, they were ought to draw an addendum and change or vary the terms as they would have agreed. However, there is no addendum to the original loan terms. The absence of an addendum or written variation of the agreed terms implies that parties didn't change the terms of their agreement and as it is agreeable that the Defendants didn't service the loans as agreed in exhibit P1 I find and hold that the Defendants are in breach of the loan agreements and this answers the first issue in the affirmative.

The second issue is about the Plaintiff's contribution to the Defendants' breach. The main complaint under this head is that the Plaintiff has debited the costs of this case in the Defendants account. I have no doubt that the alleged debiting is unwarranted and in any event illegal. In the first place costs of the case cannot be ascertained before the case is conclusively determined. Secondly, costs are reimbursements which are subject to order of the court and taxation. How could the plaintiff determine her own costs?



However, the debiting of the Defendants' account for purposes of recouping costs of this case has nothing to do with the Defendants' breach of the loan agreement. I have carefully considered the evidence adduced in this case in respect of frustration and Plaintiff's contribution towards the breach and I am unable to agree with DW1 and DW2 that the Plaintiff did frustrate or contribute in any way to the Defendants' failure to discharge their obligations under the facility agreements.

As the evidence would suggest the Plaintiff used the 1<sup>st</sup> Defendant's account with overdraft to repay the term loan long time after the breach had already been committed. Similarly charging of the costs of the case (which I have found to be illegal) was done long time after the institution of the case which means it was so done after the breach. Thus, using the Defendant's current account with the overdraft to pay the term loan and debiting costs of the case therefrom would in no way contribute to the breach of the terms of the two loan agreements (Exhibit P1) and there is no evidence that the act frustrated the Defendants in servicing the loans. I thus answer the 2<sup>nd</sup> issue in the negative and hold that the Plaintiff didn't contribute to the Defendants breach by frustrating them in servicing the loans.

Regarding reliefs this Court finds that the Plaintiff is entitled to recover the entire sum of the money claimed in the plaint. Contrary to the submissions of Counsel for the Defendant that the Defendant should be allowed to service the two loans by paying T.shs 50,000,000.00 per month till the entire sum is

liquidated, the duty of the court is not to set or fix terms of a contract or agreement between the parties but to make sure that parties' terms of agreement are performed.

In the present case the Defendants have breached the agreed terms and the entire amount is now due. The Defendants are liable to repay this sum of money as claimed under paragraph (i) of the Plaint.

I wish to observe that, even if Court had found the defence of frustration was sustainable, the money payable to the Plaintiff would still have been recovered. This is because *"a party who has done something or incurred expenses in performance of the contract prior to the frustrating event may claim compensation for such expenses or any benefits conferred upon the other party"*. – See Principles of Commercial Law 2<sup>nd</sup> Edition, by K.I. Laibuta, Pg.113.

As regards to the interest the agreed rates were 20% per annum for the Business Loan Agreement and 22% per annum for the Overdraft Facility. Accordingly I fix the interest rate chargeable on the decretal sum at the rate of 20% per annum from the date of filing the suit to the date of judgment and further court's interest at the rate of 7% per annum from the date of this judgment to the date of full payment of the decretal sum.

In the alternative to the orders pronounced above and upon failure by the Defendants to repay the outstanding sum as ordered hereinbefore, the Plaintiff will be entitled to vacant

possession and order of sale of a property on Plot No. 244 Block 12 L.O. 210834 LD No. 209658 at Mbweni Mpiji Area in Kinondoni District within Dar Es Salaam City, registered in the name of AbdulKadir Abdu Mghen. The plaintiff is also awarded costs of the suit.

Order accordingly,



  
A.R. Mruma,

Judge.

Dated at Dar Es Salaam this 9<sup>th</sup> day of February, 2018.