

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 39 OF 2019

DIAMOND TRUST BANK TANZANIA LTD.....PLAINTIFF

Versus

PRIME FARMS LTD.....1st DEFENDANT

NISHAT NAUSHAD MULJI ALIBHAI

(also otherwise known as NISHAT MULJI).....2nd DEFENDANT

PRAFUL MOGAL.....3rd DEFENDANT

SHAHIN KASSAM.....4th DEFENDANT

Last Order: 04th Sept, 2019

Date of Judgment: 26th Sept, 2019

DEFAULT JUDGMENT

FIKIRINI, J.

The plaintiff issued Credit Facilities to the 1st defendant, Prime Farms Limited, totaling Tzs. 350, 000,000/= (Tanzania Shillings Three Hundred and Fifty Million only). The Credit Facilities was made up of Term Loan Facility of Tzs. 180,000,000/= (Tanzania Shillings One Hundred and Eighty Million only) and Overdraft facility amounting to Tzs. 170,000,000/=

(Tanzania Shillings One Hundred and Seventy Million only). The Credit Facilities agreement was entered on 26th October, 2016, as per annexure P₁, and was secured by the following securities: (a) A mortgage of the 2nd defendant's immovable property on Plots No. 87 and 88 Block "N" Usagara Trading Centre, Misungwi District, Mwanza, Title No. 53465 LR MWZ. (b) A Debenture over the 1st defendant's assets; and (c) The personal guarantee of the 2nd , 3rd and 4th defendants. Annexetures marked as P₂, P₃ and P₄, respectively were annexed in support.

The 1st defendant defaulted servicing the Credit Facilities. As per the terms of the loan the full outstanding balance has become due and payable to the plaintiff immediately. A notification on default notice was issued to the 2nd defendant Nishat Naushad Mulji Alibhai; 3rd defendant Praful Mogal; 4th defendant Shahin Kassam on 22nd January, 2019, by way of annexure P₅ collectively. The 1st defendant's bank statements were as well supplied as annexure P₆ collectively.

In determining if the plaintiff has been able to prove his claim, I had to carefully review the records of proceedings which include the application for default judgment pursuant to Rule 22 (1) of the Rules as Amended under Rule 13 of the High Court (Commercial Division) Procedure

(Amendment) Rules, 2019, the affidavit and annexures in support of the claim.

Based on Mr. Daudi counsel for the plaintiff information, the defendants were duly served through a Court summons as follows: the 1st and 4th defendants were served on 24th May, 2019 while the 2nd and 3rd were served on 3rd June, 2019, and the matter was fixed for 10th June, 2019 for orders. Summons proving service to have been duly effected upon the defendants with their signatures confirming receipt of the summons was availed to the Court. None of the defendants entered appearance on the 10th day of June, 2019.

The matter was rescheduled for 24th June, 2019, with prior notice to the defendants. Again none of the defendants entered appearance nor written statement of defence had been filed. A copy of the notification letter dated 11th June, 2019 with reference number 1371/DTB issued to the defendants by the plaintiff's counsel Mr. Daudi, was annexed to the application. Save for the 2nd defendant, the 3rd and 4th defendants acknowledged receipt of the notification on 18th and 19th June, 2019, by signing against their names.

With that in place it is undoubtedly that the defendants were duly served but opted not to defend the suit filed against them.

Now turning to the claim by the plaintiff, in order for this Court to grant the reliefs sought the plaintiff has to prove that the following:

1. Whether there was Credit Facilities Agreement between the plaintiff and the defendants.
2. If the answer is in affirmative, whether there was breach of agreement.
3. To what reliefs are the parties entitled.

Thorough review of the annextures proved that the plaintiff did approve Credit Facilities worth Tzs. 350,000,000.00 to the defendants in the following manner: Term Loan Facility of Tzs. 180,000,000.00 which was to be repaid, after completion in 36 monthly installments after completion of a grace period of six months from date the loan was granted; and Over Draft Facilities worth Tzs. 170,000,000.00 for a period of 12 months from the date of setting up the limit. In other words the life of the overdraft facility was 12 months and any used money from the facility must be repaid within the 12 months.

This is exhibited by annexure P₁, Credit Facilities Agreement duly executed on 26th October, 2016 and signed by the 2nd, 3rd and 4th defendants who were all directors of the 1st defendant on 27th October, 2016.

The Credit Facilities was secured by the landed property in the name of the 2nd defendant Nishat Naushad Mulji Alibhai and as exhibited in annexure P₂ which was executed on 22nd November, 2016. Also by a debenture over the 1st defendant's assets as exhibited in annexure P₃, which was executed on 16th November, 2016, and personal guarantees of the 1st, 2nd and 3rd defendants who were company's directors, pledged on 16th November, 2016. In the absence of any controverting evidence, and with the above information found in the agreement and accompanying annexures, I am bound to conclude that there was indeed Credit Facilities extended to the 1st defendant by the plaintiff and secured as reflected in annexures P₁, P₂, P₃ and P₄.

This in my view sufficiently answers the first issue in affirmative.

Naturally, the next question would be whether the 1st defendant repaid the amount loaned as agreed and at the specified period. For the Term Loan of

Tzs. 180,000,000.00 which was repayable in 36 (thirty six) months, counting from 26th October, 2016 when the agreement was approved minus the 6 (six) months' grace period, which will be up to 26th April, 2017. Up to when this matter was filed on 30th April, 2019, it was 2 (two) years and 1 (one) month and 4 (four) days. This is not the exact 36 (thirty six) months agreed on. Nevertheless, thorough perusal of the annextures and in particular the 1st defendant's bank statement, the 1st defendant had not exactly serviced the loan, let alone on monthly installments as agreed in the Credit Facilities agreement – annexure P₁ dated 26th October, 2016.

Under item 3 titled Validity/Repayment Facilities and note (a) the Term Loan Facility, repayment plan was monthly installments from the date of first drawdown. This has not been strictly observed. There have been few instances of deposits but not on monthly installment. In actual fact by 31st December, 2018 which was prior to issuance of demand for payment letter of 22nd January, 2019, the outstanding debt loan was Tzs. -188,626,054.55 and by 06th March, 2019 which was prior to filing of this suit, the outstanding balance was Tzs. -203,793,551.91. This is clear evidence that the loan was not being serviced as per the agreement. Failure to effect repayment to service the loan cannot be interpreted otherwise except

breach of the terms and conditions of the agreement. Going by the annexure P₅ a demand letter dated 22nd January, 2019, the plaintiff pointed out to have demanded repayment from the defendants unsuccessfully, resulting into the plaintiff demanding from the defendants' immediate payment of Tzs. 292,555, 940.96 plus interest and charges applicable.

Even with the demand letter issued on 22nd January, 2019, the defendants have neither controverted the claim nor rectified the default. This is pure breach of terms of agreement of which the defendants willingly entered into and hence it is proper for the plaintiff instituting this suit claiming for payment of the amount stated above.

The plaintiff has in my view managed successfully to prove the claim against the defendants and deserves the reliefs sought in the plaint which I proceed to grant as follows:

1. Enter judgment in favour of the plaintiff jointly and severally against all 4 (four) defendants for Tzs. 298, 830, 837.26

2. Interest at the rate of 19% which was as per the agreement dated 26th October, 2016 per annum on the said sum of Tzs. 298, 830, 837.26 from 07th March, 2019 until judgment of sooner payment.
3. Interest at Court rate of 7% from the date of judgment until full payment.
4. Costs of the suit be borne jointly and severally by all 4 (four) defendants.

It is so ordered.



P. S. FIKIRINI

JUDGE

26th SEPTEMBER, 2019