

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 16 OF 2019**

**FIRST NATIONAL BANK TANZANIA LIMITED..... PLAINTIFF**

**VERSUS**

**JOSIC COMPANY LIMITED..... 1<sup>ST</sup> DEFENDANT**

**JOSEPH EDGAR CHIWALO..... 2<sup>ND</sup> DEFENDANT**

**MARIA SHIJA MABULA..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

**B.K.PHILLIP, J**

This case emanates from overdraft facilities granted to the 1<sup>st</sup> defendant by the plaintiff. A brief background to this case is as follows; On 12<sup>th</sup> March 2015, the plaintiff granted to the 1<sup>st</sup> defendant an overdraft facility to a tune of Tshs 500,000,000/= .The 1<sup>st</sup> defendant utilized all of the amount granted. In 2016 the 1<sup>st</sup> defendant applied for another overdraft facility to a tune of Tshs 400,000,000/= as an extension of the first overdraft facility. The same was granted on 7<sup>th</sup> December, 2016. This one was payable within six (6) months from the date of its issuance. The security for the aforesaid credit facility among others, were first ranking debenture over

the assets of the 1<sup>st</sup> defendant and personal unlimited guarantees signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

It is the plaintiff's case that the 1<sup>st</sup> defendant breached the terms and conditions of the credit facility agreement dated 7<sup>th</sup> December 2016 for failure to pay the outstanding amount, which as at 14<sup>th</sup> day of December 2018, it stood at a tune of Tanzania Shillings Three Hundred Seventy one Million Four Hundred Twenty One Thousand Three Hundred Ninety Five and Sixty Eight Cents (Tshs. 371,421,395.68). The plaintiff alleged that despite being served with the notice of default, the 1<sup>st</sup> defendant failed to clear the outstanding amount. That the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were served with demand notice for payment of the outstanding amount, but ignored /neglected to pay the outstanding amount. Thus, in this case the plaintiff prays for judgment and decree against the defendants as follows;

- i) Declaration that, the 1<sup>st</sup> Defendant has breached the fundamental terms and conditions of the Overdraft Agreement dated 7<sup>th</sup> December, 2016 with reference number FNBT/HC/625/12/16 entered into between it and the Plaintiff.
- ii) A declaration that the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants have breached the terms and conditions of the Personal Guarantee each one entered into and signed in favour of the Plaintiff.
- iii) An order directing the Defendants jointly and severally to pay the Plaintiff the sum of Tanzania shillings Three Hundred Seventy One Million Four Hundred Twenty One Thousand Three Hundred Ninety five

and Sixty Eighty cents (TZS 371,421,395.68) being the principal sum plus interests as of the 14<sup>th</sup> day of December, 2018 arising from the default on Credit Facilities extended to the 1<sup>st</sup> Defendant by the Plaintiff under Loan/Credit Agreements.

- iv) An order directing the Defendants to pay to the Plaintiff interests of 22% of the amount stated in item (iii) herein above per annum and to be calculated on daily outstanding balance and capitalized monthly in arrears from the 14<sup>th</sup> day of December, 2018 to the date of payment in full.
- v) An order directing the defendants to pay to the Plaintiff interests of 7% on the decretal sum calculated on daily outstanding balance and capitalized monthly in arrears from the date of judgment to the date of payment in full.
- vi) The defendants be ordered to pay General damages to the Plaintiff. The same to be assessed by this Honourable Court for the loss of income to invest in banking business, hardship and disturbance which was caused by the Defendants act to refuse and or neglect to pay the outstanding balance/debt on time.
- vii) The Defendant to be ordered to pay costs of this matter.
- viii) And any other relief as this Honourable court will deem fit and just be granted.

In their joint written statement of defence, the defendants conceded that the credit facility dated 7<sup>th</sup> December, 2016 was granted to the first defendant. They alleged that the 1<sup>st</sup> defendant agreed with the plaintiff that the money for repayment of the overdraft facility was supposed to be obtained from payments made by Vodacom Tanzania Limited (henceforth "Vodacom"), in respect of the agreement for provision of technical services to cell towers between the 1<sup>st</sup> defendant and Vodacom. Moreover, the defendants alleged as follows; That all payments from Vodacom in respect of 1<sup>st</sup> defendant's project mentioned herein above were agreed to be made through the plaintiff's collection account where the plaintiff was entitled to deduct its money for the repayment of the overdraft facility. Unfortunately, Vodacom stopped offering any work to the 1<sup>st</sup> defendant, thus no payment was done in the plaintiff's collection account. Also, they disputed to have been served with any notice of default/demand notice for payment of the outstanding amount and prayed for the dismissal of the plaintiff's claims with costs.

The following issues were framed for determination by the Court;

- i) Whether there was a breach of the fundamental terms and conditions of the overdraft agreement by either party.
- ii) Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants breached the terms and conditions of the personal guarantees each one signed and entered into with the plaintiff.

iii) To what reliefs are the parties entitled to.

At the hearing of this case, the learned advocate Augustino Ndomba and Geoffrey Lugomo appeared for the plaintiff and the defendants respectively. The plaintiff brought one witness namely Anthony Bwahama, the plaintiff's Credit Manager (PW1), while the 2<sup>nd</sup> defendant testified as DW1 in his capacity as the managing director of the 1<sup>st</sup> defendant as well as defended himself. The third defendant testified as DW2.

Now, let me embark on the analysis of the evidence adduced and the determination of the issues. Starting with the first issue, that is **Whether there was a breach of the fundamental terms and conditions of the overdraft agreements by either party**, in his testimony PW1 stated that, the plaintiff granted to the 1<sup>st</sup> defendant two overdraft facilities. The first one was granted on 12<sup>th</sup> March 2015. The same was to a tune of Tshs. 500,000,000/= (Exhibit P1). The second one was granted on 7<sup>th</sup> December, 2016. It was to a tune of Tshs. 400,000,000/=. (Exhibit P2). PW1 further testified as follows; that the preamble in the overdraft facility letter dated 7<sup>th</sup> December 2016, (Exhibit P2) states clearly that the said overdraft facility was in the series of overdraft agreements entered into between the plaintiff and the 1<sup>st</sup> defendant and that it was an extension of the overdraft facility dated 12<sup>th</sup> March 2015. The same was to be repaid within a period of six (6) months only. That the 1<sup>st</sup> defendant utilized the whole of the overdraft amount, that is Tshs. 400,000,000/=:, but has failed to pay the outstanding amount which, as of November 2018 stood at a tune of Tshs. 371,421,395.68 that is, the principal sum

plus interests (Exhibit P 11-Bank statement). It was PW1's testimony that upon realizing that the 1<sup>st</sup> defendant had defaulted to pay the outstanding amount as agreed, on 15<sup>th</sup> December 2018 the plaintiff served the 1<sup>st</sup> defendant a notice of default (Exhibit P8).

On the other hand, DW1 who is the managing Director of the 1<sup>st</sup> defendant, in his testimony did not dispute that there is an outstanding amount arising from the overdraft facility granted to the 1<sup>st</sup> defendant on 7<sup>th</sup> December, 2016 and that the time for payment of the same has expired quite a long time ago. However, he also testified as follows; that the said overdraft facility was for the purpose of financing the execution of the contract that the 1<sup>st</sup> defendant had entered into with Vodacom. The contract between the 1<sup>st</sup> defendant and Vodacom formed part of the aforesaid overdraft facility agreement. The plaintiff and the 1<sup>st</sup> defendant agreed that all payments from Vodacom to the 1<sup>st</sup> defendant would be done through the Plaintiff's collection Bank Account, where the plaintiff was entitled to deduct its money for payment of the overdraft facility. Out of the overdraft facility of Tshs. 500,000,000/= the 1<sup>st</sup> defendant paid a sum of Tshs. 250,000,000/=, but it reached a time when Vodacom had no projects to offer to the 1<sup>st</sup> defendant, thus from that time the 1<sup>st</sup> defendant failed to service the overdraft facility. DW1 tendered in court the agreement between the 1<sup>st</sup> defendant and the Vodacom which was admitted as Exhibit D1.

From the analysis of the evidence adduced by the witnesses, it is obvious that the 1<sup>st</sup> defendant is in breach of the fundamental terms and conditions of the overdraft facility date 7<sup>th</sup> December, 2016 since it failed to adhere to

the conditions for payment of the overdraft amount within the agreed time. In his testimony DW1 conceded, that the 1<sup>st</sup> defendant stopped servicing the overdraft facility when Vodacom stopped offering any work to the 1<sup>st</sup> defendant. It has to be noted that one of the fundamental terms of the overdraft facility was to service the overdraft facility and effect repayment of the same timely. Upon perusing the overdraft agreement (exhibit P2), I noted that the overdraft facility was for a period of six ( 6) months. Therefore, the answer to the first issue is that, the 1<sup>st</sup> defendant breached the fundamental terms and conditions of the overdraft facility, since it failed to pay back the amount granted in the overdraft facility as agreed.

For avoidance of doubts, I wish to state here that the 1<sup>st</sup> defendant's allegation that the repayment of the overdraft was subject to availability/existence of the business undertakings between the 1<sup>st</sup> defendant and Vodacom is not correct, since it is not reflected in the overdraft facility agreement in question. What is indicated in the overdraft facility agreement is that the contract between the 1<sup>st</sup> defendant and Vodacom was one of the collateral cover for the overdraft facility among others, which included the unlimited guarantee agreements signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.

Now, coming to the second issue, that is **Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants breached the terms and conditions of the personal guarantees each one signed and entered into with the plaintiff,** the testimony of PW1 is to the effect that 2<sup>nd</sup> and 3<sup>rd</sup> defendants each one signed unlimited personal guarantee agreement for payment of all money which the 1<sup>st</sup> defendant was obliged to pay to the plaintiff from time to

time. It was PW1's testimony that upon the 1<sup>st</sup> defendant's default in repayment of the overdraft facility, the plaintiff served the 2<sup>nd</sup> and 3<sup>rd</sup> defendants demand letters for payment of the outstanding amount (Exhibits P9 and P10) by registered mail, using the address indicated in their respective guarantee agreements, but the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not bother to pay the outstanding amount.

In their testimonies, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants admitted that they signed the unlimited personal guarantee agreements for the overdraft facility granted to the 1<sup>st</sup> defendant on 7<sup>th</sup> December 2016. However, they denied to have been served with any demand letter for payment of the outstanding amount in respect of the aforesaid overdraft facility. Moreover, they testified that they were not aware that the 1<sup>st</sup> defendant defaulted the repayment of the overdraft facility. So, all the time they were under the assumption that the 1<sup>st</sup> defendant had no problem with the repayment of the overdraft facility. DW1's testimony (the 1<sup>st</sup> defendant) that he was not aware of the 1<sup>st</sup> defendant's default in repayment of the overdraft facility leaves a lot to be desired, since he is the managing Director of the 1<sup>st</sup> defendant. It is incomprehensible for the managing director to be unaware of what is going in the Company. Not only that, in part of his testimony DW1 testified, that upon failure to obtain works from Vodacom the 1<sup>st</sup> defendant stopped servicing the overdraft facility.

During cross examination, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants admitted that the address that appears in the demand letters alleged to have been served unto them and the receipt for payment for the delivery of those letters

by registered mail is their address that they indicated in their respective personal guarantee agreements.

From the foregoing, the evidence adduced by the witnesses ( PW1, DW1 and DW2) proves the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are in breach of the unlimited guarantee agreements each one of them signed because they failed to pay the outstanding amount upon being demanded to do so. Exhibits P9 and P10 prove that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were served with the demand letters for payment of the outstanding amount in the credit facility. I do not agree with the contentions made by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants that they were not aware of the 1<sup>st</sup> defendant's failure to pay outstanding amount, because that contention is contradictory to the testimony of DW1. As I pointed out earlier in this Judgment, DW1 admitted that the 1<sup>st</sup> defendant stopped servicing the overdraft facility when Vodacom stopped offering works to the 1<sup>st</sup> defendant. Not only that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants were served with the demand letters for payment of the outstanding amount pursuant to the terms of the unlimited guarantee agreements, (Exhibits P9 and P10) but failed to pay the amount indicated therein.

As regards the reliefs the parties are entitled to, the evidence adduced by PW1, in particular the Bank statement (Exhibit P11) proves the plaintiff's allegation that as on 14<sup>th</sup> December 2018 the outstanding amount was Tshs. 371,421,395.68, being the principal sum and interests. Looking at the credit facility agreements (Exhibits P1 and P2), there is no doubt that the overdraft facilities granted to the 1<sup>st</sup> defendant attracted interests as it is normally done by financial institutions .

From the foregoing I hereby enter judgment against the defendants jointly and severally as follows;

- i) That the defendants shall pay the plaintiff a sum of Tanzania Shillings Three Hundred Seventy One Million Four Hundred Twenty One Thousand Three Hundred Ninety Five and Sixty Eight Cents (Tshs. 371,421,395.68)
- ii) That the defendant shall pay interests on the decretal sum in item (i) herein above at commercial rate of 22% from January 2019 to the date of judgment.
- iii) That the defendant shall pay interests on the decretal sum in item (i) herein above at the court rate of 7% from the date of judgment to date of full payment.
- iv) That the costs of this case shall be borne by the defendants.

Dated at Dar es Salaam this 6<sup>th</sup> day of November, 2020.



A handwritten signature in black ink, appearing to be "B.K. Phillip", written over a horizontal line.

**B.K. PHILLIP**

**JUDGE**