

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM  
COMMERCIAL CASE NO. 153 OF 2021**

**SYMBION POWER (T) LTD.....PLAINTIFF**

**VERSUS**

**CRDB BANK PLC.....DEFENDANT**

**JUDGMENT.**

*Date of the last Order: 11/05/2022.*

*Date of Judgment: 28/06/2022.*

**Z.A MARUMA J.**



The Plaintiff herein is a limited liability companies incorporated under the laws of Tanzania having its registered offices within Dar es Salaam City

Whereby the Defendant is a limited liability company incorporated under the laws of Tanzania. The Plaintiff is claiming against the Defendant for breach of Bank and Customer Relationship whereby the Defendant unlawfully and without justifiable cause withdrawn the sum of United States of America Dollars Thirteen Million Only (USD

13,000,000.00) into the Plaintiff s Bank Account Number 0250316598400 CRDB Bank.

The brief background of this case was that, The Plaintiff is Sister Company of M/S. Symbion Power LLC (herein the Borrower) and both are wholly owned by M/S Symbion Power Holdings LLC of Delaware, the United States of America. On 2<sup>nd</sup> May 2013 the Defendant extended an overdraft facility (the Facility) to Symbion Power LLC (the Borrower) in the extent of USD 10,000,000.00 (say United States Dollar Ten Thousand Only). The advanced the Facility was extended to finance working capital of the Borrower who was undertaking ongoing projects in Tanzania under the Millennium Challenge Account Tanzania (MCAT). This was followed by other facilities granted and several variations made on the facilities. On 30<sup>th</sup> December, 2016 the Borrower applied for a restructuring and made several undertakings regarding the loan which the total outstanding loan by that time was accrued to USD. 13,000,000.00 as per terms of agreed by the parties (the Plaintiff, the Defendant and the Borrower) which was duly accepted by the Borrower and signed by the parties thereby. It is alleged that the Plaintiff did not honour her obligations/undertakings to pay the

outstanding debt due as agreed in the Deed of Undertaking which resulted to a default of the aforesaid facility. Despite of the several demands to pay made by Defendant none of them was honoured by the Plaintiff and or Borrower. It was until 20<sup>th</sup> March, 2020 the Defendant was demanded to charge-off/write-off in compliance with Bank of Tanzania Regulations guiding (NPL) Non-Performing Loans. Whereby the debt due and outstanding against the Borrower's account was USD 11,032,709.6. However, despite of the charge-off, the Borrower's account continued to accrue interests and penalty interest at a tune of USD 12,915,920.05 calculated by Defendant.

On 11<sup>th</sup> August 2021 Tanzania Electricity Supply Company (TANESCO) deposited into Plaintiffs Bank Account Number 0250316598400, CRDB BANK the sum of United States of America Dollars Thirteen Million (USD 13,000,000.00). On 24<sup>th</sup> August, 2021 the defendant set off the debt on the Plaintiffs account which was credited with USD 13,000,000.00 from TANESCO alleged that the set off was done in compliance to the terms of the Deed of Undertaking ("TMA-4"). It is alleged that surprisingly on the eyes of the Plaintiff on 24<sup>th</sup> day of August 2021 the Defendant sent a letter to the Plaintiff with

reference number CRDB/3387/DC-OYS/GC/SYPT/80/21 that, USD 13,000,000.00 has been utilised to clear the outstanding loan balance in respect of Symbion Power LLC without the Plaintiff's consent or instructions (annexure "SPTL-1 "). Hence the present suit before this Court.

The Plaintiff before this Court prays for a Judgment and Decree against the Defendant as follows:

- i. A declaratory order that the Defendant to refund the amount of United States of America Dollars Thirteen Million only (USD 13,000,000.00) unlawfully withdrawn by the Defendant from the Plaintiff Bank Account Number 0250316598400 CRDB BANK PLC.
- ii. Compensation USD 4,000,000.00 due to loss of business.
- iii. Payment of general damages as may be assessed by the court.
- iv. To pay the Plaintiff commercial interest on the aforesaid amount in (i) at the rate of 22% per month from the date when each claim accrued until the date of final payment.

- v. To pay the Plaintiff Court's interest on the aforesaid amount in (i) at the rate of 7%
- vi. per month from the date when each claim accrued until the date of final payment.
- vii. Costs of the suit be provided for.
- viii. Any other relief this Court deems just to grant.

The hearing was scheduled on where the parties were presented by Mr. Silvanus Mayenga, advocate assisted by advocate Mr. Eric Royemamu for the plaintiff and Mr. Abel Msuya, Advocate assisted by advocates Ms. Iren Mchau, Ms. Regina Antony Kiumba and Ms. Ndehorio Ndesamburo.

On the Plaintiff side, the evidence PW1 to support his testimony tendered the following documents which were admitted as Exhibits STL-1 a deed of undertaking of 31<sup>st</sup> December 2016 (Exhibit – PI). STL-2 CRDB Bank statements of 2018 three pages statements, (Exhibit – P2), STL- 3 Is an email wrote to CRDB loan recovery section dated 11<sup>th</sup> January 2018, 6<sup>th</sup> April and 2018 (Exhibit – P3), STL- 6 is A letter from CRDB Bank dated 24<sup>th</sup> August 2021 (Exhibit – P4), STL- 7, letter from CRDB dated 8<sup>th</sup> November 2021 (Exhibit – P5), STL- 8, Special

Resolution dated 10<sup>th</sup> November 2021 (Exhibit – P6), STL- 4, A letter to CRDB dated 9<sup>th</sup> February 2018 (Exhibit – P7) and STL-5 Board resolution stated 10<sup>th</sup> December 2018 (Exhibit P-8). While on the defendant side, one witness testified

Support of the claim, the plaintiff called for two witnesses however, he opted to drop PW2. PW1, Dr. Magesvaran Subramania, Chief Executive Officer of the Plaintiff, testified that the Plaintiff is the holder and owner of Bank Account Number 0250316598400 with a name of SYMBION POWER TANZANIA LIMITED at the Defendant's CRDB BANK PLC at OYSTERBAY BRANCH. PW1 further that the Defendant and Symbion Power LLC, a separate and distinct entity from the Plaintiff with lender - borrower relationship where the Defendant extended various loans. He added that in 2016, the Defendant (lender) and Symbion Power LLC (borrower) approached the Plaintiff to undertake repaying Borrower's facility on ground that the loan was unsecured, and the Bank of Tanzania (BOT) was on Defendant's neck for having advanced such huge loan without security.

The approved facility was United States Dollar Thirteen Million (USD 13,000,000.00) depending on the draw down.

He further testified that after protracted negotiations, a tripartite agreement was reached whereby the Plaintiff undertook some limited obligations to the borrower's loan on the terms that: -

i) The Plaintiff (undertaker) assumed a conditional responsibility of settling the debt of Symbion Power LLC to the Defendant and to start with the undertaker will pay USD 1,490,000.00 before 2<sup>nd</sup> January 2017.

ii) The undertaker agreed to pay the Defendant USD 100,000.00 monthly for purposes of servicing interest to the restructured overdraft

iii) For purposes of settling Symbion Power LLC debt, the undertaker authorized the bank to withdrawal from its account 40 % of any payment that the undertaker would receive from M/s TANESCO during period of the validity of the undertaking.

iv) Symbion Power LLC gave him a power of attorney to execute all documents related to restructuring of its facility with the Defendant and he was corresponded with the Defendant in this capacity referred to the Deed of Undertaking dated 31<sup>st</sup> December

2016, annexure "SPTL-1" (Exhibit – PI) which expired on 31<sup>st</sup> December 2017.

PW1 testified that the Plaintiff complied with her undertakings by paying USD 1,490,000.00 and monthly USD 100,000.00 for the period of undertaking through the borrower's account. To support his testimony, he tendered Symbion Power LLC Bank Statement annexure SPTL-2 (Exhibit – P2). He further testified that the modality agreed to settle the debt was through the swiping of 40% of every payments received from TANESCO within the undertaking period until entire debt in repaid. If no money came in within undertaking period and there is no repayment of 40%, the Plaintiff would not be in default.

PW1 furthermore testified that the said deed of undertaking being not perpetual it had expired and therefore ceased to have legal force, on 1<sup>st</sup> January 2018. He further testified that the Defendant sent an email, among other things, requesting the Plaintiff to renew the deed of undertaking as the previous one expired has expired on 31<sup>st</sup> December 2017. He tendered email correspondences – annexure SPTL-3" Exhibit P-3 collectively.



PW1 testified that the Plaintiff declined further undertakings and therefore did not sign any renewal. Moreover, on 09<sup>th</sup> February 2018, PW1 testified to receive a letter wrote by the Defendant to the Plaintiff attaching with a new Deed of Undertaking and cross guarantee agreement requesting the Plaintiff to sign. However, the Plaintiff did not accept the proposed new undertaking thus declined to make any further undertakings and therefore did not sign the documents. PW1 clarified further that to the extent that Deed of Undertaking was for specific period expiring 31<sup>st</sup> December 2017 and no renewal was done. The Plaintiff's liability to the Borrower's loan became extinctic with the expiry of the undertaking.

PW1 went further to testified that, after the protracted negotiations and m terms of Exhibit SPTL-3 & 4, the Defendant had also requested the Plaintiff to submit Board Resolution requesting extension of the Overdraft from Symbion Power LLC and Power of Attorney authorizing him to transact on behalf of the borrower. On 10<sup>th</sup> December 2018, the parties had discussed on tripartite agreement, for the Overdraft Facility with an approved limit of USD 13,000,000.00 to be further be renewed for a further period of 12 months from 1<sup>st</sup>

January, 2019 until December 2019. The Plaintiff committed to transfer monthly payment on interest of USD 100,000.00 for a period of 12 months and allowed swiping of 40% of any proceeds/deposits made from TANESCO during the period. However, PW1 testified that propose was not implemented and since then, the Plaintiff, we never heard anything from the Defendant.

He further went to testified that on 13<sup>th</sup> August 2021, Tanzania Electricity Supply Company (TANESCO) through Bank of Tanzania deposited into the Plaintiff's Bank Account Number 0250316598400 held by the defendant, the sum of the United States of America Dollars Thirteen Million (USD 13,000,000.00). On 18<sup>th</sup> August 2021, the Defendant debited USD 12,999,901.00 from Plaintiff account without plaintiff's authorization. Thereafter, on 24<sup>th</sup> August 202, the defendant sent a letter to the Plaintiff with reference number CRDB/3387/DC-OYS/GC/SYPT/80/21 ("SPTL-6") stating that the sum of USD 12,999,901.00 has been debited to clear Symbion Power LLC outstanding loan balance. This was supported by the Plaintiffs Bank Statement.

PW1 alleged that the Defendant's conduct of debiting Plaintiff's monies to settle Symbion Power LLC loan without authorisation and in the absence of any tripartite agreement is unlawful and a breach of banker-customer relationship.

PW1 testified that, on 23<sup>rd</sup> September 2021, the Plaintiff raised a query with the Defendant regarding unauthorised debiting of monies in its account and demanded the transaction be reversed, however, the Defendant stood its gun that it was entitled to do so and did not comply with the demand.

PW1 testified that, the act of the Defendant of withdrawing plaintiff's monies without permission not only is unacceptable but also has caused consequential financial loss to the Plaintiff as it deprived the Plaintiff to use its money to pay its creditors on time and therefore thereby contributed to the raise of interest on the liabilities with the preferential creditors including Tanzania Revenue Authority and PSSSF whose interest rate is 24% compounded. The plaintiff submitted that the Defendant's action was in violation of Regulation 1 I(I), (2) (b) of Bank of Tanzania (Financial Consumer Protection) Regulations, 2019 which prohibits unfair business practices including abusive debt

recovery practices. To support his argument he referred this Court to various decisions of this Court and the Court of Appeal have laid a foundation on the duties vested to the bank when dealing with customer's account including the importance of issuing the notice to the customer such as The case of **National Bank of Commerce Limited Versus Lake Oil Limited**, Commercial Appeal No.5 of 2014 at pages 7-9(un reported), **Ecobank Tanzania Limited Versus Future Trading Company Limited**, Civil Appeal No.82 of 2019, at pages 27-31 (unreported) and the case of **Diamond Trust Bank Tanzania Ltd Versus Granitech (T) Co.Ltd**, at page 21 High Court (Commercial Division) unreported.

On cross examination, PW1 stated that the plaintiff is a sister company of Symbion Power hold LLC (A borrower). He said the plaintiff, Symbion Power LLC and Symbion Power Tanzania Limited are related. It was correct that the borrower had borrowed money from the CRDB as per the agreement. He has power of Attorney for Symbion Power LLC (Borrower) over the concerning the USD 13 million and USD 500,000. He was aware of the debt of 2016 and he has a power of attorney over the functions of the borrower in respect of

affairs of CRDB which was structured on 30<sup>th</sup> December 2016 to be paid the facility of USD 13 million by December 2017. He testified that he was a signatory of the overdraft facility which is one year by law to undertake the debt of the 31<sup>st</sup> December 2016 with the liability of the borrower of the principal amount of 13ml USD and 500,000 USD (Exhibit P1). That the borrower approaching the Plaintiff is the undertaker who approached he Bank.

PW1 also testified that in case of any default the bank have the right to take any recovery measure. PW1 testified that it was true that no any signed agreement to vary Exhibit P1.

Asked about the Commercial Application No.173 of 2021. He replied to remember that they have been sued. He also agreed that they did make a deed of settlement with the government (Document No.4) on 21<sup>st</sup> May 2021 signed. When he was asked by the same to be admitted as Exhibit and he did not object. PW1 testified that the amount of 13 USD will be paid to Symbions CRDB account. The symbiont Power LLC was to clear our liabilities with our creditors who are not specified in the witness statements they as were not relevant to this case.

On the other side the defendant in his written statement of defence denied the plaintiff's claim and responded that defendant has not withdrawn Plaintiff's money in the extent of USD 13,000,000.00 unlawfully as alleged or at all, and has not breached any banker-customer relationship as alleged by the Plaintiff.

It was established that on 2<sup>nd</sup> May 2013 the Defendant extended an overdraft facility (the Facility) to Symbion Power LLC (the Borrower) in the extent of USD 10,000,000.00 (say United States Dollar Ten Thousand Only). The advanced facility was extended to finance working capital of the Borrower who was undertaking ongoing projects in Tanzania under the Millennium Challenge Account Tanzania (MCAT). This facility offer letter was duly accepted by the Borrower and signed by the parties thereby on 30<sup>th</sup> December, 2016. To perfect the undertakings made by the Borrower regarding the loan facilities above, the parties: the Plaintiff, the Defendant and the Borrower did the following: -

- a) On 30<sup>th</sup> December, 2016 the Borrower appointed Dr. Magesvaran Subramanam (the Attorney) to act on her behalf in relation to restructuring the facilities herein stated inclusive of

executing all requisite legal documentations and generally to do all acts necessary as shall be necessary in the perfection of the restructuring processes aforesaid.

b) The Borrower (under said power of attorney (TMA-3) acknowledged to be indebted to the Defendant in the extent of USD 13,000,000.00 for the outstanding facilities (O/D and short-term facility).

c) Deed of Undertaking to pay USD 13,000,000.000 due and owing to the Borrower by the Defendant was prepared and signed by Plaintiff as undertaker, the Defendant and Borrower.

d) In the Deed of undertaking above, the Plaintiff acknowledges and undertook the following: -

- Plaintiff acknowledges that the Borrower is indebted to the Defendant in the extent of USD 13,000.000.00 (recital B).
- That the Borrower was in default and the Defendant contemplated to taking recovery measures which would include but not limited to filing a suit in the court of law as a recovery measure.

- Borrower has given power of attorney to Dr. Magesvaran Subramanam (the Attorney) to act for the Borrower in due execution of the undertakings made.
- Plaintiff is one approached the Bank and made own undertakings to service the loan due and owing to the Borrower by the Defendant.
- The Plaintiff shall pay the debt due (in place of the Borrower) on the installments more particularized under clauses 1, 2, 3 and 4 of annex TMA-4".

It was also agreed in the Deed of Undertaking that in the event payment of any instalment shall fall due for a period beyond 30 days, the entire debt shall become payable in full and immediately. Further that the Defendant shall be it liberty to initiate recovery measures against the Plaintiff and Borrower (Clause 6).

It was stated that the Plaintiff did not honour her obligations/undertakings to pay the outstanding debt due as agreed in the Deed of Undertaking. As a result of the default aforesaid the Defendant made several demands to pay. However, none was honoured by the Plaintiff and or Borrower despite of several demands



as "Exhibit D-4". It was pursuant to letter and Board Resolution of the Plaintiff, the said Plaintiff admits the existence of overdraft facility amounting to USD 13,000,000.00 and she applied for its renewal for a further term of 12 months. However, the offer aforesaid was not accepted. Since the debt due was not adequately serviced as covenanted and or at all, it continued to accrue. The Plaintiff's own account statement attached to the plaint Exhibit P-2 the facts.

The Defendant stated that until 20<sup>th</sup> March, 2020 the debt due and outstanding against the Borrower's account was USD 11,032.709.69 which the Defendant was demanded to charge-off/write-off in compliance with Bank of Tanzania Regulations guiding (NPL) Non-Performing Loans. It is stated further that despite of the charge-off herein stated the Borrower's account continued to accrue interests and penalty interest until on 24<sup>th</sup> August, 2021 the outstanding debt due (principle, interest and penalty interest) calculated by Defendant is USD 12.915.920.05 which same was set off on the Plaintiffs account which was credited with USD 13,000,000.00 from TANESCO. The set off was done in compliance to the terms of the Deed of Undertaking (Exhibit P-1).

DW1 Vesna Flora Ngunangwa, Manager Business Planning since September, 2021 previously, a Manager Loan Recovery since 1<sup>st</sup> May, 2015. She testified to be conversant with the dispute as at that material time, she was personally attended the bank accounts of the borrower who was unable to liquidate the then outstanding debt liabilities in her position as the undertaker of SYMBION POWER LLC (herein the borrower) with the Bank hence forth the subject account was placed to her attention because as the then Manager Loan Recovery as the Plaintiff's account the Bank was non-performing.

DW1 testified that the Borrower applied and was advanced another Overdraft Facility on 30<sup>th</sup> December, 2016 whereby by that time the loan accrued inclusive of interests and which was acknowledged by the borrower to be USD 13,000,000.00. The overdraft facility was restructured under the arrangement of deed of undertaking signed by the Bank, the Plaintiff and the Borrower (Exhibit D-4). DW1 testified among the terms of the Deed of Undertaking is that the Plaintiff specifically undertook the responsibility to settle the debt due to the Borrower in full and in case of default the Bank

reserves all rights to recover against the Plaintiff and the Borrower as per clause 6 of (Exhibit D- 4). Also, it was agreed in case of defaults measures under Clauses 9, 9.1, 9.1.1, 9.1.2, 9.1.3 and 9.1.6 will be taken including: -

9.2 Upon expiry of the Credit Period any outstanding balance together with interest charged thereon and other charges payable and this Overdraft Facility Letter sha fall due and be payable immediately or during the Credit Period if any listed hereunder occurs namely if: -

9.1.1 there is no deposit in overdraft account for thirty (30) days consecutively or deposit made do not cover interest charged thereon and other charges and remains so for thirty (30) days consecutively;

9.1.2 the Borrower fails to conduct the Overdraft Facility account in a manner satisfactory to the Bank and within the approved limit beyond 30 days;

9.1.3 the Borrower defaults in observing or fulfilling any obligation to be observed or fulfilled by the Borrower under this

Overdraft Facility Letter which, in the case of a default capable of remedy, shall continue for a period beyond 30 (thirty) days;

9.1.6 the Borrower is unable or deemed to be unable to pay debts as they fall due or any insolvency proceedings being taken in respect of the Borrower.

DW1 further testified that, it transpired that the Plaintiff was unable to service the loan as covenanted and she was in default as evidenced in Exhibit D-4 and until 23<sup>rd</sup> February, 2021 the debt due and unpaid was USD 12,915,920/05cts.

DW1 further testified that on 10<sup>th</sup> December, 2018 the Plaintiff applied for renewal of the facility for a further term of 12 months from 1<sup>st</sup> January, 2019 to 31<sup>st</sup> December, 2019. This request was not accepted by the Bank. Also, in said letter the Plaintiff acknowledges non-payment of USD 13,000,000.00 offered to the borrower by the Bank. She further testified on 13<sup>th</sup> August, 2021 the Plaintiffs account was a credited with the sums of USD 13,000,000.00 from BOT payable on behalf of TANESCO since the Plaintiff had an outstanding debt

balance of USD 12,915,920/05cts as agreed in Clause 6 of the deed of undertaking.

DW1 in her witness statement testified that in November, 2021 Locus Debt Management Limited filed a Misc. Commercial Case No. 172 of 2021 for arrest Directors of the Plaintiff Dr. Magresuaran Subramariam, Mr. Paul Hinks and Mr. Shailah Shashkant Salgarukar who were to leave the jurisdiction of this Court and had no assets why they should not finish security for their appearances. Subsequently, there was a Deed of Settlement of a matter between the Government of the Republic of Tanzania (GoT), the Plaintiff and TANESCO whereby the GoT and TANESCO agreed to pay the Plaintiff the sums of USD 76,717,103/41 as 50% of the settlement amount. Under Clause (a) thereof USD 13,000,000.00 was to be paid to the Bank to clear outstanding debts. She also testified since the deductions were proper and legally done, the Plaintiff is not entitled to any loss of revenue in the extent of USD 4,000,000.00 as claimed.

Cross examined by Mr. Mayenga about the recovery measure, DW1 testified that, recovery measures are stages to be taken by the

Bank when there is a default. It can be taken through different modes such as a case in court, a demand letter depending on the circumstances. She further testified that it is not necessary to use the mode of measures but explain several options to be taken depend on circumstances of the case. She admitted that Symbion Power Tanzania Ltd was the defendant's customer for a long time before the undertaking. She also admitted that Symbion Power Tanzania limited did not open a loan account. However, on 31<sup>st</sup> December 2016 when he took the loan facility when the relationship changed to undertaking relationship.

When she was asked why the defendant did not institute a civil case against the Plaintiff. DW1 responded that they didn't institute a case as there was a promise from the client that he is engaged with the Govt. when she was asked about the letter, her answer was that it was through several meetings not a letter. When she was asked about the minutes, his response was that the minutes were from the Govt side and cannot be accessed but her CEO was involved. She said

that they cannot institute a case because the plaintiff came up with a proposal.

To determine the disputed brought before the Court did frame issues are:

1. Whether the defendant breach banker's customer relationship by unlawful, withdrawing USD 13 million from plaintiff bank account
2. Is Whether the plaintiff suffered loss of business to the extent of USD 4 million?
3. Whether the plaintiff is entitled to the payment of interest
4. What are the reliefs are parties entitled?

Starting with the first issue on whether the defendant breach banker's customer relationship by unlawful, withdrawing USD 13 million from plaintiff bank account. The plaintiff under paragraph 3 and 4 of the plaint establishes a cause of action against the defendant by breach of Bank and Customer Relationship whereby the Defendant without plaintiff's consent withdrawn the sum of United States of America Dollars Thirteen Million Only (USD 13,000,000.00) into the Plaintiff s Bank Account Number 0250316598400 CRDB Bank.

This fact was not disputed by the defendant to the extent that, it is true that the defendant did withdraw the alleged amount from the plaintiff's account without any instruction from the plaintiff as evidenced by the letter dated 24<sup>th</sup> August 2021 to the plaintiff informing about the deduction of USD 13,000,000.00 to clear an outstanding loan (Exhibit P-4) and the bank statement in respect to account 0250316598400 (Exhibit P-5). The justification given by the defendant through the evidence of DW1 under paragraph 14.0 in her witness statement was that, on 13<sup>th</sup> August, 2021 the Plaintiffs account was credited with the sums of USD 13,000,000.00 from BOT payable on behalf of TANESCO to set off the loan as agreed in Clause 6 of the overdraft facility (Exhibit D-4).

It is not disputed that on 31<sup>st</sup> December 2016 the parties; the Defendant (the lender) and Symbion Power LLC (the borrower) and Symbion Power Tanzania LTD (The undertaker) entered into tripartite agreement through the Deed of Undertaking that the Plaintiff would pay USD 1,490,000. USD 100,000 per month for a period of twelve (12) months only and 40% of payment received from TANESCO if TANESCO paid during the subsistence of the Deed of Undertaking that



was between January and December 2017 as evidenced by (Exhibit P-1). This was to the effect of restructured overdraft entered between the Bank and Symbion Power LLC of the overdraft facility of USD 13,000,000.00

It is also not disputed that the plaintiff did pay USD 2,690,000 as evidenced by CRDB Bank statements of 2018 three pages statements, (Exhibit – P2). However, the plaintiff did not pay the amount due from TANESCO as agreed as no money was paid by TANESCO in the year 2017. This was admitted that by the defendant in DW1 witness statement that it was outside the control of the parties.

According to clause 4 of the deed of undertaking (Exhibit P-1), the plaintiff authorises the defendant to withdrawal 40% of any payment that the undertaker shall receive from M/s TANESCO. The question follows is whether the defendant was entitled to deduct the alleged amount from the plaintiff's account after the expired period of the overdraft facility Exhibit P-1.

The argument raised by the plaintiff in respect to the above issue is that, the modality agreed to settle the debt through the swiping of 40% of every payment received from TANESCO was within the undertaking period until entire debt in repaid. If no money came in within undertaking period the Plaintiff would not be in default.

PW1 also testified that the deed of undertaking was not perpetual it ceased to have legal force on 1<sup>st</sup> January 2018. This was evidenced by the Defendant who sent an email requesting the Plaintiff to renew the deed of undertaking as the previous one expired has expired on 31<sup>st</sup> December 2017 (Exhibit P-3 collectively) which was not disputed by the defendant.

This was also evidenced by the efforts done by the plaintiff and the defendant to initiate renewal of the overdraft so for the plaintiff to continue with the undertaking as the letter wrote by the defendant on 09<sup>th</sup> February 2018 to the Plaintiff attaching with a new Deed of Undertaking and cross guarantee agreement (Exhibit – P7), Special Resolution dated 10<sup>th</sup> November 2021 (Exhibit – P6) and the Board resolution stated 10<sup>th</sup> December 2018 (Exhibit P-8). However, all these

efforts did not mature as the Plaintiff did not accept the proposed new undertaking thus declined to make any further undertakings.

At this juncture at least with all the email correspondences and new draft overdraft facility (Exhibit P-3 collectively) it was clear between the parties herein that Deed of Undertaking was for specific period expiring on 31<sup>st</sup> December 2017 and no renewal was done. The Plaintiff's liability to the Borrower's loan became extinct with the expiry of the undertaking.

Defendant's argument is that since the Plaintiff had an outstanding debt balance of USD 12,915,920/05 the credited amount was utilized to set off the loan as agreed in Clause 6 of the overdraft facility (Exhibit P-1).

Reading clause 6 of Exhibit P-1 which is the default clause I quote it hereunder:

***"...Should any installment remain unpaid 30 days beyond its due date the whole amount then outstanding shall fall due and be payable immediately: in which event the Bank shall be at liberty to take recovery measures against both the Borrower and the Undertaker..."***

From the above clause it is where the defendant justified the credited amount from the plaintiff's account. The defendant also demonstrates that he did undertake other alternatives such as demand notices issued to the plaintiff and the Borrower (Exhibit D-5)

During cross examination of DW1 on the modality of measures expected under clause 6 of the undertaker agreement. Her response was the measures to taken include the outstanding to be paid within 30 days and be paid immediately. Also, pursuant to Exhibit P-3 the Plaintiff and the Borrower were already in default as the period for overdraft facility Exhibit P-1 did cover the period under clause 5 on or before December 2017 of the facility. She further said that the Bank in clause 6 is at liberty and not necessary to go to court. However, she admitted that Paragraph 14 and clause 6 is the mode under clause 6 to recover the debt. She also admitted that the money credited from the plaintiff's account were to pay several debts among them was CRDB and it was selected because the Plaintiff was undertaker.

Looking at the referred demand notices dated 1<sup>st</sup> June 2017 issued by the defendant to the Borrower and the Undertaker. Also, the remainder issued to the Plaintiff on 23<sup>rd</sup> February 2021. The pertinent

question is why did the Defendant not taking any legal action since January 2018 as per clause 6 of the undertaking agreement or after seeing the efforts for the initiated renewal were failed.

So, if the defendant wishes to apply clause 6 of the undertaking, then that should be within the period of undertaking save that there was no money received from TANESCO during the undertaking period.

Also, the defendant's argument as testified by DW1 during the cross examination was that, they didn't institute a case as there was a promise from the plaintiff that he is engaged with the Government to settle the debt and the plaintiff came up with a proposal. However, the defendant did have no any proof of a letter or minutes of the engagement though her CEO was involved on that engagement. Defendant was not a party to the settlement she referred. Therefore, her arguments have no justification in the presence of the agreement of deed of undertaking (Exhibit P-1) and Overdraft Facility (Exhibit D-4) which provides and agreed measures to be taken. In the absence of clear explanation that why the defendant did not comply with the default clause draw adverse inference against them on the intention to deduct the claimed amount.

Assuming that since the period within the undertaking, the plaintiff did not receive any money from M/s TANESCO and it was not a fault of either party, then the amount to be deducted should be within the agreed term of 40% and not otherwise as done by the defendant by taking 100% of the received amount on 13<sup>th</sup> August 2021.

Besides, the defendant in his closing submission admitted that Plaintiff was not a party in the overdraft facility making a reference to (Exhibit D-1 and D-2). Thus, anyone can ask why did the Bank not take recovery measures against the principal Borrower as remedies as stipulated and agreed measures under Clauses 9, 9.1, 9.1.1, 9.1.2, 9.1.3, 9.1.6 and 9.1.17 (Exhibit D- 2) in case of defaults or amicably and legal proceedings against borrower on the mortgage properties to secure the loan. The answerer to these questions is based on the fact that the Defendant issued a loan of overdraft facility valued at United States Dollar Thirteen Million (\$ 13,000,000.00) to Symbion Power LLC without any security. Therefore, any legal action against the borrower could bring no results thus why they opted to take recover the loan through the undertaker. However, the defendant acted while it was

too late as the responsibility of the undertaker was specifically specified to be within the period of undertaking as agreed as per clause 6 (Exhibit P-1).

Moreover, the defendant without considering Regulation 1 I(I), (2) (b) of Bank of Tanzania (Financial Consumer Protection) Regulations, 2019 deduct the amount unreasonably and defend his action by arguing that to leave a credit balance of USD 84,080.95 in the plaintiff account.

On the basis of the above findings, the 1<sup>st</sup> issue on whether the defendant breach banker's customer relationship by unlawful, withdrawing USD 13 million from plaintiff bank account. The answer is affirmative as discussed above. Although the supported cases by the plaintiff to substantiate his argument such as that of **National Bank of Commerce Limited Versus Lake Oil Limited**, Commercial Appeal No.5 of 2014 at pages 7-9 and **Ecobank Tanzania Limited Versus Future Trading Company Limited**, Civil Appeal No.82 of 2019 between, at pages 27-31 or the case of Diamond Trust Bank Tanzania Ltd Versus Granitech (T) Co. Ltd, at page 21. I find all of them to be irrelevant to the present suit as the fact that in this case

the authorization by the plaintiff was there except it was supposed to be done during the undertaking period. Therefore, the breach banker's customer relationship by unlawful, withdrawing USD 13 million from plaintiff bank account is only to the extent of amount authorised by the plaintiff.

Coming on the issue whether the plaintiff suffered loss of business to the extent of USD 4 million? The Plaintiff only established that is entitled to the compensation to the tune of USD 4,000,000 unlawfully withdrawing the sum to the tune of USD 12,915,920.05 which was intended to be used by the Plaintiff to pay its preferential creditors on time who are Tanzania Revenue Authority and PSSSF whose interest rate is 24% compounded, and other creditors filed a suit before the Court in Misc. Commercial Application No.173 of 2021 ***ExhibitD-5*** to prove the fact and clause 4.2 of the deed of settlement which also requires that there must be reconciliations of debts. He testified that failure by the Plaintiff to pay its preferential creditors on time contributed the Plaintiff to suffer loss of business, in which the interest accrued from the debts; hence the Plaintiff is entitled for the compensation of USD 4,000,000 and interests. Through the breach of fiduciary judiciary (Bank and Customer relationship) done by the Defendant, under **Section 73(1) of the Law of Contract Act CAP.**



345 R.E 2019 the Plaintiff is entitled for compensation and damages. In support of the position was also stipulated in the **M/S Universal Electronics and Hardware (T) Ltd Vs Strabag International GmbH (Tanzania Branch)**, Civil Appeal No. 122 of 2017 (Unreported).

This claim was strongly denied by the defendant that the compensation claim is based on general damages which do not need quantification in the pleadings referred this court to the case of **Tanzania- China Friendship Textile Co. Ltd Versus Our Lady of the Usambara Sisters**, Civil Appeal No.84 of 2002 TLR [2006] at pg 7,

Determining this issue, I directed myself to the facts established and argument raised by the defendant that compensation as general damage do not need quantification in the pleading. Going by the guidance provided in the case of **Peter Joseph Kilibika and CRDB Bank Public Company Ltd vs Patrie Aloyce Mlingi**, Civil Appeal No. 37 of 2009, CAT at Tabora(unreported), the Court of Appeal of Tanzania when referring to the decision of Lord Black burn in **Livingstone Vs Rawyards Coal Co** (1850) App. Case 35 at page

39 defines damages as "Damages generally are; The sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he has not sustained the wrong for which he is now getting compensation or reparation.

Based on the above position and the claim of compensation of USD 4,000,000.00 as established above with no document to substantiate that allegation neither from TRA or PSSSF on the requested prayer. I find no sufficient evidence which has been adduced to justify this claim despite of the defendant statement's that there are other creditors. Since the plaintiff has established the amount to be compensated a proof for the same should be provided by the one who alleged. In the absence of the same, I am of the view that the issue is not affirmed.

This goes together with the issue on whether the plaintiff is entitled to the payment of interest in respect of 22% interest per month from the date when each claim accrued until the date of final payment as there is no sufficient evidence to warrant such award.

On the last issue on what are the reliefs are parties entitled. Based on the evidence adduced from the both sides and the prove of

the 1<sup>st</sup> issue that defendant did breach of Bank and Customer Relationship by withdrawn the sum of United States of America Dollars Thirteen Million Only (USD 13,000,000.00) into the Plaintiff's Bank Account Number 0250316598400 CRDB Bank without plaintiff's consent. However, considered that the delay of payments from TANESCO was the default of neither party in this suit, I find for the interest of justice the defendant was only entitled to deduct the 40% of the received amount from TANESCO.

In the event, under rule of the Commercial (High Court Division Procedures) Rules of 2019 as amended, I enter a judgment in favour of the plaintiff as follows;

- i. The Defendant to refund the amount deducted from the Plaintiff Bank Account Number 0250316598400 CRDB BANK PLC with exclusion of 40% of the amount received from TANESCO.
- ii. To pay the Plaintiff Court's interest on the aforesaid amount in at the rate of 7% per month from the date when the claim accrued until the date of final payment.
- iii. Costs of the suit

I also find no reason to grant the requested payment of general damages as prayers granted to the plaintiff are sufficient.

It is so ordered.

Dated at Dar es Salaam this 28<sup>th</sup> day of June 2022.



**Z.A.Maruma, J**  
**28/6/2022**