

**IN THE HIGH COURT OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 6 OF 2022**

**I & M BANK (T) LTD .....PLAINTIFF**

**VERSUS**

**BHARAT KUMAR KARSANDAS RUPARELIA.....1<sup>st</sup> DEFENDANT**

**AMIN MOHAMED VALJI.....2<sup>nd</sup> DEFENDANT**

**MAURI-TAN HOLDINGS LIMITED.....3<sup>rd</sup> DEFENDANT**

**COSMEC SECURITY SYSTEMS LIMITED.....4<sup>th</sup> DEFENDANT**

**JUDGMENT.**

Date of Last Order: 4/10/2022

Date of Judgment: 23/11/2022.

**MARUMA J.**

The Plaintiff I & M BANK (T) LTD a limited liability company and a licensed banking institution is suing the Defendants jointly

and severally for the sum of TZS 4,568,351,658.47/=) plus interest and costs as an outstanding amount resulted from an overdraft facility advanced to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and guaranteed by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

The background of the dispute is to the effect that on 21<sup>st</sup> November, 2018 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants were granted by the Plaintiff a credit facility of TZS. 3,500,000,000/= based on terms and conditions accepted by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and by the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as guarantors. The facility was secured by immovable properties, include Plot Nos. 97, 98 and 99 Nyerere Road Industrial Area, Dar es Salaam with title No. 15056. The corporate guarantees of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants including Plot Nos. 101, 102, and 103 Nyerere Road Industrial Area, Dar es Salaam, with title No. 186078/15 of the 3<sup>rd</sup> Defendant. It is alleged that before the completion of the loan term, 8<sup>th</sup> November 2019 the 3<sup>rd</sup> Defendant submitted a written request to the Plaintiff, signed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as directors of the 3<sup>rd</sup> Defendant, for the conversion by the 1<sup>st</sup> and 2<sup>nd</sup>

Defendants of the overdraft credit facility into a term loan facility of five years to the 3<sup>rd</sup> Defendant. The loan which was granted on 6<sup>th</sup> January 2020 at a tune of TZS. 3,500,000,000/= with a tenor of sixty (60) months to take over the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the agreed terms and conditions of the credit facility which was duly accepted by all four Defendants on 8<sup>th</sup> January 2020 executed with additional securities deeds of assignment of rental income in respect of immoveable properties on Plots No. 97, 98 and 99 Nyerere Road Industrial Area, Dar es Salaam. Title No. 15056 and Plots No. 101, 102 and 103 Nyerere Road Industrial Area, Dar es Salaam. Title No. 186078/15 and properties, each one charged to secure the sum of TZS. 4,375,000,000/= plus interest and other charges. It was also alleged that the purpose of the subsequent facility to the 3<sup>rd</sup> Defendant was frustrated by an agency notice of attachment of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' overdraft accounts by the Tanzania Revenue Authority following the 1<sup>st</sup> Defendant's Tax liability as liquidator of one Calico Textile Industries Limited. The fact that

was communicated in writing to the 3<sup>rd</sup> Defendant by the Plaintiff through the letter dated 15<sup>th</sup> June 2020. It was alleged further that on 6<sup>th</sup> July 2020 the Plaintiff received written communication from the 3<sup>rd</sup> Defendant to withdraw its previous request of the five years term loan credit facility for the purpose of taking over the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants followed by further correspondence dated 31<sup>st</sup> August 2020 from the 2<sup>nd</sup> Defendant (On behalf of himself and the 1<sup>st</sup> Defendant) and from the 3<sup>rd</sup> Defendant instructing the Bank not to transfer the outstanding liabilities of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under the overdraft credit facility to the 3<sup>rd</sup> Defendant under the term loan credit facility. Hence, the Defendants continue to be jointly and severally liable to the Plaintiff under the initial overdraft credit facility dated 21<sup>st</sup> November 2018. In alternative under the subsequent term loan facility dated 6<sup>th</sup> January 2020 either as principal borrowers or as guarantors. On 5<sup>th</sup> and 6<sup>th</sup> November 2020 the Plaintiff served demand notices dated 2<sup>nd</sup> November 2020 to the Defendants followed by further notices on 9<sup>th</sup>

November 2021 together with the statutory default notices under the Land Act 113 R.E 2019 which were served to the Defendants.

To claim the outstanding amount of TZS. 4,568,351,658.47/=.

The Plaintiff therefore claims for the following order and reliefs;

1. Judgment in his favour against jointly and severally all four Defendants for TZS. 4,568,351,658.47/=
2. Interest and Default Interest at the aggregate rate of 19.5% per annum from 1<sup>st</sup> January 2022 until Judgment or sooner payment.
3. Interest at the Court rate post -Judgment.
4. Defendants jointly and severally be Ordered to pay the costs
5. Such further Orders and reliefs this Hon. Court deems just, equitable and convenient.

During the hearing of the dispute, the parties were represented by Mr. Zacharia Daudi, Advocate for the Plaintiff and Mr. Edward Nelson Mwakingwe assisted by Emmanuel Saghan, Advocate for the 1<sup>st</sup> Defendant. The 2<sup>nd</sup>, 3<sup>rd</sup>, and 4<sup>th</sup> Defendants were discharged from this suit following the consent judgment in respect to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants dated 7<sup>th</sup> June 2022.

To prove its case, the Plaintiff summoned Mr. Krishnan Ramachandaran, head of corporate banking (PW1), who tendered seventeen (17) exhibits, including an offer letter accepted by the customer and the 1<sup>st</sup> and 2<sup>nd</sup> Defendants (Exhibit P1), a request for the loan (Exhibit P2), a promissory note payable on demand (Exhibit P3), a deed of assignment (Exhibit P4), a request letter from the customer to convert the OD to a term loan (Exhibit P5). Offer letters signed by the customer (Exhibit P6). TRA notice to recover tax in favour of the bank requesting Mr. Bharat to make a payment (Exhibit P7). A letter from the bank to the customer informing them of the payment and requesting that they contact TRA (Exhibit P8). A request from the third defendant to the bank

to withdraw the third defendant's application for an overdraft transfer facility (Exhibit P9). A letter from the 1<sup>st</sup> Defendant on arrears of 90 days (Exhibit P10) a letter from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to the bank requesting that we hold interest applications until internal matters are resolved (Exhibit P11). A letter from the second defendant to the bank requesting that the third defendant not be transferred (Exhibit P12). A letter from the 3<sup>rd</sup> Defendant that the loan obligation is not to be transferred to the 3<sup>rd</sup> Defendant (Exhibit P13). a letter from the Bank to the 3<sup>rd</sup> Defendant on approval of the application, though not because of TRA notices (Exhibit P14). A demand notice to the 1<sup>st</sup> and 2<sup>nd</sup> Defendants to recall the loan with 14 days' notice to make the payment (Exhibit P15). account statement certified by the Bank (Exhibit P16). An affidavit certifies the authenticity of the bank statement (Exhibit P17). On the Defendant's side, Mr. Bharat Kumar Karsandas Ruparelia (DW1) testified against the Plaintiff's claims in support of five exhibits, including a deed of assignment of rental income dated 8<sup>th</sup> Jan 2020 (Exhibit D1), a mortgage

dated 8<sup>th</sup> March 2020 (Exhibit D2), a mortgage deed dated 23<sup>rd</sup> March 2020 (Exhibit D3), Certificate of Registration dated 23<sup>rd</sup> March 2020 (Exhibit D4), a consolidated form (BRELA application form for change of names) dated 28<sup>th</sup> April 2020 (Exhibit D5).

In determining the dispute with respect to the remaining 1<sup>st</sup> Defendant, the Court framed four issues, including whether there is an existing overdraft facility between the Plaintiff and the 1<sup>st</sup> Defendant. If issue No. 1 is answered in affirmative, whether the said overdraft facility was converted into a term loan issued to the 3<sup>rd</sup> Defendant Mauri - Tan Holdings Limited. What are the rights and liabilities of the 1<sup>st</sup> Defendant into the term loan transferred to Mauri - Tan Holdings Limited, and to what relief are the parties entitled.

Starting with the 1<sup>st</sup> issue, whether there is an existing overdraft facility between the Plaintiff and the 1<sup>st</sup> Defendant. The evidence of both PW1 and DW1 admitted that the Plaintiff and the 1<sup>st</sup> & 2<sup>nd</sup> Defendants were entered into an agreement of an overdraft facility of TZS. 3,500,000,000/= in 21<sup>st</sup> November 2018

(Exhibit P1) as reflected both in the plaint and written statement of defence for the 1<sup>st</sup> Defendant as well as in their witness statements. Therefore, the 1<sup>st</sup> issue is answered in affirmative.

Concerning the second issue, whether the aforementioned overdraft facility was converted into a term loan granted to the 3<sup>rd</sup> Defendant, Mauri-Tan Holdings Limited. The evidence from PW1 under paragraph 7 of the witness statement established that before the completion of the tenor of the 1<sup>st</sup> credit facility, the 3<sup>rd</sup> Defendant submitted to the Plaintiff a written request dated 8<sup>th</sup> November 2019 signed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants as Directors of the 3<sup>rd</sup> Defendant for conversion of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants overdraft credit facility (Exhibit P5) into a term loan facility of five years to the 3<sup>rd</sup> Defendant. PW1 went to testify that the said request was granted, and on 6<sup>th</sup> January 2020 the Plaintiff advanced to the 3<sup>rd</sup> Defendant a term loan facility of TZS 3,500.000,000/= with a tenor of sixty (60) months to takeover the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants upon the terms and conditions of the Plaintiff's credit agreement facility

letter dated 6<sup>th</sup> January 2020 which was duly accepted by all four Defendants on 8<sup>th</sup> January 2020 (Exhibit P6). This evidence was seconded by DW1 in his witness statement under paragraphs 10,11, 12 and 13. Therefore, the 2<sup>nd</sup> issue is also answered in affirmative.

On the 3<sup>rd</sup> issue, what are the rights and liabilities of the 1<sup>st</sup> Defendant under the term loan transferred to Mauri - Tan Holdings Limited. PW1 testified that the purpose of the 6<sup>th</sup> January 2020 term loan facility (Exhibit P6) to the 3<sup>rd</sup> Defendant, namely the takeover of the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants was frustrated following the service upon the Plaintiff of an agency notice and attachment of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' overdraft account by the Tanzania Revenue Authority (TRA) in relation to the 1<sup>st</sup> Defendant's tax liability as liquidator of one Calico Textile Industries Limited. PW1 further testified that such notice was communicated in writing by the Plaintiff to the 3<sup>rd</sup> Defendant by its letter dated 15<sup>th</sup> June 2020 (Exhibit P8). PW1 added that on 6<sup>th</sup> July 2020 the Plaintiff received written

communication from the 3<sup>rd</sup> Defendant withdrawing its previous application for the five years term loan credit facility for the purpose of taking over the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants followed by further correspondence of 31<sup>st</sup> August 2020 from the 2<sup>nd</sup> Defendant (on behalf of himself and the 1<sup>st</sup> Defendant) and from the 3<sup>rd</sup> Defendant instructing the Bank not to transfer the outstanding liabilities of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants under the overdraft credit facility to the third Defendant under the term loan credit facility. Reference was made to Exhibits P8, P9, P10, PI 1, PI2, PI3 and P14 tendered as evidence. PW1 testified that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants continue to be jointly and severally liable to the Plaintiff under the initial overdraft credit facility dated 21<sup>st</sup> November 2018, in the alternative under the subsequent term loan facility dated 6<sup>th</sup> January, 2020 either as principal borrowers or as guarantors.

The 1<sup>st</sup> Defendant strongly disputed the Plaintiff's claims that there are any outstanding amounts due or any rights to interest and costs related to any overdraft facility following the

takeover of the 1<sup>st</sup> facility by the 3<sup>rd</sup> Defendant. The 1<sup>st</sup> Defendant's argument was that since the terms and conditions under the term loan facility offered by the Plaintiff (the 2<sup>nd</sup> Facility') in favour of the 3<sup>rd</sup> Defendant (the 'Current Borrower') were duly signed and accepted on the 8<sup>th</sup> January 2020 by the directors of the 3<sup>rd</sup> Defendant thus novated all the terms and conditions of the first facility. DW1 added that after the perfection and registration of all the security documents in favour of the Plaintiff at the company and land registries, all the rights and liabilities of the previous borrowers to the Plaintiff immediately passed to the current borrower. Furthermore, DW1 contended that the Plaintiff's approach was in breach of the second facility's terms and conditions and not otherwise based on several admissions made by the plaintiff in their letter dated 8<sup>th</sup> September, 2020, addressed to the current borrower, which contain statements, most notably on the facts cited that ,

*"...The securities pledged to secure the term loan has already been registered -with the Lands registry and charged to*

*the bank since April, 2020 to secure the exposure in the name of Mauri - Tan Holdings Limited...”*

DW1 also argued that through a consent judgment entered on the 7<sup>th</sup> June 2022 the rest of the Defendants including the current borrower, have agreed to settle the matter amicably. The plaintiff had nothing to claim against the 1<sup>st</sup> Defendant after the rest of the defendants, specifically the current borrower, agreed to the plaintiff's claims. Since the principal debtor has agreed to settle its liabilities, all the alleged guarantors including the 1<sup>st</sup> Defendant are discharged.

Assessing the evidence above It is quite clear that the second facility with a purpose of taking over the 1<sup>st</sup> facility was duly executed between the Plaintiff and the 3<sup>rd</sup> Defendant on the 8<sup>th</sup> January 2020 as per the testimonies of PW1 and DW1 as stated above, where the 3<sup>rd</sup> Defendant was advanced a term loan facility of TZS 3,500.000,000/= with a tenor of sixty (60) months by the Plaintiff. Then comes the question of what the status of

the first facility will be. The Law of Contract Act, Cap 345 of 2018, Section 2 (e) provides that,

*"...Every promise and every set of promises, forming the consideration for each other, is an agreement..."*

Taking the definition above and applying it to the matter at hand, the request made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on November 2019 which was accepted by the Plaintiff on 6<sup>th</sup> January 2020 and duly signed by the 3<sup>rd</sup> Defendant on 8<sup>th</sup> January 2020 amounted to an agreement following the proposal from the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and acceptance by the 3<sup>rd</sup> Defendant. This means the said communication was completed when the Plaintiff communicated a letter of credit issued on 6<sup>th</sup> January 2020 to the 3<sup>rd</sup> Defendant and its acceptance was completed when it was signed on 8<sup>th</sup> January 2020 by the 3<sup>rd</sup> Defendant. This is when communication is said to be complete and the agreement becomes binding for the Plaintiff and the 3<sup>rd</sup> Defendant. Moreover, going by Section 62 of the Act (supra), it clearly provided that, I quote,

*62. " ...Where the parties to a contract agree to substitute a new contract for it, or to rescind or alter it the original contract need not be performed..."*

In the present matter, the execution of the second facility agreement on 8<sup>th</sup> January 2022, was when the 3<sup>rd</sup> Defendant took over the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and relieved them of the liabilities of the first credit facility as stipulated by Section 62 above and the authority cited by the 1<sup>st</sup> Defendant in the case of **M/s Musilanga Engineering vs P.F. Nyakutonya Nvanigesera & Another** (1986) TLR 115 the Court before His Lordship Mwalusanya J as he then was Held that;

*"..."It is obvious that the defendant was in breach of the contract for the debt that was assigned to him under the doctrine of novation. This doctrine recognises that one party to a contract can release the other and substitute a third person who then undertakes to perform the released person's obligations. Thus, by agreement, a new contract replaces the original contract. That*

*doctrine is recognised in our country and it is under s. 62 of the Tanzania Contract Act. Cap. 433, which reads: If the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed. That is exactly what happened here. By virtue of the letter Exh A there was created a new contract between the plaintiff and defendant instead of the original contract between the plaintiff and Musoma Foodstuffs Trading Co. Therefore, as to what transpired earlier between those two old contracting parties is irrelevant here. We are only concerned with the new contract...”*

Non-existence of the first facility was also admitted by PW1 during cross examination when he admitted that each facility has its own letter, they are two different facilities, and you can have them separately depending on the customers.

The evidence that the second facility was frustrated by the agency note from the Tanzania Revenue Authority (TRA) and the attachment of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants’ overdraft account in relation to the 1<sup>st</sup> Defendant’s tax liability as liquidator of one

Calico Textile Industries Limited has nothing to do with the agreement concluded between the Plaintiff and the 3<sup>rd</sup> Defendant. The second credit facility was neither between the Plaintiff and the 1<sup>st</sup> nor the 2<sup>nd</sup> Defendant. Besides, reading the said notice (Exhibit) it was concerning the 1<sup>st</sup> Defendant.

Also, despite the fact that the 3<sup>rd</sup> Defendant issued a withdrawal of its previous application to take over the overdraft credit facility of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and further instructions thereon. At this juncture, I have to remind the Plaintiff that once the communication between herself and the 3<sup>rd</sup> Defendant was completed, under Section 5 of the Law of Contract (Supra) there was no revocation as it provides that,

*5 (1) "...A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.*

*(2) An acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards...”*

On that stand, since the agreement was duly executed by the Plaintiff and the 3<sup>rd</sup> Defendant, there was no room for revocation as stipulated above, and therefore the withdrawal request by the 3<sup>rd</sup> Defendant has no legal basis in the existence of the second credit facility. This was also in support of the PW1's testimony during cross examination that the defendant's request was approved, documents were completed and granted as securities were perfected, and the Plaintiff was in the process of convection by closing the old account and opening the new account in the system. The evidence shows that the documents were signed and completed but not implemented within the system, meaning the agreement was concluded.

PW1 is also confused about when the contract is said to be concluded. According to him, since the second loan was not created in the bank system, it is only the original facility reflected

there, which means the bank is yet to honour the terms and conditions of the agreement, a definition that is wrong based on the provisions of Sections 5 and 37 of the Law of Contract (Supra).

Moreover, as argued by the 1<sup>st</sup> Defendant (DW1), the letter dated 8<sup>th</sup> September 2020 (Exhibit P14) addressed to the current borrower revealed the facts I quote,

*"...The below securities pledged to secure the term loan has already been registered -with the Lands registry and charged to the bank since April, 2020 to secure the exposure in the name of Mauri - Tan Holdings Limited..."*

This demonstrates the fact that the Plaintiff was aware of the existence of the second facility, which purposely took over the first facility. Also, going by the record, on 7<sup>th</sup> June 2022 the Plaintiff entered into a settlement with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in respect of the 2<sup>nd</sup> loan facility, whereby the 2<sup>nd</sup>

Defendant agreed to pay the outstanding amount in respect of the second facility, allowing the Plaintiff to discharge the liabilities of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. So, if the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant were liable for the 2<sup>nd</sup> facility, how would the first credit facility remain in force? From these findings, I am of the satisfied view that the Plaintiff has directed herself wrongly in approaching the first credit facility, which is not in existence in the eyes of the law. On that basis, even the alternative approach proposed to be considered in this case fails, as the 1<sup>st</sup> Defendant cannot be found liable for the claim, which is not justifiable. All of these findings point to the third issue: not answering in the affirmative.

For the aforesaid and observations made, as the 3<sup>rd</sup> issues is not in affirmative, I find nothing to consider on the last issue as the 1<sup>st</sup> Defendant is not liable for any liability in respect of the first or the second credit facilities.

In the event, I am of the settled view that the Plaintiff has failed to establish her claims against the 1<sup>st</sup> Defendant as per

required standards of civil cases. I therefore, finds the case has no merit and proceed to dismiss it with costs.

**Dated** at Dar es Salaam on this **23<sup>rd</sup> day of November, 2022**



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, likely representing the name Z.A. Maruma.

**Z.A.Maruma.**

**JUDGE**