

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**(COMMERCIAL DIVISION)**

**AT DAR ES SALAAM**

**COMMERCIAL CASE NO. 94 OF 2021**

**BETWEEN**

**STANBIC BANK TANZANIA LIMITED .....PLAINTIFF**

**VERSUS**

**MAXCOM AFRICA PUBLIC LIMITED.....1<sup>ST</sup> DEFENDANT**

**JUMA RAJABU FURAJI..... 2<sup>ND</sup> DEFENDANT**

**NASIBU VICTOR MAKASI..... 3<sup>RD</sup> DEFENDANT**

**AHMED SALUM LUSSASI..... 4<sup>TH</sup> DEFENDANT**

**HASHIM IBRAHIM LEMA..... 5<sup>TH</sup> DEFENDANT**

**BANDA BEACH PROPERTY**

**DEVELOPERS LIMITED ..... 6<sup>TH</sup> DEFENDANT**

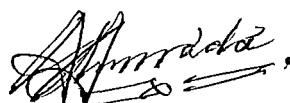
**LUBROSS HOLDINGS LIMITED..... 7<sup>TH</sup> DEFENDANT**

**J-LINK LIMITED..... 8<sup>TH</sup> DEFENDANT**

**JUDGMENT**

**A.A. MBAGWA, J.**

The plaintiff's claims in this suit stem from the loan agreement allegedly entered into between the plaintiff and 1<sup>st</sup> defendant, on the one side and



guaranteed by the 2<sup>nd</sup> to 8<sup>th</sup> defendants, on the other side. In brief, the factual background leading to the present dispute may be recounted as follows;

The plaintiff bank is a limited liability company incorporated under the laws of Tanzania and it is authorized to conduct banking business including lending services. On the other hand, the 1<sup>st</sup> defendant is a public liability company which is licensed to install and operate electronic payment systems, among other activities.

In the course of their business relationship, the plaintiff and 1<sup>st</sup> defendant, on a date which is not disclosed in evidence, entered into a loan agreement for overdraft facility. It appears after disbursement of the said overdraft facility, the 1<sup>st</sup> defendant defaulted repayment as per the agreed schedule. As such, on 22<sup>nd</sup> October, 2018, the duo entered into a restructuring agreement in order to relax the terms of payment. According to the pleadings, it is undisputed that at the time of restructuring, the outstanding loan amount stood at TZS 9,500,000,000/= Say Tanzania shillings Nine Billion Five Hundred Million.

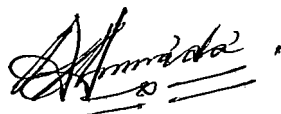
Through a restructuring agreement (a facility letter dated 22<sup>nd</sup> October, 2018 exhibit P2), a sum of Tanzania shillings Five Billion (5,000,000,000/=) was

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converted from overdraft facility into a term loan recoverable within seventy-two (72) months at the monthly instalments of TZS 97, 750,962.51 and the same was termed as Business Term Loan (the Term Loan 1 Facility). In addition, through a restructuring agreement, the plaintiff advanced to the 1<sup>st</sup> defendant a sum of TZS 164, 160,000 recoverable within twelve (12) months at equal monthly instalments of TZS 14, 739,453.22 for purposes of facilitating purchase of point of sale devices from WIZARPOS International Co. Limited and the same was termed as 'Business Term Loan (the Term Loan 2 Facility).

Thus, in what appears to make the terms and conditions clear, the plaintiff and 1<sup>st</sup> defendant on the same day of 22<sup>nd</sup> October, 2018 signed a restructuring agreement, exhibit P2 stipulating four types of facilities as follows;

1. Overdraft facility of TZS 4, 500,000,000.00
2. Guarantee by the Bank (the GBB Facility) for TZS 335,840,000.00
3. Business Term Loan (the Term Loan 1 Facility) for TZS 5,000,000,000.00
4. Business Term Loan (the Term Loan 2 Facility) for TZS 164, 160,000.00

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The above facilities were secured by deeds of guarantees and indemnities executed by the 2<sup>nd</sup> to 8<sup>th</sup> defendants. Besides, the 6<sup>th</sup> defendant, Banda Beach Property Developers Limited mortgaged its land namely, buildings, developments, fixtures and improvements on Plot No. 205 Block M Mbezi Wani Area Dar es Salaam.

It is the plaintiff's contention that the 1<sup>st</sup> defendant defaulted repayment of Term Loan 1 Facility and overdraft facility hence the outstanding loan amount for Term Loan 1 Facility stood at TZS 6, 137,152,685.30 whereas the overdraft with its interest stood at TZS 6,752,819,933.27 as of 3<sup>rd</sup> August, 2021 thereby making a total outstanding sum of TZS 12, 889,972,618.57. The plaintiff lamented that she served the 1<sup>st</sup> defendant with a default notice on 19<sup>th</sup> November, 2019 but the 1<sup>st</sup> defendant failed to remedy the default. In consequence thereof, the plaintiff filed this suit against all the defendants jointly and severally claiming for the following reliefs;

- i) Payment of the sum of TZS 12,889,972,618.57 (Tanzania shillings Twelve Billion Eight Hundred Eighty Nine Million Nine Hundred Seventy Two Thousand Six Hundred Eighteen and Fifty Seven



Cents) being the outstanding sum in both the Business Term Loan Facility 1 and Overdraft Facility as at 3<sup>rd</sup> August, 2021.

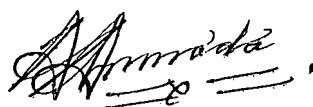
- ii) Interest rate of 17% being both the agreed and default interest in the Term Loan 1 to be calculated from the outstanding sum of TZS 6, 137, 152, 685.30 only due as at 3<sup>rd</sup> August, 2021 to be calculated from the date of filing the suit to the date of judgment.
- iii) Interest rate of 16% being both the agreed and default interest in the Overdraft Facility to be calculated from the outstanding sum of TZS 6, 752, 819,933.27 (Tanzania Shillings Six Billion Seven Hundred Fifty Two Million Eight Hundred Nineteen Nine Hundred Thirty Three and Twenty Seven Cents).
- iv) An order for the plaintiff to sell the mortgaged property over Plot No. 205, Block M Mbezi **One** Area, Dar es Salaam under the land office number 131003 in the name of 6<sup>th</sup> defendant.
- v) Interest rate of 7% in the decretal sum from the date of judgment to the date of payment in full.
- vi) Costs of this suit.
- vii) Any other relief that the court may deem just and fit to grant.



In rebuttal, the defendants filed a joint written statement of defence. In essence, the 1<sup>st</sup> defendant does not dispute the restructuring agreements (exhibits P1 and P2) nor do the 2<sup>nd</sup> to 8<sup>th</sup> defendants deny guaranteeing the said facilities. However, the defendants dispute the plaintiff's claims on the ground that the interest rates were unrealistic, exorbitant, illegal and beyond commercial practices for business enterprises. They further contend that the facility letters dated 22<sup>nd</sup> October, 2018 (exhibits P1 and P2) were revised by the facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3) as such, the facility letters dated 22<sup>nd</sup> October, 2018 had no legal force. In addition, the defendants vehemently stated that the 1<sup>st</sup> defendant's financial arrangements were frustrated by the government's cancellation of the 1<sup>st</sup> defendant's services. In the end, the defendants prayed for dismissal of the suit with costs for want of merits. They also prayed for general damages.

Upon completion of the pleadings and attendant preliminaries, this court, with consent of parties, framed the following issues;


1. Whether there is a breach of facility letter and overdraft committed by the 1<sup>st</sup> defendant.
2. Whether the 2<sup>nd</sup> to 8<sup>th</sup> defendants are liable under the facility letter and overdraft.



3. If the 2<sup>nd</sup> issue is answered in the affirmative, under what circumstances the liability arises.
4. Whether there was frustration of the financial arrangement between the plaintiff and the 1<sup>st</sup> defendant.
5. Whether there were new financial arrangements between the plaintiff and the 1<sup>st</sup> defendant rendering the facility letter and overdraft redundant.
6. Whether the interest rate and default rate to the contractual sum to be paid by the defendants are unrealistic, exorbitant, illegal and beyond commercial practices.
7. What reliefs are the parties entitled to.

When the matter was called on for hearing, Mr. Waziri Mchome, learned advocate represented the plaintiff whilst the defendants had the services of Selemani Almas, learned counsel.

In the endeavours to prove the claims, the plaintiff brought one witness namely, Fredrick Max Rugaimukamu (PW1) who tendered several documentary exhibits which were admitted and marked exhibit P1 to P15. The tendered documentary exhibits comprise of two facility letters dated 22<sup>nd</sup> October, 2018 (exhibit P1 and P2), account bank statement of Africa Maxcom








plaintiff's evidence that the 1<sup>st</sup> defendant defaulted repayment of the term loan and overdraft facility. As such, the principal and interest of the term loan stood at TZS 6, 137,152,685.30 whereas the overdraft had accrued to TZS 6,752,819,933.27 thereby making a total of outstanding amount of TZS 12, 889,972,618.57 as of 3<sup>rd</sup> August, 2021. To bolster his evidence, PW1 tendered account bank statement No. 9120001703240 (exhibit P3) for term loan and account bank statement No. 9120000231248 (exhibit P4) for overdraft facility. PW1 lamented that the plaintiff served the directors of the 1<sup>st</sup> defendant company with a default notice but nothing was done on their part to remedy the default. He tendered a notice of default dated 18<sup>th</sup> November, 2019 (exhibit P5) which indicates that it was received by Jameson Kasati (DW1) to buttress his averment. PW1 continued that the said facilities were secured by legal mortgage and personal cum corporate guarantee and indemnities which were attached to the facility letters (exhibits P1 and P2). Further, PW1 tendered default notices which the plaintiff served to the guarantors and the same were collectively received and marked exhibit P14. PW1 continued that sometimes in 2021 the plaintiff proposed for a further restructuring of the facilities but the 1<sup>st</sup> defendant did not heed to the terms and conditions set therein as such, the plaintiff through a letter (exhibit P15)



cancelled the proposal it had made via the facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3).

In defence, the defendants called six witnesses to wit, Jameson Kasati (DW1), Nasibu Victor Makasi (DW2), Ahmed Salum Lusasi (DW3), Lilian Didas Minja (DW4), Hashim Ibrahim Lema (DW5) and Juma Rajabu Furaji (DW6). Also, through DW1, the defendants produced several documents and the same were admitted and marked exhibits D1 to D3 which include business license of the 1<sup>st</sup> defendant dated 27/07/2021 (exhibit D1), various correspondences from government departments indicating cancellation of the 1<sup>st</sup> defendant's services (exhibit D2) and facility letter dated 5<sup>th</sup> May, 2021 along with a letter from Stanbic Bank to the 1<sup>st</sup> defendant (exhibit D3). Further, Nasibu Victor Makasi tendered a reply letter to the default notice (exhibit D4) on behalf of Banda Beach Property Developer.

In essence, the testimonies of all the six witnesses were substantially similar. As hinted earlier on, the defendants do not dispute signing the facility letters which gave rise to the plaintiff's claims nor do the 2<sup>nd</sup> to 8<sup>th</sup> defendants deny guaranteeing the said facilities. However, the defendants contest the plaintiff's claims on the grounds that the 1<sup>st</sup> defendant's business was frustrated by the government actions of terminating its services following



the introduction of Government Electronic Payment Gateway (GEPG). They further contended that the facility letters dated 22<sup>nd</sup> October, 2018 (exhibits P1 and P2) were no longer enforceable as they were restructured through a facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3). More so, the 2<sup>nd</sup> to 8<sup>th</sup> defendants claimed that they were not aware of the 1<sup>st</sup> defendant's default because they were not served with default notice before the institution of this case. Nasibu Victor Makasi (DW2) tendered a reply to the default notice (exhibit D4) to establish that the 6<sup>th</sup> defendant Banda Beach Property Developer was served with a default notice after the present suit was instituted in court. They thus prayed the court to dismiss the suit with costs. After closing the evidence of both sides, counsel beseeched the court and were granted leave to file closing submissions in terms of rule 66 of the High Court (Commercial Division) Procedure Rules, 2012. I am grateful to both counsel for their enriching submissions.

In a nutshell, the counsel for the plaintiff strongly argued that the plaintiff had sufficiently proved its case. He said that the evidence was clear that the 1<sup>st</sup> defendant breached the terms and conditions of the facility letters as it defaulted repayment of both term loan 1 and overdraft facility whose total outstanding amount was TZS 12, 889,972,618.57. as of 3<sup>rd</sup> August, 2021.



Further, the plaintiff's counsel challenged the alleged facility letter which was tendered by the defendants and admitted as exhibit D3. He said that the conditions contained therein were not heeded to hence it did not become a binding contract. With regard to service of notice of default, the counsel submitted that the 2<sup>nd</sup> to 8<sup>th</sup> defendants were aware of the default because the defendant's witnesses were directors of the 1<sup>st</sup> defendant company as such, they knew very well of the loan status. The counsel cited the case of **Standard Chartered Bank Tanzania Limited vs Testa Limited and Two Others**, Commercial Case No. 32 of 2019, High Court (Commercial Division) in which this court held that the defendant (guarantor) who was a director of the 1<sup>st</sup> defendant company was presumed to know the default in the repayment of loan by virtue of being part and parcel of the management. In addition, the counsel argued that through exhibit D3, there is nowhere the defendant disputed knowledge of the previous default notice (exhibit P5) which was referred in the latter notice (exhibit P14). Further, the counsel vehemently dismissed the defendant's claim of frustration. He said that DW1 Jameson Kasati testified that the 1<sup>st</sup> defendant secured a tender in Mozambique to install fare collection system. In a bid to convince the court on the absence of frustration, the plaintiff counsel invited this court to be inspired by its decision in the case of **Chines-Tanzania Joint Shipping**



**Line (Sinotaship) vs Karaka Enterprises LTD**, Commercial Case No. 140 of 2017, High Court (Commercial Division) at Dar es Salaam.

The plaintiff counsel continued that there was no new financial arrangement between the plaintiff and 1<sup>st</sup> defendant as the conditions in the facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3) were not complied with. He pointed out that no board resolution was attached as required in the facility letter.

With regard to the interest rate, the plaintiff counsel submitted that the plaintiff evidence was to the effect that the interest rates charged were below the threshold set by the Central Bank of Tanzania. He said that it was thus upon the defendants to demonstrate that the interests were exorbitant, unrealistic, illegal and beyond commercial practices.

In rebuttal, the defendants' counsel was firmly of the views that the plaintiff's case was not proved to the required standard. Citing the case of **NCBA Bank Tanzania Limited vs UAP Insurance Tanzania Limited**, Commercial Case No. 131 of 2018, HC (Commercial Division) Dar es Salaam, the counsel submitted that the burden of proving a fact rests on the party who substantially asserts the affirmative of the issue and not upon the party who denies.



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The defendants' counsel further complained that the default notice was issued and served on the 1<sup>st</sup> defendant only. He lamented that the 2<sup>nd</sup> to 8<sup>th</sup> defendants were not served with the notice of default as such, the counsel was opined that the 2<sup>nd</sup> to 8<sup>th</sup> defendants were not liable for default in repayment because they were not notified.

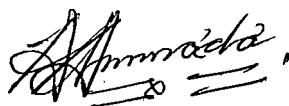
More so, Mr. Almas told the court that the landed property which the plaintiff seeks to dispose in order to recover the loan money is not the one deposited by the 6<sup>th</sup> defendant, Banda Beach Property Developers Limited. He clarified that the 6<sup>th</sup> defendant mortgaged CT No. 131003, Land Office No. 529633, Plot No. 205, Block 'M' Mbezi **Wani** Area whereas the plaintiff is praying to dispose CT No. 131003, Land Office No. 529633, Plot No. 205, Block 'M' Mbezi **One** Area. In the end, the defendants' counsel pressed for dismissal of the suit with an order for costs.

I have keenly gone through the evidence produced by the parties and accorded the deserving attention to the parties' closing submissions. It is now high time to determine the issues.

Whether there is a breach of facility letter and overdraft committed by the 1<sup>st</sup> defendant. The plaintiff through PW1 produced the two facility letters dated 22<sup>nd</sup> October, 2018 which were admitted and marked as exhibits P1

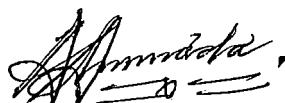


and P2. The two exhibits are louder and clear that the plaintiff and 1<sup>st</sup> defendant entered into a restructuring agreement. Clause 1 of exhibit P1 is very clear that the 1<sup>st</sup> defendant was advanced an overdraft facility of TZS 4, 500,000,000.00 and a term loan facility of TZS 5,000,000,000. According to clause 4.3, the overdraft was to be repaid within twelve (12) months whereas the term loan was recoverable within seventy-two (72) months. In addition, the plaintiff tendered account bank statements to wit, account bank statement for term loan No. 9120001703240 in the name of Africa Maxcom Limited maintained at Stanbic Bank (exhibit P3) and account bank statement for overdraft facility No. 9120000231248 in the name of Africa Maxcom Limited maintained at Stanbic Bank (exhibit P4) to prove that the 1<sup>st</sup> defendant failed to repay the loan amount as per the agreement. The 1<sup>st</sup> defendant did not perform its contractual obligation as per the agreement as such, as of 3<sup>rd</sup> August, 2021 the outstanding loan amount stood at TZS 6,229,659,974.82 for term loan and TZS 6,752,819,933.27 for overdraft. The defendants did not dispute the plaintiff's assertion on non-payment of the loan. Throughout the evidence and pleadings, there was nowhere the defendants claimed to have liquidated the loan amount.

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In view thereof, it is my considered findings that the 1<sup>st</sup> defendant breached the terms and conditions of the agreement by its failure to repay the loans namely, term loan and overdraft facility as contained in the two facility letters to wit, exhibit P1 and P2.

The 2<sup>nd</sup> issue is whether the 2<sup>nd</sup> to 8<sup>th</sup> defendants are liable under the facility letter and overdraft. In a bid to prove this issue, the plaintiff tendered personal and corporate guarantees cum indemnities executed by the 2<sup>nd</sup> to 8<sup>th</sup> defendants and the same were tendered as attachments to exhibits P1 and P2. Besides, the plaintiff tendered a deed of mortgage (exhibit P6) which was executed by the 6<sup>th</sup> defendant, Banda Beach Property Developers Limited in respect of Plot No. 205, Block 'M', Mbezi Wani under Certificate of Title No. 131003. Further, throughout their testimonies, the 2<sup>nd</sup> to 8<sup>th</sup> defendants do not dispute guaranteeing the loan in dispute. Moreso, exhibits P1 and P2 are accompanied with personal and corporate guarantees of the 2<sup>nd</sup> to 8<sup>th</sup> defendants dated 29<sup>th</sup> October, 2018. Therein, the defendants guaranteed the facilities advanced to the 1<sup>st</sup> defendants in the facility letters No. FM/NJ/MAXCOM-OD/GBB/2028/102/22 (exhibit P1) and FM/NJ/MAXCOM-TL/2018/10/22 (exhibit P2) of interest is clause 6 of the deed of guarantee. It reads;

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*'I the undersigned, hereby undertake that, if so required by the Bank, I will fund any shortfall in the cash flow requirements of the Borrower to enable it to meet on the due dates all instalments and other amounts payable by it in terms of the Facility Letter'.*

The plaintiff tendered a notice of default and the same was admitted and marked exhibit P5. The said notice was addressed to the Directors of Maxcom Africa Public Limited and it was received by Jameson Kasati (DW1) on 6<sup>th</sup> December, 2019. The notice was informing the Directors that the 1<sup>st</sup> defendant had defaulted repayment hence as of 18<sup>th</sup> November, 2019 the outstanding debt stood at TZS 9,661,704,252.77. During cross examination Nasibu Victor Makasi (DW2), Ahmed Salum Lusasi (DW3), Hashim Ibrahimu Lema (DW5) and Juma Rajabu Furaji (DW6) admitted that they were Directors of the 1<sup>st</sup> defendant and for that reason they were taking part in the management of the 1<sup>st</sup> defendant company. DW5 clearly stated, during cross examination, that he became alert of the default through the company management. The 2<sup>nd</sup> to 8<sup>th</sup> defendants claimed that they were not served with a notice of default and therefore that they were not aware of the default. However, after painstakingly analysing the evidence as indicated above, I am satisfied that they were informed of the default either through



exhibit P5 or the 1<sup>st</sup> defendant management but they failed to remedy the default. Their knowledge of default is evidenced by the fact that all the defendants testified on the facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3) which in fact was a result of the 1<sup>st</sup> defendant's failure to repay loan. The defendants stated that there was new financial arrangement and, in the effort, to substantiate their version, they tendered a facility letter dated 5<sup>th</sup> May, 2021 (exhibits D3). This connotes that they were very aware of the 1<sup>st</sup> defendant's default. It is a settled position that the guarantor's liabilities are co-extensive with that of the principal debtor. See section 80 of the Law of Contract Act. The position has been recapitulated in various decisions of the Court of Appeal including **Patrick Edward Moshi vs Commercial Bank of Africa (T) LTD**, Civil Appeal No. 376 of 2019, CAT at Dar es Salaam and **Exim Bank (Tanzania) Limited vs Dascar Limited and Johan Harald Christer Abrahamsson**, Civil Appeal No. 92 of 2009, CAT at Dar es Salaam. In the case of **Exim Bank (Tanzania) Limited** (supra) the Court of Appeal had the following to say;

*'Once a principal debtor defaults in the payment of the loan, the surety steps into or is placed into equal footing with that of the principal debtor. So, unless the principal debtor sooner discharges the liability, the guarantor is as liable as the principal debtor to the*

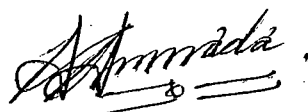
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*creditor and to the same extent under the terms of the overdraft facility'.*

Since the 1<sup>st</sup> defendant defaulted payment and upon informing the 2<sup>nd</sup> to 8<sup>th</sup> defendants, they failed to remedy the default, I am inclined to hold that the 2<sup>nd</sup> to 8<sup>th</sup> defendants are liable to repay the outstanding loan amount as they are bound by the terms of the personal and corporate guarantees given that personal and corporate guarantees are binding contracts between the guarantors (2<sup>nd</sup> to 8<sup>th</sup> defendants) and lender (the plaintiff).

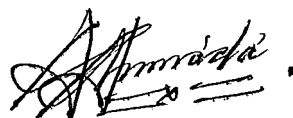
Coming to the 3<sup>rd</sup> issue namely, under what circumstances the liability arises, it is my considered views that the Defendants' liability arose when the 1<sup>st</sup> defendant defaulted payment and on being notified, the 2<sup>nd</sup> to 8<sup>th</sup> defendants failed to do good of the default. Applying the principle of co-extensiveness of the guarantor's liabilities as that of the principal debtor, it necessarily follows that the guarantors namely, 2<sup>nd</sup> to 8<sup>th</sup> defendants are liable to repay the outstanding sum.

The 4<sup>th</sup> issue is whether there was frustration of the financial arrangement between the plaintiff and the 1<sup>st</sup> defendant. The defendants pleaded frustration for their failure to repay the loans. It was contended that the 1<sup>st</sup> defendant's business was frustrated by the government's action of

  
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terminating the 1<sup>st</sup> defendant's services. To exhibit its contention, the defendants tendered various correspondences which were collectively admitted and marked exhibit D2. In rebuttal, the plaintiff disputed the existence of frustration in the circumstances of the case. It stated that the 1<sup>st</sup> defendants had other customers than the government institutions. The plaintiff further lamented that the 1<sup>st</sup> defendants entered into a restructuring agreement after the government had stopped its service as such, she was very much aware when she entered into restructuring agreements (exhibits P1 and P2) which are the genesis of the present suit.

I have keenly scanned the contents of exhibit D2 in particular correspondences with Dar Rapid Transit Agency dated 24<sup>th</sup> July, 2018, Morogoro Municipal Counsel dated 8<sup>th</sup> September, 2017, Muhimbili National Hospital dated 4<sup>th</sup> January, 2018, Tanzania Revenue Authority dated 6<sup>th</sup> July, 2017 and Tanzania Electric Supply Limited dated 5<sup>th</sup> January, 2018. All these correspondences relate to termination of services which were being offered by the 1<sup>st</sup> defendant to the government and they were made prior the restructuring agreements. In addition, according to exhibit P1, apart from restructuring the existing overdraft facilities, the 1<sup>st</sup> defendant was advanced a sum of TZS 164, 160, 000.00 for purchase of points of sale devices from



WIZARPOS International Co. Limited. The question to ponder is, if the government had terminated the 1<sup>st</sup> defendant's services as indicated in the above correspondences and that the government was the solo customer of the 1<sup>st</sup> defendant as the defendants want this court to believe, what was the reason for purchase of points of sale devices? In my opinion, this tells it all that the 1<sup>st</sup> defendant's business was not only dependent on the government institutions rather, there were other customers apart from the government. More so, during cross examination, Ahmed Salum Lusasi told the court that the defendant's company was also operating business in Rwanda and Burundi. Since the 1<sup>st</sup> defendant entered into restructuring agreement after the government had terminated its service and through that agreement it was given another sum of TZS 164, 160, 000.00 for purchase of points of sale devices, it goes without saying that the defendants' claims of frustration are without merits. I therefore decline to hold that the 1<sup>st</sup> defendant's financial arrangement was frustrated by the government's action of cancelling the 1<sup>st</sup> defendant's service hence a default to repay.

The 5<sup>th</sup> issue is whether there are new financial arrangements between the plaintiff and the 1<sup>st</sup> defendant rendering the facility letter and overdraft redundant. To establish this fact, the defendants contended that there was

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another restructuring agreement which varied the agreements dated 22<sup>nd</sup> October, 2018 (exhibits P1 and P2). DW1 tendered a facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3) which apparently was signed by the 1<sup>st</sup> defendant's directors, Jameson Kasati and Ahmed Lusasi on 28<sup>th</sup> May, 2021. In contrast, PW1 told the court that the plaintiff proposed a further restructuring of loan via a facility letter dated 5<sup>th</sup> May, 2021 (exhibit D3) but the 1<sup>st</sup> defendant did not heed to the conditions contained therein as such, the plaintiff cancelled the offer via a letter dated 6<sup>th</sup> June, 2021, exhibit P15. PW1 expounded that one of the conditions was to have the facility letter signed and returned with a board resolution to the plaintiff within thirty (30) days but the 1<sup>st</sup> defendant failed to do that. During cross examination, DW1 Jameson Kasati admitted that the facility letter (exhibit D3) was not accompanied with a board resolution contrary to the conditions of the letter. Furthermore, Juma Rajabu Furaji conceded, while under cross examination, that the conditions in the facility letter (exhibit D3) was not complied with. I have glanced at exhibit D3 and in particular clause 15. It is clear that the facility letter (exhibit D3) ought to be returned within 30 days with a duly signed board resolution. Indeed, no board resolution was signed and attached to the letter and this was confirmed by the defendants' witnesses during cross examination. It is the position of law that when an offer is made to another party, and in that



offer, there is a request express or implied that the offeree must signify his acceptance by doing some particular thing, then the offeree should act in the manner directed short of which there would not be a binding contract. See the case of **Hotel Travertine Limited and two others vs National Bank of Commerce Limited**, Civil Appeal No. 82 of 2002, CAT at Dar es Salaam. Since the 1<sup>st</sup> defendant did not return the said facility letter (exhibit D3) with a board resolution within thirty (30) days, it follows that it did not comply with the mode of acceptance which the offeror dictated hence there could not be a binding contract. In the event, I hold that there were no new financial arrangements between the plaintiff and the 1<sup>st</sup> defendant rendering the facility letter and overdraft redundant.

The 6<sup>th</sup> issue is whether the interest rate and default rate to the contractual sum to be paid by the defendants are unrealistic, exorbitant, illegal and beyond commercial practices. The plaintiff testified that the interest rates which were agreed upon were below the Bank's Tanzania Shillings Base Lending Rate which at the time of signing the agreement was 21%. The plaintiff elaborated that the rates of 16% and 17% were reasonable and legal. On the adversary, the defendants complained of the interest rates stating that the interest rates were exorbitant, unrealistic, illegal and beyond

A handwritten signature in black ink, appearing to be 'Amrda', with a horizontal line underneath it.

commercial practices. Nonetheless, the defendants did not adduce any evidence to prove the illegality and excessiveness of the interest rates. I have had an occasion to navigate through the agreements which gave rise to this suit. Clause 5.1.1 of exhibit 1 is very clear that the interest rate to be charged was 6% below the Bank's Tanzania Shillings Base Lending Rate that is to say the interest rate was 15% whereas clause 5.1.1 of exhibit P2 set the interest rate of 14%. It should be noted that the interest rate was set as one of the term and condition of agreement which both parties voluntarily entered into. Throughout the evidence, there was no allegations of inducement from either party. The law of contract is very clear on the doctrine of sanctity of contract. In the case of **Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R 288 at page 289 the court held thus: -**

*"The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement"*

In addition to the above, the Court of Appeal in the case of **Simon Kichele Chacha vs Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, CAT at Dar es Salaam, stressed that parties must perform the contracts they freely





entered unless there is proof of incapacity, fraud (actual or constructive), misrepresentation or principle of public policy prohibiting enforcement.

In view of the above and considering that the interest rates was one of the contractual terms which were agreed upon by the parties, I find myself with no option than upholding the contractual terms. In the result, it is my findings that the interest rates were neither illegal, unrealistic, exorbitant nor beyond the commercial practices.

With regard to the reliefs which the parties are entitled to, the plaintiff has prayed several reliefs as indicated herein above including interest rates of 17% being both the agreed and default interest in the Term Loan 1 to be calculated from the outstanding sum of TZS 6, 137, 152, 685.30 only due as at 3<sup>rd</sup> August, 2021 to be calculated from the date of filing the suit to the date of judgment and interest rate of 16% being both the agreed and default interest in the Overdraft Facility to be calculated from the outstanding sum of TZS 6, 752, 819,933.27 (Tanzania Shillings Six Billion Seven Hundred Fifty Two Million Eight Hundred Nineteen Nine Hundred Thirty Three and Twenty Seven Cents). It is a settled position that the interests for the period from the time of instituting the suit up to the delivery of the judgment are awarded at the discretion of the court. See the case of **Ashraf Akber Khan vs Ravji**

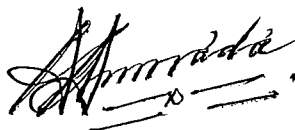


**Govind Varsan**, Civil Appeal No. 5 of 2017, CAT at Arusha. I have dispassionately considered the circumstances obtaining in this case including the colossal sum of money claimed by the plaintiff. For the interest of justice, I find it inappropriate to grant the reliefs sought under (ii) and (iii) of the prayers.

The defendants' counsel submitted that the property sought to be disposed of in the plaint is not the one which was mortgaged. He pointed out that the 6<sup>th</sup> defendant mortgaged CT No. 131003, Land Office No. 529633, Plot No. 205, Block 'M' Mbezi **Wani** Area whereas the plaintiff is praying to dispose CT No. 131003, Land Office No. 529633, Plot No. 205, Block 'M' Mbezi **One** Area. After considering the pleadings and evidence in toto, I am of the considered opinion that the anomaly in the plaint was a mere typo and therefore inconsequential.

In sum, I am satisfied that, on the evidence presented, the plaintiff has successfully established its case on the balance of probabilities against the defendants. Consequently, I enter judgment and decree in favour of the plaintiff with the following orders against the defendants jointly and severally;

- i) Payment of the sum of TZS 12,889,972,618.57 (Tanzania shillings Twelve Billion Eight Hundred Eighty Nine Million Nine Hundred

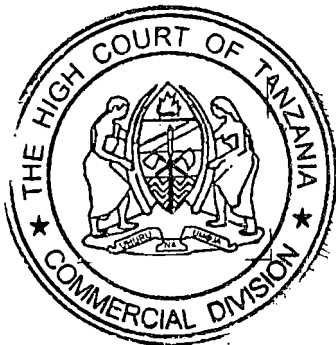


Seventy Two Thousand Six Hundred Eighteen and Fifty Seven Cents) being the outstanding sum in both the Business Term Loan Facility 1 and Overdraft Facility as at 3 August, 2021.

- ii) In case the defendants fail to pay the decretal sum under (i) above within sixty (60) days from the date of this judgment, the plaintiff to sell the mortgaged property over Plot No. 205, Block 'M' Mbezi Wani Area, Dar es Salaam under the land office number 131003 in the name of 6<sup>th</sup> defendant along with other recovery measures.
- iii) Payment of interest rate at 7% of the decretal sum under paragraph (i) above from the date of judgment to the date of payment in full.
- iv) Costs of this suit.

It is so ordered

The right of appeal is fully explained.



  
**A.A. Mbagwa**

**JUDGE**

**06/04/2023**