

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO. 48 OF 2023

NATIONAL BANK OF COMMERCE LIMITED PLAINTIFF

VERSUS

MONGATEKO MAKONGORO MONGATEKO DEFENDANT

JUDGMENT

26/10/2023 & 03/11/2023

SIMFUKWE, J.

The facts which prompted the plaintiff to file the instant case against the defendant can easily be narrated as follows: On 03/07/2020 the plaintiff advanced staff loan to his employee, the defendant herein to the tune of Tshs 80,000,000/- eighty million only. The said loan was to be repaid in 60 equal monthly instalments of one million six hundred three thousand and six only (1,603,006/=) which was to be deducted from the

defendant's monthly salary. The agreed interest was 7.5% per annum. In consideration of the Loan amount as per the terms and conditions contained in the Loan Agreement, the Defendant pledged his terminal benefits as security for the loan. In the event terminal benefits are not sufficient to cover the outstanding amount, the plaintiff was entitled to recover the amount due, from any source available only to the extent permitted by law. It has been alleged that the defendant defaulted to repay the said loan. Thus, the plaintiff opted to institute the instant suit praying for judgment and decree against the defendant as follows:

- a. An order for immediate payment of TZS 87,209,513 being the default outstanding amount of extended entire loan facility under the Loan Agreement as at 6th March 2023.*
- b. An order for payment of accrued interest computed at the rate of 17% per annum on the outstanding amount referred in prayer item (a) above computed from date of default to the date of judgment.*
- c. An order for payment of penalty interest on the outstanding amount at the rate of 12.5% per annum charged monthly*

accruing from the date of the default to repay any of the Outstanding Amount to the date of judgment.

- d. An order for payment of general damages, costs and expenses, including the legal fees incurred by the plaintiff as a result of the Defendant's failure to heed to the terms and conditions of the loan agreement and other resultant costs and expenditure incurred by the Plaintiff.*
- e. In the alternative to prayers (a) (b) and (c) above, and upon failure by the Defendant to repay the amounts stated in prayer items (a)(b) and (c) herein above;*

- i. For an order of utilization or deduction of the Defendant's terminal benefits, any entitlement, or decretal amounts due to the Defendant from the Plaintiff; and*
- ii. For an order for attachment and sale of the Defendant's properties and assets wherever they are situated in satisfaction of the debt.*

f. For payment of interest on the decretal sum at Court's rate from the date of judgment until full satisfaction of the entire decretal sum.

g. For costs of this suit and

h. For any other relief (s) this Honourable Court may deem fit and just to grant.

In the Written Statement of Defense, though the defendant impliedly admitted that the plaintiff advanced the said loan to him, he disputed the fact that he defaulted to repay the same. Among other things, the defendant asserted that his default to repay the loan was occasioned by the plaintiff who unfairly terminated him. Besides that, the defendant averred that the suit is prematurely instituted. However, by way of set off, the defendant claimed that he owes the defendant a total sum of Tshs 633,542,416.14 which is the compensation awarded to him by the High Court Labour Division, for unfair termination from employment by the plaintiff.

Basing on the above contentious matters, the following issues were framed prior to the hearing:

- 1. Whether the defendant has defaulted to pay the loan.*
- 2. Whether conversion of staff loan to commercial loan was legally justified.*
- 3. Whether the Defendant is duty bound to repay both the principal sum and interest accrued upon default.*
- 4. Whether the defendant is entitled to set off of TZS 633,542.416.14 arising from the judgment of the High Court Labour Division in Consolidated Revision No. 295 and 304 of 2022*
- 5. To what reliefs are parties entitled?*

During the hearing of this matter, the plaintiff was represented by Mr. Beda Kapinga, learned counsel while the defendant enjoyed the service of Mr. Victor Kikwasi, learned counsel.

Pursuant to **Rule 49 (2) of the High Court (Commercial Division) Procedure (Amendment) Rules, 2019**, parties were ordered to file witness statements. The plaintiff called one witness **PW1 Samson Robert Mwandu** and tendered five (5) documentary exhibits to prove their case, whereas the defendant had also one witness and three (3) documentary exhibits. All witnesses identified their Witness Statements

which were filed in this court and adopted to form part of their evidence in chief.

In his Witness Statement, **PW1 Mr. Samson Mwandu** stated inter alia that the plaintiff deals with banking business and provision of banking services. He proceeded to testify that he was working with the plaintiff as the Head of Collection and Recoveries and his duties included, collection of all debts arising from various loans extended by the plaintiff to its customers. As far as the defendant is concerned, PW1 narrated that being an employee of the plaintiff, on 3rd July 2020 the plaintiff advanced the staff loan to the defendant to the tune of Tshs 80,000,000/- with the interest computed at the rate of 7.5% per annum. He pledged his terminal benefit as security of the said loan. That, in case the said terminal benefits were not enough to recover the loan, the amount due could be covered from any source. To substantiate that the said loan was advanced to the defendant, PW1 tendered the staff loan agreement which was admitted as **exhibit P1**.

PW1 referred to clause 6.1.1 and 6.2 of the said staff loan agreement (exhibit P1) which is to the effect that the plaintiff is entitled to immediate and full repayment of any outstanding balance in the event that the

employment of the defendant was terminated for whatever reason; and upon such termination, the loan shall be converted into a commercial loan. It was the evidence of PW1 that since the defendant defaulted, failed and neglected to service and repay the entire outstanding loan amount, the plaintiff converted the said loan into commercial loan and demanded an immediate payment of the entire outstanding loan amount and interest to the tune of TZS 82,613,702. To support the fact that the defendant defaulted to pay, PW1 tendered Defendant's statement of account which was admitted as **exhibit P2**.

PW1 proceeded to narrate that, the plaintiff issued a statutory notice of default and the demand letter through the defendant's email. He tendered the email correspondence evidencing communication between the plaintiff and the defendant which was admitted as **exhibit P3**. It was averred that, despite the said email correspondence and demand letter, the defendant refused, neglected and defaulted to pay the outstanding amount.

PW1 testified further that, the defendant's neglect, refusal and continuing default to pay the outstanding loan amount, constituted a breach of contract which has caused general losses, damages, costs and expenses

to the plaintiff in seeking recovery of the outstanding amount. It was argued that, the termination of the defendant for whatever reason constitutes an event of default. That, whether the termination was fair or not, does not justify the defendant's consistent neglect, refusal, denial and default to repay the outstanding loan amount.

Concerning the claim of set off, PW1 explained that the existence of claim of set off is admission of the plaintiff's claim. He prayed the court to be pleased to enter judgment on admission for the amount that the defendant does not dispute. However, PW1 disputed the claim of set off for the reason that the Award of the High Court Labour Division dated 28th February 2022 is not final and conclusive since the plaintiff has filed an appeal before the Court of Appeal to challenge the said Award. He tendered the Notice of Appeal which was admitted in court as **Exhibit P4**. Also, PW1 tendered the Court of Appeal order of stay of execution of the judgment and decree of the High Court, Labour Division which was admitted as **Exhibit P5**.

PW1 was of the view that, if the decision of the High Court Labour Division is overturned by the Court of Appeal, the set off claimed by the defendant in the present suit will become redundant and of no effect. That, if the

claim of set off is granted, and the decision of the High Court is overturned, the plaintiff will be prejudiced as will not be able to recover the decretal sum since the defendant is an individual with no ability, security or sufficient assets to satisfy the debt. Also, if the set off is denied, and the decision of the High Court is confirmed, the defendant will not be prejudiced as the recovery of the decretal sum will be satisfied by the plaintiff who is the reputable and well-established financial institution.

PW1 concluded his testimony by imploring this court to grant the plaintiff the prayers advanced in the plaint.

DW1 Mr. Mongateko Makongoro Mongateko, the only defence witness stated inter alia that, from February 2014 to March 2021, he had employer-employee relationship with the plaintiff which was unfairly and unprocedurally ended by the plaintiff. He clarified that sometimes in 2020 while their relationship was subsisting, he applied for a staff loan amounting to TZS 80,000,000/= (Eighty Million). The said loan was to be paid within a period of sixty months (60). The security to the said loan was his terminal benefits. That, his employment was terminated through the letter dated 23rd April, 2021 as per **Exhibit D1**. The said letter of termination indicates that the outstanding loan amount in respect to the

staff loan was TZS 69,934,888/= and after all the deductions, the reminder to his terminal benefits was TZS 33,845,376.64. According to DW1, after deduction of his terminal benefits, the outstanding staff loan amount would be TZS 36,089,512/=.

Furthermore, DW1 notified this court that being aggrieved by his termination from employment, he instituted the dispute of unfair termination against the plaintiff, before the Commission for Mediation and Arbitration (CMA) which at the end found the termination to be unfair and unprocedural and awarded him Tshs 442,895,680/=. Both parties were partly aggrieved on the assessment of the amount awarded by the CMA. Thus, they both preferred Labour Revisions. Their applications for Revision were consolidated as Consolidated Labour Revision No. 295 and 304 of 2022. After determination of the applications, the High Court ordered the defendant to be awarded Tshs 633,542,416.14. DW1 tendered the judgment and decree in Consolidated Labour Revision No. 295 and 304 of 2022 which was admitted in Court as **Exhibit D2**. The plaintiff was aggrieved and preferred the appeal before the Court of Appeal. DW1 tendered the Written Submissions filed by the plaintiff before the Court of Appeal which was admitted as **Exhibit D3**.

DW1 continued to state that, after termination of his employment, the plaintiff has never agreed with him on terms and conditions of settling the outstanding mount of the staff loan. Thus, the alleged principal amount and accrued interests in respect of the staff loan agreement are baseless and have no legal justification since the defendant had never admitted that the plaintiff owed him TZS 69,934,888/= or TZS 87,209,513. He insisted that TZS 69,934,888 was to be deducted from his terminal benefits as indicated in the termination letter and Clause 5.1 and 6.2 of the Staff Loan Agreement.

DW1 contended further that, the defendant is entitled to the set off of any sum which this court will find as relief(s) to the plaintiff. He stated that, the plaintiff did not challenge the CMA's findings that the defendant's employment was unfairly and unprocedurally terminated which suggest that the Defendant is entitled to compensation. DW1 was of the opinion that, since the plaintiff is aware and is not challenging the fact that the termination of the defendant' employment was unfair and since there is a Decree in favour of the Defendant, then this suit was instituted prematurely.

The defendant prayed this court to dismiss this suit with costs. In the alternative, the setoff be granted with costs.

Counsels of both parties filed their final submissions. However, I will not summarize the same, but will consider the submissions in the cause of determining the matter whenever necessary.

Having considered the framed issues and evidence of both parties, before resolving the raised issues, on the outset, according to the pleadings and evidence of both parties, I have noted that the following facts are not disputed:

First, it is not disputed that plaintiff and the defendant had employer employee relationship. **Second,** it is not disputed that the plaintiff advanced to the defendant a staff loan of TZS 80,000,000/= (eighty million) which was to be repaid within 60 months. **Third,** it is undisputed fact that the defendant's employment was terminated and the dispute was filed before the CMA and later before the High Court Labour Division which found that the termination was unfair and unprocedural. **Lastly,** it is not contentious that the award of the High Court Labour Division is subjected to an Appeal before the Court of Appeal.

Having established the facts which are not in controversy between the parties; and having gone through the testimonies of both parties and the exhibits tendered; in resolving the first issue as to ***whether the defendant has defaulted to pay the loan***, I will be guided by what has been agreed by the parties in the Staff Loan Agreement (Exhibit P1). Clause 6.1 of the Staff Loan Agreement which is not disputed by the defendant, reads as follows:

"The following events shall constitute an event of default whereupon, the Bank shall be entitled by notice to the Staff or his/her legal representatives to cancel the loan and demand immediate and full repayment of any outstanding balance.

6.1.1 the staff resigns or his/her employment with the Bank is terminated for whatever reason." [Emphasis added]

The above clause speaks loudly the circumstances which will amount to default. According to the above clause, termination from employment for whatever reason amount to default. Equating the above clause and what

happened to the defendant, I hasten to say that the defendant defaulted to repay the loan from the date of termination.

In his final submission, the learned counsel for the defendant was of the view that the plaintiff relied on defendant's statement account (Exhibit P2) to prove the first issue. He impugned the said exhibit P2. Among other things, he stated that the said exhibit contradicts with the loan agreement. With respect as I have said before, what proves that the defendant defaulted to pay the loan is the staff loan agreement which is very clear that the termination of employment for whatever reason amounts to default. The fact that the defendant raised the claim of set off in his Written Statement of Defence presupposes that he admitted that there is an outstanding amount which is not repaid yet.

Turning to the second ground on ***whether conversion of staff loan to commercial loan was justifiable?*** This issue will not detain court's time since its answer is found under clause 6.1 of exhibit P1 which reads:

*"Where the employee's service is terminated or the employee resigns from or leaves the bank for any reason whatsoever, **the outstanding Loan balance will***

immediately become due and payable or the loan shall be converted into a commercial loan."

[Emphasis added]

The above quoted clause is to the effect that, once the employee's employment is terminated, the outstanding balance will immediately become due and the employee should pay the same or else the said loan shall be converted to commercial loan. According to **exhibit P3** which is the email correspondences, the plaintiff took trouble to issue a 60 days statutory notice requiring the defendant to repay the loan within the period of 60 days from the date of the letter which is 16th November, 2021. Based on the fact that there is evidence that the defendant did not pay the loaned amount despite being served with notice following his termination, then the act of the plaintiff to covert the loan to commercial loan was justifiable as it is in accordance with the staff loan agreement.

In his final submission, Mr. Kikwasi for the defendant was of the view that the plaintiff was required to adduce evidence on when and how the said loan was converted to commercial loan. With due respect, I urge the learned counsel to refer to clause 6.2 of the Staff Loan Agreement (Exhibit P1) which is to the effect that once the employment of an employee is

terminated, the amount become due and payable or else the loan shall be converted to commercial loan. This fact does not require evidence to prove as the defendant testified that he was terminated from employment and he did not tender evidence to prove the fact that he paid the outstanding amount after his termination as required under clause 6.2 of the loan agreement.

In his evidence, the defendant testified that the plaintiff has never agreed with him on how to settle the outstanding amount. However, his evidence is negated by the email correspondences which among other things required the defendant to pay the outstanding amount of the loan.

During cross examination, the defendant stated that the plaintiff did not comply with clause 5.1 of the loan agreement which required the plaintiff to deduct the outstanding loan amount from the defendant's terminal benefits. I am of considered opinion that, the plaintiff could not deduct the terminal benefits while there were employment labour disputes instituted against the plaintiff and the terminal benefits were among the issues to be determined.

The 3rd issue on ***whether the defendant is bound to pay both the principal and interest accrued upon default***, the plaintiff stated that the principal amount/ outstanding amount which the defendant is required to pay is TZS 69,000,000/=. During cross examination, the defendant admitted that the outstanding loan is TZS 69 million.

What is in dispute is in respect of the interest accrued and other reliefs. The plaintiff asserted that due to other charges, the amount rose to 82,613,702/=.

In his defence, the defendant contended that, since there is a decree in his favour, the plaintiff has prematurely instituted this suit. Mr. Kikwasi for the defendant submitted in his final submission that the plaintiff is not entitled to interest on the reason that if the plaintiff had complied with the provisions of clause 5.1, the outstanding amount would not attract the alleged interest and penalties.

Guided by the common law principle of equity, I agree with the defendant that this matter was preferred prematurely. After the plaintiff had filed her appeal before the Court of Appeal against the decree awarded in favour of the defendant, she could have waited the outcome of the said

appeal. As a matter of fact, the decision and decree of the Labour Court in favour of the plaintiff is still in force until final determination of the pending appeal. **Article 13 (1) of the Constitution of the United Republic of Tanzania 1977** as amended from time to time provides that:

*"13. -(1) All persons are equal before the law and are entitled, without any discrimination, to protection and equality before the law."*Emphasis added.

I think, just as the defendant had been put on halt to execute his award, in the same manner, the plaintiff should wait the outcome of her appeal before the Court of Appeal, before claiming the outstanding loan from the defendant. Otherwise, it will be against the principle of natural justice of equality before the law.

In the case of **Mbeya-Rukwa Auto parts and Transport Ltd v. Jestina George Mwakyoma [2003] TLR 251**, the Court of Appeal of Tanzania held that:

"We hold that a decision reached without regard to principles of natural justice and or in contravention of the Constitution is void and of no effect."

I am afraid to make such grave error of rendering my decision void and of no legal effect, by granting the reliefs sought by the plaintiff in contravention of the principle of equality before the law.

The last issue is ***whether the defendant is entitled to set off of TZS 633,542.416.14 arising from the judgment of High Court Labour Division in Consolidated Revision No. 295 and 304 of 2022.***

Likewise, this issue is dependent on the outcome of the said pending appeal. Therefore, it cannot be correctly decided at this stage whether to set off the awarded amount or not. The same can be safely determined after the final determination of the pending appeal.

In the event, I find it against the principle of natural justice of fairness to grant the reliefs sought. Thus, the plaintiff's case is hereby struck out with costs for being filed prematurely.

It is so ordered.

DATED and DELIVERED at Dar es Salaam this 3rd day of November 2023.



X

S. H. SIMFUKWE

JUDGE

Signed by: S. H. SIMFUKWE

03/11/2023