IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL APPEAL NO. 2 OF 2022

(Arising from Iringa Resident Magistrate Court Civil Case No. 4 of 2016)

BETWEEN

EXIM BANK TANZANIA LIMITED ..... APPELLANT

VERSUS

SAI ENERGY & LOGISTICS SERVICES LIMITED.....RESPONDENT

Last order: 02nd October 2023

Date of Judgment: 27th November 2023

JUDGMENT

NANGELA, J.

In their article titled: '*Pre-contractual Liability and Preliminary Agreements*" 120 **HARV. L. REV**. 661 (2007)[1]Professors Allan Schwartz & Rober E. Scott posited the following case scenario I find relevant to recite and pre-face this judgement.

> "Two commercial parties agree to attempt a transactionand agree also on the nature of their respective contributions, but neither the transaction nor what the parties are to do is precisely described, and neither may be written down.The

[1]Available at: https://scholarship.law.columbia.edu/faculty_scholarship/338 (as accessed on 25/11/2023 at 16:05 EAT).

> parties do not agree and, indeed, may never have attempted to agree on important terms such as the price. After the parties agree upon what they can, and before uncertainty is resolved, one or both of them make a sunk-cost investment.This pattern of commercial behavior suggests that the parties have made a "preliminary agreement"….Disputes sometimes arise under these preliminary agreements after one or both of the parties have invested. One party may then abandon the project even though the other party protests the first party's exit."

The facts from which this appeal stemmed seem to reflect the case scenario postulated by Schwartz and Scott hereabove. In brief, such facts may be shortly stated as follows:in the year 2015 the Respondent had applied for an overdraft facility of TZS.641 million from the Appellant against the Respondent's fixed deposits. According to the Respondent the parties used to communicate via e-mails only. After negotiations were done and things set in motion, the Respondent backed off.

The Respondent's reasons to back off from the deal, however, were that the Appellant did not sanction the credit facility timely and due to the delays in getting the facility which she urgently needed, she opted out of the bargain and sought an alternative from elsewhere. At the time of his backingoff from the transaction, however, the Appellant had commenced preparations which included preparing the

necessary documentations and other relevant loan advances' appraisals which had attracted an upfront debiting of the Respondent's account to a tune of TZS 4,807,500.00 (equal to a 0.75% of the credit facility amount of TZS 641million which the Respondent had applied for) as Facilitation and Documentation Fees (FF& DF).

In defense thereof, the Appellant had argued that the charging of 0.75% was part of an agreement reached out prior to the finalization and issuance of the credit facility applied for. On the other hand, the Respondent claimed and averredthat the charging of 0.75% of the facilityapplied for (equal to TZS 4,807,500.00) was unjustifiable and illegally debit from her account since there was no acceptance from his part, of said credit facility she had applied for. It is on that account the Respondent marshalled his legal arsenals and filed a suit (Civil Case No.4 of 2016) at the Resident Magistrates Court of Iringa, at Iringa claiming for the TZS 4,807,500.00 as principal sum plus 25% interest thereof, loss of profit of TZS 300,000 per day from the date when the funds were debited from her bank account, general damages to the tune of 5,000,000, costs of the suit, *inter-alia*.

Upon hearing, the trial magistrate Hon. A.R Mwankejela, (RM) entered judgment in favor of the Respondent (Plaintiff) granting her the prayers sought except that the court had reduced the interest claimed to a 7% rate p.a, and the claimed loss of profit to TZS 200,000 per day instead of TZS 300,000 per day. Further, the Respondent's

prayer for an award of general damages of TZS 5000,000 was also granted plus the costs of the suit.

Aggrieved by the decision of the trial court, the Appellant lodged this Appeal challenging the Judgment and Decree of the Iringa Resident Magistrates Court delivered on the 1st day of November 2021, in Civil Case No. 4 of 2016.

The appeal, which was brought to the attention of this court by way of a Memorandum of Appeal filed under Rules 69 and 70 of the High Court (Commercial Division) Procedure Rules, of 2012 as amended by GN.NO.107 of 2019 had raised nine (9) grounds of appeal, and the Appellant prayed that this Honorable Court be pleased to order as follows:

i. That, this Appeal be allowed.
ii. That, the decision, Judgment, decree, and orders of Iringa Resident Magistrate's Court be nullified.
iii. That, the Appellant be granted the orders sought based on the weakness of the Judgment of Iringa Resident Magistrate's Court because the Appellant bank correctly deducted the amount of TZS. 4,807,500.00 as upfront documentation and facilitation fee on the loan applied by the Respondent.
iv. That, a finding be made to the effect that the Appellant's rightly deducted the sum of TZS. 4,807,500.00 as upfront documentation and facilitation fee on the loan applied by the

Respondent, which was 0.75% accepted by the Respondent on the loan amount of TZS. 641,000.000, upon cancellation of the loan application by the Respondent.

v. That, the Appellant be granted the costs of this Appeal and the proceedings in the Court below; and,

vi. Any other or further reliefs that the Honourable Court may deem fit to grant.

The Appellant's grounds of appeal were argued by way of written submissions. Out of the nine grounds of appeal filed by the Appellant, the ground number one was abandoned and the counsel for the Appellant argued the remaining eight grounds. In terms of the Appellant enjoyed the services of Mr. Jovinson Kagirwa, learned advocate while Mr. Musa Mhagama, learned advocate, appeared for the Respondent.

In his submission, Mr. Kagirwa merged grounds number 2, 3, 4, 5, and 7 and addressed them jointly while grounds 8 and 9 were argued separately. The merged grounds of appeal are in summary based on an alleged failure on the part of the learned Magistrate to evaluate the evidence available before him. It was alleged that such a failure led the trial court to arrive at an erroneous conclusion when determining the dispute.

Mr. Kagirwa submitted that at the hearing, the Appellant tendered **Exh.D-1** and **Exh.D-4** which were

General Terms and Conditions and email correspondences stating that, on page 41 of the proceedings, the witnesses who testified before the court had testified to the effect that the sum which was deducted by the Appellant was 0.75% of the credit facility as requested and agreed by the parties through email correspondences, **Exh.D-4** being the proof tendered and relied on before the trial court.

Mr. Kagirwa submitted, reading the email correspondence dated 26th of September 2015 (sent at 02:06pm) he contended that the Appellant had proposed a payment of 0.75% upfront for documentation and loan processing fees. He submitted that the said proposal was confirmed by an email dated 28thof September 2015, at 12:49pm. From that analysis, Mr. Kagirwa submitted that, as the record will show, the Respondent was to pay 0.75% of the loan for documentation and facilitation fees which could be paid in the pre-contractual stage of the agreement. He submitted, therefore, that, the learned trial magistrate had misdirected himself on evidence by rulingout that it was improper for the Appellant to charge documentation fees as there was no acceptance from the Respondent.

He argued that it was erroneous on the part of the trial magistrate to have relied on **Exh.D-5** which was a letter of offer and turned a blind eye to the specific exhibit which was covering pre-contractual arrangements, and which were tendered and admitted as **Exh.D-4**, considering that the Respondent confirmed to have all discussions by email. To bolster the submissions, he relied on the case of

DeemayDeemayDaati& Others vs Republic (Criminal Appeal 80 of 1994) [2004] TZCA 63 (5 October 2004), theGeneral Terms and Conditions and the email correspondences stating that, on page 41 of the proceedings, the witnesses who testified before the court had testified to the effect that the sum which was deducted by the Appellant was 0.75% of the credit facility as requested and agreed by the parties through email correspondences, **Exh.D-4** being the proof tendered and relied on before the trial court.

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Mr. Kagirwa contended that, ordinarily documentation fees or charges are charges paid before the initiation of drafting of offer documents, and, as such, the Appellant was legally entitled to deduct the said amount as agreed. He concluded that it was wrong, therefore, for the trial learned magistrate to have combined the 1st issue and the 2nd issue in determining the matters before the Court as doing so landed in a wrong conclusion.He contended that had the learned magistrate correctly evaluated the evidence, specifically the **Exh.P-1** and **Exh.D-1** he would have discovered that the account in question was a partnership account and did not belong to the Respondent (Plaintiff) at all. He invited this court to embark on its assessment and make own findings considering the guidance given by the Court of Appeal in the case of **Deemay Daat's case** (supra).

As regards the 6th and the 7th ground of appeal, it was Mr. Kagirwa's submission that, the two relate to the issue of award of specific damages which the trial court awarded to the Respondent. He submitted that the trial magistrate relied on a costs analysis sheet which was tendered and admitted as **Exh.P-2** which was prepared by the Respondent to award a loss of profit on the deducted amount. He argued that loss claimed was not specifically pleaded and neither was it quantified in the pleadings, nor was it strictly proved as required by the law. He submitted that there was no

document which was produced to back up the loss alleged to have accrued to warrant the court to have awarded the sum of 200,000.00 per day from the date of deduction.

Mr. Kagirwamaintained as well that, as a cardinal principle of evidence, he who alleges must prove and special damages must be pleaded and proved. He relied,for support of his submission, on the decision of the Court of Appeal in the case of **Jonathan Kalaze vs. Tanzania Breweries Ltd,** Civil Appeal No. 360 of 2019 (unreported) where the Court had the following to say:

> "Fortunately, before the High Court, the learned advocate for the Appellant, in a way admitted that in order for one to claim loss of business, he must claim special damages which was, right in our considered view. This position was also taken in the case of Msolele General Agencies vs. African Inland Church [1994] T.L.R 92 where it was held that a claim of loss or profit falls within a specific claim requiring strict proof."

It was Mr. Kagirwa's submission that, since the Respondent alleged and claimed loss of business, he ought to have done so in line with the established rules of pleading and proving such specific damages. He argued that it was erroneous on the part of the court to have awarded damages of TZS 200,000 per day which has accumulated to a colossal sum of TZS 700,000,000 to date. Citing the case of

Anthony Ngoo and Davis Anthony Ngoo vs. Kitinda Kimaro, Civil Appeal No.25 of 2014, (CA) (Unreported), he submitted that specific damages are exceptional in their character and thus, must be specifically claimed and strictly proved.

As regards the last ground, it was Mr. Kagirwa's submission that, the trial magistrate did not assign any reason for awarding TZS 5,000,000 as general damages. He submitted that as trite law, general damages though within the discretion of the court, such discretion must be exercised judiciously. He submitted that the law is such that general damages are awarded after deliberations on the evidence on record ably justifies such an award. To back up his submission he placed reliance on the case of **Tanzania Saruji Corporation vs. African Marble Company Ltd** [2004] TLR 155, **Anthony Ngoo and Davis Anthony Ngoo vs. Kitinda Kimaro** (supra) and **National Microfinance Bank PLC vs.Mary Rwabizi Trading t/a Amuga Enterprises**, Civil Appeal No.296 of 2017 (CA) (unreported). He thus urged this court to quash and set aside the trial court's decision.

Responding to the submissions filed by Mr. Kagirwa, it was Mr. Mhagama's submission that the grounds of appeal are misconceived, lack merits, and the appeal should be dismissed. He argued that the trial court was correct in its findings and did evaluate the evidence before it arrived at a proper conclusion of the suit, thereby entering a judgement and decree in favour of the Respondent. Mr. Mhagama

argued that it is trite law that, a civil case must be proved on the balance of probabilities and a person who intends that the court should decide in his favour shall have a burden to give evidence for the court to believe his side of the case. He argued that the Respondent was able to prove his case against the Appellant on the balance of probability through the testimonies of Pw-1 and Pw-2 as well as the documentary evidence availed to the court.

Relying on the case of **Hemed Said vs. Mohamed Mbilu** [1984] TLR 113, he submitted that both parties to the suit could not have tied but the side whose evidence is heavier than the other must win the case. He argued that it would have been unsafe for the trial court to rule infavour of the Appellant based on the evidence and testimony given by the Appellant's witness (Dw-1) and the exhibits tendered by the Appellant which the trial court evaluated and decided to rule in favour of the Respondent.

Mr. Mhagama submitted the evidence was clear that the amount claimed was deducted from the Respondent's account as proved by **Exh.P-1** which was the bank statement and the testimony of Dw-1. He argued that the same was unlawfully deducted since the Appellant enforced the terms of the Letter of Offer, which was neither executed nor accepted by the Respondent, a fact which was proved by Pw-1 and Dw-1 and supported by **Exh.D-5** which was neither signed nor was there an acceptance form filled by the Respondent.

Mr. Mhagama submitted the Appellant unlawfully enforced Clause 9 of the Letter of Offer (**Exh.D-5**) which had provided for legal documentation and facilitation fees contrary to the provision of section 10 of the Law of Contract Act, Cap.345 R.E 2019. He contended that, before a contract becomes binding there are stages which it must go through between the two parties which include the stage where parties must signify their consent.

He argued that the Respondent never consented to the Facility Agreement as the parties had long discussions on one term which was the issue of facilitation and documentation fees payable but owing to the Appellant's delay in sanctioning the loan the Respondent cancelled the application and moved to other sources, a fact which made the Appellant demanding a payment of TZS 4,807,500.00 which she ultimately debited from the Respondent's account.

Mr. Mhagama relied on section 7 of the Law of Contract Act, Cap.345 R.E 2019 regarding the acceptance of an agreement and the case of **Hotel Travertine Limited &2Others vs. National Bank of Commerce Ltd** [2006] TLR 133 regarding the mode of acceptance prescribed by the Offeror arguing that, the above-cited case presents a similar scenario as the one at hand whereby the Respondent never accepted the Appellant's offer for a loan as **Exh.D-5** would show.

He submitted further that, the issue of the Respondent's account being a partnership account was never an issue before the trial court and so it cannot be raised at

this stage of appeal.As regards grounds 6 and 7 Mr. Mhagama argued that the trial Magistrate did evaluate the loss of business claims and granted them. He contended that the loss of business was pleaded and proved by the Respondent. He referred to this court paragraph 8 of the Plaint and **Exh.P-2** as well as the testimony of Pw-2. He supported his submission by relying as well on the case of **Anthony Ngoo & Another** (supra).

Concerning ground No.9 of the Appeal, it was Mr. Mhagama's submission that, the award of general damages amounting to TZS 5,000,000/= was correct and justified as the trial court did give reasons hence complied with the requirements of the law as stated in the case of **Anthony Ngoo & Anothe**r (supra). On that account, he urged this court to dismiss this appeal with costs.

In a brief rejoinder, Mr. Kagirwa rejoined that the Respondent's counsel has not responded to the submissions on grounds of Appeal Nos.2, 3, 4, 5, and 8 at all. He argued that what the Appellant maintains as her argument is that reading **Exh.D-4** collectively, the Respondent agreed to be charged a 0.75% upfront for documentation fees. He relied on the email dated 28th September 2015 and submitted that the trial Magistrate relied on **Exh.D-5** turning a blind eye to **Exh.D-4** which, according to him, was material to the case. He invited this court to look at pages 41, 44, and 45 of the proceedings and the Case of **Deemay Daat & Another** (supra).

Mr. Kagirwa submitted that section 10 of the Law of Contract Act which the Respondent relied on does support the Applicant's case and the facts that the parties had an agreement and was freely made by the parties and supported by consideration as **Exh.D-4** would show. He contended that the mere fact that the documents were not signed cannot be the basis for not paying the 0.75 % which was to be paid upfront. Relying on the Concise Oxford Dictionary 9th edition, he submitted that an upfront payment is a payment which is paid in advance/ before a particular piece of work, or a particular service is done or received.

Concerning the submission on grounds No.6 and 7 of the Appeal, Mr. Kagirwa rejoined that, neither the cost analysis nor the Respondent witnesses proved the loss incurred, and the trial court relied on **Exh.P-2** which did not prove that the TZS 300,000 per day was generated. He argued that it is uncommon for sales of a company to remain constant as they could vary from day to day. He contended that the cost-benefit analysis was prepared by a non-certified person who is Pw-2. He therefore argued that the loss was not properly proved, thereby leaving a gap in the determination of such an amount.

Finally, as regards ground number 9, Mr. Kagirwareiterated his earlier submission that the trial court did not give reasons for the award of TZS 5,000,000 as general damages and, hence, violated the principles set out in **Anthony Ngoo's case** (supra). He urged this court to

allow the appeal and quash and set aside the judgement and decree in civil case number 4 of 2016.

Considering the above rival submissions, the general issue for this court to address is whether the Appellant's Appeal is meritorious. However, before proceeding to the analysis or consideration of the rival submissions offered by the learned counsels for the parties herein, I find it apposite to state the basic principle by which this court is guided by this appeal being a first appeal.

Essentially, when it comes to dealing with an appeal at the first instance, the court seized with the appeal is duty bound to as well and thoroughlyexamine the record of the appeal and the pleadings and re-hear or re-appraise the evidence on record, subjecting it to fresh and exhaustive scrutiny, and it permitted to arrive at own independent conclusions on, not only the issues of fact but also those of the law. Such a legal position was reiterated by the Court of Appeal in the case of **Deemay Daat, Hawa Burbai & Nada Daati** (supra), a case which the Appellant has correctly cited and relied on. See also the decision of this court in the case of **Abdallah Makayule vs. Dunia Moshi**, Land Appeal No.175 0f 2018 (unreported).

My only limitation, however, comes in relation to an issue of demeanor evidence of any of the witnesses who testified before the trial court, since this court lacks the first-hand encounter with such witnesses, i.e., it neither saw nor heard the witnesses. (See **Selle vs. Associated MotorBoat**

Co [1968] EA 123,and **Zubeda Kiminda vs. Michael Mushi,** Civil Appeal No.98 of 2018 (HC) (Unreported)).

In their submissions, the learned counsels for the parties herein are at loggerheads regarding whether the trial court rightly evaluated the evidence that was presented before it. For his part, Mr. Kagirwa argues that the trial court failed to discharge its duty to properly evaluate the evidence while Mr. Mhagama argues on the contrary holding that the trial court was right and did its job rightly. Essentially, the entire evidence law is largely dependent on the rules governing relevance and admissibility of evidence and that is what a court does when it seeks to admit a particular piece of evidence in exclusion of the other. As such. whether a particular type of evidence is admissible or not is dependent on whether the fact to be established by the evidence is relevant since relevancy is also a measure of admissibility. This is then the point where the issue of evaluation of evidence comes into question.

From its semantically, "to evaluate" something means to critically analyse and give value to, ascertaining the amount, orto find numerical expression for e.t.c., to assess, to review and inspect something to give it value over the other. From that context, evaluation of evidence involves the exercise of reviewing/critiquing the evidence laid before the court during trial in its totality the aim being ascribing to it a probative value or quality. In simple terms, thus, evaluation of evidence is giving a piece of evidence a reasoned belief of or

preference over the evidence of one of the parties to the trial and disbelief of the other.

In principle, a decision arrived at without proper evaluation of the evidence laid before the court cannot stand. That is the duty of the trial court which saw and heard from the witnesses. Such a position was once stressed in the case of **Owakah vs. R.S.H & P.D.A** (2022) 12 NWLR (pt.1845) at 498 where the Nigerian Court had the following to say:

> "The evaluation of evidence and the ascription of probative value to such evidence remains the primary function of the trial court which saw, heard,and duly assessed the witnesses. Where a trial court unquestionably evaluates the evidence and justifiably appraises the facts, what the Court of Appeal ought to do is to find out whether there is evidence on record to justify the conclusion reached by the trial court. Once there is sufficient evidence on record from which the trial court arrived at its finding of fact, the Appellate Court cannot interfere with such findings."

In the case of **MateruLeison& J Foya vs R. Sospeter** [1988] TLR 102, this court was of the view that:

> "it is only in rare circumstances that an appellate court would interfere with the trial court's findings of fact, and it would interfere, for instance,

> where the trial court had omitted to consider or had misconstrued some material evidence, or had acted on a wrong principle, or had erred in its approach in the evaluation of the evidence."

I also find it pertinent to state, albeit in brief that, in the evaluation of evidence the trial court is always guided by the following principles, to state the least: (i) whether the evidence is admissible, (ii) whether the evidence is relevant, (ii) whether the evidence is credible, (iv) whether the evidence is conclusive and (v) whether the evidence more probable than that which is offered by the other opposing party.

In this present appeal, the first bone of contention is that the learned trial magistrate failed to properly evaluate the evidence laid before him. At the trial court,three issues were agreed and recorded for it todetermine, these being:

> (a) whether the Plaintiff accepted the Defendant's Offer for overdraft facility which gave rise to the Defendant to approve and disburse the said credit facilities to the Plaintiff.
> (b) Whether Defendant lawfully charged or debited TZS 4,807,500 from Plaintiff's bank account, and
> (c) What relief(s) the parties are entitled to.

In a bid to establish the said issues positively or negatively, the trial court had before it, on the one hand, two witnesses ((Pw-1) and Pw-2)who, apart from testifying before the trial court also tendered two Exhibits, (**Exh.P-1** and **Exh.P2)** in support of Plaintiff's case (Respondent herein). On the other hand, the Defendants presented only one witness and tendered before the Court six exhibits, (**Exh.D-1, Exh.D-2, Exh.D-3, Exh.D-4, Exh.D-5** and **Exh.D-6**).

It is those evidential materials laid before the Court and the testimonies of the witnesses that the learned counsel for the Appellant has assailed arguing that such evidential materials were not evaluated and, if evaluated then they were improperly evaluated. In short, Mr. Kagirwa has argued that the Magistrate did not consider **Exh.D-4** but rather only concentrated on the testimonies of Pw-1 and Pw-2 as well as **Exh.P-1**, **Exh.P-2** and **Exh.D-5.** It was submitted that had he looked at **Exh.D-4** he would have concluded that the Respondent had consented to the debiting of the 0.75% charges upfront.

I have gone through the proceedings and the judgement of the trial magistrate and looked at the testimonies made before the Court. First, I note that the Court summarised the testimonies of the witnesses as the decision of the trial court would show. According to the record, Pw-1 who testified before the court had explained how he applied for an overdraft facility from the Appellant to expand his business and that the negotiations were done via emails and mobile

phones. As per his testimony, after such negotiations Pw-1 was in the waiting mood, awaiting a Letter of Offer from the Defendant (Appellant).

In his testimony, Pw-1 stated, however, thatthe Offer Letter was not forthcoming as Defendant remained silent after the negotiations, a fact which made Plaintiff (Respondent) seek for and accept an Offer of loan from Diamond Trust Bank. It was also the testimony of Pw-1 that, upon collection of his title Deed from the Defendant, the Plaintiff (Respondent) noted that TZS 4,807,500/= was deducted from her account as facilitation and documentation fees.

On record, it is also shown that Pw-1 tendered in court **Exh.P-1** which was received by the trial court. He also told the court that the Plaintiff (Respondent) did not accept any Letter of Offer or a facility agreement from the Defendant and no such was issued by the Defendant (Appellant) though the Plaintiff (respondent) was waiting for it only to see it being annexed to the Defendant's pleadings. Besides, the record does reveal that Pw-1 had told the trial court that the amount so deducted was part of the Plaintiff's capital which could have generated profits amounting to TZS 300,000 per day.

As per the record, Pw-2 testified to the effect that as chief operations Officer of the Plaintiff (Respondent) he knew of the Defendant's act of debiting the said TZS 4,807,500 from the company's account without authority of the company and that such act affected the capital of the

company, creating a loss of TZS 300,000 per day as the company failed to produce as it used to as per the costs-analysis sheet which he tendered and was received by the trial court without objection from the Appellant (Defendant) and marked **Exh.P-2**.

Pw-2 is also on record to have told the trial court that **Exh.P-2** shows the profit that the company earns every day as it shows the costs of production, gross and net profit. He did tell the court on cross-examination that **Exh.P-2** was prepared by Timothy Msuya who held the post of operating officer which Pw-2 was now holding.

The record does show that the Defendant's case was made up of one witness (Dw-1) who also tendered in proof of the Defendant's case, sixexhibits (**D-1 to D-6**). As the proceedings and judgement of the trial court would reveal the trial magistrate did summarise the testimony of Dw-1 to the effect that, as a senior manager of the Defendant (Appellant) he was acquainted with the Plaintiff.He did admit that TZS 4,807,500/= were deducted from the Plaintiff's (Respondent's) account as facilitation and documentation fees for a loan of TZS 641,000,000/= which the Plaintiff (Respondent) had applied for and, that, the Plaintiff has authorized such deductions through terms and conditions of opening the term loan account which he tendered as **Exh.D-1**.

It is on record as well that Dw-1 tendered in court **Exh.D-2** which was composed of identity documents and Defendant's (Appellant's) officers' residence permits and

extracts of the minutes of Directors meetings.It was also Dw-1 testimony that the Defendant (Appellant) started to process the loan. **Exh.D-3** was a letter tendered by Dw-1 which was from the Defendant to Diamond Trust Bank (DTB) requesting the latter to transfer the amount of TZS 675,000,000 property of the Plaintiff (Respondent) which was held in DTB fixed account.

According to the evidence offered by Dw-1, the TZS 641million facility was approved by Defendant, but the terms and conditions were inter alia, that as a first condition, a 0.75% was to be charged upfront as documentation and facilitation fees. It is on record that Dw-1 testified that this was communicated to the Plaintiff (Respondent) by email- and tendered in court such emails dated 22/05/2015 and October 2015 collectively as **Exh.D-4**.The record does show as well that, in court Dw-1 did also testify that security documents were prepared in respect of the loan and sent to the Plaintiff (Respondent). These included spousal consent, overdraft facility of TZS 641million and of TZS 60million, Guarantee and indemnity, 1st Deed of variation, credit facility agreement, letter of offer dated 30th August 2015, general terms, and conditions applicable to the facilities, minutes of the Plaintiffs company authorizing the taking of the loan, all admitted as **Exh.D-5**.

It is also on record that Dw-1 testified to the trial court that it was after all such arrangements were done and submitted to the Plaintiff (Respondent) that the Defendant (Appellant) received a Plaintiff'sletter revoking the facility.

The letter was also admitted by the trial court as **Exh.D-6**. Dw-1 maintained thus that the debiting of the Plaintiff's (Respondent's) account was justified.

As I stated above, I have carefully gone through the record, including the judgement of the trial court. First, I find that, in his analysis, of the evidence which I have decided to recite hereabove, the trial court did not consider the testimony of Dw-1 at all. Nowhere did the trial court evaluate the testimony of Dw-1 and more so, the value if any of **Exh.D-4** which has been picked out by the Appellant as key to her case.

Whether **Exh.D-4** was a "material piece of evidence" (as Mr. Kagirwa argued in his submission) or not that was exactly the task that the trial court was supposed to discharge but which, unfortunately, did not, and as I stated, neither did the court gave its reflection and thoughts on the value of the entire testimony of Dw-1. Instead, the trial court concentrated its energy (as pages 7-8 of the judgement would show) on the testimony of Pw-1 and **Exh.D-5**.In essence, it is an established principle of law supported by a host of authorities that before any court arrives at a conclusive or decisive end of the case before it, and hence rendering its judgment, it must have considered the evidence of both parties to the case, evaluated the same, and offer its reasoned judgment of it. This has been emphasized by various authorities not only those of this court but more authoritatively by the Court of Appeal itself. I will cite a few examples below.

In the case of **Hussein Iddi and Another vs. Republic** [1986] TLR 166, the Court of Appeal of Tanzania held that:

> "It was a serious misdirection on the part of the trial Judge to deal with the prosecution evidence on its own and arrive at the conclusion that it was true and credible without considering the defence evidence".

As I stated earlier, the trial court did summarize the evidence offered in court during the conduct of the trial, and I have tried to recite such evidence in this judgment as well. However, that was not enough as the court ought to have gone a further step of analysing and evaluating such evidence considering what was offered in evidence by both parties and not just evaluating one side of the evidence while leaving the other side in the dark. Neither is it sufficient to summarise the evidence without much ado that is but one part of the assignment.

A trite legal position to that effect was aptly made out by the Court of Appeal in the case **Leonard Mwanashoka** Criminal Appeal No. 226 of 2014 (unreported), cited in **Yasini S/O Mwakapala vs. The Republic** Criminal Appeal No. 13 of 2012 (unreported) where the Court had the following to say:

> "It is one thing to summarise the evidence for both sides separately and another thing to subject the entire evidence to an objective evaluation in

> order to separate the chaff from the grain. It is one thing to consider the evidence and then disregard it after proper scrutiny or evaluation and another thing not to consider the evidence at all in the evaluation or analysis."

In the case of **Leonard Mwanashoka** (supra), the Court made an even more elaborate position stating that:

> "We have read carefully the judgment of the trial court and we are satisfied that the appellant's complaint was and still is well taken. **The appellant's defence was not considered at all by the trial court in the evaluation of the evidence which we take to be the most crucial stage in judgment writing**. Failure to evaluate or an improper evaluation of the evidence inevitably leads to wrong and/or biased conclusions or inferences resulting in miscarriages of justice. It is unfortunate that the first appellate judge fell into the same error and did not re-evaluate the entire evidence as she was duty-bound to do. She did not even consider that defence case too. It is universally established jurisprudence that failure to consider the defence is fatal and usually vitiates the conviction."

From the above extract from the Court's decision, one can see the magnitude of the effect of not evaluating the evidence when composing a judgement. In the present appeal, it follows that grounds number 2, 3, 4, 5, 6, and 7 which were jointly along those lines of failure on the part of the trial court to properly evaluate the evidence availed to it, do have merits. I am satisfied, therefore, that the trial court erred in its approach to evaluating the evidence by not considering the Defendant's case and exhibits.

But that was on the part of the trial court. What position would have been had it evaluated the entire evidence? As I stated herein before, this being a first appeal, this court is duty-bound to evaluate the evidence and is entitled to come up with its findings, save for the limitations I stated earlierabove which are well captured in **Selle and Another vs. Associated Motor Boat Co. & Another** (supra). In that case, Law, JA, (as he then was) stated that:

> "Where it is apparent that evidence has not been properly evaluated by the trial judge, or that wrong inferences have been drawn from the evidence, it is the duty of an appellate court to evaluate the evidence itself and draw its own conclusions (Price v. Kelsall, [1957] E.A. 752; Benmax v. Austin Motor Co. Ltd., [1955] 1 All E.R. 326)."

In this case, the Plaintiff had in her side Pw-1 and Pw-2 and **Exh.P1** and **Exh.P-2**. There is doubt that Exh.P-1 does

show that on the 2nd of December 2015, an amount equal to TZS 4,807,500 was deducted from the Respondent's account which was equal to a 0.75% as "FF" and "DF" (Facilitation Fee and Documentation Fee) on approved OD (Overdraft Facility) of 641million. This was the source or the basis for Civil Case No.4 of 2016 from which this appeal arose the Appellant arguing that it was a justified deduction. Was it justified?

In his testimony, Pw-1 and Pw-2 alleged that such debiting of the Plaintiff's (Respondent) account was unjustified and an unauthorised debiting the reason being thatno facility agreement was ever concluded between the Plaintiff (Respondent) (Appellant) as no Letter of Offer was issued by the Appellant (Defendant) which would have created a binding agreement. As such reliance was and has been (even in this appellate stage) put on section 10 of the Contract Act, Cap.345 R.E 2019.

However, in his testimony, Dw-1 although in his testimony Dw-1 did admit that the Appellant (Defendant) did debit TZS 4,807,500/= from the Plaintiff's (Respondent's) account, he testified that such deduction was justified as facilitation and documentation fee for the loan of TZS 641,000,000/= which the Plaintiff (Respondent) had applied for and, that, the Plaintiff had authorized such deductions through terms and conditions of opening the term loan account which he tendered as **Exh.D-1**.The immediate question to ask is whether **Exh.D-1** authorized such deductions upfront.

Looking at **Exh.D-1** it does indeed authorize the Bank (Appellant herein (also Defendant in the trial court)) "*to be paid by the Customer and may debit Customer with: … charges...and expenses incurred in complying with the Customers' request*". See as term No.5(d) of the General Terms and Conditions admitted by the trial court as **Exh.D-1**. However, as I look at **Exh.D-1** which seems to be dated 1st of April 2010, the time when the banking relationship between the Defendant (Appellant) and the Plaintiff (respondent) ensued, I do not see anywhere it authorise an upfront debiting of such kind of charges and expenses (fees) from the Plaintiff's (Respondent) account in case the Plaintiff (Respondent) applies for a credit facility.

One should also bear in mind that much as there is a contract that creates a bank-customer relationship when a customer opens an account with the bank, as stated by this court in the case of **Equity Bank Tanzania Ltd vs. Jonnelly TZ Company Ltd**, Civil Appeal No.37 of 2020 (HC) (unreported), such contractual relationship is not an ordinary one. In the case of **Ecobank Tanzania Ltd vs. Future Trading Company,** Civil Appeal No.82 of 2019 (Unreported). In that case, the Court of Appeal stated, on pages 27-28 of the typed judgment, that:

> "... in banking the relationship of a banker and its customer, is a fiduciary one. The banker is a trustee and the customer, a beneficiary. This is because of the massive control that a banker has over the

> depositor's funds and the unfettered prerogative it has to use the money without consulting its owner vis-a-viz almost no powers that a customer remains with. The latter position, into which a customer is placed by the relationship, attracts in its favour immense protection of both the law and the courts. The upper hand that the bank enjoys with the money brings it within the grip of section 115 of the Evidence Act in circumstances where there is a state of uncertainty as to the money's security or availability. … **The point we want driven home is that it was upon the appellant bank to prove that it was not at fault in the disappearance of the respondent's funds, because it was the sole custodian of the money**." (Emphasis added).

In the present appeal, the Appellant had contended that the debiting of the account was justified and relied on **Exh.D-1** which, as I said, though authorizing deductions, nowhere it authorized upfront deductions when loans are advanced. In his testimony, Dw-1 told the trial court that**,** **Exh.D-1** was issued to the Plaintiff (Respondent) when the latter opened a "term account" with the Defendant (Appellant). A term account (also known as a fixed-term account) is a type of account that allows a depositor

(customer) to agree with the bank to deposit a certain amount of money for a fixed term without having the ability to add anymore to the balance until the agreed term comes to an end.

On the other hand, a loan facility (credit facility) is completely a different thing. It is an agreement or a facility letter in which a lender, usually a bank or other financial institution, sets out the terms and conditions under which it is prepared to make a loan facility available to a borrower. It is sometimes called a loan facility agreement or a facility letter, the loan facility being either a term loan, a revolving facility, or an overdraft facility like what was the case in this present appeal.

In principle, a loan facility agreement is completely different from the ordinary underlying contract that the bank may have with its customerconcerning opening of bank accounts as it has its terms and conditions governing the lending-borrowing relationship. If so, what then, in the context of this present appeal, was the source of the alleged authorization to deduct upfront the 0.75% (FF& DF) as alleged? And, if there was such, did it constitute a binding agreement thatwas fully synchronized within the minds of the parties in such a manner that each party knew, and anybody else, could have understood for sure that the Plaintiff (Respondent) had mandated the Defendant (Appellant) to deduct upfront the said 0.75% (FF & DF)? To respond to that one must look at **Exh.D-4**.

As I stated herein earlier, the trial court did not examine this Exhibit at all nor did it consider in detail what Dw-1 has testified in court, though the trial court summarized his testimony. I have addressed the legal effect of that inaction, and I need not repeat what it means. In his testimony, Dw-1 told the court that the parties' communication was entirely based on the exchange of emails. **Exh.D-4** is therefore the respective emails in question.

Notably, most of the emails had communicated the need, on the part of the Respondent to regularize the account she maintained with the Appellant which was overdrawn and attracting penal interests. Proposals to regularise were communicated in the emails dated September 21, 2015, exchanged at 9:23 am, 11:00 am and 3:07 pm. These are the emails that brought in the issue of "Facilitation and Documentation Fees" (FF & DF) and, as theexchange of emails dated26th of September 2015 at 10:09am; and 10:23am, would reveal, this was a sticky issue.

In the last of the emails dated on the same date, which was sent at 2:06 pm, the following proposal regarding how much was to be charged as" FF & DF" the following was communicated to the Respondent, and I quote:

> "Dear Mr. Rajan,
> Upon further representation from our BM Iringa and deliberations, I am pleased to mention that we can look to reduce the total fees (FF and DF) together from 1.12% to 0.75%

upfront on the facility amount.
Please confirm it is ok.
Thanks, and Regards,
Sandeep Kumar Sinha...."

In response to the above email, on the 28th of September 2015, at 12:49 PM, the Respondent Officer, one Rajan, to whom the earlier email was communicated responded as follows, and I quote only the relevant portion of the email:

"Dear Mr. Sandeep
Greetings,
We hereby confirm the acceptance and need an ethical and professional move from DTB…."

As the facts earlier disclosed herein and **Exh.D-6** would reveal, much as all such arrangements were done and agreed upon before entering into the formal credit facility agreement, later, while the Appellant was preparing the necessary documentation, the Respondent had a change of mind and renege on her earlier position to transfer her accounts from Diamond Trust Bank (DTB) to the Appellant and from the whole deal earlier discussed and settled for action. As Pw-1 stated in her testimony, the Respondent sought and obtained a credit facility from elsewhere because there was a delay of four weeks on the part of the Appellant to sanction the credit facility which she was in dire need of.

In his testimony, Pw-1 told the trial court as well that the emails exchanged between the parties were only part of prior negotiations to the entering into a formal agreement

which, nevertheless, was not executed as **Exh.D-5** would show. However, as the testimony of Dw-1 and **Exh.D-3**would show, past the email dated September 28th, 2015 (part of **Exh.D-4**), the Appellant started to act on the Respondent's proposals which included a takeover of the Respondent's liabilities with the DTB.

In his testimony, Dw-1 testified, and, indeed, as the said email dated September 28th, 2015, confirms, that the Respondent had agreed to the charging of the 0.75 % of the request credit facility of TZS 641nilliom as "FF & DF" **upfront**.Dw-1 testified that following that acceptance, the Appellant herein proceeded with the processing of the loan-related documents which were sent to the Respondent for signing. These documents which were processed were admitted as **Exh.D-5**.

During cross-examination, on page 45 of the proceedings of the trial court, Dw-1 is on record testifying that the power to debit the 0.75% upfront was derived from the Respondent's email, this, undoubtedly being the email dated September 28th, 2015. He did admit, however, that the credit facility Letter Offer issued by the Appellant was not admitted by the Respondent. But the issue here, in my view, is not whether there was a credit facility agreement between the two parties to warrant a lengthy discussion of it since **Exh.D-5** was clear that the Offer was not accepted, and Dw-1 admitted that fact.

What was at issue and which the trial court ought to have determined is whether the Appellant was entitled to

deduct the 0.75% as charges (FF and DF). To be able to respond to that, one should have considered the status and effects of the email dated September 28th, 2015. Did it constitute a separate binding agreement within the bigger picture of the credit facility application which nevertheless never materialized? Was it just part of prior negotiations to contract and what legally is the value of such pre-contractual negotiations? Are they enforceable or just "a mere prelude to the real thing?"

To be more precise, did the email dated 28th of September 2015 create any legal relationship between the Appellant and the Respondent that could be enforced even if the latter walked out from the credit facility arrangements whose preparatory documentation phase had been sanctioned by both parties to attract a 0.75% charged upfront? In my view, those are the kinds of questions that should have engaged the mind of the trial court when analysing the evidence before him, particularly **Exh.D-4**. As I stated earlier, he never considered **Exh.D-4**. This court being a first appellate court must analyse and evaluate the entire evidence including **Exh.D-4** and respond to such questions as raised herein. I will proceed with that analysis shortly.

To begin with, the general rule is that any pre-contractual discussions, made during the negotiation of the contract, are in principle, inadmissible as evidence. They cannot even be relied on to assist in determining the construction of a contract that was being contemplated. The

English case of **Prenn vs. Simmonds** [1971] 1 WLR 1381) is clear to that stated general rule and the Court was of the view that:

> "The reason for not admitting evidence of these exchanges is … simply that such evidence is unhelpful. By the nature of things, where negotiations are difficult, the parties' positions, with each passing letter, are changing and until the final agreement, though converging, still divergent. It is only the final document which records a consensus [and] ... nothing is gained by looking back…[as] at [that] stage there is no consensus of the parties to appeal to. It may be said that previous documents may be looked at to explain the aims of the parties. In a limited sense, this is true: the commercial, or business object, of the transaction, objectively ascertained, may be a surrounding fact. Cardozo J. thought so in the *Utica Bank case*….Far more, and indeed totally, dangerous is it to admit evidence of one party's objective - even if this is known to the other party. However strongly pursued this may be, the other party may only be willing to give it partial recognition, and in a world of give

> and take, men often have to be satisfied with less than they want. So, again, it would be a matter of speculation how far the common intention was that the particular objective should be realised."

The discussion regarding the utility of prior negotiations in a contracting scenery featured as well in the English case of **Chartbrook Limited vs. Persimmon Homes Limited and others** [2009] UKHL. In that case, the rule that pre-contractual discussions do not constitute contracts featured in the Court's discussion and the case of **Prenn vs.Simmonds** (supra) was revisited with approval. However, much as Lord Hoffman approved it by quoting the above-quoted extract from the case of **Prenn vs. Simmonds** (supra), he observed (see paragraphs 33, and 42 of the House of Lords decision) that there are certain circumstances, though does not consider them as exceptions to the rule, when prior negotiations may be relevant.

One notable circumstanceis that such prior negotiations will only be relevant when establishing a background or when they are invoked to operate as estoppel against a party. For clarity, I will quote the stated observations of Hoffmann LJ who stated as follows:

> "I do however accept that it would not be inconsistent with the English objective theory of contractual interpretation to admit evidence of previous communications between

> the parties as part of the background which may throw light upon what they meant by the language they used. The general rule, as I said in Bank of Credit and Commerce International SA v Ali [2002] 1 AC 251, 269, is that there are no conceptual limits to what can properly be regarded as background. Prima facie, therefore, the negotiations are potentially relevant background. They may be inadmissible simply because they are irrelevant .... Of course, judges may disagree over whether in a particular case, such evidence is helpful or not. In *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523. Thomas J thought he had found gold in the negotiations, but the Privy Council said it was only dirt. As I have said …, however, **I would accept that previous negotiations may be relevant**…" (Emphasis added)

In paragraph 42 of the decision. Lord Hoffman further expounded on the context under which prior contractual negotiations may be relevant. He stated, and I quote, that:

> The rule excludes evidence of what was said or done during the course of negotiating the agreement for the purpose of drawing inferences about

> what the contract meant. It does not exclude the use of such evidence for other purposes: for example, to establish that a fact which may be relevant as the background was known to the parties, or **to support a claim for rectification or estoppel**. **These are not exceptions to the rule. They operate outside it.**(Emphasis added).

It is worth noting, however, that, in paragraph 61, Lord Hoffmann noted, citing with approval what Mustill J stated, in the case of **Olympic Pride (Etablissements Georges et Paul Levy vs. Adderley Navigation Co Panama SA** [1980] 2 Lloyd's Rep 67, 72, (a claim for rectification: the correction of a document where the parties were in complete agreement on the terms, but wrote them down wrongly), that:

> "The prior transaction **may consist either of a concluded agreement** or acontinuing common intention. In the latter event, the intention must have been objectively manifested. It is the words and acts of the parties demonstrating their intention, not the inward thoughts of the parties, which matter." (Emphasis added).

In that same case of**Chartbrook Limited's case** (supra),Baroness Hale stated as follows at para 99, while

generally in accord with what Lord Hoffmann and Lord Walker had stated, and I quote:

> "But I have to confess that I would not have found it quite so easy to reach this conclusion **had we not been made aware of the agreement which the parties had reached on this aspect of their bargain during the negotiations which led up to the formal contract**.... If the test of the parties' continuing common intentions is an objective one, then the court is looking to see whether there was such a prior consensus and if so, what it was. **Negotiations where there was no such consensus are indeed "unhelpful".But negotiations where consensus was reached are very helpful indeed**. ..." (Emphasis added).

I must state, in the first place, that, although the Englishcases referred to herein were dealing with the issues ofconstruing a contract that was already a final product of the parties' negotiation, meaning that the parties had gone to the ends by executing a contract, a fact which is not the case in this Appeal, it is my strong view, nevertheless that, still the cited persuasive cases are relevant and do state matters of principle which I find to be convincingly helpful in shaping my

considerations regarding **Exh.D-4** and the argument that it was merely raised during the pre-credit facility negotiations.

I hold so because, **firstly**, **Exh.D-4**, especially the emails dated 26th of September 2015 and 28th of September 2015 stand as a pre-contractual document constituting a prior agreement between the parties that a 0.75% would be charged upfront for purposes of Facilitation and Documentation Fees ("FF&DF"). **Secondly**, the email dated 28th of September 2015 does attract the attention the doctrineofestoppel. That is to say, the Respondent cannot be allowed to renege on the fact that he agreed to the charging of the "FF&DF" upfront.

But that will not in itself be the end of the spectrum or the story. A more pertinent issue will be whether such an agreement was meant to be a stand-alone agreement even where the parties failed to reach a final agreement. Put differently, if the parties were in the state of negotiation as the Respondent seems to argue, was the acceptance of 0.75% deductions upfront an acceptance that stands away from the final contemplated contract expected to be concluded by the parties? We all know for sure that the parties did not reach their ultimate goal as the documents tendered as **Exh.D-5** were at the end of the spectrum, and never executed. They never memorialized their intended credit facility agreement. As I said, however, the implication was to be sated of **Exh.D-4.**

In my considered views, if **Exh.D-4** is to be binding as Mr. Kagirwa, the learned counsel for the Appellant seems to

argue, one has to look at its wording and the context under which it was generated key factor in determining whether it is intended to have legal effect. Moreover, consideration would need to be made as to whether all elements of a legally enforceable contract are present, i.e., offer, acceptance, consideration, etc.If all elements are present such a pre-contract document may be considered legally binding.

It is also worth noting that, the parties in a pre-contractual negotiation stage, may agree to some binding obligations, say for instance on such as obligations of confidentiality, allocation of costs for negotiations, or document preparation, the latter being at issue in this Appeal. However, in such a scenario, the relevant document must be very clear and categorical on what is and what is not intended to have a legal effect. It means, therefore, that, the context under which each case is to be determined matters a lot, since, where a party has incurred sunk costs, as Schwartz and Scott argue:

> "A court must then decide whether to protect the [party's] expectation interest, or to protect [their] reliance interest by reimbursing his sunk cost, or to award him nothing."

From the literature and available case law about pre-contractual negotiations and whether they have the potential to create legal effects, it seems to me that the theoretical framework upon which such are premised is essentially the

reliance theory of contract. Under it, a gamut of doctrines such as promissory estoppel, misrepresentation, unjustified enrichment, and obligation to bargain in good faith have been at the core of attraction and discourse. While I do not intend to open to all that whole lot, I find it pertinent within the confines of this appeal to address those which apply to it only. One is the doctrine of "good faith"and several modern courts do impose a duty to bargain in good faith on the party wishing to exit from a bargain where the other party expects her to act in good faith.

According to **Schwartz &Scott,**(supra), a duty to act in good faith will hold a party liable in a situation where:

> "the parties have made a preliminary agreement … when they have agreed on certain terms but left other terms open, so that the best inference from their negotiations is that they have made a binding preliminary commitment to pursue a profitable transaction."

The American case of **Tan vs. Allwaste,** Inc.No. 96 C 3558, 1997 WL 337207 (N.D. Ill. June 11, 1997) isa good example to consider. In this case, the plaintiffs were shareholders of a firm engaged in subsurface utility engineering. The Defendant has contemplated acquiring that firm and a letter of intent was executed. It had provided that the closing of the purchase was contingent on a 'satisfactory review' of the financial statements of the firmintended to be

acquired and its operational practices. The letter bound the parties to "*pursue a deal in good faith*".

During the due diligence investigation, however, the Defendant "discovered that the company had not remitted payroll and withholding taxes to the Internal Revenue Service for some time. On that account, Defendant backtracked and was unwilling to acquire the company even after the shareholders offered to lower the price.When the parties landed in court, the court analysed the letter of intent not as a fully binding contract for Defendant to acquire Plaintiffs' company, but "*as a preliminary agreement obligating Defendant to negotiate further in good faith*." It was the court's conclusion, therefore, that the Plaintiffs had provided sufficient evidence for a reasonable jury to conclude that Defendant backed out of the deal for reasons unrelated to Plaintiffs' firm's actions, omissions, or financial status.

Ordinarily, where a party enters or continues in negotiations while he/she does not intend to reach an agreement with the other party and does leave the other party under the justified assumption that a contract would be concluded, such a party will be acting in bad faith. In such a scenario, as Klaus Peter Berger argues, in *History & Modern Evolution of Transnational Commercial Law* the party breaking off while she/he has signalled to the other party before or during the negotiations that the contract will be concluded must be held liable as their negotiations were at a point of "point of no return" after which the party may not simply say "no" and quit at will. This is simply because the

other party expected that the contract would be concluded, and that is, indeed, a "justified" expectation.

The above conclusion, however, is based on an objective test to be employed by the court and is based on a reasonable man's point of view. Put differently, one is to ask whether it was reasonable for the remaining party under the circumstances of the case and consider the conduct and statements of the other side to assume that the contract will be concluded, i.e., to rely on the conduct of the other side.

In Farnsworth, Allan, **Contracts,** 2nd ed., Boston, Toronto, London 1990 at page, 195 et seq., this learned author states, however, that:

> "The problem of liability arising out of unsuccessful negotiations is commonly viewed in the optic of offer and acceptance though, as has been pointed out, the classic sequence of offer and acceptance is often absent in important contract negotiations. Under the basic rules of offer and acceptance, there is no contractual liability until a contract is made by the acceptance of an offer. Prior to acceptance, the offeror is free to back out by revoking the offer. No sympathy is lost on the offeree if the offer is revoked, for an offeree is regarded as amply protected by the power to accept before revocation. An

> offeree [who] chooses to rely on the offer without accepting it is seen as taking the risk that the reliance will go uncompensated. This "freedom from contract" is enhanced by the judicial reluctance to read a proposal as an offer in the first place."

To ice the above propositions, Farnsworth (supra) further states, as a matter of general principle, that:

> "Courts have been even more reluctant to impose liability if no offer has been made at the time that the negotiations are broken off. At the root of this reluctance is the common law's "aleatory view" of negotiations: a party that enters negotiations in the hope of the gain that will result from the ultimate agreement bears the risk of whatever loss results if the other party breaks off the negotiations. That loss includes out-of-pocket costs the disappointed party has incurred, any worsening of its situation, and any opportunities that it has lost as a result of the negotiations. All this is hazarded on a successful outcome of the negotiations; all this is lost on failure. As an English judge expressed it, the disappointed party "undertakes this

> work as a gamble, and its cost is part of the overhead expenses of his business which he hopes will be met out of the profits of such contracts as are made ..." [citing *William Lacey (Hounslow) Ltd, v Davis*, [1957] 1 W.I.R. 932, 934 (Q.B.)] This aleatory view of negotiations rests on a concern that limiting the freedom of negotiation might discourage parties from entering negotiations. "

However, the above-noted learned author does not end on those broad understandable principles. He, on the other hand, goes further and states that:

> "With rare exceptions, Courts have resisted suggestions that parties may in some circumstances come under a duty to bargain in good faith.[...]A rare exception in which a court imposed a duty to bargain in good faith is *Heyer Products Co. v. United States*. Heyer, the disappointed low bidder on a government contract, sued the government, alleging that it had awarded the contract to a higher bidder in order to retaliate against Heyer for testimony at a Senate hearing. The United States Court of Claims held that, while the government "could accept or reject an offer as it pleased," it had an "obligation to honestly consider

> [Heyer's bid] and not to wantonly disregard it." For breach of this duty, it would be liable to Heyer for its expenses in preparing its bid, although not for its lost profits**.** The rule must be regarded with caution, having been framed in the context of an invitation to bid on a government contract where the bidder's power to revoke its bid is restricted. But though the court noted that recovery could. be had only on proof of "a fraudulent inducement for bids," subsequent decisions have required only "arbitrary and capricious" behavior."

Farnsworth (supra) notes, further that:

> "In recent decades, courts have shown increasing willingness to impose precontractual liability. The possible grounds can be grouped under four headings: (1) unjust enrichment resulting from the negotiations; (2) a misrepresentation made during the negotiations; (3) a specific promise made during the negotiations; (4) an agreement to negotiate in good faith."

In the case of *Fonderie Officine Meccaniche Tacconi SpA vs. Heinrich Wagner Sinto Maschinefabrik GmbH*, EC Reports, 2002, para 17, the EC Court of Justice held that:

> "Pre-contractual liability, however, may be imputed only to a person who has a special relationship with the person who has suffered harm, namely that resulting from the negotiation of a contract. Consequently, by contrast with the principles applicable to matters relating to tort, delict or quasi-delict, pre-contractual liability cannot be assessed except by reference to the content of the negotiations."

Another persuasive literary authority worth considering in this discourse, is Huchison, Dale (Ed.)/Pretorius, Chris (Ed.), **The Law of Contract in South Africa**, Oxford University Press, South Africa, 2008 in which, on p. 103 the authors note that:

> "South African courts have recognised that the principle of good faith applies to precontractual negotiations, but the implications of this have still to be worked out. No doubt, parties are still free to break off negotiations for any reason whatsoever. Generally, they will not incur delictual liability for doing so since a party who incurs expenditure, relying upon a representation that a contract will be concluded, usually takes a calculated business risk.**Nevertheless, it is not too difficult to envisage**

> **situations where such reliance might in fact be reasonable, in which case withdrawal from the negotiations might come at a considerable cost in damages**." (Emphasis added).

The South African cases relied on by **Huchson& Pretorius** (supra) as sanctioning the principle of good faith is the case of **Meskin NO vs. Anglo American Corporation of SA Ltd 1968** (4) SA.793 (W) at 804D; **Everfresh Market Virginia (Pty) Ltd vs. Shoprite Checkers (Pty) Ltd** 2012 (1) SA 256 (CC). In the latter case, the Constitutional Court of South Africa looked at the issue before it from the perspective of the need to develop the common law contract principles considering the constitutional developments in the country and stated, on para 36 and 37 that:

> "A common law principle that renders an obligation to negotiate enforceable cannot be said to be inconsistent with the sanctity of contract and the important moral denominator of good faith. Indeed, the enforceability of a principle of this kind accords with and is an important component of the process of the development of a new constitutional contractual order…. good faith should be encouraged in contracts and a party should be held to its bargain. The question to be

> answered is whether the common law as developed requires the enforcement of the bargain in this case."

In his article titled "*'Liability for breaking off contractual negotiations?* (2012) 129(1) **South African Law Journal** 104, Andrew Hutchison hasconsidered the possibility of one being able to succeed in a pre-contractual alleged action, but on the aspect of unjustified enrichment. The case at point is that of **Cobbe vs. Yeoman's Row Management Ltd** [2008] 1 WLR 1752. In this case Mr Cobbe, the Plaintiff contracted with the defendant company which owned several flats.

During the parties' preliminary negotiations, it was agreed but never formalised into a binding contract, that Cobbe would spend money on obtaining planning permission for a new housing development on the site of an existing block of flats. If permits were successfully obtained, the Defendant company was to sell the property to Plaintiff for £12 million, on the understanding that should the profits on the subsequent housing development reach £24 million, it would be entitled to 50 percent of the gross profits over this amount.

Having expended considerable amounts of time and energy on the project and successfully obtained the necessary permission, Defendant refused to sell the property to him for less than £20 million, with Defendant to receive 40 percent of the amount by which profits exceeded £40 million.

However, Cobbe insisted on sticking to the initial agreement, a fact which made the Defendant company to withdraw from negotiations. When the matter went up to the House of Lords. Although the Plaintiff could not rely on the doctrine of proprietary estoppel, the Court awarded the Plaintiff damages for the services rendered in the form of *quantum meruit*, (i.e.,damages are awarded in an amount considered reasonable to compensate a person who has provided services in a quasi-contractual relationship).

A similar situation may be observed in the Australian case of **Sabemo (Pty) Ltd vs. North Sydney Municipal Council** [1977] 2 NSWLR 880, relying on an earlier English case of **William Lacey (Hounslow) Ltd vs. Davis [**1957] 1 WLR 932. In the case of**Sabemo** (supra) Sheppard, J had the following to say, on pp.902-3:

> '[W]here two parties proceed upon the joint assumption that a contract will be entered into between them, and one does work beneficial for the project, . . . which he would not be expected, in other circumstances, to do gratuitously, he will be entitled to compensation or restitution if the other party unilaterally decides to abandon the project, not for any reason associated with bona fide disagreement concerning the terms of the contract to be entered into, but for reasons which, however valid, pertain only to his own position and

> do not relate at all to that of the other party.'

As I stated earlier herein, another possibility relied on in holding a party liable in pre-contractual agreements is the doctrine of promissory estoppel.Promissory estoppel is a doctrine originating in English law, which prevents the maker of a promise, intended to be legally binding, from denying that he or she is bound by that promise. This stems fromthe decision of Denning J (as he then was) in **Central London Property Trust Ltd vs. High Trees House Ltd,** [1947] KB 130, and it was developed to provide a defence where no contract could be relied on due to a lack of consideration given for the promise.

In the case of **Attorney-General of Hong Kong vs. Humphreys Estate Ltd**[1987] 1.AC. 114 at 124, the House of Lords had observed and accepted that:

> "the government acted to their detriment and to the knowledge of HKL in the hope that HKL would not withdraw from the agreement in principle. But in order to found an estoppel the government must go further. First the government must show that HKL created or encouraged a belief or expectation on the part of the government that HKL would not withdraw from the agreement in principle. Secondly, the government must show that the government relied on that belief or

> expectation. Their Lordships agree with the courts of Hong Kong that the government fail[ed] on both counts."

In principle that is how promissory estoppel works. In the case of **Crabb vs. Arun District Council** [1975] 3All E.R.865, was of the view that:

> "The basis of ... promissory estoppel—is the interposition of equity. Equity comes in, true to form, to mitigate the rigours of strict law. The early cases did not speak of it as 'estoppel'. They spoke of it as 'raising an equity'. "

The final case to look at is the Australian case of In **Walton Stores (Interstaed) Ltd vs. Maher** (1988) 62 ALJR 110 where the High Court of Australia (BrennanJ., (as he then was) stated, at para 23 that:

> "Parties who are negotiating a contract may proceed in the expectation that the terms will be agreed, and a contract made but, so long as both parties recognize that either party is at liberty to withdraw from the negotiations at any time before the contract is made, it cannot be unconscionable for one party to do so. Of course, the freedom to withdraw may be fettered or extinguished by

> agreement but, in the absence of agreement, either party ordinarily retains his freedom to withdraw. It is only if a party induces the other party to believe that he, the former party, is already bound and his freedom to withdraw has gone that it could be unconscionable for him subsequently to assert that he is legally free to withdraw."

The court went ahead to state that, for equity created by estoppel to exist, the party who induces the adoption of the assumption or expectation must have known or intendedthat the party who adopts it will act or abstain from acting in reliance on the assumption or expectation. The Court was of the view that, at para 25 and 26 of its decision, that:

> "The unconscionable conduct which it is the object of equity to prevent is the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion. The object of the equity is not to compel the party bound to fulfil the assumption or expectation; it is to avoid the detriment which, if the assumption or expectation goes unfulfilled, will be suffered by the

> party who has been induced to act or to abstain from acting thereon…A non-contractual promise can give rise to an equitable estoppel only when the promisor induces the promisee to assume or expect that the promise is intended to affect their legal relations and he knows or intends that the promisee will act or abstain from acting in reliance on the promise, and when the promisee does so act or abstain from acting and the promisee would suffer detriment by his action or inaction if the promisor were not to fulfil the promise. When these elements are present, equitable estoppel almost wears the appearance of contract, for the action or inaction of the promisee looks like consideration for the promise on which, as the promisor knew or intended, the promisee would act or abstain from acting."

I have taken the liberty of traversing the terrains of legal scholarship and that of case law simply because the appeal at hand had raised an issue of considerable importance given the fact that it is common practice in some industries such as the banking industry, to charge customers a fee facilitation and documentation fees upfront (i.e., at or near the inception of a contract. Such upfront fees are often characterized as

"nonrefundable". They may have various labels attached to them such as fees for set up, access, activation, initiation, or facilitation or preparation of documentation and the like. The challenge as demonstrated in this appeal is whether such will remain non-refundable even when the parties failed to memorialize their negotiations and discussions into a binding form.

The principle, in my considered view, is that, where an intended agreement fails to materialise in a situation where the offeror had charged such fees upfront, the non-refundability factor cannot still stand in favor of the offeror unless the basis upon which it was premised is proved to be "a binding pre-contract agreement" for which the offeree will have assumed a duty to act in good faith by not being able to freely walk out at the expense of the offeror. See also the discussion above in respect of the case of **Walton Stores (Interstaed) Ltd vs. Maher** (supra).

I hold it that way because, even from accounting or revenue perspectives, leaving aside the legal perspective, although a nonrefundable upfront fee may relate to an activity that the party is required to undertake at or near contract inception to fulfil the contract, the fact remains, as the renowned PricewaterhouseCoopers International Limited (PWC)puts it in its "**Revenue from Contracts with Customers"**(a Reporting Guide, partially updated May 2023) states in chapter 8.4 thereof, the upfront fee is only regarded as:

> 'an advance payment for future goods or services and, therefore, would be recognized as revenue when those future goods or services are provided….No revenue should be recognized upon receipt of an upfront fee, even if it is non-refundable if the fee does not relate to the satisfaction of a performance obligation. Nonrefundable upfront fees are included in the transaction price and allocated to the separate performance obligations in the contract. Revenue is recognized as the performance obligations are satisfied."

That is how those from the accounting profession would treat an upfront fee in their obligated reporting. And, if so done, I wonder why from the legal profession one will still argue that where there is no performance of the contract the upfront fees will not be refunded unless the same arose from a prior binding agreement. In the present appeal, argument has been raised to the effect that **Exh.D-4** was such an agreement. Is it so? Essentially, it must be noted that, **Exh.D-4** was arrived at in the context of the exchange of emails as the parties envisage a facility agreement part of which the terms would include a charging of 0.75% (FF&DF) upfront.

As I stated earlier herein, the context under which a particular case is decided matters a lot when dealing with the kind of situation as the one at hand. That becomes

imperative, especially where a party has incurred sunk costs, and, as Schwartz and Scott argue:

> "A court must then decide whether to protect the [party's] expectation interest, or to protect [their] reliance interest by reimbursing his sunk cost, or to award him nothing."

But the key to the stirring up of the above proposition to action is where the respective conduct of the parties during their negotiation trajectory constitutes a "preliminary binding agreement" which may attract the duty to act in good faith.But in respect of the present appeal at hand, unlike what the situation was in the case of **Tan vs. Allwaste**, (supra) where a letter of intent was executed by the parties amounted to a binding preliminary agreement obligating the Defendant to negotiate in good faith, the situation as regards **Exh.D-4** in the present appeal is different as the e-mail dated 26th of September 2015 was a mere proposal raised in the course of negotiating terms under which the expected credit facility agreement, as a whole, was to be offered.

In my view, the Respondent's acceptance of the proposed 0.75% 'FF & DF' by the email dated 28th of September 2015 cannot be held to have constituted a stand-alone binding preliminary agreement as the parties were still on the negotiation stance and no offer was yet to be made to the Respondent. If that is to be understood from that perspective, one will also be at liberty to invoke what **Farnsworth** (supra) stated, that, is, courts are always

reluctant to impose liability if no offer has been made at the time that the negotiations are broken off. In the present appeal, the Letters of Offer were not even availed to the Respondent but were still with the Appellant.

But it may as well be argued that **Fairsworth's**conclusions though correct, will apply in a situation where a party (offeror) is seeking to be compensated for having incurred sunk costs when the negotiations break off. Besides, the situation here is a bit different as it relates to fees alleged to be non-refundable and which were charged upfront, but the contract never materialized.

But one can alsoconsider the matter fromthe equitable angle of estoppel doctrine. From the reliance theoretical perspective, where one party has taken the initiative to rely on a promise made by another to his/her detriment, that will attract not only the doctrine of promissory estoppel, as some of the cases considered here above would tell butmay also invite a consideration of the duty to act in good faith.

Now, to bring the discussions once again within the context of this appeal and regard being had to **Exh.D-4**, the question will be whether after responding to the email dated 26th September 2015, which was sent at 02:06 pm by way of email dated 28th of September 2015, sent at 12:49 pm, the Respondent created an expectation on the part of the Appellant that the contract was on its way to formal execution and thus, the Respondent could not just back-off

without a tag attached to his decision even in the absence of a fully binding credit facility agreement.

Looking at the two emails forming part of **Exh.D-4**, I find that the last email sealed the negotiations with an "*understanding*" (not a binding agreement as no intention of being bound at the time was created) that a 0.75% FF&DF was chargeable upfront, thereby releasing the parties to an action path of memorializing their discussions by executing a formal binding credit facility agreement.

Firstly, from that moment, the Respondent created or encouraged a belief or expectation on the part of the Appellant that the former was ready to proceed to the last stage and not withdraw in principle from that agreed position. Secondly, the Appellant did go ahead, relying on that belief or expectation, to prepare the necessary documentation and as **Exh.D-3** and **Exh.D-5** would evince. Based on the persuasive case of the **Attorney-General of Hong Kong vs. Humphreys Estate Ltd** (supra), there being proof of the two aspects, the Respondent could not have walked away at will as she was estopped.

Besides, as noted earlier in the persuasive case of **Sabemo (Pty) Ltd vs. North Sydney Municipal Council**(supra)once two parties agree to proceed to a stage where each holds a common assumption or understanding that they will end up executing a contract, but the other party suddenly backs off while his/her counterpart has done "work beneficial for their "project", say, has embarked on preparing documentation for execution as the appeal at hand

reveals, which he would not have been expected, in other circumstances, to do gratuitously, there will be consequences.

As a matter of equity,such a counter-party will be entitled to some form of compensation or restitution in case of the earlier party unilaterally decides to backpedal or back off from the "project" for other reasons that pertain only to his position, however valid, if such decision is not associated with bona fide disagreement concerning the terms of the contract to be entered intoand do not relate at all to that of the other party. It follows, therefore, that, the decision by the Respondent to unilaterally backoff from the understanding already established between the two as evinced by **Exh.D-4**cannot just slip away scot-free. From a reliance point of view, the Appellant relying on the understanding derived from **Exh.D-4**, had gone an extramile of taking up preparatory steps as evinced by **Exh.D-3** and **Exh.D-5.**

Besides, the Respondent's act of back-tracking from the earlier position was not because the parties were indifferent regarding the terms of the envisaged contract or that the Appellant had developed a mistrust. Although the Respondent is on record to have testified before the trial court that he backedoff because the Appellant was ready to sanction the facility hence occasioning a delay on her part, there was no evidence to that effect such as a letter/email or the like from the Respondent's side showing that he ever raised such a concern with the Appellant.

From the above considerations, it follows that the Respondent's action of withdrawing from the arrangements was unconscionable. And, as the Court in **Walton Stores (Interstaed) Ltd vs. Maher** (supra) stated in paragraphs 25 and 26, it is the object of equity to seek to prevent such unconscionable conduct, i.e.,

> "the failure of a party, who has induced the adoption of the assumption or expectation and who knew or intended that it would be relied on, to fulfil the assumption or expectation or otherwise to avoid the detriment which that failure would occasion."

As I stated, the Appellant could seek to be compensated for what he had embarked on to do. And, that compensation would only be commensurate to what he had spent as preparatory expenses. Inspirations on that course may be drawn from the persuasive case of **Cobbe vs. Yeoman's Row Management Ltd** [2008] 1 WLR 1752. However,in the circumstances of this case, since the Appellant had already debited 0.75% upfront as an amount to cover facilitation and documentation fees, that amount is commensurate to what the Appellant could have claimed from the Respondent.

From the extensive discussions, it follows, therefore, that much as the amount deducted from the Respondent's account should not have been deducted because the facility agreement never came to light and **Exh.D-4** did not constitute a separate pre-contract agreement, the

Respondent's decision to walk-away from execution of the envisaged agreement was also unconscionable and created a liability on her part, which as I stated, is already satisfied by the deductions made by the Appellant from her account. The Respondent's liability is justified, and indeed so, because her conduct came at the time when the Appellant had expended preparatory/facilitative costs intending to formally memorialise the parties' discussion in the framework of a binding credit facility agreement, based on the understanding she derived from**Exh.D-4**.

The second issue which put the parties at a logger-head situation relates to the order of the trial court condemning the Appellant to pay the Respondent TZS 200,000 (each day from the date when the TZS 4,807,500 was debited from her account to the date of final payment) as loss of profits.The order was based on **Exh.P-2**. In principle, a claim for loss of profit amounts to a claim for specific damages and, as the law requires, claims of that nature require to be not only specifically pleaded but also strictly proved.

See the cases of **Professional Paint Centre Ltd vs. Azania Bank Ltd**, Commercial Case No.53 of 2021, (High Court Comm. Div (unreported);of **Stanbic Bank Tanzania Ltd vs. Abercrombie & Kente (T) Limited**, Civil Appeal No.21 of 2001 (CAT) (unreported) and **Cooper Motors Corporation (T) Ltd vs. Arusha International Conference Centre** [1991] TLR 165 (CAT).

In my earlier discussion of grounds 2, 3, 4, 5, and 8, I made a finding that the deductions made from the

Respondent's account could still be justified from a different approach though not as the Appellant seems to have argued, I do not see why I should labour to argue grounds 6 and 7 regarding the alleged losses. Doing that will only be an academic exercise.

The final matter which put the parties at loggerheads relates to the order of the trial court that condemned the Appellant to pay general damages. The argument has been that the learned trial magistrate erred as he never provided reasons to award TZS 5,000,000. The Respondent's counsel has contended that the order was justified. Having looked at the trial court's decision, the pleadings (the Plaint), and the evidence, I find that, the trial court did indeed err in its decision to award the TZS 5,000,000 as general damages. First, it is trite law that general damages are awarded at the discretion of the court and the party should not prescribe how much she/he should be awarded by the court.

In the suit before the trial court, the Plaint does indicate that the Plaintiff (Respondent herein) has prescribed the amount to be awarded as general damages to the tune of TZS 5,000,000 which is the same amount the trial court awarded. In my view, it could not have been a big issue but the problem, however, is that, as the record shows, the trial court did not assign reasons regarding why the amount was considered reasonable. In the case of **Anthony Ngoo and Davis Anthony Ngoo vs. Kitinda Kimaro** (supra), the Court of Appeal was clear that, an award of general damages would be made by a trial judge or magistrate after

consideration and deliberation on the evidence on record able to justify the award.

The court was of the view that, much as it is in the discretion of the trial court, there must be assigned reasons. Failure to do so means that the trial court erred, and the ground No.9 of the appeal has merit as well.

All said and done I find merits in this appeal. The decision of the trial court is hereby quashed and set aside. As regards the costs of this appeal, I find it imperative to state that, considering the circumstances of this case, I will not grant costs to any of the parties as each shall bear his or her own costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 27TH DAY OF NOVEMBER 2023

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DEO JOHN NANGELA
JUDGE

Right of Appeal Explained.