

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 71 OF 2021

VODACOM PUBLIC LIMITED PLAINTIFF

VERSUS

SONIA TANIL SOMAIYA &

AMAL SUBIR SOMAIYA (As Administrators of

the Estate of the late Tanil Somaiya)..... DEFENDANTS

RULING

Date of last order: 26/01/2022

Date of ruling: 10/03/2023

AGATHO J.:

This ruling was triggered by Preliminary Objections (POs) raised by the Defendants. The said POs were:

- (1) The suit is time barred.
- (2) The suit is bad in law for non-joinder of a necessary party.
- (3) The suit is ressub-judice.

It was by consensus that the POs be disposed by way of written submissions. The Court drew the submissions schedule and the parties complied with it. The Plaintiff was under legal representation of Mr Gaspar Nyika of IMMMA Advocates, and the Defendants enjoyed the services of Michael Ngalo, learned counsel.

Since the first issue of period of limitation can dispose the suit if found to have merit, I will concentrate on that. But before proceeding with the examination of the PO, it is pertinent to uncover some facts as drawn from the pleadings. Foremost, there were: a Super Dealer Agreement (herein referred as SDA) entered on 15/11/2004 between Vodacom and Shivacom, the guarantee agreement between Vodacom and Tanil Somaiya concluded on 05/12/2004 and the credit facility agreement of 01/08/2006 between Vodacom and Shivacom. The latter agreement as per clause 9.1 of the SDA was subject to review. It was reviewed in 2010 which increased credit facility limit to TZS 18.3 Billion. On 29/06/2011 the Plaintiff informed Shivacom (not a party to the present case) that credit facility is reduced to TZs 17 Billion to take effect from 01/07/2011.

As per paragraph 12 of the plaint, the Plaintiff issued the demand notice on 02/04/2013 to Shivacom that it has exceeded the credit facility limit of TZS 17 Billion. Hence, she required her to make additional payments to be within the approved credit limit.

Para 13 of the plaint is plain that on 17/04/2013 the Plaintiff withdrew the credit facility and demanded Shivacom to pay for all products

purchased which by then was at the tune of TZS 23,275,196, 323/= within 14 days from 17/04/2013.

According to paragraph 14 of the plaint, the demand letter informed Shivacom that it should pay the outstanding amount or provide appropriate payment plan within 14 days. Failure to do so the Plaintiff will enforce the securities pledged. See annexure Voda-5 to the plaint.

As per paragraph 15 of the plaint, Shivacom is alleged to have breached the terms of SDA by failing to make the payment to the Plaintiff. That is as per annexure Voda – 6 to the plaint, a demand notice dated 17/04/2013 titled "Repayment of the credit facility." The letter from Vodacom to Shivacom.

Paragraph 16 of the plaint states that on 21/09/2016 the Plaintiff made demand to the Defendant (Guarantor) under the guarantee agreement for the sum of TZS 37,157,076,683.58 an outstanding amount under the SDA as of 30/06/2016 composed of TZS 23,243,525,701.58 as principal sum and TZS 13,913,550,982.00 as accrued interest. The Defendant was required to pay the said amount within 10 days from the date of receipt of the said letter annexed to the plaint as annexure Voda-6.

It is stated in the plaint under paragraph 18 that the Arbitration commenced in 2018. But a question is, does arbitration renew period of limitation? In my considered view, certainly no. Therefore, that point should not detain us.

Since the suit is found on contract, that is a breach of guarantee agreement executed on 05/12/2004 and the breach occurred in March or April 2014 as per paragraph 12 of the plaint, and further restated on paragraph 13 of the plaint, as a result of the breach of the said agreement the Plaintiff by the letter dated 17/04/2013 she withdrew the credit facility extended to Shivacom and demanded it to pay for all products purchased there under.

From paragraphs 12 and 13 of the Plaint the breach occurred in March or April 2013 and the letter addressed Shivacom dated 02/04/2013 makes this clear, and this suit was filed in the Court on 17/06/2021. As per item 7 of the schedule to the Law of Limitation Act [Cap 89 R.E. 2019] the period of limitation for a suit found on contract is six years. Now, counting from March or April 2013 to June 2021 the six years lapsed in March or April 2019. It is conspicuous that no extension of time has been sought from the Minister of Justice and Constitutional Affairs.

As per Section 5 of the Law of Limitation Act [Cap 89 R.E. 2019].

"Subject to the provisions of this Act the right of action in respect of any proceedings shall accrue on the date on which the cause of action arises."

In my view paragraphs 16, 22, 25, 30, and 35 of the plaint, do not plead the cause of action. They rather talk about demand letters sent to the Defendant issued in September 2016, April and May 2021 which the Plaintiff is inviting the Court to assume or rather think to be the period when causes of action arose. With due respect I disagree because those demand notices do not establish causes of action. The cause of action in the present suit is based on the breach of Super Dealer Agreement (SDA) agreement. Moreover, the guarantee agreement is part and parcel of the SDA as per clause 10 of the said SDA. Even the credit facility is also linked to the SDA.

It is not disputed that the guarantor has been sued due to liability arising from the SDA which embedded the guarantee agreement. Both are read as one. There is nothing in the guarantee agreement which states that it is a continuing one or indicating that it was meant for more than one transaction which would attracted the application of Section 92 of the Law of Contract Act [Cap R.E. 2019]. The breach of contract

alleged is equally not a continuing one to attract application of Section 7 of the Law of Limitation Act [Cap 89 R.E. 2019] which provides:

"Where there is a continuous breach or continuing wrong independent of a contract a fresh period of limitation shall begin to run at every moment of the time during which the breach or the wrong, as the case may be, continues."

The analysis and distinction of a breach of contract and a continuous breach of contract have been well elucidated in the cases of **Margareth Roland Purucker v Lothar Roland Purucker, and Another, Misc. Commercial Application No.20 of 2022 HCCD; Lindi Express Ltd v Infinite Estate Ltd, Commercial Case No 17 of 2021 HCCD at pages 8 -12.** And the case of **Josephat Muniko s/o Mwita Mkindya & Another v North Mara Gold Mine Ltd, Commercial Case No. 9 of 2019 HCCD.**

That said I am of settled view that the guarantee agreement on which the Defendant is sued is neither a continuing one nor was it for more than a single transaction. Worse still, none of these have been pleaded in the plaint.

It is elementary that in credit facility secured by guarantee the principal debtor and the guarantor are co-obligors. Hence a default by one is legally assumed to be the default by both and a demand should have been made concurrently to each of them. That is to say Shivacom and the Defendant for the principal's borrower's failure to make payment within 14 days as per the letter dated 27/04/2021 annexure Voda-5 to the plaintiff.

The lapse of statutory period of limitation alone disposes the suit at hand. I shall thus not proceed to examine other POs. That said and done this suit is time barred.

For emphasis the breach of contract occurred on or before 02/04/2013. The breach by Shivacom under the SDA gave rise to the Defendant's liability as guarantor under the guarantee agreement which is part of the SDA. It will be wrong to assume that the breach of contract (cause of action) giving rise to the Defendant's liability for repayment of outstanding sum of money under the SDA arose on 26/09/2016 when a first demand letter was sent to the Defendant (the guarantor). I have already stated that the demand letters do not establish cause of action. The latter is established from a wrong done. Thus the time is looked from when the civil wrong occurred and that is the time when the cause

of action accrues. Hence the date of the demand notice is not necessarily the date when the cause of action accrued.

The Defendant was served upon with the demand letter on 26/09/2016, the second one was on 27/04/2021 and the third and last was dated 19/05/2021. The second letter emanated from arbitration award. There were two awards, partial and final. And the plaintiff erroneously submitted that these demand letters linked with arbitration issues constituted separate causes of action. With due respect the counsel for the Plaintiff seems to be misleading the Court. All that given rise to arbitration proceedings was the breach of contract (SDA agreement embedded with the guarantee agreement). Thus, a plain cause of action is the breach of contract.

It is unconvincing that the Plaintiff thinks the cause of action arose on 05/05/2021 (see paragraph 3 page 3 of the plaintiff's written submission on the POs). In the same paragraph the Plaintiff admits that the suit is based on the breach of SDA by Shivacom and the Defendant failed to pay the amount in breach of the contract of guarantee. The life of the latter contract is derived from the SDA. Thus, the breach of SDA is what led to the cause of action against the principal debtor and the guarantor (the Defendant). It is observed that the principal debtor (Shivacom) is

not a party to this suit. Nevertheless, the breach occurred in March or April 2013 and not on 05/05/2021 as contended by the Plaintiff.

It is unconvincing that the Plaintiff is using demand notices and arbitration proceedings as basis for computing time when the cause of action arose. That is a misconception. The demand notices are not contracts and hence cannot establish cause of action.

The present case is based on the SDA and the guarantee agreement and credit facility agreement. These are read as one. Default in repayment of the loan by Shivacom constituted a breach of SDA that gave rise to the Defendant's liability as the guarantor. That is the gist of the cause of action. In my view this suit is hopelessly time barred.

The failure of the Plaintiff to issue demand notice to the Defendant timely does not have the effect of renewing the period of limitation that would have otherwise been expired. The breach or default occurred in March or April 2013 and that is when the cause of action accrued. By the way it was an anomaly not to inform the Defendant when the breach occurred in March or April 2013. Be it as it may the default by the principal debtor (Shivacom) that amounts to the default of the Defendant (the guarantor). That is because in as far as the SDA is concerned their liability is co-extensive. Thus, the liability of the

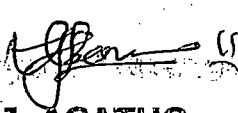
Defendant and that of the principal debtor (Shivacom) is co-extensive. See the holding of Nangela, J. in **East Africa Development Bank v Clothilda Mona Pundugu, Commercial Case No. 35 of 2022 HCCD** at page 31. In my view, in the context of this case the default by the principal is the default of the guarantor. It is unclear why the Defendant (the guarantor) was not informed about the breach by Shivacom on 02/04/2013. That in anyway though does not change the fact that the suit is time barred. The remedy is to dismiss in terms of Section 3(1) of the Law of Limitation [Cap 89 R.E. 2019] and as rightly held in **Ngoni-Matengo Co-operative Marketing Union Limited v Ali Mohamed Osman [1959] EA 577.**

For the foregoing reasons the first Preliminary Objection is sustained the suit is indeed time barred. Section 3(1) of the Law of Limitation Act [Cap 89 R.E. 2019] as well as the **Ngoni Matengo's case** (supra) are loud that where a suit is time barred it shall be dismissed. This suit is consequently dismissed with costs.

It is so ordered.

DATED ~~at Dar ES SALAAM~~ this 10th Day of March, 2023.




J. J. AGATHO
JUDGE
10/03/2023

Date: 10/03/2023

Coram: Hon. U. J. Agatho, J.

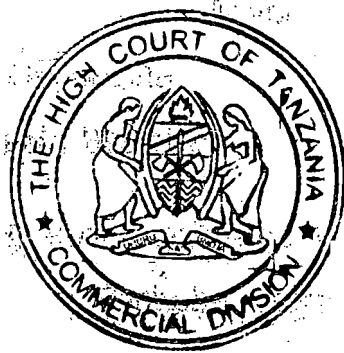
For Plaintiff: Miriam Bachuba, Advocate

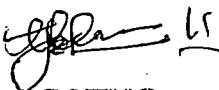
For Defendant: Miriam Bachuba holding brief of Michael Ngalo,
Advocate.

JLA: Opportuna

C/Clerk: Beatrice

Court: Ruling delivered today, this 10th March, 2023 in the presence of Miriam Bachuba, learned counsel for the Plaintiff also holding brief of Michael Ngalo, learned counsel for the Defendant.




U. J. AGATHO
JUDGE
10/03/2023