

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

**(COMMERCIAL DIVISION)**

**AT DARE ES SALAAM**

**COMMERCIAL CASE NO. 22 OF 2021**

**BETWEEN**

**ALVIC BUILDERS (T) LIMITED ..... PLAINTIFF**

**VERSUS**

**CRDB BANK PLC.....DEFENDANT**

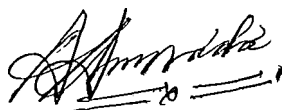
**JUDGMENT**

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

The plaintiff's claims in this suit are based on the supposedly existence of implied contract between the plaintiff and defendant allegedly entered into by the parties on 10<sup>th</sup> September, 2019. The plaintiff, ALVIC BUILDERS (T) LIMITED is a company incorporated under the laws of Tanzania and deals with construction works whereas the defendant, CRDB Bank PLC is a commercial bank dealing with lending business, among others. It appears that the plaintiff and defendant had long time business relationship as customer and banker in that the plaintiff maintains a bank account with the defendant and, on different occasions, the plaintiff borrowed money from the defendant.



The plaintiff contends that sometimes in September, 2019 received an invitation letter via email from the defendant to attend a breakfast business meeting at Serena Hotel in Dar es Salaam. The meeting was organized by the defendant bank with the view to sell its new product namely, collateral-free loans for local contractors, subcontractors and suppliers who would have tenders/contracts in the national mega construction projects namely, Julius Nyerere Hydro Power Project (JNHP) and Standard Gauge Railway (SGR). The plaintiff states that, through its Managing Director one Alexander Nyanda Kilala (PW1), attended the said meeting which was held on 10<sup>th</sup> September, 2019 at Serena Hotel in Dar es Salaam. It was the plaintiff's further contention that at the breakfast meeting, the defendant's Chief Commercial Officer one Dr. Joseph Witts promised to provide collateral free loans to local contractors and suppliers who would procure contracts in either of the above-mentioned construction projects. The plaintiff continued that relying on the promise made by the defendant's senior staff, it entered into five contracts (sub contracted by other companies in Julius Nyerere Hydro Power Project). Having secured the contracts, the plaintiff applied to the defendant for financing loan through a letter dated 09<sup>th</sup> January, 2020 (exhibit P2). However, the defendant through its reply letter dated 25/02/2020 (exhibit P3) declined to grant the requested loan facilities on a



number of grounds including failure to provide collateral acceptable by the bank, the plaintiff's unsatisfactory performance of Stanbic facility, poor repayment history, unsatisfactory rating outcome which was grade 10 and poor financial performance.

The plaintiff laments that due to delayed response from the defendant and given that the plaintiff had already entered into contracts which were to be executed within three months, the plaintiff opted to borrow from private institutions in order to cater for purchase money of materials which she had already pressed purchase order. The plaintiff tendered swift messages and payment acknowledgement receipts (P6) to exhibit purchase payments. Despite all these efforts taken, the plaintiff contends, the contracts were ultimately terminated in that the plaintiff failed to execute them within agreed time on account of the defendant's refusal to award contract financing facilities.

The plaintiff continues to expound that owing to the defendant's act, she suffered financial loss which she now wants the defendant compensate. Consequently, the plaintiff filed this suit praying for judgment and decree against the defendant as follows;

A handwritten signature in black ink, appearing to read 'A. Amadi', with a stylized flourish underneath.

- (i) Declaration that there existed an implied contract by and between the plaintiff and the defendant for the defendant financing any contract carried by the plaintiff at or in relation to the construction works at Nyerere Hydro Power Dam Project
- (ii) Declaration that the defendant has breached the said contract by non- providing financing.
- (iii) An order for payment of;
  - (a) A sum of USD 780,000 as a loss of prospective profit from the three sub-contracts terminated worth USD 2,600,000.00
  - (b) Tshs 285,900,000.00 as loss of prospective profit out of terminated works worth Tshs 953,000,000.00
  - (c) A sum of USD 1, 102, 287.00 as a loss of business investment capital of the moneys borrowed from private creditors but unpaid
  - (d) A further sum of USD 630,000.00 payable to the manufacturer of a waste-water treatment plant in India.
- (iv) Payment of general damages as will be assessed by the Honourable Court



- (v) Payment of interest on the judgment date at the rate of 12% per annum
- (vi) Costs.

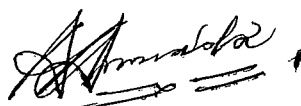
The defendant, on its part, filed a written statement of defence in which she strongly refutes the plaintiff's claims. The defendant states that it has never entered into agreement impliedly or otherwise with the plaintiff to provide collateral free loan and that the plaintiff is not entitled to any of the reliefs sought. The defendant further states that it did not guarantee support to contractors through collateral- free loans nor did it require the contractors to enter into construction contracts as a pre-condition for grant of loan. The defendant continued that there was no timeframe within which the loan application had to be responded and that criteria for successful loan applications remain in the exclusive domain of the defendant's administration. The defendant stressed that the period of six weeks within which it replied the plaintiff's loan application was reasonable. Finally, the defendant prayed the court to dismiss the suit with costs for want of merits. During final pre-trial conference, the court, with consensus of the parties, framed the following five issues;

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

1. Whether there was any contract between the plaintiff and the defendant.
2. If the 1<sup>st</sup> issue is answered affirmatively, what were the terms thereof.
3. Whether the parties breached the terms thereof.
4. Whether non-breaching party suffered any loss by reason of breach
5. To what reliefs are parties entitled?

When the matter was called on for hearing, the plaintiff was represented by Mr. Denis Msafiri, learned counsel whilst the defendant had services of Joseph Nuwamanya, learned counsel.

In a bid to prove the claims, the plaintiff produced one witness namely, Alexander Nyanda Kilala (PW1), the plaintiff's Managing Director along with seven (7) documentary exhibits notably, Daily News newspaper which published or reported the said breakfast meeting (P1), application letter for project financing (P2), reply letter in respect of loan application (P3), correspondences between the plaintiff and defendant in respect of defendant's liabilities in the Credit Information Bureau (P4), demand notices (P5), swift message printouts in respect of payments made for purchase of materials ordered from abroad (P6) and Credit Reference Bureau Customer Report (P7).



In his witness statement, Alexander Kilala (PW1) reiterated the contentions in the plaint. He stressed that the defendant through the promise made by its Chief Commercial Officer one Dr. Joseph Witts in the breakfast meeting, impliedly entered into agreement with local contractors and suppliers to award them collateral-free financing loans. He stated that non granting of financing loans as pledged amounted to breach of the terms of contract. During cross examination, PW1 admitted that he was invited to the breakfast meeting via an invitation letter which was sent to him via email but he failed to produce it in evidence on the ground that he could not locate it. He also admitted that he did not attach to the application letter the three requisite documents appearing on Daily News newspaper (P1) namely, letter of credit, bid order and invoice discounting. Upon further cross examination, PW1 said that the Chief Commercial Officer did not require them to enter into contracts as a pre-condition for grant of loan rather he was later advised to procure tender first by Hamis Saleh who, at the material time, was CRDB Branch Manager at Azikiwe. Mr. Kilala lamented that due to the defendant's breach of the agreement i.e., refusal to grant free collateral loan, the plaintiff failed to execute the contracts she had entered within the agreed time. As such, PW1 stated, the contracts worth US\$ 3, 750,000/= were terminated thereby causing the plaintiff to lose an opportunity of earning a sum of US\$ 780,000 and Tshs 285,900,000/= as prospective profits and a sum of US\$ 1,102,287/= as loss of business investment



capital and at the same time the plaintiff remains liable to pay the outstanding sum of US\$ 630,000 to the manufacturer of a waste-water treatment plant.

On the adversary, the defendant paraded one witness namely, Exavery Makwi (DW1), the defendant's Director of Credit who tendered one documentary exhibit to wit, Credit Info Report from Credit Reference Bureau. The witness said that at no time the defendant made a promise to offer collateral free loans. He emphasized that at all time loans are granted upon deposit of securities. While admitting to have held the breakfast meeting, DW1 contended that the defendant organized the said trade fair to bring its products to the attention of the public including showcasing its willingness to issue credit facilities to the intending borrowers including local contractors. DW1 accentuated that the defendant has never pledged to issue collateral free loans.

Upon conclusion of hearing counsel for both parties prayed and were allowed to file closing submissions. I commend them for their insightful submissions which were filed within the court schedule.

Submitting in support of the plaintiff's case, the counsel argued that the promise and undertaking made by the defendant's senior staff at the breakfast meeting on 10<sup>th</sup> September, 2020 was, in law, an irrevocable offer made to the general public. He referred to exhibit P1, Daily News newspaper

8

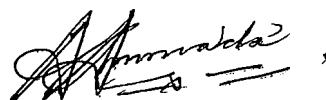
Amundsen



and candidly submitted that, upon a holistic reading, it implies that a promise to provide a collateral free loan was made. To bolster his argument on the existence of implied contract, the plaintiff counsel produced an excerpt from Treitel: LAW OF CONTRACT, 8<sup>th</sup> Edition, Sweet & Maxwell at page 157 which reads;

***'The question of contractual intention is, in the last resort, one of fact but in the case of an ordinary commercial relationship the courts do not require proof that the parties actually intended to be bound. On the contrary, the onus proving that there was no such intention "is on the party who asserts that no legal effect was intended, and the onus is a heavy one". In deciding whether the onus has been discharged, the courts will be influenced by the importance of the agreement to the parties and by the fact one of them acted in reliance on it. They will also normally apply an objective test'.***

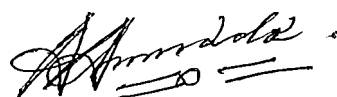
The plaintiff's counsel continued that the only condition for grant of collateral free loan was for the plaintiff to procure contract or subcontract in either Julius Nyerere Hydro Power Project or Standard Gauge Railway. The plaintiff's counsel was thus opined that since the plaintiff acted on the defendant's



statement or offer, it goes without saying that the defendant breached the terms of contract by declining to grant loan as promised.


As regard to the 2<sup>nd</sup> issue, namely, 'if the 1<sup>st</sup> issue is answered affirmatively, what were the terms thereof', the plaintiff counsel submitted that the terms of the contract were very clear in that the plaintiff was only required to show that it had obtained contracts in either Julius Nyerere Hydro Power Project (JNHP) or Standard Gauge Railway (SGR). The counsel concluded that the plaintiff proved that she met the terms of contract through exhibit P2. Further, the plaintiff's counsel submitted that the defendant breached the terms of contract as it brought in new condition through exhibit P3 in which she required the plaintiff to deposit collateral.

The plaintiff counsel continued that it was proved that the goods ordered by the plaintiff were not shipped to Tanzania due to plaintiff's failure to pay full purchase amount which was caused by the defendant's refusal to honour the terms of contract (grant of collateral free loan). As such, the plaintiff's contracts were terminated thereby causing the plaintiff to suffer loss, the counsel submitted. While citing the case of **Sylvester Lwegira Bandio and another vs National Bank of Commerce**, Civil Appeal No. 125 of 2018, CAT at Dar es Salaam, the plaintiff's counsel argued that though loss of projected earnings were pleaded as specific damages, they are mere



estimations and hence he urged the court to grant them as general damages. In the end, the counsel implored the court to grant the reliefs sought by the plaintiff.

In rebuttal, the defendant counsel vigorously contested the plaintiff's claims. He argued that the plaintiff failed to prove existence of the alleged implied contract in that she did not produce the alleged invitation letter which she was allegedly sent by the defendant nor did she prove its attendance at the meeting. Relying on the case of **Louis Dreyfuss Commodities Tanzania Limited vs Roko Investment Tanzania Limited**, Civil Appeal No. 4 of 2013, CAT at Dar es Salaam, the defendant counsel lamented that no sufficient evidence was brought to establish that a promise to offer a collateral free loan was made by the defendant to warrant implied contract. The counsel referred to the case of **British American Tobacco Kenya Limited vs Mohans Oysterbay Drinks Limited**, Civil Appeal No. 209 of 2019, CAT at Dar es Salaam and urged the court to be inspired by the way the Court of Appeal construed implied contract. It was therefore the defendant's submission that since no contract existed, there could not be terms to be breached hence the claims against the defendant are baseless. The defendant's counsel prayed the court to dismiss the suit with costs.

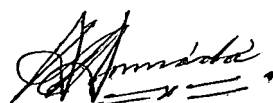


Having narrated the evidence and submissions by both parties, let me now delve in the issues framed. To start with the 1<sup>st</sup> issue namely, whether there was any contract between the plaintiff and the defendant. It is worthwhile to state, at the outset, that implied contracts are recognized under our law and are considered valid contracts if the legal ingredients of valid contract are met. Section 9 of the Law of Contract Act provides;

***"9. In so far as the proposal or acceptance of any promise is made in words, the promise is said to be express; and in so far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied".***

The foregoing provision tells it all that parties may enter into binding relationship (contract) impliedly and such relationship would be considered a valid contract subject to fulfilment of legal requirements. In addition, the applicability of implied contracts has also been recognized through various decisions of court and the Court of Appeal of Tanzania including **British American Tobacco Kenya Limited (supra)**, and **Catherine Merema Vs Wathaigo Chacha**, Civil Appeal No. 319 of 2017 CAT at Mwanza.

The plaintiff contends that the defendant made a promise to offer a collateral free loan to the local contractors and suppliers who would obtain contracts



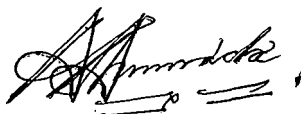
in Julius Nyerere Hydro Power Project (JNHP) and Standard Gauge Railway (SGR). The plaintiff further testified that the term and condition for the award of loan was proof of contracts or sub contracts. In the endeavours to prove the promise allegedly made by the defendant, PW1 produced a copy of the newspaper namely, Daily News dated 11<sup>th</sup> September, 2019 (P1) in which the event of breakfast meeting was reported. According to exhibit P1, the Chief Commercial Officer said that CRDB could grant loans and guarantee the contractors once they produce bid order, letter of credit and invoice. PW1 continued that the term and condition of the contract was procurement of contract of works in the projects. However, during cross examination, PW1 said that it is Hamis Saleh, CRDB Branch Manager at Azikiwe who advised him to obtain contracts before submission of application letter for loan. On the contrary, the defendant strongly denied the plaintiff's assertion. DW1 stated that at no point in time the defendant pledged to offer collateral-free loan as contended by the plaintiff. He was insistent that collateral has always been a requirement for grant of loan.

Based on the rival contentions, the germane question for this court to decide is whether, on the strength of the evidence produced in this case, the plaintiff has managed to establish, on the required standard, that the defendant



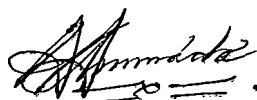
made the promise to offer collateral free loan to the local contractors and sub-contractor in the two construction projects.

It is common cause that throughout the case the only evidence to prove the promise allegedly made by the Chief Commercial Officer is the reported story in the newspaper (exhibit P1). There is no evidence directly from the maker such as a letter of invitation or brochure in respect of the new bank product (collateral free loan). The said missing pieces of evidence would have shed more lights as to whether the defendant, in actual fact, promised to grant collateral free loan as contended by the plaintiff and if yes, what were the terms and conditions thereof. Admittedly it is not even clear in evidence as to what were the terms of contract if at all the promise was made. Initially, PW1 said that the only condition for grant of loans was to procure contracts in the said projects. Nonetheless, upon further cross examination, PW1 changed the story and said that he got the idea to enter into contract before applying for loan after he was advised by Hamis Saleh, who, at the material time, was CRDB Branch Manager at Azikiwe, when he visited him (Hamisi) after breakfast meeting. This implies that the Chief Commercial Officer whom the plaintiff claims that is the one who made promise on behalf of the defendant did not set the condition to obtain contract as a pre-condition for



grant of loan. As such, this connotes absence of contract for there cannot be contract without terms and conditions.

Moreso, PW1 stated that he entered into five sub contracts based on the promise made by the defendant that he would be given financing loan free of collateral. He continued that due to the refusal and or delay by the defendant, he decided to borrow money from private lenders for purposes of purchasing materials and plant from abroad. On my party, in the efforts to assess evidence on whether the defendant really made the promise on which the plaintiff banked, I thoroughly scanned the exhibits tendered in particular loan application letter (exhibit P2) and international payments in respect purchase of materials from abroad (exhibit P6) and finally I made the following observations; **One**, the said loan application letter (P2) has no bearing of collateral free loans. It is just a normal loan application letter like others. One could reasonably expect the letter (P2) to make reference to the breakfast meeting and collateral free loans but there is no such mention. **Two**, I have looked at exhibit P6 particularly swift messages in respect of payments made to AQUASTEEL PTY LTD and found that the payments were effected on 10/12/2019 and 11/12/2019 which was even before the defendant applied for loan on 9<sup>th</sup> January, 2020. See also exhibit P2. Indeed, the plaintiff own evidence is inconsistent with her contention.



In view of the above observations, I am inclined to disbelieve the plaintiff's story that she borrowed money from private lenders after the defendant refused to grant loan nor do I concur with him that the plaintiff entered into the said five sub contracts in response to the promise made by the defendant.

In the event, it is my findings that the defendant has failed to establish, on the balance of probabilities, that the defendant made an offer to grant collateral free loan and for that reason I hereby hold that there was no implied contract between the plaintiff and defendant.

Further, it has to be noted that in this case there were framed five issues to be determined. However, the 2<sup>nd</sup> to 4<sup>th</sup> issues would be relevant only if issue No. 1 were determined in affirmative. Since I have held that there was no implied contract between the two parties, I find it a redundant exercise to deliberate on the other remaining issues.

On all the above account, I find this case devoid of merits thus liable to be dismissed. Consequently, I hereby dismiss it with costs.

It is so ordered.

A handwritten signature in black ink, appearing to read 'A. Annamalai', with a horizontal line underneath.



The right of appeal is explained.

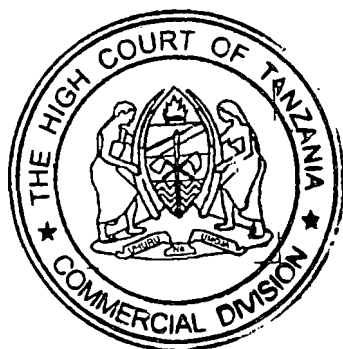


  
**A.A. Mbagwa**

**JUDGE**

**26/01/2023**

**Court:** Judgment has been delivered in the presence of Denis Msafiri, learned counsel for the plaintiff and Zuriel Kazungu, learned counsel for the defendant this 26<sup>th</sup> day of January, 2023.



  
**A. A. Mbagwa**

**JUDGE**

**26/01/2023**