IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

COMMERCIAL CASE NO.140 OF 2021

MKOMBOZI COMMERCIAL BANK PLC ..... PLAINTIFF

VERSUS

REX INVESTMENT LIMITED..... DEFENDANT

JUDGEMENT

Date of Last Order: 24/02/2023
Date of Judgment: 31/3/2023

AGATHO, J.:

The Plaintiff, **MKOMBOZI COMMERCIAL BANKPLC** is a registered company under the Companies Act No. 12 of 2002 R.E. 2002 and licensed under the Banking and financial institution Act2006 to carry out banking business whilst the Defendant is registered company under the Companies Act No. 12 of 2002 R.E 2002 doing her business in Dar es salaam and she has been sued by virtual of being a guarantor of thevarious salary loans advanced to her employees. Briefly the Plaintiff case is that,sometimes in July, 2012 she and defendant executed a collective guarantee agreement over salary loan whereof the defendant undertook to guarantee various employees of her company who would receive salary loans to the tune of (TZS.178,500,000) in various forms from the plaintiff. Throughtheoffer letters,the plaintiff availedsalary loan

to various employees into various forms and accepted guarantees by the defendant.However, in the course of operations under the said arrangement the defendant failed to deduct monthly instalments as agreedthe act which necessitated the plaintiff to call repayment of the on remitted instalment by the defendant which at the institution of this suit the remitted balance stood at TZS.392,182,509) being principal sum plus interests.All efforts to be paid proved futile as such the plaintiff on 4th October,2021 instituted the instant suit praying for judgment and decree against the defendant on the following orders: -

a. A declaration orderthat the defendant has breached her guarantee obligations on the loan repayments obligation in respect of loans dully extended to her employees.
b. Order directing the Defendant to fulfill her guarantee obligations with respect to the loan advanced by the plaintiff to the defendant's employees which as of this suit the outstanding principal and accrued interests stood at Tanzania Shilling Three hundred Ninety-Two Million One Hundred Eighty-Two Thousand Five Hundred Nine Eighty Cents (TZS392,182,509.8) only.
c. Interest on the aforesaid amount of Tanzania Shilling Three hundred Ninety-Two Million One Hundred Eighty-Two Thousand

Five Hundred Nine Eighty Cents (Tshs 392,182,509.8) only at respective contracted rate from the date they fell due to the date of full and final payment and for interest on the decretal amount at seven percent (7%) from the date of the judgement to the date of full payment.

d. Costs of this suit and

e. Any other order(s) the honorable court may deem just and fit to grant

However, the Defendant upon being served with an amended plaint, filed an amended written statement of defence disputing plaintiff's claims on the ride that defendant was only guarantor for collectability and her duty to pay debts could only be invoked as a last resort after the plaintiff has exhausted all legal remedies, since the Plaintiff has not exhausted the legal remedies, the defendant has no duty or obligation to pay the debt. On that note, the defendant urged this court to dismiss the suit with costs.

The plaintiff at all material time has been in the legal services of Mr. Makaki Masatu, learned advocate. On the other adversary part, defendant at all material time has been equally in the legal service Messer of Mr. Sylvester Shayo and Benadetha Shayo, learned advocates.

During final pretrial conference the following issues were framed, recorded and agreed between the parties for determination of this suit namely:

1. whether the Plaintiff advanced loans to the defendant's employees and on what terms.
2. What amount if any, is outstanding and due to the plaintiff under the said loan
3. Whether the defendant guaranteed payment of the said staff loan
4. Whether defendant breached the terms of the guarantee agreement
5. What (if any) is the defendant's liability in respect of the outstanding loans under the collective guaranteeagreement over salary loans.
6. To what reliefs are parties entitled.

To prove its case the Plaintiff paraded one witness **Mr. Benedicto Malembo Maziku** (to be referred in these proceedings as **PW1**). PW1under oath and through his witness statement adopted in these proceedings as his testimony in chief, told the court that, he is Recovery Manager of plaintiff with personal knowledge of the facts pertaining this suit .Testifying on the relationship between plaintiff and defendant, PW1 told the court that on 3rd July,2012 the plaintiff and he defendant executed collective guarantee agreement over salary loan whereof the defendant undertook to guarantee various employees of the defendant company who would receive loan in various formsfrom the Plaintiff.

Testifying further, PW1 told the courtthat, following the execution of the collective agreement and the introduction of defendant employees, each employee was availed with the offer letter depending on the amount applied. It was the testimony of PW1 that, each defendant's employeeacceptedthe terms and conditions contained in respective offerletter. Further testimony of the PW1 was that, in the circumstance of that arrangement the Plaintiff disbursed salary loan to various employees to the tune of TZS 169,500,000.00 to all beneficiary inrespective bank accounts of each defendant employees which were being held and maintained by the plaintiff at Msimbazi Branch.

PW1 testified that, it was common understanding that, the tenure of the loanwas between 6months to 36 monthsdepending on the amount takenpayablewith interest rate of 18% and in case of default the penal interest of 23% was to be charged. Testifying on the guarantee PW1 told the court that, thedefendant committed irrevocably remittance of monthly installment and undertaking to pay the plaintiff in case of default for whatever reasons.PW1 tendered Collective Guarantee Agreement dated 03.7.2012, letter offer, copies of letter offer and invoices whichwere tendered and admitted as **exhibit P1, P2** and **P3**. Further testimony of PW1 was that,the defendantfailed to remit monthly

deductionas agreed as such sometimes on March 2018 the defendant made an acknowledgement, that, she has failed to remit the outstanding amount of TZS. 64,095,605.27. It was further testimony of PW1 following that acknowledgement the defendant requested for the extension of time so as torepay the outstanding balance within two years by equal installment from August 2018. PW1 tendered in evidence, proposed payment schedule on Rex energy staff arrears and collective bank statement which were collectively admitted in evidence as **exhibit P4** and **P5.** PW1 stated that despite that arrangement the defendant failed to honour her obligations under the agreement as such the plaintiff handled the matter to Kisaioni General Auction Tanzania Limited to make a follow up for repayment. PW1 tendered in evidence letter dated 29.7.2021 **as exhibit P6.**

Under cross examination by Mr Shayo Learned Advocate, PW1 told the court that, clause 5 of exhibit P1 is clear that (Rex) guaranteed to salary loan of his employees.PW1 went on telling the court that, the plaintiff never instituted any case to recover money from the beneficiaries. However, he was quick to point that, they have intention to sue them.PW1 when referred to exhibit P2 read and told the court that, the defendant was not given the copy of letter offer because letter of offer

was made to individual employees for example the offer letter of James Francis Kihiyo was made on 05/10/2012 and signed on 08/10/2012.PW1 when asked on the loan application told the court that each beneficiary had its own application. PW1 added that the terms of loan, the repayment schedule and interest varied from one beneficiaryto another.However, according toclause 8 of exhibit P1 the agreed interest was 18% per annum subject to discussion.

PW1 when referred to exhibit P5 identified it as the Bank statement of James Francis Kihiyo covering the period for three yearsfrom 01/01/2012 to 02/01/2015. PW1 when asked on the proof of the disbursement told the court that, the offer letters are clear disbursement of the amount totalling TZS 169, 500,000/=/.PW1 when asked on dates of default told the court that dates of default vary and the loan end date is not the date of default.

Under Re-examination by Masatu, Advocate PW1 when referred to exhibit P1 identified it as a collective guarantee agreement and told the court that, the defendant had an obligation to avail names of the beneficiaries that is why Clause 5 of exhibit P1 was imposing obligation on the Defendant to repay the loans in case of default. PW1 went on to tell the court that, the plaintiff sued the Defendant because she failed to

deduct the monthly salaries instalment and remit to the plaintiff as agreed the act which constitute defaultto repay the loans.PW1 when pressed with questions told the court that, under exhibit P1 there were no conditions that upon default the Plaintiff was to exhaust legal remedies or fulfil before instituting the suit. When PW1 asked on the loan end date told the court that, the end date of the loan to James Francis Kihiyo was on 14/12/2018, Edith Albert Mayombo was on 14/12/2018 and Joseph Tyenyi Marwa was 14/12/2018.PW1 when asked on the end date told the court that, the end date is in the bank statement(s). PW1 when referred to paragraph 5 of his witness statement read it and told the court that, he mentioned the amount of money disbursed to the Defendant's employees because the amount were not mentioned in the bank statements that is why he brought letter offer to which indicates the said amount. That was the end of plaintiff case and the same was marked closed.

The defendant paraded one witness, **Mr. Francis Kibhisa** (to be referred herein in these proceedings as "DWI"). DW1 under oath and through his witness statement adopted in these proceedings as his testimony in chief told the court that, he is the Managing Director of the defendant, hence, conversant with the facts of case.DW1 testified that,

the plaintiff is falsely claiming fordeclaratory order that defendant breached the agreement which does not exist because defendant was not a guarantor of payment of the alleged loan but rather was a guarantor of collectability .Furthertestimony of the defendant was that, the borrowers were her staffs and her guarantee was followed after defendant accepted invitation to business from Mkombozi Bank through the letter dated 25.06.2012.According to DW1 afterthe introduction of her Staff to Mkombozi his duty or obligation could only arise after the plaintiff has exhausted all legal remedies including demand, suit,judgement ,execution and other proceeding including recovery from the insurers. Testifying further DW1 told the court that, since the plaintiff has not exhausted the legal remedies, the defendant has no duty or obligation to repay the debts falling TZS. 392,182,509.8.It was the testimony of DW1 that, the defendant never executed any loan salary with the plaintiff.DW1 testified further that, the defendant was not privy to the contract between the plaintiff as a banker and her staff who were borrowers and clients of the plaintiff bank. As such she is not aware with the arrangement regarding the disbursement nor the outstanding balance of TZS 178,000,000/=. DW1 added that, the letter dated 12th March, 2018 with the heading, Proposed payments on Rex energy staff loan was nothing than invitation for discussion of business

and therefore cannot be taken as an acknowledgement of the debt on the part of the defendant. DWI went on telling the court that, the instant suit is based on contract, the plaintiff and defendant entered into collective agreement on 3/7/2012 and the instant suit was filed on 4th October, 2022 while breach occurred more than six years before filling this suit. DW1went onfaulting the plaintiff case that, the plaintiff did not join principal debtorsas defendants or to state the date when the cause of action arose. On that note prayed this court to dismiss the suit with costs.

Under cross examination by Mr. Masatu Advocate, DW1 when referred to paragraph three ofhis witness statement read it and told the court that, the defendant had a mere collectability obligationand not an obligation for payment of loan.DW1 when pressed further with questions told the court that, Rex (defendant) and the plaintiff bank did not have any arrangement. However, he was quick to admit that, after the introductionof thedefendant employees the deed of collective guarantee agreement over salary loan was signed between plaintiff and the defendant.DW1 when referred to paragraph six of exhibit P4 identified it as a letter titled proposed payment, he admitted to have signed it and that the business cash flow referred belongs to Rex Energy. DW1 when

referred to Misc. Civil application arising from Commercial case No 140 of 2021 told the court that, he filed the said application praying that if the defendant would be found liable then the employees to indemnify the defendant.But he was again quick to point that he does not recall if employees were removed from the case. When further pressed with question he told the court that, their proposal was not accepted as such it cannot be acted upon.

Under re-examination by Mr. Shayo Advocate, DW1 when referred to exhibit P4 told the court that on 09/03/2018 he had a meeting with the Bank (the plaintiff)thereafter exhibit P4 was written, a letter proposing for repayment schedule of the loan. When pressed with more questions he admitted that, they failed to honor the responsibility that is remittance of salaries. However, he quickly pointed that, exhibit P4 was not required to be used in court because the bank never replied to it. DW1 when further questioned he replied that after that there was no communication by the plaintiff until when they filed a case against the defendant.

This marked the end of hearing of defence case and same was marked closed. The learned advocates for parties prayed to exercise their rights under Rule 66(1) of this Court's Procedure Rules to file final closing

submissions. I granted the prayer. I should express my sincere gratitude to them for their industrious input on the matter. I will, in the course of answering issues, consider them but will not be able to produce them verbatim, it only suffices to say, the same were well taken in determining this suit. But, before going into the merit of the case, the court find it ideal to address a point of objection raised and the request to add one issue,on time barred by the defence counsel. In his closing submission, the defence counsel applied to the court to add another issue of time limitation following the aforesaid objection.

I have carefully considered the objection and found that this objection was raised out of the context because I have perused the records of the case and found that this case was filed sometimes on November, 2016 and for the first time it was called on for mention on 6th December, 2021. Then in my view the allegation that it was filed sometimes in October, 2021 is not only a statement from the bar but also unfounded in law. Therefore, since the instant suit is based on contract the plaintiff was within time as per item 7 of part I of the schedule to the Law of Limitation Act [Cap 89 R.E. 2019]. Moreover, the objection was supposed to be raised and addressed during the trial. Since no such objection was raised during the commencement of the suit, the only

proper assumption is that, such objection is deemed to have been waived. In addition to that the said preliminary objections were raised on final/closing submission, the act which is unacceptable in our jurisdiction. Regarding the prayer to add another issue. This prayer cannot be accommodated because it is trite law that courts should confine itself to issues which were framed in the pleadings.The case of **Frank M. Marealle V. Paul Kvauka Njau [1982] T.L.R No. 32** underscore the point that, it is prudent for a court to confine itself to issues which were framed in the pleadings. It is common ground that the court may or on application by a party raise new issue any time before judgment. But that depends on the context of the case and upon hearing both parties. And even if the court raises the court raises the issue *suo motu* the parties have the right to be heard. **Barclays Bank Tanzania Limited v Sharaf Shipping and Agency (T) Limited & Another, Consolidated Civil Appeals No. 117/16 of 2018 and No. 199 of 2019, CAT.** The requested issue to be added in the list of agreed issues onby the defendant was not part of framed issues for determination. It was raised after agreed issues were framed therefore on the basis of the above cited case it will be improper for the court to make any decision on issue which was not framed at all. Therefore, since the preliminary objections so raised out of context and following

what I have pointed out earlier that the Defendant's counsel adopted his own style, that of raising the POs in the submission which is alien in our jurisdiction. I thus proceed to ignore the said preliminary objection for reason explained above.

Now back to instant suit I proceed to address the first issue which was couched thus,*whether the Plaintiff advanced loans to the defendant's employees and on what terms*. This issue has two parts, I will start to address the first part of the issue which was couched *whether the Plaintiff advanced loans to the defendant's employees*? The learned counsel for Plaintiff has submitted that, the plaintiff after receiving the names of the employees from the defendantexecuted a collective guarantee agreement with the defendantin favour of the plaintiff (exhibit P1) and via various letter of offer (exhibit P2) the plaintiff extended the loans to various defendant employees. In rebuttal, the defendant hasstrongly denied the existence of salary loan agreement on the ride that the plaintiff never extended loan to defendants' employees because the bank statement does not indicate the amount disbursed and when the loan was disbursed. The counsel for the defendant added that even exhibit P4 cannot be taken as a proof of loan agreement because that exhibit was an invitation to the plaintiff business.

Having considered this issue right from the pleadings, testimonies of the parties, exhibits tendered and final closing rivalling submission, I am inclined to answer this issue in affirmative. On the following reasons, **One**, the contents of exhibit p1 read together with exhibit P2 are loud and clear that thedefendant after signing the collective guarantee agreement the plaintiff extended salary loan to various defendant's employee. This fact is supported by the defendant's acknowledgementon staff loan monthly deductions amountingto TZS 64,095,605.27. In any case, if at all the plaintiff did not extend loan to defendant employee as claimed by the defendant, the latter could not have made acknowledgement on the outstanding unremitted instalments fortifying that the plaintiff extended the loan to the defendant employees. And therefore the argument that exhibit P4 should not be acted upon because is an invitation tothe plaintiff's business is far from convincing this court becausethe plaintiff version of the story is more credible than that of defendant. Thus, the plaintiff extended the loan to defendant's employees.

Two, scrutiny of the written statement of defence and in particular paragraph 2 of the amended written statement of defence though disputed the guarantee of loan but there is an admission that defendant

was a guarantor of collectability. This is constructive admission, the plaint was detailed, such that this court was expecting categorical or specific denial or more information by way of written statement of defence but the amended written statement of defence did not answer the point of substance. They answered by evasive denial. Order VIII Rules 3-5 of the Civil Procedure Code [Cap 33 R.E.2019] are very specific on how the defendant is to answer allegations on the plaint and if does answer evasively the same shall be deemed to have been admitted. In this case, the defendant in her defence gave evasive response anddid not answer the claim as such in the absence of other evidence to challenge the contents of exhibit P1 exhibit P2 and exhibit P4. The same remain proved on the balance of Probabilities that the plaintiff advanced loan to defendant employees. **Three**, I have considered the contention that, the defendant was guarantor for collectability. However, the defendant did not say she was the guarantor of collectability on what or to line up evidence to prove that or tender any document to contradict or disprove the evidence of the plaintiff that she did not extend the loan and that defendant did not guarantee. Worse enough, during cross examination the sole witness of the defendant (DW1) made an admission on the debt and agreed that, the defendant guaranteed the loan from the plaintiff leaving this court

without option but to rely on the evidence of PW1 that there was salaryloan and the defendant guaranteed it. Therefore, the defendant denial of salary loan to defendant's employees is an afterthought or unfounded.

The second part of the 1st issue isthat what were the terms of loan. It should be noted that the terms and conditions of the loan are mainly found in the letter of credit and agreements signed by the parties. The learned counsel for plaintiff has submitted that, the crucial terms of the agreement were set out in letter offer (exhibit P2) and collective guarantee agreement (exhibit P1). While the learned counsel for defendant submitted that since there was no loan advanced to defendant employees the second part of the issue as regards to terms becomes superfluous. Following what I have decided on the first part of the issue that there was a loan and having perused collective guarantee agreement over salary loan (exhibit P1) Iam in agreement with the closing submission made by the learned advocate for plaintiff that thecrucial terms of the agreement were provided under clause 4, 5 and clause 7 of exhibit P1. For easy reference I reproduce the said terms here under:

***Clause 4**: Thatthe guarantor agrees to remit monthly salary or loan instalments of its employees under this agreement*

directly to the bank at St Msimbazi Branch or at any other branch of the bank as shall be agreed to which the bank shall be entitled to deduct its prescribed instalment towards repayment of the consumer credit extended under this agreement.

***Clause 5**: That theguarantor guaranteesfull recovery of all monies due to the bank from any outstanding balance of its employees borrowing from the bank in case of non-repayment of the loan arising by whatever reasons thereto the guarantor further authorises the bank to offset its outstanding balance with the bank in satisfaction of the debt in respect of.*

***Clause: 7** That Guarantor will submit one salary cheque and payment schedule for all employees under this agreement by the last day of every month directly to the bank at its relevant branch of the bank.*

Thus, the above, are I think, the terms and conditions which have generated the present dispute. That said and done, I associate myself to the conclusion by the learned counsel for plaintiff that the first issue is to be answered in the affirmative that plaintiff extended loan to defendant employees on the above terms as contained in the collective guarantee agreement. That is exhibit P1.

This takes me to the second issue which was couched thus *what amount if any, is outstanding and due to the plaintiff under the said loan?* The

learned counsel for plaintiff had it that the outstanding amount resulting from failure to remit the salaries for 17 employees of the defendant as per August 2021 is TZS 392,182,509 comprising of the principal sum plus interest. On the other hand, the learned counsel for the defendant submitted that, there is no evidence to substantiate the outstanding balance of TZS 392,182,509 because bank statement does not provide credible evidence to indicate the amount which was availed so as to substantiate thatthe sum promised in the letter of offer were actually disbursed. I agree with the learned counsel for the defendant that salary loans were issued to various borrowers on various amounts, different dates and different interests. However, after careful scrutiny of exhibit P2 the total disbursed loan to all beneficiaries were TZS 178,000,000.00 the amount which has not been repaid in full as such the principal sum plus interest at the time of the institution of this suit stood at TZS 392,182,509 cumulative of the outstanding balance of each beneficiary.Taking into accountof exhibits p5 of each employee the outstanding unremitted balance the plaintiff has proved to the standard required in civil casesthat is amount due is TZS 392,182,509 (on balance of probability) as guaranteed by the defendant.

The third issue was couched thus *Whether the defendant guaranteed payment of the said staff loan.* The learned counsel for plaintiff had it all that through exhibit P1 the defendant irrevocably undertook to be special guarantor of the advanced loan. Whilst the learned counsel for defendant submitted that the defendant was not a guarantorfor payment but rather,she was a guarantor of collection. Having carefully considered both the pleadings, the testimonies of the respective parties' witnesses and documentary evidence tendered in their totality, I am inclined to answer this issue in the affirmative as correctly argued by Mr. Masatu, and right so in my opinion that defendant guaranteed to deduct salary loan instalment.It is worth noting that the whole transaction traces its genesis from exhibit P1, which provided that, I beg to quote in verbatim:

> ***Clause: 5*** *that the guarantor guarantees full recovery of all monies due to the bank from any outstanding balances of its employees borrowing from the bank in case of non-repayment of the loan arising by whatever reasons thereto the guarantor further authorizes the bank to offset its outstanding balances with the bank in satisfaction of the debt in respect of its employees who have defaulted to repay the loan.*

My understanding of the above quoted clauses of the collective guarantee agreement, is that the defendant agreed to remit monthly

salary of its employees and in case of non-remittance she will undertake to repay the outstanding due to the bank. Therefore, the argument that the defendant was guarantor for collection is a mere statement from the bar because the contents of exhibit p1 are loud and clear that the defendant was the guarantor and even during cross examination the sole witness for the defendant (DW1) admitted that he guaranteed the said salary loan to its employees. It is worth noting that, oncea contract has been reduced into writing then in terms of section 100 and 101 of the Evidence Act [CAP 6 R.E. 2019] provides that;

> *"When the terms of contract, grant or other disposition of property, or any matter required by law to be reduced to the form of the document, have been proved according to section 100 no evidence of any oral agreement or statement shall be admitted, as between the parties to that instrument or their representatives in interest for the purpose of contradicting varying, adding to or subtracting its terms."*

The same legal position was emphasised in the case of **Charles Richard Kombe t/a Building V. Evarani Mtungi and 2 Others, Civil Appeal No 38 of 2012 (unreported)** that, a party to such contract is not permitted to adduce oral evidence for the purpose of contradicting, varying, adding or subtracting from its terms. Guided by the above legal

position the defendant is barred from adducing oral evidence for the purpose of varying the collective guarantee agreement (exhibit p1) which he signed with free consent to avoid liability. Therefore, I subscribe to the case of **Joseph F. Mbwilizi v Kobwa Mohamed Lyeselo Msukuma (Legal representative/administratrix of the estate of the later Rashid Mohamed Lyeselo) and Two Others, Civil Appeal No. 227 of 2019 CAT**cited by the learned counsel for plaintiff that once parties to contract reduce their agreement into writing, the written agreement prevail in terms of Section 101 of the evidence Act because documentary evidence is memorial of the truth agreed. Thus, that said and done the third issue is answered in affirmative that defendant guaranteed the loan.

This takes me to fourth issue which was couched thus *Whether defendant breached the terms of the collectiveguaranteeagreement?*The learned counsel for plaintiff submitted that the defendant was failed to deduct loans instalments of its loaned employees and remit the deducted amount to the plaintiff as agreed. On the other hand, the learned counsel for defendant submitted that since the plaintiff has failed to tender evidence regarding suretyship and guarantee then there is no evidence of breach. I have carefully revisited and considered the

contents of exhibit P1 particularly clause 4 in answering this issue with keen legal eyes and mind and with respect to Mr. Shayo, the defendant breached the terms of the collective agreement because it was the obligation of the defendant to deduct salary instalment and remit to plaintiff but for the reasons better known to her,she did not deduct the said instalment as agreed the act which constitute breach of agreement. In other word exhibit P1 is the guarantee agreement. It is settled legal position that, a breach of contract occurs when one party in a binding agreement fails to perform according to the terms of the contract. Legally speaking each party in a contract is expected to fulfil its obligation under that contract. The provisions of section 37 of the Law of Contract Act, [Cap 345 R.E. 2019] underscore the point. For ease of reference, I reproduce it hereunder:

Section 37.

> "*The parties to the contract must perform their respective promises, unless such performance is dispensed with or excused under the provision of this act or by any other law.*" (Emphasis mine).

That was emphasized again in **Simon Kichele Chacha v Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT**. Guided by the above legal stance, the next question to be asked by this court *was there any such failure on the party of the defendant*. In order to find out whether there was breach or failure to perform contract; one should take into consideration the terms of the contract and find out if at all, there was any failure to fulfil any of such terms without any justifiable or lawful excuse. Back to our suit, carefulexamination of the testimony of both parties, and according to exhibit P1 the defendant breached the contract by failure to remit monthly salary of its employees under this agreement directly to the bank as agreed as such the outstanding balances of unremitted salaries stood at TZS 392,182,509 .00. It is worth noting that where a contract provides for prompt payment of each instalment as being of the essence, the effect of the clause is that 'any failure to pay an instalment promptly is a breach of contract going to the heart of the contract giving the right to terminate the contract at law. Therefore, the issue number four is for the reasons stated above answered in the affirmative that the defendant breached the Collective Guarantee agreement.

The next issue was that *what (if any) is the defendant's liabilityin respect of the outstandingloans under the collective guarantee agreement over salary loans*. I should make it clear that based on the evidence, this issue was only argued by the plaintiff counsel which indicate that the defendants had nothing to submit on It. Without much ado I fully agree with the only submissions by Mr. Masatu that the defendant is liable to all the monies due to the bank from the outstanding balance of its employees that borrowed from the plaintiff. The evidence of PW1 shows that at the time the suit was filed the outstanding balance stood at TZS 392,182, 509.00. In terms of clause 5of exhibit P1 and the nature of the agreement between the parties this court finds that, the Plaintiff is entitled to recover the entire amount due on the loan. As a matter of principle, the obligation to honour what was agreed by the parties to a contract is fundamental or cardinal principle in the law of contract this was emphasized by the Court of Appeal in the case of **Simon Kichele Chacha V. Avelina M. Kilawe (supra)** where the court held that:

> "*Parties are bound by the agreement they have freely entered into, and this is a cardinal principle of the law of contract that there should be a sanctity ofthe contract.*"

With that in mind and back to this suit, and after carefully scrutiny of exhibit P1 clause 5 and exhibit p2 clause 1 the defendant had duty to fulfil her obligation under the contract which is to repay the unremitted salaries as agreed. As such the argument that the defendant cannot be liable because the plaintiff has not exhausted the legal remedies of obtaining repayment from his employees was raised out of context because it was not among the terms in the collective agreement and worse enough the content of clause 1 of exhibit p2 is loud that this loan was made pursuant to an agreement between plaintiff and defendant. Whilst the defendant employees were contemplated for the purpose of loan. It is worth noting that the arrangement in this suit is distinct from other arrangements of contract of guarantee therefore it should be decided depending on what was agreed by the parties. According to the defendant the plaintiff was to sue the defendant for repayment of the loan after she has exhausted all legal remedies because the defendant was not privy to contract. While on the other hand the content of exhibit p1 is aloud that defendant was liable to all dues to the plaintiff in case of default as agreed in the contract. The issue for determination therefore is whether or not the court should interfere with the agreed terms and conditions of the contract freely entered by the parties. Among the cherished cardinal principles of the law of contract is the sanctity of a

contract as I have stated above and amplified in **Simon Chacha Kichele's case**. Once parties competent to contract for a lawful consideration with a lawful object entered into an agreement freely, the contract entered becomes sacrosanct. That is, the parties to the contract become bound by the terms and conditions stipulated and each has to fulfil his/her part of bargain. Neither a third party nor courts should interpolate or tamper with the terms and condition therein. When determining a similar issue as to whether or not can the court interpolate anything in a freely concluded agreement in **Simon Kichele Chacha (supra)**. The Court while insisting on its duty to give effect to the intention of the parties to the contract and not interfering with the terms and conditions therein stated among others: -

> "*That fact does not give room to this Court to tamper with the agreement... If the words of the agreement are clearly expressed and the intention of the parties can be discovered from the whole agreement then the court must give effect to the intention of the parties.*"

Strictly speaking, under our laws, once parties have freely agreed on their contractual clauses, it would not be open for the courts to change those clauses which parties have agreed between themselves unless there is allegation of fraud or other factors vitiating the consent of a

party. In this suit, the defendant wants the court to add another term that the plaintiff before institution of the suit ought to have exhausted all legal remedies something which was not contemplated in the contract. It is plain that they are praying the Court to interpolate new terms and conditions regarding the repayment of the loan and who to be sued which amounts to tempering with the agreement the parties had entered into. However, as above shown, the courts have no powers to interfere with the sanctity of the contract but to give effect to what the parties have agreed upon. Thus, the defendant cannot escape the legal consequences of the breach of collective guarantee agreement because the wording of section 80 of the Law of Contract Act [Cap 345 R.E. 2019] stipulates that a surety's liability is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. That said and done, this issue is answered in affirmative that the defendant is liable for payments of the outstanding amount to the tune of TZS 392,182,509.00.

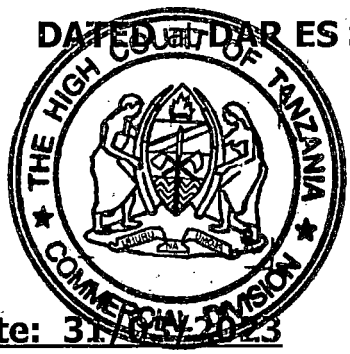
The last issue was"to what reliefs parties are entitled to". The learned advocate for the defendant prayed this suit to be dismissed with costs. On the part of plaintiff, the learned Advocate invited and strongly urged this court to grant the reliefs sought in the plaint. I have no flicker of

doubt in this suit that the plaintiff has discharged the burden of proof to the standard required under the civil cases. That said and done, I enter judgment against the defendant on the following orders, namely:

a. I declare that the defendant breached the guarantee obligation on the loan repayment in respect to loan dully extended to her employees.
b. The defendant is ordered to pay the sum TZS 392,182,509.00.
c. Payment of penalty interest at the rate of 2% on the amount standing above from the dateaccrued to the date of judgement.
d. Payment of intereston decretal amount at the rate of 7% from the date of judgement to the date of full payment.
e. Costs of the suit be borne by the defendant.

It is so ordered.

DATED at DAR ES SALAAM this 31th day of March, 2023.



U. J. AGATHO
JUDGE
31/03/2023

Date: 31/03/2023

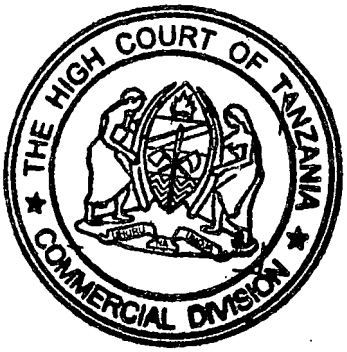
Coram: Hon. U. J. Agatho, J.

For Plaintiff: Mr. Makaki Masatu, Advocate

For Defendant: Mrs. Benadetha Shayo, Advocate

C/Clerk: Beatrice

Court: Judgment delivered today, this 31st March 2023 in the presence of Makaki Masatu, learned counsel for the Plaintiff, and Mrs. Benadetha Shayo, learned counsel for the Defendant.



U. J. AGATHO
JUDGE
31/03/2022