

TANZANIA / JUDGMENT

CRDB BANK PLC VS AFRICHICK HATCHERS LTD COMM CASE NO

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1 January 2014

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IN THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION AT PAR ES SALAAM
COMMERCIAL CASE NO.97 OF 2014 CRDB BANK PLC
PLAINTIFF VERSUS

1. AFRICHICK HATCHERS LTD 1st DEFENDANT
2. INNOCENT MWANKUNGA 2nd DEFENDANT
3. GWITU MWANKUNGA 3rd DEFENDANT

JUDGMENT

Maige, J: Date of Judgment - 9th February, 2016 In this suit, the plaintiff is claiming against the defendants both severally and jointly for payment of TZS 2,947,937,958.00 being outstanding loan balance, inclusive of interests, in respect of the loan facility extended to the first defendant on 30.6.2009 and guaranteed by the second and third defendants. The plaintiff is also claiming interest on the principal sum at the rate of 21% from the date of the filing of the suit to the date of judgement, and on the decretal sum at the rate of 7% from the date of judgement to the date of full settlement of the decretal sum. i While the first defendant has denied the claim for being premature on a number of reasons, the second and third defendants claim to have been discharged from liability for the reason of material variation of the loan. In the conduct of this suit, the plaintiff was represented by Mr. Rweyongeza, learned advocate whereas the defendants were represented by Professor Mgongo Fimbo, Messrs Martin Matunda, Kamala, Mnyele and Mwakis, learned advocates (together, "the defense counsel")- At the end of the trial, the counsel addressed the court generally by way of written submissions. I have to confess right from the outset that their submissions have been very instrumental in preparation of this judgement. Before commencement of actual hearing, the following issues were framed for determination by the court; namely:-

- (i) Whether the defendants have defaulted in repayment of the Loan Facility:-
 - a) Whether there was a fundamental breach by the Plaintiff for not issuing a fresh loan repayment schedule after 24th September 2011.

- b) Whether there was a fundamental breach by the plaintiff for not providing additional financing of the project; (ii) Whether the Demand Notice issued by the Plaintiff on 25th March, 2013, was void. (iii) Whether the 2nd and 3rd Defendants were discharged as guarantors after variation of the Loan Facility. 2 (iv) To what reliefs are the parties entitled. According to pleadings, the existence and validity of the following documents have not been in dispute: the loan facility letter for TZS 1,500,000,000/= dated 30th June 2009; the loan facility letter (variation) dated 1.11.2011; the personal guarantee of the 2nd and 3rd defendants; mortgage deed dated 26.8.2009 on a landed property at plot no. 1027, Boko area, DSM with CT. No. 78288; a deed of variation of mortgage dated 18.5.2011; a demand letter dated 25.3.2013. The loan facility letter, Certificate of Title No. 78288, Deed of Mortgage, Deed of Variation of Mortgage, Deed of Guarantee and Indemnity, Debenture Instrument and Demand Notice were produced and admitted into evidence as exhibits P-1, P-2, P-3, P-4, P-5, P-6 and P-7, respectively. It was express in exhibit P-1 that the primary term of the loan was 60 days from the date of first disbursement, and was repayable in 48 monthly installments counting from the date of the expiry of the grace period. With the reschedule of the loan repayment period, the term of the loan was extended to 30th September, 2015 from 30th June 2014. Express in P-1 was also the fact that non payment of any of the monthly installment would amount to an event of default and was repudiatory to the contract. Clause 7.1 of exhibit P-1 stipulates the details of the said monthly repayment schedule commencing from July 2010 to June 2014. It is express in clause 7.2 of exhibit P-1 that "where the loan is disbursed in installments, the above loan repayment schedule may change and detailed loan repayment schedule will be issued to the borrower when disbursement are complete" 3 It is irrefutable that until the date of the filing of the above suit, the defendants had not effected any payment in respect of the loan facility. As a result, the plaintiff alleges, the debt balance together with accruing interests due and payable to the plaintiff as of 8th July, 2014 stood at TZS 2,947,937,958.00. In its amended Written Statement of Defense and the Witness Statement of DW-1, the first defendant claims that the suit is premature on account of four factual grounds. First, the plaintiff has not availed the first defendant with details of a fresh repayment schedule despite the fact that disbursement was not effected in a single tranche. Two, the action to recover the entire loan was pursued while there was ongoing negotiations between the parties wherein the plaintiff had promised to offer additional funding after inspecting the project and satisfying itself that it was viable; and that the advanced loan was properly applied. Three, the action was taken before issuing a valid notice of default as required by law. The 1st defendant in particular attacks the demand notice in exhibit P-7 as being fatally defective for not complying with the mandatory requirements under the Land Act. Four, the loan repayment was to be paid out of the proceeds of the project which until the date of the filing of the suit had not yet started. On their part, the second and third defendants claim that they have been discharged from the guarantee by reason of material variation of the terms of the loan facility without their consent. That the variation of the loan was made without their consent, was well established in their Witness Statements, which passed unopposed. Indeed, during actual hearing, the counsel for the plaintiff informed the court that he was not intending to cross examine D-2 and D-3. As a result, their

evidence was received without being subjected to cross examination. There was no independent testimony from the plaintiff to 4 contradict the said evidence on factual point either. There was nevertheless an attempt to avoid the effect of the said factual evidence on a legal point. That aspect will be dealt with elsewhere in this judgement. At this juncture, I find it proper to hold, as a point of fact that, the variation of the loan facility was made without the consent of the second and third defendants. The Witness Statement on behalf of the plaintiff was deposed by one EXAVERY MAKWI, (PW-1) who represented himself as the senior credit officer of the plaintiff. His evidence was essentially documentary. He established that the loan of TZS 1,500,000,000/= was extended to the first defendant by way of a letter of facility (P-1) and was secured by personal guarantees of the 2nd and 3rd defendants (P-5), mortgage on the property with CT No.78288 (P-3) and floating debenture on the assets of the first defendant (P-6). He further told the Court that originally, the term loan was 60 months and was repayable in 48 installments commencing after the expiry of 12 months grace period. According to him, the time for the repayment of the loan was extended, by agreement, until on 30th September 2015. He further said that the defendants, in fundamental breach of the loan agreement, defaulted to service the loan and as a result, the outstanding balance as of June 2014 stood at TZS 2,947,937,958.00. The defendants have remained in default despite being served with a demand notice (P-7), PW-1 further testified. On the date of hearing, PW-1 was called for production of documents and cross examination. On cross examination by Matunda, learned counsel, PW-1 conceded that the purpose behind the loan was to partially finance the project; and it was to be repaid from the proceeds of the project. He admitted that the project was expected to start in July 2010 but it did not. He denied the assertion that the loan was disbursed in installments. He said it was disbursed in a single tranche. He further denied the allegation that there was made a promise by 5 the plaintiff to offer additional funds although he conceded that some officers of the plaintiff had visited the project and satisfied themselves that the loaned amount was properly utilized into the project. Equally conceded was the fact that the plaintiff had applied for reschedule of a loan repayment period. The first defendant, on its part, relied on the witness statement of ISAACK MWANASIKA (DW-1), the principal officer of the first defendant. He informed the Court that the loan in dispute was granted to partly finance the establishment of commercial hatchery for production of day old chicks; and it would be repaid out of the income generated from the financed project. DW- 1 further testified that the loan was disbursed in different tranches as shown by the official bank statements which was produced into evidence and admitted as D-1. The grant of the loan, according to DW-1 was preceded by an appraisal into the project which satisfied the plaintiff on the viability of the project. This was after studying the visibility report and the valuation of the work in progress. The feasibility study was produced into evidence and admitted as D-2 whereas the valuation for work in progress as D-3. It was further in the testimony of DW-1 that in pursuit of the contract, payment for the project would sometimes be paid directly to the suppliers as per various invoices and delivery notes which were produced into evidence and admitted collectively as D-4. PW-1 stated further that on 12th October, 2012, some officers of the plaintiff visited the project for inspection and established that production had yet to

commence. After inspection, and having been shown the relevant project documents, PW-1 further testified, the officers of the plaintiff were satisfied that the funds they disbursed were properly utilized into the project, and further that after seeing the magnitude of the project, the said officers promised more fund for completion of the project. Subsequently, PW-1 stated, the plaintiff declined to offer additional fund unless the first defendant 6 would withdraw the suit in civil case number 79/2012 which was pending at the High Court. Eventually, it is in the testimony of DW-1, the plaintiff served the 1st defendant with a demand note in exhibit P-7 wherein it was requesting for payment of the total loan plus interests within 60 days from the date thereof, or else the plaintiff would make use of its powers under mortgage. After being served with a demand notice, the first defendant informed the plaintiff, through a letter of response which was admitted as D-5 to the effect that the claim was premature. Finally, DW-1 prayed that the suit be dismissed for being premature. In cross examination by Mr. Rweyongeza, learned advocate, DW-1 conceded the fact that not even a single cent has been paid by the defendants and either of them. He also conceded that no application for additional funding was made. After making an exposition of the factuality of the case, it is high time now to address the issues framed. I will start with the third issue which is whether the 2nd and 3rd defendants were discharged as guarantors after variation of the loan facility. It is a common ground that subsequent to the grant of the facility letter in exhibit P-1, the term of the repayment of loan was extended to 30th September, 2015 from 30th June, 2014. It is also a common ground that the said variation was done without there being procured consent from the guarantors. The defense counsel have strongly submitted that in varying the terms of the loan contract without the consent of the guarantors, the guarantors were, in terms of section 87 of the Law of Contract Act, Cap. 345 R.E., 2002 C'LCA") discharged from the contract. To cement their contention, the defense counsel have relied on the authority of the East African Court of Appeal C'EAC") in REID VS NATIONAL BANK OF COMMERCE (1971) E.A 525 in support of the proposition that material variation of the term of the loan contract without the consent of the guarantor discharges the latter from the 7 contract notwithstanding the wordings of the contract. It was further submitted for the defendants, relying on the authority in COOPER MOTORS CORPORATION (T) LIMITED VS ARUSHA INTERNATIONAL CONFERENCE CENTRE (1991) TLR 165 that the omission to seek and obtain consent from the guarantors notwithstanding the statutory requirement was a repudiatory breach of the contract of guarantee. The submission of Mr. Rweyongeza, learned advocate for the plaintiff in rebuttal is based on two propositions. First, the deed of guarantee in exhibit P-5 was not discharged for the reason of variation because consent was given in advance by the express provision of clause 3.2 of exhibit P-5. Two, assuming that the guarantee was discharged, exhibit P-5 being both a guarantee and indemnity, the element of indemnity remained unaffected. Mr. Rweyongeza did not cite any authority apart from contradistinguishing between a guarantee and indemnity. My examination of exhibit P-5 establishes that it was a continuing guarantee and that the creditor had reserved the right to vary the terms of the loan facility without prior consent from the guarantors. Mr. Rweyongeza has called upon the Court to hold that the 2nd and 3rd defendants are bound by the terms of the contract. The defense counsel have vigorously

contested maintaining that the variation determined the guarantee notwithstanding the wordings of the contract. They have placed heavy reliance on the authority in REID VS NATIONAL BANK OF COMMERCE supra. The fact that variation of loan facility without the consent of the guarantor discharges the guarantor from the contract, seems not to be in dispute. The dispute, it seems to me, is whether a deed of guarantee can create a right to 8 the creditor to vary the terms of the loan facility without there being a consent from the guarantor? As I understand the provision of section 87 of LCA, variation of a loan contract without the consent of the guarantor discharges him from the contract. The equity behind the law is to protect the guarantor who in most cases has been the weaker party in the making of the contract of guarantee. As held in PATEL VS. NATIONAL & GRINDLAYS BANK LTD., (1970), E.A.112, "the law has always been jealous to protect a guarantor who, especially in a continuing and fluctuating liability, is very much at the mercy of the creditor¹". The protection is associated with the principle of equity that "a man who makes himself Hable for another person's debt is not to be prejudiced by any dealing without his consent between the secured creditor and the principal debtor". This principle was stated by His Lordship Selborne, L.C. in DEVAYNES VS. NOBLE CLAYSTON, (1816), 1. Mer. 529, 572 cited by P.E. Smart in his LEADING CASES IN LAW OF BANKING, 6th Ed. Sweet and Maxwell, p. 317. The EAC dealing with a similar issue had held in REID VS NATIONAL BANK OF COMMERCE (1971) E.A 525 that material variation of loan contract without the consent of the guarantor discharges the guarantor from the contract notwithstanding the wordings of the guarantee. The reason for the decision was that the contract between the banker and the principal debtor will no longer be the contract which the guarantor agreed to guarantee at the time of the execution of the deed of guarantee and that the variation was prejudicial to the guarantor. At page 529 of the Report His Lordship LAW, J.A, (as he then was) makes the following statement:- In postponing its mortgage, the respondent bank did something not contemplated by the parties, without the appellant's knowledge, and to 9 his grave prejudice. The burden on the appellant was thereby unduly increased, in my view so as to discharge from his liability under the guarantee. It is urged that; since the right to vary the terms of the loan without the consent of the guarantor was expressly incorporated in the deed of guarantee, the parties were bound by the terms of the contract. A similar argument was made in REID VS NATIONAL BANK OF COMMERCE supra yet the EAC, by majority, held that the guarantor was discharged, the wordings of the contract notwithstanding. It was also contended that the variation, much as it did not increase the liability of the guarantors was not prejudicial to them. With respect, I will not accept such submission for two main reasons. First, "extension of period for the repayment of loan" is expressly mentioned in section 87 of the LCA as a variation capable of discharging the guarantor in the absence of consent. It therefore amounts to material variation. Secondly, by extending the repayment period without their consents, the guarantors were prejudiced in so far as they were denied their common law right to call upon the principal debtor to pay off the debt. In ROUSE VS. BRADFORD BANK COMPANY (1894) 2. CH. 32 at page 75, His Lordship Smith LJ, made the following observations: A surety is entitled at anytime to require the creditor to call upon the principal debtor to pay off the debt, or himself to pay off the debt, and when he has paid

it off he is at once entitled in a creditor's name to sue the principal debtor. The surety cannot do either the one or the other of these things until the time so given has elapsed and it is said that by that reason this surety's position is altered to his detriment without his consent. It is for the foregoing reasons that I will agree with the defense counsel that the variation of the contract of guarantee without the consents of the 2nd and the 3rd defendants and to their prejudice has discharged them from liability as guarantors. It was also submitted in the alternative that, since exhibit P-5 serves as both a guarantee and indemnity, the element of indemnity is not affected by the provision of section 87 of the LCA. The counsel did not refer me to any provision in exhibit P-5 which would suggest that it was in fact a contract of indemnity. A mere fact that a contract is entitled "a contract of indemnity" does not by itself make it a contract of indemnity. In my view, what makes a contract a contract of indemnity are the terms and conditions and not the title. That notwithstanding, my reading of exhibit P-5 does not suggest that it is a contract of indemnity properly so called. Exhibit P-5 consists of 10 clauses and none of them make reference of indemnity. A contract of indemnity, as I understand, consists of two parties, namely, the indemnifier and the indemnity holder. Conversely, a contract of guarantee consists of three parties, namely, the principal debtor, the creditor and surety. In the absence express stipulation in the contract, the two contracts cannot be created by a single contractual instrument. It is a principle of law however according to section 97 of LCA that in every contract of guarantee, there is an implied contract of indemnity, not as between the creditor and the surety, but between the principal debtor and the surety. Professor Ram Naresh Chaundhary, one of the renowned jurist in banking Law jurisprudence, commenting on the distinction between a guarantee and an indemnity has the following to say:- In an indemnity there is only one contract, that is the contract of indemnity. But in a guarantee there are three contracts, namely, a contract of loan between the principal debtor and creditor, a contract of guarantee between the creditor and surety and finally an implied ii contract of indemnity between the principal debtor and surety. (See R.N. Chaudhary, BANKING LAW, 1st Ed., Central Law Publications, Allahabad (2009) at page 254) It would appear to me to be the law that in the absence of any express provision to the contrary, where a contract of guarantee is entitled "a contract of guarantee and indemnity", the phrase indemnity is relevant in relation to the implied contract of guarantee between the guarantor and the principal debtor, which is an essential element of a contract of guarantee. I have no doubt therefore that the phrase "guarantee" used in section 87 of LCA covers the contract of guarantee and its element of indemnity. I would, for the reasons I have given, hold that the variation of the loan facility without the consent of the 2nd and 3rd defendants discharged them from the contract notwithstanding the phrase "indemnity" appearing in the title of exhibit P-5. The third issue is henceforth answered affirmatively. I will now pass to the second issue which is whether the demand notice in exhibit P-7 was valid. The validity of exhibit P-7 has been questioned on account of non-compliance with the requirements of section 127 of the Land Act read together with G.N. 355 of 2009. It has been contended by the defense counsel that the notice requirements under section 127 of the Land Act applies to the instant case because the loan contract and deed of mortgage are inseparable. It appears to be the view of the defense counsel that since the

deed of mortgage has been pleaded by the plaintiff, and in so far as the demand notice in exhibit P-7 threatened to sell the mortgaged property in the event of non-payment of the debts, this suit is on mortgage, and as a result, the cause of action would not arise unless a proper statutory notice in terms of section 127 of the Land Act was served on the defendants. The defense counsel have placed 12 heavy reliance on the authority of the Court of Appeal of Tanzania ("CAT") in NATIONAL BANK OF COMMERCE VS. WALTER T. CZURN (1998), TLR 380. On his part, Mr. Rweyongeza, learned advocate, has submitted that the dispute at hand not being revolved around the exercise of powers under mortgage, it is not covered by the provision of section 127 of the Land Act as to notice. It would however appear to me that Mr. Rweyongeza does not dispute the fact that the demand notice in exhibit P-7 does not conform to the provision of section 127 of the Land Act. The question which I have first to resolve is whether the current suit is a suit on mortgage so that the provision of section 127 of the Land Act would be applicable. Admittedly, the demand notice in exhibit P-7 was intended to serve as a notice of default for the purpose of enforcing a mortgage. This is so because in its last paragraph, it is stated that if the defendants did not liquidate the debt within 60 days from the date of the notice, the plaintiff would enforce the mortgage. Does that alone render the suit to be on mortgage? I think the answer is no. The reason being that what determines a cause of action is the reliefs sought in the pleadings and not mere factual narration. In the plaint, the plaintiff has pleaded breach of loan agreement and has prayed for payment of the loaned amount. There is no where the plaintiff is seeking to exercise any of the powers under mortgage. In FIRST NATIONAL BANK TANZANIA LIMITED VS. WASWARD WILSON MAPANDE, Commercial case No. 75 of 2014, this court was called upon to determine whether the mere fact that a loan is secured by mortgage renders a suit thereof to fall within the purview of section 127 of the Land Act. The Court having read the provision of part X of the Land Act wholistically took the view that the provision applies only in a suit for enforcement of mortgage. I see no reason why I should depart from that position. The defense counsel have referred me to the authority of CAT in NATIONAL BANK OF COMMERCE VS. WALTER T. CZURN (supra). I understand that an authority of the CAT dealing with a similar issue is binding to the High Court. Nevertheless, I have noted that the authority relied upon by the defense counsel is based on the English Land (Law of Property and Conveyance) Act 1881, which was then applicable by virtue of section 2 (3) of the Judicature and Application of Laws Act, Cap. 358, R.E., 2002 as a statute of general application. It was applicable in Tanzania in mortgage and finance for the reason of there being a lacunae in the law relating to mortgage and finance, which lacunae has been filled in by the comprehensive and elaborate provisions of part X of the Land Act. As I observed in THE FIRST NATIONAL BANK CASE (supra), since the provisions of Part X of the Land Act addresses the issue of notice of default in relation to mortgage exhaustively, the authority of the CAT, in so far as it was interpreting the provision of English Land (Law of Property and Conveyance) Act 1881 does not apply in matters relating to notice of default. Since the demand notice in exhibit P-7 was challenged on a sole ground that it did not comply with the provisions of the Land Act, and having established that the suit at hand is not a suit on mortgage, I hold that the notice was not invalid. Issue number two is therefore answered

negatively. Assuming that I was wrong, yet the defense, to the extend that it relates to the first defendant, would not succeed in view of an established banking practice that notice is not an ingredient for enforcement of an ordinary loan facility, unless it is expressly provided for in the contract. In WALTON VS MASCALL,

(1884) 13 M&W 452 (referred in JOACHIM VS SWISS BANK CORPORATION, 14 (1921), 3 KB, 110,) it was held that "a request for payment of debt is quite immaterial, unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt when due", a similar position was stated in NORTON VS ELLAN, 1837, 2M&W 461 (Referred in JOACHIM CASE supra}. This position has been judicially recognized in Tanzania in a case of THE FIRST NATIONAL BANK CASE (supra}. I will now turn to the first issue which is whether the first defendant has defaulted in the repayment of loan. What amount to default in the repayment of the loan has been defined in clause 11 (n) of exhibit P-1 as to include "failure or default "in paying the agreed installments when they fall due." In terms of the same clause, default is proved "when installment is due and has not been repaid within thirty (30) days". There is no dispute that not even a single cent has been repaid in respect of the loan. For that reason, Mr. Rweyongeza has called upon the court to hold that since the defendants have not serviced the loan and the non payment has gone beyond 30 days, they have defaulted in paying the loan. I would, but for the various defenses raised by the first defendant, quickly agree with him. I will revert to this issue after dealing with the said defenses which are reflected in items (a) and (b) of the first issue. In the first place, it is contended that there has been a fundamental breach of contract by the plaintiff in not providing the defendants with a fresh details of the repayment installments despite the fact that disbursement was not made in a single tranche. The submissions of the defense counsel is based on clause 7.2 of exhibit P-1 which provides that "where the loan is disbursed in installments, the above loan repayment schedule may change and detailed loan repayment schedule will be issued to the borrower when disbursement are complete"

15 Parties are not in dispute that the agreed loan advance of TZS 1,500,000,000/= was credited into the account of the first defendant on 8/09/2009. There has nevertheless been a serious debate on whether the said transection amounts to disbursement for the purpose of exhibit P-1. The defense counsel has submitted, with all forces, that in terms of clause 6.2 and 6.3 of exhibit P-1, the term "disbursement" covers both crediting of the money into account and withdrawal of the same for utilization into the project. Relying on the bank statements produced as D-3 and invoices and delivery notes exhibited as D-4, the defense counsel maintain that the disbursement was in installments and that the last installment was the withdrawal made in June 2011. For clarity, I will reproduce here below the provisions of clauses 6.2 and 6.3 of exhibit P-1. 6.2 Disbursement After complying with the pre disbursement conditions the borrower shall follow the procedure outlined herein below when accessing disbursement.

- (a) the Borrower shall request disbursement of a loan by notice to the Bank within 30 days after complying with the pre-disbursement condition. The Bank reserves the right to cancel the facility if the notice is not received within 30 days from the date of complying with the disbursement conditions.
- (b) The Bank may on receipt of the notice, disburse the loan. 6.3 Disbursement Schedule
- (a) Drawdown schedule will be guided by the projected cash flow, provided that withdrawals are within the approved limit, for specified purpose and within the credit period. Direct payment will be made to suppliers of machinery.
- (b) The loan amount drawn will not exceed the amount agreed in the loan facility letter. The Bank reserves the right not to disburse the entire 16 loan amount or any part thereof if the business or project costs indicate that no more money is needed. It is a principle of statutory interpretation that in construing commercial instruments, the court should seek to ascertain the intention of the parties so as to give the contract commercial effect. The rationale behind the principle, as correctly submitted by the defense counsel, is based on the fact that commercial agreements are made so as to achieve a particular commercial object. In dealing with this issue, I will be guided by this rule of interpretation. It is not contentious that the loan in question sought to partly finance the project. It was a term loan of a specified amount of money. It was not a joint project between the plaintiff and the first defendant. As a lender, the plaintiff was duty bound to be assured that the person to whom the money are advanced, uses the money to such advantage that they will be able to repay at the time and on the terms agreed at the outset. This is so because a banker advances money which does not belong to him but belongs to depositors who have to be paid either on demand or on maturity after a certain period. If the money advanced is not recovered, the banker is likely to suffer a loss and will not be able to balance liquidity and profitability. Indeed, it has been a common practice on the part of the banking institutions to have a control of the utilization of the disbursed funds by providing in a loan contract "utilization schedule". Clause 7:2 of exhibit P-1 which is the basis of the defense, starts with the clause "when the loan is disbursed in installments". This signifies that the loan could be disbursed in installments or in a single tranche. It would follow therefore that whether disbursement was made in a single tranche or installments, is a question of fact. It cannot, in my view, get an answer from 17 the provision of clause 6 of exhibit P-1 as suggested by the defense counsel. Clause 6.2 of exhibit P-1 in my reading, provides for disbursement whereas clause 6.3 provides for utilization schedule although its is entitled "disbursement schedule". The clause "in accessing disbursement" used in clause 6.2 was in reference to the procedure through which funds are availed to the debtor and not the manner the disbursed fund is utilized as contended by the defense counsel. The procedure envisaged in the said clause are those outlined in paragraphs (a) and (b) of clause 6.2 which relates to disbursement. The procedure set out in paragraphs (a) and (b) of clause 6.3 in my understanding, is related to the way the disbursed fund was to be utilized. The purpose behind clause 6.3, as it has been the banking practice, is to monitor the utilization of the loaned fund so as to prevent

diversion of the same into irrelevant uses. It was submitted for the defendants that since the fund was operated into an account at the bank of the plaintiff, and there being restrictions in accessing the disbursed fund, it cannot be fairly said that disbursement was made at the moment the loan amount was credited into the account of the defendant. I do not agree with this submission for the main reason that the requirement for approval before withdrawing the disbursed fund is a common banking practice. The purpose behind the requirement, as stated in clause 6.3 (a) of exhibit P-1, is to ensure that "the withdrawn fund is for the specified purpose". The defendant has not adduced any evidence showing that he had requested for the withdrawal of the funds from its account for the project and denied. In *JOACHIM VS SWISS BANK CORPORATION*, (1921), 3 KB, 110, it was held that "where money is standing to the credit of the customer on current account with a banker, in the absence of special agreement, a demand by a customer is a necessary ingredient in the cause of action against the bank for the money lent". The contention by the defense counsel would have been meaningful had there been evidence of unreasonable refusal by the plaintiff of any request by the first defendant to withdraw money from the disbursement account for the project. I will therefore hold that there has not been any breach on the part of the plaintiff of clause 7:2 of exhibit P-1. Issue (i) (a) is thus answered negatively. It was also contended for the defendants that since under the agreement in dispute read together with the feasibility report (exhibit D-2), the loan was to be repaid out of the revenues generated from the project, and there being no dispute that the project is yet to be operational, the claim is premature. I will not agree with this contention for three main reasons. First, there is nothing in exhibit P-1 to the effect that the repayment of the loan would emanate from money generated from the project. Two, under clause 7 of exhibit P-1 repayment installments would commence after the expiry of the grace period and not the commencement of the project. Three, there has not been adduced any evidence to the effect that the delay of the operationalization of the business resulted from inaction on the part of the plaintiff. Although it is a fact that the granting of the loan was preceded by satisfactory appraisal on the part of the plaintiff of the feasibility report on the proposed project (D-2), I am not convinced by the view that the feasibility report forms part of the loan facility. For, whether the former was part of the latter, the answer should come from the terms and conditions of the latter and not mere speculation. I have very carefully reviewed exhibit P-1 and I could not come across with any clause incorporating exhibit D-2 or part thereof into exhibit P- 19

1. Besides, exhibit D-2 being not in nature of a contractual document, it would not, in my judgement, form part of a contract without being attached into it and specifically identified. It would appear to me that exhibit D-2 was relevant only in availing the plaintiff with information on what would be the source of the repayment of the loan so as to ensure that the repayment proposals are clear and well thought- out. In my opinion therefore the mere fact that a debtor has expressed, during pre-contractual negotiation, that he was expecting to repay the loan through monies generated from the funded project, does not give the expectation a contractual status. Sheldon and Fidler in *LAW AND PRACTICE OF BANKING*

{supra} commenting on a similar issue has the following to say at page 273. "the mere fact that both the banker and the borrower consider it likely that the borrower will repay the loan out of a particular fund does not amount to a contractual term that repayment is to be made out of this fund and this fund alone, nor does it give rise to an obligation on the part of the bank to ensure that it does nothing to delay or impede repayment out of that fund" It was also claimed that aside the contract in exhibit P-1, there was a pre- contractual oral collateral agreement between the plaintiff and the first defendant wherein the former undertook to finance the project to completion. Without wasting much time, I find this claim as an afterthought for the main reason that it does not feature out in the pleadings. It is raised for the first time in evidence. It therefore violates the rule against departure from pleadings set out in order VI rule 7 of the CPC. I have also considered the fact that the agreement in exhibit P-1 is for partial financing of the project 20 and not financing the projection to completion. There has not been adduced sufficient evidence to prove the alleged pre-contractual oral agreement either. It was also claimed that subsequent to the execution of exhibit P-1, there was negotiation between the plaintiff and the first defendant resulting into an oral collateral agreement wherein the plaintiff promised to provide additional funding for the project. It has been argued that although under the parol rule of evidence, oral evidence would generally not be admissible so as to vary the terms of a written contract, in the instant case it can, since exhibit P-1 does not constitute an entire agreement. The reason why exhibit P-1 does not amount to an entire agreement, according to the defense counsel, is absence of "an Entire Clause" which, as it has been the current trend, would expressly exclude any oral evidence to explain or add to the terms of the written agreement. The defense counsel have relied on authorities in: GILLESPIE BROS & CO. VS. CHENNEY; EGGAR & CO. (1896) 2QB 59, WESTMINNSTER PROPERTIES (1934) LTD VS MUDD (1959) CH. 129; and JOS HANSEN AND SOEHNE VS. GK. JETHA LIMITED (1959) E.A. 156. He has also relied on the commentaries from HALSBURY'S LAWS OF ENGLAND, VOL. 9(1) (REISSUE)/2. Before I direct my mind on the existence or otherwise of the alleged collateral agreement, I find it pertinent to determine whether the alleged oral evidence can, under the laws of Tanzania, be used to vary the terms of a written contract in exhibit P-1. It is the law, according to section 101 of the Evidence Act that if there be a contract which has been reduced to writing, verbal evidence will not be accepted so as to add to or subtract from or in any manner to vary or qualify the written contract. The rationale behind the rule is to uphold the value of written proof and effectuate the finality intended by the parties. The applicability of the rule, according to the authority in JOS HANSEN AND SOEHNE VS, GK, JETHA LIMITED (1959) E.A. 1563 is 21 conditional upon there being established that the terms of the parties agreement are wholly contained in the written document. The parol rule of evidence admits some exceptions. One of such exceptions, according to section 101(b) of the Evidence Act is where the oral agreement is a separate collateral agreement as to any matter on which a document is silent and which is not inconsistent to it. The reason being that the parol agreement neither alters nor adds to the written one, but is an independent agreement. In the instant case, the first defendant is claiming existence of a collateral agreement for provision of additional loan. Since exhibit P-1 is silent on the issue

of provision of additional loan and there being not inconsistency between alleged collateral agreement and the document in exhibit P-1, I find that the existence of the claimed oral evidence can be proved under the exception in section 101 (b) of the Evidence Act. Having established as such, I will now consider whether, according to the evidence adduced, there is sufficient proof of the alleged post contractual verbal collateral agreement? It is in the evidence of DW-1 that the promise was made after the plaintiff through its officers had visited the project for inspection and satisfied that the project was viable and the utilization of the disbursed fund was for the intended object. The names of the officers who visited the project and involved in the discussion and eventual promise were spelt out and there has not been a dispute on this factuality. What has been in dispute is the promise to provide additional loan. The evidence by the plaintiff in refutation of this claim was made by PW-1 who in his own testimony admitted to be a stranger to both the pre-contractual and post contractual negotiations. PW-1 also conceded in the course of cross examination that what transpired during the inspection of the project was not reduced into writing. This defeats any possibility of the testimony of PW-1 in rebuttal of what transpired during inspection of the project to be evidence on record. I would thus buy the view from the defense counsel that the evidence of PW-1 on that aspect is a mere hearsay which cannot, according to section 62 of the law of Evidence Act, be relied upon to contradict the evidence of DW-1. I therefore hold that PW-1 was not a competent witness to deny the fact that there was a collateral oral agreement to advance further financing. As I pointed out above, the visiting of the project by the named officers of the plaintiff and the subsequent promise to give additional loan was pleaded and testified upon. In my assessment, the evidence of DW-1 on this aspect is credible and reliable. The plaintiff, despite admitting that the said officers visited the project for inspection, did not call any of the said officers to contradict the testimony of DW-1. In my view, the said officers were material witnesses in the issue of the post contractual negotiations and promise. The omission to call them as witnesses without any justification entitles the court to draw an adverse inference that if the said witnesses were called, they would testify against the plaintiff. In KIMOTHO VS. KENYA COMMERCIAL BANK (2003) E.A. 108 it was held that failure to call a material witness may prompt a court to infer that the person's evidence would not have helped the party. Since in this case the said material witness has not been called and no reason for their non-production has been assigned, I find that this is a fit case to draw that inference. I consequently hold that the evidence of PW-1 on the existence of post contractual negotiation and promise to provide additional loan has not been traversed. It has therefore been proved. 23 The issue which I have to resolve here is whether the established oral promise to advance additional fund amounts to an enforceable collateral contract. My quick answer to this question is no for the reason that the said oral agreement is not certain as to its terms and conditions. It does not state what amount should be advanced as additional loan nor does it state when should the same be disbursed. More to the point, there is nothing in evidence to show how would the additional loan be repaid. It would appear to me that the promise in question was a promise to agree. It was subject to a contract which would stipulate the terms of the additional loan. In WALFORD VS. MILES 1 All E.R, cited in CHITY ON CONTRACTS, 29th ED, VOL.1(PART 1),

in paragraph 2-135 page 109, it was held that an agreement to agree was not enforceable for lack of necessary certainty. A similar position was stated in ALDERSON VS. MADDISON, L.R.S. EX.D. 293 which was referred with approval by his Lordship Mapigano in CATHOLIC DIOCESE OF MOSHI VS ATTORNEY GENERAL, (1998), TLR 418. In the latter authority the following statement was made:- There is a class of false representation which have no legal effect. Those are cases in which a person excites expectations which he does not fulfill, as for instance; where a person leads another to believe that he intends to make him his heir, and then leaves his property away from him. Though such conduct may inflict greater loss on the sufferer than almost any breach of contract, and may involve greater moral guilt than many common frauds, it involves no legal consequences. Unless the person making the representation not only excites the expectation that it will be fulfilled, but legally binds himself to fulfill it, in which case he must, as it seems to me, contract to fulfill it." It follows therefore that since the promise in question did not amount to a contract, there was no breach of contract to provide additional loan. Issue 1(b) is therefore answered negatively. 24 Having established that the promise to provide additional loan has no contractual status, can, under the circumstances of this case, be said that the promise did not have any account for the failure to repay the loan? It was submitted for the defendants that since the promise had induced the first defendant into believing that the plaintiff would not enforce the loan, it was unreasonable and premature for the plaintiff to pursue an action to enforce the loan without honoring his promise. It is at least clear from evidence and I think it is not in dispute, that at the conclusion of the contract, it was in the minds of the parties that the repayment of loan would be out of the money generated from the project, although it had never been the intention of the parties that the said element be part of the contract. The project, according to the evidence, is yet to be operational despite the fact that the money advanced by the plaintiff were properly utilized into it. It is in the evidence of DW-1, which evidence has not been disputed, that for the project to be operational, it required additional funding. PW-1 admitted during cross examination that in view of the viability of the project, the plaintiff would have granted additional loan had the first defendant applied. The defense counsel have submitted that the plaintiff's demand of the repayment of the loan coming while there was a promise to provide additional funding and in a situation where there was no prospect that the values of the securities involved was at risk, was unreasonable and was made in bad faith. In rebuttal, it was submitted for the plaintiff in the first place that since the promise alone does not create a contractual relation in the same way as it is for a promise to marry, the demand was not unreasonable. He has further submitted that in the absence of a formal application for additional loan, which 25 DW-1 has conceded, there is no way the plaintiff would advance additional fund. That a promise alone does constitute an enforceable contract, is a correct proposition of the law. The issue here is whether such a promise having been made by a banker against its customer, cannot reasonably give legitimate expectation to the customer that it would be honored? I have no doubt that it can. The reason being that the relationship between the bank and its customers being fiduciary, the bank stands in a fiduciary position such that the customer reposes trust in faithful integrity of its banker which, as correctly submitted by the defense counsel, enjoys

superiority and influence over its customer. I take it to be the law that where the banker gives promise to the customer to do or abstain from doing an act, and the customer relies on the promise, the promise though does not amount into a contract, gives legitimate expectation to the customer such that the customer can take a tortious action for damages arising from misstatement. In this case, the first defendant has not raised a counter claim for damages but it is claiming that the inaction to service the loan was occasioned by the expectation that the plaintiff would honour its promise. I have noted from evidence however that the promise to give additional loan was made on 10th October 2012 while the monthly repayment installments were to start on 30th July 2010. It can thus be said with certainty that by October 2012 when the plaintiff was making the promise, the first defendant was already in default for hardly two years. It follows therefore that the claim that the default was caused by the promise does not make sense in relation to the inaction between July 2010 and October 2012. For the inaction between October 2012 to the date of the filing of the suit, I see no reason why I should not agree with the first defendant. 26 Now, I will proceed with the last issue which is to what reliefs are the parties entitled to. The plaintiff has claimed for repayment of loan and accrued interests as of the date of the filing of the suit. He has also claimed interest at the rate of 21% from the date of the filing of the suit to the date of judgement. The agreed interest rate according to clause 4 of exhibit P-1 is 17% per annum. The initial principal loan amount according to exhibit P-1 was TZS 1,500,000,000/=. It is not in dispute that after the variation of loan facility, the interests accrued thereat were capitalized, and as a result, the principal loan amount became TZS 1,795,000,000/=. In view of my finding that the inaction on the part of the first defendant between December 2012 to the date of the filing of the suit was attributed to the promise to provide additional loan, the interests on the principal loan between 10th October 2012 to the date of judgement will not be awarded. For the same reason and in consideration of the irrefutable fact that the project was not financed by the plaintiff alone, I find it prudent and equitable to give the first defendant six months period to find out an alternative way of repaying the loan. The plaintiff has also claimed interests at the court rate of 7% per year from the date of judgement to the date of payment of the decretal amount in full. I will grant it. In the final result it is hereby decreed as follows:-

1. The first defendant has to pay the plaintiff the principal loan of TZS 1,795,000,000/= plus interests at the agreed rate of 17% per annum from 30th July 2010 to 10/10/ 2012.
2. The decretal amount should be paid within 6 months from the date of the judgement. 27
3. The first defendant has to pay the plaintiff interests on the decretal sum at the rate of 7% from the date of the expiry the 6 months subsequent to the judgement, to the date of full settlement of the decretal sum.
4. The claim against the 2nd and 3rd defendants is dismissed with costs.

5. In view of the conduct of the plaintiff in relation to the promise to pay additional loan, I will not give an order as to costs in its favour. It is so ordered. HOHkl.MAIGE JUDGE 09/02/2016 28 DATE: 09/02/2013 Coram: Hon.A. H. Msumi, DRCC For the Plaintiff: Represented For the Defendant: Represented CC. Mrs. Kihio. Ms. Jackline Rweyongeza and Mr. W. Mwakipesile for the Plaintiff - Present. Mr. Marwa for the Defendant - Present. Court: Judgment delivered in chambers in the presence of Ms. Jackline Rweyongeza and Mr. W. Mwakipesile for the Plaintiff and Mr. Marwa for the defendant. A.H. Msumi Deputy Registrar 09/02/2016

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Prepared on 14 October 2026 · Esheria