

TANZANIA / JUDGMENT

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.4 IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 32 OF 2017 DIAMOND TRUST BANK TANZANIA
LIMITEDPLAINTIFF Versus 1.SENGEREMA MOTOR TRANSPORT (1995) LIMITED 1st
DEFENDANT 2.AMRAN TALIB 2nd DEFENDANT 3.AKRAMTALIB 3rd DEFENDANT

RULING

Date of the Last Order: 0610612017 Date of the Ruling: 2110612017 SEHEL J. The Plaintiff herein filed a suit against the defendants jointly and severally claiming for payment of Tshs. 989,997,578.85 being outstanding amount arising from credit facilities issued to the 1st defendant and personally guaranteed by the 2nd and 3rd defendants. The defendants in their joint written statement of defence raised a preliminary objection that the plaintiff's suit is time barred. This is a ruling on such preliminary objection. As a matter of procedure, both parties' counsels duly filed their skeleton arguments before the oral hearing of the objections in terms of Rule 64 of the High Court (Commercial Division) Procedure Rules, GN 250 of 2012. At oral hearing, counsel Mwalongo appeared to argue the objection raised. He began his submission by adopting the skeleton arguments and briefly told this Court that the plaintiff's suit is based on credit facility executed on 21st August, 2009 as stated at Paragraph 4 of the Plaint. He also said according to Paragraph 6 of the Plaint the said credit facility expired on 28th February, 2010. It was his position and it is the law that a suit based on contract has to be filed within six years as per item 7 part I of the Schedule to the Law of Limitation Act, Cap. 89(hereinafter referred to as "LMA"). He told this Court that the time to institute an action is a date when the loan was supposed to be discharged as held in FBME Bank Limited Vs. Lupembe Tea Estates Company Limited and 2 Others, Commercial 2 Case No. 41 of 2015 (Unreported-HO). It was his contention that since the plaintiff suit was filed on 8th March, 2017 which is almost seven years and 8 days then in terms of Section 3 (1) of LMA the suit ought to be dismissed for being time barred. In support of this prayer, he referred this Court to Stephen Wasira Vs Joseph Warioba [1999] T.L.R 334 He further argued that Order VI Rule 7 of the Civil Procedure Act, Cap.33 ((hereinafter referred to as "the Act") requires the Plaintiff to state facts within which it seeks the exception as held in National Bank of Commerce Ltd Vs MM Worldwide Trading Company Limited and 2 Others, Commercial Case No. 166 of 2014 Unreported- HC) In reply, Counsel Daudi submitted that credit facility provides for interest being charged on a day to day basis on the amounts outstanding and due from time to time which means that the amount outstanding and due change on daily basis. He argued

pursuant to Sections 6 (a) and 7 of LMA there is continuing breach as a result a fresh period of limitation began to run on a daily basis. The 3 counsel said since there is continuing breach then in terms of Section 27 (3) of LMA the cause of action start to run on the date of the last payment as held in the case of Standard Chartered Bank Tanzania Limited Vs Pharmaceutical. Investments Limited and 2 Others, Commercial Case No. 44 of 2012 (Unreported - HC). He submitted that annexure P4 indicates that the last payment made by the defendant was 18th November, 2011 thus the present suit is well within the prescribed six years period. He also pointed out that annexure P5 to the plaintiff's reply to the written statement of defence, the defendant in the years 2012 and 2013 pretended to make payments through cheques which cheques were referred to the drawer. To the counsel's view, this also gave rise to new date of accrual of rights. It was briefly re-joined that the facts which show continuing breaches are pleaded in the reply and not in the plaint while the law is very clear that the plaintiff is required to show in its plaint and not 4 From the counsels' submissions it is noted that both counsels are in common understanding that the period of limitation within which to file a suit based on contract is six years. They are also in agreement that there is continuing breach. What the counsel for the defendants is complaining is the failure by the plaintiff to disclose in the plaint the grounds upon which exemption for law of limitation is claimed. He argued disclosure ought to be made in the plaint and not reply to the written statement of defence. This Court is therefore invited to determine whether the suit is time barred. As instigated earlier the suit is based on credit facility advanced to the Jsf defendant on 21st August, 2009 and that according to Paragraph 6 of the Plaint the said credit facility expired on 28th February, 2010. As correctly stated by counsel Mwalongo the limitation period for instituting a suit based on contract is six years. This means that the plaintiff had up to 27th February, 2016 to lodge it. However, the present suit was filed on 8th March, 2017, a year and twenty days after limitation period. We are told by the counsel for the plaintiff that there is continuing breaches thus the plaintiff is covered by Sections 7 and 27 (3) of LMA. He further said the continuing breaches, can be gathered from Annexure P4 to the plaint that shows interest rate is accruing daily. Annexure P4 to which the counsel is adverting this court to take cognizant is stated under Paragraph 8 of the Plaint which reads: "Notwithstanding the aforesaid demand, the Defendants have failed and neglected to repay the amounts outstanding and due to the Plaintiff, which as at 28th February, 2017 stood at TZS 989,997,578.85. True copies of the First Defendant's Bank Account Statements and Statement of accrued interest are 11 annexed hereto collectively marked "Annexure P4 ." From the above Paragraph one gathers that it simply shows as at 28th February, 2017 the amount outstanding is Tshs. 989,997,578.85 as reflected in Annexure P4. There is no mention either at Paragraph 8 or to any other Paragraphs in the Plaint that depict there are continuing breaches. Further, there is no mention in the plaint that the defendants acknowledged the claim in November 2011 and October 2013 for the suit to be within the stipulated six years period of limitation in terms of Sections 7 and 27 (3) of LMA as held in the case of Standard Chartered Bank (Supra). The said acknowledgement is reflected in the reply to the written statement of defence. It is trite law that where the plaintiff seeks exemption from the law of limitation then he must show the grounds upon which he seeks such exemption (See Order VII Rule 6 of the Act). It was held by Honourable Mwambegele, J (as he then was) in National Bank of Commerce's case (Supra) that failure to show in the plaint compliance with Rule 6 of

Order VII of the Act attracts the Court to reject the plaint as provided by Rule 11 of Order VII of the Act. I find this holding reflect correctly the position of the law that where a suit appears from the statement in the plaint to be barred by any law, it shall be rejected (See Order VII Rule 11(c) of the Act). Regarding the pleading of limitation made in the reply, I have previously held in Barclays Bank Tanzania Limited Vs. D. B. Shapriya & Co. Limited and 3 Others, Commercial Case No. 156 of 2016 (Unreported- HC) that "in a garb of submitting a reply, a plaintiff cannot be allowed to introduce new pleas in his plaint so as to alter the basis of his plaint. Reply cannot be permitted for introducing pleas which are not consistent with the earlier pleas." In that regard, I am in agreement with counsel Mwalongo that the plaintiff ought to show the grounds for exemption in the plaint and not in reply. Having analyzed all the circumstances, I find the preliminary objection has merit and I uphold the same. The suit is struck out with costs. It is so ordered. B.M.A Sehel JUDGE 21st day of June, 2017.

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