

TANZANIA / JUDGMENT

exim bank vs trulite investment ltd and others 2020 tzhccomd 2 24 march 2020

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM
COMMERCIAL CASE NO. 47 OF 2019 EXIMBANK..... PLAINTIFF Versus TRULITE
INVESTMENT LTD.....1st DEFENDANT MKUU GENERAL TRADERS
LTD..... 2nd DEFENDANT MILAN MAHENDRA
PATEL.....3rd DEFENDANT CHANDINI SAILESH

SHAH..... 4th DEFENDANT L a s t O r d e r : 2 7 , h F e b . 2 0 2 0 D a t e o f
D e f a u l t J u d g m e n t : 2 4 ' ' M a r , 2 0 2 0 DEFAULT JUDGMENT FIKIRINI, J. This is an application
by the plaintiff, Exim Bank for default judgment, in relation to unpaid monies, resulting from the
two credit facilities agreements, owed to it by 2000 Industries Limited, against the four
defendants: 1st defendant, Trulite Investment Limited, 2nd defendant, Mkuu General Traders
Limited, 3rd defendant, Milan Mahendra Patel, and 4th defendant, Chandini Sailesh Shah,
having secured the two credit facilities jointly and severally on behalf of the borrower. 1 | P a g e
The plaintiff extended two credit facilities to 2000 Industries limited (a company was under
liquidation), one with a maximum of Tzs. 1,000,000,000/= (one Billion shillings only) dated 05th
September, 2006, extended for a period of 12 (twelve) months and the other for the United States
Dollars 395,200.00 dated 14th February, 2007, for a period o f 3 (three) months or 90 (ninety) days.
Credit facilities agreements were executed on 28th September, 2006 and 18th February, 2007, by
the defendants jointly and severally. Up to 31st March, 2019 the 2000 Industries Limited was
indebted to the plaintiff for Tzs. 16, 938,919.61 and Usd 2,098,774.55 respectively. Since the
principle debtor was in default, the plaintiff prior to filing this suit against the four defendants,
who jointly and severally guaranteed the two credit facilities extended to the 2000 Industries
Limited, became liable under the executed guarantees thus were served with demand notices via
postal services. During the proceedings Mr. Gabriel Simon Mnyele learned counsel appearing for
the plaintiff urged the Court for substituted service under Order V Rule 15 which was former Rule
20 o f the Civil Procedure Code, Cap. 33 R.E. 2002 as amended. The application was granted and
service by way o f publication through publication in the East African dated 24th -30th August,
2019-page 40; Daily News dated 21st August, 2019 - page 21 and Mwananchi Newspaper dated 21st
August, 2019 - page 2 | P a g e 19 was proved effected by filing copies o f the newspapers in which
the publication was carried out. Up to 27th February, 2020, no defence has been filed. The

plaintiff moved the Court pursuant to Rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012, GN. No. 250 of 2012 as amended by GN. No. 107 of 2019 (the Rules) applying for default judgment. The application was supported by the affidavit of Mr. Edmund Aaron Mwasaga, the Principal Officer of the plaintiff conversant with facts of the matter he deponed on. In the affidavit deponed, the following exhibits were annexed in support, and proof of the claim to wit: Exim -1 and Exim -2 copies of the letters of credit facilities extended to the 2000 Industries Limited; Exim-3 and Exim-4 being executed credit facilities agreements dated 28th September, 2006 and 18th February, 2007; Exim - 5 and Exim-6 were the 1st and 2nd defendants duly passed resolution issuing corporate guarantees on the credit facilities extended to the 2000 Industries Limited. The resolutions dated 24th October, 2006 and 02nd March, 2007 passed by the 1st defendant were annexed as Exim -5 and Exim-6 while the one by the 2nd defendant executed on 29th November, 2007 was annexed as Exim-7. Annexures Exim-8 and Exim -9, dated 21st September, 2006 and 02nd March, 2007, were the 2000 Industries Limited board resolutions accepting the credit facilities as well as requesting the defendants to guarantee the facilities. In return the defendants' 3 | Page deeds of guarantees were as follows: Exim-10, by the 1st defendant; Exim-11, by the 2nd defendant; Exim-12 by the 3rd and 4th defendants; Exim-13 by the 1st defendant for the Usd credit facility acquired. By the 31st March, 2019, as exhibited by Exim-14, the 2000 Industries Limited was indebted to the tune of Tzs. 16, 938,376.61 and Usd 2,047, 121.55. Since the principle debtor has defaulted, the guarantors become liable under the guarantee executed. On 1st April, 2019 the plaintiff issued the defendants with contractual notices to pay the debt in their capacities as guarantors of the credit facilities extended to the 2000 Industries Limited. Annexures Exim-16; Exim-17 and Exim-18 were annexed as proof of notices issued on 16th April, 2019 and which have not been responded to. It was the plaintiff's claim that she has suffered financial losses and damages amounting to Tzs. 16, 938, 919, 376. 61 and Usd. 2, 098, 774.55. Against this claim the plaintiff is thus praying for the following orders:

- (a) An order for payment of Usd. 2,098,774.55 and Tzs. 16,938,919, 376.61 against the defendants as per paragraph 12 of the plaint. 4 | Page
- (b) Payment of interest on the amounts in prayer (a) above to the tune of 14.5% on the Usd amount and 27% per annum of the Tzs. amount from 1st April, 2019 to the date of judgment or at any time as the suit may be settled.
- (c) Payment of interest on the decree/judgment amount from the date of judgment to the date of final satisfaction of the decree; and
- (d) Payment of damages, costs and any other reliefs that this Honourable Court may deem fit to grant. The defendants in this suit were duly served with contractual demand notice to pay the bank Tzs. 16, 938, 919, 376. 61 and Usd 2, 047, 121.55 on 12th April, 2019. This is exhibited by annexures Exim -14, 15, 16 and 17. The demand notices were issued prior to institution of this suit. After filing of the suit the defendants were again duly served by way of substituted services by publication in the widely circulated newspapers which included the East African, Daily news and Mwananchi newspapers. Through publication in the mentioned

newspapers, I want to believe the defendants were duly served. The 2nd defendant - Mkuu General Traders Ltd, with its directors Vincent M. Laswai and Evarist Kavishe, with their address of service in Dar es Salaam, through publications in the Daily and Mwananchi newspapers were duly served. While the 3rd and 4th defendants whose address is in Kisumu, were as well properly served through the East African newspaper a newspaper widely circulated in East African countries including Kenya. The 1st defendant is equally considered as duly served bearing in mind that Mr. Rajesh Chandralal Vora who is its Managing Director is as well Director in the 2000 Industries Limited, the company which was under liquidation, extended credit facilities and guaranteed by the defendants. With that configuration I strongly believe through Mr. Rajesh Chandralal Vora the 1st defendant was duly served. Convinced that the defendants were duly served, their failure to file defence or enter appearance cannot be construed in any other way, except that they have ignored and neglected to exercise their right. The plaintiff thus correctly moved the Court pursuant to Rule 22 (1) of the Rules and filing of Form No. 1 praying for default judgment. Rule 22 (1) of the Rules provides as follows: "where any party required to file written statement of defence fails to do so within the specified period or where such period has been extended in accordance with sub-rule (2) of Rule 9, within the period of such extension, the Court shall upon proof of service and on application by the plaintiff in Form No. 1 set out in the schedule to these Rules enter judgment in favour of the plaintiff. It is the cardinal principle of evidence that the one who alleges must prove. Likewise, in this default judgment the plaintiff has to prove her case as provided under section 110, 111 and 112 of the Tanzania Evidence Act, Cap. 6 R.E 2002 (the Evidence Act). The affidavit of Mr. Mwasaga and several documents annexed thereon, in proof of the plaintiff's case were lacking in the sense that the Court could not rely on them for the following reasons: one, pursuant to section 66 of the Evidence Act, only original documents are admissible as primary evidence. In the absence of the original a party can resort to use of secondary evidence upon compliance to the requirement as provided under section 67 and 68 of the Evidence Act. In the present case all the annexed documents were photocopies and no explanation was given as to why, was that. This rendered the affidavit to be considered as without annexures. Two, the bank statements exhibited as annexures Exim-18, 19 and 20 which were the pillar to this case were lacking such that even if were in original form, the Court would not have relied on them. First, the annexures had no account numbers, name, the address of the account holder, the date when the statements were printed including the reported period covered by the statement, the statements had no stamp with signature of the banking officer issuing them and the branch from where they were issued. Second, close examination of those bank statements indicate they could be print outs from the plaintiff's website. With the advancement of technology that is possible. However, if that was so, the Court has been wondering why did the plaintiff opt for unreliable print outs, instead of printing from its own system as ordinarily done when issuing clients with bank statement? And even if that was the most convenient way the one who printed those bank statement was required to comply to sections 78 and 79 of the Evidence Act and such printouts must be accompanied by a certificate of authenticity from

the accountant or branch manager of that bank as well as the person in charge of the system where the documents were printed from. In the authentication, the person who manages the system should state as the best of his/her knowledge and beliefs, the system in place from which the printout was made was a properly operated system. To authenticate this information, an affidavit of certification by the officer who printed the documents, will be required. None of the two affidavits were annexed to answer the queries, the Court had to conclude that the bank statements were simple printouts generated from the different system to that of the bank statements as it lacks some very important information. 8 | Page Third, affidavit of Mr. Mwasaga was basically recounting of the pleadings without any details of the claimed credit facilities extended, including the interest that has accrued on the principal amount both in Tanzania Shillings and Usd. This information was vital and would have assisted the Court to understand how the figures were arrived at. Omission of such crucial information rendered the deposed affidavit and annexed Exims -18, 19 and 20 of no use. For the pointed reasons I find the plaintiff to have failed to prove her claim to warrant this Court to enter judgment in default in her favour as prayed. The suit is thus dismissed with no order as to costs. It is so ordered. 9 | Page

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