

TANZANIA / JUDGMENT

first national bank tanzania limites vs josic company limited and 2 others 2020 tzhccomd 2092 6 november 2020

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT PAR ES SALAAM
COMMERCIAL CASE NO. 16 OF 2019 FIRST NATIONAL BANK TANZANIA
LIMITED.....PLAINTIFF VERSUS JOSIC COMPANY
LIMITED..... 1stDEFENDAN JOSEPH EDGAR
CHIWALO..... 2nd DEFENDANT MARIA SHIJA MABULA.....
3rd DEFENDANT

JUDGMENT

B.K.PHILLIP, J This case emanates from overdraft facilities granted to the 1st defendant by the plaintiff. A brief background to this case is as follows; On 12th March 2015, the plaintiff granted to the 1st defendant an overdraft facility to a tune of Tshs 500,000,000/=.The 1st defendant utilized all of the amount granted. In 2016 the 1st defendant applied for another overdraft facility to a tune of Tshs 400,000,000/= as an extension of the first overdraft facility. The same was granted on 7th December, 2016.This one was payable within six (6) months from the date of its issuance. The security for the aforesaid credit facility among others, were first ranking debenture over i the assets of the 1st defendant and personal unlimited guarantees signed by the 2nd and 3rd defendants. It is the plaintiff's case that the 1st defendant breached the terms and conditions of the credit facility agreement dated 7th December 2016 for failure to pay the outstanding amount, which as at 14th day of December 2018, it stood at a tune of Tanzania Shillings Three Hundred Seventy one Million Four Hundred Twenty One Thousand Three Hundred Ninety Five and Sixty Eight Cents (Tshs. 371,421,395.68). The plaintiff alleged that despite being served with the notice of default, the 1st defendant failed to clear the outstanding amount. That the 2nd and 3rd defendants were served with demand notice for payment of the outstanding amount, but ignored /neglected to pay the outstanding amount. Thus, in this case the plaintiff prays for judgment and decree against the defendants as follows;

- i) Declaration that, the 1st Defendant has breached the fundamental terms and conditions of the Overdraft Agreement dated 7th December, 2016 with reference number FNBT/ HC/625/12/16 entered into between it and the Plaintiff. ii) A declaration that the 2nd and 3rd

Defendants have breached the terms and conditions of the Personal Guarantee each one entered into and signed in favour of the Plaintiff. iii) An order directing the Defendants jointly and severally to pay the Plaintiff the sum of Tanzania shillings Three Hundred Seventy One Million Four Hundred Twenty One Thousand Three Hundred Ninety five 2 and Sixty Eighty cents (TZS 371,421,395.68) being the principal sum plus interests as of the 14th day of December, 2018 arising from the default on Credit Facilities extended to the 1st Defendant by the Plaintiff under Loan/Credit Agreements. iv) An order directing the Defendants to pay to the Plaintiff interests of 22% of the amount stated in item (iii) herein above per annum and to be calculated on daily outstanding balance and capitalized monthly in arrears from the 14th day of December, 2018 to the date of payment in full.

- v) An order directing the defendants to pay to the Plaintiff interests of 7% on the decretal sum calculated on daily outstanding balance and capitalized monthly in arrears from the date of judgment to the date of payment in full. vi) The defendants be ordered to pay General damages to the Plaintiff. The same to be assessed by this Honourable Court for the loss of income to invest in banking business, hardship and disturbance which was caused by the Defendants act to refuse and or neglect to pay the outstanding balance/debt on time. vii) The Defendant to be ordered to pay costs of this matter. viii) And any other relief as this Honourable court will deem fit and just be granted. 3 In their joint written statement of defence , the defendants conceded that the credit facility dated 7th December, 2016 was granted to the first defendant. They alleged that the 1st defendant agreed with the plaintiff that the money for repayment of the overdraft facility was supposed to be obtained from payments made by Vodacom Tanzania Limited (henceforth "Vodacom"), in respect of the agreement for provision of technical services to cell towers between the 1st defendant and Vodacom. Moreover, the defendants alleged as follows; That all payments from Vodacom in respect of 1st defendant's project mentioned herein above were agreed to be made through the plaintiff's collection account where the plaintiff was entitled to deduct its money for the repayment of the overdraft facility. Unfortunately, Vodacom stopped offering any work to the 1st defendant, thus no payment was done in the plaintiff's collection account. Also, they disputed to have been served with any notice of default/demand notice for payment of the outstanding amount and prayed for the dismissal of the plaintiff's claims with costs. The following issues were framed for determination by the Court;
- i) Whether there was a breach of the fundamental terms and conditions of the overdraft agreement by either party. ii) Whether the 2nd and 3rd defendants breached the terms and conditions of the personal guarantees each one signed and entered into with the plaintiff. 4 iii) To what reliefs are the parties entitled to. At the hearing of this case, the learned advocate Augustino Ndomba and Geofrey Lugomo appeared for the plaintiff and the defendants respectively. The plaintiff brought one witness namely Anthony Bwahama, the plaintiff's Credit Manager (PW1), while the 2nd defendants testified as DW1 in his capacity as the managing director of the 1st defendant as well as defended himself. The third defendant testified as DW2. Now, let me embark on the analysis of the evidence adduced and the determination of the issues. Starting with the first issue, that is Whether there was a breach

of the fundamental terms and conditions of the overdraft agreements by either party, in his testimony PW1 stated that, the plaintiff granted to the 1st defendant two overdraft facilities. The first one was granted on 12th March 2015. The same was to a tune of Tshs. 500,000,000/= (Exhibit P1). The second one was granted on 7th December, 2016. It was to a tune of Tshs. 400,000,000/=. (Exhibit P2). PW1 further testified as follows; that the preamble in the overdraft facility letter dated 7th December 2016, (Exhibit P2) states clearly that the said overdraft facility was in the series of overdraft agreements entered into between the plaintiff and the 1st defendant and that it was an extension of the overdraft facility dated 12th March 2015. The same was to be repaid within a period of six (6) months only. That the 1st defendant utilized the whole of the overdraft amount, that is Tshs. 400,000,000/=. but has failed to pay the outstanding amount which, as of November 2018 stood at a tune of Tshs. 371,421,395.68 that is, the principal sum 5 plus interests (Exhibit P 11-Bank statement). It was PW1's testimony that upon realizing that the 1st defendant had defaulted to pay the outstanding amount as agreed, on 15th December 2018 the plaintiff served the 1st defendant a notice of default (Exhibit P8). On the other hand, DW1 who is the managing Director of the 1st defendant, in his testimony did not dispute that there is an outstanding amount arising from the overdraft facility granted to the 1st defendant on 7th December, 2016 and that the time for payment of the same has expired quite a long time ago. However, he also testified as follows; that the said overdraft facility was for the purpose of financing the execution of the contract that the 1st defendant had entered into with Vodacom. The contract between the 1st defendant and Vodacom formed part of the aforesaid overdraft facility agreement. The plaintiff and the 1st defendant agreed that all payments from Vodacom to the 1st defendant would be done through the Plaintiff's collection Bank Account, where the plaintiff was entitled to deduct its money for payment of the overdraft facility. Out of the overdraft facility of Tshs. 500,000,000/= the 1st defendant paid a sum of Tshs. 250,000,000/=. but it reached a time when Vodacom had no projects to offer to the 1st defendant, thus from that time the 1st defendant failed to service the overdraft facility. DW1 tendered in court the agreement between the 1st defendant and the Vodacom which was admitted as Exhibit DI. From the analysis of the evidence adduced by the witnesses, it is obvious that the 1st defendant is in breach of the fundamental terms and conditions of the overdraft facility date 7th December, 2016 since it failed to adhere to 6 the conditions for payment of the overdraft amount within the agreed time. In his testimony DW1 conceded, that the 1st defendant stopped servicing the overdraft facility when Vodacom stopped offering any work to the 1st defendant. It has to be noted that one of the fundamental terms of the overdraft facility was to service the overdraft facility and effect repayment of the same timely. Upon perusing the overdraft agreement (exhibit P2), I noted that the overdraft facility was for a period of six (6) months. Therefore, the answer to the first issue is that, the 1st defendant breached the fundamental terms and conditions of the overdraft facility, since it failed to pay back the amount granted in the overdraft facility as agreed. For avoidance of doubts, I wish to state here that the 1st defendant's allegation that the repayment of the overdraft was subject to availability/ existence of the business undertakings between the 1st defendant and Vodacom is not correct, since it is not reflected in the overdraft facility agreement in question. What is

indicated in the overdraft facility agreement is that the contract between the 1st defendant and Vodacom was one of the collateral cover for the overdraft facility among others, which included the unlimited guarantee agreements signed by the 2nd and 3rd defendants. Now, coming to the second issue, that is Whether the 2nd and 3rd defendants breached the terms and conditions of the personal guarantees each one signed and entered into with the plaintiff, the testimony of PW1 is to the effect that 2nd and 3rd defendants each one signed unlimited personal guarantee agreement for payment of all money which the 1st defendant was obliged to pay to the plaintiff from time to time. It was PW1's testimony that upon the 1st defendant's default in repayment of the overdraft facility, the plaintiff served the 2nd and 3rd defendants demand letters for payment of the outstanding amount (Exhibits P9 and PIO) by registered mail, using the address indicated in their respective guarantee agreements, but the 2nd and 3rd defendants did not bother to pay the outstanding amount. In their testimonies, the 2nd and 3rd defendants admitted that they signed the unlimited personal guarantee agreements for the overdraft facility granted to the 1st defendant on 7th December 2016. However, they denied to have been served with any demand letter for payment of the outstanding amount in respect of the aforesaid overdraft facility. Moreover, they testified that they were not aware that the 1st defendant defaulted the repayment of the overdraft facility. So, all the time they were under the assumption that the 1st defendant had no problem with the repayment of the overdraft facility. DW1's testimony (the 1st defendant) that he was not aware of the 1st defendant's default in repayment of the overdraft facility leaves a lot to be desired, since he is the managing Director of the 1st defendant. It is incomprehensible for the managing director to be unaware of what is going in the Company. Not only that, in part of his testimony DW1 testified, that upon failure to obtain works from Vodacom the 1st defendant stopped servicing the overdraft facility. During cross examination, the 2nd and 3rd defendants admitted that the address that appears in the demand letters alleged to have been served unto them and the receipt for payment for the delivery of those letters by registered mail is their address that they indicated in their respective personal guarantee agreements. From the foregoing, the evidence adduced by the witnesses (PW1, DW1 and DW2) proves the 2nd and 3rd defendants are in breach of the unlimited guarantee agreements each one of them signed because they failed to pay the outstanding amount upon being demanded to do so. Exhibits P9 and PIO prove that the 2nd and 3rd defendants were served with the demand letters for payment of the outstanding amount in the credit facility. I do not agree with the contentions made by the 2nd and 3rd defendants that they were not aware of the 1st defendant's failure to pay outstanding amount, because that contention is contradictory to the testimony of DW1. As I pointed out earlier in this Judgment, DW1 admitted that the 1st defendant stopped servicing the overdraft facility when Vodacom stopped offering works to the 1st defendant. Not only that the 2nd and 3rd defendants were served with the demand letters for payment of the outstanding amount pursuant to the terms of the unlimited guarantee agreements, (Exhibits P9 and PIO) but failed to pay the amount indicated therein. As regards the reliefs the parties are entitled to, the evidence adduced by PW1, in particular the Bank statement (Exhibit P11) proves the plaintiff's allegation that as on 14th December 2018 the outstanding amount was

Tshs. 371,421,395.68, being the principal sum and interests. Looking at the credit facility agreements (Exhibits Pl and P2), there is no doubt that the overdraft facilities granted to the 1st defendant attracted interests as it is normally done by financial institutions . 9 From the foregoing I hereby enter judgment against the defendants jointly and severally as follows;

- i) That the defendants shall pay the plaintiff a sum of Tanzania Shillings Three Hundred Seventy One Million Four Hundred Twenty One Thousand Three Hundred Ninety Five and Sixty Eight Cents (Tshs. 371,421,395.68) ii) That the defendant shall pay interests on the decretal sum in item (i) herein above at commercial rate of 22% from January 2019 to the date of judgment. iii) That the defendant shall pay interests on the decretal sum in item (i) herein above at the court rate of 7% from the date of judgment to date of full payment. iv) That the costs of this case shall be borne by the defendants. Dated at Dar es Salaam this 6th day of November, 2020. io

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CASE PAGE	https://chat.esheria.ai/case-law/tanzania/first-national-bank-tanzania-limited-overdraftfacility-tzhccomd-2020

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