

TANZANIA / JUDGMENT

habib africa bank ltd vs zamzam oil coltd and 5 others 2021 tzhccomd 3250 25 june 2021

COURT
TZHCCOMDDECIDED
25 June 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
PAR ES SALAAM COMMERCIAL CASE NO. 147 OF 2019 HABIB AFRICA BANK LTD..... PLAINTIFF
Versus ZAMZAM OIL CO.LTD.....^ DEFENDANT SHIRAZ PYARALI WAUI..2^ DEFENDANT KANIZ
RAZAHUSSEIFI FAZAL..... ...3^d DEFENDANT TAHERA FAZAL^.....^>.THIRD PARTY
MOHAMMED^JEWutj^.....THIRD PARTY RAZAL f=AZAL\$;.. v\THIRD PARTY NANGELA, J:.
This is a default judgment. It arises from a suit filed in this court, by the Plaintiff on 11th
December, 2019. In that suit, the Plaintiff prays for Judgment and Decree against the 1st Page 1 of
25 Defendant, 2nd Defendant and the 3 Defendant jointly and severally as follows:

- (1) Payment of TZS 233,549,245.53 (Two Hundred Thirty-three Million Five Hundred Forty-Nine Thousand Two Hundred Forty- Five Cents Fifty-Three) being an amount due and owing to the plaintiff from the 1st Defendant account of Credit Facilities granted to the 1st Defendant'>whidT' <X X continues to accrue. \\\
- (2) Payment of the ipterestat-the amount due Tshs.233,549,245.53xat 20%xfrom the date /r .xxx it was due to the cate of;judgment. (3) A \\\ Payment of interest^of the decretal sum in XX artheiCourt rate from the date of Xjudgmenkuntil payment of the loan full. (4)\D^aration that the 1st, 2nd and X^X/3rdDefendants are in the breach of the credit agreement as constituted under the Facility letter and thus the Plaintiff is entitled to realize the securities pledged and as stated in paragraph 10 (1), (ii), and (iv) of this plaint and over any other securities executed in favour of the Plaintiff Page 2 of 25 for full payment of the Facility extended to the 1st Defendant.
- (5) Costs of this suit.
- (6) Any other order and relief may this Honourable court deem fit and just to For the sake of clarity, I will briefly narrate the facts constituting this^case. The Plaintiff is incorporated under the^Companies Act Cap 212 [R.E 2002] a&tHicgnsed under the Bank and Financier Institution Act, 2006 to carry out the>business of<banking. Defendants, being directors of the 1st Defendant, approached the Plaintiff Bank for a Credit Facility amounting to TZS

1,000,000,000/= {Tanzanian Shillings One Biiiori). Page 3 of 25 The said Credit Facility was applied in favour of the 1st Defendant, for the purposes of financing its working capital, cash flow and operating requirements. On 19th May 2017, the Plaintiff Bank approved and granted the application in favour Defendant was allowed to-overdrawits account above its approved^limit to\ a tune of TZS 1,000,000,000/= (Tanzanian Shillings One 4X \jk // Billion).^ ^ \C“ /<JF5js5a1i^ that, as per the parties' \ arrangements, the said overdraft facility was to be repaid within a period of twelve months and, was to be charged at prime lending rate (PLR) of 15% per annum. A penalty of 5% per annum was to be imposed in case of any outstanding balance and if the account was to Page 4 of 25 be found operating over the limit or had expired. It has been further alleged that, as a safety net to the Credit Facility, the 1st Defendant pledged the following, as continuing securities, guaranteeing the full payment of the Credit Facility and its obligations' <and 'liabilities associated or incidental theretbcx

1. Personal Repayment Guarantee of its Directors and 3rd IT c \ 1. a/ Defendants^whg, ^acting in favour of Defendant, executed such xjirrevocable^ and unconditional Personal Guarantee and Indemnity guaranteeing full repayment of the Credit Facility),
2. Debenture on stocks and Assets and receivables of the Company;
3. Lien over fixed term deposits and allied account of the total amount of Page 5 of 25 US\$ 426,000.00, maintained by the Plaintiff as follows:
 - (a) For US\$ 162,500.00 maintained in the Fixed Deposit Account No.03- 2453-091 in the name of Shiraz Pyar Ali Walji & Mazahir Taki;
 - (b) For US\$ 73,5^91 Savings* Account;NdX)3^ % X\ XX 2453-051\in the^name of ZZ' \ v Shira^Pyar 'All Walji & X. z Mazahir-Taki; kc)^0F US\$ 155,000.00 < maintained in the Fixed Term Deposit Accou nt No.03-2887-091 in the name of Zamzam Oil Company Ltd;
 - (d) For US\$ 20,107.44 maintained in the Savings Account No.03- 2542-051 in the name of Page 6 of 25 Shiraz Pyar Ali Walji & Shital;
 - (e) For US\$ 14,843.65 maintained in the Savings Account No.03- 0035-051 in the name of Shiraz Pyar Ali Walji;
4. Chattel Mortgage over the follo^g Motor Vehicles: - Mercedes>.Benz<K Tanker with Reg. No. T288 AXWfaO a Toyota-Station ^Wagoh^passenger Vehicle, with R|^No^T605 CBN, a l^ ^la^ ^Tanker with Reg. No. \XT856. DBU, and a FAW Cargo Truck, \ v with Reg. No. T382 CHQ, all in the •Xz joint name of the Plaintiff and the 1st Defendant. It has been stated by the Plaintiff that, although the 1st Defendant took and utilized the Credit Facility, the 1st Defendant failed, neglected and/or ignored to repay it in full. Page 7 of 25 It was the Plaintiff's assertions that, when the credit facility became due and payable, as of 27th April, 2018, a total of TZS 1,410,000,000.00 (One Billion, Four Hundred Ten Million) was due and owing to the Plaintiff. To remedy the defaulty\Situation,/zthe Plaintiff exercised its rightsxbf recovery and prematurely encasheo the security and sold all Wagon paSengetxVehicle, with Reg. No. T605 \ 1 I cbnF<^ \C~ ^SEven)so, the sale could not satisfy the whole amount owed.

As of 12th November 2019, a total of TZS 233,549,245.53 (say, Tanzanian Shillings Two Hundred Thirty Three Million Five Hundred Forty Nine Thousand Two Page 8 of 25 Hundred Forty Five cents Fifty Three) were remaining due and owing to the Plaintiff. On 3rd October, 2018 and 8th June, 2019, the Plaintiff sent demand notices to the Defendant's Directors of the 1st Defendants, followed by an e-mail which was sent on 07th August, 2019, at 16:49, to the Defendant, copied to Sibtin Mukhtar and HasaWizvi. The notices and the email reminded the Defendants about the default and called upon them to immediately have it adjusted. It is alleged that, despite such efforts by the Plaintiff, the Defendants ignored, failed, neglected, and/or refused to repay the Credit Facility. Consequently, on the 11th December, 2019, the Plaintiff's patience ran out and was forced to file a Complaint in this Court jointly and severally suing the Defendants. Subsequent to the filing of the suit, on 27th December 2019, this Court made an Order that a substituted service be made as the Plaintiff was not finding it easy to service to the Defendants. The Plaintiff followed the orders of this Court and on 4th February 2020, a substituted service by way of a publication in the Guardian News Paper was published. In reliance on the Order of this Court and the published notice, the 2nd Defendant filed his Written Statement of Defence (WSD) on 3rd January 2020, together with two preliminary objections which were disposed of on 2nd October 2020 in favour of the Plaintiff. In his WSD the 2nd Defendant further raised a counterclaim against the Plaintiff. In Page 10 of 25 particular, the 2nd Defendant counterclaimed from the Plaintiff a total of USD 93,656.35, interest thereon at a fixed deposit rate (FDR) of 4% per annum, 7% interest at the decretal amount as well as costs. The Plaintiff filed a WSD to the counterclaim as well. Furthermore, the 2nd Defendant applied and was granted by the Court an order to issue a 3rd Party Notice which was served upon Zaidi Tahera Fazal, Mohamed Jeraj and Razal Fazal (all parties). On the other hand, while the 2nd Defendant took efforts to file a Written Statement of Defence, the 1st and 3rd Defendants did not file their defence to the claims contained in the Complaint. As such, on 3rd June 2020, this Court granted a prayer to proceed against them ex parte and, with that prayer the Plaintiff filed Form No. 1 seeking for a Default Judgment against the 1st and 3rd Defendants. The filing was made under Rule 22 of the High Court (Commercial Division) Procedure Rules, 2012 GN No. 250 (as amended by GN 107. of 2019). On 17th December 2020 Mr Romani Lamwai raised a point that, if the Court was to grant the prayers for default judgment which were made on 10th June 2020, the likelihood given the nature of their defence was that; the case against his client would be redundant. Mr Lamwai sought for guidance as to whether the Court should determine the application for default judgment or proceed to the first pre-trial conference. On their part, the Plaintiff prayed that the Court proceed to issue a default judgment. Page 12 of 25 On 9th March 2021, before this Court proceeded to compose the Default Judgment, and in the course of the general litigation of the suit in respect of the rest of parties to it, the parties appeared before me. Mr Seni Malimi, who appeared for the Plaintiff, requested the Court to put the prayer on hold for a while as he sought to liaise with the 2nd Defendant and reflect on his earlier position. I granted the prayer and adjourned until April 2021. On 13th April 2021, Mr Malimi appeared before me

representing the Plaintiff, while the 2nd Defendant enjoyed the services of Mr Abel Elisa Msuya, and Ms Gloria, learned Advocates. The 3rd Parties were absent and unrepresented.

Page 13 of 25 When Mr Malimi rose to address the Court, he submitted that, although the matter before the Court was scheduled to proceed for a first pretrial conference in respect of the case against the 2nd Defendant and the 3rd Parties, the Plaintiff was no longer interested to pursue the matter against the 2nd Defendant, with, a leave to re-file (f zv yy<> it. He submitted that the withdrawal was necessitated by the fact that, the earlier application for default judgment is against the 1st and 3rd Defendants jointly and severally, which, if granted it will have a bearing on the case against the 2nd Defendant as well. For his part, Mr Msuya did not object to the prayer by Mr Malimi. However he as well prayed to withdrawal from the Court the Page 14 of 25 Counterclaim which he raised against the Plaintiff under Order 21 rule 1(2)(b) of the Civil Procedure Code, Cap.33 of RE 2019. He also noted that the withdrawal will as well affect the 3rd parties in the like manner. Following those prayers, this Court made an order to the effect that the case against the 2nd Defendant and the notices issued to the 3rd Parties, as well as the counterclaim filed by the 2nd Defendant* were withdrawn from the Court with no orders as to costs; with leave to re-file should the parties feel that there is a necessity to do so. The matter was to proceed against the 1st and 3rd Defendant. It is from the above long background that this default judgment is now being issued against the 1st and 3rd Defendants who did not

Page 15 of 25 file their written statement of defence as required by the law. As I indicated herein above, the Plaintiff had filed in this Court, Form No.1, seeking for a default judgment against the 1st and 3rd Defendant, under Rule 22(1) of this Court's rules of procedure. The Form No.1 is as well accompanied by an affidavit Syed Mukhatar Sibtain together with various annexure that form part of the affidavit as evidence pointing towards the 1st and 3rd Defendants' involvement and obligation towards the Plaintiff's claims. In the affidavit, Mr Sibtain stated that sometimes on the 19th May 2017 the 1st Defendant applied for and received from the Plaintiff, an overdraft facility to a maximum of TZS 1,000,000,000.00. Page 16 of 25 The deponent attached annexure P.1 to the affidavit as evidencing the 1st Defendant's application letter and the Facility Letter dated 27th April 2017 and 19th May 2017 respectively. It was further averments of Mr Sibtain that, vide a letter of guarantee dated 3rd November 2017, the third Defendant's interests and/or costs. The letter of guarantee was attached as Exh.P-2 forming part of the affidavit. Besides, the deponent disclosed in the affidavit that, the credit facilities were secured by various type of securities. However, despite the steps taken by the Plaintiff's in exercise of its rights of recovery and pre-maturely

Page 17 of 25 encashing on the securities to clear the loan following the 1st Defendant's default in re-payment, the securities could not satisfy the whole amount which, as of 27th April 2017 stood at TZS 1,410,000,000.00. The affidavit discloses that, as of now, there stands an outstanding amount of TZS 233,549,245.53 which is yet to be cleared, and therefore, being claimed from the 1st and 3rd Defendants jointly and severally on the account of the overdraft facilities advanced to the Plaintiff and guaranteed by the 3rd Defendant. Attached to the affidavit was Annexure P.6, a bank

statement showing the outstanding amount. I have carefully looked at the affidavit regarding proof of this claim and the relevant annexure attached to it. I have also looked at Page 18 of 25 their originals which were availed to this Court. The issue which I am called upon to determine is whether the plaintiff is entitled to the prayers and reliefs sought in Form No.1 filed in this Court. Essentially, the filing of No. 1, seeking for a Default Judgment in favour of Plaintiff, is a matter of exercise of statutory right, open to the Plaintiff in a case where the Defendant(s) has declined to defend his case. Such particular right is provided for under VV rule 22(1) of the High Court (Commercial & Admiralty) Procedure Rules, 2012 (as amended, 2019). The said rule 22(1) 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 accordance with sub- Page 19 of 25 rule (2) of rule 20, within the period of such extension, the court may, upon proof of service and on application by the plaintiff in form No.1 set out in the Schedule to these Rules accompanied by an affidavit in proof of claim, enter judgment in favour of the plaintiff." From the above provision and looking at the facts and evidence adduced in this case, it is clear that the Plaintiff has complied with rule 22(1) by filing Form No.1 in this Court applying for a default judgment following the failure by the Defendants to file a Written Statement of Defence. It is also clear that the 1st and 3rd Defendants were given ample time to file their Written Statement of Defence but never showed up and never filed such a defence despite summoned by way of a substituted Page 20 of 25 service and notice published in the Guardian News paper dated 14th February, 2020. As once stated by this Court, in any sort of loan advanced to a borrower, timely re-payment of the principal sum and its interest is at the core of the lender's expectations. See the case of Bank of Africa (Tanzania) Limited v Joram General Enterprises Limited & 2 others commercial case No. 197 of 2017. Consequently, and as once stated by this Court in the case of First National Bank of Tanzania Limited v Josin Company Limited & 2 Others, Commercial Case No. 16 of 2019 (unreported), failure to repay the loan, amount to an express breach of the loan agreement. Page 21 of 25 That being the case, I am satisfied, as regards the recent case at hand, that, the 1st and 3rd Defendants defaulted in repaying the loan as per the agreement and the Plaintiff is entitled to recover the outstanding amount from the 1st and 3rd Defendant Jointly and severally. The issue I raised where above, therefore, is responded to in affirmative. In view of the above reasoning, and in terms of Rule 22(1) of the High Court (Commercial & Admiralty) Procedure Rules, 2012 (as amended); this Court enters judgment in favour of the Plaintiff and against the 1st and 3rd Defendant, jointly and severally, and declares as follows:

1. That, the 1st and 3rd Defendants are jointly and severally in breach of the Credit Agreement, as constituted under the Facility letter. Page 22 of 25
2. That, due to the breach of the Facility Agreement as stated in No.1 above, the Plaintiff is entitled to realize the securities pledged by the 1st Defendant and over any other securities executed in favour of the Plaintiff for full payment of the Facility extended to the 1st Defendant.

3. Further, that, this Court hereby Orders the 1st and 3rd Defendant to jointly and severally:
- (a) Pay the Plaintiff TZS 233,549,245.53 (Two Hundred Thirty-three Million Five Hundred Forty-Nine Thousand Two Hundred Forty-Five Cents Fifty-Three) being amount due and owing to the Plaintiff on the account of Credit Facilities granted to the 1st Defendant and whose repayment in full was guaranteed by the 3rd Defendant. Page 23 of 25
 - (b) Pay interest on the above stated amount at a rate of 17% per annum from the date when that amount became due to the date of this judgment.
 - (c) Pay interest of the decretal sum in No. 3(a) above, at the Court rate of 7% from the date of judgment until full repayment of the loan
 - (d) Pay Costs of this suit. Further orders: That in terms of Rule 22 (2) (a) and (b) of the High Court (Commercial Divisions) Procedure Rules, 2012 (as amended, 2019), the Court makes further orders that the decree emanating from this suit shall not be executed unless the decree holder has, within a period of ten (10) days from the date of this default judgment, publish a copy of it (the decree) in at least two (2) widely circulated newspapers in the country and after a period of twenty one days (21), from the date of expiry of the said ten (10) days, has elapsed. It is so Ordered DATED at DAR-ES-SALAAM, this 25th June, 2021 Page 25 of 25

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