

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(MWANZA SUB-REGISTRY)

AT MWANZA

CIVIL CASE NO. 02 OF 2020

INDUSTRIAL GASES AND CHEMICALS LTD.....1ST PLAINTIFF

NADAKA HOLDINGS LTD.....2ND PLAINTIFF

PAMBA INDUSTRIES LTD.....3RD PLAINTIFF

VERSUS

AZANIA BANK LIMITED.....DEFENDANT

JUDGMENT

4th April & 9th June, 2022

DYANSOBERA, J.:

The plaintiffs herein, are private limited liability companies, legally and duly incorporated in Tanzania and licensed to carry on their respective businesses. The defendant is, equally, a private liability company duly incorporated and validly existing under the laws of Tanzania and, *inter alia*, carrying out and engaging in banking business and financial intermediation.

The plaintiffs' claims against the defendant is for judgment and decree on the follows reliefs:-

- i. Declaratory order that the defendant's notices of default annexes P 6, P 8 and P 9 to the plaint are invalid, unlawful and of no legal effect;
- ii. Declaratory order that the plaintiffs are not indebted the alleged Tshs. 1, 750,018, 374.37 (say Tanzanian

Shillings One Billion Seven Hundred Fifty Million Eighteen Thousand Three Hundred Seventy-Four and Thirty-Seven Cents) to the defendant

- iii. Declaratory order that the alleged and intended recovery measures against the plaintiffs are premature and unlawful
- iv. An order for mutual calculations of the alleged debt and outstanding between the 1st plaintiff and the defendant, if any, in accordance with terms of mortgage deeds
- v. Costs of this suit; and
- vi. Any relief that this Court shall deem just to grant.

It is pleaded in the plaint and not disputed in the written statement of defence that the 1st plaintiff had and enjoyed banking relationship with Bank M (Tanzania) Limited (hereinafter referred to as the Bank) since 2010. On 8th day of December, 2010, the Bank provided to the 1st plaintiff credit facilities of USD 650, 000 for purposes of the company's expansion programme with a tenor of six years including a grace period of one year. The overdraft facilities were secured by a Debenture over the 1st plaintiff's fixed and floating assets (General Debenture) while the Business loan facility was secured by the two landed properties, namely, land and building on plot No. 47 Nyakato Industrial Area, Mwanza City

with Certificate of Title No. 6502, the property registered in the name of Nadaka Holding Ltd (2nd plaintiff) and land and building on plot No. 33 Nyakato Industrial Area, Mwanza City with Certificate of Title No. 3696, the property registered in the name of Pamba Industries Ltd (3rd plaintiff).

It is averred under paragraph 6 of the plaint that the said securities stood discharged as per note at page 2 of the Banking Facilities dated 8th December, 2010 upon completion of the construction, setting up of the new plant on Plot No. 47 and satisfactory operation of the new plant. It is further averred in the plaint that the 1st plaintiff has at all times complied with the facility disbursement repayment schedule.

Under paragraph 8 of the plaint, it is averred that by its letter Ref. No. BANKM/CB/0410 dated 25.1.2018, the Bank changed the penalty and interest rates on the facility advanced to the 1st plaintiff with repayment schedule running for five (5) years from 25.1.2018 effectively ending on 24.1.2023. The 1st plaintiff avers at paragraph 9 of the plaint that sometime in December, 2019 she was surprised to be served by statutory notice of default from the defendant in which it was

stated that the plaintiffs had defaulted payment of Tshs. 1, 750, 018,374.37 that allegedly accrued between May, 2018 to December, 2019 and that the said notices did not refer to the mortgaged properties. According to the plaintiffs, the said notices are erroneous and unlawful on the grounds that they were made under Form No. 54A- a non-existing form under the Land (Forms) Regulations, 2001, they are in violation of the mandatory provisions of section 127 of the Land Act No. 4 of 1999 as amended by the Mortgage Financing (Special Provisions) Act, that the plaintiffs are not indebted to the defendant on the alleged amount and she does not own the property located at Plot No. 33 Nyakato Industrial area.

The plaintiffs further deny having any relationship with the defendant and state that the calculations of the alleged debt and outstanding between the 1st plaintiff and the defendant, if any, are not in accordance with terms of loan agreement and mortgage deeds and that the defendant has no any right to enforce against the plaintiffs and the intended recovery measures are premature and unlawful.

The defendant has vehemently denied the claims and put the plaintiffs to strict proof thereof.

According to the pleadings, the following are five (5) issues which were agreed to by the parties, framed and recorded by the court:

1. Whether the defendant is entitled to lay any claim against the plaintiffs in respect of the credit facility and mortgages by and between the plaintiff and Bank M. Tz Ltd.
2. If the first issue is affirmatively answered, whether the notices of default that is Form No 4A issued by the defendant to the plaintiffs are lawful and valid.
3. Whether the defendant is entitled to dispose of Plots Nos. 33 and 47 Nyakato Industrial area, Mwanza.
4. Whether as at December, 2019, the plaintiffs were in default of TZS 1, 750, 081,374/37
5. To what reliefs are parties entitled?

One witness, viz. Rajesh Kapoor (PW 1) testified in support of the plaintiffs' case while for the defendant, three witnesses, namely, Paulo Masunga (DW 1), Daniel Osten (DW 2) and Smitesh Jagdish Vadgama (DW 3) gave their testimonies.

At the hearing of this suit, Mr. Malick Hamza, learned advocate, represented the plaintiffs while Mr. Deus Richard, learned Counsel, stood for the defendant.

Having summarised what, the pleadings entail and the issues, I am now in a position to embark on determination of the framed issues according to the evidence unfurled and the law applicable.

On the first issue, that is whether the defendant is entitled to lay any claim against the plaintiffs in respect of the credit facility and mortgages by and between the plaintiffs and the Bank, there is ample evidence from PW 1 who is the Managing Director of the plaintiffs that on embarking on expansion of putting in a new plant and facilities Chemical Industrial Gases, Nyakato in Mwanza, the 1st plaintiff needed facility of USD 650,000 from the Bank. However, she had no collaterals to secure the said facility. The 3rd plaintiff agreed to allow the 1st plaintiff to pledge their landed property on Plot No. 33 Nyakato Industrial area in Mwanza City. As part of the expansion programme, the 2nd plaintiff offered a green field site on Plot No. 47, Nyakato Industrial area to the 1st plaintiff to construct the plant industrial facilities.

On the terms and conditions in respect of discharge of the collaterals, PW 1 asserted that the 1st plaintiff and the Bank had agreed that upon completion of construction and installation of the plant and equipment by the 1st plaintiff, the security provided by the 2nd plaintiff

on Plot No. 33 would be discharged and upon completion and setting up of a new plant and satisfactory operation of new plant, the security of the 3rd plaintiff would also be discharged. This plaintiffs' evidence was not only supported by the Bank Facilities document dated 8th day of December, 2010 (exhibit P 1) but also was supported by the version by DW 3 one Smitesh Jagdish Vadgama who works with the defendant as analyst in the credit department but formerly worked with the Bank before the Bank's transfer of assets and liabilities. According to him, the first plaintiff had at first secured a loan facility of USD 650,000 and offered the two collaterals through the 2nd and 3rd plaintiffs as evidenced in exhibit P 1. The re-payment of the loan was to be within six years with one year grace period. Both sides, that is the plaintiffs on one hand and the defendant on the other hand, are at one on the terms and conditions on exhibit P 1. It was noted under exhibit P 1 that securities no. 2 that is 'First Legal Mortgage over land and building on plot No. 33 Nyakato Industrial Area, Mwanza City with Certificate of Tittle No. 3696, the property registered in the name of Pamba Industries Ltd' and no. 6, that is 'Corporate Guarantee of Pamba Industries Ltd in respect of the property pledged as security' would be discharged upon completion of

the construction, setting up of new plant on Plot No. 47 and satisfactory operation of the new plant.

Although the plaintiffs through PW 1 were not clear whether or not the said conditions noted in exhibit P 1 were complied with, PW 1 told this court that after the construction of the new plant on Plot No. 47 commenced, costs escalated. The 1st plaintiff resorted to the enhancement of the facility which was granted by the Bank and sent to PW 1 through e-mail on 25th day of January, 2018 (exhibit P 2). According to exhibit P. 2, all other terms and conditions would remain the same as per their letter of offer Ref: BANKM/CIB/ 0185/ dated the 8th January, 2018. It is unfortunate that the document with Ref: BANKM/CIB/ 0185/ dated the 8th January, 2018 was not tendered in court.

In his evidence, DW 3 testified that after the 1st plaintiff had secured the first facility, she (1st plaintiff) asked for an additional loan of USD 200,000 on 15th February, 2012. In proof of this evidence, DW 3 tendered in court the Banking Facilities of 15th February, 2012 (exhibit D 2). With this additional loan, the status of the securities was that the

former conditions were removed through a discharge clause and both properties would remain as securities, DW 3 argued.

A close look at exhibit D 2 reveals that in obtaining the new term loan of USD 200, 000 the securities were the same as those in the existing loan (exhibit P 1) but in Annexure 1, clause 9 on the Discharge, it was stated as follows:

'Upon full repayment of the facilities extended to the Borrower under this Letter of Offer together with interest commissions and other bank charges and all other costs and expenses, the borrower shall at any time thereafter stand discharged and released from its obligations under this Letter of Offer. The Bank shall convey such discharge by specific Letter of Discharge which will be received and acknowledged by the borrower.'

It is the evidence of DW 3 that the 1st plaintiff has not repaid the whole loan but that out of the loaned money, the 1st plaintiff has managed to pay Tshs. 3, 947, 312.07 and the amount due is Tshs 2, 566, 000. DW 3 admitted exhibit P 4 which is the Loan Repayment Statement and stated that the interest accrues on daily basis. It was his further evidence that the 1st plaintiff knows that she owes the defendant as when the defendant sent to the 1st plaintiff outstanding balance, the

said 1st plaintiff wanted to restructure the loan for five years. The defendant agreed and the 1st plaintiff promised that she could pay 10m/- every month for the first twelve months. The defendant agreed that proposal and waiving of penalty so that the remaining balance would be paid in 48 monthly equal instalments. The 1st plaintiff said that after twelve months she would inform the defendant how she was going to pay and not as previously suggested. The defendant then declined her offer.

It is the defendant's prayer that the plaintiffs should be ordered to pay.

Apart from the fact that the plaintiffs have not stated how they complied with the terms and conditions in exhibit D 2, the plaintiffs through PW 1 admitted during cross examination that no documents to show that the securities were discharged. PW 1 also admitted that he had no information on the outstanding figure and does not know the amount of money already paid.

Having analysed the evidence of the parties on the first issue, I think the issue revolves around the question of burden of proof in civil cases. Generally, there is no dispute that the burden of proof in civil

cases is on balance of probabilities. In fact, the burden of proof lies on the party who asserts the truth of the issue in dispute. If that party adduces sufficient evidence to raise a presumption that what is claimed is true, the burden shifts to the other party, who will fail unless sufficient evidence is adduced to rebut the presumption. The court makes its decision on the "balance of probabilities", and this is the standard of proof required in civil cases. Furthermore, the law is very clear, the burden only shifts to the other party when sufficient evidence is adduced to raise a presumption that what is claimed is true.

In the instant case, the plaintiffs miserably failed to adduce evidence sufficient to raise a presumption that what PW 1 was claiming was true. No burden to prove anything was, therefore, shifted to the defendant.

I, therefore, answer the first issue in the affirmative that the defendant is entitled to lay any claim against the plaintiffs in respect of the credit facility and mortgages by and between the plaintiffs and the Bank. The determination of the first issue covers also the 3rd, 4th and 5th issues which are answered in the affirmative as well.

Besides, it was amply proved by DW 1 and DW 2 that the Bank was a commercial bank in Tanzania licenced by the Bank of Tanzania to engage in commercial banking but in August, 2018, the Bank of Tanzania took over the Management of the Bank and placed it on receivership on the grounds that it had failed to meet liquidity requirements and could no longer meet its maturing obligations, the defendant then acquired the assets and liabilities of the Bank. This evidence was supported by documentary evidence (exhibit D 1) which is a letter on transfer of assets and liabilities of Bank M Tanzania PLC to Azania Bank Limited dated 23rd day of August, 2019.

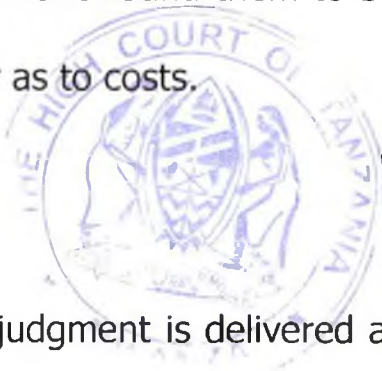
With regard to the second issue, that is exhibit P 3, I have no doubt that the said notices are, as rightly argued by PW 1, erroneous and invalid. Indeed, DW 2 who is the credit officer with the defendant, in clear and unambiguous terms, admitted that he does not know the author, owner and the addressor. In other words, it was proved that the said notices of default were not issued by the defendant.

Respecting the fifth issue which is on reliefs, I find the plaintiffs having failed to prove on balance of probabilities the claims under paragraphs (ii), (iii) and (v) of the plaint. I grant the order sought under

paragraph (i) of the plaint and declare that the notices of default (exhibit P 3) are invalid and of no legal effect.

Judgment and decree is entered for the plaintiffs against the defendant to the extent explained.

Since the notices of default triggered the institution of this plaint and I have found them to be invalid and of no legal effect, I make no order as to costs.



W. P. Dyansobera
Judge
9.6.2022

This judgment is delivered at Mwanza under my hand and the seal of this Court on this 9th day of June, 2022 in the presence of Mr. Elias Hezron learned Counsel for the defendant but in the absence of the plaintiffs.

Rights of appeal to the Court of Appeal explained.



W.P. Dyansobera
Judge