

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM.**

COMMERCIAL CASE NO. 78 OF 2022

MKOMBOZI COMMERCIAL BANK PLC.....PLAINTIFF

VERSUS

SAHARA MEDIA GROUP LIMITED.....DEFENDANT

JUDGMENT

Date of last order: 09/11/2023


Date of Ruling: 15/12/2023

A.A. MBAGWA, J.

The dispute in this suit arises from the Agreement for Acknowledgement and Undertaking to Pay Debt dated 28th December, 2017 entered into between the plaintiff and defendant. The plaintiff is a limited liability company licensed to carry out banking business whereas the defendant is a registered company dealing with provision of media services.

The Plaintiff has instituted this case against the defendant praying for judgment and decree in the following orders;

- (i) An order for payment of United States Dollars Eight Hundred Seventy Thousand Ninety-Five and Ninety-Six Cents **(USD**

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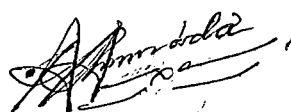
870,095.96)the equivalent of Tanzania Shillings One Billion Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eight Nine and Ninety-Six Cents **(TZS. 1,962,066,389.96)** only.

- (ii) An order for payment of interests at commercial rate of 20% on the decretal sum from date of judgment to the date of full payment.
- (iii) An order for payment of general damages to be assessed by the Court arising from disturbance, unbearable stress, cost and loss of productive time resulting from failure to perform its contractual obligations.
- (iv) Costs of the suit be borne entirely by the defendant.
- (v) Any other orders or relief(s) as the Honourable Court may deem fit and just to grant.

The background to this suit as gathered from the pleadings and evidence may briefly be recounted as follows; in the year 2015, the defendant approached the plaintiff bank to secure loans for its employees. After a fruitful discussion, the parties herein entered into loan agreement whereby the plaintiff extended loans to 405 defendant's employees. It was the agreement term that the defendant would be

remitting to the plaintiff loan instalments from the employees' salaries on monthly basis. However, in the due course, the defendant defaulted to remit the loan repayments as per the agreement. As such, upon reminder, the defendant via a letter dated 16th November 2016, acknowledged the installments due for the months of July, August, September and October 2016 and promised to cure the anomaly. It was further contended that the defendant did not remedy the default despite its promise hence through a letter dated 23rd November 2016, the defendant undertook to remit the salary deductions in respect of all 405 employees to the plaintiff by the end of November 2016. Nonetheless, the defendant's pledge was not fulfilled as a result, on 04th January 2017, the plaintiff issued a demand notice to the defendant for payment of the outstanding sum.

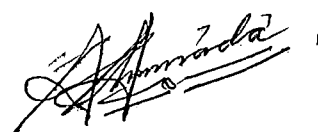
Owing to the demand notice, the defendant sought for amicable means to settle the debt and for that reason the two parties, on 24th day of May, 2017 signed a memorandum of understanding to convert the employees' salaried loans into a commercial loan payable within 36 months from the date of execution of the facility letter. As the debt remained unpaid by the defendant, on 28th December 2017, the plaintiff and defendant executed the Agreement for Acknowledgement and

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Undertaking to Pay Debt whereby the defendant acknowledged the debt and undertook to pay the amount due to wit, United States Dollars Eight Hundred Seventy Thousand Ninety-Five and Ninety-Six Cents (**USD 870,095.96**) the equivalent of Tanzania Shillings One Billion Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eighty-Nine and Ninety-Six Cents (TZS 1,962,066,389.96) on or before 28th February 2018.

It was further the plaintiff's contention that when the payment was due, the plaintiff issued to the defendant several reminders for payment as agreed in the settlement deed dated 28th December, 2017. Despite all the efforts, the defendant still failed or neglected to pay the outstanding loan amount to a tune of USD 870, 095.96 the equivalent of TZS1,962,066,389.96 hence this suit.

Upon service, the plaintiff's claims were vehemently countered by the defendant through a written statement of defence. It was contended by the defendant that, the said loan agreement was made between the plaintiff and defendant's employees and thus the defendant was not a party to the contract. The defendant stated that she was not responsible for the loan repayment because she stood as a mere guarantor. She also stated that her responsibility ended immediately upon termination

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of employment by the employees. The defendant further alleged that, she diligently discharged her duties towards the said loan agreement by remitting all the deductions to the plaintiff from its employees up to the point of termination of their employments.

Besides, the defendant denied and disowned the memorandum of understanding (exhibit P5) and Agreement for Acknowledgement and Undertaking to Pay Debt (exhibit P7). It was the defendant's contention that neither special resolution by the directors nor resolution by the general meeting was passed to bless the two agreements.

In fine, the defendant prayed for the suit to be dismissed with costs stating that there is no valid claim whatsoever against her.

On 23rd May, 2023, when the suit came for final Pre-Trial conference (Final PTC), this court, with the consensus of the parties, framed and recorded issues which were later on 28th June 2023, by consent of the parties, amended to read as follows;

- 1. Whether the Defendant legally and validly entered into agreement dated 28th December, 2017 with the plaintiff to convert salaried loan into commercial loan.*

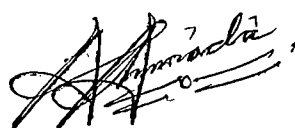
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2. Whether the defendant was indebted to the plaintiff in the sum of USD 870,095.96 equivalent to TZS 1,962,066,389.96 as of 28/02/2018

3. To what reliefs are parties entitled

During the hearing, the plaintiff was represented by Mr. Joseph Nuwamanya, learned advocate whilst the defendant had the services of Mr. Boniface Sariro, learned advocate.

In a bid to establish the claims, the plaintiff paraded one witness namely, Benedicto Malembo Maziku (PW1) whose witness statement was adopted and admitted to form part of his testimony. In addition, the plaintiff tendered eight (8) documentary exhibits namely; loan application form for salaried individual of Charles Christopher Masahi dated 11/12/2015 (exhibit P1), letter authored by Sahara Media Group Limited addressed to Mkombozi Commercial Bank PLC dated 16/11/2016 titled 'Notification Regarding SMGL employees and instalment amounts to be paid' (exhibit P2), letter written by Sahara Media Group Limited addressed to Mkombozi Commercial Bank Limited dated 23/11/2016 titled 'Sahara Media Group Limited payment of outstanding loan Instalment' (exhibit P3), letter written from Mkombozi Commercial Bank

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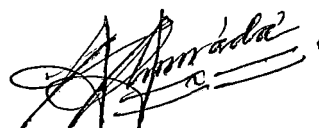
PLC to chairman and CEO of Sahara Group Limited dated 04/01/2017 titled 'Sahara Media Group Limited payment of outstanding loan Instalments' (exhibit P4), Memorandum of Understanding between Sahara Media Group Limited and Mkombozi Commercial Bank PLC signed on 24/05/2017 (exhibit P5), Letter from Sahara Media Group Limited to Mkombozi Commercial Bank PLC dated 04/12/2017 titled 'Extension of time for loan repayment' (exhibit P6), Agreement for Acknowledgment and Undertaking to Pay a Debt dated 28/12/2017 between Mkombozi Commercial Bank PLC and Sahara Media Group Limited (exhibit P7) and Demand Notice issued by Mawala Advocates to chief executive officer of Sahara Media Group Limited dated 27/04/2022 (exhibit P8).

Similarly, the defendant paraded one witness to wit, Ms Sharbano Abubakar Ally (DW1) whose witness statement was adopted and admitted to form part of her testimony. Additionally, DW1 tendered four (4) documentary exhibits namely, demand notice dated 21/10/2021 from Locus Attorneys to Sahara Media Group and letter from Sahara Group Media Limited to the managing partner, Mawala advocates dated 12/05/2022 2018 which were admitted and collectively marked as exhibit D1, Certificate of Incorporation of Sahara

Communication and Publishing Company Limited (exhibit D2), Certificate of Change of Name from Sahara Communication and Publishing Company Limited to Sahara Media Group Limited dated 05/05/2010 (exhibit D3), and Memorandum and Articles of Association of Sahara Communication and Publishing Company Limited (exhibit D4).

The plaintiff's witness one Benedicto Malembo Maziku who introduced himself as the plaintiff's Recovery Manager in his witness statement and oral testimony recapitulated the contentions in the plaint.

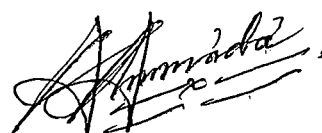
On the other hand, Ms Sharbano Abubakary Ally (DW1) dismissed the plaintiff's claims. Although DW1 admitted that the plaintiff extended loans to the defendant's employees, she was adamant that the defendant was not responsible for the repayment. DW1 stressed that the defendant's sole role was to remit the monthly instalments from the employees' salaries as such, upon termination of their employments, the defendant was no longer responsible for the remission. She also denied knowledge of the Agreement for Acknowledgment and Undertaking to Pay a Debt dated 28/12/2017 (exhibit P7) stating that no board resolution was passed by the defendant to that effect. DW1 further



testified that, the defendant became aware of exhibit P7 when she was served with the plaint.

Upon conclusion of hearing, both parties filed their respective written submissions. I am quite grateful to both counsel for their insightful submissions. Suffice it to say that I have considered the rival submissions in arriving at the decision.

Before I venture into determination of the issues, it is noteworthy that, on 28/06/2023, I admitted exhibits (photocopies) namely; P1, P2, P3, P4, P5, P6, P7 and P8 on condition that, the plaintiff and her counsel would produce the original copies on or before 14/07/2023. Surprisingly, on the material date, the plaintiff was only able to bring the original copies for exhibits P1, P4, P5 and P7. Mr. Nuwamanya, learned counsel for the plaintiff informed the court that, the original documents of exhibits P2, P3, P6 and P8 got lost and that they had filed a notice to produce the said documents so that the photocopies could be accepted. Mr. Sariro, counsel for the defendant strongly resisted the submission and prayer made by Mr. Nuwamanya. Mr. Sariro argued that, the law does not permit a party to the suit to lodge a notice to produce after the closure of his/her case. Having heard the learned advocates on that pertinent issue, I reserved the ruling and informed them that I will



determine the same in the course of composing the judgment. It is trite law that, documentary evidence must be proved by its original. This is the dictate of the provision of section 66 of the Tanzania Evidence Act, [Cap. 6, R.E 2022]. The exception under which secondary evidence (photocopies) can be tendered and admitted is provided under the provisions of section 67 and 68 of TEA (supra). I therefore agree with Mr. Sariro, learned counsel for the defendant that, the plaintiff cannot have a document admitted after the closure of its case. See the case of **ChintanMaganlalKakkadvs Magdalena A. Orwa and Another**, Land Case No. 381 of 2014, High Court Labour Division, at Dar es salaam. Since the plaintiff failed to produce the original copies of exhibits P2, P3, P6 and P8 as ordered by the Court, I am inclined to uphold the objection by Mr. Sariro, counsel for the defendant. In consequence thereof, I hereby expunge exhibits P2, P3, P6 and P8 from the court record accordingly.

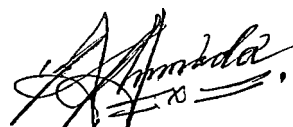
Having recounted the parties' evidence albeit in a nutshell and upon canvassing the rival submissions, it is apt now to determine the issues framed.

To start with the 1st issue to wit, whether the defendant legally and validly entered into agreement dated 28th December, 2017 with the plaintiff to convert salaried loan into commercial loan, it is to be noted, at the outset, that parties are not in dispute that the plaintiff advanced loan to 405 employees of the defendant nor is it contested that, the defendant guaranteed the said loans. Further, parties are at one that the said loans were not fully repaid. As indicated earlier, it was PW1's testimony that, following the defendant's failure to remit the monthly instalments to the plaintiff, and upon several demands, the plaintiff and the defendant on 23rd May, 2017 entered into an MOU (exhibit P5) to which they agreed to convert the salaried loans given to the defendant's employees amounting to Tanzanian Shillings Two Billion Sixty-Six Million Four Hundred Forty Two Thousand Two Hundred Eighty-Nine and Thirty Nine Cents **(TZS 2,066,442,289,39)** into commercial loan to the defendant. Clause 1 of exhibit P5 speaks for itself and I quote; -

"NOW THEREFORE THIS MEMORANDUM WITNESSES

AS FOLLOWS; -

- 1. That, the salaried loans given to Sahara Media Group Ltd employees amounting to Tanzanian Shillings Two Billion Sixty-*



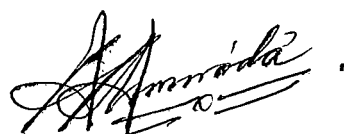
Six Million Four Hundred Forty-Two Thousand Two Hundred Eighty-Nine and Thirty-Nine Cents (TZS 2,066,442,289,39) should be converted to commercial loan to Sahara Media Group."

Sequel to MOU (exhibit P5), on 28th December, 2017 the parties signed an Agreement for Acknowledgment and Undertaking to Pay a Debt (Exhibit P7). In its recitals, Exhibit P7 makes reference to Exhibit P5. Further, clause 1.0 of exhibit P7 expressly tells it all that, the defendant undertook to pay to the plaintiff United States Dollars Eight Hundred Seventy Thousand Ninety-Five and Ninety-Six Cents **(USD 870,095.96)**, the equivalent of Tanzania Shillings One Billion Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eighty-Nine and Ninety-Six Cents **(TZS. 1,962,066,389.96)** in one instalment. The clause reads;

"1.0 UNDERTAKING TO PAY

SAHARA expressly agrees to pay to the bank the USD 870,095.96 (Say Tanzania Shillings One Billion Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eight Nine and Ninety-Six Cents (TZS. 1,962,066,389.96) (sic) only in one instalment."

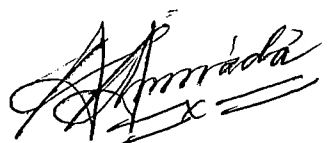
In contrast, DW1 contended that, the defendant was unaware of the said agreement (Exhibit P7) and that she first came to know of its

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existence when served with the plaint. She further lamented that, the meetings which were held by one Anthony M. Diallo (one of the defendant's directors and shareholders) on behalf of the defendant company with the plaintiff's representatives, were not sanctioned by the defendant. However, during cross examination, she conceded to have no any documentary evidence from the defendant company to prove the assertion apart from her verbals. DW1 also admitted that, at the time of signing exhibit P7, Mr. Anthony Diallo was still the Chairman and Chief Executive Officer of the defendant company. DW1 said and I quote.

".....I know Mr. Anthony Diallo. He was chairman and Chief Executive Officer. I do not remember as to when he took the role nor do I remember when this role ended. By the time I assumed my role in May, 2020, Mr. Diallo was no longer in office as Chief Executive Officer (CEO). ...I believe in 2017 Mr. Anthony Diallo was still the CEO".

Indeed, the plaintiff established the existence of the agreement for acknowledgment and undertaking to pay a debt by tendering the original agreement (exhibit P7). Conversely, the defendant's version is that Mr. Diallo was not authorised by defendant's board of directors or shareholders to enter into the agreement (exhibit P7).

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Further, exhibit D4 (Memorandum and Articles of Association of the Defendant) reveals that the said Mr. Diallo is both the Director and Shareholder of the defendant. Thus, in terms of section 38 and 39 of the Companies Act, No. 12 of 2002, he was a competent person to execute the agreement on behalf of the company.

The above-mentioned provisions provide;

"38. A contract may be made –

(a) by a company, by writing under its common seal,
or

(b) **on behalf of a company, by any person acting under its authority, express or implied**, and any formalities required by law in the case of a contract made by an individual also apply, unless a contrary intention appears, to a contract made by or on behalf of a company.

39.-(1) A document is executed by a company by the affixing of its common seal. A company need not have a common seal, however, and the following subsections apply whether it does or not.

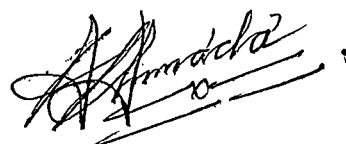
(2) A document signed by a director and the secretary of a company, or by two directors of a company, and expressed (in whatever form of words) to be executed by the company has the same effect

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as if executed under the common seal of the company.

(3) A document executed by a company which makes it clear on its face that it is intended by the person or persons making it to be a deed has effect, upon delivery, as a deed; and it shall be presumed, unless a contrary intention is proved, to be delivered upon its being so executed.

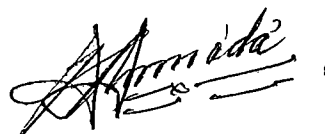
Exhibit P7 tells it all that it was signed on behalf of the defendant by Mr. Anthony Diallo and one Martha Musiba. DW1 confirmed that the duo were, at the material time, holding positions of Chief Executive Officer and Human Resource Manager respectively. Despite the defendant's claims that she became aware of the agreement (exhibit P7) when she was served with the plaint, DW1 could not produce a board resolution denouncing the said agreement. DW1's lamentations that, Mr. Diallo's decisions, actions and meeting were not sanctioned by the defendant's board of directors or shareholders are therefore, in my considered view, baseless and an afterthought. Moreso, Article 78 of the Memorandum and Articles of Association (exhibit D4) validates all transactions and acts done by a director of the defendant with regard to a person dealing in good faith with the defendant to be valid even when it is discovered otherwise.

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Furthermore, as rightly submitted by the plaintiff's counsel, the plaintiff was not duty bound, in terms of section 37 of the Companies Act, to inquire into internal matters of the defendant company given that the plaintiff was dealing with senior officers of the defendant company.

On the foregoing observations, I am inclined to hold that the defendant, through Mr. Anthony Diallo and one Martha Musiba, legally and validly entered into agreement dated 28th December, 2017 with the plaintiff to convert salaried loan into commercial loan. Consequently, I proceed to answer the first issue in the affirmative.

Having answered the first issue in the affirmative, I now turn to determine the second issue namely, whether the defendant was indebted to the plaintiff in the sum of USD 870,095.96, the equivalent of TZS 1,962,066,389.96 as of 28/02/2018. Following my deliberations on the validity of exhibit P7, this issue need not detain me more. PW1 only brought one loan agreement (exhibit P1) for one employee while in the plaintiff and evidence it is claimed that the plaintiff issued loans to 405 defendant's employees. When cross-examined by Mr. Sariro learned advocate for the defendant, PW1 replied that the other loan agreements for the defendant's employees are in the plaintiff's office and that he had

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not seen the importance of producing all the loan agreements. It is worth to note that, under exhibit P5, the recitals and clause 1 reveals that the plaintiff had advanced salaried loans to the defendant's employees amounting to Tanzanian Shillings Two Billion Sixty-Six Million Four Hundred Forty-Two Thousand Two Hundred Eight Nine and Thirty-Nine Cents (TZS 2,066,442,289,39). This fact was not controverted by the defendant. The said loan amount was later converted in to commercial loan to Sahara Media Group (the defendant) through MOU (exhibit P5). Furthermore, exhibit P7 is quite elaborate that, the defendant having agreed with the plaintiff to reduce the interests, acknowledged and undertook to pay the debt to the plaintiff amounting to USD 870,095.96, the equivalent of Tanzania Shillings One Billion Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eighty-Nine and Ninety-Six Cents (TZS. 1,962,066,389.96) only in one instalment. By signing exhibit P7, in my considered view, implies that the defendant acknowledged the debt amount indicated therein. On this, I find it pertinent to borrow a leaf from criminal jurisprudence where the Court of Appeal held that by signing on the seizure certificate, meant the appellant accepted its contents. See **Song Lei vs The Director of Public Prosecution**, Criminal Appeal No. 16A of 2016 and No. 16 of

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2017, CAT at Mbeya and **WaziriShabaniMizogivs Republic**, Criminal Appeal No. 476 of 2019 CAT Mbeya.

It is trite law that parties are bound by the terms of the contract which they freely entered. The authorities on this are without a number. They include; **Miriam E.Maro vs. Bank of Tanzania**, Civil Appeal No. 22/2017, CAT at Dar es Salaam, **Unilever Tanzania Ltd vs. Benedict Mkasa t/a BEMA Enterprises**, Civil Appeal No. 41 of 2009, CAT at Dar es Salaam, **Philipo Joseph Lukonde vs. Faraji Ally Saidi**, Civil Appeal No. 74 of 2019, CAT at Dodoma, **Simon KicheleChacha v. Aveline M. Kilawe**, Civil Appeal No. 160 of 2018, CAT at Mwanza, and **Kilanya General Supplies Ltd. and Another vs CRDB Bank Limited and Two others**, Civil Appeal No. 1 of 2018, CAT at Dar es Salaam.

Since the defendant freely signed the agreement, it goes without saying that it is duty bound by its terms. In view of the above, I am opined that the defendant was truly indebted to the plaintiff in the sum of USD 870,095.96 the equivalent of TZS 1,962,066,389.96 as of 28/02/2018. As such, I answer the 2nd issue in the affirmative.

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The 3rd issue is to what reliefs are parties entitled? It has been established through exhibit P7 that the defendant undertook to pay the plaintiff United States Dollars Eight Hundred Seventy Thousand Ninety-Five and Ninety-Six Cents (USD 870,095.96) the equivalent of Tanzania Shillings One Billion Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eighty-Nine and Ninety-Six Cents (**TZS. 1,962,066,389.96**) in one instalment which was payable on or before 28th February, 2018 but failed to perform this contractual obligation. This constituted a breach of contract and for that reason the defendant is duty bound to remedy the plaintiff. However, I do not find it fit to invoke the court's discretion to grant general damages along with commercial interest and costs of the case. This is because, in my considered views, the inconveniences caused to the plaintiff, may be adequately catered through the commercial interests and costs of the case.

In the circumstances, I hereby enter judgment and decree against the defendant with the following consequential orders;

- (1) The defendant is hereby ordered to pay the plaintiff United States Dollars Eight Hundred Seventy Thousand Ninety-Five and Ninety-Six Cents (**USD 870,095.96**) or Tanzania Shillings One Billion



Nine Hundred Sixty-Two Million Sixty-Six Thousand Three Hundred Eighty-Nine and Ninety-Six Cents **(TZS. 1,962,066,389.96)**.

- (2) The defendant is hereby ordered to pay the plaintiff interest of 20% of the decretal sum in (1) above from the date of instituting the suit up to the time of judgment.
- (3) The defendant is hereby ordered to pay the plaintiff interest at the court rate of 7% from the date of judgment until full satisfaction of the decree.
- (4) Costs of the suit be borne by the defendant.

It is so ordered.

The right of appeal is explained.




A.A. Mbagwa

JUDGE

15/12/2023