

**IN THE HIGH COURT OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**COMMERCIAL CASE No 72 OF 2017**

**Between**

**EQUITY BANK TANZANIA LIMITED.....PLAINTIFF**

**Versus**

**HOME CRAFT GROUP (T) LTD.....1<sup>st</sup> DEFENDANT**

**KARIUKI JOSEPHAT MUNYUA.....2<sup>nd</sup> DEFENDANT**

**EDWARD MAGERO.....3<sup>rd</sup> DEFENDANT**

**JUDGMENT**

**MRUMA, J**

The Plaintiff bank brought this action inter alia to recover Tanzania shillings 25,660,059.27 and USD 226, 461.55 from the Defendants interest thereon and costs being the outstanding amount on account of credit facilities extended to the 1<sup>st</sup> defendant and guaranteed by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants.

The Plaintiff's case is that on 28 November 2013, she granted credit facilities of US Dollars 253, 980.00 as an Asset Finance Facility and Kenya shillings 5, 650,000.00 as an Invoice Discounting Facility to the 1<sup>st</sup> Defendant. The Defendant secured the said credit facility by a Joint Registration of Motor Vehicles and a Hire Purchase Agreement between the Plaintiff and the 1<sup>st</sup> Defendant executed on 12<sup>th</sup> December, 2013 and Directors personal guarantees and indemnity dated and executed on 12<sup>th</sup>

December 2013 by the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants in favour of the 1<sup>st</sup> Defendant.

It is alleged that upon repayment of the said loans, the first Defendant requested for another Invoice Discounting Facility of T.shs 148,000,000/= which was issued on 17<sup>th</sup> February, 2015. This Invoice Discounting Facility was consolidated with the then existing Asset Finance loan of USD 215,506.00.

On 22<sup>nd</sup> April 2015, the Plaintiff issued to the 1<sup>st</sup> Defendant in addition to the existing Invoice Discounting Facility of T.shs 148,000,000/= and Asset Finance Facility of USD 215,506.00 an additional Invoice Discounting Facility amount of T.shs 107,000,000/= Adding up to the total amount of T.shs 225,000,000/= as new invoice Discounting Facility and USD 215,506/= as Asset Finance Facility due to the Plaintiff by the 1<sup>st</sup> Defendant. After the consolidation of the facilities the 1<sup>st</sup> Defendant failed and defaulted to service his facilities as agreed.

On 15<sup>th</sup> February, 2017 the Plaintiff issued a default notice to the Defendants through DHL notifying them about the alleged default. The Defendants didn't heed to the Plaintiff call to repay the loans.

It is the Plaintiff claim that in total breach of the contract the first Defendant has failed to repay the facilities advanced to her as a result of which on 10<sup>th</sup> March 2017 the outstanding due and payable to the Plaintiff was T.shs 25,660,059.27 being an outstanding amount on Invoice Discounting Facility and United States Dollars 226,461. 55 on Asset Finance Loan Facility.

Summons to appear and answer the claim were duly issued but the Defendants could not be served by ordinary service as their whereabouts was not known. There were efforts to serve them by posts as they are said to be resident in Kenya but to no avail. Finally they were served by electronic means pursuant to Rule 17 of the High Court (Commercial Division), Procedure Rules 2012. A returned copy of summons dated 15<sup>th</sup> August 2017 was produced as evidence that the Defendants were duly served. The matter therefore proceeded ex parte and in default of having filed a defence against all the Defendants.

At the hearing the Plaintiff was represented by Counsel Ian Lweramira Almachius of Sub-Sahara Law Chambers. She called two witnesses.

There are two issues

1. Whether the Defendants breached the terms of the Loan Facilities granted to it by the Plaintiff?
2. What remedies are available to the parties?

On the first issue which is whether the Defendants breached the terms of the Loan Facility granted to it by the Plaintiff, the Plaintiff's first witness **Gesla Nicas Salla (PW1)** testified that there was a breach by the first Defendant by failure to pay the outstanding amounts which are established by exhibit P8 of Tanzania shillings of T.shs 25,660,000/= and USD 226,000.00. As stated hereinbefore this case proceeded ex parte against Defendants therefore there was nothing to controvert this evidence.

I have carefully gone through the evidence of PW1 and the documentary evidence tendered by this witness and particularly the Asset Financing

Facility (Offer of banking facility Exhibit P1), an offer letter issued after the loan was restructured (Exhibit P5) an offer letter of T.shs 148,000,000/= an offer letter for Invoice Discounting Facility for addition of T.shs 107,000,000/= the Personal Guarantee Agreements (Exhibit P4), and the demand notice (Exhibit P9) and I am satisfied that on the evidence adduced and in absence of any evidence to the contrary the Defendants breached the terms of the loan facilities letters which were granted to them.

I accordingly find and hold that the Defendants are jointly and severally liable to pay the Plaintiff the sum of T.shs 25, 660,059/= and USD 226,461.55 based on the amount claimed in the suit.

As far as the claim for interest is concerned, the Plaintiff is entitled to an award of interests under the principle of *restitutio in integrum* for money due from the Defendants on the following grounds. In the usual suit a claim for damages flows under the doctrine established in East Africa in the East African Court of Appeal case of **Dharamshi vs. Karsan [1974] 1 EA 41** that damages are awarded to fulfil the common law remedy of *restitutio in integrum*. The Plaintiff has to be restored as nearly as possible and as money can do to a position he or she would have been in had the breach complained of not occurred. Interest are the natural or probable consequence of the wrong complained of with the result that the Plaintiff is required only to assert that the transaction involved was a business making transaction. The award of interest is compensatory in nature. The innocent party is to be placed, so far as the award of interest can do in the same position as if nothing has happened and he/she had continued to do his/her business as usual/

Where profit can be made from a business but is withheld and made unavailable to the Plaintiff due to the Defendant's conduct or breach an award of interest compensates the deprivation. Interest is therefore awarded as compensation for keeping the Plaintiff out of his money. This is at the discretion of the court under section 29 of the Civil Procedure Code which provides that:

**"The Chief Justice may make rules prescribing the rate of interest which shall be carried by the judgment debts and without prejudice to the power of the court to order interest to be paid upon to date of judgment at such rates as it may deem reasonable"**

What is a reasonable rate of interest has been considered in **Riches v Westminster Bank Ltd [1947] 1 All ER 469 HL at page 472** Lord Wright explains the essence of an interest award in the following words:

**"...It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation...."**


What is the quantum for deprivation for non use of the money? The award of interest proceeds from an assumption that the Plaintiff would have put the money in circulation and earn some profits there from. As stated hereinbefore an award of interest (just like any other damages) falls under the doctrine of *restitutio in integrum* and is meant to reflect the rate at which the Plaintiff would have had to earn what was

withheld. This is the holding of Forbes J in **Tate & Lyle Food and Distribution Ltd v Greater London Council and another [1981] 3 All ER 716** at page 722:

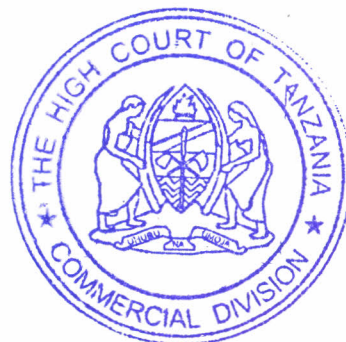
**"I think the principle now recognised is that it is all part of the attempt to achieve restitutio in integrum. ... I feel satisfied that in commercial cases the interest is intended to reflect the rate at which the Plaintiff would have had to borrow money to supply the place of that which was withheld."**

In the premises and in the circumstances of this case the Plaintiff will be awarded an interest based on their contractual agreed rate of 18% per annum on Tanzania shillings currency and 3% per annum on US-Dollar currency from the time of filing this suit to the date of judgment. The Plaintiff will be entitled to further interest at court's rate of 7% per annum on Tanzania Shillings and 1% per annum on US-Dollars currency from the date of this judgment to the date of full payment of the decretal sum. She is also awarded costs of the case.

Order accordingly,

  
A.R. Mruma,

Judge.



Dated at Dar Es Salaam this 19<sup>th</sup> day of February, 2018.