

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)**

**AT MWANZA**

**COMMERCIAL CASE NO. 22 OF 2013**

**VITA FOAM (T) LIMITED ----- PLAINTIFF**

**VERSUS**

**VINAYAK TRADERS LIMITED -----1<sup>ST</sup> DEFENDANT**

**SAMIK RAJANI -----2<sup>ND</sup> DEFENDANT**

**SANJAY GANDHI -----3<sup>RD</sup> DEFENDANT**

**AYUBU JAMES CHONJA -----4<sup>TH</sup> DEFENDANT/THIRD PARTY**

**JUDGMENT**

**B.K. PHILLIP, J**

The Plaintiff herein lodged this case praying for judgment and decree against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally as follows:

- i. For payment of a total sum of Tanzania Shillings Eighty Four Million Three Hundred Sixty Seven Thousands and Seven Shillings (Tzs. 84,367,007) being the outstanding settlement amount representing the sales proceeds not remitted and cash advanced but not paid plus interest until 30<sup>th</sup> September 2013, as per terms of the settlement Agreement, and the balance of outstanding credit sales not remitted as per the terms of the settlement agreement.

- ii. For payment of interest at the rate of 2% on (i) above from the date of signing of the settlement agreement until the date of payment in full.
- iii. For payment of specific damages in the form of actual compensation for the losses and damages suffered by the plaintiff as a result of plaintiff's loss of business caused by the defendants' action and/or omission to continue doing business with the plaintiff.
- iv. For payment of general damages, costs and expenses, including the legal fees costs and expenses, incurred by the plaintiff as a result of the 1<sup>st</sup> defendant's failure to heed to the terms and conditions of the agreement for operating the plaintiff's depot and other resultant costs and expenses incurred by the plaintiff.
- v. For payment of interest on the decretal sum at court's rate computed from the date of judgment till full satisfaction of the entire decretal sum.
- vi. for costs of this suit and
- vii. For any other relief(s) the honourable court may deem fit to grant.

A brief background to this case is that, by Memorandum of Agreement dated 1<sup>st</sup> February, 2010, (hereinafter to be referred to as 'MoA') the plaintiff engaged the 1<sup>st</sup> defendant as a branch operator for selling the plaintiff's goods in lake zone regions, comprising of Mara, Kagera, Mwanza and Tabora Regions. The MoA was for period of the year. By the letter dated 31<sup>st</sup> December, 2010, the MoA was renewed for one year. On 3<sup>rd</sup>

June, 2010, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants signed personal guarantees for the punctual payment and prompt performance of any /and all indebtedness or obligation of any kind which the 1<sup>st</sup> defendant may have in respect any transaction arising out of or in connection with the MoA. The plaintiff started delivering goods as per the terms and conditions of the MoA and the goods delivered were registered in the ledger account, however, the 1<sup>st</sup> defendant failed to pay for the goods as agreed in the MoA ,despite several demands for the payments from the plaintiff.

In endeavors to resolve the dispute that arouse following the 1<sup>st</sup> defendant's failure to pay the plaintiff, the plaintiff entered into a settlement agreement with the 1<sup>st</sup> defendant, in which the first defendant admitted that it owes the plaintiff a sum of TZS 145,974,293.35 and further agreed to pay the sum of TZS 50,000,000/= which was the outstanding unremitted amount. The 1<sup>st</sup> defendant also issued post dated cheques worth TZS 39,000,000/= and executed a promissory note to secure a sum of TZS 93,974,293.35 which was the amount due for the credit sales of the plaintiff's goods. The promissory was to mature on 31<sup>st</sup> December, 2011.

The posted cheques were presented at the bank on 9<sup>th</sup> April, 2012, but all were dishonored and marked "refer to drawer". In another attempt to settle the dispute over the payments, on 13<sup>th</sup> April, 2013, the plaintiff held a meeting with the 1<sup>st</sup> defendant. The outcome of the meeting was another agreement for payment of the debt, in which the 1<sup>st</sup> defendant agreed to pay a sum of TZS 13,000,000/= between 1<sup>st</sup> to 31<sup>st</sup> May, 2013 and the remaining balance was to be paid by equal installments up to June, 2013.



This new arrangement for the payment was confirmed by the 1<sup>st</sup> defendant by a letter dated 15<sup>th</sup> April, 2013.

All of the aforementioned attempts to settle the dispute over the payments of the plaintiff's money failed, consequently the plaintiff instructed ADCA Veritas Law Group to write a demand letter to the 1<sup>st</sup> defendant and the same was copied to the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. Upon receipt of the demand letter, the 2<sup>nd</sup> defendant responded to the same and alleged that he had relinquished all his interests in the 1<sup>st</sup> defendant. He indicated that the current directors are Ayoub Chonja and Sanjay Damubhai. Consequently the plaintiff decided to take legal action against the defendants.

Upon being served with the plaint, the 2<sup>nd</sup> defendant denied all of the Plaintiff's claims. His major defence was that, he relinquished all his interests in the 1<sup>st</sup> defendant by selling his shares to the 3<sup>rd</sup> defendant. The 2<sup>nd</sup> defendant also raised a counter claim against the 3<sup>rd</sup> defendant, claiming for payment is TZS 62,825,000/= being outstanding amount for the sale of shares. He also applied to serve a third party notice to one Ayoub James Chonja, consequently, Ayoub James Chonja was joined in this case as third party. He filed his written statement of defence in which he disputed all of the plaintiff's claims.

On 7<sup>th</sup> June, 2018 this court (Hon. A.R. Mruma, J) dismissed the counter claim for being misconceived. The 1<sup>st</sup> and 3<sup>rd</sup> defendants did not file written statement of defence, thus this case proceeded ex-parte against them.



The third party did not enter appearance at the hearing of the case, thus the case proceeded ex parte against him too.

At the Final Pre Trial Conference, the following issues were framed.

- i. Whether the plaintiff supplied to the 1<sup>st</sup> defendant various goods as per the terms of the memorandum of agreement.
- ii. whether the 1<sup>st</sup> defendant honoured the terms of the memorandum of agreement.
- iii. Whether the defendants jointly and severally fulfilled the terms of the settlement agreement.
- iv. Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being directors of the 1<sup>st</sup> defendant honoured the terms stipulated under executed personal guarantee.
- v. Whether the settlement agreement dated 24<sup>th</sup> August 2011 had the effect of discharging the 2<sup>nd</sup> defendant's liability under the MoA previously signed between the plaintiff and the 1<sup>st</sup> defendant.
- vi. What reliefs are the parties entitled to.

At the hearing of this case, the learned advocate Sylvanus Mayenga and Bruno Mvungi assisted by Advocate Chiku Chande appeared for the plaintiff and 2<sup>nd</sup> defendant respectively.

The plaintiff had two witnesses for proving its case against the defendants. The first witness was Suraj Chandalia (PW1). In his testimony in chief PW1 basically reiterated the facts and background this case as contained in the plaint and I think I do not need to repeat them here as I have narrated

them at the beginning of this judgement. In addition to the facts as stated in the plaint, PW1 testified that the 2<sup>nd</sup> and 3<sup>rd</sup> defendant's guarantee on punctual payment and prompt performance of the 1<sup>st</sup> defendant's indebtedness and obligation towards the plaintiff remained binding upon them as long as the same remained unrevoked as per clause 4 of the said guarantee.

PW1 denied the allegation that the 2<sup>nd</sup> defendant had relinquished all duties and liabilities to Mr. Ayub Mohamed Chonja, the third party, and testified further that, even if that allegation is true, the same did not relieve the 2<sup>nd</sup> defendant from his personal guarantee he signed and executed in his personal capacity. It was the testimony of PW1 that the personal guarantee executed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants did not only touch the interests of their shareholding to the 1<sup>st</sup> defendant but also turns over and above to cover the personal assets of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants, thus, gives automatic right to the plaintiff to seek any recourse over 2<sup>nd</sup> and 3<sup>rd</sup> defendants. PW1, testified further that, following the defendants' refusal to pay to the plaintiff the outstanding amount, as per the express terms and conditions in the agreements, the plaintiff suffered and continue to suffer unnecessary costs, expenses and damages as stated in the plaint. He prayed the reliefs in the plaint to be granted. PW1 tendered in court the following Exhibit. The Memorandum of Agreement between the plaintiff and 1<sup>st</sup> defendant dated 1<sup>st</sup> February, 2010 - (Exhibit P1), A letter titled "Renewal of MoA dated 1<sup>st</sup> February, 2010 to operate Vita Foam Brand" dated 31<sup>st</sup> December 2010 – (Exhibit P2), two guarantee agreements first

one signed by the 2<sup>nd</sup> defendant, and the 2<sup>nd</sup> one signed by the 3<sup>rd</sup> defendant dated 3<sup>rd</sup> June, 2010) – (Exhibit P3 collectively), Vita Foam (T) Ltd delivery note for Mwanza Deport register dated 1<sup>st</sup> February, 2010 to 24<sup>th</sup> August, 2011 (Exhibit – P4), Ledger account dated 1<sup>st</sup> January, 2010 to 30<sup>th</sup> September, 2013- (Exhibit P5), Cheques dated 31<sup>st</sup> December, 2011, 30<sup>th</sup> November, 2011, and 31<sup>st</sup> October, 2011 for Tshs. 12,750,000/=, Tshs. 13,000,000/= and 13,250,000/= respectively (Exhibit P6 collectively), Settlement Agreement between the plaintiff and 1<sup>st</sup> defendant dated 24<sup>th</sup> August, 2011 signed by the 1<sup>st</sup> Defendant (Exhibit P7), Promisory Note dated 24<sup>th</sup> August, 2011 (Exhibit P8) and a letter from the 1<sup>st</sup> defendant dated 15<sup>th</sup> April, 2013 addressed to Suraj Chandalia (Exhibit P9).

Upon being cross-examined by the Advocate for the 2<sup>nd</sup> defendant, PW1 said that, clause 6.5 of the settlement agreement (Exhibit P8) means that Exhibit P8 is the final document for any dispute arising out of the MoA and the settlement agreement prevails over the MoA.

During re-examination by his advocate PW1 said that both documents the MoA and settlement agreement were signed by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. That clause 6.5 of the settlement agreement did not interfere with the personal guarantees. That the settlement agreement is on payments of the disputed amount only and the personal guarantees have nothing to do with the 1<sup>st</sup> defendant.



The second witness for the plaintiff was Peter Zembeiya ('PW2'). In his testimony in chief PW2, stated that he was an employee of the 1<sup>st</sup> defendant at the time of operating the Mwanza Branch and at the time the 1<sup>st</sup> defendant signed the settlement deed. PW2 stated further that he was a signatory to the settlement agreement dated 24<sup>th</sup> August, 2018 and at the time of signing the settlement agreement the outstanding amount was Tshs. 145,774,293.35. Furthermore, PW2 testified that Samik Rajan and Sanjay Gandhi were the directors of Vinayak Traders (1<sup>st</sup> defendant), when Vita Foam (T) Ltd. branch was under the 1<sup>st</sup> defendant herein. Upon being cross examined by the advocate for the 2<sup>nd</sup> defendant, PW2 said that Exhibit P7 was a contract for payment of a loan between the plaintiff herein and the defendants. That he worked with Vita Form from 2010 to 2013. At the beginning the directors were Rajani and Sanjay Gandhi. In 2013, the directors were Sanjay Gadhi and Ayoub. PW2 testified Further that, Samik Rajani left the company in 2011. That by the time the 1<sup>st</sup> defendant entered into the settlement agreement Samik Rajani had already left the company, therefore when the settlement agreement was signed Samik Rajan was not working with the 1<sup>st</sup> defendant.

During re-examination PW2 Said that, to his knowledge Samik Rajani did not revoke his liability with Vita Foam.

On 7<sup>th</sup> November, 2018 when the case was called for defence hearing the 2<sup>nd</sup> defendant and his advocate did not appear in court, thus this court closed the hearing of the case and allowed the prayer by plaintiff's advocate for filing the final submission, and the same was filed as prayed.

Therefore this judgment is an ex parte judgment for the above explained reason.

Now, let the move to the determination of the issues. Starting with the first issue, that is **whether the plaintiff supplied to the 1<sup>st</sup> defendant various goods as per the terms of the MOA.** The evidence adduced in court, that is the testimonies of PW1, PW2 and the documentary evidence, that is, Exhibit P4, show that the plaintiff did supply to the defendants various goods as it was agreed in the MoA, from 1<sup>st</sup> February, 2010 to 24<sup>th</sup> August, 2011 and there is no dispute on the existence of the MoA (Exhibit P1). The testimonies of PW1 and PW2 are not contradicted or challenged in anyway. I do not see any reason to doubt them. In addition to the above, the 1<sup>st</sup> and 2<sup>nd</sup> schedule to Exhibit P7 ( The settlement agreement ) contains list of outstanding credit sales amount and inventory of unsold company's merchandise which proves that the plaintiff did supply to the 1<sup>st</sup> defendant various goods as agreed in the Memorandum of Settlement, thus the answer to the first issue is the affirmative, that's the plaintiff supplied the 1<sup>st</sup> defendant various goods as per the terms of the MoA.

Coming to the 2<sup>nd</sup> issue that is **whether the 1<sup>st</sup> defendant honoured the terms of the Memorandum of Agreement dated 1<sup>st</sup> January, 2010,** Exhibit P7 (the settlement agreement) that was signed by the 1<sup>st</sup> defendant provides the answer to this issue. In it is recitals Exhibit P7 provides as follows.

*"WHEREAS, the Company and the operator entered into a legally binding memorandum of agreement relating to the operation and management of the company's Mwanza depot (the "Agreement");*

***WHEREAS, the operator has breached the Agreement by failing, inter alia, to meet the Quarterly minimum sales Targets (as that term is defined in the Agreement),, to timely recover and remit sales proceeds from credit sales of the company's Merchandise(as that term is defined in the Agreement), and to timely remit collected sales proceeds(the "Dispute");***

*WHEREAS, the operator currently owes to the company an aggregate amount of approximately Tanzanian Shillings One Hundred Forty-three Million (Tshs. 143,000,000/=) as detailed in Schedule 1 to this settlement Agreement;*

***WHEREAS....."***

*( Emphasis is mine)*

From the above quoted part of the recitals in Exhibit P7, it is evident that the 1<sup>st</sup> defendant did not honour the terms of the MoA dated 1<sup>st</sup> January, 2010.

The third, fourth and fifth issues are intertwined, I will determine them jointly for easy of understanding let the reproduce them here under again.



- iii. **Whether the defendants jointly and severally fulfilled the terms of the settlement agreement.**
- iv. **Whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being directors of the 1<sup>st</sup> defendant honoured the terms stipulated under executed personal guarantee.**
- v. **Whether the settlement agreement dated 24<sup>th</sup> August 2011 had the effect of discharging the 2<sup>nd</sup> defendants liability under the MoA previously signed between the plaintiff and the 1<sup>st</sup> defendant.**

Exhibit P3 (the personal guarantees) were signed by the 2<sup>nd</sup> and 3<sup>rd</sup> defendants for making a guarantee in payment of debts and fulfillment of obligations of the operator (1<sup>st</sup> defendant) in respect of the MoA. Article 4 of Exhibit P3 provides for the nature, scope and duration of the guarantee to the effect that, the guarantees were for unlimited amount and have to remain effective until revoked by a thirty (30) days notice of revocation. Article 1 of Exhibit P3, provides as follows;

*"1. Guarantee. As an inducement to VITA FOAM (T) LIMITED (hereinafter referred to as the Company") to enter into the Memorandum of Agreement dated 1<sup>st</sup> February, 2010 in respect of the operation of the Company's Mwanza depot (hereinafter referred to as the "MOA") with VINAYAK TRADERS LIMITED (hereinafter referred to as the "Operator") and in consideration of the company permitting the Operator to enter into sales agreements with customers relating to the Company's goods*

*and services, the undersigned does hereby guarantee the punctual payment and prompt performance of any and all indebtedness or obligation of any kind which the Operator may now owe or which it may at any time hereafter owe to the Company, whether such indebtedness or obligation arises from or is evidenced by any note, trade acceptance, draft or other instrument or is based upon contract or open account or otherwise in respect of any transaction arising out of or in connection with the MOA”.*

Reading the terms and conditions in the above quoted Articles of the Exhibit P3, I am of a settled view that the settlement agreement did not discharge the 2<sup>nd</sup> defendant from liability under the MoA previously signed between the plaintiff and the 1<sup>st</sup> defendant. The reason behind my finding is that, the settlement agreement arose from the transactions out of the MoA and the guarantee (Exhibit P3) states explicitly that it covers all of the 1<sup>st</sup> defendant's indebtedness including the ones arising out of or in connection with the MoA.

However, according to PW2's testimony by the time the 1<sup>st</sup> defendant was signing the settlement agreement, the 2<sup>nd</sup> Defendant was no longer the director of the 1<sup>st</sup> defendant. In fact exhibit P7 shows that the 2<sup>nd</sup> signatory for the 1<sup>st</sup> defendant was PW2, not the 2<sup>nd</sup> defendant. The 2<sup>nd</sup> defendant signed the MoA (Exhibit P1) by virtue of his title as the director of the 1<sup>st</sup> defendant, thus it goes without saying that after quitting from the directorship in the 1<sup>st</sup> defendant's Company, the 2<sup>nd</sup> defendant ceased to be bound by the MoA as well as the settlement agreement as it arises from

the MoA. This is in line with the company law. According to the corporate principle as stated in the famous case of **Salomon vrs Saloman (1897) AC 22**, a company is separate and distinct from its member thus, the 2<sup>nd</sup> defendant was discharged from the liability in the MoA signed between the plaintiff and 1<sup>st</sup> defendant because he decided to quit from the 1<sup>st</sup> defendant, consequently he ceased to be the director of the 1<sup>st</sup> defendant.

As regards the fourth issue that is, **weather the 2<sup>nd</sup> and 3<sup>rd</sup> defendants being directors of the 1<sup>st</sup> defendant duly fulfilled the terms and conditions contained in their executed personal guarantees**, as aforesaid the testimony of the PW2 shows that the 2<sup>nd</sup> defendant is no longer the director of the 1<sup>st</sup> defendant.

However, though the 2<sup>nd</sup> defendant is no longer the director of the 1<sup>st</sup> defendant, it is my settled view that the guarantee that was executed by the 2<sup>nd</sup> defendant is still effective as the same was a personal guarantee for punctual payment and prompt performance of any and all indebtedness or obligations of the operator (i.e the 1<sup>st</sup> defendant) and the same was executed as an inducement to Vita Foam (T) Limited, the Plaintiff herein, to enter into the MoA. Reading the guarantee document (Exhibit P3) in its entirety and between the lines, it clear that the 2<sup>nd</sup> and 3<sup>rd</sup> defendants executed the guarantee documents by virtue of their positions as directors but the same were personal guarantees. It has to be noted that Article 4 of the guarantee provides clearly that the guarantee could be terminated by issuing a 30 days' notice of intention to revoke the same. The 2<sup>nd</sup>



defendant did not terminate the personal guarantee, therefore he is still bound by the same.

On the strength of the Article 4 of the guarantee document and the decision of the Court of Appeal in the case of **CRDB Bank Limited Vs. Issack B. Mwamasika and 2 others, Civil Appeal No. 139 of 2017** (unreported) in which it was held that Directors of a Company once execute personal guarantees commit themselves to pay the loan offered to the company or face seizure their personal assets, and Since as per Exhibit P9 and Exhibit P8, and the testimonies of PW1 and PW2, up to date, there is outstanding money unpaid to the plaintiff, the answer to this issue is that, the 2<sup>nd</sup> and 3<sup>rd</sup> defendants as former director did not fulfill the terms and conditions of contained in their existing personal guarantee.

Coming to the last issue, that is **to what reliefs are the parties entitled to**; I have noted that the plaintiff prayed for payment of specific damages, but the same was not proved during the hearing, however , under the circumstances of this case the delay in payments of the claimed amount, the frustration and finally closure of the plaintiff's business in Mwanza caused by the defendants' acts, have cause damages to the plaintiff financially thus I think this a fit case for granting general damages. From the foregoing I hereby enter Judgment and decree for the plaintiff against the defendants jointly and severally as follows;

- i. Payment of a total sum of Tanzania Shillings Eighty Four Million Three Hundred Sixty Seven Thousands and Seven Shillings (Tzs.

84,367,007) being the outstanding settlement amount representing the sales proceeds not remitted and cash advanced but not paid plus interest until 30<sup>th</sup> September 2013, as per terms of the settlement Agreement, and the balance of outstanding credit sales not remitted as per the terms of the settlement agreement.

- ii. Payment of interest at the rate of 2% per annum on item (i) herein above from the date of signing of the settlement agreement until the date of payment in full.
- iii. Payment of interest on the decretal sum at court's rate of 7% per annum computed from the date of judgment till full satisfaction of the entire decretal sum.
- iv. Payment of Tshs 4,000,000/= as general damages
- v. The defendants shall pay the costs of this suit.

Dated at Dar es salaam this 5<sup>th</sup> day of April, 2019.



**B.K. PHILLIP**

**JUDGE**