IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

COMMERCIAL CASE NO. 19 OF 2018

BETWEEN

BANK OF INDIA (TANZANIA) LIMITED.....PLAINTIFF

Versus

FOMCOM INTERNATIONAL LIMITED.....1st DEFENDANT

FURAHA MOHAMED MAWAMBA.....2nd DEFENDANT

FARIDA MOHAMED MAWAMBA.....3rd DEFENDANT

Last Order: 15th July, 2019

Date of Judgment: 11th Sept, 2019

JUDGMENT

FIKIRINI, J.

The plaintiff sued the defendants namely Fomcom International Limited, Furaha Mohamed Mawamba and Farida Mohamed Mawamba hereinafter referred as 1st, 2nd and 3rd defendants. The defendants were sued for failure of the 1st defendant to repay the debt money amounting to Tzs. 3, 674, 245, 170.25 (plus the accruing interest) which the 1st defendant disbursed from the credit facility provided by the plaintiff. The 2nd and 3rd

defendants were sued as guarantors, and also mortgaged their properties as collateral.Mr. Fredrick Mbise learned Counsel who represented the plaintiff told the court that defendants were put on notice about the pending case on 05th March, 2018. The court believed the averment because the 2nd and the 3rd defendants could not have filed their written statement of defence through Mr. Kihamba the counsel for defendants if they knew nothing about the pending case in the court. The written statement of defence of the 1st defendant, also represented by Future Mark Attorneys, was not filed and no reason was given. However even though 2nd and the 3rd defendants had filed their written statement of defence but failed to appear on mediation which led to the defence being struck out.

The plaintiff through Mr. Kihamba applied for judgment in default in respect of the 1st defendant, the application which was granted, and the Court proceeded to order *ex parte* proof against the 2nd and 3rd defendants.

An application in terms of Rule 22 (1) of the High Court (Commercial Division) Procedure Rules, 2012 (the Rules) was filed accompanied by an affidavit of Satyasai Behera, Principal Officer of the plaintiff in support of the default judgment prayed against the 1st defendant. On the other hand,

a witness statement was filed to prove the case *ex parte* against the 2nd and 3rd defendant.

In order to appreciate the case of which decision is about to be made brief facts leading to the institution of this suit are necessary. The 1st defendant obtained various credit facilities from the plaintiff with the 2nd and 3rd defendants guaranteeing the repayment of the money used from the credit facilities plus the accruing interest and other charges if the 1st defendant will fail to pay back. The line of credit facilities which were provided by the plaintiff to the 1st defendant were as follows: on 16th April, 2015 while operating under the directorship of the 2nd and 3rd defendants the 1st defendant obtained line of credit worth Tzs. 1, 600,000,000.00 (Tanzania Shillings One Billion Six Hundred Million only) from the plaintiffclassified in the following categories: FNB-LC Revolving line of credit with a credit Limit of USD 270,000.00 (United State Dollars Two Hundred and Seventy Thousand Only) for the duration of one (1) year.

Under the terms and conditions as agreed, FNB-Overdraft Working Capital was payable at the rate of 3% over Benchmark Prime Lending Rate (BPLR) of 19.00% per annum and FNB-LC Revolving Limit of USD 270,000.00 payable at the rate of 1% per quarter plus Swift charges.

On 23rd April, 2015 the 1st defendant through its directors the 2nd and 3rd defendants issued a fixed rate and floating rate) which was registered to cover Tzs.2,000,000.00 plus interest and other charges thereon in favour of the bank as a security for the provided credit facility of Tzs. 1,600,000.00.

The credit facilities were also secured by a mortgage dated 23rd April, 2015 by the 1st defendant surrendering a Certificate of Title No. 1542-DLR, with a Land Office No. 36057, for Plot Nos. 13 & 14, Block "A" Mshindo Area, located within the Iringa Township in the name of Fomcom International Limited.

The 2nd and 3rd defendants created personal guarantee and indemnity agreement that they shall fully repay on or before its due date and that in case of any default they shall be fully personally liable to repay immediately upon demand the outstanding amount, used from the credit facility, plus the interest and penalties accruing from it.

On 17th December, 2015, the credit facilities limit was revised to be up to Tzs. 2,600,000,000.00, as follows: FNB - Overdraft - Working Capital remained the same Tzs. 1,100,000,000.00, FNB - LC Revolving Limit of

USD 270,000 was converted in Over Draft with a Limit of Tzs. 500,000,000.00 and demand loan facility worth Tzs. 1,000,000,000.00 was established. FNB - Overdraft-Working – Capital and Demand loan was to be repayable on demand. The interest chargeable was 3% for FNB-Overdraft Working Capital and FNB - LC Limit over BPLR by then was 19.00% per annum with monthly rests and Demand Loan at 5% over BPLR by then was 21% per annum with monthly rests as specified in the credit facility letter.

A variation was made to the two debenture deeds to relate to the increased credit facility to Tzs. 2,600,000,000.00. Each debenture was registered to cover Tzs. 3,250,000,000.00 plus interest and other charges thereon. As additional security for additional credit granted the 1st defendant created equitable mortgage by depositing the following additional residential licences with reference numbers ILA/KWN/KGL1/83; ILA/KWN/KGL2/115; ILA/KWN/KGL2/117 and ILA/KWN/KGL8/1 and by passing a Board Resolution dated 17th December, 2015 accompanied by a letter from the director of the 1st defendant dated 17th December, 2015.

The 2nd and 3rd defendants being guarantors of the credit facilities provided to the 1st defendant, also made variations of the guarantee and indemnity agreement to cover Tzs. 3,250,000,000.00 plus interest and

other charges for the credit facilities which by then summed up to Tzs. 2,600,000,000.00.

Despite all these, after obtaining the credit facilities from the plaintiff, the defendants refused and/or failed to repay the loan in accordance with the agreed terms and conditions of the loans. This led the plaintiff vide Deed of Appointment of Receiver dated 30th May, 2016, appointed Mr. Abduel Gilead Kitururu – advocate as a Receiver/ Manager of the Company's fixed and floating assets under debenture Deed as varied. Form No. 106a was filed by the Receiver/Manager with the Business Registration and Licensing Agency (BRELA) in line with the requirements of the law and published a notice in the Daily News to that effect.

From there the Receiver/ Manager took possession of the 1st defendant's properties comprised in residential licenses with reference numbers: ILA/KWN/KGL1/2/115; ILA/KWN/KGL 2/117; ILA/KWN/KGL 1/134 and ILA/KWN/KGL 1/135 by locking down the premises to secure the charged assets that included building material. Guards from Kiwango Security Guard (T) Ltd were placed. On 02nd June, 2016 the Receiver/Manager received from the security guards copies of an *ex parte* temporary injunction order of the District Court Ilala at Samora Avenue in Miscellaneous Civil

Application No. 183 of 2016, ordering the plaintiff and the Receiver/Manager, among other things, to unlock the premises for the 1st defendant to proceed with business as normal as applied.

While the plaintiff was in the process of applying for stay of execution of the said order, the 2nd and 3rd defendants assisted by Police removed the security guards and broke into the premises allegedly under the strength of the interim order, removed all stocks and make the whole receivership process to fail. By the time Commercial Case No. 76 of 2016 was determined on the 24th February, 2017 there was no stock left to be sold from the premises.

Due to interference by the 2nd and 3rd defendants with the receivership process leading to failure of recovery of the debt, the plaintiff terminated the services of Mr. Kitururu as Receiver/Manager effective 31st July, 2017. And consequently the plaintiff was forced to claim from the 2nd and 3rd defendants personally as guarantors of the said loans, for payment of the outstanding amount. To date the plaintiff has not been able to recover the claimed debt money totaling to Tzs. 3, 674, 245, 170.25 plus accruing interest.

On 15th July, 2019 the Court conducted ex parte hearing in respect of the 2nd and 3rd defendants, meanwhile an application for default judgment in respect of the 1st defendant plus an affidavit in support deponed by Mr. Satyasat Behera was filed. Through PW1-Satyasat Behera, the Court admitted a number of documents into evidence: A Sanction Letter of credit Facilities dated 6th April, 2015 from Bank of India (T) Ltd which was admitted as exhibit P_1; A certificate of registration of a charge (Debenture Deed) dated 28th April, 2015 admitted as exhibit P_2; 2 (two) mortgages dated 23rd April, 2015 and 20th May, 2015 admitted as exhibit P_3; Personal Guarantee and Indemnity by Furaha Mohamed Mawamba and Farida Mohamed Mawamba dated 23rd April, 2015 admitted as exhibit P_4; Additional Sanction Letter of Credit Facilities dated 17th December, 2015 admitted as exhibit P_5; First Deed of Variation of Debenture dated 17th April, 2016 admitted as exhibit P_6; First Deed of Variation of a mortgage dated 17th April, 2016 admitted as exhibit P_7; 4 (four) residential licenses with numbers: ILA 0143997, ILA 029596, ILA 005277 and ILA 017167 and 2 (two) Board Resolutions dated 17th December, 2015 admitted as exhibit P_8; Bank Loan Statements from Accounts: 360260020000005; 36022510000011 and 36022510000012 admitted as exhibit P_9 collectively;

Agreement on appointment of Receiver/Manager dated 20th May, 2016 admitted and marked as exhibit P_{10}; A copy of a Daily news newspaper dated 27th May, 2017 on notice of appointment of Receiver/ Manager admitted and marked as exhibit P_{11}; Seizure report dated 31st May, 2016 by Mr. Abduel G. Kitururu admitted as exhibit P_{12}; The scanned copy of the Court Order in Miscellaneous Civil Application No. 183 of 2016 between Fomcom International Ltd v Bank of India & Abdiel G. Kitururu dated 1st June, 2016 admitted and marked as exhibit P_{13}; A letter from Bank of India (T) Ltd to Mr. Kitururu Receiver/ Manager dated 17th July, 2017 admitted and marked as exhibit P_{14}; and a Demand Notice issued on behalf of the plaintiff dated 7th December, 2017 admitted as exhibit P_{15}.

From the advanced evidence the Court is tasked with answering the following issues:

1. Whether there was any loan agreement between the plaintiff and the 1st defendant guaranteed by the 2nd and 3rd defendants.

2. Whether there was breach of the said credit facilities agreement.

3. To what reliefs are the parties entitled.

From the available evidence including documents exhibits P_1 and P_5 Credit Sanction letters dated 16th April, 2015 and 17th December, 2015; P_2, and P_6 Debenture Deed and certificate of Registration of a charge created under section 102 (3) of the Companies Act, 2002, dated 23rd April, 2015 and 17thApril, 2016; 2 (two) mortgages exhibited as P_3 collectively and P_7, all are referencing to the existing agreement between the plaintiff and the 1st defendant.

Initially the plaintiff provided the 1st defendant with following credit facilities; FB-Overdraft-Working Capital limited to the tune of Tzs. 1,100,000,000.00 and NFB-LC Revolving Limit of USD 270,000.00 – exhibit P_1. These credit facilities were secured as reflected in exhibit P_2. Adding to the security, the 1st defendant pledged as collateral his certificate of titles as exhibited in P_3 collectively, in respect of certificate of title number 1542-DLR, Plot Nos. 13 & 14, Block "A" Mshindo Area, Iringa township in the name of Fomcom International Limited and two other mortgages over Residential Licences Number ILA/KWN/KGL1/134 and ILA/KWN/KGL1/135.

The credit facilities were later revised as follows: The limit of the FB-Overdraft – Working Capital limit of Tzs. 1, 100,000,000.00 remained the same, the NFB-LC Revolving Limit was converted to an Overdraft (OD) with

a limit of Tzs. 500,000,000.00 and a Demand on Loan worth Tzs. 1,000,000,000.00. The FB-Overdraft-Working Capital and the Demand loan was to be repayable on demand, as exhibited in P_5. The 2nd and 3rd defendants on 23rd April, 2015 entered into personal guarantee and indemnity agreement in favour of the plaintiff, guaranteeing that the credit facilities obtained by the 1st defendant shall be fully repaid on or before its due date and in case of default the two defendants shall be fully personally liable to service the whole outstanding loan amount, interests and penalties accruing at that point in time as exhibited in P_4.

Through the 2nd and 3rd defendants who were directors to the 1st defendant, the credit facilities was revised and increased up to Tzs. 3,250,000,000.00. This led to variation on Debenture Deed, by executing the First Deed of Variation of Debenture as exhibited in P_6. Similarly, Deed of Mortgages was varied as per exhibit P_7. The 1st defendant provided the plaintiff with additional security which included deposit of residential licenses with reference numbers: ILA/KWN/KGL1/83; ILA/KWN/KGL2/115; ILA/KWN/KGL2/117 and ILA/KWN/KGL8/1. This is exhibited in P_{10}. The above evidence is fortified by exhibit P_8, a letter dated 17th December,

2017 with reference no. FIL/001 from Fomcom International Limited addressed to the plaintiff.

All these evidence examined together has in my view proved that there was an agreement between the plaintiff and 1st defendant, whereby the 1st defendant obtained credit facilities from the plaintiff. The agreement guaranteed and indemnified by the 2nd and 3rd defendants who were 1st defendant's directors.

The 1st issue has in my considered view been answered in affirmative.

Coming to the 2nd issue as to whether there was breach of the said credit facilities agreement between the plaintiff and the 1st defendant. The credit facilities provided to the 1st defendant and guaranteed by the 2nd and 3rd defendants was breached when the 1st defendant failed to pay back the money used from the credit facilities plus the accrued interest and penalties to the plaintiff.

From the bank statement collectively admitted as exhibit P_9, in respect of Fomcom International Limited Overdraft accounts number: 36022510000012; 36022510000011 and 36026020000005, no debt has been serviced.

The plaintiff appointed Mr. Abduel Gilead Kitururu of Amicus Attorneys, under the powers contained in the Debenture Deed dated 23rd April 2015, the First Deed of Variation of Debenture dated 17th April 2016 executed by Fomcom International Limited in favour of the plaintiff. The plaintiff was empowered to appoint a Receiver/ Manager of all fixed and floating assets of the 1st defendant. The 1st defendant's landed properties as exhibited in P_2, P_3 and P_8 was placed under receivership. The Receiver/Manager proceeded to execute his tasks including publication of notice in the Daily News paper as exhibited by P_{11} as well as taking possession of the properties as exhibited in P_{12}, seizure report dated 31st May, 2016. All these are a proof that the 1st defendant failed to service his debt loan which in essence was a breach of an agreement.

The 2nd issue has been answered in affirmative as well.

I equally find that the plaintiff has been able to prove his case against the 1st defendant and hence judgment in default is entered in that regard. Likewise the plaintiff has been able to prove the case against the 2nd and 3rd defendants *ex parte.*

The last issue as to what reliefs are the parties entitled, under section 73 (1) of the Law of Contract, Cap 345 R.E. 2002 provides as follows:

> *"When a contract has been broken the party who suffers by such breach is entitled to receive from the party who has broken the contract, compensation for any loss or damage caused to him thereby which naturally arose in the usual cause of things from such breach or which the parties knew when they made the contract to be likely to result from the breach of it"*

From the provision it is without much ado that the plaintiff is entitled to compensation for any loss naturally arising from the breach. Borrowing from the case of **Admiralty Comrs v SS Susquehanna[1926] AC 655** where the following was stated:

> *"the aim of an award of damages for breach of contract is to put the injured party, so far as money can do it, in the same position if the contract has been performed"*

Due to the defendants acts the plaintiff being a bank must have been denied use of its money for lending or other purposes the bank was established for. This should therefore be compensated by way of general damages, of which I proceed to grant an amount of Tzs. 20,000,000.00 (Tanzania Shillings Twenty Million Only).

One of the relief order sought was an order to pierce corporate veil of the 1st defendant that the 2nd and 3rd defendants be personally held liable to pay the full outstanding amount of the debt, for their illegal acts. This is evidenced by the 2nd and 3rd acts of interfering with receivership process. *One*, the 2nd and 3rd defendants filed Miscellaneous Civil Application No. 183 of 2016 where an *ex parte* temporary injunction was issued, and the Receiver/ Manager and the plaintiff were ordered to unlock the premises for the 1st defendant to proceed with business as normal as applied and as exhibited by exhibit P_{13}.

Two, the case against the Receiver/Manager and the plaintiff by the 2nd and 3rd defendants was filed in my view in bad faith. The two defendants who were directors of the 1st defendant knew and had all reasons to know that the plaintiff's credit facilities advanced to the 1st defendant has not been repaid. Even the guarantees and indemnity signed by 2nd and 3rd

defendants securing the credit facilities extended to 1st defendant has not been repaid. They should therefore be the last persons to act as they did. Their acts cannot be given any other interpretation except that they deliberately interfered with the receivership process, which resulted into Receiver/Manager terminated as exhibited by P_{14} a letter dated 17th July, 2017 from the plaintiff.

The termination of the appointment which was as a result of the 2nd and 3rd defendants actions, put back the 1st, 2nd and 3rd defendants on the liability to repay the credit facilities extended to the 1st defendant.

Three, the plaintiff had continued demanding payment of the unpaid credit facilities from the defendants as exhibited by P_{15} the letter dated 7th December, 2017, a demand notice in favour of the plaintiff for prompt payment of Tzs. 3,674,245, 170.25 as of 30th September, 2017.

Considering the above in its totality, there is abundant evidence that the 2nd and 3rd defendants as directors of the 1st defendant have been obstructing the realization of the plaintiff's effort to recover the unpaid debt loan. Whilst appreciating the legal position as stated in the case of **Solomon v Solomon & Co. Ltd [1897]AC 22 HL,** in which, the Court

has clearly stated that, upon incorporation, a company becomes a separate entity from its shareholders, directors and officers who own and/or act for the company. However, the principle has nonetheless its exceptions, and the Court when called upon to act can in actual fact intervene by piercing or lifting of a corporate veil. And in so doing, the Court will consider among other things, where the person/s controlling a company have acted fraudulently, the company is considered as "sham" or where a company is used to avoid an existing legal duty, before lifting the corporate veil.

The exceptions have been dealt with in the cases such as **Multichoice Kenya** (supra) where the Court had this to say:

> *".....Other instances include when a fraudulent and improper design by scheming directors or shareholders is imputed. In such exceptional cases, the law either goes behind the corporate personality to the individual members or regards the subsidiary and its holding company as one entity"*

Bringing the experience close to home is the decision in **Yusuf Manji** (supra), where the Court of Appeal had this to say:

".....In the circumstances, it is our view that the Respondent would be left with an empty decree as it were, against the company.....Here, as just shown such circumstance is premised upon the fact that the appellant was the managing director of the company. The appellant was also alleged to be involved in concealing the identity and assets of the company"

The rationale behind lifting of the corporation veil was to make sure the decree holder is not left with an empty judgment due to the unscrupulous behavior of the company through its directors who run day to day activities of the company who are likely to act dishonestly and commit frauds or avoid legal obligations.

The 2nd and 3rd defendants have in my considered view exactly exhibited that. I thus do not see any reason not to pierce the corporate veil so as to allow for the 2nd and 3rd defendants to be liable one, for the guarantee and indemnity signed and two, as directors who have been obstructing process of recovering the debt through sale of mortgaged properties.

In that regard I find the 1st, 2nd and 3rd defendants jointly and severally liable. The plaintiff is therefore entitled to the reliefs prayed as follows:

1. Immediate payment of Tzs. 3, 674, 245, 170. 25 plus commercial interest at the rate of 7% per annum from 30th September, 2017 till date of this judgment as specified in the Facility Agreement.

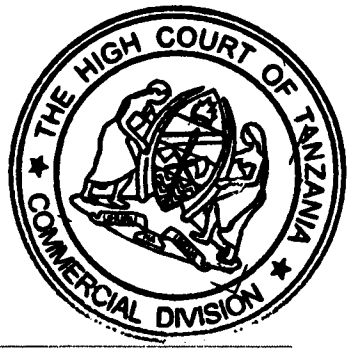
2. Granting an order to pierce corporate veil of the 1st defendant that the 2nd and 3rd defendants be personally liable to pay the full outstanding amount of debt, for their illegal acts, and as well being directors and owners of the company.

3. Interest at the Court's rate of 12% from the date of judgment to the date of payment in full.

4. General damages of Tzs. 20,000,000.00

5. Costs of the suit.

It is so ordered.



P. S. FIKIRINI

JUDGE

11th SEPTEMBER, 2091