IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT ARUSHA

COMMERCIAL CASE NO. 08 OF 2019

ACTIVE PACKGAGING (T) LIMITED.....PLAINTIFF

Versus

TIB DEVELOPMENT BANK.....DEFENDANT

Last Order: 22nd July, 2020

Date of Judgment: 08th Sept, 2020

JUDGMENT

FIKIRINI, J.

The plaintiff, Active Packaging (T) Limited on the 25th May, 2011, applied for a loan from the defendant, TIB Development Bank. The loan was a long term loan to the tune of Tzs. 420,000,000/= and an overdraft facility amounting to Tzs. 80,000,000/= as a working capital to her project. The said loan was approved on 24th September, 2014 and executed on 10th November, 2014, upon the plaintiff securing it by the landed property: Plot No. 24-27 situated at Loovilukunyi area, Arumeru District with certificate of title No.37976 and LO No. 447730 and as well Mr. Prosper Fidelis Swatty securing it by personal guaranteeing it with his landed property on Plot No. 189, Block "GG" Kimandolu area, Arusha city with certificate of title No. 18078 and LO No. 212561. To the contrary to what was

agreed the defendant has not provided or issued the overdraft facility to the plaintiff.

The plaintiff is now suing for breach of contract and seeking for declaratory order in that respect; specific performance of such terms and conditions as stipulated in the credit facility agreement; such as return of the mortgaged land and release of collateral; payment of Tzs. 200,000,000/= being compensation for loss of business and profit at interest at 12% per annum from the date of commencement of the agreement to the date of breach of the facility agreement; at 7% commercial interest for breach of contract from the date of filing these proceedings to the date of judgment; costs to the plaintiff and plaintiff's advocate, and any other relief(s) that this Court deems fit and just to grant.

The defendant, TIB Development Bank, filed written statement of defence in which each and every allegation raised by the plaintiff was denied and prayed for the dismissal of suit entirely.

Before commencement of the hearing, parties agreed on the following framed issues to be determined by the Court which are:

i) Whether the defendant breached the terms and conditions of credit facility agreement;

ii) If the answer to issue number one is in affirmative whether the plaintiff has suffered loss due to breach and to what extent; and

iii) To what reliefs are the parties entitled.

Mr. Daniel Dannland Lyimo learned counsel appeared for the plaintiff and Ms. Jacquline Kinyasi from the office of Solicitor General and Mr. Matendo Manono from TIB Development Bank Limited, both State Attorneys featured for the defendant.

Mr. Prosper Swatty – PW1, a Managing Director of the plaintiff's company was the only plaintiff witness. PW1 appeared in Court for cross-examination after his witness statement was tendered and adopted as his examination in chief, and under oath a number of documents were tendered and admitted as exhibits, which included, a copy of credit facility agreement which was admitted and marked as exhibit P_1; amended facility letter of offer which was admitted and marked as exhibit P_2; business plan admitted and marked as P_3 and a letter from the defendant promisingthe plaintiff for utilization of the overdraft facility which was admitted and marked P_4.

From cross-examination and his witness statement the witness was able to confirm that the defendant extended a long term loan to the plaintiff ofTzs. 420,000,000/= to facilitate completion of the factory building, installation of machinery, purchase

of forklift, motor vehicle, purchase and facilitation of installing of 60 KVA generator, connection of three phase electricity, road rehabilitation and costs related to freight. It was also learnt from PW1 that after the plaintiff had fulfilled that pre-condition, an overdraft facility of Tzs. 80,000,000/= would then be issued by the defendant, which would have been used as a working capital for the operations. The overdraft facility, was however not issued, instead the plaintiff was issued with a new facility letter intending to amend the previous agreement executed on 10th November, 2014 and hence this suit.

On cross-examination PW1 admitted to have removed the standby generator and forklift, without the defendant's written approval as the latter was informed after the exercise has already been carried out. The plaintiff promised to return the equipment. He was also asked on insurance cover he was supposed to purchase to insure the factory and equipment therein, in which he stated to have informed the bank about insurance on 31st January, 2018.

That was the plaintiff's case in summary.

The defendant had one witness Mr. Lameck Mavipya –DW1, in his testimony he acknowledged existence of the credit facility agreement between the parties, in which the 1st facility to the tune of Tzs. 420,000,000/= was issued and disbursed as agreed. It was however, discovered later that the plaintiff had breached the terms

and conditions of the agreement by removing the generator and forklift and this made the defendant initiate recovery measure by recalling the credit facility and proceeded to issue sixty (60) days statutory notice as shown in exhibit D_1. Despite the breach of the terms of the agreement by the plaintiff the defendant business changed in 2015 from that of a commercial bank to a development bank. The changes governed by the Banking and Financial Institution (Development Regulations), 2011 and in particular regulation 61 (a) the bank is prohibited to offer any credit facility. The plaintiff was informed as per exhibit P_2 and the defendant offered to amend the credit facility from overdraft to short term loan.

That was the defendant's account in summary.

Counsels prayed to be allowed to file final written submissions, the application which was granted. It was Mr. Lyimo's submission that under Article 2 (ii) of the executed deed it was agreed that an overdraft of Tzs. 80,000,000/= will be issued after the condition precedent have been fulfilled. The condition precedent which required fixing of the plant ready for production including installation of machine was done and the defendant notified but nothing occurred. That according to Mr. Lyimo was breach of contract and pursuant to section 73 (1) of the Law of Contract Act, Cap. 345 R.E. 2002 (the Law of Contract), consequences for such occurrence was compensation to the person who has suffered loss from the alleged breach of contract, which in this case is the plaintiff. Mr. Lyimo based his assertion

on exhibit P_4, in which the defendant assured the plaintiff to the utilization of the overdraft facility, which was never issued and in its place the plaintiff was issued with an amended offer letter as exhibited in P_2, the offer which was declined by the plaintiff.

It was Mr. Lyimo's further submission that since the plaintiff has abided by the contract, then the defendant be compelled under section 37 (1) of the Law of Contract, to perform her part after the plaintiff has performed hers by completing the installation of machine phase and notified the defendant. Fortifying his submission he as well referred to article 8.01 and specifically item 6 which provided for breach or non-compliance with any of the conditions stated in the agreement. To bolster his submission, Mr. Lyimo cited the case **of First National Bank v Miles Solutions Company Ltd & Others, Commercial Case No. 108 of 2017, High Court of Tanzania Commercial Division at Dar Es Salaam (unreported),** in this case the borrower failed to utilize the overdraft facility issued by the lender, the argument by borrower that there was delay in the project was rejected and the borrower was penalized for breach of contract. Bringing the experience to the case at hand, is the lender failed to issue overdraft for utilization by the borrower as per their agreement, the lender was therefore in breach of the contract, submitted the counsel.

This according to him answered in affirmative the 1st issue. Answering the 2nd issue on the loss suffered, the counsel referred this Court to section 73 (1) and (3) of the Law of Contract, that the party who had suffered loss or damages after the breach of contract deserved compensation. Extending his submission and persuading the Court to be on his side, he argued that had the overdraft been issued and the plaintiff failed to utilize it and failed to service the loan on time as per the agreement, the defendant's remedy would have been to attach and auction the plaintiff's property which secured the credit facility. The plaintiff at this point was required to pay penalty and interest of 18% per annum as per the credit facility agreement. For not being issued and/or allowed to utilize the overdraft loan, the plaintiff lacked working capital and this has caused her to suffer loss, despite having in place a business plan as exhibited by P_3.

The 2nd issue was answered in affirmative as well.

On the 3rd issue on reliefs, it was the counsel's submission that based on the evidence produced and the position of the law the plaintiff was entitled to the prayers as indicated in the plaint. The counsel, also pressed that from the confession made by the defendant, that the bank was no longer issuing overdraft package it was thus prudent for her to release the collaterals so as to allow the plaintiff to seek for overdraft facility from another financial institution.

The defendant's final submission strongly challenged the plaintiff's case and submission by arguing that the plaintiff was in breach of several articles in the credit facility agreement. Among the articles violated were article II section 2.01 (b), that the overdraft facility would be available upon fulfilment of the condition precedent as illustrated in Schedule I of the agreement. The plaintiff is said to have failed to fulfil those conditions precedent namely: under Schedule 1 rule 5 the plaintiff was required to purchase comprehensive insurance cover in respect of all its assets mortgaged to the bank, but did not. Also under section 6.02 (f) the plaintiff was not allowed to sell, pledge, rent or otherwise dispose of any of the assets acquired through the proceeds of the loan, the condition which the plaintiff did not heed to and this was what made the defendant decline to offer the overdraft.

On top of all these, the defendant in 2015 was changed from being a commercial bank to development bank, so could not process the overdraft facility any more. Referring to section 37 (1) and section 56 (2) of the Law of Contract the defendant's failure to perform its duty was aside from breach of contract caused by the change in its status and undertaking. Finding refuge in the case of **Ndarry Construction v Ilala Municipal Council, Commercial Case No. 31 of 2015 (unreported) p.13-17,** the Court concluded that once the contract is frustrated, it automatically is terminated. The same position was reflected in the case of

Howard & Company (Africa) Limited v Burton [1964] 1 EA 540 (CAN), in which bolstering their submission, counsels for the defendant's, answered the 1st issue in negative that the defendant did not breach the contract but rather the contract was frustrated by operation of law and not the defendant's actions.

On the 2nd issue it was the counsels' submission that the contract has become impossible to perform after it has been frustrated by operation of the law and not the defendant's actions and urged the Court to find that the defendant did not suffer any loss.

Reliefs as prayed which included special damages to the tune of Tzs. 200,000,000/= from loss of business and profit, the defendant's counsels contended that special damages have to be specifically and strictly proved. Supporting their stance they cited the cases of **Bolag v Hutchson [1950] AC 515 at p. 525,** and **Zuberi Augustino v Anicet Muagbe [1992] T.L.R. 137 at 139.**

Submitting further, the counsels submitted that the burden of proof lies to a person who alleges existence of a fact and has the knowledge of the said fact, making reference to section 110 of the Evidence Act, Cap. 6 R. E. 2002. It was thus their position that most of the items prayed in the relief category were those requiring strict ad specific proof of which the plaintiff has failed to accomplish the task and

therefore asking the Court to rule that the plaintiff was not entitled to any relief prayed.

As for the specific performance, it was their submission that, it was impossible for the defendant to perform due to the change which has occurred. And essentially parties have been discharged from performing term of the contract, and on those basis prayed for the dismissal of the suit with costs.

Coming to release of collateral, it was the defendant's counsels' submission that the plaintiff has already been issued with credit facility worth Tzs. 420,000,000/= which was secured by the mentioned properties but not repaid yet, so the collaterals cannot be released as requested. After all the plaintiff had defaulted repayment of this credit facility as a result of which a default notice as exhibited in D_1 was issued. The defendant thus objected to the grant of this prayer, since the plaintiff was still under contractual obligation to repay for the 1st credit facility issued.

Having thoroughly considered the evidence presented to the Court and the submissions for and against, I find it crucial to preface this judgment with issues that are not in dispute. It is not in dispute that the plaintiff and the defendant entered into a credit facility agreement on the terms and conditions as stipulated in exhibit P_1, which was executed on 10th November, 2014. Among terms and

conditions was the plaintiff will be issued with long term loan amounting to Tzs. 420,000,000/= as illustrated under Article II, Facility 1: section 2.01 (a) of the agreement. Upon compliance to the terms and conditions on the 1st credit facility, the plaintiff was to be issued with the 2nd credit facility which comprised of an overdraft facility amounting to Tzs. 80,000,000/= to be used as working capital for the operations. Terms and conditions for issuance of the 2nd phase of the credit facility are as illustrated under Article II, Facility 2, section 2.01 (a). The 2nd credit facility was not issued, the fact not disputed by the defendant and that is the genesis of the claim by the plaintiff, who is suing for breach of contract.

However, the defendant has raised two defences for not issuing the overdraft credit facility of Tzs. 80,000,000/=; *one,* that there was breach of terms and conditions on part of the plaintiff and *two*, the contract was frustrated by the operation of the law which transformed the defendant from being a commercial bank into becoming a development bank.

In light of what I have observed above, I will now embark on discussing the framed issues starting with the 1st issue:

Whether the defendant breached the terms and conditions of credit facility agreement.

The agreement between the parties is strictly governed by the terms and conditions as stipulated in exhibit P_1. PW1 in his evidence stated to have complied to all the

terms and conditions, yet the defendant failed to issue the utilization of the overdraft amounting to Tzs. 80,000,000/= and hence failing the project for lack of working capital which would have earned the plaintiff profit as well as ability to service the loan. In response to the evidence, DW1 asserted breach of the terms and conditions of the credit facility agreement, specifically assigning these reasons: **one,** that the plaintiff had removed the generator and forklift contrary to what is stipulated in the agreement and without the written permission of the defendant. **Two**, the plaintiff failed to comprehensively insure all its assets mortgaged to the defendant. **Three,** change in the defendant's operational policy affected the agreement.

PW1 admitted that under section 6.02 (f) of the credit facility agreement – exhibit P_1, was barred from moving the equipment, but went on stating in cross-examination and re-examination that the generator and forklift were not sold but were with the supplier who will return them upon being paid. Otherwise the plaintiff would not have been able to complete the erection of the factory and installation of the equipment.

Section 6.02 (f) of the credit facility agreement provides as follows:

"*Unless the Bank shall otherwise in writing agree, the Borrower shall not:*

(f) ***Sell, pledge, rent or otherwise dispose of****:*

(i) ***Any of the assets acquired through the proceeds of this loan****;*

(ii) ……

(iii) Any other fixed assets being part of the project or of the Trust's business and whose disposal might, in the reasonable opinion of the Bank, impair the normal and efficient operation of the project or of the Trust's business as a whole."[Emphasis mine]

The two equipment, though not stated explicitly but the fact PW1 did not claim owning the equipment personally or by failing to disassociate the equipment with the assets acquired from the loan, this Court has a right to conclude that the equipment were obtained from the loan money and hence subjected to the conditions stipulated under section 6.02 (f) (i) of the credit facility agreement. By removing and placing the equipment financed by the bank and which was part of the loan collateral; with the supplier for whatever reasons the plaintiff contravened the provision of the credit facility agreement. The plaintiff's claim that it was the defendant who breached the contract is unsupported, instead there is sufficient evidence to show that it was in actual fact the plaintiff who breached the terms and conditions of the credit facility agreement. This evidence was not contested, instead PW1 gave reason for the plaintiff's action, the reason which short fall of honouring the terms and conditions of the credit facility agreement.

The plaintiff's argument that it was the defendant who failed to honour the terms and conditions of the agreement is not supported. The submission that by issuance

of exhibit P_4 – a letter dated 15th May, 2017 with reference TIB/MG/395/Vol.1, the defendant promised the utilization of the overdraft, this assertion though not disputed but reading from the letter it was subject to compliance to the four requirements stipulated in the letter. There was no follow-up evidence that the requirements were fulfilled. In short utilization of the overdraft was subject to fulfilment of conditions precedent, which included compliance to the terms and conditions, of which the plaintiff had breached the terms and conditions under section 6.02(f) of the credit facility agreement.

Another reason offered by the defendant is that the plaintiff failed to comprehensively insure the assets mortgaged to the bank as per the agreement. According to PW1 when the defendant inquired on the comprehensive insurance purchase, she was provided with the evidence of insurance purchase dated 30th January, 2018, that not being the only insurance purchased. Although no evidentiary document was produced in that regard, this issue was however, not pleaded. I will thus consider it as an afterthought. And no wonder the plaintiff could not supply the necessary document to prove purchase of insurance to refute the claim that she was in breach of this terms and conditions of the agreement.

The cited case of **First National Bank (T) Ltd** (supra), though the facts are not exactly the same as those in this case, but still, it is not relevant to the situation at hand for the reasons stated above.

Even without the breach of contract caused by the plaintiff for acting contrary to the terms and conditions under section 6.02 (f) of the credit facility agreement the utilization of the overdraft facility could not be effected. This was due to the fact that the defendant bank being converted from being a commercial bank to being a development bank (Development Financial Institution), governed by Banking and Financial Institution (Development Regulation) 2011. Under Regulation 61 (a) development institutions were prohibited from offering overdraft facilities.

For either the first reason or the second, the plaintiff's claim that she be provided the remedy availed under section 73 (1) of the Law of Contract, cannot be possible. The provision of section 73 (1) of the Law of Contract is reproduced below for ease of reference:

> *"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."*

In the present case it is the plaintiff who breached the terms and conditions of the agreement and not the defendant. Therefore, no compensation for the loss or

damage is deserved. Likewise, no performance can be ordered by this Court pursuant to section 37 (1) of the Law of Contract, which requires that parties to a contract to perform their respective promises, unless such performance is dispensed with or excused under the provision of the law. In the circumstances of this case aside from breach of agreement, the change in policy in the defendant's bank which came into effect after the credit facility agreement has already been executed turned the agreement impossible to be effected as the same has been frustrated, in this case by operation of the law. The credit facility agreement was executed on 10th November, 2014 and the defendant's status changed in 2015, which means, change in the defendant's status came after the agreement has already been executed. Under section 56 (2) of the Law of Contract, the agreement is void and automatically terminates the contract. When this occurs, it exterminates the agreement executed between the parties and consequently parties to the frustrated and now void agreement are discharged. The cases of **Ndarry Construction** and **Howard & Company (Africa) Limited** (supra), have well elucidated the predicament in the credit facility agreement executed between the parties on 10th November, 2014. In the case of **Howard & Company (Africa)Limited** the Court had this say:

> *"When frustration in legal sense occurs, it does not merely provide one party with a defence in an action brought by the*

other. It kills the contract itself and discharge both parties automatically."

Under the situation the defendant cannot be said to have breached the agreement, but rather the operation of the law frustrated the agreement and not the defendant's acts.

The option put forward by the defendant and declined by the plaintiff of restructuring the facility dated 5th February, 2019 – exhibit P_2, was in my view not as interpreted by the plaintiff that after the defendant has failed to issue utilization of the overdraft facility, restructuring option was randomly brought on board, for two reasons: **one,** the 1st credit facility of Tzs. 420,000,000/= had not been serviced at all and plus the interest the amount rose to Tzs. 697, 625, 576/= restructuring was inevitable and probably the best option. **Two**, in order to fulfil their obligation and accomplish what was agreed the overdraft was converted to short term loan since the defendant pursuant to section 61 (a) could no longer issue credit facility. There was no sinister motive sensed as insinuated by PW1.

The first issue is thus answered in negative, that it was not the defendant who breached terms and conditions of the credit facility agreement.

Turning to the 2nd issue that on:

If the answer to issue number one is in affirmative whether the plaintiff has suffered loss due to breach and to what extent.

Based on the conclusion in the 1st issue which found the defendant in breach of the terms and conditions of the credit facility agreement, on one hand, on the other concluded that even without the breach, the agreement itself had already been frustrated by operation of the law rendering the agreement void, whereby parties were discharged of the obligations automatically as far as overdraft facility is concerned, the plaintiff's claim that she suffered loss cannot be sustained either way.

The 3rd and last issue is on reliefs:

To what reliefs are the parties entitled.

It was the plaintiff's submission that she was entitled to the reliefs as listed in the plaint. The (i) and (ii) aspects of the reliefs have been well covered when discussing the 1st issue in which it was concluded that whichever of the scenarios is to be taken still the plaintiff will be disadvantaged. *First and foremost*, there is proof of her breaching the terms and conditions and *secondly*, even without the breach, the agreement was frustrated by the operation of the law which changed the defendant's status from that of a commercial bank to that of a development bank which bars issuance of overdraft facilities.

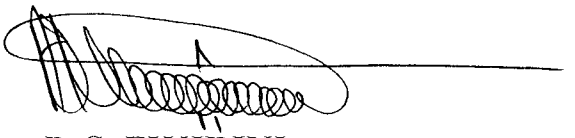
Nonetheless, the relief sought as an alternative, under items (iii) and (v), is not sustainable as there is still unrepaid credit facility loan of Tzs. 420,000,000/= plus accrued interest secured with those properties. The default in payment resulted into

issuance of default notice as exhibited in D_1. The plaintiff is therefore still under contractual obligation to service her debt loan.

Under item (iv) the plaintiff has claimed for Tzs. 200, 000,000/= being compensation for loss of business and profit as a result of breach of agreement. This being claim under specific damages, apart from the requirement that it has to be specifically pleaded, it has to be strictly proved. There is a long list of authority on that including the two referred by the defendant that of **Bolag** and **Zuberi Augustino** (supra), which I fully subscribe to. This goes hand in hand with the requirement under section 110 of the Tanzania Evidence Act, Cap. 6 R. E. 2002, that who alleges must prove, even though in civil cases the balance is on the balance of probabilities. The plaintiff has miserably failed to prove that she deserved compensation to the tune of Tzs. 200,000,000/=

Items (vi), (vii) and (viii) automatically fail for the reasons stated when answering the 1st issue.

In conclusion, the plaintiff has failed to prove her claims as stated in the plaint and this suit is dismissed with costs. It is so ordered.



P. S. FIKIRINI

JUDGE

08th SEPTEMBER, 2020