**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA**

**COMMERCIAL DIVISION**

**AT DAR ES SALAAM**

**MISC. COMMERCIAL CAUSE NO. 33 OF 2023**

**IN THE MATTER OF THE HIGH COURT (COMMERCIAL DIVISION) PROCEDURE RULES, 2012**

**AND**

**IN THE MATTER OF INTERPRETATION OF THE TWO MULTIPLE CREDIT FACILITIES ARRANGEMENT FEES' CLAUSES IN RELATION TO THEIR REFUNDABILITY NATURE**

**BETWEEN**

**GEFA AGRICULTURE LIMITED ..... PLAINTIFF**

**AND**

**UNITED BANK FOR AFRICA (TANZANIA) LIMITED ..... DEFENDANT**

**JUDGMENT**

*March 8th & 22nd, 2024*

**Morris, J**

This matter was initiated by way of originating summons under Rules 10, 11 and 52 of ***the High Court (Commercial Division) Procedure Rules***, 2012. The plaintiff is mainly claiming from the defendant a refund of USD 425,625 allegedly accruing from the balance of the arrangement fee

paid to the latter in line with two Multiple Credit Facility Arrangements (***MCFAs***) between the parties.

To achieve his objective, the plaintiff invites the Court to interpret and adjudicate on **Clause 1** of both MCFAs conjointly and hold that he is entitled to the stated refund together with allied reliefs. In the interest of precision, six types of remedies are sought by the plaintiff. *One*, USD 425,625 being refund amount; *two*, interest at 25% commercial lending rate from date of cause of action to judgement; *three*, court-rate interest on decretal sum from the date of judgement to full settlement thereof; *four*, general damages; *five*, costs of the suit; *six and last*, any discretionary reliefs by the Court. The defendant opposed the matter by filing the counter affidavit of one Dora Kyungu.

I will now decipher a brief history of this case. On February 8th, 2022, the plaintiff successfully applied for USD 76 million credit facilities (cash-backed deferred payment Letter of Credit and Overdraft) from the defendant. The lending was under the Multiple Credit Facility Arrangement (herein, the "*First Multiple Credit Facility Arrangement*": acronymized as ***FMCFA***). Under Clause 1 of FMCFA, the plaintiff was obliged to pay 0.75

percent of the loan amount as arrangement fee. The fee worked out to USD 570,000 and was payable upfront. The plaintiff paid it on February 16th, 2022. Nevertheless, due to technical loan security issues, the credit was not disbursed to him by the defendant. Consequently, the plaintiff unsuccessfully demanded for refund of the money that was paid by him as arrangement fee (USD 570,000).

The foregoing non-disbursement of loan amount notwithstanding, the plaintiff fruitfully requested the defendant to amend FMCFA by reducing the amount from USD 76 million down to USD 19,750,000. This step gave life to another Multiple Credit Facility Arrangement (herein, the "*Second Multiple Credit Facility Arrangement*": abbreviated to ***SMCFA***). As it was the case in the first facility, SMCFA had within its Clause 1 demanding upfront payment of 0.75 percent of the loan amount to cater for arrangement fee. This time round, the fee payable was USD 144,375. However, this amount was not paid directly by the plaintiff because under the subject Clause 1 of SMCFA; the said fee was to be "**covered**" from the previous arrangement fee (USD 570,000).

With the foregoing *modus operandi* regarding arrangement fee, the plaintiff holds that such two transactions entitle him refund of the balance. That is, USD 570,000 minus USD 144,375 spares USD 425,625 for him from the defendant. Unsurprisingly, the latter fervently puts up a solid denial against the plaintiff's allegations and craves for dismissal of the whole matter with costs.

Out of the above rivalry, three (3) issues were framed for determination by the Court.

i) Whether the facility arrangement fee under Clause 1 of the Multiple Credit Facility Agreement dated 08.02.2022 is refundable to the plaintiff.

ii) If the 1st issue above is in the affirmative, whether the plaintiff was entitled to refund from the defendant

iii) To what reliefs are parties entitled.

The plaintiff and defendant enjoyed legal representation from Ms. Natalie Michael Nyamwilimira and Ms. Doreen Chiwanga, learned advocates. Pursuant to Rule 52 of ***the High Court (Commercial Division)***

***Procedure Rules***, 2012; parties' affidavits were adopted as their respective evidence. In addition, the deponents from both sides of the matter were subjected to cross examination sessions by their opponents. Mr. Fredrick Malima and Ms. Dora Kyungu were examined as PW1 and DW1 respectively.

Apart from reiterating their affidavital depositions, the subject witnesses were consistent during their cross and re-examination sessions that own side of the case deserved victory. The plaintiff maintained that, out of the two loan facilities between the parties, there was unutilized amount of money due to him from the defendant. However, the defendant was stout in denying such allegations. Therefrom, the plaintiff had a total of seventeen (17) documents to refer to while the defendant relied on sixteen (16) documents.

In addition, parties secured an opportunity to file respective written closing speeches. The Court appreciates the eloquent final submissions from each party's counsel. Expectedly, the submissions summarize strengths of own case and highlight weaknesses in the opposite side's suit theory. For the plaintiff, it was submitted that prior to executing the FMCFA, parties agreed that the arrangement fee was refundable. Thus, the blame was

placed on the defendant on the basis that he did not honour the terms of the contract in such connection. The Court was referred to the cases of ***Unilever Tanzania Ltd v Benedict Mkasa t/a Bema Enterprises***, Civ. App. No. 41 of 2009; and ***Philipo Joseph Lukonde v Faraja Ally Said***, Civ. App. No. 74 of 2019 (both unreported) to the effect that freely-entered contracts should be honoured by parties. Further, section 62 of ***the Law of Contract Act***, Cap. 345 R.E. 2019 (***LCA***) was cited by the plaintiff to buttress his argument that as the FMCFA was substituted by SMCFA, the former ceased to operate. Hence, the justification for refund of the fee paid under it (FMCFA). Finally, the plaintiff prayed for reliefs in the originating summons.

Nonetheless, the defendant's counsel submitted that the amount of money paid by the plaintiff as arrangement fees was not refundable under both loan facilities. To her, the plaintiff signed the contracts while aware that the subject amount is not refundable. To drive the point home, the defendant reiterated that, if the bank intended to refund the fee, a corresponding term ought to be drafted in that regard. It was submitted further that, in line with ***Simon Kichele v Aveline M. Kilawe***, Civ. App.

No. 160 of 2018; and ***Joseph Mbwiliza v Kobwa Mohamed Lyeseelo Msukuma & Others***, Civ. App. No. 227 of 2019 (both unreported); parties to a contract remain bound by what is contained therein and that written contractual terms cannot be superseded by subsequent oral agreements. In concluding, the defendant also argued that, as the plaintiff did not prove the basis of his claims, the present suit should be dismissed with costs. I have objectively taken all submissions into consideration while resolving the framed issues.

The **first issue** interrogates refundability of the facility arrangement fee to the plaintiff under Clause 1 of FMCFA. Parties are at loggerheads here. While the plaintiff maintains that reading Clause 1 found in both FMCFA and SMCFA between the lines, USD 425,625 is due to him from the defendant; the latter argues the whole arrangement fee was fully earned by the bank. The plaintiff's basis for the claim is fourfold. I will summarize his stance now. **One**, that while negotiating for the facility which was granted on February 8th, 2022, parties agreed that the arrangement fee was refundable in case the application was unsuccessful. **Two**, that Clause 1 in FMCFA did not expressly provide that the arrangement fee was nonrefundable. **Three**, that

inversely Clause 1 in SMCFA was categorical that the arrangement fee was nonrefundable. **Four**, that the defendant deducted the arrangement fee applicable in second facility (SMCFA) from the amount paid in respect of the first loan (FMCFA).

The defendant is not without a foundation for his contra-arguments too. **First**, that the parties had no pre-contractual agreement entitling the plaintiff refund of the arrangement fee upon failure of the contract. **Second**, that the arrangement fee was both payable upfront and nonrefundable. **Third**, that it was fully earned by the bank as an apportionment of the plaintiff's consideration for procurement of the first credit. **Fourth**, the second facility was a completely new or application subject to fresh terms and conditions. **Fifth**, the deduction of the arrangement fee for the SMCFA from FMCFA arrangement was the defendant's discretionary gesture of relief in favour of the plaintiff.

Before I embark on determining whether or not the plaintiff is entitled to a refund of a balance from the money paid in respect of the FMCFA, it is important that the subject Clauses are reproduced below foe ease of reference. They were couched as: -

(For FMCFA)

*"PRICING: LC issuance fee of 0.75% per quarter for each LC established.*

***Arrangement Fees** – 0.75% flat of the total facility amount payable upfront upon execution of Offer Letter."*

(For SMCFA)

*"PRICING: LC Commission: - 0.75% flat per quarter for each LC established.*

*Arrangement Fee: - 0.75% flat of the total facility amount i.e. USD 140,625 (United States Dollars One Hundred Forty Thousand Twenty Five Only). The arrangement fee is non-refundable and payable upfront upon execution of Offer Letter.*

*For avoidance of doubt, the arrangement fee of USD 140,625 will be covered from the previous arrangement fee paid under the previous facility of US$75million."*

From the above excerpts a number of undisputed facts are crystal clear. **One**, both facilities (MCFAs) were subject to 0.75% arrangement fee. **Two**, the subject fee was payable upfront by the plaintiff. **Three**, while the

subject clause in SMCFA expressly provided that the arrangement fee was nonrefundable, its counterpart in FMCFA was silent about such provision.

In determining the contention between the parties regarding the first issue, the court sets itself to answer a very critical question first: **was the second loan facility (SMCFA) a completely new arrangement or an amendment to the previous facility thus interdependent**? The evidence on record indicates that parties are at variance. The plaintiff primarily considers the two facilities as dependent to each other. Weirdly, in his submissions, he cites ***LCA*** and argues that the first one was not supposed to be performed. On his part, the defendant treats the two contracts stood autonomously.

The above contention notwithstanding, I am inclined to hold, which I hereby firmly do, that both FMCFA and SMCFA were symbiotic. I humbly think, there are numerable pointers to support this conclusion. I will address them. One at a time. **Firstly**, the plaintiff's request leading to SMCFA was unambiguously particular. He requested the defendant to amended the existing facility by reducing the amount from USD 76 million to USD 19.3 million". According to annexure GEFA-7/UBA-8, the plaintiff did not propose

changes other than the loan amount and security thereof. Seemingly, he knew the defendant was equally specific with the requested alterations.

**Secondly**, the heading of the second facility (GEFA-13/UBA-14) is reflective of the plaintiff's request. The same runs as: "Offer for reduced multiple credit facility...." This phraseology, to me, implies that there is in existence another agreement with a higher amount. **Thirdly**, pursuant to paragraph 1 of the second facility document (GEFA-13/UBA-14), the defendant makes specific reference to FMCFA and keeps it in mind to be referred to later in the facility. For clarity, the relevant part reads as follows;

> *"Reference is made to the Offer Letter dated 8th February 2022 with reference number UBAT/CO/GEFA/0208/022 (hereinafter referred as "the Initial Agreement") where the Board and Management of United Bank of Africa (Tanzania) Limited approved for Multiple Credit Facility amounting to USD 76,000,000.00 (United States Dollars Seventy-Six Million Only)."*

**Fourthly**, the defendant made consistent reference to contents of the FMCFA in SMCFA (using phrases such as "previous approved limit"; "previous facility", "previous arrangement fee", "previous overdraft facility", etc) especially in areas where the 2nd facility needed to be perfected by such

cross-referencing. **Fifthly**, the second facility (SMCFA) did not specifically provide that the previous on (FMCFA) was cancelled or rendered inoperative. **Sixthly**, the payment for arrangement fee for the second facility was deducted from the fee paid under the first facility.

Having concluded that the MCFAs cannot be read in total isolation, another equally important interrogation is in regard to the omission of the words "non-refundable" in the first facility; incorporation of the same in the second facility; and effects thereof. The plaintiff's director deposed in his affidavit and maintained such consistency during cross examination that the parties verbally agreed that the arrangement fee was refundable before executing FMCFA. However, the defendant ably argued that all agreed terms were reduced into writing. A list of indicative terms and conditions (Annexure UBA-1) was referred to in order to prove that the plaintiff was supplied with a summary of terms/conditions to be included in the contract. To the defence, the plaintiff was at liberty to query any term/condition before the same ultimately formed part of the facility agreement.

The checklist (UBA-1), however, is not referred to/incorporated into in both agreements; and is particular that it was for discussion purpose; and is

not binding. Nevertheless, PW1 acknowledged it during cross examination. Hence, its existence is not disputed. However, I need not overstate the firm position of the law that when parties to a contract orally agree over terms to be included in their contract; and later the agreement is reduced into writing, the latter takes precedent. I also agree with the argument of the defendant that oral agreements do not take precedent over corresponding written ones. The cited case of ***Joseph F. Mbwiliza v Kobwa M. Lyeeselo*** (*supra*) is accordingly followed. On the face of the record, therefore, it is not legit to state that the purported oral covenant, if any, formed part of the FMCFA. Hence, the plaintiff's assertion that parties covenanted that the arrangement fee was refundable before execution of the first facility is feeble.

The above clear position notwithstanding, the facilities were solely drafted by the defendant. Technically put, this agreement is one of such contracts in which the plaintiff had less or no involvement in drafting and grafting howsoever. Reading clause 1 in FMCFA one cannot conclusively hold that the fee was or was not refundable. It can be either way. Thus, such term is ambiguous. The ambiguity is further exhibited by the contrasting

depositions and testimonies of both parties' witnesses (PW1 and DW1 respectively).

For instance, the defendant's witness (DW1) is on record testifying to the effect that the corresponding Clause 1 in SMCFA was recast in order to clear any doubts and stop unnecessary future disputes over refundability or otherwise of the arrangement fee. This concession, on the part of the defendant, conclusively indicate the ambiguity of the subject term in the facility under review.

Working from the basis that the agreement was entirely the defendant's authorship; any ambiguity embedded in the terms therein, should be resolved in favour of the other party. That is the law. Indeed, it is the core spirit of *verba forties accipiuntur contra proferentem rule*. This rule runs from the Latin maxim which literally means "against the offeror" or "guilt of the drafter" ***(Rajdip Housing Development Ltd v Wambugu*** [1999] 2 EA 279; and ***Cheleta Coffee Plantations Ltd v Mehlsen*** [1966] E.A. 203). However, I am aware that the application of this rule takes aboard the general appreciation of the principle not to use oral evidence to interpret unambiguous contractual terms [***AMC Trade Finance Limited v SANLAM***

***General Insurance (Tanzania) Limited***, Civil App. No. 393 of 2020 (unreported)]. Hence, the evidence and testimony PW1 and DW1 hereof have been considered on such legal foundation.

In addition to the foregoing firm position of the law, the defendant acknowledged that the plaintiff had paid USD 570,000 under the FMCFA. From such amount the defendant deducted 144,250 as arrangement fee applicable to SMCFA. By analogue, the money in the former/previous facility was not fully or completely exhausted/utilized. I am mindful of the evidence by the defence that the arrangement fee under SMCFA was covered from FMCFA as the defendant's discretionary gesture of good will and appreciation of the business relationship with the plaintiff. I am loath to accept such argument by the defence. I will give my reasons. **One**, if really the defendant wanted to exhibit such so-called goodwill; the clause would specifically indicate so.

**Two**, if it was not payable by the plaintiff, the same could be completely waived. **Three**, if the fee paid under FMCFA had been exhausted by the arrangements conducted by the defendant, how was bank going to cater for such arrangement to effectuate SMCFA? **Four**, the defendant

counsel states in the final submissions that the word "covered" as used in the subject clause implied that money from the previous facility "would be extended to cater" for such fee in the second loan. This line of argument is forceful. The defendant being the experienced banker-financier, is expected to apply the correct banking terminology in the contract. Thus, if the defendant intended to use the suggested word/phrase, it would have done so expressly. This observation notwithstanding, the terminology is a suggestion from the bar not backed up by evidence.

In law, submissions from the bar are not evidence. See, for instance, ***The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman, Bunju Village Government & 11 Others***, Court of Appeal Civil Appeal No. 147 of 2006; ***Bish International B.V. & Rudolf Teurnis Van Winkelhof v Charles Yaw Sarkodie & Bish Tanzania Ltd***, Land Case No. 9 of 2006; and ***Rosemary Stella Chambejairo v David Kitundu Jairo***, Court of Appeal (Dar Es Salaam) Civ. Reference No. 6 of 2018 (all unreported).

In view of the reasoning and analysis above, the first issue is answered in the plaintiff's disfavour. It accordingly passes. For precision, the

arrangement fee paid by the plaintiff under the FMCFA was refundable to him.

The **second issue** is if the first issue is in the affirmative, whether the plaintiff was entitled to refund from the defendant. Having resolved the first issue in the affirmative, the Court now addresses the extent of the refund. In this connection, I will evaluate the evidence to establish if or not there remained unexhausted amount to be refunded to the plaintiff. It is not disputed that the plaintiff paid USD 570,000 under FMCFA. Further, it is not disputed that the arrangement fees payable under SMCFA was USD 144,375. Furthermore, parties join no issue to the truth that the latter amount was nonrefundable. It is expressly provided so in in the second contract.

Moreover, though DW-1 testified that the former amount was fully earned by the bank, she did not account how the same was utilized with specificity. Part of her evidence established that the defendant carried out due diligence activities; such as intensive reviews of the plaintiff's status with various government agencies like the Business Registration and Licencing Authority (BRELA) and Credit Reference Bureau; and made a number of correspondences. However, such accounting was too general and

significantly vague. It did no prove, say, the number(s) of meetings held by the defendant; experts appointed to evaluate and verify the plaintiff's status and/or securities; fees or charges paid by the defendant in the specific due diligence efforts. Doing so, would have established/justified exact expenditure of the arrangement fee under facility one.

To simply state and alleged that the amount paid as arrangement fees was earned by the bank without substantiating how the same was specially utilized, would place into jeopardy the rights of the borrowers who, in my view, are entitled to the just account of their money.

In law, the onus of parading every important evidence to prove the allegations rests upon the maker (See, section 110 of ***the Evidence Act***, Cap 6 R.E 2022). In such connection, the defendant who alleges that the activities conducted by the bank were the basis for the full utilization of the arrangement fee, was duty bound to account for full utilization of the charged fee. More so, when the MCFAs are silent as to the explicit matters/costs for which the fee was levied.

Thus, in the absence of the account of how the money paid by the plaintiff under the FMCFA was debited to exhaustion, the safe conclusion

would be the money debited for arrangement fee regarding SMCFA. Consequently, the difference between the two fee-figures in both MCFAs above (USD 425,625) stands to be the amount of money not exhausted hereof. The same is due to the plaintiff. Subsequently, in view of this whole evaluation, the second issue is also merited.

Finally, the Court is left with the **third issue**, namely, the reliefs parties are entitled to. Surely, this one is highly dependent on the findings of the preceding issues. As it can be seen, the two above issues relate to establishment of rights and liabilities of parties. The Court has already determined them affirmatively in favour of the plaintiff. Definitely, the plaintiff's right under issue number two has already been sounded.

The foregoing observation notwithstanding, the plaintiff claimed for more reliefs. By way of recap, in addition to the refund amount, he demanded the following: interest at 25% commercial US$ lending rate from date of cause of action to judgement; court-rate interest on decretal sum from the date of judgement to full settlement thereof; general damages; costs of the suit; and discretionary reliefs by the Court.

Briefly, the Court will determine the foregoing remedies. I will start with the 25% interest. I have gone through the entire documents by the plaintiff to find the basis of this claim. Principally, apart from stating it in the originating summons, the plaintiff did not give any proof thereof. The affidavit is silent hereof. Further, during oral testimony, PW1 did not mention it, even in passing. Mainly, law dictates that claims for interest must be pleaded, particularized and proved for them to pass. See, for instance, ***National Insurance Corporation (T) Limited v China Civil Engineering Construction Corporation***, Civil Appeal No. 119 of 2004; ***Zanzibar Telecom Ltd v. Petrofuel Tanzania Ltd***, Civil Appeal No. 69 of 2014; ***Alfred Fundi v. Geled Mango and Two Others***, Civil Appeal No. 49 of 2017; and ***Ami Tanzania Limited v Prosper Joseph Msele***, Civ. App. No. 159 of 2020 (all unreported).

I am also cognizant of the principles laid down in cases like ***Yara Tanzania Limited v Ikuwo General Enterprises Limited***, Civil Appeal No.309 of 2019; and ***Amani Safari Adventure Limited v Petrofuel (T) Limited***, Civil Appeal No. 67 OF 2023 (both unreported) that, on the basis

of mercantile practices, interest may be granted to the winning litigant even where he has not proved it specifically.

However, in this particular matter, the plaintiff greatly contributed to the money herein remaining in the defendant's hand. To begin with, after paying it, the plaintiff spent a substantial time in perfecting the collaterals to secure the loans which undertaking, altogether, did not grow to fruition. At times, he demanded the refund from the defendant but later officially retracted his move. Further, thereafter, he requested for amendment of the facility the process which also took a considerable time before ending to an unsuccessful halt. Hence, as the plaintiff also contributed to his plight herein, the Court disallows this prayer. This disallowance notwithstanding, the plaintiff is entitled to 7% interest on the decretal sum from the date of this judgement to full payment.

Regarding general damages, I hasten to reiterate the operating rule that such damages are to be awarded judiciously. Factors to consider before awarding such damages include: the directness of the defendant's wrong doing in causing the damages to the opposite party; consequences to the latter being the natural or probable result of the wrong complained of;

whether or not, the defendant is the sole or particularly significant contributor to the established consequences; and the remarkableness of magnitude of the damages (see, ***Tanzania Saruji Corporation v African Marble Company Limited*** [2004] T.L.R 155).

As it was the case for claim of interest at 25%, in the matter at hand, the plaintiff cannot avoid being blamed for what befell him. There is a pack of weighty evidence to the effect that the defendant carried on and processed the plaintiff's applications twice but both failed. The primary reason for such failure was that the plaintiff did not get the requisite securities for the loan facilities.

Further, the defendant not only accorded the plaintiff necessary cooperation needed in accomplishing the mutual business transactions herein; but also, he availed the substantial loan amounts at the plaintiff's disposal only for the latter to fail to drawdown. In my view, comparatively, the defendant moved too way far from his lane towards the plaintiff who proved to be less enthusiastic about effectuation of the MCFAs. On such basis, I will deny the plaintiff's claims under the general damages section. Nevertheless, this litigation has earned him costs.

For avoidance of any doubt, the reliefs granted to the plaintiff are as follows: refund of USD 425,625.00; interest at 7% from the day of this judgment to full settlement of the decree; and costs of this suit.

In the upshot, this case accordingly succeeds to the scope stated in this judgement. It is so ordered. The right of appeal is explained to parties.


**C.K.K. Morris**

**Judge**

**March 22nd, 2024**

Judgement delivered this 22nd day of March 2024 in the presence of Advocates Natalie Nyamwilimira and Doreen Chiwanga for the defendant respectively.

**C.K.K. Morris**

**Judge**

**March 22nd, 2024**