REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE 451 OF 2010

TRANS NATIONAL BANK LIMITED …….....…..…….....…… PLAINTIFF

VERSUS

SWIFT TRUCKERS LIMITED(IN RECEIVERSHIP) ……..…… 1ST DEFENDANT

THE ADMINISTRATOR of the Estate of the late

JAN MOHAMED H. VIRJEE (DECEASED) …….....… 2ND DEFENDANT

NAZIR J. VIRJEE ……..…..…….. 3RD DEFENDANT

ROSHAN JAN MOHAMED VERJEE ……....….....……. 4TH DEFENDANT

JUDGEMENT

1. The plaintiff in this case is a bank duly licensed under the Banking Act and carries on business in Nairobi and elsewhere in Kenya. Its case was that by an agreement dated 17 October 2005 the plaintiff offered an invoice factoring facility for the first defendant for an amount up to KShs 25 million. The Claimant detailed that the factoring facility was to be used for factoring invoices from selected companies doing business with the first defendant as agreed between the parties to the agreement. The facility was to be secure by the personal guarantees of the second, third and fourth defendants all of whom the plaintiff maintained were directors of the first defendant at all material times. It is to be noted that the first defendant was engaged in the transport and haulage business in East Africa. The Plaint detailed that the first defendant was put into receivership by Diamond Trust Bank Kenya Ltd on 26th of January 2010. At that stage the Plaint went on to say that sums were due to the plaintiff under the financing arrangements totaling KShs.24,979 401.70 as well as US dollars 9700. Further, the Plaint went on to detail that through a fraudulent course of conduct and in breach of the factoring agreements, the third and fourth defendants converted sums payable to the plaintiff on factored invoices from Desbro Uganda Ltd totaling KShs.1,367,785/-and US dollars 278,300. The above stated sums were pray for in the Plaint along with interest and costs.

2. The Defence of the 1st Defendant contained a general denial of it ever having entered into any factoring facility with the Plaintiff. In the alternative, the 1st Defendant pleaded that if it did enter into such factoring agreement, then it was currently being repaid in accordance with the terms and conditions of the agreement. In the further alternative, the first defendant averred that if it had entered into any credit and/or loan and/or invoice factoring facility as alleged, then the same was repaid by it but through the negligence and/or breach of contract and/or fraud on the part of the plaintiff as well as the second, third and/or fourth defendants, the plaintiff fraudulently allowed monies paid to it by the first defendant to be

transferred to the personal accounts of the second, third and/or fourth defendants. The 1st Defendant denied that it had ever received notice to sue and maintained that the plaintiff had ever given any particulars of the alleged loan and/or credit facilities allegedly ever extended to it.

3. However, following upon the filing of the 1st defendant's Defence, the Plaintiff made an application for further and better particulars and having not received such, filed an application dated 11 February 2011 for the 1st Defendant's Defence to be struck out. Such was refused by a Ruling of my learned brother Justice Njagi delivered on 29 September 2011. At the hearing of the suit before me, there was no appearance for the first defendant, although this was hardly surprising in view of my Order of 21 February 2012 that the firm of Mohammed Madhani & Co., advocates be permitted to get off the record as representing t5he 1st defendant in this matter.Thus it was that only Muchiri Gachara& Co., Advocates on record for the 3rd defendant and were served with a hearing notice by the advocates for the Plaintiff on 28 February 2012. Such was returnable on the 14 March 2012 but Mr. Muchiri was unavailable on that day, the hearing date having been fixed ex-parte. The matter then came for hearing and proceeded on 22 March 2012.

4. It should be noted that the 3rd defendant had filed a Defence herein on 1 September 2010. He detailed that the agreement as between the 1st Defendant and the Plaintiff Bank was unlawful and unconscionable and therefore unenforceable. It had not been stamped nor registered as required by law and was inadmissible in evidence. Further the third defendant maintained that the personal guarantees given by the directors of the first defendant were in value and unenforceable. The third defendant maintained a that any and all invoices factored under the said agreement had been duly paid and that the amount of Kshs 25 million was duly paid to the plaintiff and it was put to strict proof to the contrary. The third defendant also detailed in his defence that any and all amounts claimed by the plaintiff over and above the initial KShs 25 million were erroneous and arose out of miscalculations and the factoring of interest and penalty charges, not agreed by the parties to the factoring agreement. The third defendant then went on to say that he denied issuing any personal guarantee to the plaintiff. He maintained that any such personal guarantees were mere formality and it did not amount to a binding contract. The Defence contained various allegations that the plaintiff had acted carelessly and straightforward outer due regard to the inherent is an obvious risk of lending or extending credit to the first defendant. The Defence concluded by denying that the third defendant was in any way personally liable for the amounts claimed in the Plaint. He added that the failure of the first defendant to pay at the alleged amounts if at all, was due to the admitted fact that the company was put under receivership on 26 January 2010 by the Diamond Trust Bank and not due to any personal fault on the part of the third defendant.

5. On 4 November 2010 and the plaintiff applied for further and better particulars of the third defendant\'s Defence. It had requested such particulars earlier but to no avail. An Order was made on the 10 December 2010 that third defendant do supply further and better particulars of his Defence. Then on 11 February 2011, the plaintiff made an application to strike out the Defence of the third defendant for failing to comply with the further and better particulars Order. The third defendant opposed the application but on 12th of May 2011 a consent order was reached by which paragraphs 5, 8, 9, 13, 14 and 19 of the third defendant\'s Defence were thereby struck out and the third defendant ordered and Amended Defence excluding those paragraphs. From the court record it does not appear that the third defendant ever complied with the consent Order. However, it does appear from the record at that judgement against the second defendant was entered on 5 November 2010 and against the fourth defendant on 1 April 2011.

6. At the hearing of the suit on 22nd of March 2012, Ms. Kierieni appeared for the plaintiff and Mr. Muchiri for the third defendant. Two witnesses were called for the plaintiff the first being a Mr. Joseph Seii who testified to being the Operational Excellence Officer for the plaintiff bank. He noted in his witness statement dated 28 February 2012, that the first defendant had been a customer of the plaintiff for many years. He was aware that the first defendant had been placed in receivership and that such had since been lifted. He testified that the late Janmohamed Verjee (represented by the administrator of his Estate) had been a director of the first defendant and had also issued a personal guarantee for the facility is granted by the plaintiff to the first defendant. He noted that the administrator had been sued on the basis of the guarantee. He also told the court that both the third and fourth defendants herein had been directors

of the first defendant. He went on to say that in August 2004, the first defendant had applied for an invoice factoring facility with the plaintiff bank. He explained that this is a business facility where a borrowing company assigns or sells its accounts receivables, such as an invoice, to the lender, in this case the bank, for a fee/commission. The first defendant being involved in the transport business would invoice its customers for payment at a later date. In order to access funds in the meantime, i.e. before the invoices became due and payable, the first defendant would factor those invoices to the bank and it would be able to obtain funds against those invoices thus improving its cash flow. The witness stated that upon reviewing the application for the invoice factoring facility, the bank, by a letter of offer dated 18 August 2004, offered such facility for a sum of shillings 10 million. The tenure of the facility was for one year which meant that it was euphoria view on 31 July 2005 he admitted that in the said letter dated 18th of August 2004 there would appear to be an error in the name of the borrower which was stated as being Highland Minerals Ltd. However he confirmed that the acceptance of the facility was executed by the first defendant to whom the letter was addressed. Mr. Seii went on to confirm that the security for the facility was to be the verified invoices plus the directors\' guarantees. Interest was to be applied at the rate of 11.5% per annum payable monthly on daily rests. The rate of interest could be varied by the plaintiff bank without prior notice to the borrower. A factoring commission of 0.5% was to be charged on each invoice. Upon maturity, if the invoice was not paid, then an interest charge of 11.5% per annum was to be applied to the balance all outstanding invoices. There was also a default fee of 0.75% or 9% per annum to be charged upon a skipped or missed payment. The witness noted that the first defendant was required to endorse on each factored invoice the remark that payment was to be made to the bank to the account of the first defendant.

7. Mr. Seii went on to say that the first defendant did not service the borrowing fully and when the facilities when reviewed in 2005, the plaintiff bank agreed to enhance the limit for invoice factoring to Shs 25 million. Thereafter in December 2007, the first defendant agreed to restructure its facilities. It was agreed that the sum of Shs.25 million comprising of outstanding mature invoices would be converted into a loan and that the balance of Shs.19,730,641.45 comprising invoices within the maturity period were to be repaid as per the invoice terms. A fresh letter of offer dated 24 December 2007 was issued and agreed to by the first defendant, who was to establish a standing order from Diamond Trust Bank to the plaintiff for the payment of Shs.2,270,000 each month towards liquidating the loan. According to Mr. Seii, the defendants accepted the plaintiff bank’s offer and executed the factoring agreement. The directors at the time being the second and third defendant both executed guarantees for the payment of a sum not exceeding Shs.44.7 million which was the debt then outstanding. Mr. Seii pointed to some of the letters in the plaintiff\'s bundle received from the first defendant and signed in by the third and fourth defendants with respect to invoices they sought to have factored. Attempts by the plaintiff to collect payment from the unnamed companies at 30 invoices were unsuccessful as the defendants had already collected payment. The witness maintained and that the defendants continued in default and after attempts were made to recover the arrears the third defendant wrote a letter dated fifth of October 2009 indicating that whilst they did not deny the debt, they would make payment "as and when the situation improves". Again by letter dated 26th of November 2009, the third defendant made a proposal of payment in which it was proposed to pay US dollars 35,000 over a period of time between 7 December 2009 and 15 February 2010. The defendants further proposed to pay Shs 1.5 million per month, but no payments were made.

8. In cross-examination, Mr. Seii clarifying that there was an initial letter of offer from the plaintiff bank dated 18 August 2004. Although this letter was addressed in error, it was still there and the error was never rectified. The agree however that the form of acceptance at page 3 of the plaintiff\'s bundle does not detail the name of the company accepting the terms of the letter. He confirmed that at page 4 of the bundle the factoring agreement was executed pursuant to the letter of offer. He further confirmed that the factoring agreement was between the plaintiff and the first defendant and did not involve the other three defendants. Mr. Seii also confirmed that there was no requirement for a personal guarantee from the directors, it was a requirement under the facility letter. He noted that under the factoring agreement commission in clause 10 was stated at 0.5% and that there was no figure for interest under clause 11. As to the methodology of factoring the invoices emanating from the first defendant, the witness confirmed that the plaintiff did ensure that there was an endorsement on each invoice. There was a stamp on each invoice from the first defendant\'s customer. Mr. Seii then confirms that he was not aware that the plaintiff could terminate the factoring agreement. Rather than enforcing the agreement, the plaintiff drew

up a new agreement dated 17 October 2005. There was also a new letter of offer. He confirmed that there were no figures shown on 17 October 2005 Agreement and no interest figure was included therein, it referred to a separate letter of offer. Again the witness detailed, that there was no requirement in the fresh factoring agreement for personal guarantees of the directors, which was detailed in the letter of offer. Mr. Seii was then known shown the personal guarantee for Shs.44 million detailed at page 27 of the plaintiff\'s bundle of documents and he noted that the guarantee was dated 24 December 2007. He confirmed that the guarantee was signed on the last page and from the small revenue stamp, it was stamped on 29th of October 2010. The guarantee was not signed on page 12 or three thereof, only the last page. He confirmed that there were no figures on the last page as to the amount of the guarantee. He was unable to sell counsel whether this was the last guarantee signed by the defendants. The witness told the court that the plaintiff had received a letter from the Receiver of the first defendant. He was aware that the receivership had been lifted but that most of the assets of the company had been sold. He was referred to pages 106/107 of the plaintiff\'s supplementary bundle and confirmed that these work extracts of minutes of board meetings of the first defendant. If further explained that pages 117 to 256 of that bundle were the bank statements for the accounts of the first defendant. The overdraft account was expressed in Kenya shillings, there was a US dollar current-account and the loan account, that the latter being again in Kenya shillings. The statement period was strong one January 1985 to 17 February 2012 for the Kenya shilling overdraft account which when the loan of Shs.24,750,000 was dispersed on the 31 December 2007 shows a credit balance of Shs.8,897,890/78. At page in June 26 the statement of the loan account showed that Shs.23 million was owed. Then at page 192, there was the sum of US dollars 10,531/99 owing to the plaintiff bank.

9. In re-examination, Mr. Seii clarifying that the sum owing in the US dollar account as above was what the plaintiff was claiming in that currency. He then clarified various other queries raised including the date of the factoring agreement at page 4 of the Princes bundle was 18 August 2004. He pointed out that in the initial facility letter clause 4 item number 2 was the requirement for personal guarantees of directors. The further factoring facility of Shs 25 million was detailed at page 8 of the plaintiff\'s first bundle of documents. The first defendant had requested such further facilities to boost its working capital. That amount plus interest charge was detailed in the facility letter dated 17 October 2005. Interest was at 11.5% per annum on each invoice factored. The commitment to that facility letter was signed by the third defendant. Finally, Mr. Seii stated that at page 72 on the plaintiff\'s bundle the first defendant was making an offer of settlement at Shs 1.5 million per month, no payment was forthcoming.

10. The plaintiff\'s second witness was Jacqueline Onsando, who described herself as the Head of Legal and Credit Administration with the plaintiff. She confirmed her witness statement signed on 20 February 2012. She informed the court that the plaintiff bank was notified of the receivership of the first defendant on 26th of January 2010. In view of the legal implications of that occurrence, the first defendant\'s account was placed under the management of the plaintiff bank\'s legal department. The witness noted that invoices are signs of the bank belonged to it and as such it was entitled to pursue the proceeds thereof. The witness stated that she had proceeded to make the demands upon some of the first defendant\'s customers to whom invoices had been rendered. After clarifying with some of the first defendant\'s customers, it became evident to the witness that the first defendant had not adhered to the terms of the factoring agreement which required it to endorse on the buyer\'s copy, a notice that payment was to be made to the bank. The witness stated that from communication received from the debtors, it was clear that the defendants collected some sums due on the invoices despite having already factored the same invoices for funds from the plaintiff. In the witness' view, this was fraudulent conduct on the part of the directors of the first defendant. She detailed that the sums due on factored in invoices were Kenya Shs.1,367,785/-and US dollars 278,300. The loan account stood at KShs.23,611,616. The overdraft facility at Kshs.12,650.70 and the dollar current-account was overdrawn in the sum of US dollars 9799.02. She went on to state that interest on the loan and current accounts had been charged at 17.25% per annum together with penalty interest of 9% per annum; while on the factoring facility interest accrued at 12.75% per annum.

11. PW 2 went on to say that she had seen the Defences filed by the first and third defendants herein. In the defence of the first defendant there were various contradictory statements which prompted the plaintiff\'s advocates to seek particulars. She noted that on the one hand the first defendant denied it

having entered into any loan or factoring facility agreement and then claimed that it was not in default. Wren requested to indicate when it had made its last payment, it was unable to do so. The Defence also alleged negligence, breach of contract and fraud on the part of the plaintiff. The allegation that the plaintiff received funds due on the account of the first defendant and thereafter credited the personal accounts of its directors is unsubstantiated, particularly when it had already detailed that the directors of the first defendant did not have personal accounts with the plaintiff bank. The witness noted that in his Defence, the third defendant made various allegations for which he failed to furnish particulars resulting in six paragraphs thereof being struck out. The witness noted that the third defendant and claimed that the factoring agreement was neither understand nor registered. She was aware that there is no requirement to stamp the factoring agreement. It is not one of the documents set out in the Schedule to the Stamp Duty Act. The witness also denied that there was any need for registration of the factoring agreement as it did not involve an immovable property. As regards the personal guarantees by the directors, the witness could see no basis for the challenge on their validity. She finally wrapped up her evidence in chief by to pay the debt owing to the plaintiff was because it was placed in receivership was in her opinion, without basis, as the debt was incurred before the receivership. Such did not explain why the third defendant had failed to honour his obligations under his guarantee.

12. The first thing that PW 2 confirmed to counsel for the third defendant was that the invoices assign under by the first defendant to the bank under the factoring agreement, belonged to the plaintiff bank. She explained that the assignment of the invoice by the first defendant was achieved by an endorsement on each invoice to the customer/debtor to pay the plaintiff bank direct. When the invoices became due, the plaintiff bank would communicate with the first defendant\'s customers. The witness confirmed that at the time of the restructuring of the first defendant\'s facility with the bank, it was in arrears. She explained that it is common practice in local banking to restructure the facilities as a mode of recovery. The restructured facilities did not require further additional security to be provided. She clarified that in the invoice factoring product the security is the payment of the face value of the invoice rather than going the traditional route of an overdraft with appropriate security. PW 2 went on to say that at the time of restructuring, the plaintiff bank’s Risk Department would be looking at the big picture and if there were no obvious security is available, then there would be no alternative but to rely on the existing personal guarantees of the directors. In this case there were no other securities. The plaintiff bank was not aware that the assets of the first defendant were charged by way of Debenture although it was aware that the first defendant had an account with the Diamond Trust Bank. The plaintiff only became aware of the Debenture when the Diamond Trust Bank appointed a Receiver. The idea of the restructuring was to convert part of the existing facility into a loan, repayable at Shs.1.5 million per month. She denied that the plaintiff bank would have to create an impression to the Central Bank of Kenya that the facility was performing. The idea was to credit the first defendant\'s account with the amount of the invoice less an amount that will be used to pay off the outstanding balance on matured invoices. This would allow the first defendant increased working capital and reduce new exposure on matured invoices. It would certainly be a way of mitigating the plaintiff\'s losses.

13. Continuing with her cross-examination, PW 2 confirmed that the plaintiff had obtained a board resolution of the first defendant for the facility in 2004 – see pages 106/7 of the plaintiff\'s original bundle of documents. The total amount of two resolutions (the second being for another facility) came to Shs.12 million. With regard to the original facility letter, the witness admitted that although it was addressed to Swift Truckers Ltd, it did say, in the body of the letter, that the facilities were for Highland Mineral Water Company. There was no name detailed of the company in the confirmation of acceptance. As for PW 1, the witness confirmed that the factoring agreement was entered into pursuant to the letter of offer. Further, under clause 5 of the agreement there is no requirement for directors’ guarantees. She also agreed at page 15 of the agreement, it did not detail the amount of interest and it did not refer to a specific date of the letter of offer. Under the heading of "Events of Default" there were no remedies detailed other than allowing the plaintiff to terminate the agreement.

14. Then the witness was referred to paragraph 6 of the first defendant\'s Defence and she firmly stated that she did not believe that the bank was negligent in any way but it did everything possible to redeem itself. Turning to the personal guarantees at page 27 of the plaintiff\'s bundle of documents, the witness detailed that the signatures on those guarantees were on the last page of each. She agreed that the figure

of Shs.44 million is on page 1 of the guarantee and that there was no signature on that page. The witness confirmed that demand was made on the third defendant and the bank had received an acknowledgement from him of the debt. The plaintiff bank had conducted investigations into the personal circumstances of the third defendant but the same were not conclusive. Finally, she stated that in banking practice, personal guarantees of the directors holding a lot of weight in terms of risk as they allow the lifting of the veil of incorporation.In re-examination, PW 2 re-emphasised that the invoices were payable to the bank and indeed such were security for the plaintiff bank. The plaintiff did not expect the first defendant to collect and chase payment of the factored invoices. At the time of the lending, Swift Truckers was a thriving transport and logistics company. The guarantee of a director of such a company would be worth its weight as a security.

15. At this stage, the plaintiff\'s Counsel closed the case for the plaintiff. Rather surprisingly Mr Muchiri for the third defendant detailed that he was not calling any witnesses. The only evidence therefore before the court was that from the plaintiff\'s 2 witnesses. The plaintiff filed its submissions on 4 May 2012. Having set out the details of what it was claiming, the plaintiff noted that its claim was predicated upon the guarantees issued by Janmohamed H. Virjee, now deceased, and the third defendant, Nazir Verjee. The plaintiff further submitted that the 2 said directors are also personally liable for the losses suffered by the plaintiff on account of their acts of fraud. The plaintiff noted that judgement was entered against the second defendant in default of defence and whilst a similar application has been made as against the fourth defendant, it has not been acted upon. The plaintiff urged the Court to enter judgement against the fourth defendant as prayed. The plaintiff was relying upon the witness statements of PW 1 and PW 2 as well as their viva voce evidence given in Court. Its submissions detailed the facts in relation to the factoring transaction as between the plaintiff and the first defendant as between August 2004 and 2007. By that year, according to the plaintiff, the amount owed was Shs.44,730,641/45. Such led to the restructuring of the first defendant’s facility which was converted into a loan repayable on agreed terms. The loan constituted the amount made up of overdue invoices and the balance of Shs.19,730,641/45 remained as under the factoring arrangement made up of current invoices to be repaid as they matured.

16. The plaintiff went on to submit that although the first defendant and its directors accepted the restructuring arrangement including agreed installments for loan repayments, no payments were forthcoming despite various admissions and proposals. The plaintiff then went into the merits of the first defendant’s Defence which I have already referred to above as regards the evidence of the plaintiff’s two witnesses. The plaintiff’s comments upon the third defendant’s Defence were that he denied signing any guarantee in favour of the plaintiff but, at the same time, neither did he come to give evidence at the hearing or produce any documents to counteract what the plaintiff had produced by way of documents in relation to the whole transaction. In the plaintiff’s opinion, it had proved that the first defendant did obtain and use credit facilities. It criticized the third defendant’s claim that the letter of offer dated 18 August 2004 did not refer to the first defendant but to Highland Mineral Water Ltd.as the borrower and recipient of the facilities. It maintained that the letter was addressed to the first defendantand signed by its directors on the same day. The plaintiff’s submissions continued by outlining the plaintiff bank’s charges for the factoring arrangement as well as its charges for the restructuring of the facilities. It detailed that the defendants had admitted the sums owed and made proposals for payment which they did not honour. It maintained that as regards the point raised by the third defendant in his defence that the factoring agreement was invalid because it was not stamped or registered, the document was not covered by the Schedule to the Stamp Duty Act and thus did not require to be stamped. Further and as testified to by PW 2, it was not a document in relation to land or mortgages/charges so did not require registration. It also maintained that late stamping of documents did not disentitle the plaintiff to rely upon them. Further, the Plaintiff had proved that the second and third defendants had executed personal guarantees. It also stood by its submission that from responses received from the first defendant’s customers/debtors, payment for a number of factored invoices had been made direct to the first defendant and not accounted for to the plaintiff bank. Finally, the plaintiff submitted that the debt was incurred before the receivership of the first defendant so that it cannot be a defence that the first defendant was unable to pay because of the receivership.

17. The first submission made by the third defendant was that it felt that the plaintiff must first prove its case as against the first defendant before seeking payment from the third defendant as guarantor. It was

important at the outset, the third defendant maintained, to note that the sums claimed in the Plaint did not tally with the figures contained in the documents produced by the plaintiff's witnesses in evidence. The third defendant submitted that it wasn't enough to throw sets of figures at the court and leave it to sort them out as to the actual amount claimed. He also pointed out that as regard the documentation in relation to the transaction between the plaintiff and the first defendant, the same could only be described as "casual" to say the least. Interestingly, the third defendant commented that when the account was non-performing, the plaintiff took no adverse action but simply restructured the facilities. He commented to the extent that no documents were produced to the court to show that the second, third and fourth defendants were directors of the first defendant or that they were sued as such. To this end, I took note that no statement had been put forward in the defendants' pleadings that the second to fourth defendants were not directors nor did those defendants put forward any evidence to the contrary.

18. However, I would agree with the third defendant's submission that the plaintiff had put forward no documentary evidence of the fraud of all or any of the four defendants as had been pleaded in the Plaint. There was mention made by PW 2 that certain factored invoices had been paid direct to the first defendant but the only documentation that was put before court to verify such was a copy of a letter from Damco Logistics Kenya Ltd dated 19 February 2010 (at page 79 of the plaintiff's preliminary bundle) confirming that it had paid the first defendant's invoices direct to it. However, and as queried by the third defendant in his submissions is this proof of fraud? No attempt was made by the plaintiff's witnesses to show that invoices raised by the first defendant to Damco Logistics had been factored to the plaintiff. As the third defendant has pointed out, there is no trail shown of money paid to the directors' personal bank accounts, merely a statement from PW 2 that the second to fourth defendants did not have accounts with the plaintiff bank. However, I was not convinced by the third defendant's submission that because of the mention in the letter of offer dated 18 August 2004 of the Highland Mineral Water Company therein, the offer was defective. Obviously the plaintiff had made an error of transcription, always the danger of copying documents by means of word processors. The fact of the matter is that the letter of offer was addressed to the first defendant, properly signed by the plaintiff's (bank) officials and, more importantly, executed by two of the directors of the first defendant on page 3 thereof. In this regard, firstly I cannot agree therefore with the third defendant's submission that the letter of offer was defective and thus all subsequent documentation as between the plaintiff and the defendants (including the defendants' guarantees) were null and void. Secondly, the third defendant has submitted that it was not shown by the plaintiff, that the letter of offer was not signed on behalf of the first defendant by its registered directors. With respect such was never pleaded in the third defendant's Defence and I cannot accept that the point can be raised now, more particularly as the third defendant presented no evidence at the hearing let alone evidence on this point.

19. Where the third defendant is on stronger legal ground is as regards the Resolutions of the first defendant company as to the borrowing. It is correct that the only such resolutions produce by the plaintiff's witnesses before court, were at pages 106/107 of the plaintiff's supplementary list of documents, dated 21 February 2012. The facility for factoring invoices up to a total amount of Shs.10 million would appear to have been sanctioned but that resolution (on page 106) was not sealed by the first defendant company, the same is a certified copy. By rights, the plaintiff should have produced or have the first defendant produce the original of the resolution document before court. The first defendant's second resolution at page 107 is for a separate facility and has no bearing as to the matter before court. What is significant as pointed out by the third defendant, is that no resolution or indeed copy resolution, was produced before court by the plaintiff's witnesses in relation to the increase of the factoring facility to Shs.25 million, as per the plaintiff bank's further letter of offer dated 17 October 2005. The next point made by the third defendant in its submissions was that there was no documentary evidence produced before court to show that the Shs.10 million facilities were ever drawn down by the first defendant. The bank statements produced by the plaintiff's witnesses only show transactions from 2007 yet its claim goes back to 2004. As regards that point and because of the lack of resolution in relation to and under the second facility granted by the plaintiff, it was the third defendant's submission that the second facility as per pages 8-16 of the plaintiff's original bundle of documents, was unenforceable against the first defendant and any personal guarantees issued thereunder or pursuant thereto ***"must meet the same fate".*** Thereafter, the third defendant's submissions devolved into a series of questions which were never put to the plaintiff's witnesses e.g. proof that the 2nd facility was ever drawn down or why did the plaintiff allow

the amount of the facility to accrue to Shs.44,730,641/45 when the agreed limit was Shs.25 million?

20. To my mind, the third defendant's next line of submission lent the court no assistance as to arriving at a decision in this matter. For example, the fact as put forward by the third defendant that he had received no notice from the plaintiff as to non-performance by the first defendant would be of relevance only if the third defendant had pointed to the legal reason why this fact was of import. Similarly, whether or not the plaintiff bothered to ascertain whether the "alleged" guarantors were worth the amounts that they had guaranteed, is of little relevance to my way of thinking. Further the fact that no monies were paid to the first defendant under the restructuring facility made by the plaintiff is of no relevance to my mind as to the illegality or non-enforcement of the securities for that facility. Other points put forward by the third defendant in his submissions were that the plaintiff failed to carry out due diligence as regards the first defendant's Debenture with Diamond Trust Bank and is therefore:

"***the author of its own misfortunes and should not seek the assistance of the court to undo its own mess***."

I failed to grasp the relevance of this point just as much as failed to understand the third defendant's submission that there was no admission of debt by the first defendant. To my mind, although there are not any specific sums detailed therein, the letter from the first defendant to the plaintiff dated 5 October 2009, is a clear admission of amounts owing and therefore debt. In my opinion for the third defendant to maintainthat as the letter was not accompanied by a sealed and signed resolution of the board of directors of the first defendant, it cannot bind the first defendant company is somewhat misleading. Thereafter, the third defendant commented upon the difficulty experienced in taking the evidence of the plaintiff's witnesses in relation to the bank accounts held by the first defendant with the plaintiff bank. He pointed out that at pages 193-254 of the plaintiff's supplementary bundle of documents, in relation to the KShs overdraft account, the final balance reflected a credit of Shs.8,897,889/78. What the third defendant failed to point out was that this was the balance on that account as at 9 January 2008 when the loan had been disbursed thereto on 31 December 2007 of Shs.24,750,000/-.The court is unable to understand how the third defendant can therefore submit that the Shs.8.8 million amount:

"is rightfully owed by the plaintiff to the 1st defendant".

21. At this stage, the third defendant turned to the real meat of his submissions – the issue of the personal guarantees. He pointed out that the guarantee documents at pages 102-105 of the plaintiff's supplementary bundle were not signed by all the guarantors on all pages of the same and according to the third defendant, more importantly, where the figure (sum) of the guarantee appears on page one thereof. He submitted that the effect of that omission is that the guarantee cannot be enforced against the persons whose signatures appear on the last page thereof. The third defendant detailed that it could not be said to be the same document or that the person(s) signing at the last page thereof intended to be bound as to what figure appears on the first page. The third defendant referred to the Law of Contract Act (Cap 23) – the memorandum must be in writing and signed by the person it is intended to be proved against. In the third defendant's opinion:

"it is for this reason that banks and indeed all serious business persons require that all pages of a document be signed by the parties".

The third defendant thereupon urged this court to find that the personal guarantees did not amount to any contract or memorandum binding on the third defendant as a matter of law.

22. Rather surprisingly, the third defendant's next submission was that the entering into of the Factoring Agreements as required by the two letters of offer from the plaintiff had the effect of superseding the letters of offer. He maintained that as the credit limits and the interest charges to be applied were not specified in the Factoring Agreements, these could not apply. The only way such could apply, stated the third defendant, would be if those provisions in the letters of offer were incorporated into the Factoring Agreements. As such were not so incorporated, the interest rates could not apply as against the first defendant. The net effect of that was that the interest charged by the plaintiff bank must be deducted from

the overall claim. As regards the prayers in the plaint, the third defendant commented that prayer (a) relating to the amounts of Kshs.23,611,616/70 and US $ 9700 were never proved and to the contrary, the amount of Shs 8,897,890/78 was owed to the first defendant. The claim for US $9700 was not proved as the bank statement at page 192 of the plaintiff's supplementary bundle showed a credit of KShs.10,531/99. Under cross examination, it had been brought out that the total debits and credits in the so-called US dollar account were in KShs not dollars. The third defendant maintained that the plaintiff's witnesses in examination, had been unable to show just where the US dollar claim in the Plaint had come from. As regards the claim for interest at the rate of 17.25% and penalty interest at 9% per annum, the third defendant submitted that the same had no basis in law or fact, were never part of the Factoring Agreements and were not authorised by Board resolution of the first defendant. So far as prayer (c) was concerned, the third defendant submitted that the sums/figures of KShs 1,367,785/- and US $ 278,300 never featured in the documents produced before court and they were not shown to have arisen from any legally binding agreement. The claim for interest under prayer (c) at 12.5% per annum, in the opinion of the third defendant also failed for the same reason as detailed above.

23. The plaintiff responded to the third defendant's submissions by reply thereto filed on 22 June 2012. It pointed out that the fact as maintained by the third defendant that the figures as claimed and prayed for in the Plaint, do not tally with the documents produced by the plaintiff, was patently incorrect.The plaintiff then went into detail in that regard, pointing out that as per page 256 of its Supplementary Bundle, the figure of Shs.213,598,966/- is shown, which is the same figure that is detailed in the Plaint. The plaintiff also explained the claim figure as regards the US dollar account being $ 10,531/99, maintaining that the amount claimed is the cleared effects reflected on that account. Similarly, as regards the current account, the plaintiff explained that on page 254 of its Supplementary Bundle, the same contained the sums on the factored invoices and of the loan account. Although detailed as credits on the account, the plaintiff submitted that they were sums owed by the first defendant under other facilities. The amount being claimed by the plaintiff under the overdraft facility was Shs.12,650/70. The plaintiff continued its submissions by remarking that judgement in default had already been entered as against the second and fourth defendants and as I have noted above, the issue of proving that they and the third defendant were directors of the first defendant does not arise as the same was not denied. The plaintiff also commented upon the proof of fraud, which I have noted above and the typographical error in the original letter of offer, again which I have commented upon above.

24. As regards the points raised by the third defendant in his submissions in relation to the security documentation, the plaintiff had this to say:

"The sums advanced to the 1st defendant have been demonstrated as due and payable. The factoring agreements were executed by the directors of the 1st defendant as were the guarantees. There was no illegality with respect to the facilities which the defendants utilized, and they are stopped from denying that the agreements were properly executed. In any event the guarantees are by themselves enforceable as against the parties who gave them."

Further points made by the plaintiff were that the fact that the first defendant was placed in receivership did not discharge the guarantees. Further, the fact that the first defendant had other accounts with the plaintiff and a debenture with Diamond Trust Bank has no bearing on the matters before court. It maintained that all it was required to do was to show that the first defendant utilized the facilities it sought from the plaintiff and that it has subsequently refused to repay the sums advanced. The plaintiff maintained that the restructuring proposal accepted by the first defendant and its directors was an admission of liability. It clarified further that the dollar account was just that and was not expressed in Kenya Shillings. As to the contention that it was the plaintiff that was indebted to the plaintiff, the latter's position was that the third defendant needed to show that the loan of Shs.24 million had been repaid, the factored invoices paid to the plaintiff and that there therefore remained a credit of Shs.8 million due from the plaintiff bank.

25. More importantly, as far as the court is concerned was the position of the plaintiff as regards the guarantees signed by the 1st defendant's directors. It is the plaintiff's submission that the contention that all pages of the guarantee must bear the signatures of the guarantors is not supported in law. The

guarantees were in writing and executed by the guarantors. To the plaintiff's way of thinking, that satisfied the requirements of the law.

26. I have examined at length the documentation produced by the plaintiff to substantiate its claim as detailed in the Plaint. I accept the evidence of the plaintiff's 2 witnesses in that regard. The third defendant has only disputed the figures in his submissions. He never appeared before court to give evidence on anything different in money terms. Accordingly, I find that the figures detailed in prayer a. of the Plaint being Shs.23,611,616.70 and US $ 9,700 as proved. As I have referred to above, although the Plaintiff has brought to court three letters in its original bundle, one from Damco Logistics Kenya Ltd (pages 79 – 83) dated 19 February 2010, one from Desbro (Uganda) Ltd dated 22 February 2010 (page 84) and the third from Krystalline Salt Ltd dated 25 February 2010 (page 85), it never produced the invoices for these 3 traders. There is no evidence before this court that the invoices for these 3 traders were ever factored and that it was the first defendant (plus possibly its directors) who fraudulently collected the sums due under the invoices, rather than the payment therefore being made directly to the plaintiff bank.. There is no proof of fraud and accordingly, the plaintiff's prayer c. in the Plaint cannot succeed. That leaves me with the question of the guarantees executed by the third defendant quite apart from the second and fourth defendants).

27. **Section 3 (1)** of the *Law of Contract Act (Cap 23, Laws of Kenya)* states as follows:-

"3. (1) No suit shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriages of another person unless the agreement upon which such suit is brought, or some memorandum or note thereof, is in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized".

It seems therefore that for the Plaintiff herein to enforce the guarantees it holds from the third defendant, the provisions of **section 3 (1)** if the Law of Contract Act must have been complied with. In the plaintiff's two bundles of documents there are 3 copy Guarantee documents produced. Surprisingly, all 3 are **undated**. The first is at pages 27 – 30 of the plaintiff's original bundle. I am satisfied that the same has been signed by the third defendant (as well as the late second defendant) and witnessed but not under seal. It is in the amount of Shs.44.7 million and has been stamped in the amount of Shs5/- as well as a penalty amount of Shs.3/- on 29 October 2010. The second is at pages 98 – 101 of the plaintiff's Supplementary Bundle. It is for Shs.5 million and again has been signed by the 2 aforementioned directors/defendants and witnessed but not sealed. It has been stamped with 2 x Shs 100/- revenue stamps. Similarly for the 3rdGuarantee at pages 102 – 105 of the plaintiff's Supplementary Bundle for Shs.50 million. Both defendants/directors have signed (not under seal)and the same have been witnessed. These are standard bank form guarantees of the plaintiff. Why there is no provision therein for a date to be inserted, I have no idea. At least in the Guarantee for Shs.44.7 million, there is reference to a Resolution of the first defendant dated 24 December 2007. However, this would seem immaterial unless the guarantee document was being executed by a company to secure a different principal (borrower).

28. The point as to whether the Guarantees were dated or otherwise was not taken up by counsel for the third defendant. All that has been said is that there was a general denialby the third defendant that he had executed the Guarantees in the first place. Secondly that the Guarantees were rendered unenforceable because the first letter of offer was improper because of the mention of the Highland Mineral Water Company Ltd or because the letters of offer had no validity because they had been superseded by the Factoring Agreements, which contained no mention of the requirement of the Guarantees. I cannot support any of these submissions by the third defendant. I do take cognizance of **section 64** of the *Evidence Act (Cap 80 Laws of Kenya)* which provides:-

"The contents of documents may be proved by either primary or by secondary evidence."

as read with section 66 which details that secondary evidence includes:

"(e) oral accounts of the contents of a document given by some person who has himself seen it."

Both PW 1 and PW 2 commented upon the documents produced more particularly the Guarantees. Leaving aside the 2 Guarantees for Shs.5,000,000/- and Shs.50,000,000/- respectively, I am satisfied that both the late second defendant and more particularly the third defendant executed the Guarantee for Shs.44,700,000/- following upon the restructuring of the first defendant's facilities in December 2007, more precisely 24 December 2007. I say so as a result of perusing the terms of the letter of offer from the plaintiff dated 24 December 2007 which required directors' personal guarantees covering the total approved limit of the facility which was signed (on every page) by the two directors/defendants on 24 December 2007. At the same time and on the same date, they both executed the Factoring Agreement (which incidentally was stamped for Shs.5/- on 29 October 2010). From the evidence of PW 1 and PW 2, as to the contents of those documents, I have no difficulty in accepting that the third defendant particularly had every intention of being bound by the Guarantee. There is no requirement at law for such a document to be signed on every page. As to the third defendant's submissions that the plaintiff had not conducted any "due diligence" as to who were the directors of the first defendant, at pages 40 – 47 of the plaintiff's original bundle, there is a copy of the Annual Return of the first defendant made up to 31st December 2008, which quite clearly shows the second and third defendants as being directors of the first defendant company.

29. Accordingly and always bearing in mind that the third defendant presented no evidence before Court, I uphold the said Guarantee for Shs.44,700,000/- and enter Judgement for the Plaintiff against the third defendant in the amount of Shs.23,611,616/70 together with US dollars 9,700.00. Such sums will bear interest at the rate of 17.25% from 1st March 2010 until payment in full. I do not consider that I should award penalty interest as against the third defendant but I do award costs of this suit and interest thereon from today's date until payment in full to the plaintiff as against the third defendant.

DATED and DELIVERED at NAIROBI this 17th day of July, 2012.

J. B. HAVELOCK
JUDGE