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Busoga Growers Cooperative Union Ltd V Non-Performing Assets Recovery Trust- HCT-00-CC-CS-0240-2004 [2007] UGCommC 17 (21 February 2007)

THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

COMMERCIAL COURT DIVISION

HCT-00-CC-CS-0240-2004

Busoga Growers Cooperative Union Ltd Plaintiff

Versus

Non-Performing Assets Recovery Trust Defendant

21 February 2007

BEFORE: THE HONOURABLE MR. JUSTICE FMS EGONDA-NTENDE

JUDGMENT

1. The plaintiff had loan accounts with the Uganda Commercial Bank. The balance of one such account, being Shs.49,383,580.00 as at 31/12/1995, was assigned to the defendant, a statutory body, established under the Non-Performing Assets Recovery Act, Chapter 95, Laws of Uganda 2000 Rev. Ed., on the 7/03/1996. This assignment was in writing. The loan originally granted to the plaintiff in respect of this matter arises was used for the purchase of certain goods, some of which, were eventually retained by Uganda Commercial Bank, and were never released to the plaintiff.
2. The plaintiff after the assignment referred to above entered into an arrangement with the defendant whereby it paid to the defendant the assigned sum together with interest, less certain sums waived off, totalling to Shs.146,490,444.00. The plaintiff now brings this action seeking to recover from the defendant the said sums plus other sums on the ground that the defendant falsely represented to the plaintiff that the sum assigned was shs.146,496,444.00, whereas not. It is contended that demand for shs.146,496,444.00 was a false representation in so far as the defendant, as assignee, did not have power and or authority to demand and receive any more than Shs.49,383,580.00 that was assigned to it.
3. The plaintiff further claimed special and general damages, particulars whereof, were set out in the plaint, arising from the detention and non-release to date, by Uganda Commercial Bank of the goods, to wit spares, that the plaintiff had imported using the funds obtained from Uganda Commercial Bank. The plaintiff further claimed interest on all the sums claimed, an order for delivery of spares, and costs of the suit.
4. The defendant denied the plaintiff's claim and contended that the plaintiff had collected most of the spares that it had imported and what had remained, was eventually valued and the value thereof was included in the discount/waiver of shs.42,000,000.00 credited to the plaintiff's account with the defendant.

5. At scheduling stage of the proceedings the parties agreed to the following facts. That the plaintiff was given loans by Uganda Commercial Bank. It defaulted in repaying the loans. That the current account kept by the plaintiff with UCB relative to the loans was No.10-0015 which had 2 loan accounts no. BFL 4026 and 3030. That account number 10-0015 was assigned to the defendant by deed of assignment dated 7th March 1996.

The amount assigned was shs.49,383,500.00 as at 31st December 1995. Included in the assignment were securities LRV 1384/4 and LRV 1359/23 and a debenture dated 17th August 1988. That the plaintiff paid off the assigned debt to NPART.

6. The parties agreed that all the documents annexed to the plaint be admitted into evidence without proof and marked as exhibits in the order that they were annexed. Similar agreement was reached with regard to the documents annexed to the amended written statement of defence. This was done accordingly.

7. The parties agreed that in light of the admitted facts and documents there were only three issues to be determined by this court. Firstly, how much money did the plaintiff pay to the defendant? Secondly, if this amount is higher than the sum assigned, whether the defendant was entitled to receive more amounts than was assigned. Thirdly, if the defendant was not so entitled, whether the plaintiff would be entitled to receive it back with interest.

8. The plaintiff chose not to call any further evidence, in light of the documents accepted in evidence, and therefore did not call any witnesses. The defendant called 3 witnesses. These were, DW1, Mr. Apollo Obo from the Bank of Uganda, DW2 Mr. Francis Onebe from Ernest & Young and DW3 Mr. Herbert Kwikiriza from NPART.

9. The relevant facts of this case, as can be gathered from the agreed facts, the documentary evidence admitted in evidence, and the testimony of the defendant's witnesses, are essentially not in dispute. The plaintiff had loans with the defunct Uganda Commercial Bank which had become non-performing assets in the portfolio of Uganda Commercial Bank.

10. On the 7th March 1996 Uganda Commercial Bank assigned by deed of assignment to the defendant 'loan bal. Shs.49,383,580 as at 31st December 1995 A/C 10-0015.' The defendant approached the plaintiff and got them to sign a repayment proposal which the plaintiffs signed on 6th May 1996, admitted in evidence as Exhibit 28. This repayment proposal sets out the outstanding amounts as on 30.09.94 to be Shs.81,383,580.00 and the particulars thereof are stated to be 'balance confirmed by E & Y'. The next entry is for the same date, and is a debit entry for 'interest updated Jan-Sept 94 for Shs.65,106,864.00.' This brought the total debit balance to Shs.146,490,444.00. The rest of the entries are credit entries showing the monthly payments that the plaintiff was to make to the defendants until the debit balance was 0.

11. The plaintiff did not keep to this schedule but finally the whole amount was paid off save for the discount or waiver of Shs.42,492,356.00 and this is shown in Exhibit D20.

12. It is now the plaintiff's case that defendant was not entitled to demand more than the sum assigned, Shs. 49,383,580.00, and any payment in excess thereof was made under mistake, and the defendant ought to pay back the same to the plaintiff with interest. On the other hand the defendant asserts that it was entitled to recover the loan amount inclusive of outstanding interest, which is what they did. Both parties' counsel filed written submissions.

13. In the written submissions of learned counsel for the plaintiff, Mr. Nestor Byamugisha, the defendant was only entitled to the sum assigned, and in case the defendant had to claim any other sum from the plaintiff, other than the sum assigned, there had to be a fresh new assignment for such new sums of money, which is not the case at hand. He referred to the decisions of the NPART Tribunal in support of his

arguments. These are NPART v West Nile Distilling Co. Ltd, tribunal case no. 28 of 1996 and Paul J Erongot v NPART tribunal case no. 17 of 1996, all unreported. He submitted that the plaintiff had paid the defendant a total of shs.183,129,317.00 when only Shs.43,210,065.00 (sum assigned less the automatic discount of 12.5%) should have been demanded of the plaintiff. The difference, being shs.139,919,232/=, was not due to the defendant and was paid under mistake. This court should order the defendant to pay it back to the plaintiff with interest at the rate of 30%.

14. In the written submissions of learned counsel for the defendant, Dr. Byamugisha, it is contended that the sum assigned had an element of interest which had been suspended but was recoverable. He relies on the deed of assignment and the annexures to the same, which he contends were assigned to the defendant, and not just the sum of Shs.49,383,580.00 only. Dr. Byamugisha further contends that according to the testimony of DW1, Mr. Obbo, an employee with the Bank of Uganda, recovery of a nonperforming asset could involve recovery of all accrued interest up to the time of recovery.

15. Dr. Byamugisha further submitted that according to the testimony of DW2, the amount due had been carefully worked out by Ernest & Young in 1994 who issued their report a year later, presumably in 1995, which arrived at the principal sum and interest that the defendant recovered from the plaintiff, as it was entitled to do.

16. The plaintiff relies on two cases decided by the NPART Tribunal. The first one is Non-Performing Assets Recovery Trust v West Nile Distilling Co. Ltd, Tribunal Case No. 28 of 1996. In that case there was dispute as to what amount was recoverable. Was it to be the sum assigned or a larger amount inclusive of interest?

17. The Tribunal answered the question in the following words,

‘We note that on 5th September, 1995, UCB by deed of assignment assigned to the Plaintiff only Shs.130,388,305/=, which the deed, now annexure "F" to the plaint, described as – "Loan Bal. Shs.130,388,305/= as at 30th September, 1995 A/C 10000479." This was done in virtue of s.11(1) of Statute 11 of 1994. Section 11(2) of the statute reads as follows, "11(2) All assets, rights, liabilities and obligations attached to a non-performing asset transferred by the bank to the Trust under this Section, which immediately before the date of transfer were held by or subsisted against the bank shall subject to any directions given by the Minister in writing, vest in or as the case may be, subsist against the Trust." We have no evidence that the Minister has given any directions in this case. Unless there exists in the Statute an express provision or a provision by necessary implication, conferring power to NPART to charge interest on a non-performing asset upon assignment by UCB, NPART cannot confer upon itself the powers UCB could not exercise at the date of assignment and which were neither conferred by the assignment deed nor by statute. In the case of Paul J. Erongot vs. NPART Tribunal Case No. 17 of 1996, we considered a similar situation and held that NPART (also Plaintiff then) could only recover by action the amount assigned to it by the deed of assignment. We have not been persuaded that that decision was wrong. We propose to adopt the same reasoning. We accordingly hold that the plaintiff in this case can only recover shs.130,388,305.00 which was assigned to it by deed.’

18. In the case of Paul J Erongot v NPART Tribunal Case No.17 of 1996, the plaintiff Paul Erongot was a member of staff of Uganda Commercial Bank. He obtained a loan from the Uganda Commercial Bank to build a home. Over the course of time the parties varied the agreement, waiving off some accumulated interest. At the time of assignment

the loan amount was Shs.229, 035,554.00. When NPART took over the loan, it sought to disregard the interest waived, and claimed Shs289,299.296.00, ignoring the rescheduled payment schedule and amount agreed to between the Plaintiff and Uganda Commercial Bank.

19. The tribunal dealt with the matter in this manner.

‘The second leg of the issue is how much is due and recoverable. As earlier noted, Mr. Byenkya contends that only the assigned amount is recoverable. On the other side Mr. Walubiri contends that the amount is more than that, i.e. Shs.289,299, 296/-. This is the figure which was worked out by Ernest and Young and adopted by D.W.3 and in effect this amount incorporates the interest in arrears which UCB had waived. With some adjustments, this figure is in exh.D2 produced by DW3. It appears to us that by operation of S.11(2) the defendant took over all rights, liabilities, and obligations attached to the loan of the plaintiff. Notwithstanding our findings on issue No.1, we think that, as there was a binding contract between the plaintiff and UCB in respect of the amount outstanding at the time of assignment on 26/2/1996, the defendant inherited the obligations under that agreement. The result is that the defendant can only recover the amount assigned to it, i.e. shs.229,035,554/-. That answers the second leg of the second issue.’

20. It appears to me that the Tribunal in the *Erongot v NPART* (supra) held that the NPART was bound by the agreement between Uganda Commercial Bank and the plaintiff which in effect waived off some interest due on the loan of the Plaintiff to Uganda Commercial Bank, and NPART could not therefore ignore it, and claim that interest waived off. I entirely agree with the reasoning of the Tribunal in *Erongot v NPART* (supra).

21. This is somewhat different from the holding in *Non-Performing Assets Recovery Trust v West Nile Distilling Co. Ltd* (supra) that NPART could not recover more money than was stated in the assignment deed. In particular that NPART could not recover interest at all, unless expressly or by necessary implication authorised by Statute, as UCB itself had no such power. What gives me some disquiet is that the Tribunal adopted the reasoning in *Erongot v NPART*, which was dealing with somewhat different facts from those presented to the tribunal in *Non-Performing Assets Recovery Trust v West Nile Distilling Co. Ltd* (supra).

22. It would appear to me that Section 9(2) of the Nonperforming Assets Recovery Statute Act, (referred to as S.11 (2) by the Tribunal and set out in full), preserved the existing assets, rights, liabilities, and obligations attached to the nonperforming asset, to continue, after the assignment, to vest in or subsist against the Trust. For instance if the nonperforming asset, in case it was a loan, it could still carry interest, if interest had originally attached to the loan, and unless such interest had been waived expressly by UCB or both parties, as was the case in *Erongot v NPART*, such interest would continue to attach to the loan, or nonperforming asset, from the date expressed in such assignment to be the date at which the loan balance assigned was outstanding.

23. The Minister had the power to give directions in writing with respect to such rights, obligations, liabilities or interests and where he/she had not exercised such power, the status quo in law, and by subsisting agreement would remain. In *Non-Performing Assets Recovery Trust v West Nile Distilling Co. Ltd* (supra) it is not clear from the judgment how UCB had lost the power to charge interest. In my humble view, once a nonperforming asset was assigned to NPART, NPART could do what UCB could do with effect from the date of assignment or, as in this particular case, the date expressed

‘as at 31st December 1995’ which is the date up to which the amount assigned had been ostensibly or otherwise calculated. NPART was not entitled to go back, beyond the date of assignment, or the date expressed as ‘as at.....’ and the sum assigned. The date expressed in the deed as the date at which X amount of money was outstanding, for the sum assigned, was the cut off point, or if no such date was expressed in the deed of assignment, the effective date of assignment would be the cut off point.

24. NPART could, in light of Section 9(2) of the statute, if it commenced an action to recover the assigned amount, claim interest that was agreed between UCB and the borrower with respect to the nonperforming asset for the period between the date expressed in the deed of assignment and the date of filing the action. Similarly it could agree with the parties on the issue of interest on the assigned amount from the date expressed in the deed of assignment till payment in full. In my view, there is no prohibition against charging interest post the date expressed in the deed of assignment. What NPART could not do is go behind the assigned sum, and the date referred to therein, as its rights stem from the assignment, including the sum assigned. To that extent I am, respectfully, unable to arrive at the same conclusion as the tribunal did in *Non-Performing Assets Recovery Trust v West Nile Distilling Co. Ltd (supra)*, that NPART could not charge interest.

25. I accept, in part, the submission of Dr. Byamugisha that NPART could charge interest, but only post date expressed in the deed of assignment.

26. In the case before me, the asset assigned was Loan Bal. Shs.49,383,580.00 as at 31st December 1995. These words must be given their ordinary meaning. As of the 31st December 1995, the loan outstanding was shs.49,383,580.00. This must be both the principal and interest as of that date. This is so because the loan outstanding ordinarily and the banking practice must be referring to both loan and interest. It is the balance outstanding as of that date. Had there been any other sums outstanding, this should have been indicated by qualifying that statement and figure assigned.

27. This loan balance was assigned on 7th March 1996. By this date Ernest & Young had presumably reported to whoever they had to report to, and who had to arrange for the assignment. Whether the report of Ernest & Young was taken into consideration before the assignment was not an issue here, and it was not necessary for it to be investigated here. That report could have informed the parties before the assignment, and not after the assignment. The sum assigned of Shs.49,383,580.00 would have to be the starting balance in the account that NPART would open for this plaintiff. It could not be any other figure that was not assigned to it. The basis of any authority for the defendant to recover from the plaintiff was the deed of assignment, and not the report by Ernest & Young, if such report was not acted upon in settling the figure or sum and date expressed in the deed of assignment.

28. The plaintiff was not party to the assignment. It was between the defendant and the Uganda Commercial Bank. These two parties had the benefit of all their records, the reports of Ernest & Young, and whatever else they needed. These two parties determined the asset to be assigned as ‘loan balance of Shs.49,383,580.00 as at 31st December 1995.’ As of 31st December 1995 the loan balance due was Shs.49,383,580.00, and this was the only sum assigned.

29. Dr. Byamugisha contends that what was assigned was not only the sum of Shs.49,383,580.00 but also the annexures to the deed of the assignment. Even if this argument was accepted, the annexures to the deed of assignment did not set out any other sums of money which the defendant would claim, beyond what was assigned. These annexures were the records (one file and ledger cards), which were evidence of the loan, and securities for the loan. The assignee had no right to attempt and derive a

different figure from the ledger cards, for instance, and then claim that such amounts were the sums the defendant was entitled to by 31st December 1994, as the defendant purports to do in Exhibit P30 and Exhibit D20. The sum assigned as at 31st December 1995 could only be shs.49,383,580.00 as this is what the deed of assignment specified. 30. What the defendant claimed from the plaintiff was not this sum assigned but something entirely different. The defendant claimed shs.146,490,444.00 as of 30th September 1994. See Exhibit D19. In law and in fact there was no basis for this claim. This sum was not assigned to the defendant. Any claims of interest had to be on the assigned sum and from the date expressed in the deed of assignment, and if no date was expressed, from the date of the assignment. The opening balance against the plaintiff in the defendant's books of accounts ought to have been Shs.49,383,580.00, the sum assigned, as at 31st December 1995, the date so specified in the deed of assignment, and not Shs.81,383,580.00 plus Shs.65, 106,864.00, wherever and whatsoever derived. In effect the defendant trashed the deed of assignment and embarked on a voyage of their own, completely devoid of authority of any kind.

31. The deed of assignment was executed on 7th March 1996. Five weeks later, as indicated by Exhibit D19, the plaintiff had paid to the defendant a total sum of Shs.54,898,088.00 made up of the Shs.32,000,000.00 as collections thru UCB and Shs.22,898,089.00 being 20% deposit required by NPART. These payments had liquidated the sums assigned with an excess that could have taken care of a proper claim of interest for the period between 1st January 1996 to 30th April 1996.

32. In addition UCB was holding onto spares valued at Shs.24,232,541.00 belonging to the plaintiff which the defendant eventually credited to the plaintiff and lumped it, in what it called a discount/waiver of Shs.42,492,356.00, including a discount that was given to every debtor of 12.5%.

33. On a review of the account of the plaintiff in the defendant's books, it is clear that that the plaintiff paid Shs.128,130,629.00 to the defendant being the difference between the sum, claimed by the defendant from the plaintiff, of Shs.146,490,444.00 less Shs.18,259,815.00, (the actual discount being the difference between the value of the spares and the sum credited to the plaintiff as discount/waiver, which was the discount on the figure claimed.) To that sum of Shs.128,130,629.00, if you add the 12.5% discount (on Shs.49,383,580.00, the sum assigned, which is Shs.6,772,947.50), to which every person who paid 20% of the claim was entitled to, you would get a figure of Shs.134,903,576.50 to the credit of the plaintiff in the defendant's books. Against that amount in the debit column would stand the sum assigned, shs.49,383,580.00, that leaves a credit balance in favour of the plaintiff in the sum of Shs.85,519,996.50.

34. For the said sum of Shs.85,519,996.50 to remain with the defendant would be unjustified unjust enrichment to the detriment of the plaintiff who is the person entitled to the said monies. To this sum must be added interest. The defendant charged the plaintiff interest on the loan at the rate of 30% per annum. This is clearly evident from Exhibit D1, the letter of offer of the loan. It is just and equitable for the defendant to be charged the same rate for the sums of money it extracted out of the plaintiff, without justification whatsoever.

35. I would have been inclined to order interest on the above sum from the 24th September 1996 when the plaintiff made the last payment directly to the defendant, and by which date the defendant was in possession of all the sums I have found to be due to the plaintiff though portions thereof had got into the defendant's or UCB's possession earlier in the year, 1996, to the date of this judgment. However, as counsel for the plaintiff has prayed for interest effective from the 19th February 1999, I will order

interest at the rate of 30% per annum to be paid from 19th February 1999 till the date of this judgment.

36. Accordingly I enter judgment for the plaintiff in the sum of Shs.85,519,996.50 together with interest at the rate of 30% per annum from 24th September 1996 to the date of this judgement, and thereafter at court rate till payment in full, and costs of this suit.

Signed, dated and delivered this 21st day of February 2007

FMS Egonda-Ntende
Judge