THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL DIVISION)

MISCELLANEOUS APPLICATION NO. 2050 OF 2023
ARISING FROM CIVIL SUIT NO. 404 OF 2018

GABAS INVESTMENTS LIMITED
T/A AIRPORT VIEW HOTEL :: APPLICANT

VERSUS

EXIM BANK (UGANDA) LIMITED :: RESPONDENT

(Before: Hon. Lady Justice Patricia Mutesi)

RULING

Background

This application is brought by notice of motion under **Section 33** of the **Judicature Act Cap 13, Sections 82** and 98 of the **Civil Procedure Act Cap 71** and **Order 52 rules 1** and **3** of the **Civil Procedure Rules S.I. 71-1** seeking the following orders and reliefs:

1. The consent judgment and decree entered on 14th December 2022 by this Honourable Court vide Civil Suit No. 404 of 2018 (Gabas Investments Limited t/a Airport View Hotel v Exim Bank (Uganda) Limited) be reviewed and set aside; and
2. Civil Suit No. 404 of 2018 (Gabas Investments Limited t/a Airport View Hotel v Exim Bank (Uganda) Limited) be set down for hearing on the merits inter parties.

The grounds of this application are that:

1. At the time of execution of the consent judgment, the applicant believed that Microfinance Support Centre Ltd ("MSC") was going to lend to it UGX

1,400,000,000/= which would be applied to the payment of the first installment under the consent.

2. However, unbeknownst to the applicant, MSC had changed and adopted policies which preclude the refinancing of non-performing loans.
3. The applicant has not been able to secure alternative funding to meet the obligations stipulated in the consent judgment of 14th December 2022 due to the mistaken belief that MSC was to avail funds for the settlement of the first installment under the consent.
4. The consent judgment entered did not constitute an admission of liability, but rather sought to amicably and summarily end the dispute.
5. However, the occurrence of unforeseen events over which the applicant had no control has rendered the consent judgment impossible to perform.
6. The applicant prays that this Honourable Court does set aside the consent judgment for the reasons stated and proceeds to hear and determine the case on its merits.
7. This application has been brought in good faith and due to unavoidable and unforeseen circumstances.
8. It is in the interests of justice and equity that this application is allowed.

The application is supported by the affidavit of James Byagaba, a director in the applicant. Briefly, he asserts that the applicant obtained a term loan of USD 600,000 on 1st September 2014 from Imperial Bank (Uganda) Limited (now Exim Bank Uganda Limited – the respondent) for construction and furnishing of 9 additional rooms and for refinancing term loans with Stanbic Bank and East African Development Bank. The applicant obtained an additional term loan of USD 490,000 on 22nd March 2016 from the respondent to construct and furnish 10 rooms. The two credit facilities, totalling to USD 1,090,000, were secured by two properties to wit LRV 2692 Folio 24 Plot 34 Kiwafu Close, Entebbe and LRV 4409 Folio 10 Plot 36A Kiwafu Close, Entebbe on which Airport View Hotel is located ("the suit land"). Upon completion of construction, the applicant applied for another additional loan of USD 60,000 for furnishing but the respondent only offered and disbursed UGX 157,971,923.

On 26th July 2017, the applicant applied for restructuring of its credit facilities and for additional financing support. However, the respondent declined both requests on 12th October 2017. The respondent rejected a subsequent proposal for refinancing of the loan from Stanbic Bank and proceeded to categorise the loan as non-performing. It demanded that all arrears be cleared and went ahead to advertise the suit land for sale on 9th April 2018. The applicant then filed the main suit in this Court to stop the sale. On 30th May 2019, the Minister for Finance, Planning and Economic Development wrote to Uganda Development Bank (UDB), MSC and the respondent recommending syndicated financing of UGX 3,000,000,000 to refinance the loan with the respondent and to operationalize all the rooms at Airport View Hotel. MSC agreed to lend UGX 1,500,000,000 to the Applicant, most of which was to be used for the partial settlement of the loan. Mr. Byagaba asserted that it is on that basis that the applicant entered into the consent on 14th December 2022 and settled the main suit. That however after the consent, the applicant learnt that MSC had changed its financing policy and that MSC was now precluded from refinancing non-performing loans. That therefore this made it impossible for the applicant to fulfill the consent.

The respondent strongly opposed the application through an affidavit in reply sworn by John Nambale, its Legal and Company Secretary. He reminded the Court that the main suit was initially settled through the consent judgment of 1st November 2018, but the applicant failed to comply with that Consent and instead applied to set it aside on the ground of being misadvised by its lawyers. The application was allowed on 13th April 2021 and the main suit was set down for hearing on its merits.

Mr. Nambale further averred that when the main suit came up for hearing in December 2022, the applicant again requested that the matter be mediated and settled out of court. The parties, upon mediation, entered into another consent judgment on 14th December 2022. The applicant still failed to honour this 2nd consent forcing the respondent to institute execution proceedings, and this Court has since allowed execution to proceed. However in a total turn around,

similar to the one in 2019, the applicant has now brought this application to set aside the consent and frustrate the respondent's recovery effort.

Mr. Nambale maintained that that the respondent is not privy to the applicant's arrangements with its financiers. He believes that the consent is still capable of being performed since no specific source of refinancing was named in the consent. He also believes that the applicant ought to have secured refinancing from other financiers if MSC had declined. He, therefore, asserted that this application is meritless and ought to be dismissed.

The applicant filed an affidavit in rejoinder also sworn by James Byagaba, its director. He reiterated that at the time the applicant entered the consent, MSC had committed to refinance part of its loan with the respondent. For this reason, the applicant was certain that it would be able to honour the terms of the consent. Mr. Byagaba added that clause 3 of the consent provides for sharing of securities on a pari passu basis because both parties were aware that the only way the applicant would be able to settle the respondent's claims was by accessing a refinancing facility which would necessitate security sharing. He maintained that the respondent had been engaged in the initial attempts to secure syndicated funding from MSC and UDB. Reiterating that the application was brought in good faith, Mr. Byagaba concluded that the applicant's failure to honour the terms of the consent judgment resulted from unforeseen circumstances outside its control.

Representation and hearing

At the hearing of this application, the applicant was represented by Mr. Francis Gimara, S.C., Mr. Lastone Gulume and Ms. Lucy Suki from M/S ALP Advocates while the respondent was represented by Mr. Eriya Mikka from M/S MMAKS Advocates. I have carefully reviewed the materials on record, the submissions of the parties and the laws and authorities cited.

Issue arising

1. Whether this application discloses any ground which justifies setting aside the Consent Judgment of 14th December 2022.

Determination

The parameters within which a consent judgment and, or, decree can be interfered with and set aside have been well established by the courts. In **Attorney General & Anor v James Mark Kamoga & Anor, Supreme Court Civil Appeal No. 8 of 2004**, the Supreme Court of Uganda re-stated the following legal principle upon which a consent judgment can be interfered with and set aside by Court;

> *"... The principle upon which the court may interfere with a consent judgment was outlined by the Court of Appeal of East Africa in* ***Hirani vs. Kassam (supra)*** *in which it approved and adopted the following passage from* ***Seton on Judgments and Orders, 7th Ed., Vol. 1 p. 124****:*
>
> > ***"Prima facie, any order made in the presence and with consent of counsel is binding on all parties to the proceedings or action, and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court ... or if the consent was given without sufficient material facts, or in misapprehension or in ignorance of material facts, or in general for a reason which would enable a court to set aside an agreement."***
>
> *"... It is a well settled principle therefore that a consent decree has to be upheld unless it is vitiated by a reason that would enable a court to set aside an agreement, such as fraud, mistake, misapprehension or contravention of court policy. This principle is on the premise that a consent decree is passed on terms of a new contract between the parties to the consent judgment."* (Emphasis mine).

In the instant case, the applicant seeks to have the consent judgment and decree of 14th December 2022 set aside on grounds that the same was entered into under a unilateral misapprehension of facts. The applicant contends that at the time, it honestly but mistakenly believed that MSC would extend to it a credit facility which would enable it to settle the first installment under the consent. However Counsel for the respondent contested the alleged misapprehension of facts and clarified that at the time the consent was entered, the applicant was already aware that MSC's financing, which was conditioned upon the respondent's prior consent which had already been denied, would not be extended. I am inclined to agree with the respondent for the reasons stated below.

First, the true construction of the consent judgment shows that the applicant's commitments therein were not tied to, and solely dependent on the then proposed MSC facility. In relevant part, the consent provided:

> *"1. The Plaintiff shall pay to the Defendant a total sum of UGX 3,469,181,573 as full and final settlement of its debt to the Defendant. The UGX 3,469,181,573 shall be paid as follows:*
>
> *1.1 The Plaintiff shall pay UGX 1,500,000,000 within a period of two (2) months from the 15th day of January 2023.*
>
> *1.2 The balance of UGX 1,969,181,573 shall be paid in twenty (20) equal quarterly installments after receipt of the first installment in 1.1 above.*
>
> *2. In the event the Plaintiff fails to pay the sum of UGX 1,500,000,000 in (2) above within the stipulated time or fails to pay two (2) consecutive quarterly installments in (1.2) above, the Defendant shall be at liberty to sell the mortgaged properties or institute execution proceedings to recover the outstanding balance.*

3. *The Defendant shall agree to the mortgaged properties being held on pari passu basis with the financial institution that may advance credit to the Plaintiff.*

4. *The Plaintiff's directors agree that they have entered this consent voluntarily and that this consent is entered without any undue influence, duress or misrepresentation ..."* (Underlining for emphasis).

From the above it is evident that the parties did not agree on a specific person or institution which was to finance the performance of the consent. The consent left all options open to the applicant to source funding. If the parties had wanted to condition the performance of the consent on the receipt of funding from MSC, they would have said so expressly in the consent.

Thus since all financing options were open to the applicant, any misapprehension about the ability of one financier to provide refinancing is inconsequential to the validity of the consent. The applicant was obligated to pursue any and all other financing options. Therefore, even if this Court was to accept that there was a misapprehension of facts as alleged by the applicant, I would still find that the misapprehension does not vitiate the consent judgment in any way because the terms of the consent allowed the applicant to explore other sources of refinancing.

Mr. Byagaba, the applicant's director, asserted at paragraph 6 of the affidavit in rejoinder that clause 3 of the consent was added because both parties anticipated that the applicant would obtain refinancing in order to perform the terms of the consent. While this is true, the parties did not ring-fence the applicant's refinancing options in the consent. In fact from the correspondence on record, it appears that at the commencement of the refinancing discussions in 2019, both MSC and UDB were potential options. The true import of the consent is that once refinancing from one possible financier is frustrated, the applicant is supposed to explore and engage other financiers in order to comply with the consent. As counsel for the respondent rightly submitted, clause 3 of

the consent was included only for purposes of opening up the security so that the applicant can source for financing from any institution of its choice.

Furthermore this application has shown that the MSC facility would only have financed part of the 1st installment in the consent. The 1st installment was UGX 1,500,000,000 yet the MSC facility was supposed to have been only UGX 1,400,000,000. Thus, the applicant was supposed to top up the balance of UGX 100,000,000 to make the 1st installment and to finance all the remaining quarterly installments from other sources. As such, even if the applicant had been mistaken as to the MSC financing policy as has been asserted, that would have only have affected UGX 1,400,000,000 for the first installment. Other payments like the top-up of UGX 100,000,000 and some of the quarterly payments would already have been deposited with the respondent, as they fell due, by this time. However, the applicant has still not made any of these other payments to this day.

Secondly, I am not satisfied that there was any "misapprehension of facts" at all in this case. Counsel for the applicant defined "misapprehension" to mean a "misperception", "miscomprehension" or a "misbelief". Even by that rather limited definition, it is clear that there was no misperception, miscomprehension or misbelief regarding the then proposed MSC facility at the time the consent was entered on 14th December 2022. This is because, as counsel for the respondent correctly submitted, both parties were, at that time, well aware that the MSC facility would not be extended since the respondent had not agreed to the arrangement.

The correspondence leading up to the proposed MSC facility shows that the facility had been conditioned upon consent and compliance from the respondent who was required to submit certain commitments to MSC before the facility could be extended. On 5th June 2019, the respondent unequivocally clarified that it was not willing to take part in any syndicated lending arrangement with MSC. Without securing these critical commitments by 14th December 2022, the applicant entered into the consent with actual notice and

full knowledge that the MSC facility would not be extended. For this reason, I find that the applicant's claim that it entered the consent honestly believing that it would get money from MSC is not credible.

In any case, contrary to the applicant's assertions, the respondent was not under any duty, at any material time, to assist the applicant with its refinancing efforts. The respondent is a secured creditor. It disbursed facilities to the applicant who was obliged to repay the same with interest within the agreed timelines. It is doubtful whether any cause of action could arise, whether in law or in the loan agreements between the parties, from any alleged "refusal to assist in refinancing proposals", especially when all such proposals involved creating further encumbrances on the security already held by the respondent in respect of a non-performing loan which would have created more vulnerability for the secured creditor. In my considered view, the respondent was always at liberty to agree or not to agree to any refinancing proposal.

In light of the foregoing, this application does not disclose any ground to justify this court setting aside the Consent Judgment of 14th December 2022. Consequently, I make the following orders:

i. This application is hereby dismissed.

ii. Costs of this application are awarded to the respondent.

.....

Patricia Mutesi

JUDGE

(15/11/2023)