



**IN THE HIGH COURT OF UGANDA SITTING AT KAMPALA
COMMERCIAL DIVISION**

Reportable
Miscellaneous Application No. 2493 of 2023

In the matter between

- 1. VS HYDRO UGANDA LIMITED**
- 2. VS HYDRO (PVT) LIMITED**
- 3. BENTHOTAGE NISHAN CHANDANA MAHANAMA**
- 4. PRABODHA KESHANA SUMANASEREKA** **APPLICANTS**

And

UAP OLD MUTUAL INSURANCE UGANDA LTD **RESPONDENT**

Heard: 04 March, 2024.

Delivered: 20 March, 2024.

***Civil Procedure** - unconditional leave to appear and defend a suit - the court merely considers whether the facts alleged by the applicant constitute a good defence in law and whether that defence appears to be bona fide - a frivolous defence is one whose intention is to stall and wrongfully delay settlements of a legitimate claim.*

***Construction** - Indemnities - a counter indemnity creates an obligation to make a reimbursement in relation to a primary indemnity, guarantee, bond or any similar arrangement - as long as the guarantor's demand under the counter indemnity complies with the requirements of its terms, the guarantor is entitled to payment (in the absence of established fraud or another ground for non-payment), whether or not the guarantor has paid the beneficiary or has received a demand for payment or is legally liable to pay a demand received - established fraud on the part of the insurer as beneficiary under the counter indemnity is an exception to the principle that the demand counter indemnity is payable on the presentation of a demand regardless of whether the obligations in the underlying contract or the principal guarantee have been performed or not - being autonomous agreements, it*

does not matter whether the claim against the principal guarantee was made outside the time limit; what matters is whether or not the counter indemnities were claimed within the agreed period of time, and in this case they were. Counter indemnities are viewed by the Courts as absolute undertakings to pay if the conditions of payment are satisfied.

RULING

STEPHEN MUBIRU, J.

Introduction:

- [1] On or about 9th February, 2017 and 31st March, 2017 the 1st and 2nd applicants and M/s Rwenzori Hydro (PVT) Limited and M/s Greenewus Energy Africa Limited executed three separate Engineering, Procurement and Construction Turnkey Contracts in respect of the Nyamagasani I Hydro power project, Nyamagasani II Hydro power project and Kakaka Hydropower project in Kasese District respectively, which required the 1st applicant to obtain advance payment and performance guarantees from a reputable insurance company, to secure the repayment of the sum of US \$ 3,000,000 advanced to the 1st applicant under a facility letter doted 11th August 2020. The 1st applicant duly obtained the requisite guarantees from the respondent, issued on condition of the 1st and 2nd applicants issuing general counter indemnities, while the 3rd and 4th applicants were required to take out personal counter indemnities. The respondent then issued three advance payment bonds and two performance bonds.
- [2] Under the general counter indemnities, the applicants undertook, *inter alia*, to indemnify the respondent against all claims and liabilities under any or all of the said Bonds, to pay on demand to the respondent the full amount of such monies together with all costs and expenses incurred by the respondent in respect thereof. All the bonds in respect of which the counter-indemnities were given were called on by M/s Rwenzori Hydro (PVT) Limited on 5th December, 2021 and M/s Greenewus Energy Africa Limited on 10th February, 2022.

- [3] By Miscellaneous Application No. 0030 of 2022, the applicants sought to secure a temporary injunction order restraining the respondent, its agents, receivers, managers, servants, assignees or any other person acting under or pursuant to its authority, from effecting payment on the demand on the two performance bonds and three advance payment bonds, until final determination and disposal of the main Civil Suit No. 251 of 2023 filed by M/s Rwenzori Hydro (PVT) Limited. In a ruling delivered on 13th March, 2023, the application was allowed in respect of one performance bonds but dismissed in respect of the three advance payment bonds and one of the performance bonds.
- [4] Subsequently, the applicant's application No. 0453 of 2023 seeking leave to appear and defend the suit was dismissed on 11th July, 2023. Consequent thereto, judgment was entered for M/s Rwenzori Hydro (PVT) Limited against the applicant in respect of; (i) advance Payment Bond No. 010/133/1/000716/2020 dated 30th August, 2021 for the sum of US \$ 3,000,000; (ii) advance Payment Bond No. 010/133/1/000717/2021 dated 2nd February 2021 for the sum of US \$ 1,500,000; (iii) advance Payment Bond No. 010/133/1/000711/2019 dated 29th July, 2021 for the sum of US \$ 800,000; (iv) Advance Payment Bond No. 010/133/1/000709/2019 dated 9th February, 2018 for the sum of US \$ 550,000; and (v) Performance Bond No. 010/132/1/001060/2018 dated 9th February, 2018 for the sum of US \$ 982,325. The total decretal amount was to bear interest at the rate of 6% per annum from the date of judgment until payment in full. The respondents were awarded the costs of the suit.
- [5] On account of that outcome, by a consent execution order dated 31st August 2023, the respondent entered into a payment arrangement with both M/s Rwenzori Hydro (PVT) Limited and M/s Greenewus Energy Africa Limited. On 12th September, 2023 the respondent in turn filed a summary Civil Suit No, 1052 of 2023 seeking recovery under the General Counter Indemnities and Personal Counter Indemnities.

The application.

- [6] The application by Notice of motion is made under the provisions of section 98 of *The Civil Procedure Act*, section 33 of *The Judicature Act*, Order 36 rules 3 and 4; and Order 52 rules 1 and 3 of *The Civil Procedure Rules*. The applicants seek an order granting them leave to appear and defend the suit. It is the applicants' case that the General Counter Indemnities issued in favour of bond No. 10/133/1/000709/2019 by the 1st applicant on 1st March 2022 after a call on the bond was made on 14th February 2022 should not have been honoured since there were no valid bonds to underwrite or be secured under the General Counter Indemnities. The Personal Counter Indemnity issued by the 3rd and 4th applicants in relation to bond No. 010/132/1/001060/2018 had expired on the 14th February, 2022 when the call on the bond was made.
- [7] The respondent cannot make a call on the 3rd and 4th applicants to indemnify it based on a Personal Counter indemnity that was executed after the call since there were no valid bonds to underwrite. The General Counter Indemnities and Personal Counter Indemnities issued on 1st March, 2022 and expiring on 31st August, 2022 referring to bond Nos. 010/132/1/001060/2018 and 010/133/1/000709/2019 were made under the representation by the respondent that it would renew the bonds but the same were never renewed by the respondent, thus the indemnities are void and unenforceable. The calls on the General Counter indemnities and Personal Counter Indemnities securing bonds No. 010/133/1/000716, 010/133/1/000717 and 010/133/1/000711/2019 were made when there was an interim injunction restraining the making of a call and payment under the underlying Advance Guarantees and Performance Guarantees, which in essence prohibited a call on the General Counter Indemnities and the Personal Counter Indemnities.
- [8] It is further the applicants' case that the respondent was fully aware that the call by the beneficiary had to include a statement detailing the amortized amount and

any liability arising from the General Counter Indemnities and Personal counter Indemnities issued by the applicants was only in relation to the un amortized amounts and not the face value of the bonds. The respondent by oath has numerously stated that the call on underlying advance payment guarantees and performance guarantees are fraudulent, unconscionable, made in bad faith and contrary to rules governing advance payment guarantees and performance guarantees and thus a call on General Counter Indemnities as well as Personal Counter Indemnities based on a fraudulent, unconscionable call arising on the Advance payment Guarantees and performance guarantees cannot be made.

The respondent's affidavit in reply:

- [9] In the respondent's affidavit in reply, it is contended that the Bonds alluded to had not expired at the time that the respondent made the calls on the Counter indemnities since, contrary to the applicants' allegation, Bonds No. 010/132/1/1060/2018 and 010/133/1/000709/2019 had "Bond Periods" from 15th March, 2018 to 28th February, 2022 and from 1st September, 2021 to 28th February, 2022 respectively. The calls on both bonds were made on 1st February, 2022, and received by the respondent on 14th February, 2022 well within the bond period. Counter indemnities, are payable on-demand, notwithstanding any alleged dispute regarding the underlying bond which they were issued to secure. According to the terms of the counter indemnities, the respondent was entitled to call on the counter indemnities whenever notification of claim or potential claims was received in respect of any one of the said Bonds. The calls on the counter indemnities were made strictly within the terms of the counter indemnities since they were called following the notification of potential claims in respect of the Bonds they were issued to secure. The Counter indemnities are independent/autonomous contracts obliging the applicants to pay the respondent in the event that the respondent makes demands in accordance with the wording of the Counter indemnities.

Submissions of counsel for the applicants:

[10] Counsel for the applicants submitted that there were procedural errors by the respondent when they failed to make an effective rejection of the calls. In some of the bonds there was no response at all to the call and in another matter, there was delay in response. The liability is contested between the contractor and the employer which gives rise to the call and the subsequent call to the counter indemnities. The respondent is at fault for failure to disclose. Annexure B3 was called in February, 2022 relating to non-extension. The bonds were to expire on 14th February, 2022. The call was made on 15th March, 2022. It was made almost a month after expiry. Bond B4 relates to a call on a bond of a lower amount against the terms of the contract. They paid more than was due under that bond. Bond B1 the counter indemnities had expired before the bond was called. This applies to B5. They expired 31st Augst, 2021 and the call was on 14th February, 2022. B3 the call was made on 14th February, 2022 yet the counter indemnity was created on 1st March, 2022 expiring on 31st August, 2022. It therefore did not exist at the time the call was made. The respondent seeks to benefit from its breach. It failed to extend the bonds as requested. There was an undertaking for extension.

Submissions of Counsel for the respondent:

[11] Counsel for the respondent submitted that payment of more than was due was based on an order of the court. The counter indemnities are payable against all claims and liabilities. The respondent's claim does not go beyond what court ordered. There is no draft defence attached. *In S. M Ssebowa Family Ltd v. Manna Harvesters International Ltd. C. A. Civil Appeal 161 of 2017* it was held that failure to attach the proposed defence is fatal. Bond 709 of 2019 and that of 1060 of 2018 are the alleged counter indemnities made after expiry. There is no expiry date for the counter indemnities. Annexure E2 is dated 1st March, 2021 the time indicated must be that of the bond. Para 17, 18, 19 and 20 of the affidavit in support and para 15 of the rejoinder. Calls were made on 10th February, 2020 and 14th

February, 2022. Annexure D3 and D5 run from 1st September, 2021 to 28th February, 2022.

The decision.

- [12] Under Order 36 rule 4 of *The Civil Procedure Rules*, unconditional leave to appear and defend the suit will be granted where the applicant shows that he or she has a good defence on the merits; or that a difficult point of law is involved; or that there is a dispute which ought to be tried, or a real dispute as to the amount claimed which requires taking an account to determine or any other circumstances showing reasonable grounds of a bona fide defence (see *M.M.K Engineering v. Mantrust Uganda Ltd H. C. Misc Application No. 128 of 2012*; *Bhaker Kotecha v. Adam Muhammed [2002]1 EA 112*; and *Makula Inter global Trade Agency v. Bank of Uganda [1985] HCB 65*). The applicant should demonstrate to court that there are issues or questions of fact or law in dispute which ought to be tried. The procedure is meant to ensure that a defendant with a triable issue is not shut out.
- [13] In an application of this nature, there must be sufficient disclosure by the applicant, of the nature and grounds of his or her defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. To this end, the applicant cannot merely rely on conclusions in law but must set out actual evidence. A court that is satisfied that this threshold has been crossed is then bound to grant unconditional leave. Where court is in doubt whether the proposed defence is being made in good faith, the court may order the defendant to deposit money in court before leave is granted.
- [14] Wherever there is a genuine defence either to fact or law the defendant is entitled for leave to appear and defend. The applicant is not at this stage required to persuade the court of the correctness of the facts stated by it or, where the facts are disputed, that there is a preponderance of probabilities in their favour, nor does the court at this stage endeavour to weigh or decide disputed factual issues or to

determine whether or not there is a balance of probabilities in favour of the one party or another. The applicant must show a state of facts which lead to the inference that at the trial of the suit he or she may be able to establish a defence to the plaintiff's claim, in which case he ought not to be debarred of all power to defeat the demand upon him. The court merely considers whether the facts alleged by the applicant constitute a good defence in law and whether that defence appears to be bona fide. In order to enable the court to do this, the court must be apprised of the facts upon which the defendants rely with sufficient particularity and completeness as to be able to hold that if these statements of fact are found at the trial to be correct, judgment should be given for the defendant.

[15] The applicant, in his or her affidavit in support of the application, must fully disclose the nature and grounds of the defence and the material facts on which it is based. The applicant must depose to facts which, if accepted as the truth or proved at the trial, would constitute a defence to the plaintiff's claim. While it is not incumbent upon the applicant to formulate the defence with the precision that would be required in evidence, nonetheless the applicant must do so with a sufficient degree of clarity to enable the court to ascertain whether the applicant has deposed to a defence which, if proved at the trial, would constitute a good defence to the suit.

[16] Such a defence should not be averred in a manner that appears to be needlessly bald, vague or sketchy. If the defence is based upon facts, in the sense that material facts alleged by the plaintiff in the plaint are disputed or new facts are alleged constituting a defence, the court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party or the other. If the defence is averred in a vague, bald or sketchy manner, that may be taken into account when determining whether the applicant has a bona fide defence or not.

[17] On the other hand, a triable issue is one capable of being resolved through a legal trial i.e., a matter that is subject or liable to judicial examination in court. It has also

been defined as an issue that only arises when a material proposition of law or fact is affirmed by the one party and denied by the other (see *Jamil Senyonjo v. Jonathan Bunjo, H.C. Civil Suit No. 180 of 2012*). A judgment under summary procedure is based upon a contention that all necessary factual issues are settled or so one-sided that they need not be tried. Leave to appear and defend must be given only if the court is satisfied that there is a triable issue in the sense that there is a fair dispute to be adjudicated. The issue raised should not be illusory or sham or practically moonshine. Consequently, when an application for leave to defend is made on basis of the existence of triable issues of fact, the applicant must fully disclose the nature and scope of the material facts to be tried.

[18] The law requires that the defendant, in his affidavit supporting the application, must fully disclose the nature and grounds of the defence and the material facts on which it is based. All that the court enquires, in deciding whether the applicant has set out a bona fide defence, is: (a) whether the applicant has disclosed the nature and grounds of its defence; and (b) whether on the facts so disclosed the applicant appears to have, as to either the whole or part of the claim, a defence which is bona fide and good in law.

[19] A frivolous defence is one whose intention is to stall and wrongfully delay settlements of a legitimate claim. By raising frivolous defences and defending the indefensible, such tactics needlessly prolong cases, waste courts' time and other resources. A defence is frivolous where it lacks an arguable basis either in law or fact. Put another way, a defence is frivolous when either (1) the factual contentions are clearly baseless, such as when allegations are the product of delusion or fantasy; or (2) the defence is based on an indisputably meritless legal theory. The factual theory presented by the applicant is clearly meritless.

[20] To merit a grant of leave to appear and defend, the defence proffered must amount to more than mere assertion or statement. There must be substance to the proposed defence. Mere averment in the affidavit supporting the motion will not

suffice unless the document to support of the averment is attached. The Court will examine the motion for specificity as also the supporting material for sufficiency and then pass appropriate orders. If the applicant's pleadings do not give sufficient details, they will not raise plausible defence, and the Court can reject the application and pass a decree. According to Order 6 rule 30 (1) of *The Civil Procedure Rules*, the court may order any pleading to be struck out on the ground that it discloses no reasonable answer and in case of the defence being shown by the pleadings to be frivolous or vexatious, may order judgment to be entered accordingly, as may be just.

[21] In this application, it is the applicants' case that there are triable issues arising from its plausible defence to the effect that the respondent failed in its duty to reject the call for being non-compliant, there were no valid bonds to underwrite at the time the calls were made since the bonds had expired, the personal counter indemnities were made under the representation by the respondent that it would renew the bonds which it never renewed rendering the indemnities void and unenforceable, there was an interim injunction restraining the making of calls and payment under the underlying Advance Payment Guarantees and Performance Guarantees at the time the respondent acted on them, and the liability of the 3rd and 4th applicants was limited to the un amortized amounts and not the face value of the bonds.

[22] It is trite that a counter indemnity creates an obligation to make a reimbursement in relation to a primary indemnity, guarantee, bond or any similar arrangement. Where a counter indemnity is given to an insurance company in return for the insurance company issuing an advance payment or performance guarantee, the indemnity may be enforced by the insurance company notwithstanding the fact that the advance payment or performance guarantee and the underlying contract to which they relate are invalid and unenforceable.

[23] An "indemnity" is a core risk shifting provision of a legal contract, obligating one party (the "indemnitor" or the "indemnifying party") to compensate and reimburse (or

“indemnify”) the other party (the “indemnitee” or the “indemnified party”) for certain losses such as monetary costs and expenses (the “indemnified losses”) which arise from, result from or relate to certain acts, omissions or occurrences defined in the contract (the “scope of the indemnity”). By their respective counter indemnities, the applicants undertook;

To indemnify the Surety against all claims and liabilities under any or all of the said Bonds and if the Surety is called upon to pay any monies under any or all of the said Bonds, to pay on demand to the Surety the full amount of such monies together with all costs and expenses incurred by the Surety in respect thereof. In pursuance of this Counter indemnity the Surety shall be entitled whenever notification of claim or potential claims is received in respect of any one of the said Bonds to call upon the indemnitor to deposit with the Surety the full amount of the said Bond or Bonds such deposit or deposits shall be paid by the indemnitor to the Surety within 14 days after request in writing and the Surety may use such monies to settle claim or claims together with costs and expenses in connection herewith. If there is a surplus in the hands of the Surety after settling all such claims, costs and expenses such surplus shall be refunded forthwith to the indemnitor but if there is a deficiency then the amount of such deficiency shall be paid by the indemnitor to the Surety forthwith upon request in writing

- [24] Under an indemnity, the indemnifier undertakes a primary obligation or liability to pay or discharge the amounts or liabilities owing as its own, new liability. The “principle of independence” or “autonomy” applies to counter-indemnities rendering them independent of the principal guarantee. Thus, the liabilities undertaken by the indemnifier are new primary liabilities of that person and so the defences that might be available to a third party in respect of the liabilities which are the subject of the indemnity will not, as a rule, be available to the indemnifier so as to limit its liability under the indemnity. The counter-guarantee possesses the same independence from the demand guarantee as the latter from the underlying contract between the principal and the beneficiary.

[25] Accordingly, as long as the guarantor's demand under the counter indemnity complies with the requirements of its terms, the guarantor is entitled to payment (in the absence of established fraud or another ground for non-payment), whether or not the guarantor has paid the beneficiary or has received a demand for payment or is legally liable to pay a demand received (see *Denel Soc Limited v. Absa Bank Limited and others* [2013] 3 All SA 81). Consequently, since a demand counter indemnity is independent of the principal guarantee and of the underlying contract between the principal and the beneficiary, regardless of any dispute between the parties to the underlying contract or the principal guarantee, upon the insurer receiving notification of claim or potential claims in respect of the principal guarantee, or paying any monies under the principal guarantee, the counter indemnity must be paid on demand, as long as there is no fraudulent collusion between the insurer and the beneficiary under the principal guarantee.

[26] While established fraud on the part of the insurer as beneficiary under the counter indemnity is an exception to the principle that the demand counter indemnity is payable on the presentation of a demand regardless of whether the obligations in the underlying contract or the principal guarantee have been performed or not, the applicants have not advanced fraudulent collusion on the part of the respondent as part of the proposed defence. For the fraud exception to apply to demand counter indemnities, the fraud must have been committed by the beneficiary (or his agent with the beneficiary's knowledge) and not by a third party. Even where the fraud relates to a forgery or materially fraudulent document, the fraud must have been committed by the beneficiary for the exception to apply.

[27] The applicants have not pleaded any fraud on the part of the respondent in effecting payment under the principal guarantees, nor in making the call under the counter indemnities. They have instead advanced the argument that there were no valid bonds to underwrite at the time the calls were made since the bonds had expired, and that the personal counter indemnities were made under the representation by the respondent that it would renew the bonds which it never

renewed rendering the indemnities void and unenforceable. Both arguments cannot override the autonomy and strict compliance principles, While the principle of autonomy detaches the payment obligation under these instruments from the performance of the underlying contract, that of strict compliance requires payment to be made where the documents presented are precisely those the instrument calls for.

[28] The rule of strict documentary compliance requires not only that the tendered documents appear on their face, upon reasonably careful examination, to conform to the terms and conditions of the demand guarantee but that they also appear to be consistent with one another. The rule of strict documentary compliance does not extend to minor variations or discrepancies that are not sufficiently material to justify a refusal of payment. Therefore, where the documents presented were in strict compliance with their description in the advance or performance guarantee and were conforming, payment had to be made as directed by the Court. The respondent was acting in compliance with an order of Court. The challenge to that payment presented by the applicant cannot override the Court order.

- i. The proposed defence that the bonds had expired at the time the calls were made.

[29] Having examined the documentary evidence submitted by both parties, I find that contrary to the averments contained in the affidavit in support of the application and the submissions of counsel for the applicants, bond numbers 010/132/1/1060/2018 and 010/133/1/000709/2019 had “Bond Periods” running from 15th March, 2018 to 28th February, 2022 and from 1st September, 2021 to 28th February, 2022 respectively. The calls on both bonds were made on 1st February, 2022, and received by the respondent on 14th February, 2022 well within the respective bond period. This aspect of the proposed defence therefore is devoid of a factual basis.

[30] In any event, being autonomous agreements, it does not matter whether the claim against the principal guarantee was made outside the time limit; what matters is whether or not the counter indemnities were claimed within the agreed period of time, and in this case they were. Counter indemnities are viewed by the Courts as absolute undertakings to pay if the conditions of payment are satisfied. In this respect they are similar to a banker's confirmed documentary credit and many of the considerations applying to the latter apply also to the counter indemnities just as they apply to the underlying demand guarantees.

ii. The proposed defence that the personal counter indemnities were made under the representation by the respondent that it would renew the bonds.

[31] It was counsel for the applicant's submission that the respondent seeks to benefit from its breach in that it failed to extend the bonds as requested, yet it had made an undertaking for extension as illustrated by annexure "S" to the affidavit in support of the application. The available documentation shows that the 1st applicant made a request for bond extension on 30th November 2021 and the respondent replied on 2nd December 2021, indicating that the bonds would be extended subject to the applicant sharing original documents, paying the premium to underwrite the extension and approval by the Insurance Regulatory Authority.

[32] It is trite that a promise not supported by consideration is not a binding contract and is thus unenforceable (see *Balfour v. Balfour* [1919] 2 KB 571 and *Merritt v. Merritt* [1970] 2 ALL ER 760). Having perused the documents referred to as proof of consideration, I find that they are in respect of Industrial all Risk Insurance Policies and not the advance payment and performance bonds secured by the counter indemnities in issue in the present application. Therefore, they do not offer proof of payment of premiums as consideration for the undertaking to renew the underlying advance payment and performance bonds. Secondly, the undertaking to renew was conditional and by the time the call on the bonds were made on 5th December, 2021 primarily owing to the applicants' non-payment of the advance

payment guarantees, the Insurance Regulatory Authority had not approved the respondent's license, such that the eventual variation of the respondent's bond issuance license on 19th October, 2021 proved inconsequential. Furthermore, there is no evidence to show that the personal counter indemnities were made on 17th August, 2021 under any representation by the respondent that it would renew the advance payment and performance bonds. Therefore, the argument that the personal counter indemnities are void and unenforceable, is misconceived.

[33] In conclusion, having perused the affidavit in support of the application, considered the submissions of both counsel and the intended defences, I have formed the view that the proposed defences do not present an arguable basis either in law or fact in answer to the respondent's suit. There being no plausible defence to the suit nor any triable issue, the application accordingly fails and is hereby dismissed with costs to the respondent.

Order:

[34] According to Order 36 rule 5 of *The Civil Procedure Rules*, where, after hearing an application by a defendant for leave to appear and defend the suit, the court refuses to grant such leave, the plaintiff is entitled as against the defendant to a decree. Consequent thereto, judgment is entered for the respondent against the applicant in accordance with the prayers contained in the plaint. The respondent is awarded the costs of the suit as well.

Stephen Mubiru
Judge.

Appearances:

For the applicants : M/s Jason & Co. Advocates.
For the respondent : M/s Signum Advocates.