TRANSAFRICA ASSURANCE CO. LTD

v

CIMBRIA (EA) LTD

COURT OF APPEAL OF UGANDA AT KAMP ALA

CIVIL APPEAL NO. 11 OF 2001
(ON APPEAL FROM HIGH COURT COMPANIES CAUSE NO. 19 OF 1999)

BEFORE:

HON. MR. JUSTICE G. M. OKELLO, JA
HON. LADY JUSTICE A. E. N. MPAGI BAHIGEINE, JA
HON. MR. JUSTICE .A. TWINOMUJUNI, JA

March 26, 2001

JUDGMENT

G. M. OKELLO, JA: This appeal arose from the decision of the High Court (BYAMUGISHA, J) given at Kampala on October 26, 2000 in Companies Cause No. 19 of 1999 where it allowed the Respondent's petition and ordered that the Appellant be wound up.

The summary background facts which led to this appeal, are that the appellant had on July 24, 1997, executed a Performance Bond in favour of the respondent in respect of a contract of Sale dated February 12, 1997 between the respondent. Hereinafter referred to as the supplier and Mytrade (U) Ltd. hereinafter referred as the buyer. Under the contract the buyer agreed to buy and the supplier agreed to sell and supply to the buyer a Coffee Drying and processing plant at an agreed price. The pro-forma invoice No. 1006 which was attached to the contract quoted the value of the plant in Danish Kroner as 3,600,000.00. The terms of payment required the buyer to make a down payment of DKr 686,295,00. The balance of DKr 3,183,225 was to be paid by installments secured by a confirmed letter of credit or performance bond.

The supplier delivered to the buyer the plant after the appellant had executed a performance bond to secure the balance of payment. When the balance of payment was not made, the supplier wrote to the appellant demanding payment on the performance bond. The appellant failed for more than three weeks after the last demand to pay the balance and the supplier instituted in the High Court the Petition in Companies Cause No. 19 of 1999 seeking an order to wind up the appellant under section 222 (e) of the *Companies Act* Cap 85. The appellant denied liability on the ground that the respondent had entered into another contract dated February 19, 1997, with Mytrade Limited of Nairobi. Kenya for the sale of the same plant and the contract of February

19, 1997 superseded the contract of February 12, 1997. The High court heard the petition and allowed it, hence this appeal.

The memorandum of appeal comprised six grounds framed as under:

1. The learned trial judge erred in law and in fact when she held that the appellant was indebted to the respondent under the performance bond dated July 25, 1997, made in respect of a contract dated February 12, 1997, the validity of which said contract was in dispute on the grounds that it had been superseded by a contract dated February 19, 1997.

2. The learned trial judge erred in law and in fact in failing to properly evaluate the evidence on record that the existence or validity of the contract dated February 12, 1997 in respect of which the bond was made giving rise to the debt was in dispute by the appellant and Mytrade (U) Limited consequently erroneously holding that the appellant's debt was not substantially disputed.

3. The learned trial judge erred in law and in fact in failing to properly evaluate the evidence relating to invoices attached to the affidavit of Mr. Nielsen purporting to be proof of the existence of the contract which invoices did not constitute invoices made in pursuance of the contract dated February 12, 1997.

4. The learned trial judge erred in law and in fact in failing to properly evaluate the evidence when she held that two contracts were in existence in respect of the same subject matter but did not determine which of the two contracts was binding so as to determine the validity of the performance bond.

5. The learned trial judge erred in law and ill fact in failing to properly evaluate the evidence relating to the existence of two contracts on the same subject matter thereby failing to hold that the evidence disclosed that the contract of February 12, 1997 in respect of which the bond was made was superseded and replaced by the contract of February 19, 1997 without the knowledge or consent of the appellant.

6. The learned trial judge wrongly exercised her discretion to order a winding up of the Appellant when she found that there was no substantial bona fide dispute to the debt on the basis of conflicting affidavit evidence without subjecting such evidence to further full inquiry detailed scrutiny and evaluation.

In his written submissions filed under rule 97 (1) of the Rules of this Court, counsel for the appellant argued grounds 1, 2 and 4 together, then grounds 3, 5 and 6 separately. I propose to consider the arguments in that order

Grounds 1, 2 and 4:
The gist of the appellant's complaint in these grounds is that the trial judge erred to find that the appellant did not substantially dispute the debt and that it was indebted to the respondent when there is evidence on record which show-s that the said debt was substantially disputed by the appellant. His reason for that complaint was that the performance bond dated July 24, 1997,

which gave rise to the debt, was executed in conformity with the requirements of the contract of February 12, 1997, whose value was DKr 3,600,000.00. The terms of the contract required down payment of DKr 686,295.00. The balance of DKr 2,913,705.00 plus a flat rate of interest of 9.25% per anum in the sum of DKr 269,520.00 was to be secured by irrevocable letter of credit or performance bond. While agreeing that failure to pay the debt under the performance bond would amount to inability to pay the debt, counsel argued that in the instant case the evidence shows that the contract in respect of which the bond was issued was superseded by another contract of February 19, 1997 between the supplier and Mytrade Ltd. of Nairobi. Kenya. This second contract had no provision for performance bond. Rajesh Vohora, the Managing Director of the buyer denied in his affidavit the buyer's indebtedness to the supplier arising from the bond of July 24, 1997. He explained that after executing the contract of February 12, 1997 - the buyer informed the supplier of its inability to make the requisite down payment. It was then agreed by the parties that a new' agreement between the supplier and Mytrade Ltd. of Nairobi, be made.

Learned counsel for the appellant pointed out that Jorgen Nielsen, Director of the supplier admitted in his affidavit the execution of the new contract with Mytrade Ltd, of Nairobi, Kenya on February 19, 1997, though he stated that the contract did not discharge the buyer of its obligation under the contract of February 12, 1997.

In counsel's view Nielsen never explained in his affidavit why a separate contract of February 19, 1997 was executed in respect of the same subject matter as in contract of February 12, 1997, Both contracts were described as No. 005 and the equipment was to be delivered to Entebbe and Kampala, Uganda, There is only a slight increase in the value of the subject matter In the second con tract with no requirement for performance bond.

He stated that the evidence on record show's that no down payment was made in respect of the contract of February 12, 1997. The supplier was paid K.Shs.6 million on February 19, 1997 by Mytrrade Limited of Nairobi- Kenya. Nielsen admitted this payment and attempted to explain that the payment was made for dues from the buyer under the contract of February 12, 1997, Counsel argued that under Price Basis in the second contract payment would be in Danish Kroner or it's equivalent in Kenya shillings. No such provision was made in the contract of February 12, 1997. He stated that since the payment which was made on February 19, 1997 did not refer to the contract of February 12, 1997. The clear inference to be drawn was that the contract of February 19, 1997, replaced or superseded the contract of February 12, 1997 even though the ultimate beneficiary in Uganda remained the same. He likened this to a contract entered into between a father of a child as a purchaser and a seller for purchase of goods for the benefit of the child; the contractual parties remained the father as the purchaser and the seller.

So in his view, Mytrade Ltd., of Nairobi became the contractual party in respect of the subject matter formerly the subject matter of the first con tract. Rajesh Vohora stated in his affidavit that the contract of February 19, 1997 was executed in place of the contract of February 12, 1997 and that for all intent and purposes. The first contract was superseded by the contract of February 19, 1997.

On whether there was a debt owed by the appellant to the respondent. Learned counsel submitted that the respondent should have gone to court first to determine which of the two contracts was

binding to determine the appellant's indebtedness. He criticised the trial judge for her observation that counsel's submission would have made sense only if the contract of February 19, 1997 had been entered into before the appellant had executed the bond when there is evidence showing that the bond was in fact executed on July 24, 1997, after the contract of February 19, 1997.

He further criticised the trial judge for finding that the indebtedness of Mytrade (U) Ltd, to the respondent was not disputed when there is evidence that Rajesh Vohora denied that Mytrade (U) Ltd. was indebted to the respondent. Nsereko Male Paddy, an accountant with ZAK and Company Accountants and Auditors also deponed that the buyer was not indebted to the respondent. Counsel submitted that in view of the above conflicting evidence, the trial judge could not have found that the appellant was indebted without recourse to trial to test any or all the deponents for credibility.

Regarding the issuance of the cheques by the buyer to the supplier, learned counsel submitted that there is no evidence to show that the payment related to the contract of February 12, 1997. He concluded that there is no evidence to justify a finding that the contract of February 19, 1997 did not replace the contract of February 12, 1997 and therefore the appellant is indebted to the respondent.

Mr. John Kanyemibwa learned the counsel for the Respondent contended that the trial judge carefully evaluated the evidence on record and rightly found no cogent evidence to show that contract of February 12, 1997 between the respondent and Mytrade (U) Ltd. was superseded or replaced by the contract of February 19, 1997, between the respondent and Mytrade Ltd. of Nairobi, Kenya or that the appellant bona fide disputed its debt. According to learned counsel, the trial judge considered the affidavit evidence of Rajesh Vohora, S.C. Sharma and Nsereko Male Paddy, all of which dispute Mytrade (U) Ltd's liability under the contract of February 12, 1997 but found them false and rightly rejected them. He argued that Mytrade(U) Ltd conducted itself in such a manner which showed that it was bound by the contract of February 2, 1997. It applied for the performance bond in respect of that contract with full knowledge of the existence of the contract of February 19, 1997. It was upon this performance bond that the respondent delivered the machinery. Mytrade (U) Ltd later wrote a letter dated February 4, 1999, assuring the Respondent of it's commitment to meet it's obligations under the contract and pleaded with the respondent not to take adverse steps against it in respect of the outstanding debt under the contract.

However, Counsel sought under rule 91(1) of the Rules of this court to affirm the decision of the High Court on the ground that the liability of the Appellant as the institution which gave a performance bond, was not affected by any dispute between the supplier and the buyer arising from the contract in respect of which the performance bond was given. It is bound to honour its obligation in accordance with the terms of the bond except for fraud of which it has notice. He cited *Edward Owen Engineering Ltd. v Barclays Bank Ltd* **(**1978) 1 Q.B 171 as authority for that proposition.

The issue that emerged from the above arguments is whether the appellant as the institution which gave a performance guarantee is liable in accordance with the terms of the guarantee,

when there is a dispute between the seller and buyer arising from the contract in which the guarantee was given. The law governing performance guarantee or bond was stated in *Edward Owen Engineering Ltd. v Barclays Bank Ltd*. (supra**).**

In that case, the plaintiff. English supplier contracted with Libyan customers to erect green house in Libya and agreed that a performance guarantee for 10 percent of the contract price should be issued by the defendant English bank and lodged with a Libyan bank. The contract which was governed by Libyan law provided that an irrevocable confirmed or confirmable Letters of Credit payable at the English bank was to be opened in favour of the plaintiff. After the plaintiff had given a counter guarantee to the English bank. the latter gave a performance bond for £50, 203 to the Libyan bank and confirmed that their guarantee was payable on demand without proof or conditions. The Libyan bank then issued a guarantee for the plaintiff in favour of the Libyan customers. No Letters of Credit which complied with the terms of the contract was opened by the customers and the plaintiff, after telling them that the guarantee given had no effect accepted their conduct as a repudiation of the contract. At the customers' request the Libyan bank then claimed £50,203 under the guarantee from the English bank.

The plaintiff obtained an interim injunction on their exparte application to restrain the English bank from paying the Libyan bank. The injunction was discharged. On appeal DENNING MR said;

> "A performance bond is a new creature so far as we are concerned. It has many similarities to a letter of credit with which of course, we are very familiar. It has been long established that when a letter of credit is issued and confirmed by a bank, the bank must pay it if the documents are in order and the terms of the credit are satisfied. Any dispute between buyer and seller must be settled between themselves. The bank must honour the credit. That was stated in *Hamzeth Malas & Sons v British Imex Industries Ltd.* (1958) 2 QB 127"

A bank or institution giving a performance bond is therefore bound to honour it in accordance with the terms of the bond if the papers are in order regardless of any dispute between buyer and seller arising from the contract in respect of which the bond was given. It is only excused where there is fraud of which it has notice. Mr. Nkuruziza agrees with the above legal position and referred us to the terms of the performance bond dated July 24, 1997.

The terms of this performance bond state that.

> "…the liability of us the said Transafrica Assurance Co. Ltd. P. O. Box 7601, Kampala (surety) under the above written bond shall not in any way be discharged or impaired by reason of any breach ,or breaches (willful or otherwise) of the said Agreement committed with or without the knowledge or consent of the said Mytrade Uganda Limited (Contractor) by or on behalf or with the knowledge or consent of the said Cimbria East Africa Limited (sub-contractor)."

It is clear from the above terms of this performance bond that the liability of the appellant under the bond is not dependent on any dispute between the respondent and the buyer arising from the

contract in respect of which the bond was given. This is in line with the above legal position regarding performance guarantee.

It is clear to me that the trial judge was right to find that the appellant is liable on the bond. The conditions of the bond were satisfied as the event for which it was given had happened, There is evidence showing that demands for payment were made to the appellant but for well after three weeks it did not respond to the demands, The dispute it claimed to have raised to the debt was not bona fide as it was directed to a dispute between the seller and the buyer regarding the existence or validity of the contract in respect of which the bond was given, This is a dispute which is to be settled between the seller and the buyer themselves. Liability of the appellant under the bond is not dependent on any such dispute, there is no evidence that the papers upon which the appellant issued the bond were improper or that there was fraud of which the appellant had notice. I therefore, find no merit in these grounds 1, 2 and 4. They would fail.

Grounds 3 and 5 complained about the trial judge's finding that the contract of February 12, 1997 existed and was not superseded by contract of February 19, 1997. I have already dealt with this issue when discussing grounds 1, 2 and 4 above. The complaint is directed to a dispute which can be settled between the seller and the buyer themselves. Liability of the appellant under the bond is dependent on the term of the bond and there is no complaint about that. I. therefore find no merit on these grounds too.

Ground 6 complained about the trial judge's order that the appellant be wound up for inability to pay its debt, It was submitted for the appellant, rightly so in my view that the order to wind up is in the discretion of the trial judge. That reflects a correct interpretation of section 222 (e) of the Companies Act Cap 85, Learned counsel for the appellant contended that the exercise of that discretion should take into account whether the issue of disputed debt would require further hearing and investigation. He argued that the existence or validity of the contract of February 12, 1997 in respect of which the bond was given needed detailed inquiry and that failure of the trial judge to direct that inquiry amounted to a wrong exercise of her discretion. He cited *Mbogo v Shah* (1968) EA 93 and *Lympne Investment Ltd.* (1972) 2 ALLER 385 as his authorities for that proposition.

A well settled principle was enunciated in *Mbogo v Shah* (supra) that a court of appeal should not interfere with the exercise of discretion of a trial judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision or unless it manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been injustice.

In the instant case while making the winding up order the trial judge stated:

> "I have given careful consideration to the facts submissions and the evidence adduced in this matter. Whereas I agree that there are two contracts, the bond referred to only one of them. Apparently the bond was initiated by Mytrade (U) Ltd. who has now turned round to claim that the contract of 12th is no longer binding. There .was however no explanation as to why Mytrade (U) Ltd., prepared a bond based on a contract which was no longer in existence and later

> pleaded with the petitioner not to take adverse action against it for a debt arising out of a contract which was no longer there. The averment that Mytrade (U) Ltd. is indebted to the Petitioner was not disputed. There is therefore no substantial dispute of the debt arising out of the bond. It is also not disputed that the respondent was served with three notices and it did not respond. In the circumstances it be said that it is unable to pay its debt. It should therefore be wound up. I so order."

I am unable to fault the learned trial judge in her order for winding up of the appellant for its inability to pay its debt. She found that the appellant was indebted to the respondent under the bond and that despite several demands it did not respond, in my view she exercised her discretion under sections 222 (e) and 223 of the *Companies Act* properly. The dispute regarding the existence or validity of the contract of February 12, 1997, is a dispute which can be settled between the respondent and Mytrade (U) Ltd. themselves, It does not affect the appellant's liability under the bond so long as the terms of the bonds were satisfied. There is no dispute regarding non satisfaction of the terms of the bond. fide dispute to the debt to be investigated, There is thus no bonafide dispute to the debt to be investigated.

Mr. Nkuruziza. learned counsel for the appellant informed us from the bar that the appellant deposited at the High Court an amount of money which covered the outstanding debt together with costs. as evidence that the non-payment of the debt by the appellant on demand was not due to inability but rather due to the dispute thereto on principle. No evidence of such payment was made available to us. As is well known, a statement of fact by counsel from the bar is not evidence and therefore. court cannot act on it. The fact of such deposit is thus not proved.

In the result. I would dismiss the appeal; uphold the judgment and order of the High Court with costs here and in the High Court in favour of the respondent.

A.E.N BAHIGEINE, JA: I have read in draft the judgment of OKELLO,J.A. I agree with it and I have nothing useful to add.

TWINOMUJUNI, JA: I have read in draft the judgment of OKELLO,J.A. I agree with it and I have nothing useful to add.