

**THE REPUBLIC OF UGANDA
IN THE HIGH COURT OF UGANDA AT KAMPALA**

IN THE MATTER OF TRANSAFRICA ASSURANCE COMPANY LIMITED

COMPANIES CAUSE NO. 19 OF 1999

CIMBRIA EAST AFRICA LIMITEDPETITIONER

AND

TRANSAFRICA ASSURANCE COMPANY LIMITED RESPONDENT

BEFORE: THE HONOURABLE LADY JUSTICE C.K. BYAMUGISHA

JUDGMENT

The Petitioner Cimbria East Africa Ltd filed this petition under the provisions of section 222 (e) of the Companies Act seeking the winding up of the Respondent on the ground that it is insolvent and unable to pay its debts. The facts are not in dispute. On the 24th July, 1997 the Respondent executed a Performance Bond in favour of the Petitioner in which it bound itself to pay the sum of Danish Kroners Three million one hundred and Eighty Three Thousand and Two hundred and twenty five (3,183,225) to the petitioner in the event of the failure by Mytrade Uganda Ltd to pay the above sum.

The Bond was based on an agreement of sale entered into by the Petitioner and Mytrade Uganda Ltd dated the 12th February, 1997. The payment terms of the Agreement was that the buyer (Mytrade Uganda Ltd) had to make a down payment of Danish Kroner 686,295.00 and was to provide an irrevocable letter of Credit for the balance or a Performance Bond of Danish Kroner 2,913,705.0.

It was in fulfillment of the latter clause that the Performance Bond was executed. On the strength of this Bond the Petitioner supplied and installed a Coffee drying and Processing Plant to Mytrade Uganda Ltd at its business premises in Kawempe. The buyer Mytrade (U) Ltd made sum payments and a balance of Dkr. 2,493,095.65 has remained unpaid to date.

It is the Petitioners case that since the 30th June, 1998 the date on which the balance became payable it made applications to the Respondent pursuant to the Bond through letters dated 1st July 1998; 18th February 1999 and 12 April 1999 for the payment of the sum of Danish Kroners Two million four hundred and ninety-three thousand and ninety-seven cents sixty five (2,493,097.65). The Respondent apparently neglected to pay or to satisfy the same - hence this petition.

The Respondent filed two affidavits dated 23rd December, 1999 and 30th August, 2000 respectively opposing the petition. Other affidavits were sworn to oppose the petition by Vohora the Managing Director of Mytrade (U) Ltd and Nsereko Male an accountant with an Audit firm. In Sharma's affidavit of 23rd December, he stated that the Performance Bond was to be executed by two Directors or a Director of the company and company Secretary according to Articles of Association. He also stated in paragraph three thereof that the Respondent has no knowledge of the contract of 12th February but was presented with a contract between the Petitioner and Mytrade Ltd P.O. Box 57821 Nairobi. For the above two reasons, the Respondent contended that the Petitioner is not entitled to the reliefs being sought.

In the supplementary affidavit of Mr. Sharma he stated in paragraph three thereof that when the Respondent received instructions from both the Petitioner and M/S Mytrade Ltd Nairobi - Kenya to prepare a Performance Bond they were never presented with the contract executed on 19/02/97 but were only presented with the contract of 12/02/97 on which basis a Performance Bond was issued in good faith albeit mistakenly.

The affidavit of Volora the Managing Director of Mytrade (U) Ltd on its part denied the existence of the debt maintaining that the contract of 12/02/97 was displaced by the one of 19/02/97 between the Petitioner and M/S Mytrade Ltd of P.O. Box 57821 Nairobi Kenya. He averred that the Performance Bond was prepared on the basis of the wrong contract and therefore there is no debt owing based o the Bond.

A Director of the Petitioner one Nielsen deponed another affidavit in rejoinder. He first all denied that the petitioner gave instructions to the Respondent to prepare a Performance Bond. Instead he averred that the Bond was presented to the Petitioner by Mytrade (U) Ltd in pursuance of the

contract dated 12th February, 1997, for purposes of approving the warding. He also denied that the contract of 12th February, 1997 was displaced with the contract of 19th February, 1997 between the Petitioner and Mytrade Ltd of Nairobi-Kenya. He also referred to a number of invoices presented to Mytrade (U) Ltd in pursuance of the contract, the Proforma Invoice No. 1006 and a number of cheques drawn on Crane Bank Ltd forwarded to the Petitioner by Mytrade Uganda Ltd. Finally the deponent referred to the letter of 4th February 1999 written by Mytrade Uganda Ltd informing the Petitioner that it was fully committed to meet its obligation and pleaded not to take any adverse steps.

The following were the issues for Court's determination:

1. Whether the Performance Bond was executed by the Respondent.
2. Whether the Respondent has knowledge of the contract of 12/02/97 between the Petitioner and Mytrade (U) Ltd.
3. Whether the Respondent is liable on the Bond.
4. Whether the Petitioner is entitled to the reliefs sought.

On the first issue, counsel for the Petitioner submitted that the bond was signed by an officer of the Respondent who had been authorised by power of Attorney No. 3237. He pointed out that under clause 120 of the Respondent's articles and memorandum of Association, the Respondent is empowered to appoint any person by power of Attorney to execute any functions on its behalf except the function of borrowing money. He further submitted that under section 34 (1) (a) of the Companies Act, a contract which is required to be in writing may be made on behalf of the company and signed by any person acting under its authority express or implied. He invited Court to hold that the bond was properly executed.

Counsel for the respondent made no submission on this issue, I therefore take it that the Respondent no longer contests the due execution of the bond. Nonetheless, it had been averred by Mr. Sharma in his affidavit of 23rd December, 1999 that the bond was supposed to be executed by two Directors or a Director and a company Secretary as required by the articles and memorandum of Association. I have looked at the performance bond dated the 24th July, 1997. It

was signed by a Principal Officer who claimed to have been authorised by Power of Attorney No. 3237. It is not being contested that no such power was given. Moreover, Article 120 of the memorandum and Articles of Association give the directors of the company power to appoint any person for such purposes and with such powers other than the power to borrow money. The bond was not a document for borrowing money. It is therefore my finding that the bond was properly executed.

On the second issue of whether the Respondent had knowledge of the contract of 12/02/97. Both counsel made submissions on this issue relying on the affidavits of Mr. Sharma and Mr. Vohora the Managing Director of Mytrade (Uganda) Ltd. Mr. Sharma's affidavit of 23rd December, 1999 states in paragraph 3 thereof:

“That in reply to paragraph 7 of the petition the respondent has no knowledge of the said contract but was presented with a contract between the Petitioner and Mytrade Limited P.O. Box 57821 Nairobi.”

In the supplementary affidavit dated 30th August, 2000 in paragraph he averred as follows:-

“That when we received instructions from both the Petitioners and M/S Mytrade Limited of Nairobi - Kenya to prepare a performance bond we were never presented with the contract executed by the two parties dated 19/2/1997 annexed to Mr. Rajesh Vohora's affidavit dated 29th August, 2000, we were only presented with contract dated 12/02/1997 on which basis we issued out a performance bond dated 24/07/1997 in good faith albeit mistakenly.”

If we accept that the above paragraph is correct, that the Respondent was presented with the contract of 12/02/97 this would be in line with the recital in the bond which refers to the contract of 12/02/97 between the Petitioner and Mytrade (Uganda) Ltd. Section 91 of the Evidence Act provides that:

“When the terms of any such contract., grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties

to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from its terms:

Provided that:-

- a. Any fact may be proved which would invalidate any document or which would entitle any person to any decree or order relating thereto, such as grand intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration or mistake in fact or law.”

It is the case for the Respondent that there was a mistake between itself and the Petitioner because their minds did not meet as to the date of the contract. Admittedly two contracts existed at the time the bond was signed. I have perused both contracts and particular, the clause on payment Terms. Whereas the contract of 12th February required an Irrevocable Letter of Credit or a Performance Bond the contract of 19th February required only an Irrevocable Letter of Credit and no bond. This means as I understand it that the Respondent could not have issued a bond on the strength of the contract of the 19th without reading the terms. The contradictions in the affidavits of Mr. Sharma as to which contract, the Respondent saw before issuing the Bond show that the Respondent was trying to hide the truth. I do not think there was any mistake on the part of the Respondent.

It was however submitted by counsel for the Respondent and Mytrade (U) Ltd that the contract of 12th was superseded by the one of 19th and such Mytrade (U) Ltd has no financial obligations towards the Petitioner. However, there are a number of Invoices attached to Mr. Nielsen's affidavit. These invoices show that they were issued as per Contract Agreement No. 005 and Performance Bond TACPB/10/0016/7/97 - the subject matter of these proceedings. Mytrade (U) Ltd also issued various cheques between July 1998 and June 1999 in favour of the Petitioner. Furthermore, there are two letters dated 03/02/99 and 04/02/99 written by the Petitioner and a reply thereto by Mytrade (U) Ltd in which the former talks about the outstanding amount of Danish Kroner 2,517,018.00 and the latter's reply that it was committed to meet its obligations. The affidavit of Mr. Vohora than the contract of 12th February was replaced with the one of 19th must be false. Therefore there was no mistake in the bond as is being claimed. Moreover Mr.

Sharma contradicted his own averments by stating in one affidavit that the Respondent saw the contract of the 19th and in another affidavit he claimed that he saw the contract of the 12th. This means that he either saw both contracts or he was being economical with the truth about his lack of knowledge. If the Respondent did not know about the existence of the contract of 12th, the Bond would not have made reference to it. It is my finding that the Respondent had knowledge of the contract under question.

The third issue is whether the Respondent is liable on the bond. Submitting on this issue counsel for the Petitioner referred to the law on bonds and in particular the case of Edward Owen Engineering Ltd Vs Barclays Bank (International) Ltd [1978]. I AVER 976 where the principles to guide Court were summarised. Basically these are that a performance bond stand on a similar footing to a letter of credit and is independent of the primary contract of sale between the buyer and the seller and once it has been issued the authority issuing it must honour it according to its terms, the exception to the above is where there is fraud.

Counsel contended that there is a dispute between the petitioner and Mytrade (U) Ltd regarding the contract of 12/02/97 and that since the Respondent is not denying the demand made by the Petitioner and it is not pleading fraud, it has no lawful excuse for refusing or neglecting to honour its obligations on the bond.

On the respondents part it was submitted that the petition is premature as is has not been established to the satisfaction of the Court whether Mytrade (U) Ltd owes the amount claimed in the petition. He referred to the case of Hoima Ginnors Ltd (No) [1964] EA 439. Where it was held inter alia that the petitioning creditors should have obtained judgment on the quantum of damages and breach of contract before filing a petition for winding up.

Counsel further submitted that the Petitioner should have first given to Court to establish which contract is binding before filing the petition.

The submissions which have been by counsel for the Respondent would have made sense, if the contract of 19th had been entered into before the issuance of the bond by the Respondent. The bond referred to a contract between the Petitioner and Mytrade (U) Ltd. In my view it is not necessary for the Petitioner to go to Court to prove which contract is binding. The evidence

which has been adduced showed that Mytrade (U) Ltd conducted itself in a manner indicating that it was bound by the contract of 12/02/97. The plea it made to the Petitioner not to take adverse steps against, it, could not have been made if the contract of 12/02/97 had been displaced by the one of 19th. It is therefore not necessary in my view for the Petitioner to prove which contract is binding as the Respondent is claiming. It is therefore liable on the bond. The last issue to determine is whether the Petitioner is entitled to the reliefs being claimed. The Petition is brought under the provisions of section 222 (e) of the companies Act which provides that; -

“A company may be wound up by the Court if the company is unable to pay its debts. A company shall be deemed to be unable to pay its debts:

- a. if a creditor by assignment or otherwise, to whom the company is indebted in a sum exceeding one thousand shillings then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor”

It was submitted by counsel for the Petitioner that the only instance where a person issuing a bond can be excused from honouring the terms of the same is where there is fraud. He pointed out that the dispute between the Petitioner and Mytrade (U) Ltd is not of any concern to the Respondent. He pointed out that since the Respondent is not denying made by the Petitioner, it is not pleading fraud, it has no lawful excuse for refusing or neglecting to honour its obligations on the bond. He concluded his submissions by contending that in terms of section 222 (e) (Supra) the Respondent is unable to pay its debts and therefore it should be wound up.

Counsel for the Respondent contended in his submission that there were reasonable grounds not to comply with the notice served on the Respondent because the contract of 12th was superseded by the one of 19th.

Counsel for Mytrade (U) Ltd in his submissions stated that it is essential to prove beyond reasonable doubt that the company is unable to pay its debts. He stated that there is no debt owing from Mytrade (U) Ltd and the basis of the petition is wiped out.

Responding to the above submissions counsel for the Petitioner stated that the bond was issued long after the contract of 12th and 19th and it was initiated by Mytrade (U) Ltd who invited the Petitioner to approve it before it could be issued. He claimed that there was no substantial opposition to the petition and there is no plea of fraud.

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 debts. It should therefore be wound up.

I so order.

C.K. Byamugisha

JUDGE

26/10/2000