AFRICANA GUEST HOUSE LTD v. GROFIN AFRICA FUND LTD

[Rwanda URUKIKO RUKURU RW'UBUCURUZI – RCOMA 00254/2019/HCC (Kayisire, P.J.) 15 Ugushyingo 2019]

Amategeko agenga imanza z'ubucuruzi – Amasezerano – Umwenda watanzwe na banki – Igipimo cy'inyungu – Ntibifatwa nko kwica amasezerano mu gihe igipimo cy'inyungu cyari cyabariweho umwenda cyakosowe bigatuma zibarwa nk'uko byari byumvikanyweho mu masezerano.

Amategeko agenga imanza z'ubucuruzi – Umwenda watanzwe na banki – Amafaranga ya Business Support – Iyo mu mwenda watanzwe na banki hemeranyijwe amafaranga y'ubufasha mu bucuruzi (business support), yishyurwa n'uwahawe inguzanyo mu gihe atagaragaje ibimenyetso bimukuraho iyo nshingano.

Amategeko agenga imanza z'ubucuruzi – Umwenda ugomba kwishyurwa – Kwiyambaza umuhanga mu kuwubara – Iyo impande zombi zitumvikana kumwenda watanzwe bigatuma urukiko rugashyiraho umuhanga, uwo mwenda yabaze niwo ufatwaho ukuri mu gihe nta ruhande rwashoboye kuwuvuguruza.

Incamake y'ikibazo: AFRICANA Guest House Ltd (AFRICANA) yagiranye amasezerano y'inguzanyo na GROFIN Africa Fund Ltd (GROFIN) biza kugera aho AFRICANA ivuga ko GROFIN yabaze igipimo cy'inyungu cyitaricyo, ko n'umwenda iyishyuza nawo atariwo kuko ari mwinshi. AFRICANA yatanze ikirego mu Rukiko rw'Ubucuruzi ivuga ko GROFIN yishe amasezerano kubera kutubahiriza ibivugwa haruguru byayigizeho ingaruka; bityo isaba kubahiriza ibyumvikanyweho mu masezerano y'umwenda ku bijyanye n'igipimo cy'inyungu ndetse n'umwenda wishyuzwa.

Urukiko rw'Ubucuruzi rwemeje ko ikirego cya AFRICANA nta shingiro gifite bituma ijuririra Urukiko Rukuru rw'Ubucuruzi ivuga ko GROFIN yarabaze nabi inyungu, bityo ko Urukiko rw'Ubucuruzi rwagombaga kubishingiraho rwemeza ko ari impamvu yo kwica amasezerano; yavuze kandi ko GROFIN yatanze business support kandi atari byo; ko kandi umwenda remezo AFRICANA igomba kwishyura ari amafaranga 213.368.934frw, aho kuba 248.442.531frw nk'uko byemejwe mu rwego rwa mbere.

GROFIN yireguye ivuga ko ikibazo cy'igipimo cy'inyungu impande zombi zakiganiriyeho nyuma yaho amasezerano asinyiwe kandi kirakemuka; bityo ko nta masezerano yishwe. Ku kibazo kijyanye na business support, GROFIN yavuze ko yatanzwe ahubwo ko AFRICANA itubahirije inshingano zayo. Kubijyanye n'umwenda ugomba kwishyurwa, GROFIN yavuze ko 213.368.934frw avugwa na AFRICANA adafite aho ashingiye haba mu mategeko cyangwa se amasezerano y'inguzanyo yabaye hagati y'impande zombi.

Incamake y'icyemezo: 1. Kuba igipimo cy'inyungu cyarakosowe kikava kuri 24% kuri 20%; ibyo bikaba ari nabyo byagaragajwe mu gika cya 13, mu mikirize y'urubanza rwajuririwe; bityo ntibyashingirwaho bwemezwa ko ari impamvu yo kwica amasezerano, nk'uko byagaragajwe na AFRICANA.

2. Kuba uwahawe inguzanyo atavuguruza ko business support yatanzwe, uwatanze umwenda yarayitanze; bityo kuba GROFIN yaratanze business support, ubujurire bwa AFRICANA nta shingiro bufite.

3. Iyo impande zombi zitumvikana kumwenda watanzwe bigatuma urukiko rugashyiraho umuhanga, uwo mwenda yabaze niwo ufatwaho ukuri mu gihe nta ruhande rwashoboye kuwuvuguruza. Bityo, umwenda AFRICANA igomba kwishyura GROFIN ungana na 248.442.531frw.

Ubujurire nta shingiro bufite.
Imikirize y'urubanza RCOM 01678/2018/TC rwaciwe ku wa 30/01/2019 n'Urukiko rw'Ubucuruzi, ntihindutse.

Amategeko yashingiweho:
Itegeko n° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, ingingo ya 12 igika cya mbere n'ingingo ya 111.

Nta manza zifashishijwe.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Uru rubanza rwatangiriye mu Rukiko rw'Ubucuruzi, aho AFRICANA Guest House Ltd yaregaga GROFIN Africa Fund Ltd, iregera guhatira GROFIN Africa Fund Ltd kubahiriza amasezerano n'ibyumvikanweho mu kuyashyira mu bikorwa, kwemeza umwenda uhari, uko inyungu zikwiye kubarwa, amafaranga y'ikurikiranarubanza. AFRICANA ikaba yaragaragaje ko ku wa 10/11/2011 yagiranye na GROFIN Africa amasezerano y'inguzanyo y'amafaranga 206.500.000frw yagombaga kwishyurirwa inyungu zisanzwe zingana na 20% ku mwaka, amafaranga 157.500.000frw akishyurwa mu gihe cy'amezi 84, naho amafaranga 49.000.000frw akishyurwa mu gihe cy'amezi 60, ko ariko GROFIN Africa itubahirije amasezerano. Mu mikirize y'urubanza RCOM 01678/2018/TC, Urukiko rwemeje ko ikirego cya AFRICANA Guest House Ltd nta shingiro gifite, ikaba yarajuriye.

[2] Uwonkunda Clarisse uhagarariye AFRICANA na Me Ntabwoba Théoneste umwunganira, bagaragaje ko kuba GROFIN yarabaze nabi inyungu, Urukiko rwagombaga kubishingiraho rwemeza ko ari impamvu yo kwica amasezerano; ko Urukiko rwemeje ko GROFIN yatanze business support kandi atari byo; ko umwenda remezo AFRICANA igomba kwishyura ari amafaranga 213.368.934frw, aho kuba 248.442.531frw.

[3] Ababuranyi muri uru rubanza basabye indishyi.

[4] Ibibazo bigomba gusuzumwa ni kuba GROFIN yarabaze nabi inyungu, Urukiko rwagombaga kubishingiraho rwemeza ko ari impamvu yo kwica amasezerano; kumenya niba Urukiko rwaremeje ko GROFIN yatanze business support kandi atari byo; kumenya niba

umwenda remezo AFRICANA igomba kwishyura ari amafaranga 213.368.934frw, aho kuba 248.442.531frw nk'uko byemejwe mu rwego rwa mbere no kumenya niba ababuranyi muri uru rubanza bakwiye guhabwa indishyi basabye.

II. ISESENGURA RY'IBIBAZO BIRI MU RUBANZA

I. Ku byerekeye kumenya niba kuba GROFIN yarabaze nabi inyungu, Urukiko rwagombaga kubishingiraho rwemeza ko ari impamvu yo kwica amasezerano.

[5] Uwonkunda Clarisse uhagarariye AFRICANA na Me Ntabwoba Théoneste umwunganira, bagaragaje ko kuba GROFIN yarabaze nabi inyungu, Urukiko rwagombaga kubishingiraho rwemeza ko ari impamvu yo kwica amasezerano, ko bigaragarira mu buryo GROFIN yagiye ihindagura ijanisha ry'igipimo cy'inyungu, ntikurikize 20% yari mu masezerano; ko mu gika cya 13 mu mikirize y'urubanza rwajuririwe, Urukiko rwemeje ko GROFIN yakurikije ibipimo binyuranye, ariko iza kwikosora, ko nyamara n'igihe habayeho gukosora, hagarutsemo andi makosa nk'uko AFRICANA yabigaragaje mu mabaruwa yo kuwa 07/07/2015 no ku wa 31/07/2015, ko mu gihe hari uruhande rwagize amakosa mu iyubahirizwa ry'amasezerano, Urukiko rwagombaga kubyemeza kandi rukabiryoza urwo ruhande.

[6] Me Sangano Yves uhagarariye GROFIN yagaragaje ko mu gika cya 13, mu mikirize y'urubanza rwajuririwe, bigaragara ko Urukiko rwashingiye ku nyandiko impande zombi zashyizeho umukono, ko ikibazo cyo kubara nabi amafaranga yagombaga kwishyurwa buri kwezi, cyakemutse muri 2015.

UKO URUKIKO RUBIBONA

[7] Amasezerano y'inguzanyo yo ku wa 10/11/2011, hagati ya GROFIN na AFRICANA, agaragaza ko AFRICANA yagurijwe amafaranga 206.500.000frw, yagombaga kwishyurwa ku nyungu ya 20% ku mwaka; ayo masezerano akaba yarashyizweho umukono n'impande zombi. Urukiko rusanga na none hari n'amasezerano y'inguzanyo yo ku wa 14/11/2011, hagati ya GROFIN na AFRICANA, agaragaza ko AFRICANA yagurijwe amafaranga 206.500.000frw, yagombaga kwishyurwa ku nyungu ya 24% ku mwaka; ayo masezerano akaba nayo yarashyizweho umukono n'impande zombi. Mu ibaruwa yo ku wa 07/07/2015 AFRICANA yandikiye GROFIN, yagaragazaga ko itemeraga uko umwenda yari ifitiye GROFIN wabazwe, ikagaragaza ko GROFIN yabaze umwenda ishingiye ku nyungu ya 24%, aho kuba 20% nk'uko yari yabyemereye AFRICANA mu ibaruwa yayandikiye ku wa 13/04/2015.

[8] Mu ibaruwa yo ku wa 26/08/2015, GROFIN yandikiye AFRICANA, isubiza ibaruwa yo ku wa 07/07/2015 yavuzwe haruguru mu gika cya 7, GROFIN yagaragarije AFRICANA, ko ibijyanye n'igipimo cy'inyungu byakosowe, bigatuma umwenda wa AFRICANA wanganaga n'amafaranga 342.580.380frw ku wa 31/12/2014, ungana n'amafaranga 342.499.390frw ku wa 31/05/2015frw; bityo ibyasobanuwe haruguru bikaba bigaragaza ko igipimo cy'inyungu cyakosowe, kigashyirwa kuri 20%; ibyo bikaba ari nabyo byagaragajwe mu gika cya 13, mu mikirize y'urubanza rwajuririwe; bityo Urukiko rukaba rusanga kuba mu rwego rwa mbere, Urukiko rwaragaragaje ko byakosowe, bitaragombaga gushingirwaho rwemeza ko ari impamvu yo kwica amasezerano, nk'uko byagaragajwe na AFRICANA.

II. Ku byerekeye kumenya niba Urukiko rwaremeje ko GROFIN yatanze business support kandi atari byo.

[9] Uwonkunda Clarisse uhagarariye AFRICANA na Me Ntabwoba Théoneste umwunganira, bagaragaje ko Urukiko rwemeje ko GROFIN yatanze business support kandi atari byo, ko icyasabwaga ari ukumenya niba amafaranga yishyuzwa nk'igiciro cya business support ahwanye koko n'iyatanzwe, aho ubwo bufasha butatanzwe ntibwishyuzwe; ko AFRICANA yagaragaje aho yishyuriye ubufasha yahawe mu gihe cyo kugura umwenda, yerekana n'ahandi yishyuriye business support ya mbere, ko nyamara Urukiko ruterekanye impamvu rwemeje umwenda wa business support ungana n'amafaranga 17.000.000frw, mu gihe GROFIN ubwayo yasabaga amafaranga 10.000.000frw.

[10] Me Sangano Yves uhagarariye GROFIN yagaragaje ko kugirango business support ikomeze hari ibyasabwagwa mu masezerano nk'uko bigaragara mu gace ka 3 (page 3) term loan facility hagati ya GROFIN na AFRICANA, ko ariko AFRICANA itigeze ibyubahiriza.

UKO URUKIKO RUBIBONA

[11] Mu masezerano y'inguzanyo yo ku wa 14/11/2011, hagati ya GROFIN na AFRICANA, bigaragara ku rupapuro rwayo rwa 2 n'urwa 3, ko GROFIN yagombaga guha AFRICANA ubufasha mu bucuruzi bwayo (business support), ubwo bufasha bukaba bwaragombaga kwishyurwa. Muri raporo yo ku wa 31/10/2018 yakozwe n'umuhanga HABIMANA Védaste, bigaragara ko mu mwenda AFRICANA ifitiye GROFIN, harimo n'amafaranga 17.215.198frw ya business support.

[12] Mu gika cya 16, mu mikirize y'urubanza rwajuririwe, Urukiko rwagaragaje ko GROFIN yasobanuye uko yahaye AFRICANA ubufasha mu bucuruzi bwayo, kuko byatumye GROFIN igura umwenda AFRICANA yari ifite muri KCB Bank, bitewe n'uko itakoraga neza, ko GROFIN yafashije AFRICANA mu kwongera gutunganya ubucuruzi bwayo, ko nyuma AFRICANA yishe amasezerano ubwo itatangaga management accounts hamwe n'izindi nyandiko za buri kwezi, nk'uko byari byemeranyijwe. Mu bujurire, Urukiko rusanga AFRICANA itarashoboye kuvuguruza ibyashingiweho mu rwego rwa mbere, Urukiko rwemeza ko business support igomba kwishyurwa; bityo hashingiwe ku biteganywa n'ingingo ya 12 igika cya 1 y'Itegeko n° 22/2018 ryo ku wa 29/04/2018 ryerekeye imiburanishirize y'imanza z'imbonezamubano, iz'ubucuruzi, iz'umurimo n'iz'ubutegetsi, iteganya ko urega agomba kugaragaza ibimenyetso by'ibyo aregera, Urukiko rukaba rusanga AFRICANA itarashoboye kugaragariza Urukiko aho ubufasha (business support) butatanzwe kugirango ntibwishyuzwe; bityo iby'uko Urukiko rwemeje ko GROFIN yatanze business support kandi atari byo, bikaba nta shingiro bifite.

Ku byerekeye kumenya niba umwenda remezo AFRICANA igomba kwishyura ari amafaranga 213.368.934frw, aho kuba 248.442.531frw nk'uko byemejwe mu rwego rwa mbere.

[13] Uwonkunda Clarisse uhagarariye AFRICANA na Me Ntabwoba Théoneste umwunganira, bagaragaje ko umwenda remezo ari amafaranga 213.368.934frw, ari nawo wagombaga gushingirwaho mu kubara inyungu, ko ibijyanye n'umwenda remezo nta n'impaka byari bikwiye gutera, kuko na GROFIN ubwayo yiyemerera ko umwenda remezo ari amafaranga

213.368.934frw nk'uko yawugaragaje kuri certificat yatanze; bityo ko byakosorwa hakemezwa ko inyungu zisanzwe n'inyungu z'ubucyererwe zigomba kungana n'umwenda remezo ungana n'amafaranga 213.368.934frw, aho kuba 248.442.531frw.

[14] Me Sangano Yves uhagarariye GROFIN yagaragaje ko iby'uko umwenda remezo ari amafaranga 213.368.934frw, bidafite aho bishingiye haba mu mategeko cyangwa se amasezerano y'inguzanyo yabaye hagati y'impande zombi.

UKO URUKIKO RUBIBONA

[15] Muri raporo yo ku wa 31/10/2018 yakozwe n'umuhanga Habimana Védaste, bigaragara ko umwenda remezo AFRICANA ifitiye GROFIN ungana n'amafaranga 248.442.531frw; uwo mwenda ukaba ariwo AFRICANA igomba kwishyura, aho kuba amafaranga 213.368.934frw nk'uko byagaragajwe na AFRICANA. Mu inyandiko yo ku wa 25/11/2018 y'umuhanga Habimana, asubiza ku mpungenge zari zagizwe na AFRICANA kuri raporo yo ku wa 31/10/2018, yagaragaje uko umwenda remezo wabazwe ukagera ku mafaranga 248.442.531frw, ibisobanuro bikubiye muri iyo nyandiko akaba yarabigaragaje na none mu iburanisha mu rwego rwa mbere, ku wa 26/11/2018.

[16] Hashingiwe ku byasobanuwe haruguru mu gika cya 15, Urukiko rusanga iby'uko umwenda remezo AFRICANA igomba kwishyura GROFIN ari amafaranga 213.368.934frw, aho kuba 248.442.531frw, nta shingiro bifite kuko Uwonkunda uhagarariye AFRICANA na Me Ntabwoba umwunganira, batashoboye kuvuguruza ibyashingiweho n'umuhanga muri raporo yo ku wa 31/10/2018 yavuzwe.

Ku byerekeye kumenya niba ababuranyi muri uru rubanza bakwiye guhabwa indishyi basabye.

[17] Uwonkunda Clarisse uhagarariye AFRICANA na Me Ntabwoba Théoneste umwunganira, basabye ko GROFIN yaha AFRICANA amafaranga 1.000.000frw y'indishyi z'igihembo cya avoka n'amafaranga 40.000frw y'ingwate y'amagarama yatanze.

[18] Me Sangano Yves uhagarariye GROFIN yasabye ko AFRICANA yaha GROFIN amafaranga 500.000frw y'indishyi z'ikurikiranarubanza n'amafaranga 2.000.000frw y'igihembo cya avoka.

UKO URUKIKO RUBIBONA

[19] Ingingo ya 111 igika cya 1 y'Itegeko n° 22/2018 ryo ku wa 29/04/2018 ryavuzwe haruguru, iteganya ko ikirego cy'amafaranga y'ikurikiranarubanza ari ikirego gishamikira ku kirego cy'iremezo kigamije kwishyuza ibyakoreshejwe mu rubanza; ibiteganywa n'iyo ngingo bikaba bigaragaza ko umuburanyi ashobora gusaba indishyi zijyanye n'ibyo yakoresheje mu rubanza.

[20] Indishyi zasabwe na AFRICANA nta shingiro zifite kuko ubujurire bwayo nta shingiro bufite, nk'uko byasobanuwe haruguru.

[21] Indishyi z'ikurikiranarubanza zasabwe na GROFIN, ntizikwiye gutangwa kuko zitagaragarijwe ibimenyetso kugirango Urukiko rugire icyo rushingiraho mu kuzigena, naho igihembo cya avoka, gikwiye gutangwa kuko kuba yararezwe muri uru rubanza, byatumye ishaka avoka, bityo AFRICANA ikaba igomba kuyiha amafaranga 500.000frw y'igihembo cya avoka.

III. ICYEMEZO CY'URUKIKO

[22] Rwemeje ko ubujurire bwa AFRICANA Guest House Ltd nta shingiro bufite.

[23] Rutegetse AFRICANA Guest House Ltd kwishyura GROFIN Africa Fund Ltd amafaranga 500.000frw y'indishyi z'igihembo cya avoka.

[24] Rwemeje ko imikirize y'urubanza RCOM 01678/2018/TC rwaciwe ku wa 30/01/2019 n'Urukiko rw'Ubucuruzi, idahindutse.