

BCR v. ETABLISSEMENT RWANDAIS

[Rwanda Supreme Court – 2011 SC – RCOMA 0089/09/SC (Kanyange, P.J., Mukandamage and Munyangeri, J.) 30 November 2010]

Commercial procedure – Deciding the case basing on what has not been heard – Deciding the case beyond the subject matter of the case – It is not considered as deciding on what has not been heard in case the judge did not go beyond the limits of the subject matter he/she was seized with, but has rather given the legal qualification to the subject matter – Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as modified and complemented to date, article 6.

Commercial procedure – Evidence – Requesting for carrying out investigation – The one who has the burden of proof –The plaintiff cannot say that the court did not rule on all that has been referred to it basing on the fact that no investigation has been carried out while the plaintiff has himself said that it may be carried out in case the court finds it necessary and it is the one with the burden to prove the facts of what it alleges – Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as modified and complemented to date, article 9, item 2.

Commercial procedure – Resolving the disputes on facts not agreed up on by parties – The obligation of the judge to qualify the facts of the subject matter –No party to the case may allege that the judge has contradicted him/herself in deciding, in case the latter has the obligation to qualify facts submitted to him/her by the parties, and he/she may even change the qualification given by the parties.

Commercial procedure – Negotiations for the decrease of the debt – The renunciation of the debt –If there is a compromise reached by both parties from negotiations to decrease the debt and the court has been seized it is only seized for breach of the compromise as agreed up on without coming back to the amount of the debt before the negotiation – Decree of 30/07/1888 instituting book three of the civil code, article 33.

Evidence law – The case which has been finally decided – The additional claim filed for the first time at the appeal level –No party may claim again for the interests within another case where the case has been finally decided, basing on the same grounds, to the action is pending between the same parties and that the action is brought by or against the same parties in their original names – Law n° 15/2004 of 12/06/2004 relating to evidence and its production, Article 106.

Law of contract or contractual obligations –Advocate’s fees – If nothing proves that it is the exact amount which has been paid it is awarded by the court in its discretionary power.

Facts: BCR sued Ets Rwandais before the Commercial High Court for the claim relating to the reimbursement of the debt amounting to 279,078,350 Frw which BCR claimed from the latter. The Commercial High Court decided that Ets Rwandais owed 33,303,307 Frw to BCR instead of 279,078,350 Frw it claimed. It has ordered BCR to pay Ets Rwandais 2,000,000 Frw in damages, the procedural and lawyer’s fees, the court bailiff’s fees as well as payment of proportional rights.

BCR appealed to the Supreme Court arguing that the case which has been decided by the Commercial High Court, was decided beyond the facts that were not submitted; that it did not rule on the claim of BCR where it requested to carry out investigation to find out the veracity of its allegations. It has also said that the Commercial High Court has contradicted itself in deciding the case because it has stated that the argument advanced by Ets Rwandais cannot be considered; but decided on the contrary that its claim has basis. It concluded saying that the Commercial High Court refused to hear from the parties which lead it to misconstrue the facts.

As for Ets Rwandais, it presented its defense saying that the Commercial High Court ruled on what has been submitted, but rather BCR misinterprets the facts since the parties tells the judge their claims and he/she relates them to the law. It has also argued that the that the request of BCR to carry out investigation cannot be considered with more reasons that it is not up to the Court to look for evidence for the parties rather each party has to prove what he/she alleges.

With regard to the ground on which BCR based its appeal that the Commercial Court has contradicted itself, Ets Rwandais argued that the Court did not contradict itself, rather it has corrected its argument with more reasons that it is within its obligations to do so. With regard to the debt at issue that has been misunderstood, Ets Rwandais has argued that after that BCR has notified it that the remaining debt amounted to 33,303,370 Frw, it does not understand why BCR came back to its initial debt.

It has concluded by lodging a cross appeal arguing that the Commercial High Court refused to admit its additional claim which proved that it owed to BCR 1,389,741 Frw when its assets were sold in auction.

It has also claimed the interests of 18% of the debt that BCR has claimed. It has also claimed to be awarded procedural fees, lawyer's fees and the fees for the court bailiff.

In respect to these grounds for the cross appeal, BCR argued that the way it calculated the amount of the remaining debt is not correct since it does not include the interests while there has been no remission of the debt. It has also argued that Ets Rwandais should not be awarded the interests of 18% since they were provided for within the contract between both parties and it has been performed.

With regard to the procedural fees, lawyer's fees, and court bailiff's fees that Ets Rwandais claimed, BCR argued that they cannot be granted to it because they are based on the contract that the lawyer made with his client.

Held: 1. Where the judge has given the legal qualification to facts submitted by the parties according to the claim he was seized with, this cannot be considered as ruling beyond what has been referred to the court.

2. The plaintiff has to prove the facts he/she alleges. If he/she fails the defendant wins the case. Thus, the appellant cannot criticize the Court for not having carried out the investigation since the issue was not to know how the debt has been calculated; but rather to know its basis; that's to mean what was the agreement between the parties.

3. The judge has the obligation of finding the qualification of the facts referred to him/her by the parties and he/she may even change the qualification given by the parties since he/she is not bound by the qualification given by the party to his/her claim. There is no contradiction in the fact that the Commercial High Court has not followed the qualification on which the plaintiff

based its claim, but rather chose another qualification which matched with the subject matter and decided that the defendant's claim has merit since it was awarded what it claimed.

4. Contracts made in accordance with the law shall be binding between parties. Thus, the appellant had to respect the contract it has made with the defendant aiming at decreasing the debt and facilitating the defendant to pay and should do so without bad faith.

5. The appeal court does not examine the additional claim in case it was not heard in the first instance. Thus, the plaintiff's claim cannot be examined.

6. Where the claim which has been finally decided, basing on the same ground, relating to the same parties and the action is brought by or against the same parties in their original names, it cannot be heard again. The defendant cannot claim again the interests of 18% it claims in this case since it would be coming back to the issue which has been finally decided.

7. If nothing proves the exact amount which has been paid as the lawyer's fees, it is awarded by the court in its discretionary power. But since the case went on up to the appeal level, the amount awarded has to be increased by 500,000 Frw.

**Appeal has no merit.
Cross appeal has merit in part.
Court fees to the appellant.**

Statutes and statutory instruments referred to:

Law n° 15/06/2004 of 12/06/2004 related to the evidence and its production, Article 106.

Law n° 18/2004 of 20/06/2004 relating to the civil, commercial, labour and administrative procedure as modified and completed to date, Article 6, Article 9, paragraph 2.

Law of 30/07/1888 instituting contract or contractual obligations, Article 33.

No case referred to:

Authors cited:

Mélina DOUCHY- OUDOT, Manuel de procédure civile, l'action en justice, le procès, les voies de recours, 2^e Edition, Gualino, EJA – Paris- 2006, p. 213.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] The Commercial High Court delivered the judgment and decided that until 4th December 2006 Etablissement Rwandais had debt of 33, 303, 307 Frw towards BCR instead of 279,078,350 Frw; it ordered BCR to pay Ets Rwandais 2, 000, 000 Frw in damages, to pay 80, 000 Frw of proportional rights and 500,000 Frw of procedural which includes advocate fees and court balliff fees and it ordered it to pay 34, 850 Frw of court fees.

[2] BCR appealed before the Supreme Court, by alleging the judgement appealed against was delivered beyond what was submitted (le juge a statueé *ultra petita*); that the judge has refused to rule on the pleas of BCR (*Refusal to respond to the pleas of parties which is a lack of motivation*). Moreover, the judge rendered a contradictory judgment and e refused to hear the parties and he consequently misconstrued facts.

[3] The case was heard on the 22th June 2010 and on the 14th September 2010; on the 2nd November 2010 the Court visited the headquarters of BCR for necessary clarifications.

II. LEGAL ISSUES OF THE CASE AND THEIR ANALYSIS

1. Whether the Court ruled *ultra petita*.

[4] Counsel for BCR, RUKANGIRA Emmanuel says that the Court has ruled on issues not debated on during the hearing *ultra petita* because Ets Rwandais argued there was a compromise but in his judgement, the judge ruled there was no compromise; but rather there was a release of debt which was never mentioned in this case.

[5] Counsel NDAGIJIMANA Emmanuel says that BCR confuses the issues because “*ultra petita*“ is not looked at in terms of evidence but rather n terms of what is requested and what is awarded, that parties submits facts to the judge who conciliates them with the law and therefore this ground of appeal has no merit.

[6] The Court finds that the judge has not ruled beyond the subject matter, but rather he qualified claims of parties in accordance with the law as provided for by article 6 of Law n°18/2004 of the 20th June 2004 relating to the civil, commercial, labour and administrative procedure as modified and completed to date which provides that Judges shall decide cases by basing their decisions on the law applicable to the case at hand.

2. Whether the Court has not ruled on the request of BCR.

[7] Counsel for BCR says that the Judge of Commercial High Court did not decide on his request that, if the Court finds it necessary, may carry out inquiry in BCR for gathering all necessary information so as to discover the truth about 279,078,350 Frw.

[8] Counsel for Ets Rwandais says that this point also has no merit because the request of Counsel for BCR is illegal since the Court has no obligation to search proofs for the parties (The Court is passive), but rather BCR has an obligation to bring the evidence in support of the debt of 279, 078, 350 Frw with more reasons that each party has the burden of proving the veracity of the facts it submits.

[9] Article 9 paragraph 2 of Law n°18/2004 of the 20th June 2004 mentioned above provides that every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case.

[10] The Court finds that, as provided for by article 9 of the Law mentioned above, it was up to BCR to prove its claim; the fact that the Commercial High Court did not carry out

investigation cannot be the ground of appeal because even BCR itself stated that it may be carried out in case the Court may deem it appropriate. In addition, BCR cannot blame the Court for failure to carry out inquiry because the problem was not about the calculation of the debt but rather its basis, which means the agreement between parties.

3. Whether the judge contradicted himself.

[11] Counsel for BCR says that the Judge rendered contradictory judgment where he stated that article 591 of Civil Code book III invoked by Ets Rwandais is cannot be considered while in the ruling he said that Court admits the claim of Ets Rwandais and finds it with merit, whereas Ets Rwandais had based its submissions in the hearing on the article said above.

[12] Counsel for Ets Rwandais says that the judge did not contradict himself but rather corrected the statements used by Ets Rwandais and that the judge should in principle resolve conflicts between parties and provide solutions there to.

[13] As stated by legal scholars, the judge has duty to qualify the facts submitted by parties; he can even change the qualification initially given by parties and is not bound by legal basis invoked by them in support of their claims¹.

There is no contradiction in the fact that the Commercial High Court did not maintain the qualification on which Ets Rwandais based its claim, but rather chose another qualification which matched with the claim, and decided that the claim of Ets Rwandais has merit because the latter was given what it requested.

4. Whether the Judge has misconstrued the debt in litigation.

[14] In his court submission, Counsel for BCR says that if a person failed to pay the debt owed to the Bank, he benefit from another payment alternative to be able to pay his debt and that 33, 303, 307 Rwf Ets Rwandais claimed was not a result of compromise, but debt restructuring instead.

[15] He said that the word restructuring has different meanings such as rescheduling, reorganization and refitting and he alleges that this is what BCR did for its client Ets Rwandais by offering another alternative of paying off.

[16] In addition, Counsel for BCR says that the basis for BCR's reduction of the debt to 230, 000, 000 Frw is a portion of interests it exonerated Ets Rwandais from and they agreed on the new payment scheme but the latter defaulted; this led BCR to return to the previous debt and thus there was no restructuring. Moreover, he said that the Court misconstrued facts by deciding that there was the release of debt allegedly because BCR has accepted to reduce the debt of Ets Rwandais from 501, 038, 338 Frw to 230 000 000 Rwf while Ets Rwandais had to pay 100, 000,

¹ Il le juge à l'obligation et le pouvoir de qualifier les faits, au besoin de les requalifier et de ne pas s'en tenir au fondement juridique invoqué au soutien de la prétention. Il s'agit même du principal travail du juge. Le juge doit donner aux faits leur vêtement juridique, dire sur quel fondement juridique il est fait droit à la demande, Méline DOUCHY- OUDOT, Manuel de procédure civile, l'action en justice, le procès, les voies de recours, 2^e Edition, Gualino, EJA – Paris- 2006, p. 213.

000 Frw not later than the 23rd March 2005 to benefit from restructuring and thereafter they were to agree on the way of payment of balance which it has failed to comply with.

[17] He explained that failure by Ets rwandais to fulfill the conditions required for the restructuring led BCR to write to the former the letter of the 09th August 2007 notifying it its decision to reconsider the initial debt equal to 279, 078, 350 Frw.

[18] NDAGIJIMANA Emmanuel, Counsel for Ets Rwandais says that after BCR purchased the debt of Ets Rwandais in BK but the former failed to pay as agreed, BCR filed a claim with the First Instance Court claiming payment of the debt of 310,348,059 Frw. Thereafter, both parties reach an agreement whereby BCR remitted part of interests and they agreed on the amount of debt equal to 230,000,000 Frw.

[19] He said that Ets Rwandais requested the loan of 100,000,000 Frw from COGEBANQUE to be able to pay and BCR helped it to move from class V of defaulters to class II in order to obtain the loan from COGEBANQUE.

[20] Counsel NDAGIJIMANA explained that even though Ets Rwandais has not paid 100,000,000 Frw immediately, but has paid on the 8th July 2005 and thereafter continued to pay to the point that on the 4th December 2006 BCR notified it that it had the outstanding debt of 33,303,370 Frw; thus it does not understand why BCR re-considered the initial debt.

[21] The Court finds that, as agreed by parties, there have been negotiations to reduce the debt of Ets Rwandais and facilitate it to pay off which reduced the debt from 501, 078, 338 Frw to 230, 000, 000 Frw on condition that the debt would be paid immediately.

[22] In explanations of Counsel for BCR and those its employees provided to the Court in its inquiry, they said the Bank can make restructuring of debt for its client but on condition that the latter complies with the terms of agreement between both parties.

[23] With respect to Ets Rwandais, they explained that BCR has accepted to restructure the former's debt if it accepts to pay immediately 230, 000, 000 Frw. In addition, they explained that Ets Rwandais was however unable to pay this agreed amount and they agreed it should pay 100,000,000 Rwf, which means that this became the new condition for debt restructuring because even if that amount was not paid immediately as was requested to Ets Rwandais, it is clear that it paid it on the 8th July 2005 after receiving the loan from COGEBANQUE, and continued to pay off the balance thereafter.

[24] The explanations provided above similarly transpires from the letter BCR wrote to COGEBANQUE on the 1st December 2005 with a copy to Ets Rwandais notifying it of the current balance on the loan, where it states that it has paid 167,000,000 Frw from the total debt of 230,000,000 Frw due to that bank, that it must pay 33,000,000 Frw from the outstanding debt of 63,000,000 Frw not later than the end of December 2005 while 30,000,000 Frw should be paid in twelve month after paying the amount said above. Therefore, the Court finds that, if BCR had not accepted the debt restructuring, it should not have written that amount Ets Rwandais had paid should be deducted from 230,000,000 Frw that both parties agreed on as explained above.

[25] The fact that BCR states that the debt restructuring was not effective because Ets Rwandais did not pay on time 33,000,000 Frw cannot be considered because it was an issue concerning payment of the agreed on amount which is different from the conditions to be fulfilled by Ets Rwandais for reduction of its debt from 501,078,338 Frw to 230,000,000 Frw.

[26] The Court finds that BCR should have abided by the contract it made with Ets Rwandais with the purpose of reducing the debt due by Ets Rwandais and facilitating it to pay and should have done so in good faith as provided for by article 33 of Civil Code book III or file a case in breach of that contract. It is in that context that BCR should not have reconsidered the initial debt of 501,078,338 Frw while it has not even notified Ets Rwandais before.

[27] Basing on the explanations above, the Court finds that as mentioned by BCR itself in the letter of the 4th December 2006, the outstanding debt that Ets Rwandais had for the latter on that date is 33,303,370 Frw as was decided by the Commercial high Court.

5. Whether the Court should have confirmed the amount of money that Ets Rwandais paid after the 04th December 2006.

[28] In the cross appeal filed by Counsel for Ets Rwandais, he says that the Commercial High Court refused to admit the additional claim they filed requesting the confirmation of amount paid to BCR after the 4th December 2008 to the extent that the balance was 1, 398, 741 Frw on 30/04/2008 and which made the balance of the debt that Etablissement Rwandais had for BCR when its properties were sold in public auction.

[29] Counsel for BCR said that the request of Ets Rwandais is without merit because its calculation of the loan shows that it does not include interests and on top of that there was no release of debt.

[30] The Court finds that the claim of Ets Rwandais filed with the Commercial High Court was to request the court to confirm the debt that BCR mentioned in the letter of the 4th December 2006 was the one due to the latter and not 279, 078, 350 Frw claimed by BCR and that was the subject of matter of claim. The claims Ets Rwandais alleges the Court has not ruled on have no merit because there is no additional claim filed which was not examined, this Court also cannot rule on what was not heard at first instance.

6. Whether Ets Rwandais may be awarded the interest of 18% calculated on 279, 078, 350 Frw.

[31] Counsel NDAGIJIMANA says that the judge decided that BCR must not pay the interests of 18 % of 279, 078, 350 Frw to Ets Rwandais because they will be awarded in another case about its properties auctioned in relation to this debt, he says, however, that that case has been ruled without awarding those interests.

[32] Counsel for BCR says that the requested interests are based on the public auction carried out pursuant to the contract it made with Ets Rwandais which provided for the sale without court recourse and on top of that Ets Rwandais has no ground for claiming interests because BCR did not commit any fault.

[33] With regard to the issue of interests of 18 % claimed by Ets Rwandais, article 106 of Law relating to evidence and its production provides the authority of a final judgment extends to the subject - matter of the judgement where the subject matter of the judgement is the same, that action is based on the same ground, that the action is pending between the same parties and that the action is brought by or against the same parties in their original names.

[34] The Court finds that Counsel for Ets Rwandais admits those interests have been claimed in another case and it cannot again claim them in this case because it would be to claim what was finally ruled on while it is prohibited by article 106 said above.

7. Procedural, advocate and Court bailiff fees.

[35] Counsel NDAGIJIMANA says that the Court awarded Ets Rwandais 500,000 Frw while it had requested 10 % of amount in litigation as advocate fees and 5% for court bailiff fees and the Court did not grant them while Ets Rwandais must pay them due to the fault of BCR which involved the former in litigations .

[36] Counsel for BCR said that amount requested by Ets Rwandais has no merit because they are based on the contract between the lawyer and his client.

[37] The Court finds that as decided by the previous judge, nothing proves that that money is the actual amount which should be paid by Ets Rwandais. This is why that amount has been determined in the discretion of the Court; but 500,000 Frw should be added to the awarded amount because the case has continued up to this appeal level.

III. COURT DECISION

[38] The Court decides that the appeal of BCR has no merit.

[39] The Court decides that the cross appeal of Ets Rwandais has merit in respect to procedural fees.

[40] The Court orders BCR to pay Ets Rwandais 500, 000 Frw of procedural fees in addition to 500,000 Frw awarded at first instance.

[41] The Court rules that the judgement appealed against is only changed in respect to procedural fees.

[42] The Court orders BCR to pay 42, 850 Frw of court fees and in case of default of payment within 8 days, this amount will be drawn from its assets by State coercion.