

BRD v. UWIMBABAZI

[Rwanda SUPREME COURT – RCOMA0052/12/CS (Hatangimbabazi, P.J., Mukamulisa and Hitiyaremye, J.) December 4, 2015]

Contracts law – Loan contract – Interests and penalty for late payment – The borrower has to pay to the bank interests and fee for late payment in case he/she does not respect the contract since any contract made in accordance with the law shall be binding between parties and it shall be performed in good faith – Law of 30/07/1888 relating to the contracts or contractual obligations, articles 33 and 480.

Contracts law – Loan contract – Award of top-up loan – The banks have the rights of granting or not the loan without even providing explanations; because the basis, most of the time, is the trust that any bank may have in its client and the capacity it assesses that he/she will repay the loan he/she is requesting for – The law of 30/07/1888 relating to the contracts or contractual obligations, article 33.

Contracts law – Loan contract – Damages resulting from the breach of the loan contract – The bank cannot be awarded the damages for the breach of the loan contract in case it has been awarded the interests and fee for late payment.

Commercial procedure – Action against the surety – The fact for the surety to have guaranteed the payment of the loan only is not enough to condemn him/her to repay in case he/she was not party to the case – Law N°21/2012 of 14/06/2012 relating to the Civil, Commercial, Labour and Administrative procedure, articles 10 and 117.

Damages – Damages resulting from the loss – None can be awarded the damages resulting from the loss in case he/she cannot establish the prejudice caused by the defendant.

Facts: Uwimbabazi Jean Paul concluded a loan contract with BRD. BRD disbursed the agreed loan in different instalments. Thereafter, he requested for additional loan to expand his project but BRD refused since the new objective was different from that agreed in the principal loan contract.

Uwimbabazi Jean Paul decided to sue BRD before the Commercial High Court submitting that its acts caused to him loss. In its decision, the Court condemned him to repay to BRD 302,000,000Frw for the owed debt, the damages for breach of the contract amounting to 5,000,000Frw together with 500,000Frw for advocate and procedural fees, and 4% amounting to 220,000Frw for the prorated fees and 6,900Frw for the court fees.

In deciding on this case, the Court held that BRD committed no fault to be condemned to pay the damages, since the loan contract on which he based his claim had the resolute conditions. With regard to the damages requested by BRD, it decided that they cannot be awarded since the financed project was not implemented. It decided again that the loan surety should not be condemned to jointly repay the loan with the borrower since he was not summoned into the proceedings.

BRD appealed to the Supreme Court deploring that the judge refused to grant the interests of the whole loan that Uwimbabazi had taken and that Mukabutera as the surety together with Uwimbabazi had to repay that loan. Uwimbabazi requested the court to adjourn the hearing so that Mukabutera who guaranteed the loan could also be summoned. He also stated that there were on-going negotiations with BRD towards the settlement of the problem between them. On these incidences, the court decided the case to be heard in the absence of the guarantor.

Uwimbabazi claimed that BRD may not be awarded the interests it requests. Instead, he accepted to repay only the money he was given as the loan because this loan was for investment which is different from the business loan. He adduced further that BRD could not consider the accrual of the interests in case it had given the grace period to Uwimbabazi.

Held: 1. The contract concluded in accordance with the law shall be binding between parties and shall be performed in good faith. Therefore, the fact that both parties have concluded the contract and agreed upon some terms such as the interests and fee for late payment but the court decided that the Bank could not be awarded those interests basing on the fact that the financed project was not implemented while it decided that no fault can be attributed to that bank; this indicates the contradiction of the Court with regard to the explanation on these interests. Thus, the decision thereon should be overturned.

2. He cannot pretend that it is the Bank which debilitated him by refusal to grant an additional loan to expand his project, as he desired since it demonstrated to him that it was no enchanted with the modification of the project as long as the principle is that the Bank has right of granting loan or not without even giving explanations; instead, most of the time, the award of the loan is determined by the confidence that any Bank may have in its client and the capacity it assesses that he/she will repay the loan.

3. No decision can be taken against someone who has not been party to the case. Thus, the guarantor cannot jointly be condemned with the debtor to repay the debt in case he/she has not been summoned.

4. None can be awarded damages resulting from the loss in case he/she cannot establish the prejudice occasioned by the fault of the defendant.

5. The bank cannot be awarded damages for breach of the loan contract in case it has been awarded the interests and fees for late payment; instead it has to be paid the procedural and lawyer's fees.

**Appeal has merit in part;
Cross appeal has no merit.**

Appealed judgment only changed with regard to the amount of money that the plaintiff has to pay.

Orders the plaintiff to pay the loan and its interests, procedural and advocate fees on both instances.

The court fees to the plaintiff.

Statutes and statutory instruments referred to:

Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 10 and 117.

Law N°15/2004 of 12/06/2004 relating to evidence and its production, article 3.

Law of 30/07/1888 relating to the contracts or obligations, articles 33 and 480.

No case referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Uwimbabazi Jean-Paul concluded a loan contract with BRD, it first disbursed 235,000,000Frw according to the contract N°106/2006/Uj/MM/MM of 22/09/2006 and then 67,000,000Frw according to the contract N°068/2008/UJ/NPJ/npj of 13/10/2008.

[2] Uwimbabazi states that he requested again the additional loan amounting to 225,000,000Frw to start his project which BRD accepted but thereafter refrained. This made Uwimbabazi to seize the Commercial High Court submitting that the behaviours of BRD caused to him both a loss and harm.

[3] The Commercial High Court decided the case, and condemned Uwimbabazi to pay to BRD 302,000,000Frw for the debt he owed to it, the damages for breach of the contract amounting to 5,000,000Frw together with 500,000Frw for advocate and procedural fees and its 4% amounting to 220,000Frw for the prorated fees and 6,900Frw for the court fees. It released Mukabutera from any charge in the case.

[4] While motivating its decision, the Court stated that BRD committed no fault to be held liable for the payment of damages, as the counsel for Uwimbabazi wanted it to be understood because the loan contract on which he bases his claim contained the resolutive condition which is in conformity with article 81 of Civil Code Book III and article 18 of Law N°45/2011 of 25/11/2011 governing contracts.

[5] It found that the requests of BRD to order Uwimbabazi to pay the entire loan he acquired for running the project of diary has basis because the Bank proved that Uwimbabazi had arrears on the initial loans, and it is evident that he breached the contract he concluded with BRD.

[6] It motivated further that the grace period that Uwimbabazi requests, could not be proved because his counsel admitted before the Court that the milk project cannot generate interests, and he does not demonstrate alternative source of payment and the needed period of time for the payment to be executed.

[7] With regards to the interests on the loan that according to BRD must accrue until the date of the hearing of the case, the Court held that this cannot be considered since BRD itself knows that the financed project did not run. It concluded that Uwimbabazi Jean Paul must repay the loans he had been granted amounting to 302,000,000Frw (235,000,000Frw + 67,000,000Frw). It realised further that it had no basis to condemn Mukabutera Béatrice who signed as the guarantor, to jointly pay with Uwimbabazi Jean Paul, because she has not been summoned in this case.

[8] BRD appealed to the Supreme Court contesting that the judge refused to grant the interests on the loan that Uwimbabazi Jean Paul had taken which amounted to 510,657,673Frw until 24/01/2012 (date of the hearing of the case in the Commercial High Court) while even the borrower does not deny them, and also refused to decide with regard to Mukabutera while she had signed on the loan contract as the guarantor; hence, she had to be ordered together with Uwimbabazi Jean Paul, to pay the outstanding loan.

[9] The public hearing was held on 28/04/2015, 28/07/20015 and on 03/11/2015 and counsel Zitoni Pierre Claver who was present informed the Court that he only pleads on behalf of Uwimbabazi Jean Paul, while Mukabutera did not appear and she had not presented

to the Court the reasons of her absence, while counsel Mafaranga Anastase appeared on behalf of BRD.

[10] Before hearing the case on merit, Zitoni Pierre Claver, the counsel, requested the court to postpone the hearing for Mukabutera to be summoned again because she was absent due to the activities she carries in New York and that if it is fixed in August 2015, she would be available to jointly defend the cause of action together with her lawyer. He added that he had started the negotiations with BRD to get how to settle the problem amicably.

[11] Mafaranga, counsel for BRD, states that the case has to be heard since the objection raised by counsel Zitoni about the absence of Mukabutera has no basis in case he does not represent her. In addition, he stated that this same date and other previous ones have been fixed upon his request, and to his view, the postponement of the hearing would be only to delay the case. He emphasized that even counsel Zitoni himself has been defaulting in preliminary hearings, and he has only appeared because he knew that this day is the last date which was fixed for this case.

[12] With regard to the negotiations that had started between BRD and its debtor as mentioned by counsel Zitoni, counsel Mafaranga argues that it cannot be considered, since on 609,050,135Frw that the defendants owes BRD, they accepts only to pay 302,000,000Frw which was ordered by Commercial High Court.

[13] After hearing the submissions of both parties about the default of Mukabutera, the Court realised that, during the hearing of 19/02/2015, it ordered that if neither counsel Mitsindo nor Counsel Zitoni does not appear on 28/04/2015, the case will be heard. It realised further that the fact that counsel Zitoni admits that he talks to Mukabutera every day, proves that the latter knew about the date of the hearing. Basing on article 59 of the Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labor and administrative procedure¹, the court decided to hear the case in Mukabutera's absence.

II. ANALYSIS OF LEGAL ISSUES

Whether the interests on the loan that BRD granted to Uwimbabazi Jean Paul should be considered.

[14] Mafaranga Anastase, counsel for BRD argues that the loan contract clearly shows the purpose, and even provides for the interests and fee for late payment. He added further that on the last date of the hearing of 24/01/2012, the debt was amounting to 510,657,673Frw, and the defendant did not refute it; and therefore, the Commercial High Court would have condemned both Uwimbabazi and Mukabutera to pay that money instead of ordering them to pay only 302,000,000Frw without considering the interests and the fee for late payment.

[15] The counsel for BRD added that the Commercial High Court contradicted itself because it held that BRD was at no fault, and later it held that there were arrears that Uwimbabazi did not pay. it condemned him to pay to BRD the damages amounting to

¹ That article provides that “if the defendant does not appear to the first hearing without valid reason, the plaintiff may apply for adjournment of the case or for the case to proceed in the absence of the defendant. In the latter situation, the submissions of the plaintiff shall be considered, his/her claim received and given basis if well founded and if it has been lodged in compliance with the procedure provided for by the Law”.

5,000,000Frw while with regard to the loan, it decided that he had to pay the principle debt only without motivating exclusion of the payment of interests whereas there was evidence of the quantum of the money which BRD seeks payment and the modalities of their computation until the case was heard at the first instance.

[16] Moreover, he requests the Supreme Court that in determining the interests from the whole loan, it would base on the calculations that BRD had submitted demonstrating that on 22/09/2006, the first date of the hearing before this court, the total debt including its interests was 609,050,531Frw.

[17] With regard to how the debt that BRD demands the payment was calculated, particularly with regard to the amount of 235,000,000Frw that Uwimbabazi was granted on 22/09/2006, counsel Mafaranga states that the borrower was allowed by the bank the grace period until September 30, 2007, thereafter he wrote again to BRD requesting more time and this led both parties to the operation of the novation of the contract. He states further that in article one (1) of the new contract, both parties agreed that Uwimbabazi is allowed another extension of payment of the principal debt until 31/03/2009 but, however, the interests will accrue in case the borrower will not yet have started paying and be added to the principal loan, which is the reason why after that time, the calculated interests of 13% and fee for late payment on the rate 4%, BRD considered 264,000,000Frw as the principle loan.

[18] He added that BRD calculated the loan and its interests and amounted to 467,446,136Frw, and when added to another loan of 67,000,000Frw that Uwimbabazi was granted, which is also calculated together with its interests and the fee for late payment that they have agreed upon like those mentioned above, the total debt amounted to 609,050,531Frw as mentioned above.

[19] He goes on submitting that the defense of both Uwimbabazi and Mukabutera that BRD had partnered in their project, has no basis because they cannot prove it and the contract is clear because it does not provide that BRD partners with them in that project.

[20] With regards to the abuse of rights by BRD as invoked by counsel for Uwimbabazi Jean Paul, counsel Mafaranga argues that it also has no merit because the Bank committed no fault as held by the Court in the appealed judgment. However, he conceded, what happened is that BRD refused the modification of the project since it found it worrisome, the reason why it refused granting additional loan as Uwimbabazi desired and even the bank is not bound to grant the loan in case it realizes that the project would not generate interests.

[21] Zitoni Pierre Claver, counsel for Uwimbabazi Jean Paul submits that the Commercial High Court cannot be blamed since it demonstrated that BRD misbehaved through its abuse of rights because it hold the key for the success of the project in which it had partnered with Uwimbabazi.

[22] He went on arguing that Uwimbabazi requested BRD to allow her relief measures but it refused and it refuted also his request to allow him to have possession of the pledged security so that he could get loan of the needed amount of money. He deplored in consequence that it is because of these behaviours that the Commercial High Court decided that he must only pay the debt without computation of interests, because it has found that BRD also played an active role in the failure of the financed project.

[23] With regard to the interests that BRD claims, Zitoni, the counsel argues that they cannot be granted since the disbursed amount of money is not for commercial loan rather it was the loan for investment, the reason why BRD has only to be paid the principal debt because it is it which debilitated Uwimbabazi and led to the failure of his project.

[24] Counsel Zitoni argues moreover that it is not understandable how BRD could have continued computing the interest even during the extension of the time of payment allowed to Uwimbabazi, and that his client does not accept how the contract can be amended to give rise to compound interests.

THE VIEW OF THE COURT

[25] Article 33 of the Civil Code Book III which was into force when BRD and Uwimbabazi concluded the contract provides that “Contracts concluded in accordance with the law shall be binding between parties. They may only be revoked at the consent of the parties or for reasons based on law. They shall be performed in good faith”.

[26] Article 3 of the Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that “each party proves the veracity of what he/she claims”.

[27] The Court finds that the case file includes the instrumentum of loan contract of 235,000,000Frw and the one of mortgage N°106/2006/UJ/MM/MM which took effect on 22/09/2006 between Uwimbabazi Jean Paul and BRD. These contracts indicate that the loan was for running the project of mini-dairy which is located in Runda, Kamonyi District. In its article 4, it is proved that both parties agree that the borrower is allowed grace period for the payment of the principle debt until 30/09/2007 and after that period, the payment would be executed monthly within the period of 7 years. Moreover, in article 5, the parties to the contract agreed that the rate for interest was 13% per year and fee for late payment at the rate of 4%.

[28] Again, the case file indicates that on 03/02/2009 BRD and Uwimbabazi concluded another contract N°01/2009 relating to the amendment of the contract N°106/2006/UJ/MM/MM, which provides in its article 1 that “the borrower is allowed the grace period to pay the principle debt on the loan until 31/09/2009, and the interests which shall be calculated before the commencement of payment by the borrower shall be added to the principle debt”.

[29] The documents of the case file contain another loan contract signed on 13/10/2008 for 67,000,000Frw of the same kind as the loan of 22/09/2006 mentioned above. In article 4 of that contract, both parties agreed that the loan should be paid within the period of 7 years from 31/03/2009 at the interest rate of 14% per year, and fee for late payment at the rate of 4%.

[30] The case file includes a letter of 23/04/2009 that Uwimbabazi wrote to BRD notifying it that his project may run at any time since the machines to use are available to the project site, but he added that he wanted to expand the project to the production of juice, ultra-high temperature milk (UHT) and mineral water in order to compete with others on the market. Within this letter, he requested to be granted the additional amount of money equaling to 45,000,000Frw for starting this project expansion.

[31] In addition, the case file demonstrates that after that date, Uwimbabazi wrote other letters to BRD, among them there is that of 03/12/2010 that BRD replied to notifying him that the grounds that he had advanced to abandon the project that had been agreed upon are not valid because they were not approved by experts, and there is no evidence that the new project will be successful. Therefore, BRD decided, if he opts to abandon the project that it had started financing, and then it cannot grant the loan of 225,000,000Frw that they had agreed earlier (cancellation of loan).

[32] In his letter of 03/12/2010 in response to that of BRD mentioned above, and his letter dated 4/11/2010, Uwimbabazi explained the grounds of changing the project, and the basis for his confirmation that the new project would generate interests while in its letter of 15/12/2010, BRD notified again Uwimbabazi that it was not convinced with regard to his desire of producing mineral water and juice before implementing the project of milk production for which he had been granted the loan. In that letter however, BRD notified him of arrears amounting to 125,500,078Frw.

[33] Taking into account the above mentioned holdings, it is evident that BRD did not accept Uwimbabazi's proposal of introducing in the projects other products than that which both parties had agreed upon. The Bank seized that opportunity to inform him about the aspect of the debt and addressed to him a payment order, effective after 08 February 2011..

[34] The Court is of the view that while deciding of not granting the interests accrue from the loan BRD granted to Uwimbabazi Jean Paul, the Commercial High Court grounded on the fact that BRD itself clearly knew that the project had never ran, while on the other hand it had demonstrated that the Bank was not at fault; hence, its motivations with regard to those interests contain the contradictions; that is why the decision of this court has to be changed.

[35] The Court again found that the pleadings of counsel for Uwimbabazi that it is BRD which debilitated him when it refused to grant him an additional loan to enable him to expand the project as he planned, cannot be considered because it demonstrated to him that it was not satisfied with the modification of the project that it had financed. Furthermore, as explained by experts in banking, the leading principle on granting the loan, is that the banks have the rights of granting them or not without even giving justifications; but the motive is, most of times, the credibility that any bank may have towards its client and the capacity it assesses that he/she will repay the requested loan².

[36] The Court again realised that the pleading of counsel for Uwimbabazi regarding the fact that the calculation of interests for the investment loan should not be similar to that of the commercial loan, and that BRD abused its rights, cannot be considered, because given that he cannot even prove it, in the contract entered into by both parties, they agreed on those interests. That is why it must bind them.

[37] After the explanations above, the Court finds that as far as Uwimbabazi does not contradict that he has been indebted by BRD the amount of money mentioned above which

² Thierry Bonneau: "Droit bancaire", 2007, 7ème éd., Montchrestien, p.367: "*Si un droit au compte a été légalement consacré, en revanche, il n'y a pas de droit au crédit, les banquiers étant libres de consentir ou de refuser les crédits sollicités par leurs clients: ...hors le cas où il est tenu par un engagement antérieur, le banquier est toujours libre, sans avoir à justifier sa décision qui est discrétionnaire, de proposer ou de consentir un crédit quelle qu'en soit la forme, de s'abstenir ou de refuser de le faire*".

had to generate interests and the fee for late payment and other things specified in the aforementioned contract while these explanations are subject to the reading of article 480 of the third book of the Civil Code³ which was in force when the contract was signed, it is understandable that he must be condemned to pay to that Bank the loan it has granted to him together with its interests in addition to the fee for late payment, the total debt that Uwimbabazi owes to BRD as it has calculated it, being of 609,050,531Frw.

Whether at the first instance Mukabutera had to be jointly condemned together with Uwimbabazi Jean Paul to pay the debt she owes BRD.

[38] Counsel Mafaranga adduces that the judge decided that Mukabutera could not be condemned to pay because she was not party to the appealed judgment in disregard of the suretyship contract she concluded with BRD on 09/10/2006 and on 01/12/2008 whereby she committed herself to jointly pay BRD with the borrower. To him, no any other constraints or discussions on that payment must be constituted. In addition, BRD cannot be held responsible of the absence of Mukabutera in the hearing while in its defense submissions it had detailed what it claimed from her.

[39] Zitoni, the counsel for Uwimbabazi argues that there was no ground that Mukabutera would have been brought in the case while it is Uwimbabazi who filed the claim. He added further that what BRD claimed before the Commercial High Court as the judgment appealed against demonstrates it, is the condemnation of Mukabutera with Uwimbabazi to jointly pay, while no request to summon her to defend herself on this claim was made. To him, the court could not take the decision against someone who was not summoned. He states in addition that, if BRD wanted Mukabutera to appear in this case, it should have respected the procedure of intervention of a third party.

THE VIEW OF THE COURT

[40] Article 10 of Law N°21/2012 of 14/06/2012 relating to the civil, commercial, labor and administrative procedure provides that “no party to the case shall be subject to a court ruling without being heard or summoned”.

[41] Article 117 of that law provides that “forced interventions may be instituted by any interested party against all persons who are third parties to a case against which they can sue by a third party opposition in order to challenge them in one case.

[42] The documents in the case file demonstrate that Uwimbabazi Jean Paul is the initiator of the claim before the Commercial High Court against BRD and even if in its defence submissions, the Bank concluded requesting to jointly condemn Uwimbabazi, the borrower, and Mukabutera to pay the debt she had guaranteed, it did not request her summon to appear before this Court to be condemned till the debates were closed without being party to the case.

[43] Basing on the aforementioned holdings and on the provisions of article 117 of Law N°21/2012 of 14/06/2012 mentioned above, the court realised that the fact that there is a contract entered into between Mukabutera and BRD securing the loan taken by Uwimbabazi,

³ It states that “the interest rate resulting from the contract is fixed by the agreement of the contractants, and to prove it respects the ordinary laws”.

is not itself sufficient to condemn her to pay that debt together with its interests since she has not been a party at the first instance.

With regards to cross appeal raised by Uwimbabazi Jean Paul as incidental to the principal appeal lodged by BRD and the amount of money claimed by BRD.

[44] Zitoni Pierre Claver, the counsel, submits that it is BRD which caused the project of Uwimbabazi to fail generating interests as expected, and that it denied granting to him the loan it assured which caused him such a loss, and therefore, based on this ground he claims 50,000,000Frw of damages.

[45] Mafaranga Anastase, the counsel, states that the requests of damages submitted by counsel for Uwimbabazi are baseless; instead, as it has demonstrated within its appeal submissions, it requests the Court to order Uwimbabazi to pay it the procedural and advocate fees amounting to 1,000,000Frw.

THE VIEW OF THE COURT

[46] The Court finds that the damages that Zitoni Pierre Claver, counsel for Uwimbabazi Jean Paul, claims cannot be granted because, as demonstrated in this case, he did not prove the fault that BRD committed in a such a way that it may be ordered to pay damages.

[47] The Court finds that the procedural and advocate fees requested by BRD must be granted but because it is excessive, Uwimbabazi Jean Paul must pay to that Bank 500,000Frw for the procedural and advocate fees at this instance.

[48] The Court finds further that as long as BRD is awarded the interests and the fee for late payment accruing from the loan it has granted, there is no ground to maintain the damages for breach of contract as granted by the Commercial High Court. Therefore, Uwimbabazi has only to pay 500,000Frw for the procedural and advocate fees at the first instance.

III. THE DECISION OF THE COURT

[49] Decides that the appeal of BRD has merit in part.

[50] Decides that cross appeal filed by Uwimbabazi has no merit.

[51] Decides that the ruling of the judgment N° RCOM0119/11/HCC decided by the Commercial High Court on March 2, 2012, is reversed with regards the amount of money that Uwimbabazi has to pay.

[52] Condemns Uwimbabazi Jean Paul to pay to BRD the money for the debt it has granted to him and its interests, all amounting to 609,050,531Frw and 1,000,000Frw for the procedural and advocate fees at both instances in which the case has been heard, which amounts to 610,050,531Frw.

[53] Orders Uwimbabazi Jean Paul to pay also the court fees amounting to 100,000Frw.