

STRONG CONSTRUCTIONS LTD v RADIANT INSURANCE COMPANY LTD

[Rwanda SUPREME COURT – RS/INJUST/RCOM 00002/2019/SC (Rugege, P.J., Kayitesi, Hitiyaremye, Cyanzayire and Rukundakuvuga, J.) November 15, 2019]

Contract – Contracts of suretyship – Joint surety (Caution solidaire) – The creditor has the right to enforce the surety before seeking the payment from the principal debtor’s personal property in case the latter defaults on the payment of the debt – A guarantor who breaches the contract of joint surety and causes a loss to the insured is liable for damages.

Facts: Strong Constructions Ltd signed with Radiant Insurance Company Ltd a contract to guarantee the loan it took from the Bank of Kigali to execute the tender it won at Kanombe Military Hospital. In that contract, Radiant Insurance Company Ltd had to pay the loan when it is obvious that Strong Constructions Ltd did not get enough money from that tender to pay the loan.

Strong Constructions Ltd did not meet the deadline for the payment which resulted in the Bank of Kigali requesting Radiant Insurance Company Ltd to repay that loan for which it had insured. Before paying the loan, Radiant Insurance Company Ltd requested the Bank of Kigali to provide it with information regarding the transactions on the bank account of Strong Construction Ltd and after realizing that through its bank account, it received a lot of money which can cover the loan, it refused to pay the loan it had insured, this led to Strong Construction Ltd to sue Radiant Insurance Company Ltd in the Commercial Court for the breach of the contract.

That Court found the claim with no merit because Strong Construction Ltd was the one to repay the loan it was given.

Strong Construction Ltd appealed to the Commercial High Court, which rendered the judgment and found the appeal with merit on the ground that Radiant Insurance Company Ltd was in breach of the guarantee contract as it failed to prove that Strong Construction Ltd received payment from the tender for which it had insured. This led the Commercial High Court to order Radiant Insurance Company Ltd to reimburse Strong Construction Ltd the money it had been charged for late fees by the Bank of Kigali and also pay the money which the Bank of Kigali had seized.

As a result, Radiant Insurance Company Ltd appealed to the Supreme Court, it found the appeal with merit on the ground that Strong Construction Ltd did not fail to get the money for the payment because enough money to pay the laon it owed the Bank of Kigali had been deposited on its bank account.

Thereafter, Strong Constructions Ltd wrote to the Office of Ombudsman requesting that the judgment be reviewed because it is vitiated with injustice. After analyzing the judgment, the Ombudsman wrote to the President of the Supreme Court requesting the review of that judgment. The President of the Supreme Court ordered the judgment to be reviewed.

During the hearing, Strong Constructions Ltd argue that the Supreme Court ignored the fact that Radiant Insurance Company Ltd was a joint guarantor “Caution Solidaire”, and is also accepted to pay on first demand and it also ignored the evidence proving that it was not able to repay the loan,

which includes the fact that the owners of the tender failed to secure the funds and consequently failed to pay it on time.

On the issue of failing to secure the funds « *financement* », Radiant Insurance Company Ltd argues that Strong Constructions Ltd was the principal debtor, therefore it had to pay only if it failed to pay but on the contrary, it had the money as the bank statement of the account indicated.

On the issue that it agreed to be a joint surety “Caution solidaire” and to pay on first demand, it argues that this is not the case, because the contract set out the requirements which must first be fulfilled before it pays, they include to first demonstrate that the money deposited on the Strong Constructions Ltd’ account was not enough to repay the loan.

Held: 1. The creditor has the right to enforce the surety before seeking the payment from the principal debtor’s personal property in case the latter defaults on the payment of the debt.

2. A guarantor who breaches the contract of joint surety and causes a loss to the insured is liable to pay damages.

**The claim for the review of the judgment due to injustice has merit.
The judgment rendered by the Supreme Court is overturned.**

Statutes and statutory instruments referred to:

Law N° 45/2011 of 25/11/2011 governing contracts, article 64 and 137.

Authors cited:

Denis Philippe, Delphine Dehase, Code Civil, 5^{ème} edition, Bruylant, 2007, page 287.

Jérôme François, Droit civil, les sûretés personnelles, Tome VIII, Economica, Paris, 2004, page 33.

Martin Imbleau, William A. Schabas, Introduction au droit rwandais, Les éditions Ivon Blais Inc, 1999, page 83.

Pierre Voirin, Gilles Goubeaux, Droit civil, Personnes-Famille-Incapacité-Biens-Obligations-Sûretés, Tome 1, 30^{ème} édition, LGDJ, Paris, page 635.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] On 14/04/2014, Strong Constructions Ltd received a loan from Bank of Kigali of 272,000,000 Frw for the construction of VIP WING at Kanombe Military Hospital., on 15/04/2014, Strong Constructions Ltd immediately signed a contract with Radiant Insurance Company Ltd called “Contract de Cautionnement no RD 0010CRI1403488” to insure the loan. On the same date, in a document entitled "Acte de Cautionnement no RD 0010CRI1401759 / 02645", Radiant Insurance Company Ltd agreed to repay the loan on behalf of Strong Constructions Ltd, in case the money it will get from the tenders is not enough to service the loan paid on the bank account no 010- 0323102-28 in the Bank of Kigali.

[2] Strong Constructions Ltd did not repay the loan to the Bank of Kigali on the agreed period, and on 13/04/2015 the Bank of Kigali wrote to Radiant Insurance Company Ltd informing it that Strong Constructions Ltd was in breach of its obligations to repay the loan amounting to 272,000,000 Frw, thus required Radiant Insurance Company Ltd to repay that loan as stipulated in the insurance a contract, (contract de cautionnement) it signed with Strong Construction Ltd.

[3] Upon receiving the request, Radiant Insurance Company Ltd asked the Bank of Kigali for information on the loan granted to Strong Constructions Ltd to see if any money had been paid from the tender for the construction of VIP WING at Kanombe Hospital, the " historique " of the account of Strong Constructions Company Ltd in the Bank, showed that it received 354,681,513 Frw for advance payment "advance deemrage", paid in two installments, 300,000,000Frw paid on 21/11/2013 and 54,681,513 Frw paid on 16/06/2014.

[4] After noticing that money was transferred to Strong Constructions Ltd's account, Radiant Insurance Company Ltd refused to pay the Bank of Kigali. Strong Constructions Ltd immediately filed a claim to the Commercial Court of Nyarugenge claiming that Radiant Insurance Company Ltd was in breach of the insurance agreement, they concluded on 15/04/2014.

[5] In the judgment NoRCOM 00011/2016 / TC / NYGE rendered on 05/05/2016, the Court found the claim of Strong Constructions Ltd that Radiant Insurance Company Ltd breached with without merit, as it was the one with the primary responsibility to pay the debt it had taken, and did not demonstrate that it failed to get the money to repay the loan or any other reason why it did not pay, it also ordered it to pay counsel and procedural fees amounting to 1,000,000 Frw to Radiant Insurance Company damages.

[6] Strong Constructions Ltd appealed to the Commercial High Court and in judgment N°. RCOMA 00312/2016 / CHC / HCC rendered on 14/10/2016, the Court found the appeal with merit on the ground that Radiant Insurance Company Ltd has no substantial evidence. To prove that Strong Constructions Ltd was paid for the tender of the construction of VIP WING at Kanombe Hospital, but did not repay the loan it got from the Bank of Kigali, therefore, it held that Radiant Insurance Company Ltd did not comply with its obligations as stipulated in the insurance contract. It also ordered Radiant Insurance Company Ltd to reimburse Strong Constructions Ltd, Frw 84,271,004 it paid to the Bank of Kigali for late fees, to repay Frw 83,103,377 Frw seized by the Bank of Kigali, to pay Frw 126,000 it paid for court fees on the first and second instance and to pay him 3,000,000 Frw for the procedural and counsel fees on those levels.

[7] Radiant Insurance Company Ltd appealed to the Supreme Court, in judgment No. RCOMAA 00065/2016 / SC-RCOMAA 0071/16 / CS rendered on 21/06/2017, the Court found the appeal of Radiant Insurance Company Ltd with merit, that it should not pay the loan given to Strong Constructions Ltd, as the latter did not fail to get the money to repay the loan because it has been realized that enough money to repay the debt owed to it by the Bank of Kigali was deposited on its account, but failed to do it, it ordered it to give Radiant Insurance Company Ltd, 1,000,000FRW for counsel and procedural fees, and to reimburse the court fee of 100,000 Frw.

[8] On 11/09/2017, Strong Constructions Ltd wrote to the Office of the Ombudsman requesting that judgment N° RCOMAA 00065/2016 / SC-RCOMAA0071 / 16 / CS be reviewed because it is vitiated by injustice. After analyzing the grounds of Strong Constructions Ltd, the

Ombudsman found that Radiant Insurance Company Ltd did not comply with the insurance contract it had with Strong Construction Ltd, therefore wrote to the President of the Supreme Court requesting for the review of that judgment.

[9] After examining the issue, in his order dated 27/06/2019, the President of the Supreme Court ordered the case to be referred to the Registry of the Court and be recorded in the register so that, the case be reviewed.

[10] The case was heard in public on 8/10/2019, Strong Constructions Ltd represented by Counsel Idahemuka Tharcisse, while Radiant Insurance Company Ltd was represented by Counsel Kazungu Jean Bosco, Counsel Ruzindana Ignace, and Counsel Twiringiyemungu Joseph, the hearing was closed and the pronouncement scheduled for 15/11/2019.

[11] In its court submissions and also during the hearing in the Court, Strong Constructions Ltd, the ground of the injustice is based on the fact that in the judgment N°. RCOMAA 00065/2016 / CS-RCOMAA 0071/16 / CS rendered by the Supreme Court on 21/06/2017, the Court ruled that it did not fail to get the funds to repay the debt owed to it by the Bank of Kigali, ignoring the evidence that it was incapable of repaying that loan. One such evidence is that the owner of the tender for the construction of the VIP WING at Kanombe Military Hospital, MINADEF / RMH, failed to secure the funds, therefore, the work did not go as planned, thus it was also unable to complete the work on time, and that is the reason why Radiant Insurance Company Ltd had to pay. The fact that Radiant Insurance Company Ltd as its insurer did not pay for it it has to be liable for the damages and the loss caused.

[12] Radiant Insurance Company Ltd argues that the Strong Constructions Ltd's account had enough money to repay the debt owed to it by the Bank of Kigali but decided not to repay it, thus it would not have paid on its behalf when it did not fail to get the funds to repay the loan. The issue to analyze is whether Radiant Insurance Company Ltd breached its contractual obligations stipulated in the insurance contract it signed with Strong Constructions Ltd, if it breached them, then analyze whether the damages for the loss requested by Strong Constructions Ltd should be awarded.

II. ANALYSIS OF THE LEGAL ISSUES

a. Whether Radiant Insurance Company Ltd breached the surety agreement (Acte de cautionnement) it had with Strong Constructions Ltd.

[13] Adv. Idahemuka, the counsel for Strong Constructions Ltd alleges that the injustice contained in judgment RCOMAA 00065/2016 / SC-RCOMAA0071 / 16 / CS is as follows :

The fact that in the judgment the Supreme Court ruled that Radiant Insurance Company Ltd was not liable to repay the debt of 272,000,000 Frw owed to Strong Constructions Ltd by the Bank of Kigali which is insured, because it did not fail to get the money to repay it, since enough funds to repay it was deposited on its account, but it ignored the evidence proving that it was not able to repay the loan, which includes the fact that MINADEF / RMH failed to get the funds and consequently failed to pay it on time, resulting in the work not being done as planned.

The Supreme Court ignored the fact that the first clause of the contract (Contract de cautionnement No RD0010CRI1403488) it signed with Radiant Insurance Company Ltd stipulated that it accepted to be “Caution Solidaire”, and to pay on first demand (assuming an irrevocable guarantee of payment), and in the document entitled “Acte de cautionnement No RD0010CRI1401759 / 02645” in its paragraph 5, it accepted to pay the Bank of Kigali immediately when it formally requests it in writing

The Court's disregard for the origin of the loan payment of 272,000,000 Frw, confirms that a sufficient amount has been transferred to the account of Strong Constructions Ltd and paragraph 5 of the contract (Acte de Cautionnement) provided that the payment will come from the money to be paid on the invoices for the insured tender of the construction of VIP WING at Kanombe Hospital, and the fact that the loan was confused with the advance payment while it had a special contract called advance payment guarantee No RD001RC0A1305281 dated 04/10/2013, and it was paid before the contract in litigation was signed because it was signed on 15/04/2014 while the advance was paid on 30/10/2013.

[14] Counsel Idahemuka Tharcisse furthermore argues that another cause of the injustice is that the Court disregarded the following provisions of the law :

Article 170 of the CPCCSA prohibiting the judge from adjudicating beyond the limit of the appeal subject-matter, as it examined all funds transferred through the Strong Construction Ltd account including those paid for other tenders, ignoring the fact that the issue was the Kanombe Military Hospital's payment for the contract for the construction of the VIP WING, and it ignored the fact that a commercial or civil case belongs to the parties themselves.

Article 110 of Law N°15/2004 of 12/06/2004 relating to evidence and its production provides that a judicial admission refers to statements the accused or his or her representative makes before the court. Such statements shall serve as plaintiff arguments, so the fact that in the contract, Radiant Insurance Company Ltd agreed to be a joint surety " Caution solidaire " and provided an irrevocable guarantee “garantie irrevocable” of repaying the loan should not have been ignored by the Court.

[15] Counsel Kazungu Jean Bosco, Counsel Ruzindana Ignace and Counsel Twiringiyemungu Joseph representing Radiant Insurance Company Ltd responded to the arguments made by Strong Constructions Ltd as follows :

On the issue of failing to secure the funds « financement », they argue that Strong Constructions Ltd was the one who took the loan from the Bank of Kigali, and it was the principal debtor, therefore Radiant Insurance Company Ltd had to pay only if Strong Constructions Ltd failed to pay, on the contrary, it had the money to pay. After all, the Bank of Kigali indicated that on its account, the amount of money deposited on it exceeds the loan which Radiant insured and that the Bank of Kigali paid its debts because Strong Constructions Ltd had it.

On the issue that Radiant Insurance Company Ltd had agreed to be a joint surety “Caution solidaire” and to pay without any hesitation, they argue that this is not the case, because the contract stipulates the requirements which must first be fulfilled before it pays, including first showing that the money deposited on the Strong Constructions Ltd’ account

in that bank was not sufficient to repay the loan. They explain that the provisions of the “acte de cautionnement” on which Strong Constructions Ltd bases on do not engage it, because that contract was between the Bank of Kigali and Radiant Insurance Company Ltd, so no other party can base on it to sue based on the principle that the contract binds the parties, and therefore it does not engage Strong Construction Ltd, as it is not its beneficiary

On the issue that Radiant Insurance Company Ltd disregarded the origin of the payment, they argue that the money paid to Strong Constructions Ltd, whether it was advance payment or any other payment received later, all had to be used for the payment of the loan, that is why the Bank of Kigali paid itself from the money which was on the bank account of Strong Construction Ltd.

[16] They further argue that in a letter from the Bank of Kigali dated 14/04/2014, granting a loan to Strong Construction Ltd, it included properties that were furnished as mortgages, on which the Bank of Kigali used to repay its debt. These mortgages are :

Registered mortgage of 599,000,000 Rwf on 1st rank on parcelle N° 2276 in Gisozi-Gasabo,

Fire insurance covering the building given as a guarantee with an endorsement transfer of interests in our favor made on 06/17/2014,

Guarantee of the partners of 807,800,000Frw and *domiciliation des paiements des divers contrats*

[17] They argue that based on such mortgages, in particular, the "*domiciliation des paiements des divers contrats*" it is obvious that the Bank of Kigali had to pay itself the money from contracts/invoices paid if it was insufficient, then requests Radiant Insurance Company Ltd to pay the balance pursuant to pay for the loss under the « Acte de cautionnement », or based on the terms of the loan contract pays itself on the money deposited on the account regardless of its origin, which is what it did, therefore since it did it, and paid itself, Radiant Insurance Company Ltd hand no other obligation.

[18] Concerning the legal provisions that Strong Constructions Ltd claims that they were not complied with, the counsels for Radiant Insurance Company Ltd respond as follows:

Regarding article 170 of the CPCCSA which provides that a judge only adjudicates on the appealed subject matter, they state that in paragraph 20 of the judgment sought to be reviewed due to injustice, it appears that the Court examined the appeal of Radiant Insurance Company Ltd and found that on the Strong Constructions Ltd's account the money which was deposited on it was enough to repay the loan, therefore it did not adjudicate beyond the limits of the appealed subject matter because it had to pay only if on the account there was no enough money to repay the loan. They add that the principle that in civil and commercial hearings, the case belongs to the parties, is also no longer applicable, instead, according to the new laws, the case belongs to the parties and the Court ; they give an example of a pre-trial meeting held by the Court, and another one that the Court may on its initiative go to the location of the subject matter.

Regarding article 110 of Law N°15/2004 of 12/06/2004 relating to evidence and its production, whereby Strong Constructions Ltd alleges that Radiant Insurance Company Ltd acknowledged the loan, they refute that it never did it because according to articles 5

and 8 of the guarantee contract (contrat de cautionnement), Strong Constructions Ltd was the one given the loan and was the one to repay it, if it is paid by Radiant Insurance Company Ltd then the former would reimburse the money it paid on its behalf, they conclude by stating that since the Bank of Kigali was paid, they find this case unfounded.

DETERMINATION OF THE COURT

[19] Strong Constructions Ltd claims that alleges that it failed to repay the loan of 272,000,000 Frw it got from the Bank of Kigali because the owners of the project of constructing a VIP WING at Kanombe Hospital failed to get the funds and thus it was not paid and that there is evidence to prove it, and Radiant Insurance Company Ltd refused to pay the loan as it had agreed in their surety contract dated 15/04/2014 (Contract de Cautionnement N° RD0010CRI1403488).

[20] On the issue of failure to repay the loan because the owners of the tender failed to get the funding, the evidence in the case file which was argued upon by both parties shows that the agreement to construct a VIP WING at Kanombe Hospital was signed between Strong Constructions Ltd and Rwanda Military Hospital in partnership with the Ministry of Health, was not implemented within the provided time framework due to the lack of funds which affected the payment of Strong Constructions Ltd for the work it had completed, which caused it not to honor the loan contract of 272,000,000 Frw it concluded with the Bank of Kigali.

[21] Those elements of evidence include :

The bank statement issued by Bank of Kigali demonstrate that the first invoice No 04/01/023/2013 / T / NCB / RHM / MOH of 143,864,240 Frw issued by Strong Construction Ltd on 23/05/2014 and a second invoice No 05/02/023/2013 / T / NCB / RMH / MOH of 60,751,920 Frw, issued on 07/07/2014 was not paid by Kanombe Military Hospital ;

The bank statement issued by the Bank of Kigali demonstrates that since the surety contract was signed on 15/04/2014, Kanombe Hospital had paid 54,681,513 Frw paid on 16/06/2014, 51,484. 678 Frw paid on 20/03/2015, and 136.123.194 Frw paid on 10/12/2015.

Except for 54,681,513 Frw paid on 16/06/2014, others were paid after the period stipulated in the contract for the construction of VIP WING had expired, because clause 5 of the contract provided that the construction was to be completed within 15 months, beginning from the date it was signed by both parties on 15/10/2013, thus that duration had to expire on 15/01/2015 ;

A letter dated 16/10/2014 from Strong Constructions Ltd to the Director of Kanombe Hospital reminding them to pay those bills (No 04/01/023/2013 / T / NCB / RHM / MOH of 143,864,240 Frw and invoice No 05/02/023/2013 / T / NCB / RMH / MOH of 60,751,920 Frw). That letter indicated that as of 16/10/2014, no invoice of Strong Constructions Ltd had been paid ;

Two letters, dated 20/01/2016 and 30/03/2016, of the Directorate of Military Hospital requesting the Minister of Health to continue funding the project of constructing the VIP

WING at Kanombe Hospital. It is obvious that the hospital by writing those letters they were short of funds, as stated by Strong Constructions Ltd.

A letter dated 19/02/2015 from the Director of Military Hospital in response to a letter from Strong Constructions Ltd dated 18/02/2015 requesting an extension of the deadline for the completion of the work.

In the case file, there is no single letter from the Military Hospital stating that Strong Constructions Ltd was the one that delayed the work.

[22] The contracts on which both parties base are in two categories: the surety contract dated 15/04/2014 (Contrat de Cautionnement N° RD0010CRI1403488) whereby Radiant Insurance Company Ltd agreed to pay on behalf of Strong Constructions Ltd in case it fails to get the payment, and the contract dated 15/04/2014 entitled "Acte de Cautionnement RD0010CRI1401759 / 02645" concluded by Radiant Insurance Company Ltd assuring the Bank of Kigali to repay the debt of Strong Constructions Ltd in case it defaults.

[23] Concerning the claims of Radiant Insurance Company Ltd that Strong Constructions Ltd should not use the contract of the "Acte de Cautionnement RD0010CRI1401759 / 02645" as its defense because it does not engage it as it was concluded by Radiant Insurance Company Ltd alone, the Court finds that the mentioned contract should not have existed in the first place in the absence of the principal loan contract between the Bank of Kigali and Strong Construction Ltd, which is the basis of the surety contract (Contrat de Cautionnement). That surety contract "Contrat de cautionnement" is dependent on the principal contract in which Strong Constructions Ltd has an interest, Radiant Insurance Company Ltd cannot claim that Strong Constructions Ltd has no interest in it or it does not engage it, because all are based on a loan it got from the Bank of Kigali. Regarding the issue that the Bank of Kigali should have been the one to sue because it's the one which the contract "Contrat de Cautionnement" engages, the Court finds that whether it did not sue or it sued but later abandoned the claim as alleged by the counsels for Radiant Insurance Company Ltd, does not prevent Strong Constructions Ltd to sue if it finds that the contract it signed with Radiant Insurance Company Ltd was not honored.

[24] Regarding the surety contract in general, Legal scholars state that anyone who agrees to be a guarantor undertakes to answer for the performance of another person's obligation in the event of a default by the person primarily responsible for it [...celui qui se rend caution d'une obligation, se soumet envers le créancier à satisfaire à cette obligation, si le débiteur n'y satisfait pas lui-même...]¹ .

[25] Legal scholars distinguish between simple guarantee (cautionnement simple) and joint guarantee (Caution solidaire) and argue that their consequences are different. They argue that under the simple guarantee, the creditor has to first try to get the payment in the debtor's property, after it has been established that he cannot pay the debt then the guarantor pays. [*...le cautionnement est simple, lorsque la caution dispose d'un bénéfice de discussion. Elle peut contraindre, à certaines conditions, le créancier à discuter d'abord les biens du débiteur, c'est-à-dire à établir son insolvabilité...*]. On the other side for the joint guarantee, (Caution solidaire) they explain that the guarantor has no right to request that the payment first be sought first from

¹ Denis Philippe, Delphine Dehasse, Code Civil, 5 ème edition, Bruylant, 2007, page 287.

the insured person's property. ...[*la caution solidaire, en effet, ne dispose pas de bénéfice de discussion, ...la caution est exposée au paiement de la dette principale lorsque, celle-ci, est exigible..*]²

[26] The Court finds that in the first clause of the contract between Radiant Insurance Company Ltd and Strong Constructions Ltd (contract de cautionnement No RD0010CRI1403488 of 15/04/2014), Radiant Insurance Company Ltd explicitly agreed to be a joint guarantor (Caution solidaire) of Strong Constructions Ltd, it put it in these words [*...déclare se porter caution solidaire de Strong Construction Ltd envers Bank of Kigali Ltd, et assumer la garantie irrévocable du paiement d'un montant de 272.000.000 Frw (deux cent soixante-douze millions de Francs Rwandais) représentant la garantie de bonne exécution du contrat ci-haut cité..*]. Pursuant to this clause and the explanations of the scholars, the Court finds that in order for the Bank of Kigali's debt to be repaid, it was not necessary to first seek payment from Strong Construction Ltd's own assets.

[27] The court also finds that in the “Acte de cautionnement” issued by Radiant Insurance Company Ltd alone, despite being a unilateral contract (contrat unilatéral)³, it directly obliged itself of repaying the debt owed to Strong Constructions Ltd by the Bank of Kigali, which was intended to increase trust and chances of repaying the loan in case Strong Constructions Ltd failed to repay it because it assured the Bank of Kigali to repay the loan if it fails to repay it and pay immediately after the bank has requested for the payment. This is also emphasized by the scholars that the first demand guarantee agreement is a way to make it easier for the creditor to be repaid because he has two people who have to pay him and that anyone who acknowledges that procedure directly is reliable to the creditor. [*..., la garantie à première demande renforce la situation du créancier en lui donnant deux débiteurs au lieu d'un seul. Tandis que le cautionnement est une obligation accessoire, la garantie à première demande est une obligation autonome, le garant s'engageant, non pas pour autrui, mais à l'occasion des relations contractuelles d'autrui., ... il promet non pas d'exécuter l'obligation du débiteur principal défaillant, mais de verser sur simple réclamation du créancier une somme déterminée...*]⁴

[28] As for the source of the payment, the contract titled “Acte de Cautionnement” indicates that the source of the payment is money got from the contract for the construction of the VIP WING at Kanombe Military Hospital, whereby that clause stipulates that Radiant Insurance Company Ltd will pay the Bank of Kigali after proving that the amount of the invoice paid and the money deposited on the bank account of Strong Constructions Ltd in the Bank of Kigali for that specific tender is not enough to repay the loan. The agreement stipulates that: « *Et nous nous engageons à rembourser BANK OF KIGALI, dès réception de sa demande écrite, montrant que le Contractant (Strong Construction Ltd) ne se conforme pas aux stipulations du contrat signé entre lui et Bank of Kigali, la somme ci- dessus stipulée (272.000.000 FRW) après avoir prouvé que le(s) paiement (s) au compte 040-0323102-28 ouvert à la BANK OF KIGALI au nom de Strong Construction Ltd, pour le marché ci-haut mentionné, n'a pas été suffisant pour le remboursement du crédit contracté* ».

² Jérôme François, Droit civil, les sûretés personnelles, Tome VIII, Economica, Paris, 2004, page 33

³ Martin Imbleau, William A. Schabas, Introduction au droit rwandais, Les éditions Ivon Blais Inc, 1999, page 83.

⁴ Pierre Voirin, Gilles Goubeaux, Droit civil, Personnes-Famille-Incapacité-Biens-Obligations-Sûretés, Tome 1, 30ème édition, LGDJ, Paris, page 635

[29] Again the source of the payment can be found in the letter dated 14/05/2015 issued by the Bank of Kigali in response to the Radiant Insurance Company Ltd's request for information regarding the account of Strong Constructions Ltd, whereby the Bank of Kigali had informed it that on the account of Strong Constructions Ltd, money had been deposited on it but it does not originate from the tender which is guaranteed, and in a letter dated 13/09/2018, it wrote to the Ombudsman explaining that the money for the payment of the loan it gave to Strong Constructions Ltd had only to be got from the payment of the tender for the construction of VIP WING at Kanombe Hospital.

[30] The Court finds that the claims of the counsel for Radiant Insurance Company Ltd that the payment should first have been sought from other mortgages furnished by Strong Constructions Ltd without merit because based on "Acte de Cautionnement RD0010CRI1401759 / 02645" especially in its paragraph 5, Radiant Insurance Company Ltd had to pay the loan of Strong Constructions Ltd on the first demand, and that is the view of the scholars that if the contract of guarantee is joint (caution solidaire) which is the contract that Radiant Insurance Company concludes with Strong Constructions Ltd, the guarantor has no right to first request that the payment should first be sought from the debtor's property...[*la caution solidaire, en effet, ne dispose pas de bénéfice de discussion, ...la caution est exposée au paiement de la dette principale lorsque, celle-ci, est exigible.*]⁵.

[31] The court also finds that in terms of the nature of the insurance itself, the guarantee of good execution "garantie de bonne exécution", when the issue of non-payment is a result of the work not being executed as expected due to the lack of funds, a ground which was not caused by strong Constructions Ltd, and which is not prohibited under clause 4 of the guarantee contract N° RD0010CRI1403488, the representatives of Radiant Insurance Company Ltd cannot claim that the payment should have been sought first from the other mortgages.

[32] As to whether there was a confusion between the loan for the advance payment and the 272,000,000 Frw granted to Strong Constructions Ltd, the Court finds in the case file that there are two guarantee contracts entered into by Radiant Insurance Company in the benefit of Strong Constructions Ltd, namely: The contract dated 04/10/2013 entitled "Advance Payment Security/Advance payment guarantee No RD001RCOA1305281" and the contract dated 15/04/2014 entitled "Contrat de cautionnement No RD0010CRI1403488". Although the two contracts are related to the construction of VIP WING at Kanombe Hospital, the Court finds that it differs in its structure, timing, purpose, and on the amount guaranteed, this implies that even the loans on which it is premised must be separated, therefore the claims of the representatives of Radiant Insurance Company Ltd that it had to use it first to get the money for the payment is unfounded.

[33] The Court also finds that, as indicated in paragraph five of the "Acte de Cautionnement RD0010CRI1401759 / 02645", one of the grounds on which Radiant Insurance Company Ltd had to base before paying on the behalf of the Strong Constructions Ltd was that, if it found that its account which it had opened with the Bank of Kigali, there was not enough money transferred on it to repay a loan of 272,000,000 Frw got from the payment of the tender for which is guaranteed. The Court finds that there was no other way Radiant Insurance Company Ltd would have known

⁵ Jérôme François, Droit civil, Ibidem, page 33

whether Strong Constructions Ltd had been paid enough money for the construction of the VIP WING at Kanombe Hospital to pay the loan, without considering all the money passed through its account, as the Court had examined it, therefore the Court did not adjudicate beyond the limit of the subject matter of the appeal.

[34] Therefore, the Court finds that since in the guarantee contract dated 15/04/2014 (Contrat de Cautionnement no RD0010CRI1403488), Radiant Insurance Company Ltd agreed to be a joint guarantee “Caution Solidaire” for the loan owed to the Bank of Kigali, as well as in the contract (Acte de Cautionnement RD0010CRI1401759 / 02645) it agreed to the Bank of Kigali that in the event Strong Constructions Ltd fail to repay, it will pay on the first demand, Radiant Insurance Company Ltd as a guarantor had to pay, especially that in its letter dated 4/05 / 2015, it informed Strong Constructions Ltd that in case it pays for it, the money has to be immediately reimbursed to Radiant Insurance Company Ltd.

[35] The Court also finds that in the judgment RCOMAA 00065/2016 / SC-RCOMAA 0071/16/CS, it was decided that Radiant Insurance Company Ltd should not pay for Strong Constructions Ltd, as it has the money to pay for itself because the Bank account history indicated that the transactions carried out on that account the amount was far much that the amount of the loan, that was an error, there was confusion on the source of the payment because other money which Strong Constructions Ltd was paid from other tenders was not supposed to cover the payment of that loan, as each tender has its management otherwise, the work would be delayed or not executed, which could cause another loss.

[36] The Court also finds that in the judgment RCOMAA 00065/2016 / SC-RCOMAA 0071/16 / CS sought to be reviewed on the grounds of injustices, the Court held that the payment of the loan had to be got from all the money deposited on the bank account of Strong Constructions Ltd, in that case, the payment was got from its private property, rather than for money got from the tender of construction of the VIP Wing at Kanombe Hospital because it was a joint guarantee, which was an error which prejudiced Strong Constructions Ltd.

[37] Based on the motivations given above and on article 64 of Law N° 45/2011 of 25/11/2011 governing the contract, which provides that the contract is legally binding on the parties, the Supreme Court finds that for Radiant Insurance Company Ltd refusing to repay the loan of Strong Constructions Ltd was in breach of the guarantee contract dated 15/04/2014, therefore the judgment No RCOMAA 00065/2016 / CS-RCOMAAA0071 / 16 / CS rendered by the Supreme Court on 21/06/2017 is vitiated by injustice, therefore it has to be overturned.

b. Whether damages claimed by Strong Construction Ltd should be awarded

[38] Counsel Idahemuka argues that in previous cases and this case, Strong Constructions Ltd did not sue for the payment of the debt because the Bank of Kigali has been paid; instead it sued claiming for the late fees and penalties amounting to 84,271,004 Frw which it was charged after Radiant Insurance Company Ltd refused to pay, and to release the following money which was seized: 52,598,296Frw it got from the contract. of "mechanization RADA" and 30,505,081Frw which was paid by the OT, all amounting to 83,103,337Frw, that seizure led to nonexecution of other tenders.

[39] He argues that the contract which Strong Constructions Ltd had with Kanombe Military Hospital was on the various occasion extended, without its role but because the government did not have the funding, and that the contract between it and Radiant Insurance Company Ltd, and the contract between Bank of Kigali and Radiant Insurance Company Ltd were not extended. He states that all the contracts had a one-year term and that the Bank of Kigali was not within that year, the reason why Strong Constructions Ltd was charged late fees.

[40] Regarding the interest and late fees claimed by Strong Constructions Ltd, Counsel Kazungu Jean Bosco, Counsel Twiringiyemungu Joseph and Counsel Ruzindana Ignace representing Radiant Insurance Company Ltd, argue that those late fees and penalties do not apply to Radiant Insurance Company Ltd, because if the Bank of Kigali finds that it has not complied with its guarantee contract (Acte de cautionnement) it would have sued it, because based on the principle that contract is bidding to the parties, no one else could use it to sue other than itself, and that the Bank of Kigali sued Radiant Insurance Company Ltd in Commercial Court of Nyarugenge, but after receiving the payment from Strong Constructions Ltd it abandoned the claim.

[41] They argue that the Bank of Kigali should be the one to be sued for late fees and penalties because that loan generated the late fees and it had the payment and that so far the Bank of Kigali has no problem because it has been paid, and Strong Constructions Ltd should have no problem because he extinguished its obligation when it paid. They conclude that the contract between Strong Constructions Ltd and Kanombe Military Hospital was restructured and that restructuring was not notified to Radiant Insurance Company Ltd, nor should it have been the one to guarantee it.

DETERMINATION OF THE COURT

[42] Article 137 of the Law N°45/2011 of 25/11/2011 governing contracts provides that the aggrieved party has the right to damages from the party failing to perform his/her contractual obligations unless the claim for damages has been suspended or withdrawn.

[43] The court finds that the arguments of the counsel for Radiant Insurance Company Ltd that Strong Constructions Ltd should not rely on the contract entered into between Radiant Insurance Company Ltd and the Bank of Kigali to sue for damages without merit. Even though the contract signed by Radiant Insurance Company Ltd "Acte de Cautionnement N° RD0010CRI1401759 / 02645" is a unilaterally contract whereby it agreed to repay the debt of Strong Constructions Ltd to the Bank of Kigali on its behalf⁶, but that contract was based on another contract between Strong Constructions Ltd and Radiant Insurance Company Ltd, and also it was concluded in its benefits as described above.

⁶ ...« Et nous nous engageons à rembourser BANK OF KIGALI, dès réception de sa demande écrite, montrant que le Contractant (Strong Construction Ltd) ne se conforme pas aux stipulations du contrat signé entre lui et BANK OF KIGALI, la somme ci-dessus stipulée (272.000.000 FRW) après avoir prouvé que le(s) paiement au compte 040-0323102-28 ouvert à la BANK OF KIGALI au nom de Strong Construction Ltd, pour le marché ci-haut mentionné, n'a pas été suffisant pour le remboursement du crédit contracté ».

[44] The court also finds that if Strong Constructions Ltd paid late fees which it did not have to pay if Radiant Insurance Company Ltd honoured its contract, which it requests to be reimbursed, thus Radiant Insurance Company Ltd cannot claim that it has no right to sue.

[45] The court finds that Radiant Insurance Company Ltd did not honour its contractual obligations under the guarantee contract it concluded with Strong Constructions Ltd as set out in the preceding paragraphs, there is a loss incurred including the late fees amounting to 84,271,004 Frw which it was charged, which caused it not to comply with its obligations of other tenders with other parties, as explained by Counsel Idahemuka Tharcisse, its representative, therefore Radiant Insurance Company Ltd is liable for damages.

[46] The Court, therefore, finds that pursuant to article 137 of the Law N° 45/2011 of 25/11/2011 mentioned above, Radiant Insurance Company Ltd is liable to pay Strong Constructions Ltd damages equivalent to the late fees amounting to 84,271,004 Frw which Bank of Kigali charged it.

[47] As for the amount of 83,103,337 Frw which Strong Constructions Ltd claims to have been seized by the Bank of Kigali, and it is seeking reimbursement from Radiant Insurance Company Ltd, as the seizure resulted in non-execution of other tenders, the Court finds that it was not reimbursed, as it was unable to prove to the court that it is among the money which reduced the loan it owed to that Bank.

III. DECISION OF THE COURT

[48] Admits the claim for the review of the judgment No RCOMAA 00065/2016/CS-RCOMAAA0071/16/CS rendered by the Supreme Court on 21/06/2017 on the grounds that it was vitiated with injustice and upon its examination, it finds it with merit ;

[49] Holds that Radiant Insurance Company Ltd breached the guaranteeship contract it had with Strong Constructions Ltd on 15/04/2014 ;

[50] Holds that Judgment N° RCOMAA 00065/2016/CS-RCOMAA0071/16/CS rendered by the Supreme Court on 21/06/2017 is overturned ;

[51] Orders Radiant Insurance Company Ltd to give Strong Constructions Ltd 84.271.004Frw for the damages equivalent to the late fees it was charged by the Banki of Kigali ;

[52] Orders Radiant Insurance Company Ltd to give Strong Constructions Ltd procedural and counsel fees equivalent to 3.000.000 Frw and 126.000 Frw for the court fees it was awarded by the Commercial High Court.