

# **ENTREPRISE TWAHIRWA FAUSTIN (ETF) Ltd v. BRALIRWA Ltd**

[Rwanda COURT OF APPEAL – RCOMA 00003/2018/CA  
(Karimunda, P.J., Ngagi and Munyangeri, J.) January 25, 2019]

*Commercial law – Company – A private company with one director – Replacement of the director – The document issued by Rwanda Development Board (RDB) is the only proof to confirm the successor of the Director of a company in which s/he was the sole shareholder.*

*Commercial procedure – Admissibility of the claim – Standing of the plaintiff – The claim is only admissible to court when the plaintiff and the defendants have the standing – Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 3.*

**Facts:** Entreprise Twahirwa Faustin (ETF Ltd) represented by its CEO, who is also its sole shareholder, Twahirwa Faustin, concluded a contract with Bralirwa Ltd to construct a school. The duration of the contract lapsed without completion of the work, which led Bralirwa to terminate the contract, prompting Entreprise Twahirwa to take the matter for arbitration claiming that the contract was illegally terminated. In its award, the arbitral tribunal held that Bralirwa should pay ETF Ltd 2,462,090Frw and immediately return all the material at the construction site.

ETF was not satisfied with the award and thus appealed to the Commercial High Court but the CEO of ETF died before the closure of the trial, the case was continued by the deceased's

legal counsel, the court found that the case was filed contrary to article 46 of Law N°005 / 2008 of 14/02/2008 on Arbitration and Mediation in Commercial Matters.

On behalf of ETF Ltd, its counsel appealed to the Supreme Court, following the reform of the Judiciary, the appeal was transferred to the Court of Appeal, he requests that the decision of the arbitral tribunal be reversed, stating that the arbitration tribunal did not examine the issue that BRALIRWA Ltd illegally terminated the contract and assessing the loss incurred as a result of the termination of the contract but on the contrary, it ruled that ETF Ltd should be given back its material which was at the construction site and also ordered BRALIRWA Ltd to pay 2,462,090Frw, while the value of that material and the damages claimed by ETF Ltd are more than two hundred million.

Bralirwa immediately raised a preliminary objection of inadmissibility, arguing that ETF Ltd's appeal should not be admitted accepted because it was filed by a person who had no standing and capacity to represent it, because EFT Ltd's former CEO and its sole shareholder died and no one has replaced him in those duties because he had not been replaced in those responsibilities as CEO, as there is no document issued by Development Board (RDB) conforming his successor.

On that objection, on behalf of ETF Ltd, its representative argues that it is unfounded because the wife of the deceased and the children he left behind are the only ones left in the management of the company as they are entitled to under succession laws, especially that ETF Ltd which was a party to the case at the first level is the one that appealed.

**Held:** 1. The minutes of the general meeting of the members of the company are not a proof of who replaced its Director, when its evident that he was the sole shareholder, rather the successor is proved by a document issued by RDB to that effect.

2. The claim is only admissible to court when the plaintiff and the defendants have the standing.

**The preliminary objection of inadmissibility sustained;  
Court fees deposit covers the expenses incurred in this case.**

**Statutes and statutory instruments referred to:**

Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, article 3.

Law N° 17/2018 of 13/04/2018 governing companies, article 142.

**No cases referred to.**

**Authors cited:**

Serge GUINCHARD, Droit et pratique de la procedure civile, 5e edition, Paris, Dalloz, 2006-2007.

## **Judgment**

### **I. BRIEF BACKGROUND OF THE CASE**

[1] Entreprise Twahirwa Faustin (ETF Ltd) entered into a contract with BRALIRWA Ltd for the construction of Rambo

school in Rubavu District, in which both parties agreed that in case of any dispute relating to that contract will be resolved through arbitration.

[2] BRALIRWA Ltd later terminated the contract based on the fact that the term of the contract was over, ETF Ltd later saw it as an illegal termination of the contract, which led to the commencement of the proceedings before the Arbitrator Rusanganwa Jean Bosco who was appointed by the Commercial Court. of Nyarugenge in the Judgment RCOM 01657/2016 / TC / NYGE, rendered on 23/03/2017 at the request of ETF Ltd.

[3] On 26/09/2017, the Arbitral Tribunal issued an award ordering BRALIRWA Ltd to pay ETF Ltd 2,462,090 Frw and to immediately return all the equipment to the building site “chantier” as they were computed on 24/08/2017.

[4] ETF Ltd was dissatisfied with the award and appealed to the Commercial High Court and in its judgment RCOMA 00035/2017 / CHC / HCC rendered on 27/04/2018, it found the appeal of ETF Ltd which seeks to modify (réformation) the award of the Arbitration tribunal is inconsistent with the provisions of article 46 of Law N°005 / 2008 of 14/02/2008 on arbitration and mediation in commercial matters, which states that the request submitted to the appealed court is the annulment of the award ((annulation) instead of its modification as requested by ETF Ltd in its appeal, therefore, it finds that since ETF Ltd has no ground of appeal which are provided under the provisions of Article 47 of Law N°005 / 2008 of 14/02/2008 mentioned above, makes its appeal inadmissible and that the award rendered on 26/09/2017 by the arbitration tribunal remains in force, it ordered ETF Ltd to pay BRALIRWA Ltd 600,000Frw in damages for both procedural and counsel fees.

[5] Counsel Buhuru Pierre Célestin, on behalf of ETF Ltd, appealed to the Supreme Court, the case was registered on RCOMA 00004/2018 / SC. Following the reform of the Judiciary, its appeal was transferred to the Court of Appeal and registered on RCOMA 00003/2018 / CA, he claimed that the award of the Arbitration Tribunal be reversed in accordance with the provisions of article 46 of Law N°005 / 2008 of 14/02/2008 on arbitration and mediation in commercial matters, he stated that the award was vitiated by contradictions and breach of the provisions of the law, he requests the Court to establish whether BRALIRWA Ltd terminated the contract legally and whether there is no other issue which is not related to the termination of the contract except those regarding the loss it incurred caused by BRALIRWA Ltd and the determination of damages.

[6] Explaining the grounds of appeal, Counsel. Buhuru Pierre Célestin argues that the Arbitral Tribunal, instead of examining the issue of whether BRALIRWA Ltd terminated the contract illegally and assessing the losses caused by that termination of the contract, it decided that ETF Ltd should be given back its materials and equipment which was on the site and BRALIRWA Ltd to pay 2,462,090Frw, while the value of the materials and the damages claimed by ETF Ltd exceeds two hundred million; and when he appealed to the Commercial High Court, it did not reverse the award but it rejected the claim, thus he requests the Court of Appeal to rely on the provisions of article 46 of Law N°005 / 2008 of 14/02/2008 on arbitration and mediation in commercial matters and rescinds the award of the Arbitration tribunal.

[7] The case was heard in public on 09/01/2019, with EntrepriseTwahirwa Faustin (ETF Ltd) represented by Counsel Buhuru Pierre Célestin, while BRALIRWA Ltd represented by Counsel Abijuru Emmanuel, who raised an objection of inadmissibility of the ETF Ltd's appeal as it was filed by 'a person without standing.

## **II. ANALYSIS OF THE LEGAL ISSUES**

**Whether the appeal of ETF Ltd is not admissible on the ground that it was lodged by a person with no standing and ability.**

[8] Counsel Abijuru Emmanuel, representing BRALIRWA Ltd, argues that the appeal of ETF Ltd should not be admitted because it was filed by someone who has no standing and capacity to represent it. He explains that ETF Ltd, was formerly headed by Twahirwa Faustin as its CEO and its sole shareholder, he died as evidenced by the death certificate dated 09/01/2018, while the case was still pending. in the Commercial High Court, so far no one has replaced him as CEO as there is no document issued by Rwanda Development Board (RDB) to identify Twahirwa Faustin's successor, accordingly, BRALIRWA Ltd does not know who mandated Counsel Buhuru Pierre Célestin to file the appeal of ETF Ltd, he requests that article 142 of Law No. 17/2018 of 13/04/2018 on Companies providing how companies are represented be complied with.

[9] Counsel. Buhuru Pierre Célestin, representing ETF Ltd, also states that Twahirwa Faustin was the sole shareholder of ETF Ltd and its CEO, now represented by Antoinette

Mukandekezi together with and her five children. namely Twagirayezu Félicien, Mupenzi Jean Damascène, Mugisha Fred, Uwera Séraphine and Kwizera Claudine are its owner. He goes on to argue that the members of the company may be removed but the company continues to exist belonging to those entitled to it in accordance with the succession law, therefore finds this objection to be unfounded because the appellant ETF Ltd was also a party in the case at the first instance.

## **DETERMINATION OF THE COURT**

[10] Article 3, first paragraph, of Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that " Unless otherwise provided by law, a claim is admissible in court only if the claimant has standing, interest and standing to sue." Article 142, first paragraph, of Law N° 17/2018 of 13/04/2018 N° 17/2018 provides that " The business and affairs of a company are managed by or under the direction of the Board of Directors of the company which has all powers (....). The second paragraph of the article provides that " Where a private company has one Director, he/she exercises the powers and carries out the duties of a Board of Directors provided for in this Law."

[11] The analysis of the above provisions of the law, considered together, implies clearly that the power to take any action on behalf of a company including that of filing a lawsuit in a court is governed or supervised by the Board of Directors which have full power if the company has one Director is the one with the authority and responsibilities of the Board of Directors.

[12] In this case, the documents in the file demonstrate that Twahirwa Faustin was the sole shareholder and CEO of Entreprise Twahirwa Faustin (ETF Ltd) who was also its legal representative in the case., it sued BRALIRWA Ltd, until his death on 04/01/2018, when the case was in the Commercial High Court.

[13] The case file also demonstrates that after the Commercial High Court rendered judgment RCOMA 00035/2017 / CHC / HCC on 27/04/2018, and held that the claim of ETF Ltd is inadmissible, on 25/05/2018, Counsel Buhuru Pierre Célestin appealed the case to the Supreme Court on behalf of ETF Ltd, but does not prove that he was mandated by the CEO of ETF Ltd who replaced Twahirwa Faustin after his death, which BRALIRWA Ltd bases on to argue that the appellant had no standing to appeal.

[14] At the hearing of 09/01/2019, when the Court asked Counsel Buhuru Pierre Célestin to tell the Court the person who replaced Twahirwa Faustin as the CEO of ETF Ltd after his death, he replied that the company was represented by Mukandekezi Antoinette, its member and her five children, Twagirayezu Félicien, Mupenzi Jean Damascène, Mugisha Fred, Uwera Séraphine and Kwizera Claudine, tasked to prove that his statement was testified by the Registrar General in RDB, he stated that he had requested Mukandekezi Antoinette to get the relevant documents from RDB but she did not.

[15] The case file also indicates that this objection was raised by BRALIRWA Ltd in the pre-trial hearing on 30/10/2018, and at that time Counsel Buhuru Pierre Célestin was requested to submit before this court the evidence proving that Mukandekezi Antoinette replaced Twahirwa Faustin as the CEO of ETF Ltd.



[16] The Court finds that both parties agree that ETF Ltd exists legally and that is also the view of the Court, because the death of the shareholder of the company, even if he/she is a sole director does not prevent the company's continuity and belongs to the heirs after they have consented.

[17] Besides that, the Court finds that apart from the fact that in the hearing of 09/01/2019, Counsel Buhuru Pierre Célestin claimed that he had been mandated by Mukandekezi Antoinette to appeal, he did not produce any evidence to prove that Mukandekezi Antoinette would have replaced Twahirwa Faustin as CEO of ETF Ltd, to have mandated him to file an appeal on behalf of ETF Ltd, this is emphasized by legal scholars including Serge Guinchard who argues that for a claim to be admissible, the plaintiff and the defendant must have the standing (*qualité*), contrary the claim is inadmissible<sup>1</sup>.

[18] Regarding the document entitled " INAMA RUSANGE Y'ABANYAMURYANGO BA ENTREPRISE TWAHIRWA Faustin (E.T.F LTD " MEMBERS) which appeared in the file of 17/01/2019, after the closing of the hearing on 09/01/2019, pursuant to article 75, Paragraphs 1, 2 and 3, of Law N° 22/2018 of 29/04/2018 Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, the Court finds that this document is inadmissible for consideration as it does not help the Court to reach its decision, because what was required which was not produced within time, was not the

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<sup>1</sup> "La qualité est une condition d'existence de l'action, exigée tant en demandant qu'en défense. Le défaut de qualité donne lieu à une fin de non-recevoir", Serge GUINCHARD, Droit et pratique de la procédure civile, 5e édition, Paris, Dalloz, 2006-2007, p.22.

minutes of the meeting of the members but the document issued by RDB indicating the successor of Twahirwa Faustin as the CEO of ETF Ltd.

[19] Based on the provisions of the law and the explanations already given, the Court finds that Counsel Buhuru Pierre Célestin has no standing to file an appeal on behalf of ETF Ltd, therefore the objection raised by BRALIRWA Ltd is sustained and the appeal of ETF Ltd is rejected

**Whether the damages claimed by BRALIRWA Ltd should be awarded.**

[20] At the pre-trial hearing on 30/10/2018, Counsel Abijuru Emmanuel, representing BRALIRWA Ltd, claimed damages for the procedural and counsel's fees amounting to 1,500,000 Frw because ETF Ltd dragged it in unfounded lawsuits and during the hearing of 09/01/2019, he requested an additional 200,000 Frw for the counsel fees.

[21] Counsel Buhuru Pierre Célestin, representing ETF Ltd, argues that the damages requested by BRALIRWA Ltd are unfounded because if the parties do not agree, they have the right to go to court, and ETF Ltd has done nothing else illegal, for which it should be charged damages.

## **DETERMINATION OF THE COURT**

[22] Article 111 Law N° 22/2018 of 29/04/2018 relating to the civil, commercial, labour and administrative procedure, provides that “the claim for legal costs is adjudicated at the same time with the principal claim. It can also be admitted and adjudicated even if the principal claim has not been admitted.

[23] Concerning the procedural and counsel fees claimed by BRALIRWA Ltd, the Court finds that it should be awarded because ETF Ltd dragged it in the lawsuit and had to hire a legal counsel, but it should be awarded in the discretion of the court as it does not show how it calculated the 1,700,000Frw he requests for it, therefore BRALIRWA Ltd is to be awarded 500,000Frw for the counsel fees and 200,000Frw for the procedural fees, altogether amounting to 700,000Frw.

### **III. DECISION OF THE COURT**

[24] Admits the objection of inadmissibility filed by BRALIRWA Ltd;

[25] The objection sustained;

[26] Orders Entreprise Twahirwa Ltd (ETF Ltd) to pay BRALIRWA Ltd 500,000Frw for the counsel fees and 200,000Frw for the procedural fees, totaling 700,000Frw;

[27] It declares that the court fees deposit covers the expenses of the trial.