

NAEB v. SINFOTEC Sarl

[Rwanda SUPREME COURT – RADA 0025/12/CS (Mutashya, P.J., Rugabirwa and Gakwaya, J.) 25 April, 2014]

Administrative procedure – Burden of proof – Evidence of fortuitous event – Every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case – OCIR-THE should not reimburse the late fees of 12 days it charged SINFOTEC because the latter did not produce to the court the evidence demonstrating that the ship transporting the raw materials encountered a mechanical problem – Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure article 9 – Law no 15/2004 of 12/6/2004 relating to evidence and its production, article 3.

Contracts or obligations law – Breach of the contract – Late fees – Damages – If the breach of the contract consists of a failure to pay a sum of money or to render a performance with fixed or ascertainable monetary value, interests are calculated from the time for performance was due less all deductions to which the party in breach is entitled and those damages may be provided for in the contract but at a reasonable amount based on the actual loss or potential loss to occur in case of breach of the contract or in case of difficulty in providing evidence of the loss – Damages for breach of the contract may be provided for in the contract but at a reasonable amount based on the actual loss or potential loss to occur in case of breach of the contract or in case of difficulty in providing evidence of the loss – When both parties claim for procedural and Counsel fees while each party has won some of his/her claims and lost others in the judgment, compensation shall be operated between their requests but the Court will have to first indicate what it has awarded to every party – A creditor cannot simultaneously claim from the debtor the damages arising from the non-performance of the contractual obligation and those arising from the torts – Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 7, 9 and 147 – Law n°45/2011 of 25/11/2011 governing contracts, articles 64, 144 and 146 – Law of 30/07/1888 relating to contracts or obligations, article 258.

Facts: SINFOTEC Sarl entered into a contract with former OCIR-THE, currently known as NAEB for supplying it with the sacks for tea leaves packaging at the price of 208,250,000Frw. It was paid the first instalment for what it had supplied and remained a balance of 45,968,585Frw, but after supplying the remaining goods NAEB paid it 19,570,252Frw because it deducted 14,855,333Frw for late fees, 11,543,000Frw which the manager of EIS who is at the same time the manager of SINFOTEC Sarl took, all together amounting to 26,398,333Frw.

SINFOTEC Sarl sued in the High Court claiming to be reimbursed that amount and be paid various damages, late fees for the amount it was not paid on time equivalent to 0.1% per day, the interests it was charged by FINA Bank at the value of 25% per month, in addition of the interest at the flat rate of 1,000,000Frw because the money it used was a loan from the bank which it had to pay with the interests equivalent to 10,074,427Frw, and the counsel fees of 10% of the subject matter and the procedural fees of 1,000,000Frw. The Court held that the claim of SINFOTEC Sarl has merit on the late fees it was charged contrary to the contract for 12 days because it demonstrated that it was due to casus force majeure and the amount which was withheld by OCIR-THE. OCIR-THE appealed in the Supreme Court, claiming that the High Court held that there was force majeure which led to a late fine of 12 days in supplying the first instalment of the sacks while SINFOTEC Sarl did not produce evidence in support of

it and it argued that the late fees which was awarded to SINFOTEC Sarl was charged on the amount it should not have been paid.

In SINFOTEC Sarl's defence, it stated that the evidence proving the force majeure was produced during the hearing and the judge understood it and relied on it. SINFOTEC Sarl appealed also, stating that the High Court disregarded the fact that it was OCIR-THE which caused the delay, that the High Court delay, that the Court failed to realize that there was a force majeure which made it impossible to perform the contract, that it did not award the damages it requested, and that the High Court did not award late fine to OCIR-THE faults.

Held: 1. Every plaintiff must prove a claim, failure to obtain proof, the defendant wins the case and a party who alleges that he/she has been discharged from an obligation that has been established must prove that the obligation no longer exists, failure to do so, the other party wins the case. Thus, the fact that SINFOTEC did not produce evidence demonstrating that the ship which was transporting the raw materials broke down, OCIR-THE does not have to reimburse the amount it retained as late fees.

2. OCIR-THE should not have retained the money which it owes SINFOTEC Sarl for the purposes of compensation because OCIR-THE had paid that money to another company called E.I.S which is separate from SINFOTEC Sarl. Therefore, OCIR-THE must pay damages for the late fine.

3. The fact that OCIR-THE informed SINFOTEC Sarl what will be mentioned on the bags 43 days after the conclusion of the contract, it is obvious that the High Court did not error on the starting date for the computation of late fees because SINFOTEC had to wait until it was informed of the bags' mentions for the performance of the contract, that is to say from 13 October 2002 up to 28 November 2008. Therefore, the appeal of SINFOTEC has no merit.

4. The ground which is based on the fact that SINFOTEC Sarl informed OCIR-THE in the letter that the Kenyan company which manufactures the sacks closed due to financial crisis cannot be considered as force majeure because those sacks were supposed to be delivered within 45 days and that event happened after those days provided for by the contract. Therefore, moratorium interests charged by OCIR-THE on arrears left at the time SINFOTEC supplied the second lot of sacks are well-founded.

5. Damages for breach of the contract may be provided for in the contract but at a reasonable amount based on the actual loss or potential loss to occur in case of breach of the contract or in case of difficulty in providing evidence of the loss, therefore article 258 of the Law of 30/07/1888 relating to contracts or obligations cannot be applied in this case because it concerns the performance of the contract.

6. Damages awarded by the court should be indicated in the judgment; therefore that error should be rectified.

7. If the breach of the contract consists of a failure to pay a sum of money or to render a performance with fixed or ascertainable monetary value, interests are calculated from the time the performance was due less all deductions to which the party in breach is entitled.

8. The judge shall rule only and on all that which is referred to the court, and the judgement must contain grounds in law and in fact, thus the Supreme Court finds that the fact for the High Court to have ordered compensation of the procedural and counsel fees claimed by both parties without first demonstrating what each party is awarded and motivation thereto, is in contradiction with the law.

9. OCIR-THE had the right to charge the late fees to SINFOTEC but had no right of retention of the money meant for SINFOTEC in the context of compensation of loans which do not belong to it. OCIR-THE should therefore pay late fees for 1753 days, starting from the day it was supposed to pay it until the day the judgment was rendered at the rate of 0.1% of that amount per day.

10. Regarding the 31,623,000Frw claimed by SINFOTEC Sarl for for default to pay back the FINA Bank loan due to OCIR-THE fault ($26.398.333 \times 25\% \times 57,5 \text{ months}/12 \text{ months} = 31.623.000\text{Frw}$), the Court is of the view that they should not be awarded, because it cannot request damages based on article 258 of the Law of 30/07/1888 relating to contracts or obligations for issues regarding the performance of the contract.

11. Regarding the 1,000,000Frw of the flat rate claimed by SINFOTEC Sarl, it should not be awarded it because no motivation was provided thereto.

12. Regarding the procedural and counsel fees equal to 10 % of all damages it has to be paid by OCIR-THE, the Court finds them excessive; hence they are awarded upon the discretion of the Court.

13. A creditor cannot simultaneously claim from the debtor the damages arising from the non-performance of the contractual obligation and those arising from the torts.

**The appeal of OCIR-THE has merit in part;
The appeal of SINFOTEC Sarl has merit in part;
Court fees to both parties.**

Statutes and statutory instruments referred to:

Law n° 21/2012 of 14/6/2012 relating to civil, commercial, social and administrative procedure, articles 7, 9 and 147.

Law n° 15/2004 of 12/6/2004 relating to evidence and its production, article 3.

Law n°45/2011 of 25/11/2011 governing contracts, articles 64, 144 and 146.

Law of 30/07/1888 relating to contracts or obligations, article 258.

No case referred to.

Authors cited:

Henri De Page, *Traité de droit civil belge, principes-doctrine-jurisprudence*, Tome deuxième, troisième édition, Bruylant, Bruxelles, 1964, PP 596-597-602.

Judgment

I. BACKGROUND OF THE CASE

[1] On 30/08/2008, SINFOTEC Sarl concluded a contract with former OCIR-THE, currently known as NAEB, to supply it with sacks for the package of tea worth 208,250,000Frw. After it has been paid for the supplied first instalment, and the remaining instalment amounting to 45,968,585Frw, SINFOTEC Sarl supplied the remaining instalment but when it came to payment it was paid 19,570,252Frw. It was told that there has been a deduction of 14,885,333Frw as penalty for late fee and 11,543,000Frw, taken by the director

of EIS Rudaharishema Emmanuel, who is also the director of SINFOTEC and thus, a total of 26,398,333Frw was deducted.

[2] SINFOTEC was not satisfied with explanations it was given by OCIR-THÉ, the today's NAEB, relating to deduction of this amount and resorted to the High Court seating in Kigali, requesting the reimbursement of that amount and the payment of damages worth 12,855,988Frw of moratorium interests as the amount in question was not paid on time, calculated to 0,1% a day ($2.398.333\text{Frw} \times 0.1\% \times 487 \text{ days} = 12.855.988 \text{ Frw}$), the payment of damages based on interests deducted by FINA Bank computed on 25% a month, in addition to the lump sum of 1,000,000Frw because the money that it used was a loan owed to the Bank that it would have paid after the payment by OCIR-THE. It requested interests on that amount equal to 10,074,427Frw ($26,398,333\text{Frw} \times 25\% \times 16.5/12 + 1,000,000\text{Frw} = 10,074,427\text{Frw}$), and it claimed the payment of council's fees equal to 10% of the value of the subject matter and 1,000,000Frw of case follow up expenses.

[3] The court ruled on the case RAD 0156/10/HC/kig on 27 April 2012, and held that the claim of SINFOTEC Sarl is founded as to 2,449,000Frw for the 12 days late fine deducted contrary to the contract of 30 August 2008 because it has indicated that it encountered "force majeure" and as to 11,543,000Frw retained by OCIR-THE on the ground that it operates compensation between the debt owed to it by the other company, Entreprise d'Ingénierie et de Service (EIS). But, it ruled that other SINFOTEC claims are not founded and ordered OCIR-THÉ to pay it 14,042,000Frw.

[4] OCIR-THE was not contended with the decision of the High Court and appealed before the Supreme Court on 25 May 2012, arguing that the High Court, as to the late fine of 12 days of supplying the first instalment of sacks, held that there has been a force majeure yet SINFOTEC did not produce any evidence to prove it. It also argues that the High Court held without motivation that SINFONTEC has to be awarded moratory damages equal to 6,838,616Frw.

[5] SINFOTEC Sarl appealed against that judgment too on 26 May 2012 alleging that the High Court, disregarded that the delay was caused by OCIR-THE, failed to discover that there has been a force majeure that prevented the performance of the contract, refused to award it damages, and that due to Ocir- Thé's faults of delay of payment of the loan occasioned disputes between SINFOTEC and FINA Bank. It further argues that the High Court did not include the damages awarded worth 6,838,616Frw in the sum that appears in the judgment, that it did not award all damages it claimed, yet it was cleared that it was prejudiced; rather, it ruled that the claimed damages had to be set off. Moreover, the High Court refused to award 26,398,333Frw and that this amount was subject to moratory damages of 487 days, equal to 12,855,988Frw.

[6] The hearing was conducted in public on 11 March 2014, OCIR-THE represented by State Attorney Rubango Epimaque while SINFOTEC Sarl was represented by Rudaharishema Emmanuel, assisted by Counsel Baragondoza Jean Damascène.

II. ANALYSIS OF LEGAL ISSUES

The appeal of OCIR-THE

Whether SINFOTEC Sarl did produce any evidence before the High Court to prove the occurrence of force majeure as the ship that carried raw materials would have faced a serious problem while in the ocean.

[7] State Attorney Rubango Epimague, who represents Ocir-thé argues that the High Court ruled that the lateness of 12 days from 28 November 2008 to 9 December 2008 which led OCIR-THE to penalise SINFOTEC Sarl, charging it 2,499,000Frw as a moratory penalty has to be ruled out since during that period SINFOTEC encountered a force majeure as the ship carrying raw materials encountered a difficulty while in the ocean, being the cause for SINFOTEC's failure to execute the contract, while no evidence was produced to prove that force majeure as explained, to the extent that it would have been admitted as proving such a force majeure, and he therefore finds that the court confirmed that force majeure on mere statements of SINFOTEC Sarl, and prays that the period of 12 days be included among the delay period that SINFOTEC should be penalized for.

[8] State Attorney Rubango Epimague explains that the force majeure is something that is known by all people once occurred, therefore it should not be known by SINFOTEC only, and the fact that the ship broke down in the ocean and this was known by SINFOTEC only yet it should have been known by anybody, that is not a force majeure, especially that except it was written in the letter, there is no other related evidence produced by SINFOTEC.

[9] Counsel Baragondoza Jean Damascène, representing SINFOTEC argues that the evidence of the force majeure was produced during the hearing and that the judge was able to understand and consider it. Therefore, he finds the ground put forward by OCIR-THE baseless as the High Court acted in accordance with the law, especially that the force majeure is stipulated in the contract between SINFOTEC and OCIR-THE.

COURT FINDINGS

[10] Article 9 of the law n° 21/2012 of 14/6/2012 relating to civil, commercial, labour and administrative procedure provided that "every plaintiff must prove a claim. Failure to obtain proof, the defendant wins the case. Likewise, a party who alleges that he/she has been discharged from an obligation that has been established must prove that the obligation no longer exists. Failure to do so, the other party wins the case".

[11] Article 3, paragraph 1 of the law n° 15/2004 of 12/6/2004 relating to evidence and its production provides that "Each party has the burden of proving the facts it alleges".

[12] The Supreme Court finds that in the paragraph 4 of the judgment appealed against, the High Court basing on article 64 of the Law n°45/2011 of 25/11/2011 governing contracts and on the letter of SINFOTEC Sarl of 28 October 2008 received by OCIR-THE on 30 October 2008 notifying that it could not be able to perform its obligations in the due time since the ship that carried raw materials coming from South Africa to Kenya encountered a barrier in the ocean; ruled that SINFOTEC Sarl should not be charged the moratory damages of 12 day amounting to 2,499,000Frw, because the failure to fulfil its obligations was beyond its control as stipulated in their contract in its paragraph 31.

[13] Upon analysis of the content of paragraph 4 of the judgment appealed against, it is obvious that the High Court held that there has been a force majeure that could not be foreseen which prevented SINFOTEC Sarl from supplying the first instalment of sacks

9/12/2008, after 12 days of delay, and that was held only basing on the letter of 28 October 2008 drawn by SINFOTEC Sarl, where it notifies OCIR-THE that the ship that was coming from South Africa towards Mombasa-Kenya encountered a barrier in the ocean that took three weeks to be sorted out. However, except notifying that problem, SINFOTEC Sarl had to produce evidence thereto, especially before the high court, since it was claiming that OCIR-THE charged it 2,499,000Frw because of 12 days of lateness¹.

[14] Pursuant to the provisions of article 9 of the law n° 21/2012 of 14/6/2012 stated above and article 3 of the law n° 15/2004 stated above in its paragraph 1 and the motivation of the High Court in paragraph 4 of the judgment appealed against, the court finds that there is no single evidence that proves the occurrence of that force majeure, therefore the High Court should have not held that there have been a force majeure, as long as there is no evidence to sustain it.

[15] Having considered all those grounds, the Supreme Court is of the view that the ground of appeal of OCIR-THE is founded, therefore OCIR-THE should not pay SINFOTEC Sarl 2,499,000Frw that was deducted as moratory damages for 12 days.

Whether SINFOTEC Sarl deserve to retain moratory damages that the High Court awarded to it

[16] State Attorney Rubango Epimaque argues that damage equal to 6,838,616 Frw of late fine, the High court awarded to SINFOTEC Sarl are not reasonable as they were calculated on the amount it should have not been awarded including 2,499,000Frw of late fine and 11,543,000Frw OCIR-THE deducted from the amount owed to SINFOTEC Sarl in terms of set-off, therefore he finds that SINFOTEC should not be awarded those damages as there is no reason that 14,042,000Frw had to be removed by the High Court.

[17] Counsel Baragondoza Jean Damascène puts forward that it should have not been deducted 2,499,000Frw of late fine as it has encountered the force majeure that led to the non-performance of its obligations towards OCIR-THE, and that it should have not been deducted 11,543,000Frw because that amount was owed by another company different from SINFOTEC Sarl, therefore, he finds that the ground of appeal of OCIR-THE has no merit.

COURT FINDINGS

[18] With regard to 2,499,000Frw as stated above, OCIR-THE had the right to charge SINFOTEC Sarl that amount as moratory damages because except the mere argument, it did not prove the force majeure that prevented it from supplying OCIR-THE with the sacks within the agreed period, therefore the High Court did not have to calculate those moratory damages basing on this amount.

[19] With respect to 11,453,000Frw, the Supreme Court finds that according to appeal submissions of OCIR-THE, the motivation given by the High Court as per that amount, under paragraph 6 and 7 of the judgment appealed against, is founded because OCIR-THE should have not retained that amount in terms of set-off provided for by article 181 and 182 of the

¹“C’est au débiteur qui se prétend libéré par cas fortuit ou par force majeure, à prouver cette libération, et par conséquent le fait qui la produit. La preuve de la cause étrangère doit être faite avec tous les caractères requis pour qu’elle soit libératoire, c’est-à-dire que l’exécution soit réellement impossible, et pas simplement plus onéreuse, et que toute faute du débiteur soit exclue”. Henri De Page, “Traité de droit civil belge, principes-doctrine-jurisprudence”, Tome deuxième, troisième édition, Bruylant, Bruxelles, 1964, PP 596-597-602.

civil code book III, upon the payment owed to SINFOTEC Sarl because that amount was paid to another company named E.I.S, different from SINFOTEC Sarl.

[20] As explained above, the Supreme Court finds that the late fine on the amount of money that SINFOTEC claims were not paid to it, should have been computed basing on 11,543,000Frw which was deducted without any just cause, hence OCIR-THE has to pay related moratorium interests.

[21] Pursuant to all those grounds, the Supreme Court is of the view that this ground of appeal of OCIR-THE is founded as regards to 2,499,000Frw only that the High Court ordered it to pay to SINFOTEC Sarl.

The appeal of SINFOTEC Sarl

To know whether the High Court counted the first late fine from 30/8/2008

[22] Counsel Baragondoza Jean Damascène argues that the High Court did not analyse carefully to find that OCIR-THE caused all problems of delay. He elaborates that the first lateness was caused by OCIR-THE that changed the artwork and notified SINFOTEC Sarl after 43 days (13 October 2008), after the conclusion of the contract, and that contract was due to performed within 45 days from 30 August 2008.

[23] State Attorney Rubango Epimaque puts forward that the High Court did not start the computation of delay from 30 August 2008, the date on which the contract was concluded as it is obvious from paragraph 4 of the appealed judgment that the date the High Court started to compute the delay is 13 October 2008, after the confirmation of the artwork to be marked on sacks. He explains that 45 days of the supply of sacks as convened begun on 13 October 2008 up to 27 November 2008, therefore he finds that the High Court did not error by computing the lateness period starting after 13 October 2008.

COURT FINDINGS

[24] The Supreme Court finds that when you read paragraph 4 of the appealed judgment, it is clear that the High Court started to compute the late period of delay from 13 October 2008 the day on which the artwork was confirmed and it confirmed that all sacks worth 208,250,000Frw had to be supplied within 45 days, on 28 November 2008 but this was not done and the first installment was supplied on 9 December 2008, the second on 31 December 2008, the third 8 April 2009 and the fourth that was the last on 10 April 2009.

[25] With regard to motivation above, the Supreme Court is of the view that, the High Court, as OCIR-THE does not refute it, ruled rather that the performance of the contract between SINFOTEC Sarl and OCIR-THE was late as SINFOTEC Sarl had to wait for OCIR-THE to inform it the content of the artwork, the reason why instead for OCIR-THE to begin to count 45 days of supplying the agreed sacks on 30 August 2008 the day the contract was concluded, it begun from 13 October 2008, the day SINFOTEC Sarl was notified of the artwork.

[26] Pursuant to all those grounds, the Supreme Court finds that the fact that OCIR-THE notified SINFOTEC Sarl the artwork after 43 days from the date of the conclusion of the contract, does not justified the delay of SINFOTEC Sarl to supply the sacks within 45 days beginning from 13 October 2008 to 28 November 2008, therefore that ground of appeal of SINFOTEC Sarl has no merit as OCIR-THE is not responsible for SINFOTEC Sarl's delay.

Whether there has been a second force majeure that led SINFOTEC Sarl to delay the performance of the contract and whether the late fine deducted from 52,205,875Frw by OCIR-THE was contrary to the law

[27] Counsel Baragondoza Jean Damascène argues that the High Court was not able to find out that there was a second force majeure and did not consider the second instalment relating to the sacks worth 58,205,875Frw.

[28] In the course of hearing, Counsel Baragondoza Jean Damascène, explains that after the first instalment was stocked in MAGERWA, a part of it worth 58,275,639Frw was transported by two lorries to OCIR-THE and there left the other part worth 58,205,875Frw equal to two lorries that had to comply with tax procedures, but OCIR-THE delayed to pick them from MAGERWA, the reason why SINFOTEC Sarl wrote a letter requesting it to pick the remaining part. Hence, he finds that it should have not been deducted the late fine as the delay was caused by OCIR-THE.

[29] Rudaharishema Emmanuel argues that after the supply of the first instalment of sacks, the factory that manufactured them closed its doors due to global economic crisis, consequently SINFOTEC wrote a letter to OCIR-THE on 16/2/2009, notifying it that problem and requesting it to supply it other sacks different from those agreed upon previously according to the new sample presented to it. He further explains that OCIR-THE replied to the letter of SINFOTEC Sarl after 15 days stating that the problem was out of SINFOTEC Sarl's will but that it will charge it moratorium interests as it did not supply sack on time, therefore he finds that OCIR-THE contradicts itself because after accepting that the problem was beyond SINFOTEC Sarl's control, it should not have decided to charge it the late fine.

[30] State Attorney Rubango Epimaque argues that OCIR-THE does not accept any force majeure as it explained above in the first ground of appeal of OCIR-THE. He explains that as for the second force majeure alluded by SINFOTEC Sarl, the High Court gave a clear and reasonable explanation, therefore he finds that failure for SINFOTEC Sarl to supply all sacks at once, yet it knew that it delayed to supply them, OCIR-THE should not be held liable.

COURT FINDINGS

[31] The Supreme Court finds that the second force majeure stated in the appealed judgment concerns the shutdown of the factory that manufactured sacks that had to be supplied by SINFOTEC Sarl due to the global economic crisis, while 58,205,875Frw relates to the other part of sacks supplied to OCIR-THE on 31 December 2008 by SINFOTEC Sarl.

[32] With regard to the second force majeure stated above, the Supreme Court is of the view that, Even if SINFOTEC Sarl notified OCIR-THE in the letter of 16 February 2009 that the factory manufacturing sacks had shut down upon presentation of a copy of Daily nation newspaper from Kenya released on 7 February 2009 to sustain it; this is not a force majeure as the contract with OCIR-THE stipulates that all 200,000 sacks had to be supplied within 45 days, yet the last day was on 28 November 2008 and that raised incident occurred after that date. Therefore, the arguments of SINFOTEC are not founded.

[33] With regard to the late fine charged by OCIR-THE to SINFOTEC Sarl amounting to 52,205,875Frw, the Supreme Court finds that SINFOTEC Sarl does not prove that the delivery destination of sacks had to be at MAGERWA, and does not prove that OCIR-THE

had the obligation to get them from there. In contrast, article 25.1 and 25.2 of the book of particular administrative clauses show that the delivery of sacks was due to be at the head offices of OCIR-THE as they stipulate that the verification of sacks will be carried out at the time of delivery at Gikondo at OCIR-THE head offices². It moreover finds that article 16 of the book of general administrative clauses clearly shows that SINFOTEC Sarl had the obligation to pay all taxes relating to all its delivery to OCIR-THE³, and indeed, the provisional certificate of arrival of 1 December 2008 of the sacks warehoused in MAGERWA indicates the owner of the sacks as SINFOTEC Sarl, therefore the argument of SINFOTEC Sarl that the delay to carry out the fiscal procedure by OCIR-THE was the cause of the delay of release of the second instalment of the sacks by MAGERWA on 31 December 2008, yet it was there since 1 December 2008; is baseless because the analysis of the aforementioned grounds, undoubtedly indicate that the obligations to ensure the compliance with the fiscal procedure befell on SINFOTEC Sarl.

[34] Basing on all those grounds, the Supreme Court finds that the High Court did not error in holding that the second force majeure raised by SINFOTEC was baseless and that the late fine deducted from 149,974,361Frw remained by the time SINFOTEC Sarl supplied the second party of sacks worth 58,205,875 Frw are reasonable and therefore that ground of appeal of SINFOTEC Sarl is not founded.

Whether SINFOTEC Sarl deserves to be awarded damages it claims for basing on article 258 of the civil code book III

[35] Counsel Baragondoza Jean Damascène argues that the the High Court refused to charge OCIR-THE damages to be awarded to SINFOTEC Sarl based on article 64 of the law n° 45/2011 of 25/11/2011 governing contracts, and because that failure to pay it, it led to its failure to pay FINA Bank, to the extent that it was charged enormous damages by the Commercial High Court, yet it is obvious that the High Court disregarded the provisions of article 258 of the civil code book III. He explains that except the contract between SINFOTEC Sarl and OCIR-THE provides for the late fine, SINFOTEC Sarl incurred a serious loss from the failure to get paid.

[36] State Attorney Rubango Epimaque argues that on this ground of appeal of SINFOTEC Sarl, under paragraph 10 of the appealed judgment, the High Court's motivation is clear and concise, and in contrast, what is not understandable is how SINFOTEC claims for damages provided in the contract concluded with OCIR-THE, and at the same occasion claims for the payment of debts and damages it owes to FINA Bank.

²L'article 25.1 du Cahier des Clauses Administratives Particulières dispose que "Les inspections et essais seront effectués à la livraison. Elles vérifieront la conformité entre spécifications techniques et la livraison". Quant à lui, l'article 25.2 du Cahier des Clauses Administratives Particulières dispose que "les inspections et essais seront conduits à Gikondo, siège de l'Ocir-Thé".

³L'article 16.1 du Cahier des Clauses Administratives Générales édicte que "pour les fournitures provenant d'un pays autre que le pays de l'Entité de passation des marchés, le Fournisseur sera entièrement responsable de tous les impôts, droit de timbre, patente et taxes dus à l'extérieur du Rwanda". L'article 16.2 du Cahier de Clauses Administratives Générales prévoit que "pour les fournitures fabriquées au Rwanda, le Fournisseur sera entièrement responsable de tous les impôts, droits, patentes, etc... à payer jusqu'au moment de la livraison à l'Entité de passation des marchés des fournitures faisant l'objet du marché". Enfin, l'article 16.3 du Cahier des Clauses Administratives Générales stipule que "si le fournisseur peut prétendre à des exemptions, réductions, abattements ou privilèges en matières fiscale dans le pays de l'Entité de passation des marchés, l'Entité de passation des marchés fera tout son possible pour permettre au Fournisseur d'en bénéficier jusqu'à concurrence du maximum autorisé".

COURT FINDINGS

[37] Article 144 of the law n° 45/2011 of 25/11/2011 governing contract provides that “if the breach of the contract consists of a failure to pay a sum of money or to render a performance with fixed or ascertainable monetary value, interests are calculated from the time for performance was due less all deductions to which the party in breach is entitled”, and article 146, paragraph 1 provides “damages for breach of the contract may be provided for in the contract but at a reasonable amount based on the actual loss or potential loss to occur in case of breach of the contract or in case of difficulty in providing evidence of the loss”.

[38] With regard to late fine, the Supreme Court finds that under the contract concluded between SINFOTEC Sarl and OCIR-THE, article 15.5 of the book of general administrative clauses⁴ provides that if OCIR-THE does not pay SINFOTEC Sarl on time, it will be charged to late fine of all days of delay on that amount on the rate stipulated under the book of general administrative clauses. Indeed, for execution of the aforementioned article, paragraph 15.5 of the book of particular administrative clauses⁵ explains that late fine are computed on the rate of 0.1% a day and computation of which shall start running after 45 days from the time SINFOTEC handed OCIR-THE with the invoice requesting the payment.

[39] With regard to damages that SINFOTEC Sarl claims basing on article 258 of the civil code book III, the Supreme Court finds that pursuant to the general principle of law that prohibits creditors to request from the debtors the damages arising from the contract and those arising from torts at the same time, SINFOTEC Sarl cannot request the court to charge OCIR-THE the payment of damages basing on article 258 of the civil code book III relating to torts and quasi-torts, while it shows that the fault committed by OCIR-THE are based on the non-performance of the obligations arising from their contract. Therefore, article 258 stated above cannot be invoked in this case which concerns the execution of the contract.

[40] In spite of all those facts, without prejudice to what are stated in the previous paragraph, if the contract provides for damages that will be awarded once one of the parties has delayed in performance, there is no other alternative apart from complying with the stipulations of the contract in accordance with article 64 of the Law n° 45/2011 of 25/11/2011 governing contracts as there is no other alternative to that. Therefore, the Supreme Court is of the view that SINFOTEC Sarl should not request OCIR-THE to pay the loss it suffered on the ground that the delay in payment caused the failure to honor its obligations towards FINA Bank as it defaulted to pay its debt.

[41] Pursuant to all those grounds, that ground of appeal of SINFOTEC Sarl has no merit.

Whether the decision of the judgment appealed against does not contain the moratory damages equal to 6,838,616Frw awarded to SINFOTEC by the High Court

⁴L'article 15.5 du Cahier des Clauses Administratives Générales prévoit que “dans l'éventualité où l'Entité de passation des marchés n'effectuerait pas un paiement dû à sa date d'exigibilité ou dans un délai indiqué au CCAP, l'entité de passation des marchés sera tenu de payer au Fournisseur des intérêts sur le montant du paiement en retard, au(x) taux spécifié(s) dans le CCAP pour toute la période de retard jusqu'au paiement intégral du prix, que ce soit avant ou à la suite d'un jugement ou une sentence arbitrale”.

⁵ Le point CCAG 15.5 du Cahier des Clauses Administratives Particulières prévoit que “le nombre de jour de retard de paiement de la facture du Fournisseur qui conditionne le paiement des intérêts de retard est de 45 jours. Le taux d'intérêt applicable sera de 0,1% par jours de retard”.

[42] Counsel Baragondoza Jean Damascène argues that even though the High Court awarded to SINFOTEC Sarl late fine equal to 6,838,616Frw, it did not include i in the sum found in its decision under paragraph 15 of the appealed judgment.

[43] State Attorney Rubango Epimaque argues that if damages awarded by the court have merit, this has to be included in the ruling of the case in order to facilitate its enforcement once it becomes final.

COURT FINDINGS

[44] The Supreme Court is of the view that under paragraph 9 of the appealed judgment, the High Court awarded late fine to SINFOTEC Sarl equal to 6,838,616Frw and this amount is not indicated in the ruling.

[45] As argued by litigants, this amount had to be included in the court ruling, therefore, the Supreme Court finds that this ground for SINFOTEC Sarl's appeal is founded as this mistake has to be rectified.

To determine whether the High Court provided motivation for the compensation between the counsel and proceeding fees claimed by both parties

[46] Counsel Baragondoza Jean Damascène argues that under paragraph 11 of the appealed judgment, the High Court ruled that damages claimed by all parties were well founded but they are excessive and after, it ruled that they have to be compensated. He argues that the expenses incurred by all parties cannot be equal, and finds that there is no ground to deny SINFOTEC Sarl all the damages it claimed and order it to pay a half of the court fees.

[47] State Attorney Rubango Epimaque argues that in this case, the High Court found that concerning the amount all parties claimed, there is certain amount that SINFOTEC had to be awarded, and another amount that OCIR-THE deducted which are founded, therefore the fact that under paragraph 11 of the court's decision, the High Court in its discretion, held that damages claimed by both parties, as each party lost and won on some points, and he finds that that ground of appeal is ill-founded as there is no irregularity of that court's discretion was proven.

COURT FINDINGS

[48] Article 7 of the relating to civil, commercial, labour and administrative procedure provides that "the judge shall rule only and on all that which is referred to the court".

[49] Article 147, paragraph 2 of the law relating to civil, commercial, labour and administrative procedure provides that "the judgement must contain grounds in law and in fact".

[50] With regard to the counsel's honorary and procedural fees, the Supreme Court finds that SINFOTEC Sarl claimed damages equal to 10% of the subject matter because it was dragged into lawsuits and 1,000,000Frw of proceedings' expenses whereas OCIR-THE claimed 1,000,000Frw of the counsel fees and 500,000Frw of procedural fees. The court finds that pursuant to article 258 Of the civil code book III, the High Court found that the claims of litigants are founded but because they were excessive, and in addition each party wins and losses on some grounds of the claim there should be compensation.

[51] Given that the High Court ordered the compensation of the counsel and procedural fees without first demonstrating what has been awarded to each party, the Supreme Court finds that the High Court did not respond to the requests of litigants and therefore pursuant to article 7 and 147, paragraph 2 of the law relating to civil, commercial labour and administrative procedure, the High Court did not abide by the law because before the confirmation of the compensation of the amount, it had first to indicate the amount awarded to each party and its basis.

[52] Due to that ground, the Supreme Court finds that the ground of appeal of SINFOTEC Sarl is founded.

To know whether Sarl has to be awarded all damages it claims

[53] Counsel Baragondoza Jean Damascène argues in his written submissions that the High Court refused to award SINFOTEC Sarl 14,8555,333Frw deducted as late fine unnecessarily and 11,543,000Frw retained yet it was owed by another company (E.I.S). He further argues that the late fine for 487 days on the rate of 0.1%, equal to 12,855,988Frw had to be calculated on all amount of money (26,398,333Frw) as stipulated under article 15.5 of the book of general administrative clauses. He further adds that he should be awarded extra 25% of the damages computed from 21 April 2009 to 10 March 2010 as OCIR-THE caused a loss to SINFOTEC Sarl which led it to have contentions with FINA Bank, in addition to the lump sum of 1,000,000Frw as SINFOTEC Sarl used a loan as indicated in the letter of 10 March 2010 FINA Bank wrote to it, all damages amounting to 10,074,427Frw (26.398.333Frw + 25% + 16,5 months/12 months) + 1,000,000 Frw). He concludes that the sum of all amount that OCIR-THE owes to SINFOTEC Sarl is 55,261,622Frw (39,254,321Frw + 10,074,427Frw +10% (39,254,321Frw + 10,074,427Frw: Counsel fees) + 1,000,000Frw: Procedural fees), in addition to 500,000Frw of the counsel fees at appellate level.

[54] During the hearing, Counsel Baragondoza Jean Damascène explains that as the law provides that late fines cannot exceed the rate of 10% of the value of the tender, SINFOTEC Sarl cannot compute them up to this day because they may exceed that 10% of the total value of the entire tender, and he therefore prays that SINFOTEC be awarded damages equal to 10% of the entire tender, that is 20,825,000Frw. He further explains that SINFOTEC Sarl prays for the award of 31,623,000Frw relating to the loss caused by the faults of OCIR-THE as it was not able to pay the debt owed to FINA Bank (26,398,333 x 25% x 57,5 months/12 months = 31,623,000Frw) in addition to the lump sum of 1,000,000Frw. He concludes by arguing that SINFOTEC SARL prays for the counsel fees and the procedural fees equal to 10% of all the amount that has to be paid to OCIR-THE, that is to say, 7,984,633Frw (26,398,333 + 20,825,000 + 31,623,000Frw + 1,000,000 Frw = 79,846,333Frw x 10% = 7,984,633Frw), altogether amounting to 87,830,966Frw.

[55] State Attorney Rubango Epimaque adduces that the High Court clearly motivated the grounds on which it admitted or rejected all amounts claimed by SINFOTEC Sarl, therefore, the fact that SINFOTEC Sarl does not demonstrate what it criticizes on each motivation given by the High Court on each amount claimed, instead wishes to get all it claimed for, he finds that ground of appeal not founded.

COURT FINDINGS

[56] With regard to 26,398,333Frw, including 2,499,000Frw, 3,299,436Frw, 8,933,312Frw and 63,585Frw of the late fine SINFOTEC Sarl was deducted by OCIR-THE and 11,543,000Frw deducted due to the debt it owed to OCIR-THE, for which the compensation was operated, the Supreme Court finds that as stated above, except 11,543,000Frw; OCIR-THE had the right to deduct from SINFOTEC Sarl the late fine equal to 14,855,333Frw, therefore the fact that it retained 11,543,000Frw owed to SINFOTEC Sarl without just cause, as explained under paragraph 19 and 20, OCIR-THE has to pay late fine for 1,753 days, from the date it was supposed to pay up to the day of the pronouncement of the judgment, on the rate of 0.1% of that amount per day, that is to say 20,234,000 Frw ($11,543,000 \times 0.1\% \times 1,753$ days).

[57] With regard to 31,623,000Frw claimed by SINFOTEC Sarl relating to the loss OCIR-THE caused it as due to its faults, it failed to pay the debt owed to FINA Bank ($26,398,333 \times 25\% \times 57,5$ months/12 months = 31,623,000Frw), the Supreme Court find that it should not be awarded this amount as explained above under paragraph 39 and 40, on the ground that it cannot claim damages basing on article 258 of the civil code book III for issues relating to the execution of the contract.

[58] As for 1,000,000Frw of lump sum, the Supreme Court finds that they should not be awarded to it, as it does not prove its relevance.

[59] With regard to 7,984,633Frw of the counsel and procedural fees equal to 10% of all damages that it has to be paid by OCIR-THE, the Supreme Court finds that this amount is excessive and therefore, upon its discretion the Court awards it 500,000Frw for counsel fees and 300,000Frw for the procedural fees, altogether amounting to 800,000Frw.

[60] Pursuant to the grounds stated above, the Supreme Court finds that OCIR-THE has to pay 11,543,000Frw to SINFOTEC Sarl which it deducted without any justification, 20,234,000Frw for late fees, 500,000Frw for the counsel fees and 300,000Frw for the procedural fees, altogether amounting to 32,577,000Frw.

III. COURT DECISION

[61] Decides that the appeal of OCIR-THE has merit in part.

[62] Decides that the appeal of SINFOTEC Sarl has merit in part.

[63] Orders OCIR-THE to pay to SINFOTEC Sarl 11,543,000Frw deducted without any justification, 20,234,000Frw for the late fine computed on that amount of money, 500,000Frw of the counsel fees and 300,000Frw for the procedural fees, altogether amounting to 32,577,000Frw.

[64] Orders OCIR-THE and SINFOTEC sarl to pay court fees equal to 19,000Frw.