

RWANDA TEA TRADING LTD v GT BANK LTD

[Court of Appeal – RCOMAA 00037/2018/CA- RCOMAA 00023/2018/SC (Karimunda, P.J., Ngagi and Mukanyundo, J.) 22 February 2019]

Contract – Force majeure – Case of force majeure shall have the following criteria: It shall be irresistible, caused by an external circumstance other than parties to contract and unpredictable.

Facts: Rwanda Tea Trading Ltd entered into a three hundred and fifty million rwandan francs (350.000.000 Frw) loan contract with GT Bank Ltd to be repaid for six months; and entered into a surety contract with Karyabwite Claver, Mukandori Eugénie, Karyabwite Désiré, Karyabwite Eric and Karyabwite Jean Claude.

Rwanda Tea Trading Ltd did not respect the contract, consequently, it entered into another agreement of loan restructuring with GT Bank Ltd and they agreed on that Rwanda Tea Trading Ltd got another loan amounting to 415.445.080 Frw to be repaid for a single payment together with interests.

Rwanda Tea Trading Ltd did not again respect the contract. Therefore, GT Bank Ltd filed a case to Nyarugenge Commercial Court against Rwanda Tea Trading Ltd and its guarantors requesting repayment of loan and its interests amounting to 623.353.711 Frw, and various damages

The Nyarugenge Commercial Court declared that the request filed by GT Bank Ltd has merits and ordered Rwanda Tea Trading Ltd and its guarantors to repay the principal loan with interests.

All the parties to the case made an appeal to the Commercial High Court, GT Bank Ltd stating that it is not satisfied with the loan to be repaid ordered by Court, while Rwanda Tea Trading Ltd and its guarantors denied breach of contract, but rather it was annulled by GT Bank Ltd before the beginning of repayment period. The Commercial High Court declared that the appeal by Rwanda Tea Trading Ltd and its guarantors lacks merits, while those of GT Bank Ltd has merits in part.

Being dissatisfied with the ruling of the case, Rwanda Tea Trading made an appeal to the Supreme Court. After the establishment of the Court of Appeal, the appeal was referred to the latter stating that the Commercial High Court had ruled that Rwanda Tea Trading and its guarantors had not respected the contract; and the Bank would write to it requesting the payment while the due date was not reached.

GT Bank Ltd made defence by stating that the Commercial High Court made no mistake to declare Rwanda Tea Trading Ltd's non-performance of loan agreement because it did not prove if the granted loan has been repaid. Therefore, GT Bank Ltd maintained that there was no reason for Rwanda Tea Trading Ltd to keep the loan unpaid, as its main purpose no longer existed.

In its defence, Rwanda Tea Trading Ltd stated that the project suspension that was not caused by its own mistakes should be considered as case of force majeure which led to the breach of contract because no provision had been made to what would happen if the project was suspended. It further noted that after the project was suspended, the situation would be reinstated to initial contract, GT Bank Ltd should be repaid the loan it had granted indicated in the agreement of loan restructuring without paying interests nor damages.

GT Bank Ltd stated that Rwanda Tea Trading Ltd's statement that GT Bank Ltd should not claim the interests is unfounded as the reason for loan granting was about getting interests. The

suspension of factory construction by the Government of Rwanda should not prevent the Bank from getting the interests of granted loan.

GT Bank Ltd requested that Rwanda Tea Trading Ltd and its guarantors be compelled to pay the outstanding loan. It stated that the Commercial High Court had calculated interests at 17.5% whereas it should have added 2% as provided for under the contract.

According to Rwanda Tea Trading Ltd, 594,052,834 Frw has already been paid as written in the provisional execution of judgment and it estimated that the Bank has received enough money, the interests should be calculated until 22/04/2016, the date on which the project of factory construction was suspended.

Held: 1. Failure to comply with an obligation to repay the loan until the expiration of deadline provided for under the contract is considered as the non-performance. Thus, the borrower is required to pay the principal loan, its interest and the penalties for delayed payment in case of non-compliance with the payment deadline provided for under contract.

2. The case of force majeure must meet the following criteria: it shall be irresistible, caused by an external circumstance other than parties to contract and unpredictable. Consequently, no one shall invoke preventable case as force majeure, though it is expensive; no case of force majeure related to repayment obligation shall happen as it can be made from his/her properties; and the loss does not protect the borrower.

Appeal lacks merit.

The cross-appeal has merits.

The court fees cover the expenses of the case are equivalent to all proceedings.

Statutes and statutory instruments referred to:

Law n° 45/2011 of 25/11/2011 Governing Contracts, Articles 80 and 60.

No cases referred to.

Judgment

I. BRIEF BACKGROUND OF THE CASE

[1] Rwanda Tea Trading Ltd entered into a loan agreement with GT Bank Ltd on 25/09/2013 in which GT Bank Ltd granted a loan of three hundred and fifty million Rwandan francs (350.000.000 Frw) to Rwanda Tea Trading Ltd to be repaid within a period of six months. On the same day, GT Bank Ltd entered into a surety contract with Karyabwite Claver, Mukandori Eugénie, Karyabwite Désiré, Karyabwite Eric and Karyabwite Jean Claude as guarantors of Rwanda Tea Trading Ltd for loan granted by GT Bank Ltd.

[2] Rwanda Tea Trading Ltd did not respect the contract and after negotiations it entered into another agreement with GT Bank Ltd for restructuring the loan, they agreed that Rwanda Tea

Trading Ltd was granted a loan amounting to 415,445,080Frw to be repaid and its interest for a single payment not later than 30/10/2016¹.

[3] Rwanda Tea Trading Ltd did not also respect the contract. Therefore, GT Bank Ltd filed a claim to Nyarugenge Commercial Court against Rwanda Tea Trading Ltd and its guarantors requesting the repayment of loan and its interests equivalent to 623.353.711 Frw provisionally calculated until 11/01/2017, it also claimed various damages and requested for the provisional execution of the judgement on the loan recognized by the defendants.

[4] On 19/05/2017, Nyarugenge Commercial Court pronounced the judgement RCOM 00093/2017/TC/NYGE and decided that the claim filed by GT Bank Ltd had merits, it ordered Rwanda Tea Trading Ltd and its guarantors to repay the principal loan equivalent to 594,052,834 Frw plus its interests, 500,000 Frw as court fees and lawyer's fees, 50,000 Frw as court fees deposited by GT Bank Ltd by filing the claim as well as the provisional execution of judgement regarding the loan and the interests recognized by the defendants.

[5] All the parties to the case filed an appeal to Commercial High Court against this judgement. GT Bank Ltd stated that it was not satisfied with the loan confirmed by the Court to be repaid and the principal loan with its interests amounted to 769,564,268 Frw, it requested to be repaid such amount; whereas Rwanda Tea Trading Ltd and its guarantors supported that they were not liable for the breach of contract, but it was GT Bank Ltd that annulled the contract before the repayment deadline and they maintained that they were against the provisional execution of the judgement ordered by Court at the first instance.

[6] On 05/01/2018, the Commercial High Court pronounced the judgement RCOMA 00393/2017/CHC/HCC-RCOMA 00395/2017/CHC/HCC and ruled that the appeal of RTT Ltd and its guarantors lacked merits and the one of GT Bank Ltd had merits in part, the principal loan with its interests to be repaid to GT Bank Ltd amounted to 657,430,909 Frw. The Court also ruled that the provisional execution decided at the first instance on the loan equivalent to 594,052,834 Frw was sustained. The Court ordered Rwanda Tea Trading Ltd and its guarantors to pay GT Bank Ltd a sum of 500,000 Frw for the lawyer's fees on appellate level plus 500,000 Frw at the first instance.

[7] Rwanda Tea Trading Ltd was not satisfied with the ruling and appealed to the Supreme Court and after the establishment of the Court of Appeal, the appeal was transferred to that Court according to the Article 105 of Law n° 30/2018 of 02/06/2018 determining the jurisdiction of the courts².

[8] The case was tried in public on 17/01/2019, Rwanda Tea Trading Ltd was represented by Counsel Nkongoli Laurent and Counsel Rwagatare Janvier while GT Bank Ltd was represented by Counsel Bimenyimana Eric.

¹ However, GT BANK Ltd alleged that there was a mistake, the new loan was equivalent to 431,102,236 Frw credited to the account of Rwanda Tea Trading Ltd on 30/10/2015, instead of 415,445,080 Frw.

² From the day this Law comes into force, except cases already under trial, all cases that are no longer in the jurisdiction of the court seized are transferred to the court with jurisdiction in accordance with the provisions of this Law".

II. ANALYSIS OF THE LEGAL ISSUES

A. APPEAL BY RWANDA TEA TRADING Ltd

- 1. Whether Rwanda Tea Trading Ltd has complied with the loan agreement

[9] According to Rwanda Tea Trading Ltd, the Commercial High Court decided that Rwanda Tea Trading Ltd and its guarantors had not complied with the agreement, whereas it has explained that after the suspension of Gatare Tea Factory by the Government of Rwanda on 22/04/2016, GT Bank Ltd immediately wrote a letter requesting immediate payment by Rwanda Tea Trading Ltd while the agreed date was not elapsed because it remained a period of six (6) months. It further stated that it has not failed to repay the loan, but it was GT Bank Ltd which made annulment of the contract because the purpose for loan non longer existed when the construction project of Gatare Tea Factory had been suspended, the terms of agreement should have been reinstated to the initial contract.

[10] GT Bank Ltd stated that the Commercial High Court made no error to decide Rwanda Tea Trading Ltd did not fulfill the loan agreement because it has not proved if it repaid the granted loan. It noted that there was no reason for Rwanda Tea Trading Ltd to retain the loan as the project purpose no longer existed; it observed that if Rwanda Tea Trading Ltd and its guarantors repaid the loan on time, it would have helped for reducing the increase of interests. It further stated that even though the total loan would have been repaid on 30/10/2016, it is evident that even later, Rwanda Tea Trading Ltd did not repay the loan on the date agreed on under the contract, so that GT Bank Ltd wrote to Rwanda Tea Trading Ltd requesting the repayment of 594,052,834 Frw, but it did not immediately repay; but during the court trial at the first instance they accepted the same loan and the Court ordered the provisional execution of the judgement.

DETERMINATION OF THE COURT

[11] Paragraph 2, Article 80 of Law N° 45/2011 of 25/11/2011 Governing Contracts provides that: “When the performance of obligations under the contract is due, the non-performance shall be a breach”.

[12] Documents included in the case file indicated that on 25/09/2013 GT Bank Ltd entered into a loan agreement with Rwanda Tea Trading Ltd equivalent to 350,000,000 Frw to be repaid within six (6) months. This agreement was renewed on 16/10/2014 with both parties by agreeing on Rwanda Tea Trading Ltd's loan owed to GT Bank Ltd equivalent to 415,445,080 Frw³ that would be repaid on 30/10/2016 by single payment. Before the expiration of the deadline, GT Bank Ltd realized that the project of which Rwanda Tea Trading Ltd had applied for the loan was suspended and immediately asked Rwanda Tea Trading Ltd for early repayment of the granted loan Rwanda Tea Trading Ltd was unable to repay the loan. Therefore, after issuing notice, GT Bank Ltd filed a suit to Nyarugenge Commercial Court on 06/11/2016. The Court ordered Rwanda Tea Trading Ltd and its guarantors to repay 594,052,834 Frw of loan plus its interests. This decision was

³ GT BANK Ltd stated that there is was an error in contract on the loan of 431,102,236 Frw instead of 415,445,080 Frw.

subjected to appeal in Commercial High Court, which decided also that Rwanda Tea Trading Ltd violated the contract and was ordered to repay 657,430,909 Frw of loan plus interests owed to GT Bank Ltd.

[13] The case file indicated that in the contract of 16/10/2014 amending the contract of 25/09/2013, Rwanda Tea Trading Ltd has agreed to repay, by single payment, the loan of 415,445,080 Frw and its interest calculated at 17.95% on 30/10/2016.

[14] For this issue, the Court finds that the party to the case still liable to comply with the contract was Rwanda Tea Trading Ltd of which primary obligation was to repay the loan as provided for under the contract of 16/10/2014 aforementioned. The fact that the the deadline agreed on was expired without repayment of the loan by Rwanda Tea Trading Ltd to GT Bank Ltd means that Rwanda Tea Trading Ltd became party that has not complied with its obligations as set forth in the contract.

[15] The Court finds that the statement of Rwanda Tea Trading Ltd's Counsel that GT Bank Ltd did not respect the contract as it asked for the early repayment can be considered unfounded, given that, as the Commercial High Court realized it, due to the fact that GT Bank Ltd immediately asked for the payment of its money, after being aware that the project for which the loan was granted was suspended by the Government of Rwanda, it made no mistake, as the repayment was in the interest of both parties, especially, as indicated, Rwanda Tea Trading Ltd did not even repay until the expiration of the deadline provided for under the contract, this led GT Bank Ltd to file a claim to Nyarugenge Commercial Court as it observed that the notice it provided was no longer valid.

[16] Basing on the provisions of paragraph 2, Article 80 of the Law n°45/2011 of 25/11/2011 above mentionned, the Court finds that due to the fact Rwanda Tea Trading Ltd has not been able to perform its obligations to repay the loan granted by GT Bank Ltd until the period stipulated under the contract became expired and exceeded, it is the one that violated the contract, the Commercial High Court would have no ground to decide that Rwanda Tea Trading Ltd did not violate the contract and such is the observation of this Court.

- **2. Whether the fact that the suspension of Gatare Tea Factory project by the Government of Rwanda would be considered as case of force majeure for the breach of the contract so that the interests should not be calculated**

[17] Rwanda Tea Trading Ltd stated that the fact that the project suspension which was not resulted from its own mistakes should be considered as case of force majeure which led to the breach of the contract as provided for under the Article 92 of the Law Governing Contracts⁴ because no provision had been made about what would happen if the project was suspended. It further stated that after the project was suspended, the terms of the contract would have been reinstated to the initial agreement and GT Bank Ltd should have been repaid the granted loan

⁴ That article provides that Where a party's performance is made impossible for reasons beyond her/his control including the absence of the object matter of the contract or another case of force majeure, his/her obligation of performance shall be extinguished, unless the circumstances indicate otherwise.

indicated in the additional agreement of 15/10/2014, but without paying damages and interests as set forth under paragraph one, Article 92 of the Law Governing Contracts⁵.

[18] GT Bank Ltd stated that Rwanda Tea Trading Ltd's statement that GT Bank Ltd's interests should not be claimed would be declared unfounded as the purpose for loan granting was about getting interests. The fact that the Government of Rwanda (MINECOFIN) has suspended the project of factory construction should not prevent the Bank from getting the interests of granted loan ; rather Rwanda Tea Trading Ltd should have sued MINECOFIN for damages.

DETERMINATION OF THE COURT

[19] Article 64 of Law N° 45/2011 of 25/11/2011 Governing Contract provides that: “Contracts made in accordance with the law shall be binding between parties.” Article 92 of this Law provides that: "Where a party’s performance is made impossible for reasons beyond her/his control including the absence of the object matter of the contract or another case of force majeure, his/her obligation of performance shall be extinguished, unless the circumstances indicate otherwise “.

[20] According to the case file, it is stated that the agreement of 16/10/2014 between Rwanda Tea Trading Ltd and GT Bank Ltd, the article herein after called “*Les intérêts débiteurs*,” both parties agreed on annual interest rate of 17.95%, but that the rate may change (decrease or increase) due to movements in market prices.

[21] The Supreme Court finds that the High Court made no mistake while ruling that the interest should still be counted, but corrected the manner of which the interest was calculated. While it was found that GT Bank Ltd was not the party that violated the contract, but Rwanda Tea Trading Ltd and its guarantors which failed to comply with the terms of the contract, the Court finds that there was no reason for not calculating the interests.

[22] The Court also finds that Article 92 of Law N° 45/2011 of 25/11/2011 Governing Contracts invoked by Rwanda Tea Trading Ltd by stating that Commercial High Court used it to calculate the interests should not be considered for this case, except being used for Rwanda Tea Trading Ltd which was also declared as the one to breach the terms of the contract, the latter cannot claim for the interest exemption as the interpretation of this Article is contrary to the views of Rwanda Tea Trading Ltd's Counsel as explained in the following paragraphs.

[23] The Supreme Court finds that the purpose of the agreement between Rwanda Tea Trading Ltd and GT Bank Ltd was the loan amount provided by the Bank to Rwanda Tea Trading Ltd, rather than the construction of a tea factory, and even if this was the case, the Court finds no case of force majeure that have prevented Rwanda Tea Trading Ltd from maintaining the construction as the force majeure must meet the following conditions : be irresistible, beyond parties control and unpredictable.

⁵ The obligation to pay damages for repudiation of obligations is extinguished if it appears that repudiated obligations would have been extinguished by their impossibility of performance or the impossibility of the purpose

[24] It finds that the fact that MINECOFIN has suspended the tender of factory construction because it was not satisfied with the way it was executed, it is inconsistent with the provisions of Article 92 of the aforementioned Law under the pretext of its mistakes by invoking that the decision of MINECOFIN was case of force majeure. This statement is also underpinned by the notes from legal scholars where they stated that no one should invoke preventable case as force majeure, though it is expensive; no case of force majeure related to repayment obligation shall happen as it can be made from his/her properties; and the loss does not protect the borrower⁶.

[25] With respect to the statements by Rwanda Tea Trading Ltd's Counsels that GT Bank Ltd did not comply with the provisions of article 70 of the Law n° 45/2011 of 25/11/2011 Governing the Contracts⁷ by stating that if it really had a good faith and fair dealing to its client, it would have not considered the interest calculation after realizing that the purpose of which Rwanda Tea Trading Ltd applied for loan was suspended; but it would have only accepted the repayment of the principal loan. The Court also finds it cannot be declared as founded, because after realizing that the project was suspended, GT Bank Ltd requested Rwanda Tea Trading Ltd to repay its money, which Rwanda Tea Trading Ltd did not respect immediately, but it waited for the deadline provided for under the contract. Rwanda Tea Trading Ltd did not pay when the deadline was due after receiving a written notice from GT Bank Ltd. That's made GT Bank Ltd to seize the courts. Therefore, the Court finds that there was no bad faith or precondition in the behaviour of GT Bank Ltd. Therefore, there was no reason to prevent it from continuing to count interests as provided under the contract, especially since it was not concerned by the agreement between Rwanda Tea Trading Ltd and MINECOFIN. Furthermore, it was not involved in the suspension of the project such as making funds available for no reason to prevent Rwanda Tea Trading Ltd from complying with its obligations under a contract with the Government of Rwanda (MINECOFIN).

B. CROSS-APPEAL FILED BY GT BANK Ltd

- 1. Whether Rwanda Tea Trading Ltd and its guarantors should be compelled to repay the outstanding loan

GT Bank Ltd requested that Rwanda Tea Trading Ltd and its guarantors should be compelled to repay the outstanding loan equivalent to 255,279,610 Frw calculated until 17/01/2019 as it accepted that the sum of 594,052,834 Frw has already been repaid. It stated that the Commercial High Court had calculated interests at 17.5% whereas it should have added 2% as provided for under the contract.

With respect to GT Bank Ltd's appeal, Rwanda Tea Trading Ltd maintained that a sum of 594,052,834 Frw had already been paid as written in the provisional execution of the judgement and it estimated that the Bank had received enough money and the interests should be calculated until 22/04/2016, the date of which the project of factory construction was suspended.

⁶ Ph. MALAURIE, L. AYNES, Ph. STOFFEL-MUNCK, *Droit des obligations*, 7e edition, Paris, LGDJ, 2015, pp. 515-516.

⁷Each party shall have obligation to perform the contract in good faith and fair dealing between parties.

DETERMINATION OF THE COURT

[26] With respect to the statements by GT Bank Ltd's Counsel that the Commercial High Court had counted interests at 17.5% but it did not add 2% as provided for under the contract, the Court finds that Article 3 of the contract of 16/10/ 2014 stipulated that apart from the interest rate above (17.95%), an additional 2% would be deducted from the total amount in excess of the granted loan. The Supreme Court also finds that in the paragraph 16 of this judgment subjected to appeal, the Court did not give its position about 2% provided for under the contract.

[27] With respect to the amount of loan Rwanda Tea Trading Ltd had to pay to GT Bank Ltd, the Court finds that both parties agreed that GT Bank Ltd had already been paid the sum of 594,052,834 Frw as indicated above. But as stated by GT Bank Ltd in the hearing of 17/01/2019, RTT Ltd had to pay 255,279,610 Frw with the remaining principal loan inclusive, its interests and penalties for delay as it has not amended it ; rather Rwanda Tea Trading Ltd insisted on the fact that no interest should be counted due to a case of force majeure and the fact that it has paid enough money. The Court cannot roughly refer to this because Rwanda Tea Trading Ltd did not provide evidence to contradict the amount of loan and its interests⁸.

- C. Determining the basis of the damages claimed

[28] GT Bank Ltd requested the Court to order Rwanda Tea Trading Ltd to pay one million (1,000,000 Frw) for lawyers' fees at this level because of being dragged into unnecessary lawsuits.

[29] Counsel Rwagatare Janvier, representing Rwanda Tea Trading Ltd requested the Court to examine the basis of damages claimed by GT Bank Ltd.

DETERMINATION OF THE COURT

[30] The Court finds that GT Bank Ltd has hired a lawyer to represent its interests at this level. It is evident that it has required a cost to do the job.

[31] However, the Court finds that 1,000,000 Frw claimed by the Bank has no evidence. Therefore, it must be awarded 700,000 Frw of lawyers' fees determined according to its discretion.

III. DECISION OF THE COURT

[32] Declares that Rwanda Tea Trading Ltd's appeal lacks merits;

[33] Declares that the cross-appeal of GT Bank Ltd has merits;

⁸ Article 12 of Law n° 22/2018 of 29/04/2018 relating to the Civil, Commercial, Labour and Administrative Procedure, provides that: "*a party who alleges that he/she has been discharged from an obligation established by evidence must justify the cause as a result of which the obligation has extinguished. Failure to do so, the other party wins the case*".

[34] Declares that the case 00393/2017/CHC/HCC-RCOMA00395/2017/CHC/HCC rendered by the Commercial High Court on 05/01/2018 is reversed with respect to the amount of the loan and its interests that Rwandatea Trading Ltd must pay to GT Bank Ltd;

[35] Orders Rwanda Tea Trading Ltd to repay GT Bank Ltd the remaining amount of the loan plus interests equivalent to 255,279,610 Frw;

[36] Orders Rwanda Tea Trading Ltd to award GT Bank Ltd the sum of 700,000 Frw for lawyers' fees at this regard;

[37] Declares that the court fees deposits are equivalent to the expenses incurred.