GAJU v. ACCESS BANK

[Rwanda URUKIKO RW'IKIRENGA – RCOMA 0138/12/CS (Nyirinkwaya P.J., Hatangimbabazi na Hitiyaremye, J.) 16 Gicurasi 2014]

Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Ingwate – Amasezerano y'ubwishingire – Kumenyesha umwishingizi mu buryo bweruye – Umwishingizi ntiyaryozwa umwenda atigeze amenyeshwa mu buryo bweruye n'uwawutanze kuko aba ari inshingano ze zo kumenyesha umwishingizi imiterere n'ingano n'inshingano asezeranye – Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 555.

Amategeko agenga amasezerano cyangwa imirimo nshinganwa – Indishyi zo gushorwa mu manza n'igihembo cya avoka – Nta ndishyi zo gushorwa mu manza umuburanyi yahabwa mu gihe nta mpanvu yazo, ariko iyo hari ingingo yungukiye mu bujurire agenerwa igihembo cya Avoka mu bushishozi bw'urukiko mu gihe amwitabaje.

Incamake y'ikibazo: ACCESS BANK RWANDA Ltd yahaye Twagira Azzy inguzanyo ya 25.000.000Frw, yishingiwe n'umugore we Gaju wemeye ko ingwate y'inzu yatanzwe na Twagira izavamo ubwishyu mu gihe atishyuye, ariko uwo mwenda uza kwishyurwa nk'uko impande zombi zabyemeranyijweho. Nyuma yaho banki yongeye guha Twagira indi nguzanyo ingana na 12.000.000Frw agwatiriza n'inzu ye. Ntiyubahirije amasezerano bituma banki imurega mu Rukiko Rukuru rw'Ubucuruzi hamwe n'umugore we Gaju Cyntia, rwemeza ko ikirego cya ACCESS BANK RWANDA Ltd gifite ishingiro, ko Twagira Azzy na Gaju batsinzwe.

Gaju yajuririye icyo cyemezo mu Rukiko rw'Ikirenga avuga ko atishingiye amasezerano y'inguzanyo ya 12.000.000Frw umugabo we yagiranye na ACCESS BANK. Yavuze kandi ko atigeze yemera imyenda atazi nk'uko yari yarabyemeye mu masezerano ya mbere, kandi ko nta ngwate yatanzwe ku nzu y'umuryango cyane ko itanditswe mu bitabo. Yasoje asaba indishyi zo gushorwa mu manza n'igihembo cy'Avoka

Banki yo ivuga ko yasanze bitari ngombwa ko Gaju amenyeshwa iby'inguzanyo ya kabiri ishingiye ku masezerano y'ubwishingire aho yari yariyemereye ko azishingira n'indi myenda umugabo we azafata, akaba ariyo mpamvu bagomba gufatanya kwishyura umwenda bakurikiranyweho. Banki yakomeje ivuga ko inzu yari yatanzweho ingwate ku mwenda wa mbere nta gihe ntarengwa yari yarahawe, ko byongeye kandi Twagira yayitanze ari iy'umuryango, Gaju nawe akaba yarabyemeye mu masezerano y'ubwishingire.

Banki yasoje ivuga ko Gaju nta ndishyi zo gushorwa mu manza akwiye kuko nta kindi banki yari gukora uretse kwiyambaza inkiko kugirango yishyurwe.

Incamake y'icyemezo: 1. Umwishingizi wishingiye umwenda, banki ikishyurwa, uwari wahawe umwenda akongera agahabwa undi, umwishingizi ntiyafatwa nk'uwishingiye uwo mwenda wa kabiri ngo awuryozwe mu gihe atawumenyeshejwe mu buryo bweruye kuko aba ari inshingano z'uwawutanze kugirango uwishingiye umwenda amenye neza imiterere n'ingano y'inshingano asezeranye. Uwahawe umwenda niwe uba ugomba kuwuryozwa wenyine.

2. Mu gihe umwishingizi agaragaje ko nta ruhare na ruto yagize mu masezerano y'ubwishingire bw'inguzanyo, nta gaciro ingwate iyavugwamo ihabwa kuko aba atabimenyeshejwe ngo agire icyo abivugaho.

3. Nta ndishyi zo gushorwa mu manza umuburanyi yahabwa mu gihe nta mpanvu yazo, ariko iyo hari ingingo yungukiye mu bujurire agenerwa igihembo cya Avoka mu bushishozi bw'urukiko mu gihe amwitabaje.

Ubujurire bufite ishingiro.
Imikirize y'urubanza RCOM 0087/12/HCC irahindutse.
Amagarama y'urubanza aherereye ku warezwe.

Amategeko yashingiweho:
Itegeko ryo kuwa 30/07/1888 ryerekeye amasezerano cyangwa imirimo nshinganwa, ingingo ya 555.

Nta manza zifashishijwe.

Ibitekerezo by'abahanga byifashishijwe:
Thierry Bonneau, Droit Bancaire, 7é éd., Montchrestien, Domat, Droit Privé, 2007, p.525.
Dominique Legeais, Le cautionnement, Edition Economica, 1995, pp.27-28, 40.

Urubanza

I. IMITERERE Y'URUBANZA

[1] Ku itariki ya 28/04/2006, ACCESS BANK RWANDA Ltd yemereye Twagira Azzy inguzanyo y'amafaranga 25.000.000, uwo mwenda wishingirwa na Gaju Cynthia nk'uko bigaragazwa na "Acte de cautionnement solidaire et indivisible" yasinye ku itariki imaze kuvugwa, ndetse mu ngingo ya 11 yayo akemera ko ingwate yatanzwe n'umugabo we Twagira ku nzu y'umuryango izavamo ubwishyu, Twagira aramutse atishyuye, ariko uwo mwenda ukaba waraje kwishyurwa nk'uko impande zose muri uru rubanza zibyemeranyaho.

[2] Nyuma y'aho, ku itariki ya 24/04/2007, Banki yemereye Twagira Azzy indi nguzanyo y'amafaranga 12.000.000 impande zombi zisezerana ko uwo mwenda wagombaga kwishyurwa mu mezi 24, uwagurijwe yemera kugwatiriza inzu ye iherereye mu Murenge wa Kagarama, Akarere ka Kicukiro.

[3] Kubera ko Twagira Azzy atubahirije amasezerano ngo yishyure uwo mwenda wa 12.000.000 Frw Banki yamureze hamwe na Gaju Cynthia imbere y'Urukiko Rukuru rw'Ubucuruzi, narwo ruca urubanza RCOM 0087/12/HCC kuwa 29/06/2012, rwemeza ko ikirego cya ACCES BANK RWANDA Ltd gifite ishingiro, ko Twagira Azzy na Gaju Cynthia batsinzwe, rubategeka kwishyura ACCES BANK RWANDA Ltd amafaranga angana na 25.230.942 no kwishyura umusogongero wa Leta ungana na 1.009.550Frw.

[4] Gaju Cynthia ntiyishimiye icyo cyemezo maze akijuririra mu Rukiko rw'Ikirenga avuga ko ACCESS BANK RWANDA Ltd itubahirije uburenganzira bwe nk'umukirya ku bijyanye n'amasezerano y'inguzanyo ya 12.000.000Frw iyi Banki yagiranye na Twagira, ko ahubwo yitwaje umwanya wayo w'ingufu (position de force) ishyiraho ingingo zitamurengera ishingiye ku kuba we nta mbaraga yari afite (position de faiblesse) kuko atamenyereye ibintu bya Banki. Yongeraho ko atigeze yemera imyenda atazi, cyane cyane izaza nk'uko yabisinyiye mu masezerano y'inguzanyo yishingiye ya 25.000.000Frw, akaba

asanga nta ngwate iri ku nzu y'umuryango we nk'uko ACCESS BANK RWANDA Ltd ibyifuza, cyane cyane ko itanditswe mu bitabo nk'uko biteganywa n'amategeko.

[5] Urubanza rwaburanishijwe mu ruhame kuwa 04/04/2014, Gaju Cynthia aburanirwa na Me Mugengangabo Jean Nepo, naho ACCESS BANK RWANDA Ltd iburanirwa na Me Bugingo Jean Bosco, Twagira Azzy aburanirwa na Me Shema Gerard.

II. IBIBAZO BIGIZE URUBANZA N'ISESENGURWA RYABYO.

1. Kumenya niba Gaju Cynthia yarishingiye umwenda wa 12.000.000Frw Twagira Azzy yahawe na ACCESS RWANDA Ltd.

[6] Uburanira Gaju Cynthia avuga ko uyu yajurijwe n'uko Urukiko rwamutegetse gufatanya n'umugabo we Twagira kwishyura inguzanyo ya ACCESS BANK RWANDA Ltd ya 12.000.000Frw atigeze amenya, akaba atarigeze ayishingira nk'uko byagenze ku nguzanyo ya mbere ya 25.000.000Frw.

[7] Akomeza avuga ko kuba Twagira Azzy yarasubiye muri Banki agasinya andi masezerano y'inguzanyo ya 12.000.000Frw, Banki nayo ikemeza ko Gaju akomeje kwishingira uwo mwenda wa kabiri, nyamara atabimenyeshejwe, asanga ari ukurengera uburenganzira bw'umuguzi ugiye guhabwa "*service*" nk'uko biteganywa mu ngingo ya 33 y'itegeko rirengera umuguzi.

[8] Avuga ko ACCESS BANK RWANDA Ltd, nka Banki, iba izi ibyo ikora mu rwego rw'akazi imenyereye (professionnel), ko kuba itarahamagaye Gaju ngo imusobanurire iby'iyo nguzanyo ya kabiri, asanga itarubahirije uburenganzira bwe, nyamara umukiriya agomba guhabwa nibura amakuru ajyanye n'ingano y'umwenda utanzwe, igihe cyo kwishyura, inyungu cyangwa andi mafaranga ajyanye n'umwenda, hamwe n'ijanisha ry'inyungu ku mwaka.

[9] Uburanira ACCESS BANK RWANDA Ltd avuga ko iyi Banki yashingiye ku masezerano Gaju Cynthia yasinye yiswe "acte de cautionnement solidaire" ku mwenda wa 25.000.000Frw umugabo we yafashe, aho mu ngingo yayo ya mbere havugwa mu magambo yeruye ko azishingira n'iyindi myenda Twagira azafata, ko kandi Gaju amaze kuyasoma, nk'umuntu wize ndetse usobanukiwe bihagije (knowledge), yasinye nta gahato ko azayishingira, naho mu ngingo ya 11, akagaragaza ko yemera gutangaho ingwate inzu afatanyije n'umugabo we, akaba asanga rero bitari ngombwa ko Gaju Cynthia amenyeshwa iby'inguzanyo ya kabiri ya 12.000.000Frw kuko hari n'ingwate yatanzwe mbere yari igikomeje.

[10] Uburanira ACCESS BANK RWANDA Ltd asoza avuga ko yaba Gaju Cynthia, yaba umugabo we Twagira Azzy, ntawigeze ahingutsa ko iyo ngwate itakiri iyabo, akaba ari yo mpamvu bagomba gufatanya kwishyura umwenda bakurikiranyweho.

[11] Uburanira Twagira Azzy avuga ko umwenda awemera kandi ko yiteguye kuwishyura, akaba asaba ko ibyo Urukiko Rukuru rw'Ubucuruzi rwemeje aribyo byahamaho, ko yiteguye guhita atangira kwishyura uwo mwenda urubanza rukimara kurangira, ari yo mpamvu yifuza ko inyungu z'ubukerererwe zakurwaho.

UKO URUKIKO RUBIBONA

[12] Ku bijyanye na "Cautionnement", ingingo ya 555 y'igitabo cya 3 cy'amategeko y'imboneza mubano iteganya ko "Le cautionnement ne se présume point; il doit être exprès, et l'on ne peut pas l'étendre au-delà des limites dans lesquelles il a été contracté".

[13] Umuhanga mu mategeko ya za banki Thierry Bonneau, mu gitabo cye cyitwa "Droit Bancaire", ahareba uburenganzira bw'umwishingizi w'inguzanyo ya Banki, asobanura ko "itangwa ry'inguzanyo rihuza abantu babiri, bashobora kuba badahuje ingufu mu by'ubukungu, ari yo mpamvu kurengera udafite imbaraga ari inshingano iba igamijwe mu mirimo yose ijyanye n'iryo gurizwa ndetse no mu bindi bitari iby'igurizwa, abadafite imbaraga bagomba kurengerwa bakaba ari uwahawe inguzanyo n'uwishingiye iyo nguzanyo"[1].

[14] Ku bijyanye n'umwishingizi (caution), uwo muhanga mu mategeko asobanura ko umwishingizi agomba guhabwa amakuru, bitari gusa igihe asinya amasezerano y'ubwo bwishingizi, ko ahubwo ayo makuru akomeza no kuyahabwa igihe ayo masezerano ashyirwa mu bikorwa, kandi ikigo cyahaye amafaranga uwagurijwe w'ibanze (débiteur principal), kikamumenyesha ko nyirukugurizwa atubahirije inshingano ze zo kwishyura umwenda.

[15] Ibi ni nabyo bivugwa n'undi muhanga mu mategeko witwa Dominique Legeais[2] aho asobanura ko ibigo biguriza amafaranga (établissements de crédit) bifite inshingano yihariye yo guha amakuru abakiriya babyo n'abishingizi babo ndetse no gutanga ikimenyetso cy'uko byubahirije iyo nshingano (….une obligation d'information a été mise à la charge des établissements de crédit lorsque le cautionnement consenti par une personne physique ou morale est la condition d'un crédit accordé à une entreprise quelle que soit sa forme……Quel que soit le cautionnement, le créancier tenu à un devoir d'information, doit…rapporter la preuve de l'exécution de son obligation).

[16] Hashingiwe ku bisobanuro by'abahanga mu mategeko bimaze kuvugwa, Urukiko rurasanga kugirango umwishingizi yitwe ko yemeye ku buryo bweruye (exprès) inshingano yo kwishingira uwahawe inguzanyo n'ikigo cy'imari, iki kigo kigomba kuba cyamuhaye amakuru ahagije ajyanye n'iyo nguzanyo (obligation d'information), kugira ngo amenye kandi yumve neza imiterere n'ingano y'inshingano asezeranye.

[17] Urukiko rurasanga igihe Gaju yashyiraga umukono ku masezerano y'ubwishingizi kuwa 28/04/2006, inguzanyo yari yishingiye mu buryo bweruye yari iya 25.000.000Frw, iyo nguzanyo ikaba yarishyuwe nk'uko ababuranyi bose babyemeranyaho.

[18] Ku bijyanye n'inguzanyo ya 12.000.000Frw Twagira yafashe nyuma yo kurangiza kwishyura ideni rya mbere rya 25.000.000Frw rimaze kuvugwa haruguru, Urukiko rurasanga ACCESS BANK RWANDA Ltd itagaragaza ko yamenyesheje Gaju Cynthia iby'iyo nguzanyo mu gihe cyose amasezerano yashyirwaga mu bikorwa, ikaba yarabimumenyesheje gusa mu ibaruwa yo kuwa 20/03/2012 itangira kumwishyuza ishingiye ku masezerano yasinye mbere yishingira inguzanyo ya 25.000.000Frw, icyo gihe Gaju nawe agahita

[1] Thierry Bonneau, Droit Bancaire, 7é éd., Montchrestien, Domat Droit Privé, 2007, p.525, n°703: "la distribution du crédit met en rapport des parties dont la situation économique n'est pas forcément la même: l'une peut être en position de faiblesse par rapport à l'autre. La protection de la partie faible est alors un objectif à poursuivre dans le domaine des opérations de crédit comme il l'est dans d'autres domaines. Cette protection a deux destinations: le débiteur et la caution".

[2] Dominique Legeais, Le cautionnement, Edition Economica, 1995, pp.27-28, 4.

ayisubiza kuwa 23/03/2012 abinyujije kuri Avoka wayo asobanura ko atigeze amenya iby'uwo mwenda, yaba abibwiwe na Twagira cyangwa abibwiwe na Banki.

[19] Urukiko rusanga kandi ibyo Banki iburanisha by'uko bitari ngombwa ko Gaju Cynthia amenyeshwa iby'inguzanyo ya kabiri yahawe Twagira ya 12.000.000Frw ngo kuko mu ngingo ya 1 y'amasezerano ya "Cautionnement solidaire et indivisible", yasinyiye ko yishingiye imyenda yose ya Twagira afite n'iyo ashobora kuzagira mu bihe bizaza (engagements que Twagira a ou pourrait avoir actuellement ou à l'avenir) nta shingiro bifite, kuko ibisobanuro byatanzwe haruguru bigaragaza ko iyo ngingo itavanaho inshingano za banki zo guha umwishingizi amakuru ahagije ajyanye n'inguzanyo (obligation d'information) yahaye uwo yishingiye kugira ngo amenye kandi yumve neza imiterere n'ingano y'inshingano ze, ayo makuru akaba ari nayo umwishingizi aheraho akoresha bibaye ngombwa uburenganzira yemererwa n'amategeko bwo kuba yasesa ubwishingizi yatanze.

[20] Hashingiwe ku bimaze kuvugwa haruguru byose, Urukiko rurasanga mu gihe ACCESS BANK RWANDA Ltd nta kimenyetso igaragaza cy'uko hari aho Gaju yamenyeshejwe inguzanyo ya 12.000.000Frw kugira ngo amenye ingano yayo, ntaho rwahera rwemeza ko hari amasezerano amureba yo kwishingira uwo mwenda wa 12.000.000Frw, bityo hakaba ntacyo Access Bank igomba kumwishyuza imufatanya na Twagira gikomoka kuri iyo nguzanyo, ahubwo uwahawe uwo mwenda ariwe Twagira Azzy, unawemera, akaba ariwe ugomba kuwuryozwa wenyine nk'uko wemejwe mu Rukiko Rukuru rw' Ubucuruzi.

2. Kumenya niba Gaju yaratanze ingwate ku nzu y'umuryango ku mwenda uburanwa muri uru rubanza wa 12.000.000Frw.

[21] Uburanira Gaju Cynthia avuga ko nta ngwate y'inzu yigeze atanga ku mwenda wa 12.000.000Frw Twagira yahawe na ACCESS BANK RWANDA Ltd, akaba yifuza ko iyi Banki itakomeza kwita iyo nzu ingwate ngo ibe yanatezwa cyamunara kubera uwo mwenda atazi wa 12.000.000Frw.

[22] Uburanira ACCESS BANK RWANDA Ltd avuga ko iyo nzu ikiri ingwate yayo cyane cyane ko nta gihe ntarengwa bigeze bayiha, byongeye kandi Twagira akaba yarayitanze ari iy'umuryango, Gaju nawe akaba yarabyemeye igihe yashyiraga umukono ku masezerano y'ubwishingizi bw'umwenda wa 25.000.000Frw, ibyo bikagaragarira mu ngingo ya 11 y'ayo masezerano, ahanditse ibikurikira ko "la caution, épouse du débiteur principal, déclare avoir pris connaissance de la promesse d'hypothèque que son conjoint a donné à la BANCOR, en couverture des engagements et donne son plein consentement à la constitution de ladite hypothèque".

UKO URUKIKO RUBIBONA

[23] Urukiko rurasanga hashingiwe ku byavuzwe haruguru, ubwo nta bwishingizi Gaju yatanze bw'inguzanyo ya 12.000.000Frw Twagira yahawe na ACCESS BANK RWANDA Ltd, byumvikana ko nta n'ingwate y'inzu yigeze atanga kuri uwo mwenda nk'uko ACCESS BANK RWANDA Ltd ibiburanisha, kuko ibivugwa mu ngingo ya 11 y'amasezerano y'ubwishingizi yo kuwa 28/04/2006 bireba gusa ubwishingizi bw'inguzanyo ya 25.000.000Frw, kandi nayo ikaba yaraje kwishyurwa nk'uko impande zose muri uru rubanza zibyemeranyaho, bikaba rero ntaho bihuriye n'amasezerano yabaye nyuma kuwa 02/05/2007 ACCESS BANK RWANDA Ltd iha Twagira inguzanyo ya 12.000.000Frw, Gaju atabimenyeshejwe kugira ngo abe yagira icyo abivugaho.

1. Ku bijyanye n' indishyi Gaju Cynthia asaba

[24] Uburanira Gaju avuga ko asaba indishyi z'uko yashowe mu manza bikamutera guhangayika igihe yumvaga ko hashobora gutezwa cyamunara umutungo we, akaba yifuza izingana n'amafaranga 2.000.000Frw akubiyemo ay'ikurikiranarubanza, agahabwa na 5.000.000Frw y'igihembo cy'avoka.

[25] Uburanira ACCESS BANK RWANDA Ltd avuga we ko ayo mafaranga ntayo Gaju Cynthia akwiye guhabwa kubera ko yemeye kwishingira umugabo we, nyamara ntiyishyure, ko rero atashowe mu manza nk'uko abivuga, kuko nta kindi Banki yari gukora uretse kwiyambaza Urukiko.

UKO URUKIKO RUBIBONA

[26] Urukiko rurasanga bwari uburenganzira bwa ACCESS BANK Ltd bwo gukurikirana Gaju mu nkiko mu gihe yumvaga iri mu kuri, rukaba rusanga ibyo Gaju aburanisha by'uko yamushoye mu manza nta shingiro bifite, bityo n'indishyi abisabira zikaba nta shingiro zifite.

[27] Urukiko rurasanga ariko ubwo hari ingingo Gaju yungukiye mu bujurire bwe, akaba yaragombye gufata Avoka wo kumuburanira, yagenerwa mu bushishozi bw'Urukiko 300.000Frw y'igihembo cy'avoka wamukurikiraniye urwo rubanza.

III. ICYEMEZO CY'URUKIKO

[28] Rwemeje ko ubujurire bwa Gaju Cynthia bufite ishingiro;

[29] Rwemeje ko nta bwishingizi Gaju yigeze atanga ku mwenda wa 12.000.000Frw, ndetse ko nta ngwate y'uwo mwenda yigeze atanga ku nzu afatanyije n'umugabo we Twagira.

[30] Rwemeje ko imikirize y'urubanza RCOM 0087/12/ HCC ihindutse ku bireba Gaju Cynthia, ni ukuvuga ko Twagira Azzy ari we wenyine ugomba kwishyura ACCES BANK RWANDA Ltd amafaranga angana na 25.230.942Frw yemejwe n'Urukiko Rukuru.

[31] Rutegetse ACCESS BANK RWANDA Ltd guha Gaju Cynthia 300.000Frw y'igihembo cy'avoka;

[32] Rutegetse ACCESS BANK RWANDA Ltd gutanga amagarama y'urubanza angana na 23.150Frw itayishyura, agakurwa mu byayo ku ngufu za Leta.