

RWANDA / JUDGMENT

RADIANT INSURANCE COMPANY LTD v RWANDA AGRICULTURE BOARD

RLR V.3-2021

COURT

Court of Appeal

DECIDED

8 February 2019

CASE / FILE NUMBER

RCOMAA 00026/2018/CA

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RADIANT INSURANCE COMPANY LTD v RWANDA AGRICULTURE BOARD

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RADIANT INSURANCE COMPANY LTD v RWANDA AGRICULTURE BOARD [Rwanda COURT OF APPEAL – RCOMAA 00026/2018/CA – (Karimunda, P.J., Munyangeri and Kanyange, J.) 08 February 2019] Public procurement – The advance received by the successful bidder – In case the tender is cancelled before the procuring entity deducted the entire amount of the advance it paid, the fact that the work which was done is equivalent or more than the advance paid is not a ground for the guarantee to refuse to pay the remaining amount of the advance which was not deducted because that advance is not the price of the work or service rendered. Insurance law – Advance payment – Obligations of the insurer in case the latter is asked to pay the party who offered the tender – The security for the advance payment for the start of work remains valid until that advance is entirely refunded, it is not invalidated by the fact that the completed works are worth or exceed the advance paid, as it is not the payment. Facts: Rwanda Agricultural Board (RAB) signed a contract with ETECO (Entreprise de Construction, Commerce, Mines et Carrières) for the construction of a laboratory and Radiant Insurance Company Ltd agreed to insure that advance payment.

Meanwhile, RAB terminated the contract before the advance payment was fully used and consequently, it wrote to Radiant

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Insurance Company Ltd requesting the latter to refund the unused amount from the advance paid. Radiant Insurance Company Ltd refused to refund that money arguing that it should not be liable for it since the work completed by ETECO exceeds in value the advance paid. RAB filed a claim before the Commercial Court stating that Radiant Insurance Company Ltd has to pay since the latter agreed to secure the advance payment until it is fully refunded, and not the completed work worth that advance payment. The Court ruled that the claim of RAB has merit and ordered Radiant Insurance Company Ltd to refund the advance payment. Radiant Insurance Company Ltd appealed before the Commercial High Court stating that it should not be held liable for the advance since the works executed extremely exceeds in value the secured advance payment, and the Commercial High Court found this appeal with merit. RAB appealed before the Supreme Court, but due to the law reforms, the case was tried by the Court of Appeal, and RAB was criticizing the decision of the Commercial High Court, arguing that it should have examined whether the advance paid was used in the activities related to the tender; and if this is the case, to order Radiant Insurance Company Ltd to refund the balance in accordance with the agreement they concluded. Held:1. In case the tender is cancelled before the procuring entity deducted the entire amount of the advance it paid, the fact that the work which was done is equivalent or more than the advance paid is not aground for the guarantee to refuse to pay the remaining amount of the advance which was not deducted because that advance is not the price of the work or service rendered.

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2. The security for the advance payment for the start of work remains valid until that advance is entirely refunded, it is not invalidated by the fact that the completed works are worth or exceed the advance paid, as it is not the payment Appeal has merit. Cross appeal lacks merit. The judgment rendered by the Commercial High Court is reversed in whole. The defendant has to refund to the appellant the court fee paid for the appeal.

Statutes and statutory instruments referred to: Law N° 12/2007 of 27/03/2007 governing public procurement as modified and complemented by the Law N° 05/2013 of 13/2/2013, Article 89. Cases referred to : Forest Company Volcanoes Gorillas (FCVG) Ltd v Rwanda Revenue Authority (RRA) RCOMAA 00055/2016/SC rendered by the Supreme Court on 29/9/2017.

Judgment

I. BRIEF BACKGROUND OF THE CASE

The subject matter in this case is based on the advance payment for the commencement of works which Rwanda

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Agriculture Board (RAB) offered to ETECO (Entreprise de Construction, Commerce, Mines et Carrières), basing on the concluded contract of 20/10/2014 for construction of a laboratory, and Radiant Insurance Company Ltd agreed to insure that advance as evidenced by the security document N° RD001RCOA140815/03695 of 11/09/2014, but the tender contract was later terminated by RAB on 22/12/2015 before ETECO finished to refund the advance paid, since it used to pay it on every invoice by deducting 20% of the total amount. For three (3) invoices ETECO had submitted so far, RAB has withheld the advance worth 60,239,971 Frw and the balance which remained due amounting to 107,796,028 Frw.

Due to the fact that after the third invoice ETECO completed the works worth 53,878,560 Frw, the compensation between the balance of advance to be refunded and the completed works was effected (107,976,028 Frw – 53,878,560 Frw), and the balance was 54,017,468 Frw, which RAB stated that it should be paid by Radiant Insurance Company Ltd, because the contract it concluded with ETECO was terminated before the latter finishes to refund the advance received. Radiant Insurance Company Ltd states that it should not pay that advance because it has been used in the activities relating to tender and the completed works exceed in value the advance paid.

After failing to reach an agreement on the refund of the remaining advance by ETECO, RAB sued Radiant Insurance Company Ltd before Nyarugenge Commercial Court praying that the latter be instructed to pay 54,017,468 Frw that ETECO owes it, and the damages for being dragged in unnecessary law suits. That Court rendered the

judgment

n° RCOM 531/2017/TC/NYGE on 27/7/2017 where it found the claim of

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RAB with merit, and ordered Radiant Insurance Company Ltd to pay the balance of 54,017,468 Frw from the advance paid to ETECO, 500,000 Frw in damages for being dragged in unnecessary law suits, 500,000 Frw for Counsel fee, and reimburse 50,000 Frw to RAB for the court fee.

Radiant Insurance Company Ltd appealed before the Commercial High Court arguing that it should not be ordered to pay the advance for the commencement of works because it was fully spent on activities it was paid for, in the judgment n° RCOMA 0055/2017/CHC/HCC rendered on 28/12/2017. This Court found the appeal of Radiant Insurance Company Ltd with merit, therefore that the security for the commencement of works offered to RAB was fully spent on the targeted tender-related activities, which is the purpose of the security. Consequently, Radiant Insurance Company Ltd owes RAB nothing else in relation to that security. The Court ordered RAB to pay Radiant Insurance Company Ltd the damages amounting to 1,000,000 Frw for judicial damages and the counsel fee for the first appeal and to refund the amount of 75,000 Frw for the court fees paid for lodging an appeal, and reversed the judgment n° RCOM 00531/2017/NYGE rendered on

27/07/2017.

RAB appealed before the Supreme Court, requesting the Court to examine whether when the advance payment is spent on the works related to the tender should not be paid in total. It also prayed to examine whether it should be held liable for the damages while it is Radiant Insurance Company Ltd which failed to respect the terms of the contract. Radiant Insurance Company Ltd states that what it insured was the use of the advance complied with its purpose, and it was necessary to order RAB to pay the damages since it dragged it in unnecessary law suits.

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After the law reforms, the appeal of RAB was transferred to the Court of Appeal in accordance with the provisions of the article 105 of the Law n° 30/2018 of 02/06/2018 determining the jurisdiction of courts, and the case was tried in public on 9/1/2019, whereby Radiant Insurance Company Ltd was represented by Counsel Ruzindana Ignace and Counsel Twagiramungu Joseph, while RAB was represented by State Attorneys Kayiranga Rukumbi Bernard, Kabibi Spéciose and Umwali Munyentwari Claire. II. ANALYSIS OF LEGAL ISSUES

1. Whether the fact for the advance payment for the commencement of works was spent on tender-related activities, discharges Radiant Insurance Company Ltd from the obligations of to pay the balance from the advance ETECO did not refund.

In the RAB court submissions, it states that Radiant Insurance Company Ltd insured the advance paid to ETECO, and the contract they concluded provides for the payment modalities of the advance, and with reference to the article 89 of the Law governing Public Procurement, RAB used to withhold the payment from every invoice submitted by ETECO but the latter failed to complete the payment because the contract was terminated before the completion of the works, and for this reason Radiant Insurance Company Ltd should pay the balance deducted of the money RAB owes ETECO, as it was stated in work completion report.

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RAB states furthermore that the Commercial High Court should have considered the content of the security document issued by Radiant Insurance Company Ltd for the advance payment for the commencement of works, which states that “The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the contractor as indicated in copies of interim statements or payment certificates which shall be presented to us. This guarantee shall expire after the complete reimbursement of the advance amount. Consequently, any demand for payment under this guarantee must be received by us at that time”, which entails that the insurer’s obligation is not only limited to the use of the advance for the tender work, but extends also to recovery of the advance to the concerned institution, and apart from the law governing public procurement, eve the article 64 of the law governing contracts provides that contracts made in accordance with the law shall be binding between parties.

It also states that its interpretation corroborates the decisions of another judgment rendered by the Commercial High Court (N° RCOMA 00254/2017/CHC/HCC) between Bugesera District and Radiant Insurance Company Ltd, against which Radiant didn't appeal.

Among other explanations given by the counsel for RAB, it is stated that the statements of the representatives of Radiant Insurance Company Ltd that it owes nothing because the advance payment was entirely spent on the tender-related activities, and that the security is seized when it is not used for that purpose, are unsubstantiated; rather, RAB should have been paid in accordance with the provisions of the article 89 of the Law

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governing Public Procurement and not the article 88, because the security has to be recovered by the procuring entity.

They further state that the intention behind the stipulations in the contract concluded between RAB and Radiant Insurance Company Ltd that the expiry of security shall occur when the advance is totally recovered, was to ensure the party recovers the total advance he paid, and the contract exclusively binds those two parties, especially that the contractor didn't sign anywhere. They believe that it should not only be considered that the advance was spent on the given works, rather a consideration should be made on the fact that in the contract they agreed that the payment will be deducted from the invoice, that the security will expire when the advance is totally recovered which consists of its purpose.

Radiant Insurance Company Ltd states that the subject of insurance consisted of ensuring the use of the advance payment for the commencement of works complied with its purpose and not spent on something else (article 88 of the Law governing public procurement); that the security is only seized when the total or a part of it is not used for the tender purposes it was paid for, and that RAB has no any other ground for its request for the security payment while disregarding the provisions of this article 88.

It explains that RAB admits that ETECO completed the work which exceeds in value the security, because the completed work is worth 355,361,917 Frw, entailing that the total advance payment it received was used for its purpose, therefore that the statements of RAB according to which the tender was terminated before ETECO finishes to refund the advance it received, should not be based on to request Radiant Insurance Company Ltd to pay

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that unrecovered advance because it is not the subject of insurance given that the advance should have been entirely recovered if the tender was not terminated and completed, and it's this act that ensued the contractor to fail to refund the advance, the reason why Radiant Insurance Company Ltd was required to pay the performance security worth 84,018,000 Frw, the amount which exceeds in value the one requested by RAB worth 54,017,468 Frw, and had the tender not been terminated, a request to refund the performance security should have not been made.

It continues stating that the concern of Rwanda Agriculture Board of whether the fact that the advance payment for the commencement of works should not to be totally recovered, doesn't concern the insurer, because the subject of insurance consists of the guaranty of its use according to its purpose, otherwise, the security is seized by the procuring entity, and that the article 89 of the Law governing Public Procurement providing for the payment modalities for security by the contractor, binds the procuring entity and the successful bidder, and not the insurer.

It further states that the fact that it insured for the use of the advance payment for the commencement of the works for its purposes, RAB should prove that the advance was used for something else in order to be able to require Radiant Insurance Company Ltd to refund as provided by the article 88 of the Law governing Public Procurement. DETERMINATION OF THE COURT

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The issue to be analyzed, is to know whether when the advance payment for the commencement of works is spent on activities related to the tender, discharges the insurer from the obligations to refund the advance payment unpaid by the successful bidder.

With regards to the advance payment for the commencement of works, the article 89 of the Law n° 12/2007 of 27/03/2007 governing Public Procurement as modified and complemented by the Law N° 05/2013 of 13/2/2013 provides that "The advance received by the successful bidder shall be refunded by deducting a certain amount from submitted and approved invoices. The bidding document shall determine the percentage to be deducted until the whole amount of the advance is refunded. The advance security shall be returned to the successful bidder within thirty (30) days following the payment of the entire advance received".

This article stating how the advance is paid, as its heading reads "Refund of the advance paid", clearly infers that when the successful bidder receives an advance, it doesn't entail he/she is paid, but rather it consists of the money he/she has to refund to the procuring entity, through deductions from the approved invoices, and the security is reimbursed until the entire money is refunded. The aforementioned statements corroborate the holding of the Supreme Court in the judgment RCOMAA0055/2016/SC rendered on 29/9/2017, where it stated that the advance payment for the commencement of works is the amount of money awarded to the successful bidder in order to help him/her to get started with the execution of the tender he/she won;

therefore, it does not correspond to any certain part of executed work to be considered as payment. Rather, the successful bidder deducts a certain

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amount for the reimbursement of the advance as agreed by both parties to the contract from the progressive payments of the executed works, and the completion of the entire work becomes concurrent with the reimbursement of the entire advance to the procuring entity. Accordingly, since the advance is paid back to the procuring entity, it cannot be considered as payment for the same tender.

The advance payment guarantee RD 001RCOA 1408157/0395 that Radiant Insurance Company Ltd issued on 11/9/2014, states that it is committed to insure the total amount of money not exceeding 168,035,999 RWF, that it will pay upon presentation of the request accompanied by the document stating that the contractor failed to fulfill his/her obligations provided in the contract, and used the advance for purposes other than the activities in respect of the tender as agreed in the contract¹. In the last paragraph of the same document, it is stated that the insured amount of money shall be progressively reduced by the amount of the advance payment repaid by the Contractor, and that the security shall expire after the complete reimbursement of the advance amount².

¹ 'At the request of the Contractor, we RADIANT INSURANCE COMPANY LTD, P.O.BOX 1861 KIGALI, hereby irrevocably undertake to pay you any sum or sums not exceeding in total amount of ONE HUNDRED SIXTY EIGHT MILLION THIRTY FIVE THOUSAND NINE HUNDRED NINETY NINE RWANDAN FRANCS (168,035,999 RWF) upon receipt by us of your demand in writing accompanied by a written statement stating that the Contractor is in breach of its obligation under the Contract because the Contractor used the advance payment for purposes other than the costs of mobilization in respect of the works". ² "The maximum amount of this guarantee shall be progressively reduced by the amount of the advance payment repaid by the Contractor as indicated in copies of interim statements or payment certificates which shall be presented

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The court finds that one part of the clauses of the guarantee document, corroborates the provision of the article 88 of the Law N° 12/2007 of 27/03/2007 mentioned above providing that "if the successful bidder uses the entire advance or part of it in other activities that are unrelated to the tender, the advance shall immediately be considered as a debt which shall be paid by seizing the entire security or part of it", and another part of that document corroborates the provisions of the article 89 (in fine) mentioned above, which provides that "The advance security shall be returned to the successful bidder within thirty (30) days following the payment of the entire advance received."

The court finds that the fact that it is mentioned in the security document that the request of payment should be accompanied by another document proving that the contractor used the advance payment in other activities unrelated to the tender, should not be as the sole reason of the refund of advance payment to the procuring entity, because this is one of the elements the security document, and it should not be considered in isolation, since in the last part of that document, Radiant Insurance Company Ltd also admitted that the security expire by the time the entire advance is refunded, implying that before that time, the security remains valid, and the advance has to be refunded as provided in the article 89 above-stated. This reasoning corroborates the stated position of the Supreme Court regarding the advance payment for the commencement of works.

With regards to the statements of Radiant Insurance Company Ltd that the works already completed by ETECO

to us. This guarantee shall expire after the complete reimbursement of the advance amount. Consequently, any demand for payment under this guarantee must be received by us at this office on or before that date”.

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exceeds in value the paid advance and therefore RAB should n request for payment, the Court finds it without merit, because as explained above, an advance does not consist of the payment to the extent that its refund be envisaged in terms of the value of the completed works, rather it has to be refunded to the procuring entity as provided by the article 89 of the aforementioned law and as agreed on in the last paragraph of the security performance document. In addition, the statements of Radiant Insurance Company Ltd that the works completed by ETECO exceed in value the advance the latter received, are raised while disregarding that ETECO did not only receive the advance but also received the payment for the completed works.

The court finds thus that, the Commercial High Court should not have assigned much importance to the ground that an advance is only refunded when it was not used for activities in respect of the tender while leaving aside the ground that the security shall expire after the entire advance is refunded. Those both grounds are stated in the same document Radiant Insurance signed and comply with the provisions of the Law governing Public Procurement.

Basing on the aforementioned legal provisions and the explanations provided, the Court finds that Radiant Insurance Company Ltd has to refund RAB the remaining advance payment worth 54,0170,468 Frw.

2. Whether RAB should pay damages

The counsel for RAB argues that the Court ordered the latter to pay Radiant Insurance Company Ltd the damages amounting to 1,000,000 Frw for dragging it in unnecessary lawsuits and 75,000 Frw for the court fees deposit, while it is the

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one which failed to respect the agreement they concluded, which drove it to sue before the court seeking justice. They find rather that Radiant Insurance Company Ltd is the one that should pay damages for its failure to respect the terms of the agreement which is the reason of RAB plaintiff, therefore it is praying the Court of Appeal to deem that it should not pay any damage.

The counsel of Radiant Insurance Company Ltd argues that it was necessary that RAB be held liable for the damages because it dragged it in an unnecessary lawsuit, because it insured the use of the advance payment given to ETECO for its purpose, which it did since RAB states that it completed the work worth 355,361,917Frw, meaning that it executed the works which exceed the double of the value of the security given; therefore, RAB should not have requested nothing as a refund given that the subject of security was executed. DETERMINATION OF THE COURT

The court finds that as explained above, Radiant Insurance Company Ltd should refund RAB the advance paid because the tender was terminated before the refund was completed, and that Radiant Insurance Company Ltd had insured the entire advance payment given to ETECO ; therefore, the damages worth 1000,000 Frw for unnecessary lawsuits and 75,000 Frw for court fees the Commercial High Court ordered RAB to pay are without merit and should not be paid.

3. Regarding the damages requested by Radiant Insurance Company Ltd

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In the cross-appeal, Radiant Insurance Company Ltd states that RAB continues to drag it in unnecessary lawsuits, and prays that it be held liable for the damages worth 2,000,000 Frw and 800,000 Frw for judicial damages and counsel fees.

The counsel for RAB argues that those damages are ungrounded because it has the right to exercise the appeal, and in addition to that, the requested damages are excessive, and Radiant Insurance Company Ltd fails to prove the grief it experienced. DETERMINATION OF THE COURT

The Court finds that Radiant Insurance Company Ltd should not be awarded the damages it is requesting, because, as explained above, it is the one with contractual obligation to refund the advance for the commencement of works RAB paid to ETECO, which it failed to do.

Consequently, RAB seized the Court and the fact it lost this case, the damages it is requesting are without merit. III. DECISION OF THE COURT

Finds the appeal of Rwanda Agriculture Board (RAB) with merit ;

Finds the cross-appeal filed by Radiant Insurance Company Ltd without merit ;

Orders Radiant Insurance Company Ltd to pay Rwanda Agriculture Board (RAB) the balance of 54,017,468 Frw from the advance paid to ETECO ;

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Quashes the damages Rwanda Agriculture Board was instructed to pay by the Commercial High Court ;

Reverses in whole the

judgment

RCOMA00553/2017/CHC/HCC rendered by the Commercial High Court on 28/12/2017 ;

Orders Radiant Insurance Company Ltd to refund Rwanda Agriculture Board 100,000 Frw of court fees it paid on the appeal.

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