

RWANDA / JUDGMENT

JV TP-TPGL v. SONARWA

RCOMA 0147/12/CS

COURT

Supreme Court

DECIDED

3 March 2016

CASE / FILE NUMBER

RCOMA 0147/12/CS

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Text

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JV TP-TPGL v. SONARWA [Rwanda SUPREME COURT – RCOMA 0147/12/CS (Kayitesi R., P.J., Mukandamage and Kanyange, J.) 3 March 2016] Commercial procedure – Summary procedure – Request for procedural and advocate fees in the instance of summary procedure – These fees and damages must not be awarded in the instance of the summary procedure application since they must be examined in the course of the main claim, in the former only court fees are paid – Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 132, 319 and 320. Facts: JV Thomas & Piron et Thomas & Piron Grand Lacs sued SONARWA to the Commercial High Court through a summary procedure. In filing this procedure, it stated that it was grounded on another applicationre f: 18175/VRO pending before arbitration, Chambre de Commerce International (CCI) in France and hence, its application was based on article 23 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters. During the hearing, Thomas & Piron et Thomas & Piron Grand Lacs declared its self-deprivation of right to action since the claim had to be heard within 48 hours since the ground of suspension of the works of the construction for which it was filed was no longer in existence as the construction was ongoing. SONARWA requested advocate fees. Delfe deprivation of right to

action was granted but JV Thomas & Piron et Thomas & Piron Grand Lacs was ordered to pay 600 000 Frw for procedural and advocate fees prorated fees equivalent to 24 000 Frw and court fees. JV Thomas & Piron et Thomas & Piron Grand Lacs appealed to the Supreme Court stating that the first instance court had altered the claim while it was not qualified to do it and it ordered it to pay 600 000 without valid grounds. SONARWA replied that there was no alteration of the claim because that claim has no nature of summary procedure because the decision on this application would have substantial impact on the claim which was pending before Arbitration. Held: The fact that the summary procedure filed by JV Thomas & Piron et Thomas & Piron Grand Lacs was heard as ordinary claim almost after two months while it had to be heard within 48 indicates that JV Thomas & Piron et Thomas & Piron Grand Lacs had not to be ordered to pay damages since damages and other procedural expenses of the litigant on the summary procedure must be requested in the main claim especially that the provisions of the law which were based on do not highlight other charges to the party who deprived himself of the right to action apart from the court fees. Appeal has merit; Cross appeal has no merit; Appellant is ordered to pay court fees as ordered by Commercial High Court Respondent is ordered to pay court fees on this instance.

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Statutes and statutory instruments referred to Law N° 21/2012 of 14/06/2012 relating to the civil, commercial, labour and administrative procedure, articles 132, 319 and 320. No cases referred to:

Judgment

I. BRIEF BACKGROUND OF THE CASE [1] On July 6, 2012 JV Thomas & Piron et Thomas & Piron Grand Lacs sued SONARWA in Commercial High Court stating that it files a summary procedure requesting the suspension of the works of construction of Hôtel Nobilis, to order SONARWA to pay 602. 000.000 Frw for the working day would it fail to respect the order of suspension of the works of construction and appointment of the valuation of the done works in accordance with the contract that both parties had concluded in the month of November 2006. [2] In filing that claim, Thomas & Piron et Thomas & Piron Grand Lacs further lamented that it is based on article 23 of Law N° 005/2008 of 14/02/2008 on arbitration and conciliation in commercial matters and that there was a pending case 18175/VRO which is pending before Chambre de commerce International (CCI) in France which and which was filed on August 31, 2011 and received on September 14, 2011 which concerns the termination of the contract of the works of construction of that Hotel. [3] During the hearing, Thomas & Piron et Thomas & Piron Grand Lacs declared that its self deprivation of the right to action because the time for its examination had elapsed since it had to be examined within 48 hours. It asserted that the fact that it was done and the works for the construction went on, then there is no reason as to continue the proceeding. SONARWA requested advocate fees. [4] On September 7, 2012, the Court in the judgment RCOM 0185/12/HC confirmed self- deprivation of the right to action by JV Thomas & Piron et Thomas & Piron Grands Lacs since it was done in accordance with the Law. It ordered to pay 600.000 Frw to SONARWA for procedural and advocate fees, to pay 24.000 Frw for prorated fees and to pay

court fees. [5] JV Thomas & Piron et Piron Grands Lacs appealed to the Supreme Court stating that the Judge had altered its claim while he was not in position to do that. He added that he was ordered to pay 600 000 Frw to SONARWA without ground and that the judge has wrongly applied article 132 paragraph 2 of Law relating to civil, commercial, labour and administrative procedure. [6] The Court was heard in an open court on February 2, 2016. JV Thomas & Piron et Thomas & Piron Grand Lacs was represented by Kazungu Jean Bosco while SONARWA was represented by Niyibizi Diogène. II. ANALYSIS OF LEGAL ISSUES

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Whether there was no ground for the Commercial High Court to award SONARWA 600 000 Frw for procedural and advocate fees. [7] Counsel KazunguJean Bosco states that JV Thomas & Piron et Thomas & Piron Grands Lacs filed a summary procedure before the Commercial High Court on July 6, 2012 and during the preliminary hearing the judge decided that the case would be heard on September 5, 2012 and thereafter wrote to the President of the Court requesting an early date which is on accordance with the hearing of the summary procedure since he was suspecting that there might have been an error of computation of time but was not answered back. [8] He continued stating that it is at the day of the hearing that he declared his self- deprivation of his right to action since he had no reason to declare the necessity after two months. He added that the judge has never invoked the issues of summary procedure and this must not be considered as if the Commercial High Court has altered the claim. [9] Kazungu, the counsel, states further that the Court accepted self-deprivation of right to action by JV Thomas & Piron et Thomas & Piron Grands Lacs and it was also accepted by the other party but after it ordered it to pay 600 000 Frw based on the provisions of article 132 paragraph of the Law relating to civil, commercial, labour and administrative procedure which provides that who withdraw from the case pays court fees. He added that his client was the plaintiff and withdrew from the case and does not understand how he could give up court fees while it is him who had deposited it. He finds therefore that 600 000 Frw that the Court awarded to SONARWA is not in the ambit of the Law. He added that the statements that SONARWA hired an advocate are logic but JV Thomas & Piron et Thomas & Piron Grands Lacs committed no fault since it is not it which fixed the hearing within two months. [10] Niyibizi Diogène, counsel for SONARWA states that the Court altered the claim filed by JV Thomas & Piron et Piron Grands Lac since the its nature does not demonstrates the character of summary procedure because as it is clear in its paragraph 2 since the requests to the Court under the summary procedure would have serious impact on the claim which was submitted before the Arbitration because for example the expert who was requested to conduct another expertise while there was another which was in the Arbitration, such expertise was to have serious impact on the one which had been already made. [11] Instead, he notes that counsel for JV Thomas & Piron et Thomas & Piron Grands Lacs during the Proceeding had never had his say during the proceeding on the objection of inadmissibility of the claim which had been raised by SONARWA since it had been referred to the Arbitration before which it was still pending since that objection was making him lose and he opted for withdrawal from a case. He states further that SONARWA must not be held liable of the fact of fixing the hearing on September 5, 2015 without respecting

48 set for summary procedure because it is the court which designs the program for the hearing. [12] He continues pleading that article 132 paragraph 2 of Law relating to civil, commercial, labour and administrative procedure provides that if a party withdraws from a case is obliged also to give up the court fees deposited but also that article 258 of Civil Code Book III provides that any act of man, which causes damage to another obliges the person by whose fault it happened to repair it and the fact that JV Thomas & Piron et Thomas & Piron Grands Lacs

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withdrew from the case while it had sued SONARWA and led the latter to hire two advocates who drafted submissions and the fact that it was ordered to pay 600 000Fr constitute no injustice, it is rather less amount especially that there were no submitted evidence in support of the interests. THE VIEW OF THE COURT [13] In the judgment RCOM 0185/12/HC decided by the Commercial High Court on September 7, 2012 as appealed, it is clear that during the hearing JV Thomas & Piron et Thomas & Piron Grands Lacs withdrew from the case advancing that there was no ground to go on with it while SONARWA stated that the withdrawal from the case was a surprise to it. It ended requesting to be refunded of 2 000 000Frw that it spend on the preparations and the advocate fees. [14] In deciding to the request of JV Thomas & Piron et Thomas & Piron Grands Lacs, the Court based on article 131 paragraph 2 and on article 132 paragraph 2 of Law N° 21/2012 of 14/06/2012 relating to civil, commercial, labour and administrative procedure which provide for the modalities of withdrawal from the case and its effects and after the it granted the request of withdrawal from action, it condemns it to pay 4800 Frw for court fees and ordered it to pay SONARWA 600 000 Frw for procedural and advocate fees. [15] The Court finds that the summary procedure that was submitted to the Commercial High Court by JV Thomas & Piron et Thomas & Piron Grands Lacs was considered ordinary claim while it was under obligation to hear it within 48 hours as provided for by article 319 paragraph 2 of Law N° 21/2012 of 14/06/2012 as referred to above and it took a decision on that application almost after two months and it led it to losing interests it had over the claim and it withdrew from a case. [16] The Court further finds that if that complaint was considered as a summary procedure, JV Thomas & Piron et Thomas & Piron Grands Lacs could not have been condemned to pay damages because article 320 paragraph 4 of that Law as cited above, provides that damages and related expenses incurred by the party during the hearing of summary procedure shall be claimed together with the principal application. In addition, provisions of that Law that seed as the base of the decision of the court do not provides for other expenses that a party that must be charged to the part who who has deprived him/herself of the right to action apart from the court fees. [17] Based on those provisions of the Law and the holdings above, the Court finds that JV Thomas & Piron et Thomas & Piron Grands Lacs had not to be charged 600 000Frw for procedural and advocate fees because it had filed a summary procedure requesting for immergence and provisional decision thereon while the main suit submitted before Arbitration was ongoing since they had to be examined in the same main suit. Only court fees ordered on the first instance based on article 132 of Law n° 21/2012 of 14/06/2012 as referred to above.

2. Whether SONARWA may be awarded procedural fees [18] Niyibizi Diogène, counsel for SONARWA states that 600 000 which was determined by the Commercial High Court as advocate fees for two lawyers who defended its case. He

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advanced further that the money includes procedural fees and he requests the Court to change that decision and awards 1 200 000 and 1 000 000Frw on each instance. [19] Counsel for Kazungu Jean Bosco states that JV Thomas & Piron et Thomas & Piron Grands Lacs it must not give any money away since it committed no fault in respect o the program set by the Court and that this case was brought to court while rules about advocates fees were not yet legislated and hence must not retroact. He states further that article 131 and 132 of Law relating to civil, commercial, labour and administrative procedure which served as the base of the judge to order such a payment are only in connection with the court fees only and not damages and he has never applied article 258 of Civil Code Book III so that he can allege the fault. THE VIEDW OF THE COURT [20] As explained above, the Court finds that SONARWA would not have awarded procedural and advocate fees. Even now, this money must not be awarded because since appeal filed by JV Thomas & Piron et Thomas & Piron Grands Lacs has merit. DECISION OF THE COURT [21] Decides that appeal filed by JV Thomas & Piron et Thomas & Piron Grands Lacs has merit; [22] Decides that cross appeal filed by SONARWA has no merit; [23] Orders JV Thomas & Piron et Thomas & Piron Grands Lacs that it was ordered to pay by Commercial High Court; [24] Orders SONARWA to pay 100.000 Frw for procedural fees to this instance.

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