

TANZANIA / JUDGMENT

RULING FIRST ASSURANCE AND NAT GROUP LTD 3RD PARTY CASE 1

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT
DAR ES SALAAM MISC. COMMERCIAL APPLICATION NO. 8066/2024 (Arising from Commercial
Case No.5005 of 2024) FIRST ASSURANCE COMPANY LIMITED APPLICANT
VERSUS NATGROUP LIMITED..... RESPONDENT

RULING

Date of Last Order: 07/08/2024 Date of Ruling: 23/08/2024 GONZI, J. This is an application for leave to present a Third-Party Notice. In the Chamber summons, the Applicant prayed for exparte orders that:

- (i) The Applicant be granted leave upon which to present and issue a third-party notice against the respondent herein who is a Co-defendant in the main suit No.5005 of 2024. 1 (ii) Costs and interest on costs of this application be costs in the cause. (iii) Any other relief and or direction the court shall deem fit to grant. The Application was supported by the affidavit of Regina Herman, Advocate for the Applicant. She stated that upon reading the Plaint in Commercial Case No. 5005 of 2024 wherein the Applicant is the Second Defendant, she discovered that the Plaintiff therein is claiming TZS. 2,896,963,760/= plus interest therefrom being the outstanding amount for the goods supplied to the first Defendant in the case. She stated that the amounts were allegedly guaranteed by the 2nd Defendant in that case in accordance with supply bond guarantee issued by the 2nd Defendant to the 1st Defendant who had allegedly failed to honour the agreement. She stated that the Plaintiff is also claiming for damages. She stated further that the Respondent accepted the liability to repay the outstanding amount but requested for rescheduling of the payment. She stated that whereas the Plaintiff seeks to hold the Applicant liable for the Supplier Bond to the tune of TZS. 2,946,963,760/= plus damages, there is no credit supply bond between the Applicant and the Respondent to the extent of the amounts 2 claimed by the Plaintiff in Commercial Case No. 5005/2024. She stated that the Applicant's contract with the Respondent is for a maximum of TZS. 2,300,000,000/= which does not include the other claims of the Plaintiff against the 1st Defendant in the Commercial Case No.5005/2024. She stated that should Judgment and Decree be entered against the Applicant in Commercial Case No.5005/2024, the Applicant as a Guarantor of the Respondent has a right to be indemnified by the

Respondent herein in respect of the amounts thereto. Hence this application. On 7th August 2024, the Application was set for hearing. Ms. Regina Herman, Learned Advocate, represented the Applicant. The Respondent did not enter appearance despite being notified. Ms. Regina Herman, Learned Advocate, adopted the affidavit in support of the application and all annexures thereto. She submitted that the Application is based on an agreement between the Applicant and the Respondent whereby the same agreement is in dispute under the main case and the same amount is involved. She submitted that the Applicant was the Guarantor in the contract. She submitted that it is the duty of the Respondent to pay the debts of the plaintiff, and in case the Applicant is ultimately held liable to pay the same, then the Respondent, as the third party, should indemnify the Applicant. She 3 argued further that the Respondent was supposed to have paid premium to the Applicant, but that it seems that up to the time the Plaintiff fulfilled his obligations, the Respondent had not paid premium as per Regulation 35(a) of Insurance Regulations 2009 and section 137 of the Insurance Act which provide that validity of the Insurance agreement depends on payment of premium. She submitted that as the Respondent had not paid the premium and as there was an agreement whose claims are the subject of the main case; the Applicant prays that the Third-Party Notice be issued against the Respondent herein who is also a co-defendant in the suit. She submitted that the aim of making the Respondent a Third Party is that in case the Applicant is found liable in the main suit, the Respondent as a Third Party, should bear the burden to pay. Ms. Herman, Learned Advocate, submitted further that the application at hand is connected to the main case where the same subject matter is at issue. She argued therefore that it is fair that under Order I Rule 14 of the Civil Procedure Code, the application be granted. She submitted that the all the legally prescribed conditions have been met by the Application at hand since there is a right of indemnity under the Agreement that existed between the Applicant and the Respondent. 4 Ms. Regina Herman, Learned Advocate, submitted further that the Respondent failed to execute an IPF Contract, (Insurance Premium Finance) Agreement which was signed between the Applicant, the Respondent and KCB Bank. She relied on the following cases for this application. The first case is China International Corporation Group versus Athuman Ausi Kirama and 2 Others (2022). The second case is of the Registered Trustees of JHPiego versus Liason Tanzania Limited (2018). She submitted that in those cases the Court held that where the insured has not paid the insurance premium, there is no insurance contract. She concluded by praying that that the prayers in the chamber summons be granted. After hearing the Learned Counsel for the Applicant, I will determine the application accordingly. In Parry v. Carson (1962) E.A. 515, 517-8, it was held that: "In order to bring himself within the ambit of Order 1 Rule 14 the applicant must show upon the face of the pleadings and upon his supporting affidavit that he would be entitled to indemnity from the third party in respect of the amount which the plaintiff claims from him in the event of that claim be successful." 5 In Wyne v. Tempest [1897] 1Ch.110 at 113, Chitty, J; held that: "A right to indemnity may arise under express or implied contract or by reason of an obligation from the relation of the parties, such an obligation arises in equity from the relation of the parties when two trustees are liable for a breach of trust and one has applied the trust fund to his own use; in that case the

trustee who has so dis-applied the fund is liable to indemnify his co-trustee; so where a man has requested another to hold as a trustee for him shares upon which there is liability for calls or the like the trustee is entitled to an indemnity not merely out of the trust property but by the cestui que trust i.e. the beneficiary.” From the above quoted decisions, in essence, the right to indemnity is a contractual right or one that may emanate from the relation of the parties, such as an obligation which arises in equity. I asked myself whether there was any contractual or equitable relationship between the Applicant herein and the Respondent as to give the Applicant the right to indemnity. Without going into the substance of the agreement, my answer is in the affirmative. The Applicant has shown that there was an indemnity agreement and a guarantee contract between the Applicant and the Respondent. As a 6 guarantor, the Applicant would be entitled to indemnity from the Respondent if the Applicant is made to pay for the liabilities of the Respondent towards the Plaintiff in Commercial Case No.5005. The Applicant is complaining that the Respondent did not timely pay the premium under the insurance contract, however, that is an issue for determination in the suit where validity of the contracts will be considered. In the present application suffice it that the circumstances of the case and the relationship of the parties would create the right to indemnity exercisable by the Applicant as against the Respondent. As it was held in *Wyne v. Tempest* [1897] 1Ch.110 at 113, that: “A right to indemnity may arise under express or implied contract or by reason of an obligation from the relation of the parties, such an obligation arises in equity from the relation of the parties...” In the case at hand, the Applicant relies on the right to indemnity from the Respondent that arises under the guarantee contract. The Applicant guaranteed the Respondent’s liability towards the Plaintiff in Civil Case No.5005/2024. Should the Plaintiff win that case, and the Applicant be called upon to make good the Plaintiff’s claims, the Applicant may become entitled 7 to claim for indemnity from the Respondent. This is a perfect setting that warrants the issuance of Third Party Notice under Order I Rule 14(a) of the Civil Procedure Code. The Application is therefore grantable on this basis. The Applicant’s affidavit also has alleged that there is connectivity between the claims of the plaintiff against the Applicant in Commercial Case No.5005/2024 and the claims of the Applicant as against the Respondent Third party. That is that they both emanate from and are based on the same agreement. In the Case of *Bhamji Laxman limited V. National Sisal Authority & the NBC*, Civil Case No.60 of 1993, High Court of Tanzania at Dar es Salaam (unreported) the court (Hon. Mwaikasu J.) held that: “At this juncture let it be pointed out that a Third- Party Notice is for all practical purposes, a form of a claim by the defendant instituted against the third party, for the relief’s sought. As the defendant’s claim against the third-party hinges on the nature of the claim of the plaintiff against the defendant, it is for a fair and just adjudication of the dispute imperative that the third party should be supplied with sufficient facts as to make him know adequately the nature of the claim as to be in a 8 position to prepare a proper and adequate defence.”(emphasis supplied) In the case at hand, I find that indeed there is nexus between the claims of the plaintiff as against the Applicant and the claims of the Applicant as against the Respondent Third party. Therefore, the Applicant’s claim against the Respondent herein hinges on the claim of the plaintiff in Commercial Case No.5005/2024 as against the

Applicant. In that regard, the alternative condition for issuance of Third Party Notice under Order I Rule 14 (b) would also be satisfied. The other requirement in law is that the applicant should disclose the name and address of the third party. In this case the Applicant has pointed out that the third party is a co-defendant in the main suit. I find that the address of the Third Party has been adequately disclosed in this application as well as in the main suit. I am satisfied therefore that all the necessary conditions for the grant of an order for the Applicant to present a Third-Party Notice are satisfied. It is fair that NATGROUP Limited be joined to the Commercial case No.5005 of 2024 as a third party so that the claims of the Plaintiff as against the Applicant herein can be determined in tandem with the claims of the 9 Applicant as against the Respondent Third party. This will avoid multiplicity of proceedings. In fine I grant the application and order that:

- (a) The Applicant is granted 10-days leave from the date of this Ruling, to present a Third-Party Notice in Commercial Case No.5005 of 2024 against NATGROUP Limited, the Respondent herein. The same shall be served upon the Third Party and the Plaintiff in Commercial Case No.5005/2024 immediately.
- (b) The Third party shall present its Third Party Written Statement of Defence within 21 days from the date of being served with the Third-Party Notice.
- (c) As the application for issuance of 3rd Party Notice was heard exparte and the Respondent did not appear to resist the application despite being served, I make no order as to costs. It is so ordered. A.H. GONZI JUDGE 23/08/2024 10 Ruling is delivered in Court this 23rd day of August, 2024 in the presence of Mr. Yasin Maka, learned Advocate, holding brief for Ms Regina Herman learned advocate, for the Applicant and in absence of the Respondent. A.H. GONZI JUDGE 23/08/2024 11

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