

TANZANIA / JUDGMENT

20070817 TZHC Arusha

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17 August 2007

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., . .): IN THE HIGH COURT OF TANZANIA AT ARUSHA CIVIL APPEAL NO. 20 OF 2003 (Arising out of Arusha District Court Civil Case No. 43 of 2001 YONA HAMISI MVUNTAH APPELLANT VERSUS GEM AND ROCK VENTURES CO. LTD RESPONDENT

JUDGEMENT

R. SHEIKH, J. This is an appeal from the Arusha District Court against a judgment on admission entered in favour of the respondent in Civil Case No. 43 of 2001. On 16/12/2004 the plaintiff/respondent had sued the defendant/appellant for money due to the plaintiff under a loan agreement. The plaintiff/respondent claimed 10,000,000/= being the amount due to it under the said 2 loan agreement dated 9/07/2001 made between the plaintiff and the appellant/defendant. Clause 3 of the agreement discloses that the defendant expressly agreed to repay the loan together with interest charged at 50% per month on or before 25/07/2001. In paragraphs 4 and 5 of the plaint it is averred: "... (4) That the defendant expressly agreed with the I' plaintiff that the said loan of Tshs 3,000,000/= shall be charged an interest of 50% per month and further that both the principal loan sum and the monthly interest shall be paid by the defendant to the plaintiff on or before 25/07/2001.

- (5) That on 25/07/2001 the defendant defaulted and/or refused to pay to the plaintiff the said sum of T.shs 4,500.000/= being the principal sum plus 50% monthly interest." 3 In paragraphs 6 and 7 it is averred that the total principal sum plus interest due and claimed as of 25/11/2001 is shs. 10,000,000/=. In paragraphs 3 and 4 of the written statement of defence the defendant basically admits the averments under paragraphs 3,4,5,6 and 7 of the plaint, but in defence pleaded that -the agreement was frustrated on account of a supervening event. Paras 3 and 4 of the written statement of defence state:- "3 That WITHOUT PREJUDICE TO THE ABOVE the defendant whereas admits the averments under paragraphs 3 and 4 of the plaint states that the agreement has been frustrated by reason of a supervening event of terrorism ,which has exponentially affected gemstones market in the U.S.A. The defendant depends, by and large, on sales of gemstones in his earnings. I •' 4
4. Tha~- in answer to the allegations under paragraphs ~6 and 7, the defendant repeats the contents under paragraph 3 hereinabove. ,√ Para 4 of the Reply to the written statement of defence states:- " That the plaintiff in view of the actual and specific admissions of the plaintiffs claim contained in paragraphs 3 and 4 of the written statement of defence/ shall at

the earliest opportunity availed by the court apply for judgment against the defendant on admissions. 11 Indeed on 21/10/2002 Mr. Ojare learned counsel for the plaintiff applied for judgment on admission. The court thereupon ordered that the motion be heard by written submissions, and in a ruling that was read on 14/07/2003 the trial court (Msumi R.M) entered judgment on admission in favour of the plaintiff. 5 The Memorandum of Appeal sets are three grounds of appeal. However in his written submission Mr. Makange learned counsel for the appellant clearly confined his arguments to ground one of the appeal. This fact has also been pointed out by Mr. Ojare, who has in his submission invited me to treat grounds (2) and (3) as having been abandoned by counsel for the appellant. As the appellant's counsel has not filed any reply in response to the respondent's contention, I will with respect hold that the appellant has abandoned grounds (2) and (3) of the Memorandum of Appeal. (See (ARUSHA) (PC) Civil Appeal No. 39/1998, Milia Meduti V. Lashilunye Meshwareki (unreported), relied on by the respondent's counsel). Ground one of the appeal reads as follows:- "1. That the learned trial magistrate grossly erred both in law and fact in entering a judgment on admission as a matter of right in favour of the respondent WITHOUT having 1. I. 6 addressed himself to a central issue that admissions being complained of are clear and unequivocal" Mr. Makange made the following submissions on behalf of the appellant:- That judgment on admission is not a matter of right in law, that judgment on admission can only be granted by a court in the exercise of its discretion under Order XII, r.4 of the Civil Procedural Code, that before a court can act on a motion for judgment on admission, the court must satisfy itself as to whether the admission claimed and relied upon by a party is clear and unambiguous. He further submitted that the court had not addressed itself to the central issue as to whether the alleged admission was clear and unambiguous that it was wrong not to do so and that the plea of frustration relieves the parties of their contractual obligations under the loan agreement. Mr. Makange in essence has argued that due to the plea of frustration in the 1 I I 7 I written statement defence thJre was. no clear admission to the claim and further that the: plea, 6f frustration cannot be disposed qf by application unber Order XII r.4 of the Civil Procedure Code that it must b'e decided on merits based on .) I evidence adduced by the partiJs. I In response thereto Mr: Ojare maintained that the decision of the trial court clnnot be faulted, that taken . I I together the averments in paragraphs 3 and 4 of the appellant's written statement !f defe~ce are in a totality an I I I express admission to the plaintiff's claim. I have carefully considered the arguments by counsel in the context of the provisions of Order XII r.4 of the Civil Procedural Code which reads as follows:- ! . _ "4. Any party may at any stage of a suit, where I I admissions of fact have been made either on the pleadings, or otherwise, I apply to the court for such judgment or order as upon admissions he may be .. ' - 8 entitled to/ without waiting for determination of any question between the parties and the court may upon such application make such order, or give Judgmen~ as the court may think Just" It is common ground that a judgment on admission is not a matter of right, but a matter of discretion of the court. Indeed I will say that this is clear from the provisions aforesaid. The question is, were the. statements in paras 3 and 4 of the written statement of defence of the appellant ,, clear and unequivocal admissions to the averments in the plaint, in the light of the plea of

frustration? Having gone through both the plaint and written statement of defence carefully I cannot but agree with the respondent's counsel that there can be no doubt that the contents of paras 3 and 4 of the written statement of defence are nothing but a clear and unequivocal admission to the claims and averments in ' the plaint, notwithstanding the plea of frustration. The :I 11 9 0 \ bas1s of the claim are the express terms in the loan I) agreement between the parties that the appellant would \ repay the agreed amount by 25/7/2001, the specified date. The al'leged intended sale of gemstones in the U.S.A is not a term in the agreement; it is not expressed to be the object of the loan agreement, the loan advanced. What is more the defendant has admitted that 'he has defaulted in the • repayment, he cannot now be heard to say that the contract was frustrated by the alleged supervening event of terrorism in U.S.A. Frustration means that a contract has ceased to bind the parties because the com;mon basis on which by mutual understanding it was based has failed. (See the case of Twentsch Overseas Trading Co. LTD v. Uganda Sugar Factory LTD 12 EACA 1.). In the instant case the plaintiff has performed his part, his contractual obligation, has advanced a loan to the defendant, which is sufficient consideration, and the defendant has not fulfilled his obligations under the agreement. He is clearly in default and he has admitted as much. Mere hardship or inconvenience to one of the parties does not justify discharge under the doctrine of frustration - (See Cheshire & Fifoot, on the Law of Contract).. Besides the alleged supervening event of terrorism referred to by the appellant in para 3 • of the written statement of defence may have frustrated a_ny agreements he may have had for the alleged sale of gemstones in the U.S.A, but it does not follow that the plaintiff's loan agreement must also be frustrated- (See Shah V. Attorney -General, Uganda (1969) E.A. 261). I also agree with the argumen;ts by Mr. Ojare that the alleged supervening event of terrorism referred to being undoubtedly the terrorist attacks of the twin towers in New York on 11/09/2001 cannot be said to be a supervening event, as the money was due before the date of the alleged frustrating event. According to the agreement the loan was ' 11 to be repaid by 25/07/2001, while the terrorist events referred to by the appellant occurred on 11/09/2001, by which time the appellant was already in breach of the agreement. Indeed the appellant has in paragraph 4 of his written statement of defence admitted very clearly the allegations in paras 5, 6 and 7 of the plaint that he had defaulted and/or refused to pay the amount claimed plus interest. In the circumstances of this case, in the light of the clear admissions in the written statement of defence and the express terms of the agreement I arr of the firm view that it was not necessary to decide the issue of frustration on merit as urged on behalf of the appellant as the doctrine of frustration does not apply. In the instant circumstances for the reasons I have given a~9ve I find that the appeal has no merit. The appeal is accordingly dismissed with costs. The decision of the Arusha District Court is affirmed. II, 1) 12 R. SHEIKH JUDGE 15/08/2007 Judgment delivered this 17/08/2007, in the presence Mr. Makange learned counsel for the appellant and iri the absence of the respondent duly served, and Vero B/C. R. SHEIKH JUDGE 17/08/2007

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Prepared on 14 October 2026 · Esheria