

UGANDA / JUDGMENT

Fiba Coffee (U) Ltd v Greenland Bank Ltd & Anor (Civil Suit No. 104 of 2012) [2016] UGCommC 72 (22 March 2016)

[2016] UGCommC 72

COURT

Commercial Court of Uganda

CASE / FILE NUMBER

Civil Suit No. 104 of 2012

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THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA

[COMMERCIAL COURT]

CIVIL SUIT No. 104 OF 2012

FIBA COFFEE (U) LTD ::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

1. GREENLAND BANK LTD (In Liquidation)
2. ATTORNEY GENERAL ::::::::::::::::::::::::::::::::::: DEFENDANTS

BEFORE: HON. MR. JUSTICE B. KAINAMURA

RULING

The plaintiff first filed this suit against Attorney General on the 21st March 2012. On 5th July 2012 an amended plaint was filed adding M/S Greenland Bank Ltd (in liquidation) (GBL) as the first defendant. The 2nd defendant filed its WSD on 5th August 2012. On 16th July 2012 M/S Omongole & Co. Advocates purportedly acting for the 1st defendant filed a WSD. On 7th October 2014 M/S MMAKS Advocates also purportedly acting for the 1st defendant filed a WSD. Earlier on, the said MMAKS Advocates had written to the Registrar High Court on 14th August 2012 protesting the action of M/S Omongole & Co. Advocates filing a WSD on behalf of the 1st defendant alleging that the said firm did not have institutions and that it was their firm which had instructions through Bank of Uganda (BOU) the Statutory Liquidator of Greenland Bank Ltd. No further action was taken on the file until the parties were requested by court on 25th June 2014 to file a joint scheduling memorandum.

Before the matter could proceed further both firms purporting to represent the 1st defendant by consent agreed to raise a point of law pursuant to O.6 r 28 CPR. The point of law for determination by court is:-

“Who as between Nile River Acquisition Company (Nile River) and Bank of Uganda (BOU) is entitled to conduct the defence of Greenland Bank Ltd (in liquidation) (GBL) in this suit in light of the terms of the Debit Purchase and Transfer Agreement dated the 24th November 2007 (the agreement) and the Financial Institutions Act (cap) (“the FIA”)?”

It was agreed that the parties address court in written submissions.

In its submissions Mr. Omongole of M/S Omongole & Co. Advocates for Nile River Acquisition Company (NRAC) submitted that when GBL was put into liquidation by BOU the statutory liquidator under the Financial Institutions Act, BOU first attempted to correct all the outstanding loans with the general public but after a period of 8 years invited bids from the public to buy the loan portfolio of GBL. Upon selecting NRAC as the preferred bidder, BOU together with GBL entered into a Purchase and Transfer Agreement (DPTA) on the 5th day of November 2007, under which GBL sold all its loans to NRAC which had the effect of transferring all rights of GBL in the loans to NRAC including the right to sue and be sued on any issue of the loans. Further that under the DPTA, NRAC has the right to conduct litigation relating to the loans directly in the names of GBL and that BOU have no say about the resolution of the cases.

In his submission, Mr. Masembe Kanyerezi of MMAKS for BOU submitted that the suit is an action on the banker/customer contractual relationship between FIBA as customer and GBL as banker relating to alleged unlawful and illegal debits by GBL of FIBA account outside the FIBA mandate. That the unlawful debits if true created a liability on GBL and BOU's position is that under DPTA, NRAC only purchased the loan stock of GBL but specifically excluded GBL's liabilities which remained with BOU the statutory liquidator.

In my view the answer to who is entitled to conduct the defence of GBL in this suit lies in determining what it is that NRAC purchased under the DPTA.

In his submission Mr. Omongole of M/S Omongole & Co. Advocates submitted that under the DPTA, Article 7.2 thereof provides that NRAC shall have the right to control and participate in any suit featuring the 1st defendant whether as a plaintiff or defendant relating to any loan it purchased. He further submitted that all NRAC needs to do is demonstrate to court that the suit relates to a loan after which NRAC will be allowed to take the lead role in the prosecution of the case and that BOU and the 1st defendant are under a duty to cooperate.

Mr. Omongole further submitted that C. S No. 104 of 2012 arose out of the debt owed by the plaintiff to the 1st defendant and relates to the settlement of the debt. Further that the plaintiff acknowledges its indebtedness to the 1st defendant and wants to settle the debt but has failed to do so. In Mr. Omongole's opinion the suit therefore relates to the loan between the 1st defendant and the plaintiff and falls within the purview of Article 7.2 of the DPTA and is under the control of NRAC and not BOU.

On his part Mr. Masembe Kanyerezi of MMAKS Advocates submitted that under the DPTA, NRAC purchased the portfolio of loans, receivables and other assets of GBL but not the liabilities which were specifically excluded. That the liabilities remained with GBL under the control of the statutory liquidator BOU. To back this assertion he cited recital D and Article 2.1 of DPTA. He further contended that the DPTA was given effect through an Assignment and Assumption Agreement which under clauses 4 and 6 clearly excluded liabilities.

Counsel further stated that as a matter of fact it is BOU as statutory liquidator and in line with Section 31 (2) (e) of the Financial Institutions Act Cap 54 that is enjoined to defend any action or proceeding to which GBL is a party to. Further that Article 7.7 of DPTA clearly stipulates that GBL (seller party) shall be solely responsible for any liabilities. Further that an action within the meaning of Art 7.2 DPTA can only be an action for a loan recovery by GBL.

Further that in the pleadings filed by NRAC on behalf of GBL there is an admission of liability so as to facilitate the claim by FIBA against GOU which is not in NRAC's powers to do. That the suit is an action by FIBA against GBL and GOU for a declaration that the debit by GBL of the sums in issue from FIBA's account was unlawful and illegal. Counsel further asserted that a finding to the above effect would create a liability which puts the case within the statutory mandate of BOU under FIA. As to the relevance of Art 7.2 DPTA, Counsel argued that the article is only relevant if the suit in question relates to a loan or other asset so as to form part of the portfolio. As for Art 7.9 of DPTA Counsel argued that BOU had not failed to perform its obligations so as to trigger the article.

In conclusion Counsel pointed out that the subject matter of the suit was conclusively handled during the London Arbitration proceedings where it was agreed that the erstwhile owner of UCBL, Westmount would not receive back the monies it had paid for purchase of UCBL part of which are the sums under claim in this suit and that those sums would be retained in satisfaction of the claim against Westmont.

In re-joinder Mr. Omongole submitted that whereas he is in agreement that NRAC did not buy the liabilities of GBL he asserted that NRAC is not claiming responsibility for the liabilities. That NRAC is only asserting its right to control and participate in all suits that relate to the portfolio. Further that NRAC has made out its case that the suit relates to a loan sold in the portfolio as set out in the plaint.

The parties all agree that the liabilities of the seller parties were expressly excluded from the portfolio that was sold to the Buyer. It is NRAC's assertion however that the subject matter of C S No. 104 of 2012 is not a liability within the meaning of the DPTA and falls squarely under the Portfolio as set out in the DPTA. According to the amended plaint filed on 5th July 2012, the plaintiff's cause of action is founded on a bank account held by the plaintiff with the 1st defendant Bank which was first credited with the suit amount, which amount was then advanced by the 1st defendant's managers to M/S Westmount to go towards purchase of some of the shares in Uganda Commercial Bank which were being sold by the 2nd defendant. It is averred that the said action by the managers of the 1st defendant was unlawful and illegal. Further that when the

2nd defendant repossessed the shares it had sold to Westmount it did not return the plaintiffs money which the plaintiff held in the 1st defendant Bank which the former managers had unlawfully and illegally advanced to Westmount.

In the WSD filed on behalf of NRAC for the 1st defendant, it is admitted that the plaintiff's account was, as alleged in the plaint, debited by the former managers of the 1st defendant and further that a mandate to debit the said account from the official signatories of the plaintiff's account with the 1st defendant cannot be traced. It is further averred that the actions of the former managers of the 1st defendant of debiting the account of the plaintiff was illegal and not sanctioned by the 1st defendant. Further it is stated that the monies that were passed on to the 2nd defendant were done in error and once returned to the 1st defendant they shall be property re-credited to the plaintiff's account less monies owing to the 1st defendant. Lastly that the 2nd defendant be held liable for holding the plaintiff's money unjustifiably and that the 2nd defendant be held liable as prayed in the plaint.

On the other hand in the WSD filed by M/S MMAK's Advocates on instructions of Bank of Uganda the Statutory Liquidator of the 1st defendant, liability is denied and it is averred that the plaintiffs operated a US Dollar account with the 1st defendant and that the impugned debits were made upon purchase by it of Uganda Shillings which it paid to an associated Investment Company known as Greenland Investments Ltd and that during the period the plaintiff had full control of its account with the 1st defendant.

As earlier pointed out two WSDs were filed. The one filed on behalf of NRAC tacitly admits liability but points to the 2nd defendant as the one culpable with a prayer that the 2nd defendant refunds the monies in issue to them so that they in turn handle the claim of the plaintiff. Their argument is that the claim of the plaintiff forms part of the portfolio which they purchased under the DPTA. They contend that the sums in issue relate to a loan between the 1st defendant and the plaintiff but were unlawful passed on to the 2nd defendant and falls within the purview of Art 7.2 of DPTA and should therefore be controlled by it (NRAC).

On the other hand the WSD filed on behalf of BOU denies liability and contends that the debit made by GBL on FIBA accounts were lawful and had been authorized by the plaintiff. Attached to the WSD are the bank statements of the plaintiff which clearly indicate when the debits were made, one on 11th March 1998 and the other on 17th April 1998. They contend that the two debits were made well over a year before the 1st defendant was placed in receivership by the BOU and the plaintiff had enough time to contest them and that the plaintiff filed a suit fourteen years after the cause of action arose which is outside the limitation period. Further that when the debit were made the plaintiff was operating and in full control of its accounts with the 1st defendant and would not have failed to notice and query the debits if they were unauthorized.

According to the DPTA the term **portfolio** is stated to mean;

*“*The portfolio of loans, Receivables and other assets identified in schedule 6.7 and any other assets related thereto”**

Under Art 2.1 of DPTA, NRAC purchased the said portfolio free and clear from any and all encumbrances and free and clear from any and all liabilities.

The above in my view should be the starting point in determining what NRAC purchased under the DPTA. The same DPTA contains a detailed mechanism for determining what NRAC purchased under it. Art 3.1 thereof puts a price (estimate) to the portfolio and goes further to provide under Art. 3.2 how the parties to the DPTA will go about adjusting the purchase price. Article 4 of DPTA provides for closing and in particular Art 4.2 provides for deliverables at closing. For our purposes I will quote in full Art 4.2(ii). It provides;-

1. **“A list of all loan files which the seller parties represents will contain* *all loan/draft agreements** statements of accounts, security documents (if any) information regarding collateral and letters of acknowledgment of debt of which any seller partly is aware in each case in respect of or otherwise relating to the* *portfolio*,* *electronic database*, passwords, the back-ups for the database and all information used in creating the database and the back-ups (collectively the* *Database*”) and an instrument effecting the release of all these instruments and data to the Buyer”.* (emphasis mine)*****

Further under Art 6.7 (b) the seller parties represent and warrant that the **“Data base”** shall include among others a description of all the loans and other assets comprising the **portfolio**.

In my view the above terms of DPTA clearly identify and determine what does fall under the portfolio passed on to NRAC. I fail to see where in the agreement any partly and for our purposes NRAC is mandated to go and search for what it conceives to form part of the portfolio as they seem to be doing in the instant case.

It is not in dispute that the USD 1,600,000/= (United States Dollars One Million Six Hundred Thousand) plus interest owed by the plaintiff to the 1st defendant is a loan within the meaning of the DPTA and stands to be collected by NRAC. However what is intriguing and perhaps the crux of this application is how NRAC has chosen to go about enforcing its rights against the plaintiff. In its submissions NRAC states that when it made demands against the plaintiff for the sums stated above, which form part of the portfolio and I presume is captured as such in the database, the plaintiff informed NRAC that it was owned money by the 2nd defendant which was being illegally detained. The monies the plaintiff is claiming from the 2nd defendant which was allegedly advanced to the 2nd defendant by an associated company of the 1st defendant is US \$ 5,449,980 (Five Million Four Hundred and Forty Nine Thousand Nine Hundred and Eighty dollars). However the question is; how does this sum form part of the portfolio passed on to NRAC so as to fall under Art 7.2 of DPTA.

It is clear-whether the debit of the plaintiffs account was illegal or not-that the said sums do not form part of the portfolio of the 1st defendant passed on to NRAC in accordance with DPTA and captured under Art 4.2 (ii) thereof. If it did, all that NRAC would have done is to point to the database and institute a suit against the 2nd defendant as a plaintiff as mandated under Art 7.2 of DPTA. However to contrive to pursue its claim against the plaintiff - by extending its mandate under DPTA to the sums not captured in the database is in my view not legally tenable.

If indeed GBL unlawfully and allegedly debited the plaintiff's account with the sums in issue, then as submitted by Counsel for BOU that becomes a liability and is in my view outside the mandate of NRAC under the DPTA.

In the premise it is my finding that BOU is the right party entitled to conduct the defence of the 1st defendant in C. S No. 104 of 2012.

B. Kainamura

Judge

22.03.2016

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