IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., BWANA, J.A. AND LUANDA, J.A.)

CIVIL APPEAL NO. 77 OF 2009

RENAIR LIMITED ..... APPELLANT

VERSUS

PHOENIX OF TANZANIA ASSURANCE COMPANY LTD..... RESPONDENT

(Appeal from the Judgment of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mjasiri, J.)

Dated 17th April, 2008
in
Commercial Case No. 106 of 2005

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JUDGMENT OF THE COURT

6th & 21st September 2010

BWANA, J.A.

The appellant, RENAIR Ltd, sued the respondent, PHOENIX OF TANZANIA ASSURANCE COMPANY Ltd, for breach of contract. It claimed from the said respondent a sum of US$ 140,000 being the insured value of an aircraft, a Piper 23 – 250, with registration number 5H – MAB. The appellant also claimed US$ 2406 from the

respondent being security expenses; general damages; interest and costs. The appellant was not successful. The trial court, the High Court of Tanzania, Commercial Division, dismissed the suit with costs. Undaunted, the appellant lodged this appeal, raising ten (10) grounds of appeal in its Memorandum of Appeal.

Before us, the appellant was represented by Mr. Melkizedeck Lutema, counsel, while the respondent's counsel was Mr. Octavian Temu.

To appreciate the issues before us, it is opportune, to recapitulate the facts of the case as discerned from the court record. The appellant is a limited liability company registered in Tanzania. It owns several aircrafts one of which got an accident while landing at Ukerewe airstrip. As a result of that accident, the aircraft was extensively damaged. The extent of the damage was described by the witnesses during trial, as "not economically reparable.....severe damage .....it was a constructive total loss". The said aircraft had been insured with the respondent for US$ 140,000 on indemnity basis. The insurance contract between the parties herein was for a

period one year, commencing from 14th January, 2004 to 13th January, 2005. The risk insured is described as being "hull liability".

On the 10th October, 2004, the said aircraft was involved in an accident. It encountered an animal on the runway at the said Ukerewe airstrip.

According to the insurance contract governing the parties, tendered during trial as Exh. P1, the respondent was either to indemnify the appellant or replace the aircraft in case of a total loss. As it transpired and as already stated herein above, the damage to the aircraft was said to be constructive total loss. Further, the trial court was informed that aircrafts of that make were no longer being manufactured. Therefore there was no possibility of a replacement.

In so far as indemnification was concerned, the parties never agreed on the sum to be paid. While the appellant claimed for the sum insured (US$ 140,000), the respondent was prepared to pay US$ 105,000 (Exh. P2). The appellant declined the offer because that sum was contrary to the terms of the contract and was seen as

not sufficient to replace the damaged aircraft. Subsequently, the respondent cancelled the offer of US$ 105,000 made to the appellant. They ended up in court. It is on record that the salvage (the whole damaged aircraft) was sold for Tshs.600,000 as scrap.

While the appellant was insisting on being indemnified in the sum of US$ 140,000 the respondent was prepared to pay the lesser sum of US$ 105,000. This sum was arrived at after consulting several experts in the aviation industry and after commissioning a surveyor, the Alpha Surveyors. The respondent arrived at such conclusion after taking into account several factors, including a report that the very aircraft had suffered an earlier accident in 1997. That earlier accident is said to have reduced the value of the aircraft by at least 8%.

Further, it was the respondent's averrment that according to the price digest as published in the **Aircraft Blue Book**, the average price for that model of aircraft was US$ 89,000, excluding tax and import duties which were to be met by the purchaser in a given country. The respondent further averred that the appellant had

breached two fundamental contractual obligations. **The first** such breach was the non disclosure of the earlier accident that had occurred in 1997. **The second** one is the material alteration which rendered the contract voidable. The said alteration involved changes to the nature of the use of the aircraft. Initially and as per insurance cover, the aircraft was registered for charter – commercial flights. However some time before the Ukerewe accident it had been changed to private use of the company. That change took place on the 13th September, 2004. The respondent was not notified of that change of registration.

It is apparent that the trial judge took into consideration the two "breaches" and concluded that they were fatal to the appellant's case. She therefore dismissed the suit with costs.

The appellant came before us, as stated above, armed with ten grounds of appeal namely:-

1. That the trial judge erred in law and in fact in holding that there was non disclosure by the appellant of the fact that the aircraft was involved in an accident in 1997.
2. That the trial judge erred in law and in fact in holing that the respondent had no obligation to investigate on past accidents in the log book or with the Tanzania Civil Aviation Authority.
3. That the trial judge erred in law and in fact in not holding that the earlier accident was not a material fact in the circumstances of this case.
4. The trial judge erred in law and in fact in not holding that the information about the said accident was not a private issue but a public knowledge by virtue of being recorded in the log book.
5. The trial judge erred in law in holding that the appellant breached the principle of utmost good faith.
6. The trial judge erred in law and in fact in holding that the change of use of the aircraft from public to private use was a material alteration that rendered the insurance contract voidable.

7. That the trial judge erred in law and in fact in not holding that the respondent ought not to have avoided the contract thus it was duty bound to honour the same.
8. That the trial judge erred in law and in fact in holding that the appellant was not entitled to any compensation.
9. That the trial judge erred in law in dismissing the suit with costs.
10. That the decision of the trial court is otherwise faulty and bad in law.

Mr. Lutema argued the first five grounds together. Grounds six and seven were also argued together. The remaining three grounds were argued separately.

In so far as the first five grounds of appeal are concerned, they centre on the non disclosure by the appellant of the 1997 accident. According to Mr. Lutema, the non disclosure of that accident is not a material fact leading to the contract being voided. It is so because **firstly** all relevant information about that earlier accident could be obtained from the aircraft log book and/or from the certificate of air

principle of "caveat emptor" does not apply in aircraft insurance, Mr. Temu asserted. Had the material facts been known to the respondent and he kept quiet, that would be something else. Mr. Temu was of the further view that section 19(1) of the Law of Contract Act is irrelevant to the present case.

Concerning the alteration to the aircraft's use, from public to private use, Mr. Temu aptly stated further that it was a material alteration as it touched on the risk to be insured against. Such alteration therefore, ought to have been communicated to the respondent by the appellant. That was not done. The failure was fatal and made the contract voidable at the discretion of the innocent party, that is, the respondent herein. The said respondent exercised that option by withdrawing the offer (for payment of $ 105,000).

Mr. Lutema considered grounds six and seven together by asserting that alteration of the aircraft's use, from public commercial to private use was not material. Rather, it was beneficial to the respondent because exposure to risk was reduced and the premium would be low. Although failure to disclose the alteration was not

worthness issued by the Tanzania Civil Aviation Authority. The same accident is also mentioned in the proposal form (question 8 of Exh. P1.). **Secondly**, it was a requirement that an accident to be mentioned/listed, it must have occurred within the previous five years. That was not the case here. The material contract between the parties had been entered into in 2004 while that first accident occurred in 1997 – thus a period of more than five years. It was Mr. Lutema's further submission that both the log book and certificate of air worthness are public documents which could be accessed by any person including a prudent insurer. Mr. Lutema relied on the provisions of section 19(1) of the Law of Contract Act which deals with voidable contracts.

On his part, Mr. Temu conceded that the 1997 accident was recorded in the log book. But the said log book was kept in the custody of officers of the appellant. It was not for the respondent to go and search for all relevant information concerning the aircraft. A contract of insurance is governed by the principle of "uberrimae fidei." Therefore before concluding the contract, the appellant was under obligation to disclose all material facts and in good faith. The

proper, the consequences would have been for the contract to be rescinded at the instance of the innocent party. However, according to Mr. Lutema, the innocent party, the respondent, took no steps in that direction, meaning therefore, that the contract remained in force – up to the time the case was filed in court.

Since the contract had not been rescinded, the two issues (the non disclosure and material alteration) did not affect the respondent's duty to indemnify the appellant – Mr. Lutema argued in support of ground eight. The respondent could have rescinded the contract by invoking section 64 of the Law of Contract Act. He never invoked the same although the two material facts were known to him (the respondent), Mr. Lutema asserted. Amplifying on grounds nine and ten, Mr. Lutema was of the view that non disclosure and alteration to the use of the ill fated aircraft were not material breaches of the contract. If they were still, the respondent did not rescind the contract. Therefore he be ordered to indemnify the appellant.

On his part, Mr. Temu submitted that the respondent rescinded the contract by withdrawing the US$ 105,000 offer.

In disposing off this appeal, we find it apposite and do concur with both counsel that the trial judge arrived at her decision after considering the two alleged breaches namely, the non disclosure of the 1997 accident and the failure to inform the respondent of the material alteration to the aircraft's use. We will revert to these two issues shortly.

We do also agree with both counsel that the consequences of the two breaches would have led to the contract being treated as voidable but not void abinitio. The difference between the two terms is well settled. **A void** contract has no legal effect whatsoever. It is a nullity from the beginning. Therefore it cannot be legally enforced.

A voidable contract on the other hand, is legally binding unless and until one of the parties, usually the innocent one, rescinds it. The rescission may be a result of several factors including, but not limited to failure by the other party to disclose material facts. Section 19(1) of the Law of Contract Act, Cap 345 (the Act) enumerates some causes of a voidable contract. It states:-

> "When consent to an agreement is **caused by coercion, undue influence, fraud or misrepresentation,** the agreement is a contract voidable at the option of the party whose consent was so caused ...."(Emphasis provided).

The provisor to the foregoing is relevant to the present case. It states:-

> "Provided that if such consent was caused by misrepresentation or by silence or by fraud.....the contract nevertheless is not voidable, **if the party whose consent was so caused had the means of discovering the truth with ordinary diligence**" (Emphasis provided).

The respondent had, in our considered view, the means and every opportunity to find out the state of the aircraft, particularly about the

1997 accident. The relevant information could be obtained from the following sources. **One**, from the aircraft logbook. **Two** from a certificate of airworthness issued by the Tanzania Civil Aviation Authority. **Three,** from the Aircraft Insurance Proposal Form (Exh. P1) (question 8). All these three sources clearly show that the material aircraft had an earlier accident in 1997. Estimated cost of the said damage was given as US$ 50,000. As a result of that accident the aircraft damaged its under carrier.

We re-emphasize the importance of the principle of **uberrimae fidei** when it comes to contracts of this kind. But given the disclosure in Exh. P1 (about the previous accident) and the availability of the relevant information from the log book and the certificate of air worthness, we are satisfied that **uberrrimae fidei** was complied with on the part of the appellant.

The trial judge should have taken note of the fact that the appellant was under obligation only to disclose accidents that had occurred in the previous five years. In our considered view, Mr. Lutema was correct in asserting that it was not necessary to disclose

the 1997 accident as it was past the five year period. Nervertheless, the appellant made that disclosure in Exh. P1. That was a clear indication of the utmost good faith on his part.

The same cannot be said of the failure to disclose the material alteration to the use of the aircraft, from public to private. The alteration took place on 13th September, 2004 and the accident occurred on the 10th October, 2004, some 27 days later. In the same spirit of uberrimae fidei, the appellant ought to have communicated with the respondent about the said alteration. Failure to do so was a breach of a fundamental term of the contract. The immediate question for our determination is whether the respondent did rescind the contract upon discovery of the alteration.

According to Mr. Temu, the respondent did rescind the contract by withdrawing the offer for payment of US$ 105,000. With due respect, we fail to comprehend Mr. Temu's assertion. We have examined the relevant letter (Exh. D1) sent by the respondent to the appellant. The contents of that letter clearly show that the offer was withdrawn after the appellant had declined to accept the US$

105,000 as indemnity, in place of the US$ 140,000. There is nothing in that letter which shows that the withdrawal of the offer was a result of the discovery of the breach. The accident occured on the 10th October, 2004. The appellant reported the matter to the respondent within reasonable time thereafter. Until the said letter was communicated to the appellant, on the 9th March 2005, the respondent had taken several steps in an attempt to settle the claim. Such steps included commissioning a surveyor and loss adjuster. There is no indication that the respondent rescinded the contract as a result of those breaches and in compliance with the provisions of section 66 of the Act. Therefore if the respondent became aware of the breaches but proceeded to negotiate for a settlement, in our considered view, such express actions by the respondent are supportive of the fact that the contract was not rescinded. The contract remained in force and therefore, the respondent was under obligation to compensate the appellant.

The contract between the parties was on indemnity basis. The aircraft is described as having been a total loss. Indemnity therefore would be the insurable value of the aircraft immediately before the

occurance of the accident. In this respect the indemnity would be the sum of US$ 140,000. In our judgment, the appellant is entitled to compensation in the like sum.

In the main suit before the trial court, the appellant had also prayed for the sum of US$ 2406 as costs for security keeping of the damaged aircraft. This issue was however, not canvassed before us. We therefore make no finding to that effect. General costs were prayed for by both parties. As we have entered judgment in favour of the appellant, we proceed to award him costs as well.

In conclusion and for the reasons shown above, this appeal succeeds. The judgment and orders of the trial court are set aside. The appellant is awarded the sum of US$ 140,000 as indemnity, together with costs. It is so ordered.

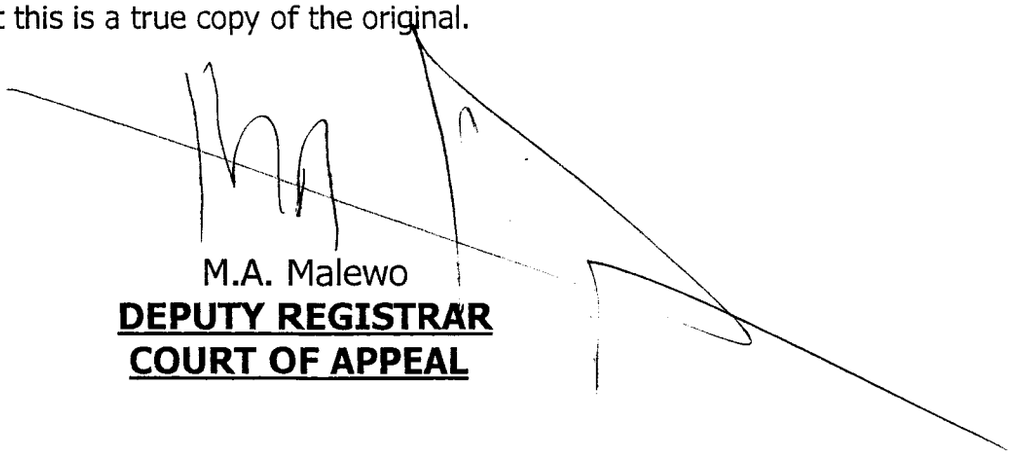
DATED at DAR ES SALAAM this 17th day of September, 2010.

E. N. MUNUO
JUSTICE OF APPEAL

S. J. BWANA
JUSTICE OF APPEAL

B. M. LUANDA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.



M.A. Malewo
DEPUTY REGISTRAR
COURT OF APPEAL