

IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 97 OF 2003

ABDULRAZAK KHALFAN as
Constituted agent of IATA.....PLAINTIFF

VERSUS

NATIONAL INSURANCE
CORPORATION LIMITED.....1ST DEFENDANT
PARASTATAL SECTOR
REFORM COMMISSION.....2ND DEFENDANT
M/S AMI TRAVEL BUREAU LIMITED..THIRD PARTY

J U D G M E N T

KIMARO, J.

M/S AMI TRAVEL BUREAU LTD (The Third Party in these proceedings) deals with among others, an Agency business of sale of tickets issued on monthly basis by the Principal who are Members of International Airlines participating in the IATA Billing and Settlement Plan (IATA/BSP).

On 31/05/2001, the National Insurance Corporation executed an unconditional and irrevocable deed of guarantee for United States Dollars ninety five thousand (USD 95,000) in favour of the plaintiff by signing a letter of guarantee referred to as CPBN No.4884. The deed of guarantee was made at the request of the Third Party so as to enable the Third Party get tickets on credit from IATA/BSP for the

period 01/05/2001 to 30/04/2002. In that deed of guarantee, the NIC committed itself to pay the amount of the bond in the event M/S Ami Bureau Ltd would fail to pay for the air tickets.

The letter of guarantee was tendered and admitted in court as exhibit P1.

The testimony of Miriam Mjema (PW1), the Manager of IATA in Tanzania is that the Third Party defaulted to make payments. At the time this suit was filed, the Third Party owed IATA/BSP an amount of USD 121,595.27 and T.shs 7,631,370/= being an amount arising out of ticket sales not remitted to the IATA/BSP. This is a default which was discovered on 7th February 2002 upon receipt of a dishonoured cheque from the Third Party's Bank. M/S AMI TRAVEL BUREAU was put under a default notice and required to settle the amount of USD 41779.18 within 24 hours but that was not done. An audit followed, and the Third Party was then discovered to owe IATA/BSP the amount of USD 121,595.27 and T.shs 7,631,370/=.

PW1 said the default was brought into the attention of the 1st Defendant vide a letter dated 24th March 2002. The letter was tendered and admitted in court as exhibit P2. Exhibit P2 required the 1st Defendant to pay to the plaintiff the amount of the bond (USD 95,000 as per exhibit P1) but the 1st defendant never replied to the letter nor paid the amount of the bond. It was then the suit was filed.

PW1 prayed that the plaintiff be granted the prayers in the plaint.

The 1st Defendant does not deny execution of the letter of guarantee (Ex.P1) and the receipt of notice of default by the Third Party (Exhibit P2). However, liability is denied. The 1st Defendant thinks that it proper that the liability be carried out by the Third Party. The 2nd Defendant has been joined into the proceedings as a matter of formality because of legal technicality of its role of receivership for specified public corporations to which NIC belongs.

The witness for the Third Party (Ernest Mwenewanda) admitted default but said he made part payment. Factors giving rise to the default were explained as selling tickets on credit to government institutions which do not pay in time as well as the withholding of commissions by airlines because of the default.

All the parties in these proceedings are represented by Learned Advocates. The plaintiff is represented by Mr. Bundala Kalolo, the Defendants by Mr. Ngudungi and the Third Party by Mrs. Chihoma.

The issues are –

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- i) *Whether there was breach of deed of guarantee.*

ii) *Whether the defendant are entitled to be indemnified by the Third Party in respect of the same.*

iii) *To which relief(s) are the parties entitled to."*

In her testimony Vivian Mmari (DW1) admitted that the 1st Defendant executed the letter of guarantee (Exhibit P1). Although she saw the notice of default served on the 1st Defendant, her testimony was that it was never placed before her. However, the witness said that the normal procedure when the NIC is informed of such a default is to pay the amount of the bond and then take recovery measures against the party who defaulted. According to the witness the normal process is foreclosure because they normally require the person who is asking for a bond to surrender a Certificate of title.

From the Third Party, Ernest Mwenewanda testified as (TPW1). His testimony was that because the Third Party defaulted, the NIC who executed the guarantee have to pay the bond amount.

In his final submissions, both the plaintiff's advocate and the Third Party's Advocate submitted that the pleadings and the evidence tendered proved that the Third Party defaulted and therefore the 1st Defendant had to pay the plaintiff the amount of the bond in exhibit P1. Both PW1 and DW1 testified that the 1st Defendant has not paid the amount of the bond to the plaintiff. DW1 while giving her testimony said:

“ From the bond we are indebted to the tune of USD 95,000...

We have not paid the plaintiff but it was the legal department which was required to settle the claim. The plaintiff has not been paid.”

From the above testimony it is undoubtedly clear that the 1st Defendant is in breach of the deed of guarantee. The 1st Defendant made a commitment to pay USD 95,000 if the Third Party defaulted in paying the plaintiff for the air tickets sold on credit. The Third Party defaulted. Notice of the default was sent to the 1st Defendant. No payment was made. The 1st defendant is in breach of the deed of guarantee.

As regards the second issue it is obvious that it is the default of the Third Party which brought about the liability against the 1st Defendant. The testimony given by the Third Party's witness is that part payment was made. He prayed to the court to take into consideration the commission and refunds withheld by airline members as constituting payments to offset the outstanding balance of the debts owed. The Advocate said if this aspect is taken into consideration, the money due to be paid by the Third Party will be USD 63,719.65 and T.shs 930,946. This is the amount which the Third Party says is ready to indemnify the 1st Defendant and it should be exclusive of interest and costs because the 1st Defendant did not honour their commitment to the plaintiff.

As stated, it is the default of the Third Party which led to the 1st Defendant being sued. I do not see how the blame can be shifted to the 1st Defendant. The 1st Defendant is required to be indemnified by the Third Party to the extent of its liability to the plaintiff. The excuses given by the Third Party on the withholding of commissions by airlines cannot be considered here. PW1 was very clear in her evidence. The IATA regulations allow numbers to withhold commissions for defaulting agents.

Before going to the reliefs prayed for, it is important to discuss about an issue which was raised by the 1st Defendant in their submissions on the locus standi of the plaintiff to file this suit. The Advocate for the 1st Defendant submitted that although the plaintiff has indicated that he is suing on a power of attorney, the power of attorney was not tendered in court and nor did he come to court to testify. He said the plaintiff's case should fail because of this defect.

The Advocate for the plaintiff made a very long reply. It is not the intention of this court to go through the submission made by the Advocate because of one main reason. In the pleadings the 1st Defendant never questioned the status of the plaintiff and the question of power of attorney was not even raised when the witness for the plaintiff gave evidence. Neither was it raised as a preliminary objection.

The submission by the Advocate for the 1st Defendant on this aspect is disregarded because parties are bound by their pleadings. The case of **Vidyrthi Vs Ram Rakha** (1957) EA 527 is the authority to support this statement.

Lastly is the relief to which the parties are entitled to.

The plaintiff has proved his claim. He is entitled to judgment as prayed. Only that the rate of interest at courts rate is set at 7% till full satisfaction. The 1st Defendant is also entitled to indemnification by the third Party to the extent of his liability to the plaintiff.

N.P.KIMARO,

JUDGE

03/08/2004

6/08/2004

Corum: N.P.Kimaro, J.

For the Plaintiff – Absent.

For the 1st Defendant – Absent.

For the 2nd Defendant – Absent.

For the 3rd Party – Mr. Ernest Mwenewanda.

CC: Mr. Mtey.

Court: Judgment delivered today.

Order: The plaintiff is granted judgment as prayed. Only that the rate of interest at court's rate should be 7% till full satisfaction. The 1st Defendant is also entitled to indemnified by the Third Party to the extent of its liability to the Plaintiff.

N.P.KIMARO,

JUDGE

6/08/2004

1,680 – words

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I Certify that this is a true and correct
of the original order judgement Rulling

Sign

Registrar Commercial Court Dsm.

Date

6/8/04