IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., MKUYE, J.A., And NDIKA, J.A.)

CIVIL APPEAL NO. 159 OF 2017

BASIC ELEMENTS LIMITED ..... APPELLANT

VERSUS

THE NATIONAL BANK OF COMMERCE LTD ..... RESPONDENT

[Appeal from the decision of the High Court of Tanzania

(Commercial Division) at Dar es Salaam]

(Sehel, J.)

date the 20th day of April, 2017

in

Commercial Case No. 127 of 2013

JUDGMENT OF THE COURT

6th November, 2018 & 29th April, 2019

MWARIJA, J.A.:

The appellant, Basic Element Ltd was one of the defendants (the 1st defendant) in Commercial Case No. 127 of 2013. The other defendants were Robert Simon Kisena, Florencia Robert Mashauri, Robesika Agro Products Ltd, Simon Group Limited and Leonard Dominic Rubuye (the 2nd – 6th defendants respectively). They were jointly sued in the High Court of Tanzania (Commercial Division) by the respondent herein, the National Bank of Commerce Ltd.

The facts giving rise to the suit and later this appeal can be briefly stated as follows:- Sometime in October, 2009 the appellant learnt that a milling plant situated on Plot No. 53 Mikocheni Light Industrial Area (hereinafter "the Property"), was being sold. The Property which was owned by a firm known as Ben Es Haq Limited was under receivership following a default in payment of a loan advanced to it by the respondent bank. Messrs Silvanus Benedict Mlola and Seni Songwe Malimi t/a Kisarika & Mlola Advocates were the Receiver Managers and were thus selling the Property in that capacity.

According to the respondent, the Property was initially shown to be valued at TZS 17,000,000,000. That value was based on the 2007 valuation report. After negotiations, the appellant agreed to purchase it for TZS 7,000,000.000.00. It was agreed further that the appellant was to make an initial payment of TZS 3,000,000,000.00 on or before 20/3/2010. The Property was transferred to the appellant on 4/10/2011 vide a transfer under power of sale (hereinafter "the Sale Agreement"). Since however, the appellant did not have sufficient funds to pay for the Property in accordance with the agreed payment schedule, it entered into a credit facility agreement with the respondent bank. In that agreement (exhibit P.1) which was executed on 15/1/2015, the

appellant was granted a term loan of TZS 4,000,000,000.00 for settling the balance of the purchase price and an overdraft facility of TZS 2,000,000,000.00 as a working capital. The credit facility was secured by a legal mortgage over the Property and personal guarantees of the 2nd - 6th defendants (the Guarantors). The 2nd and 6th defendants were the directors of the appellant company. Out of the required down payment, the appellant made a payment of TZS 1,000,000,000.00 on 17/6/2010 and TZS 800,200,000.00 on 11/8/2010. It however failed to pay the balance of TZS 1,200,000,000.00 on account of having encountered a financial difficulty.

Meanwhile, the respondent brought to the attention of the appellant existence of a valuation report of the Property conducted in 2009. According to the report, the value of the property had dropped to TZS 9,443,000,000.00. The respondent required the appellant to execute more securities on the credit facilities and the appellant did so by mortgaging its property situated on Plot No. 418/130 Flur II Nkrumah Street, Dar es Salaam valued at TZS 1,000,000,000.00.

The appellant was perturbed by the respondent's act of concealing the 2009 valuation report and instead, used as the basis of negotiations for the purchase price, a 2007 valuation report. As a result, it filed a

case against the respondent in the same court, Commercial Case No. 72 of 2012. In that suit which was based on fraudulent misrepresentation of the Property's value as at 2009, the appellant claimed for special and general damages contending that the respondent's act of concealing the 2009 valuation report denied the appellant the opportunity of knowing that the value of the Property was less than the amount shown in the 2007 report, the fact which would have enabled it to purchase the Property for a lesser price.

The case terminated in favour of the appellant. The trial court found that the Property was sold at an overpriced value of TZS 1,000,000,000.00 and ordered the respondent to refund that amount to the appellant with interest. It also awarded the appellant general damages of TZS 1,500,000,000.00 with interest.

As stated above, the appellant did not discharge its obligation under the Sale Agreement (exhibit P4). It failed to fully pay the agreed purchase price of the Property. As a result, while Commercial Case No. 72 of 2012 was still in progress in the trial court, the respondent instituted the suit (Commercial Case No. 127 of 2013) which gave rise to the impugned decision. In the suit, the respondent claimed for the following reliefs:-

"*(a) Payment by the Defendants jointly or severally Tanzania Shillings Eight Billion Nine Hundred Seventy-Six Million One Hundred Thirty Thousands Nine Hundred Eight Four Shillings and Four cents (TZS 8,976,130,984.4) as of 31st August 2013.*

(b) Payment by the 1st Defendant of the sum of ***Tanzania Shillings One Billion Two Hundred Million Only.***

(c) Interest on (a) above at the rate of 19% from 31st August 2013 to the date of judgment.

(d) Interest on (b) above at the commercial rate of 14% per annum.

(e) Interest on the decretal amount at the court's rate from the date of judgment up to the date of payment.

In the alternative and in the event of failure by the Defendants to pay the amount at (a), (b) (c) and (d) above

(f) Appointment of Mr. Sadock D. Magai, an Advocate as a Receiver Manager with powers to sell the Mortgaged properties over CT No. 32516, Plot No. 53 Mikocheni Light Industrial Area, and over C.T. No. 6818, Plot No. 418/130 of FLUR II Nkrumah Street;

(h) Costs of the suit; and

(i) Any other relief which this Court may deem just to grant in favour of the Plaintiff."

In their joint written statement of defence, the appellant and the 2nd to 6th defendants, though admitting that it was granted the two credit facilities, they contended that they did not apply for the same. They denied having requested for the facilities as a loan for any commercial purpose. According to the appellant, the facilities amounting to a total of TZS 6,000,000,000.00 were granted as a conditional acceptance of the appellant's intention to purchase the Property. That defence is stated in paragraphs 2 and 3 of the joint written statement of defence as follows:-

"2. That the contents of paragraph 8 of the Plaint are without prejudice noted to the extent that the Plaintiff granted the two credit facilities to the 1st Defendant [the appellant]. It is further stated that the 1st Defendant never requested any loan or any form of financial accommodation from the Plaintiff for any commercial use or otherwise which led to execution and performance of the credit facility offer letter dated 15th January 2010.

6. *That vide the credit facility offer letter dated 15th January, 2010, the Plaintiff granted the 1st Defendant two credit facilities amounting to Tanzania Shillings Six Billion (TZS 6,000,000,000/=) as a conditional acceptance of the 1st Defendant formed intention to purchase the Mill Plant under the right of occupancy, certificate No. 32516. Land office No. 49066, Plot No. 53, Mikocheni Light Industrial Area, Dar es Salaam City together with all its fittings and fixtures and machineries and assets thereof all once belonging to BEN ES HAQ LIMITED which was under Receivership."*

Having heard the evidence of the two witnesses for the respondent/plaintiff, Salehe Mohamed (PW1) and Faith Majaliwa (PW2) and one witness for the appellant/defendants, Robert Simon Kisena (DW1), the trial court found that the respondent had proved its case. In their evidence, the respondent's witnesses testified about the existence of transactions concerning the purchase of the Property by the appellant and credit facilities granted to it as a loan. It was their evidence that the appellant defaulted to repay the credit facilities hence the suit.

In his defence evidence, DW1, relied on Commercial Case No. 72 of 2012 which was decided by the trial court in the appellant's favour. As

stated above, in that case, the trial court found that the respondent had sold the Property through fraudulent misrepresentation of its real value. It was DW1's evidence further that the credit facilities were granted as conditional acceptance by the appellant to purchase the Property. The appellant's defence therefore, was that although there was a default in repayment of the credit facilities, the default was justified because of fraudulent misrepresentation made by the respondent on the value of the Property at the time of execution of exhibit P.4.

In her decision, the learned trial judge was of the view that the appellant's default in repayment of the credit facility was not justified. She went on to consider the issue of fraudulent misrepresentation raised in the appellant's defence and found that, since the appellant did not rescind the Sale Agreement but instead, opted to claim for damages vide Commercial Case No. 72 of 2012, it could not absolve itself from the liability arising from the Credit Facility Agreement. The learned trial judge held therefore that the appellant was liable to pay the whole of the outstanding amount of the two credit facilities plus interest at the rate of 14% per annum from the respective dates of the issue of the two facilities to the date of judgment and 7% from the date of judgment to the date of full payment.

The trial court ordered further that in the alternative, the Property be sold so that the decree could be satisfied. It appointed Mr. Sadock Magai to be the Receiver Manager having the power of selling the Property in case of the appellant's failure to satisfy the decree.

The appellant was aggrieved by the decision of the High Court hence this appeal which is predicated on three grounds as follows:-

> *"1. THAT, having regards (sic) to the evidence on record and the circumstances of the case, the learned trial Judge grossly misdirected herself in fact and in law in failing to hold that the contract between the parties was a sale agreement and not a loan agreement.*
>
> *2. THAT, having regard to the evidence on record and the circumstances of the case, the learned trial Judge grossly misdirected herself in fact and law in finding that the appellant was liable to the extent of the Award in the Judgment.*
>
> *3. THAT, the learned trial Judge grossly misdirected herself in law and in fact in finding for the respondent against the weight of evidence."*

After the lodgement of the record and memorandum of appeal, the appellant's counsel filed a written submission in support of the

appeal as required by Rule 106(1) of the Tanzania Court of Appeal Rules, 2009 (the Rules). On his part, upon service on him of a copy of the appellant's written submission, the respondent's counsel filed a reply submission in terms of sub rule (8) of Rule 106 of the Rules as amended by GN No. 362 of 2017.

At the hearing of the appeal, the appellant was represented by Mr. Richard Rweyongeza assisted by Ms. Jacquiline Rweyongeza, learned advocates. The respondent had the services of Mr. Joseph Nuwamanya, learned advocate. In arguing the grounds of appeal, Mr. Rweyongeza started by adopting his written submission and proceeded to make a brief oral submission challenging the findings of the trial court. On his part, Mr. Nuwamanya followed suit by also adopting his reply submission and thereafter responded to the oral arguments made by the appellant's counsel.

In his written submission, Mr. Rweyongeza argued that from the evidence and the circumstances of the case, the learned trial judge erred in finding that there was a loan agreement between the appellant and the respondent. He submitted that, from the evidence on record, the appellant did not apply for a loan. He stressed that the appellant had denied so in its written statement of defence and through the evidence

of DW1. According to the learned counsel, despite the contention that the appellant had applied for loan, the respondent has not substantiated that contention by producing in evidence, the appellant's letter to that effect. He reiterated the appellant's defence that the credit facility was advanced by the respondent as a conditional acceptance by the appellant, to purchase the Property, the purpose being to facilitate it financially to comply with the schedule of payment of the purchase price and to be further availed with a working capital.

The appellant's counsel argued further that the transaction was however influenced by the respondent's act of failing to disclose the real value of the Property at the time of the sale transaction. Had it disclosed the real value, Mr. Rweyongeza argued, the appellant would have considered the respondent's offer of the credit facility differently. He emphasized that the Credit Facility Agreement was entered into as one of the essential conditions of the agreement for the sale of the Property not a loan agreement. He stressed his argument by making reference to the statement of DW1 whereby, at page 1197 of the record, he states as follows:-

> *"...it is in my knowledge that the 1st defendant has never requested any loan or any form of financial accommodation from National Bank of Commerce*

Limited for any commercial use or otherwise which led to the execution and performance of the credit facility offer letter dated 15th January, 2010."

In addition, the appellant's counsel argued in his oral submission that the learned trial judge erred in holding that the respondent's act of misrepresenting the value of the Property did not invalidate the parties' agreement because the appellant opted not to rescind the contract and instead, claimed for damages.

In his reply written submission, Mr. Nuwamanya supported the decision of the trial court that the appellant is liable under the Credit Facility Agreement to the extent adjudged by the learned trial judge. He argued that, since the respondent proposed to finance part of the purchase price by issuing a credit facility to the appellant who inturn, accepted by signing the agreement, it cannot absolve itself from making repayment in accordance with the Credit Facility Agreement.

The learned counsel recapitulated the facts giving rise to the signing of the Credit Facility Agreement as stated above and argued that under the circumstances, even if the appellant did not apply for the credit facilities, having received and utilized them to secure the transfer of the Property and later started to operate business as testified by

DW1, the trial court properly found that the appellant was fully bound by the terms and conditions of the Credit Facility Agreement.

The respondent's counsel went on to argue that from the evidence, the appellant did not pay any part of the credit facilities. He made reference to the demand notice issued by the respondent on 23/4/2013 as contained on pages 1740 - 41 of the record showing that, as at that date, the amount which the appellant owed the respondent was TZS 6,804,269,959.70 and another notice issued on 12/7/2013 (at pages 1744 - 1745) showing that as at 31/3/2013, the outstanding amount was TZS 9,437,418,301.90.

With regard to Mr. Rweyongeza's oral argument that the trial court erred in failing to find the Sale Agreement invalid for the respondent's fraudulent misrepresentation because the appellant did not rescind the agreement, Mr. Nuwamanya submitted that the appellant did not raise that point in its memorandum of appeal. In rejoinder however, Mr. Rweyongeza submitted that since what was sought by the respondent in the trial court was a declaratory order which did not have a finality effect, the appellant is entitled to challenge that finding.

From the submissions made by the learned counsel for the parties on the grounds of appeal, two issues arise for determination. **Firstly,** is whether or not there existed a loan agreement between the appellant and the respondent and **secondly**, if the answer to the first issue is in the affirmative, whether or not the respondent was entitled to the decretal amount awarded by the trial court.

With regard to the first issue, it is instructive to start by observing that the appellant did not dispute that it received the two credit facilities comprising of an overdraft of TZS 2,000,000,000.00 and a term loan of TZS 4,000,000,000.00. According to exhibit P.1 and its addenda (exhibits P2 and P3) dated 4/5/2010, the credit facilities which were repayable by 31/8/2013, attracted an interest rate of 14% per annum chargeable every month on the outstanding amount. In addition to the monthly interest rate, in default of repayment of the agreed instalments of the overdraft or the term loan facility, the respondent had the right of charging a penal interest of 5% on the outstanding balance.

As stated above, the appellant's contention is that, although it received the amount stated in exhibit P.1, it did not apply for it. As stated above, the appellant's defence was that it was granted the facilities as a conditional acceptance by it to buy the Property.

In our considered view, from the terms and conditions agreed upon by the parties as stipulated in exhibit P.1., it is clear that apart from the Sale Agreement, they entered into a loan agreement. The absence of a letter showing that the appellant had applied for the loan does not in our view, have a repercussion on the clear terms and conditions of the Credit Facility Agreement showing that the appellant had secured from the respondent, a loan which was repayable with interest. Similarly, the appellant's defence that the credit facility was received by the appellant as a conditional acceptance to buy the Property is not borne out by the evidence on record. The purpose of the credit facility is clearly stated in paragraph 17 of exhibit P.1 as follows:-

> *"17-*
>
> *(a) The purpose of overdraft facility is to supplement working capital requirements for operating expenses related to the business; and*
>
> *(b) The Term Loan of TZS 4.0 billion will be used for part financing purchase of the milling plant assets previously belonging to Ben Es Haq Ltd."*

The linkage between the credit facility and purchase of the Property appears also in paragraph 4 as follows:-

"4. Condition Precedent to the Offer:-

The Facility shall be available upon fulfilling of the following:-

(a) The Borrower to pay TZS 3.0 Billion up front to NBC Limited as part of the agreement to purchase the Milling plant currently under receivership before utilizing the requested facilities."

From the terms and conditions of the Credit Facility Agreement as reproduced above, the appellant was offered the two facilities to enable it to comply with the agreed payment conditions for the property and to finance the operational costs. The credit facilities were not offered to the appellant as condition for it to accept to buy the Property. It is in fact clear from wording of exhibit P.1 that the parties had entered into a loan agreement. We therefore answer the first issue in the affirmative, that there existed a loan agreement between the parties.

The second issue arises from the complaint that the respondent had committed a fraudulent misrepresentation on the value of the Property. The appellant's contention is that the learned trial judge erred in failing to find that the appellant was, for that reason, not liable to repay the credit facility to the extent decreed by the trial court. In

paragraph 26 of his statement which appears at page 1201 of the record, Robert Simon Kisena (DW1) contents as follows:-

> *"26. That since the 1st Defendant successfully proved fraudulent misrepresentation against the Plaintiff, the Defendants are not liable for any sum of money, costs interest and charges in favour of the Plaintiff."*

In the circumstances, the argument by Mr. Nuwamanya that the issue is extraneous, is in our view, not tenable. The trial court considered the issue when determining the effect of the respondent's failure to disclose the 2009 valuation report at the time of negotiating the purchase price of the Property. The finding thereof is the subject of discontent by the appellant in the 2nd ground of appeal. In her decision the learned trial judge held that since the appellant had opted to claim for damages instead of rescinding the sale transaction, it could not absolve itself from the obligation to repay the credit facilities in accordance with the terms and conditions agreed upon by the parties.

Having considered the issue, we find that the trial court had properly applied the principle of equitable remedy of rescission in determining the effect of fraudulent misrepresentation complained of by the appellant. As correctly observed by the learned trial judge, the

appellant did not seek to rescind the contract but decided to claim for damages in Commercial Case No. 72 if 2012. In principle, even if the Credit Facility Agreement would have been dependent on the validity of the Sale Agreement, since both contracts remained intact, the appellant cannot avoid liability. The appellant's option to claim for damages instead of rescinding the contract precluded it from denying liabilities over either the Sale Agreement or the Credit Facility Agreement. The principle is clearly stated in the case of **Damodar Jinabhai & Co. Ltd and another v. Eustace Sisal Estates Ltd** [1967] 1 EA 153 (CAD). In that case, the *erstwhile* Court of Appeal for East Africa had this to say: -

> *"... if there had been any misrepresentation the purchaser, having adopted the contract as a whole would not be entitled to absolve himself from liability under one of the clauses of the contract even if that clause was severable...."*

From the foregoing therefore, having decided to remain with the Property which was transferred to it vide a deed of transfer dated 4/10/2011 and proceeded to claim for damages, the appellant cannot absolve itself from the liabilities arising from either the Sale Agreement or the Credit Facility Agreement. In the circumstances therefore, the

answer to the 2nd issue is also in the affirmative, that the respondent is entitled to the decretal amount awarded by the trial court.

On the basis of the above stated reasons therefore, we do not find merit in the appeal. In the event, the same is hereby dismissed with costs.

DATED at **DAR ES SALAAM** this 16th day of April, 2019.

A. G. MWARIJA
JUSTICE OF APPEAL

R. K. MKUYE
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

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

B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL