IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MUGASHA, J.A, KIHWELO, J.A. And RUMANYIKA, J.A.)

CIVIL APPEAL No. 32 OF 2020

CRDB BANK PUBLIC COMPANY LIMITED.....APPELLANT

VERSUS

UAP INSURANCE COMPANY LIMITED..... .....RESPONDENT

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

(Magoiga, J.)

Dated the 13th day of December, 2019

in

Commercial Case No. 70 OF 2018

.....

RULING OF THE COURT

8th & 16th February, 2023

KIHWELO, J.A.:

This appeal arises from the decision of the High Court of Tanzania (Commercial Division) at Dar es Salaam ("the trial Court") in Commercial Case No. 70 of 2018 dismissing with costs the appellant's suit on account of insufficient evidence.

We find it imperative to briefly give a historical account of this matter, which is, ostensibly, not very difficult to comprehend. The

appellant, on 27th January, 2014 issued a loan facility to CATA Mining Limited (the Principal Debtor) to the tune of United States Dollars Two Million Five Hundred Thousand (USD 2,500,000) only, being monies to partly finance purchase of additional mining equipment and meet other capital expenditure, to be repaid in twenty-four months from the date of finance. Subsequently, on 1st February, 2016 the appellant issued an additional loan facility to the tune of United States Dollars Twelve Million and One Hundred Thousand (USD 12,100,000) to the Borrower, which was added to the then outstanding amount of United States Dollars Five Million Five Hundred Fifty-Seven Two Thousand Ninety Two and Six (USD 5,557,292.06) only thereby making a total facility of United States Dollars Seventeen Million Eight Hundred Thousand (USD 17,800,000) only.

On 8th February, 2016 the respondent issued a Payment Bond on Demand in favour of and for the benefit of the appellant to secure and guarantee the sum of United States Dollars Thirteen Million Five Hundred Thousand (USD 13,500,000) only in relation to the loan facility dated 1st February, 2016 and the validity of this guarantee was up to and including 30th July, 2017 and was to be renewed annually up to 30th June, 2021.

Furthermore, on 11th August, 2016, the respondent issued a Payment Bond on Demand Extension in favour and for the benefit of the appellant to secure and guarantee the sum of United States Dollars Two

Million Five Hundred Thousand (USD 2,500,000) only in relation to the loan facility dated 27th January, 2014 which was valid and extended from 31st August, 2016 to 31st August, 2017. The respondent irrevocably undertook to unconditionally pay the appellant on receipt of the appellant's first written demand, the full sum guaranteed in the Bond, irrespective of the validity and the legal effects of the credit relationship between the appellant and principal debtor.

Since the principal debtor defaulted to discharge the loan as obliged under the loan facility as well as the first and the extended guarantee, the appellant served upon the respondent written demands, however, the respondent as the insurer of the Payment Bonds on Demand neither responded nor paid. Subsequently, the appellant instituted a suit against the respondent at the trial court claiming among other things an immediate payment of United States Dollars Fifteen Million Five Hundred and Five Thousand (USD 15,505,000) only, being an amount secured by the respondent through the first and extended Guarantees issued by the respondent in favour of the appellant.

Upon hearing the parties on merit, the trial court came to the conclusions that, the appellant and the principal debtor breached the terms and conditions of the bonds and therefore dismissed the suit with

costs. Disgruntled, the appellant knocked the doors of the Court by way of an appeal seeking to challenge the decision of the trial court.

When the matter came up for hearing on 8th February, 2023, Mr. Deodatus Nyoni, learned Principal State Attorney, Mr. Edwin Webiro and Mr. Dandi Nyakiha, both learned State Attorneys teamed up with Mr. Mugisha Mboneko learned counsel appeared for the appellant while Mr. Richard Rweyongeza, learned counsel assisted by Mr. Peter Swai, Mr. Karoli Tarimo and Mr. Robert Rutaihwa both learned counsel, appeared representing the respondent. Before we could go into the hearing of the appeal in earnest, we prompted the learned counsel to address us on one issue ahead of canvassing the appeal and that is whether it was proper not to join CATA Mining Limited, the principal debtor which they dutifully did.

Mr. Nyoni took to the floor first. He prefaced his brief submission by arguing that the loan facility subject of the impugned judgment was extended by the appellant to the principal debtor subject to the guarantee which was given by the respondent and the same was subject to the Uniform Rules for Demand Guarantee, 2010 Revision, International Chamber of Commerce (the URDG Rules) which do not require the principal debtor to be notified before going after the guarantor who has deep pocket in order to realise the security. In his opinion, it was proper

and in good order not to join the principal debtor in the suit before the trial court and proceed against the respondent only because Demand Guarantee was the only security for the loan facility. To bolster his argument, Mr. Nyoni further referred us to section 80 of the Law of Contract Act, [Cap 345 R.E. 2019] (the Act) which is *in pari-materia* with section 128 of the Indian Contract Act, 1872 which stipulates that a surety's liability is coextensive with that of the principal debtor and cited also the case of **Exim Bank (Tanzania) Limited v. Dascar Limited & Another**, Civil Appeal No. 92 of 2018. He therefore implored us to find that failure to join the principal debtor in the impugned suit was inconsequential.

In reply, Mr. Swai had an opposing view in respect of the propriety of not joining CATA Mining Limited, the principal debtor. In his brief and focused submissions, he contended that the principal debtor was required to be made a party to the suit owing to the circumstances surrounding this matter, in particular in order to establish whether the loan facility was issued or not, how much was advanced and how much was outstanding. In his view, the appellant did not raise any formal demand against the principal debtor. He further submitted that, it was necessary for the principal debtor to be joined in the case because, according to clause 8.2.1. of the loan facility the principal debtor and the appellant were duty

bound to ensure perfection and registration of all securities and in this case security bond in the form of insurance policy and referred to the Payment Bond on Demand to facilitate his proposition and argued that the appellant was duty bound to know whether the premium for the securities were paid or not. Mr. Swai rounded up his submission by arguing that it was necessary for the principal debtor to be joined in the case which is a subject of the current appeal.

In a brief rejoinder, Mr. Mboneka forcefully submitted that the operations of the URDG Rules did not require the principal debtor to be joined in the case and that reference to perfection at clause 8.2.1 of the URDG Rules merely refers to guarantee to the Bank which was meant to register the securities with the authorities. He reiterated the earlier submission in chief made by Mr. Nyoni and contended that section 80 of the Act is categorically in favour of the appellant. In his opinion, Mr. Mbonea submitted that, the URDG Rules are made in such a way that, for convenience purposes lenders may pursue the guarantor without necessarily going after the principal debtor is based upon the rationale that the guarantor has deep pockets.

After a careful consideration of the submission of the learned counsel for the parties and the application, the issue before us is a narrow

one and that is whether it was proper in the circumstances of the present case not to join the principal debtor.

We think, for the sake of precision, we should first appreciate the gist of the understanding between the appellant and the respondent and in so doing, we wish to let record of appeal, at page 50 speak for itself;

"PAYMENT BOND ON DEMAND"

Beneficiary name and address *Place and date*

CRDB BANK PLC *Dar es Salaam, February 08, 2016*

P.O.BOX.268

DAR ES SALAAM, TANZANIA

Bond No. 010/130/1/003262/2016

We refer to the Loan Facility Letter dated 01st February, 2016 for the purpose of finance construction of tailing dam, water dam, meet land compensation costs to affected indigenous people in mining site, purchase of processing chemicals and pre-take off working capital (the "Contract") between you and CATA MINING LIMITED of P.O. Box 105469, (the "Customer") and to the guarantee to be provided to secure the Cata Mining Limited fulfilment of its payment obligations under the Contract.

We irrevocably undertake to pay to you (the beneficiary) on your first written demand irrespective of the validity and legal effects of the above-mentioned credit relationship and waiving all rights of objection and

defense arising from the said credit relationship as stated in the facility. Our iiability under this Bond shall be limited to the payment of a totai amount not exceeding US$. 13,005,000.00 (UNITED STATES DOLLAR THIRTEEN MILLION FIVE HUNDRED THOUSAND ONLY).

This Bond is valid up to and Including 30th July, 2017 and thereafter to be renewed annually on outstanding loan balance up to 30th June 2021.

Claims, if any, under this Bond, stating that Cata Mining Limited has failed to repay any outstanding instalment under the Contract on the due date for such invoice, must be received by us, UAP Insurance Tanzania Limited P. O. Box 71009 Dar es Salaam, in written form not later than the Expiry date to be valid against us.
This Bond is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 revision, ICC Publlcation no. 758.

This Bond shall be governed by and construed in accordance with the laws of the United Republic of Tanzania and shall be subject to the jurisdiction of the High Court, Commercial Divislon at Dar es Salaam.
UAP Insurance Tanzania Limited
Seal and Signatories of UAP Insurance"

Furthermore, record of appeal, at page 51 provides as follows;

"PAYMENT BOND ON DEMAND- EXTENSION"

Beneficiary name and address *Place and date*

CRDB BANK PLC *Dar es Salaam, August 11, 2016*

P.O.BOX.268

DAR ES SALAAM, TANZANIA

Bond No. 010/130/1/021950/2016

We refer to the Loan Facility Letter dated 27th January, 2014 for the purpose of purchase of additional mining equipment from Canada and set up of infrastructure (the "Contract") between you and CATA MINING LIMITED of P.O. Box 105469, (the "Customer") and to the guarantee to be provided to secure the Cata Mining Limited fulfilment of its payment obligations under the Contract. We irrevocably undertake to pay to you (the beneficiary) on your first written demand irrespective of the validity and legal effects of the above-mentioned credit relationship and waiving all rights of objection and defense arising from the said credit relationship as stated in the facility. Our liability under this Bond shall be limited to the payment of a total amount not exceeding US$. 2,500,000.00 (UNITED STATES DOLLAR TWO MILLION FIVE HUNDRED THOUSAND ONLY)

This Bond is valid and extended from 31st August, 2016 to 31st August, 2017.

Claims, if any, under this Bond, stating that Cata Mining Limited has failed to repay any outstanding instalment

under the Contract on the due date for such invoice, must be received by us, UAP Insurance Tanzania Limited P. O. Box 71009 Dar es Salaam, in written form not later than the Expiry date to be valid against us.
This Bond is subject to the Uniform Rules for Demand Guarantees (URDG) 2010 revision, ICC Publication no. 758.

This Bond shall be governed by and construed in accordance with the laws of the United Republic of Tanzania and shall be subject to the jurisdiction of the High Court, Commercial Division at Dar es Salaam.
UAP Insurance Tanzania Limited
Seal and Signatories of UAP Insurance"

Quite clearly, the excerpts above are a clear manifestation that the loan facility extended to the principal debtor by the appellant was the core to the transaction which led to the guarantee which was provided by the respondent to the appellant in favour of the principal debtor. The one million dollars question which has exercised our mind quite considerably is the propriety of the trial before the high court on account of the non-joinder of the principal debtor for fair and effective determination of the dispute.

Both parties made their rival submissions with commendable preparedness despite the fact that the matter was raised by the Court

promptly. The appellant on its part submitted that the operations of the URDG Rules did not require the principal debtor to be joined in the case while on the adversary side, the respondent argued that the principal debtor was required to be made a party to the suit owing to the circumstances surrounding this matter, in particular in order to establish whether the loan facility was issued or not, how much was advanced and how much was outstanding at the time of the demand. Similarly, in order to address the issue of non-payment of premium.

At the outset, we wish to reaffirm the time-honoured principle of law that, it is incumbent upon the trial court in terms of Order 1 rule 10 (2) of the Civil Procedure Code, [Cap. 33 R.E. 2019] (the CPC) to scrutinize the pleadings in order to determine a party or parties whose presence before the court will be necessary to enable the court effectually, completely adjudicate upon and settle all the questions involved in the suit. See, for instance, **Farida Mbaraka and Farid Ahmed Mbaraka v. Domina Kagaruki**, Civil Appeal No. 136 of 2006 (unreported), where the Court said:

> *"Under this rule, a person may be added as a party to a suit (i) when he ought to have been joined as a plaintiff or defendant and is not joined so; or (ii) when, without his presence, the questions in the suit cannot be completely decided."*

We are also aware that in terms of Order 1 rule (9) of the CPC a suit cannot be defeated for the reason of non-joinder of a party or parties but every case must be decided according to the circumstances prevailing in that particular case. We are equally, mindful of the peremptory principle of law that, where the court discovers that a necessary party has not been joined in the suit and neither the plaintiff nor the defendant is willing and ready to apply to have such a party added, the court is duty bound to direct that such a party be added. There is, in this regard, a considerable body of case law, See, for instance **Tanga Gas Distributors Ltd v. Mohamed Salim Said and Two Others**, Civil Revision No. 6 of 2011 and **NUTA Press Limited v. MAC Holdings and Another**, Civil Appeal No. 80 of 2016 (both unreported).

In the instant matter before us and according to the pleadings on record, a number of issues touching upon the principle debtor were raised and remained unanswered and these were, the status of repayment of the outstanding instalments, the most critical issue of non-payment of premiums and also the validity of the credit facility between the appellant and the principal debtor. The argument by Mr. Mboneka that the operations of the URDG Rules did not require the principal debtor to be joined in the case is, in our considered opinion erroneous and misleading in the circumstances of the matter before us as explained before, and if

at all, we think that, such a convenient escape route is not, unhappily, available to the appellant. It is, we think, axiomatic that, section 80 of the Act, does not offer any helping hand to the appellant, in the circumstances of the matter before us. This is particularly so, where the learned trial Judge declared in his judgment at page 624 of the record of appeal that, the plaintiff (now appellant) and the principal borrower (the principal debtor) breached the term and conditions of the bonds (exhibit P4 and P4a) and Letters of Credit (exhibits P2 and P3) on their true intent of the parties and the commercial purposes in which the defendant (now respondent) guaranteed within the bonds.

In view of the settled position of the law and the circumstances obtained in this case we are of the considered opinion that, the principal debtor was a proper party to be joined to enable the court to fairly, completely, effectively and adequately adjudicate upon all matters in dispute.

That being said and done, we invoke the powers vested on us under section 4 (2) of the Appellate Jurisdiction Act, [Cap. 141 R.E. 2019], and hereby nullify the proceedings and quash the judgment of the High Court and set aside the subsequent orders. For avoidance of doubt, we order that the principal debtor be made a party to the case as soon as practicable for fair and effective determination of the case.

Since the issue under consideration was raised by the Court *suo motu*, we leave the parties to bear their own costs.

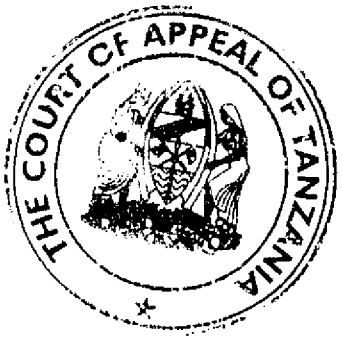
DATED at **DAR ES SALAAM** this 15th day of February, 2023.

S. E. A. MUGASHA
JUSTICE OF APPEAL

P. F. KIHWELO
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The ruling delivered this 16th day of February, 2023 in the presence of Mr. Stephen Noe, learned State Attorney together with Mr. Mugisha Mboneko, learned counsel for the Applicant and Mr. Karoli Tarimo, learned counsel for the Respondent, is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL