THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA AT KAMPALA
(COMMERCIAL COURT DIVISION)

HCT-00-CC-CS-0588 OF 2003

1. ROBERT MWESIGWA
2. ABEL NAYEBAZA AND 134 OTHERS :::::::::::::::::: PLAINTIFF

VERSUS

BANK OF UGANDA :::::::::::::::::::::::::::::::::::: DEFENDANT

BEFORE: THE HONOURABLE MR. JUSTICE YOROKAMU BAMWINE

R U L I N G:

It is claimed in this suit that on 18/9/98 the Defendant under the authority of the Financial Institutions Statute (Statute No. 4/1993) seized and took over control of the International Credit Bank Ltd, ICB. It is also claimed that the Defendant negligently ran ICB and mismanaged it in the sense that the Defendant has currently not fully paid the Plaintiffs, who were employees of ICB, their salaries and terminal benefits. This state of affairs is said to have occasioned suffering, hardship and inconvenience for which they hold the Defendant liable. Hence the claim for general damages for breach of contract, duty and/or trust and negligence, exemplary damages for bad faith,

recklessness, mental anguish, destitution, embarrassment and/or inconvenience and a declaration that the Plaintiffs are entitled to salary arrears and terminal benefits from the Defendant.

It is noteworthy that the same points were raised before my brother Lugayizi, J. in HCCS No. 1/2000. He dismissed them for reasons stated in his Ruling of 22/9/2003. Subsequent to that Ruling, the Plaintiffs filed another suit, the instant one. In HCCS No. 1/2000, the Plaintiffs had sued ICB and BOU jointly and severally. My brother Lugayizi, J. held that the suit against BOU was unmaintainable in the form in which it had been instituted. Hence the Plaintiffs' decision to fine tune their claim in the current form, this time against BOU alone since the Court had okayed the plaint against ICB in that suit. We therefore have 2 suits running along side each other, one against ICB (HCCS No.1/2000) and the other against BOU (HCCS No. 588/2003, the instant one). Both are in respect of the same employment contracts between the Plaintiffs and ICB.

This is a second Ruling in this case. When it first came up for hearing on 23/3/2005, Mr. Masembe Kanyerezi for the Defendant raised some preliminary points of law. He argued that the Plaintiffs' claim was resjudicata and that the suit was incompetent in that there was yet another suit pending in this Court (HCCS No.1/2000). In a Ruling which I delivered on 6/4/2005, I over ruled the 2 objections for reasons that appear in that Ruling. I did state,

however, that there was yet another hurdle for the Plaintiffs to jump and this was whether or not the plaint raises a cause of action against the Defendant. The point had not been raised for Court's determination. When the case came up for a scheduling conference once again, Mr. Masembe-Kanyerezi this time raised it.

The thrust of his argument is that the Defendant is a statutory liquidator of all closed banks, including ICB. That the power to close them is derived from a statute, the Financial Institutions Statute, FIS. That the plaint discloses no cause of action against BOU in so far as it seeks enforcement of employment contracts which BOU is not privy to. In his view, the Plaintiffs may have a cause of action against their employer, ICB (now in liquidation) but not against BOU which is merely managing ICB in accordance with powers vested upon it under the statute.

The second leg of Mr. Kanyerezi's objection is that under S.49 of the Statute, no suit or legal proceedings shall lie against the Defendant or any officer thereof for anything which is done in good faith pursuant to the provisions of the statute. That to sustain a claim against BOU, bad faith must be pleaded with sufficient particularity which, in his view, the Plaintiffs have not done. On the strength of the 2 objections above, he has invited me to have the plaint struck out.

Mr. Rutiba for the Plaintiffs does not agree. According to him, when the Defendant terminated services of the Plaintiffs, it assumed the contractual role of the employer. That as such, BOU is liable on the contracts of employment between the Plaintiffs and ICB. He has invited me to find that the doctrine of promissory estopped is applicable in this case.

On the issue of bad faith, his assertion is that bad faith has sufficiently been pleaded and particularized. He therefore invited me to reject the two objections and proceed to determine the suit on its merits.

I have very carefully addressed my mind to the arguments of both counsel. It is trite that a plaint which discloses no cause of action must be rejected.

To say that a plaint discloses a cause of action, it must show that the Plaintiff enjoyed a right; that the right was violated; and that the Defendant is liable for that violation. There is a wealth of authorities on this point, including the often cited **AUTO GARAGE & OTHERS –VS- MOTOKOV (NO. 3) [1971] E.A. 514.**

As regards privity of contract, this refers to a relationship between the parties to a contract, which makes the contract enforceable as between them. The general position is that a stranger to a contract cannot sue upon

the contract unless given a statutory right to do so: **Kayanja –Vs- New India Assurance Company Ltd [1968] EA 295.**

Turning now to the issue before me, I'm of the considered view that on the face of the pleadings, the Plaintiffs case against the Defendant satisfies the two requirements stated in the AUTO GARAGE case, supra. The plaint shows that the Plaintiffs enjoyed a right and that their right was violated. It shows that they have since 1998 been rendered idle on account of loss of employment. They are yet to be paid their terminal benefits, if any. The issue as I see it is over whether the Defendant, BOU, is liable for that violation.

From the pleadings, the Defendant was not party to the contracts of employment in issue. The contracts were between the Plaintiffs and ICB. In view of the fundamental principle that only a person who is a party to a contract can sue or be sued on it, clearly the Plaintiffs have no cause of action against BOU.

I notice that what is in issue herein are liabilities under a contract of employment. The general rule is that such liabilities can not be assigned. However, they can be assigned with the consent of the other party to the contract, a situation known as Novation in law. Generally speaking, the parties may make them assignable, either expressly or impliedly. None of

the circumstances above is applicable to the issue at hand. The above notwithstanding, this Court is also cutely aware that a right or benefit under a contract may be assigned by legal assignment, equitable assignment or by operation of law. The only likely event herein would be assignment by operation of law. In such event, the law would itself confer such a right.

I have looked at the Financial Institutions Statute, 1993. It is silent on the transfer of any such employment rights from the employer to the Central Bank that may take possession of a financial institution. The Plaintiff's strong point appears to be based on their interpretation of the FIS, especially S. 32 thereof. This section provides that the Central Bank shall, upon possessing a financial institution under S. 31 of the Statute, be vested with exclusive powers of management and control of the affairs of the Financial Institution. Under Subs. 2, the powers include the power to continue or discontinue its operation as a financial institution, initiate, defend and conduct <u>in its name</u> any action or proceeding to which the financial institution may be a party. The Plaintiffs argument herein is that BOU is liable because it took over the management and control of ICB. In view of this Court's decision in **GREENLAND BANK LTD –VS WESTMONT LAND** (Asia), HCCS No. 309/1999, unreported, the Plaintiffs' argument is unsustainable.

In that case, BOU had taken over as herein, the management and control of Greenland Bank. S.32 came under direct interpretation of Court. The Court, per Ntabgoba PJ (as he then was) held that by BOU taking possession of

Greenland Bank, the latter had not ceased to be a corporation sole, capable of suing or being sued in its name. That the Central Bank had assumed the roles of management and control of the institution which was exercised by the Board of Directors and depositors respectively, before Greenland Bank was taken over. Applying the same reasoning to the instant suit, ICB has not ceased by reason of its being possessed by BOU. It cannot sue or be sued directly using its own lawyers because that function has been assumed by the Central Bank. However, it can sue or be sued through BOU which has the management function of that Bank. True, the employment contracts were terminated by officials of the Central Bank. However, it did what the Board of Directors of ICB would have done if the Board had not been disbanded. Until ICB is finally liquidated and de-registered, it remains liable for its former employees employment rights. Accordingly, I find merit in Mr. Kanyerezi's argument that the Plaintiffs have no direct cause of action against BOU as regards the alleged breaches.

Mr. Rutiba's other argument relates to the doctrine of promissory estoppel, that is, that BOU promised to pay them (i.e. the Plaintiffs) but that it has renaged on its promise. Once again, it would not be BOU to pay them but their employer ICB. Such payment would come from ICB although it would reach the Plaintiffs through BOU by virtue of its being the current manager of ICB. Accordingly I have not found the doctrine of any help to the Plaintiffs. In any case, to rely on it, the law places a duty on the Plaintiffs to plead it

and prove it. The law as I understand it is that facts giving rise to a plea of waiver or estoppel must be pleaded. See: **BALWANT SINGH –VS-KIPKOECH arap Serem [1963] EA 651.** In the instant case, estoppel is only left to be inferred, it is not pleaded as a cause of action. The Plaintiffs have only cited it as an instance of bad faith, not as a cause of action.

For the reasons stated above, I find merit in the objection raised by Mr. Kanyerezi on this point and sustain it.

This now brings me to the other leg of Mr. Kanyerezi's argument, the Plaintiffs' purported failure to plead the acts of bad faith. Paragraphs 4,5 and 6 must be read together. Para 4 sets out the facts constituting the alleged cause of action against BOU. They include seizure of the Bank on 18/9/98. It is not alleged that this was done in bad faith.

In para 5, it is contended that the actions of the Defendant (pleaded in para 4) amount to breach of contract for failure to pay salary arrears in the first instance, and terminal benefits in the 2nd instance, and clearly an abuse of the Defendant's statutory powers. It is not shown what provisions of the statute were abused. It was necessary that it be pleaded.

In para 6, they submit that as a statutory corporation, the Defendant was charged with the orderly seizure, merger and/or liquidation of Financial Institutions, that the Defendant breached its duty/and or trust to the Plaintiffs

and acted with manifest professional negligence. Again, what they (BOU) is alleged to have done in bad faith is not pleaded.

Thereafter, the plaint gives what is said to amount to breach of duty and/or trust, negligence, recklessness, bad faith and abuse of statutory powers. In other words, *"bad faith"* is being particularised without being pleaded! This, so argues Mr. Kanyerezi, offends against 0.6 r 2 of the Civil Procedure Rules. Again, Mr. Rutiba does not see anything wrong with the pleadings. He thinks that Mr. Kanyerezi is simply splitting hairs. I have addressed my mind to the able arguments of both counsel.

Under S.49 of the Statute, no suit lies against BOU or any of its officers for anything which is done or intended to be done in good faith pursuant to the provisions of the statute. The bad faith must therefore relate to the implementation of the statute. Accordingly, BOU is protected against suits arising out of seizures of financial institutions unless the aggrieved party is able to show that what BOU did was not in good faith. It is argued by counsel for the Defendant that the plaint as it stands does not plead any bad faith against which the Defendant should prepare itself to defend.

I agree with that argument. 0.6 r 2 is couched in these terms:

> *"In all cases in which a party pleading relies on any misrepresentation, fraud, breach of trust, willful default or undue*

influence, and in all other cases in which particulars may be necessary, such particulars with dates shall be stated in the pleadings."

The Plaintiffs' case is based on alleged acts of bad faith. The purported acts of bad faith are not pleaded. There is only an attempt to particularise them. From my reading of the plaint, no single instance is pointed out as an act of bad faith on the part of the Defendant or its officers. Most of the cited grievances in the particulars relate to alleged breaches by the employer which, as already pointed out, the Defendant is not.

In my view, the requirement under the law not only to plead it but to also particularize it has a sound jurisprudential foundation. As Court observed in the Ruling in HCCS No. 1/2000 striking out the plaint as regards the Defendant, the rationale behind the protection under S. 49 of the Statute is fairly obvious. It is in the public interest that BOU, as a watchdog of financial institutions in Uganda charged with the responsibility of ensuring that such institutions are properly managed, must not be unnecessarily opened up to all sorts of legal actions as it carries out its statutory duties. Hence the requirement not only to plead bad faith but also to prove it. I know that proof can only be on evidence adduced. However, it is necessary that the alleged acts of bad faith be pleaded so that the Defendant gets to know how to counter them. Imputing bad faith to someone, be it to an artificial or natural person, is a grave matter. It goes to the person's reputation and

professionalism. As counsel has correctly put it, a person can act negligently towards another. To say that this was in bad faith goes far beyond the act of negligence itself.

Accordingly, 0.6 r 2 requires that a person alleging willful default, which the Plaintiffs appear to be alleging herein, he/she must give particulars of the faults in issue so that the Defendant can adequately prepare himself for the grave accusations before the trial begins. From the instances cited by the Plaintiffs in (a) – (j), e.g. uttering conflicting and contradictory communications and directions, withholding monies due to the Plaintiffs, etc, these were matters incidental to the seizure. The law giving the Defendant the power of seizure was, in the words of the learned PJ in the Greenland Bank, supra, inelegantly drafted. I agree.

This inelegant draftsmanship cannot be blamed on the Defendant whose onerous duty was to implement the statute to the letter. The plaint as it stands, as regards the alleged acts of bad faith, does not show what rights were enjoyed by the Plaintiffs under the statute and how those rights were violated. To give an example, it is not enough to allege that the Defendant uttered conflicting and contradictory statements on the matter. They must show that the Defendant was under duty, imposed by the statute, to do X,Y,Z which were not done, or if done, not done in accordance with the statute, to raise inference that the act or omission was in bad faith. In my view, Mr.

Kanyerezi's second objection to the plaint also has merit. In the result, both objections are sustained. Under 0.7 r 11 (a) of the Civil Procedure Rules, a plaint which does not disclose a cause of action must be rejected. In both instances cited by counsel, the plaint does not disclose a cause of action against the Defendant. I would strike it out in accordance with 0.7 r 11 (a) of the Civil Procedure Rules and I do so.

As regards costs, the usual result is that the loser pays the winner's costs. This practice is, however, subject to the Court's discretion, so that a winning party may not necessarily be awarded his costs. In the instant case, I'm of the considered view that the inelegant manner in which the Financial Institutions Statute was drafted, particularly S. 32 thereof, greatly contributed to the Plaintiffs' inelegant interpretation of it. In these circumstances, I'm inclined to order each party to bear its own costs and I order so.

Yorokamu Bamwine

J U D G E

21/6/2005