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CALICO TEXTILE INDUSTRIES LTD AND ANOTHER
v. TANZANIA DEVELOPMENT FINANCE CO. LTD

COURT OF APPEAL OF TANZANIA G

(Kisanga, Ramadhani and Mfalila, JJA.)

CIVIL APPEAL NO 25 OF 1993

26 October, 1995 – DAR ES SALAAM H

(Appeal from the Ruling of the High Court of Tanzania, Dar es Salaam, Kyando J.)

Debtor and Creditor – Loan agreement – Debenture to secure such loan – Rectification sought of amount repayable stated thereon – I

When such rectification competent – Section 85 of the Companies Ordinance, Cap 212.

Law of Limitations – Fraudulent misrepresentation – Effect on limitation of proceedings – Section 26(a) of the Law of Limitation Act.

On 11 September 1992, the High Court (*per* Kyando, J) ordered the rectification of certain official forms held by the Appellants, in which forms a loan amount secured by a debenture was stipulated variously as being US$ 904,000 or Shs. 16,626,500/= or both. The trial Court found that the clear intention of the parties at all material times was that the amount expressed in dollars had been advanced and that accordingly the amount repayable, as evidenced by the amount secured by the debenture (as well as the relevant official forms), should reflect the amount in dollars only without reference to the Tanzanian shilling equivalent. The Court ordered rectification accordingly.

The First Appellant is the debtor under the loan and debenture, the Second Appellant is the Registrar of Companies (holder of the official forms) and the Respondent is the creditor in terms of the loan and debenture.

The Appellants appeal against the order of rectification, submitting that the trial Judge erred in law for various reasons in holding that Respondent's application was competent.

Held:

(i) Since the loan had not been repaid in the full amount expressed in dollars, it could not be said that the debt had already been discharged and thus an application for rectification could be brought.

(ii) The trial Judge was correct in finding that the actual terms of the loan should be established with reference to the document creating the charge, being the debenture, *in casu.*

(iii) The trial Judge correctly found, further, that the Second Appellant's certificate of discharge of the debt was invalid and fell to be set aside, since such discharge was based on the repaid amount expressed in shillings, and not in dollars.

(iv) The First Appellant's misstatement in its memorandum to the Second Appellant to the effect that the debt had been discharged, was a false declaration on its part and amounted to fraudulent conduct.

(v) The period of limitation for the bringing of legal proceedings in the Law of Limitation Act does not begin to run until the victim of fraud has discovered the fraud.

(vi) The application was brought timeously before the trial court since it was brought within 60 days of the discovery of the First Appellant's fraudulent misrepresentation to the Second Appellant.

(vii) The appeal is dismissed with costs.

Ordered accordingly.

Cases referred to:

1. *In re Mechanisations (Eaglescliffe) Ltd* [1964] 3 All ER 840

2. *Lolkilite Ole Ndinoni v Netwala Ole Nebele* [1952] 19 EACA 1 A
3. *Nothman v London Borough of Barnet* [1978] 1 All ER 1243 (CA)
4. *Osman v The United India Fire and General Insurance Company Ltd* [1968] EA 102

Ismail, for the First Appellant.
Salula, Senior State Attorney, for the Second Appellant. B
Kameja, for the Respondent.

Kisanga JA:
This appeal arises from the decision of the High Court (Kyando J) allowing an application for the rectification of errors under s 85 of C the Companies Ordinance Cap 212.

Briefly the background to the case was as follows: In April 1979 the first appellant, Calico Textile Industries Ltd (hereinafter referred to simply as Calico Textile) and Tanzania Development Finance Company Ltd (hereinafter referred to by its acronym D TDFCL) entered into a loan agreement whereby Calico Textile was to receive from TDFCL a loan of US $904,000 (or the equivalent thereof in other convertible currencies) by way of a foreign currency loan. In point of fact TDFCL was acting essentially as a conduit in an arrangement whereby it was allowed to borrow from E the World Bank for re-lending to feasible projects in Tanzania, and the Tanzanian Government guaranteed repayment by TDFCL to the World Bank. Calico Textile having obtained the said loan, issued a single debenture to TDFCL as security for the principal sum of US $904,000 with interest thereon. All the moneys, including F the principal and interest as secured under the debenture, were repayable in Tanzanian shillings converted to the currency of the loan at the rate of exchange ruling on the date of repayment.

Calico Textile received full payment of the loan as agreed and it started repayment in accordance with the terms of the agreement. G Meantime the debenture was, in compliance with statutory requirement, filed with the second respondent, the Registrar of Companies (hereinafter referred to as the Registrar) for registration as a charge. On its cover page the debenture was shown to be a security 'for US $904,000 (or the equivalent thereto in other convertible currencies) H being approximately Shs 16,626,500/=', but in its body it was shown to be a security for a foreign currency loan only; there was no reference to the Tanzania shillings. Also filed with the Registrar in compliance with statutory requirement, was form No 9, being particulars of the said debenture, and showing that the amount I secured was 'US $904,000 being approximately Shs 16,626,500/='.

Acting on the information filed the Registrar issued form C2, the certificate of registration of the charge showing that the debenture secured in favour of TDFCL was Shs 16,626,500/= only; no reference was made to foreign currency. As mentioned earlier, Calico Textile had started repaying the foreign currency loan on the terms as agreed, and it continued to do so for some time. The case for TDFCL is that before that loan was fully repaid, Calico Textile on 7 May 1992 filed with the Registrar Form No 10 wherein it declared that the charge as registered, being a debenture to secure Shs 16,626,500/= only in favour of TDFCL, had been satisfied to the extent of Shs 17,418,438.35/=. Acting on that information the Registrar on the same day issued a certificate to the effect that the debenture was discharged. TDFCL claims that from that time to the time of bringing this action Calico Textile no longer repaid or serviced the foreign currency loan.

The case for TDFCL was that Calico Textile was aware of the misstatement on the cover page of the debenture, in the particulars on Form No 9 and in the Registrar's certificate of registration Form C2 that the debenture was for Shs 16,626,500/= or approximately that amount while, to its knowledge, the true position was that the debenture was a security for US $904,000 or the equivalent thereof in other convertible currencies as was expressly stated in the loan agreement and in the body of the debenture. Again Calico Textile knew that it had not fully repaid the foreign currency loan. Thus TDFCL contends that with the knowledge of such misstatement of the particulars of the loan and of the non-payment of part of the foreign currency loan, the declaration by Calico Textile to the Registrar that the charge had been satisfied was obviously false, and that the Registrar's purported certificate of discharge based, as it was, on such false declaration was necessarily void. In its prayer, therefore, TDFCL asked for an order for the rectification of the misstatement of the particulars on Form No 9 and on the certificate of registration of Form C2 by deleting therefrom all reference to Shs 16,626,500/= so as to reflect the amount secured by the debenture as being US $904,000 only. As intimated before, the learned Trial Judge granted the application and made orders in the following terms:

> 'I grant the application as prayed, with costs to the applicant. The second respondent is hereby ordered to, within fourteen (14) days from the date of the delivery of this ruling, rectify forms No 9 and C2 (plus his register of charges) to show that the amount secured by the Debenture discussed in this case is US $904,000 (or its equivalent in

other convertible currency) by way of a foreign loan, or, simply US $904,000 without any reference to Shs 16,626,500/=. The first respondent is ordered also to rectify his register of charges in relation to this loan so that it is shown therein that the Debenture is security for US $904,000 only, as the Debenture itself states.'

It is from that decision that this appeal is preferred.

In this appeal the first appellant, Calico Textile, is represented by Mr *M A Ismail*, learned advocate, the second appellant, the Registrar, is represented by Mr *S B Salula*, learned Senior State Attorney while the respondent. TDFCL is represented by *Captain A K Kameja*, learned advocate. Mr *Ismail* had filed five grounds of appeal but at the hearing he abandoned grounds 1 and 5 and argued the remaining three. Mr *Salula* filed four grounds but argued only the fourth ground because he abandoned ground 3 while grounds 1 and 2 were covered by Mr *Ismail* in the course of his submissions. Therefore altogether Mr *Ismail* and Mr *Salula* argued a total of four grounds which, for convenience are set out and renumbered as follows —

1. The learned judge grossly erred in law in not holding that there could be no rectification of the debenture/charge as the latter was already satisfied/discharged.
2. The learned judge erred in law in not holding that the application of the respondent was legally incompetent.
3. The learned judge erred in law in not holding that the application was time barred.
4. The learned judge erred in law in issuing decrees which are not enforceable in law.

The thrust of Mr *Ismail's* submission on the first ground is that once the charge was certified by the Registrar on 7 May 1992 to have been discharged, then this application which was filed only subsequently on 29 May 1992 was misconceived. For, as at the date of filing that application the charge no longer existed, and therefore no application for rectification could properly be made in respect of a non-existent charge. Learned counsel took the view that in the circumstances what TDFCL should have done was to apply to Court to have the charge restored in the first instance after which it was then open to it to apply for the desired rectification of errors in respect of the restored charge.

Mr *Ismail* who had also represented Calico Textile at the trial had raised this point there but the Trial Judge rejected it saying in effect

that the purported discharge was invalid in as much as the foreign currency loan had not been fully repaid. We are in complete agreement with the learned judge on this. There was ample evidence that Calico Textile has not repaid fully the foreign currency loan, and Calico Textile can have been under no misapprehension whatsoever about it. For instance, in para 18 of the applicant's affidavit it was stated that as at the date Calico Textile made the declaration to the Registrar that the charge had been satisfied, there still remained US $534,736 unpaid by Calico Textile to TDFCL. That averment was not controverted. Indeed both at the trial and during this appeal it was not seriously contended on behalf of Calico Textile that the foreign currency loan has been fully repaid. Even the grounds of appeal filed in this court do not put forward any such suggestion. Once it was rightly found that the foreign currency loan was not fully repaid, then the High Court judge was entitled to hold, as he did, that the Registrar's certificate of discharge was invalid as it was based on Calico Textile's false declaration that the charge securing that loan was satisfied, meaning that the loan itself was fully repaid.

There was the related question as to the amount of money secured by the debenture. That question arose because the Registrar's certificate of registration shows that the debenture was a security for Shs 16,626,500/= only while TDFCL contended that it was for US $904,000 (or the equivalent thereof in other convertible currencies). Mr *Ismail* appeared to take the view that the Registrar's certificate was conclusive evidence of the amount secured. The learned Trial Judge resolved that question by holding that the debenture was a security for US $904,000 (or the equivalent thereof in other convertible currencies). In doing so he cited with approval the decision in the English case of *In re Mechanisations (Eaglescliffe) Ltd* (1) which said in effect that in order to ascertain the terms and effect of the charge one has to look at the document creating the charge and not at the register.

Like the Trial Judge we are satisfied that that view correctly represents the law of this country on that point. Applying that principle to the facts of the present case then, it is common ground that both in the loan agreement and in the body of the debenture the amount of money stated is US $904,000 (or the equivalent thereof in other convertible currencies). The only variation of this appears on the cover page of the debenture wherein it is stated thus:

> 'Single Debenture for US $904,000 (or the equivalent thereof in other convertible currencies) being approximately Shs 16,626,500/=.'

It cannot seriously be maintained that the debenture was created as a security for Shs 16,626,500/= when there was no reference to that sum, or to that currency for that matter, either in the loan agreement or in the body of the debenture itself. Had the parties contemplated Tanzania Shillings as the currency of the loan, they would certainly have shown this in the loan agreement or in the body of the debenture.

It was submitted on behalf of TDFCL that Shs 16,626,500/= was inserted on the cover page of the debenture only for the purposes of determining the stamp duty which was payable in Tanzanian money upon registration of the debenture. That submission was not refuted and to our minds it sounds plausible. In any case we are firstly of the view that in ascertaining the terms and effect of the debenture one should not merely look at the title page of the debenture and ignore what is stated in the body of the debenture itself; rather one should look at the document as a whole which is exactly what the Trial Judge did. In addition the learned judge found that the loan agreement made no reference to Tanzania Shillings. Consequently he came to the conclusion that the debenture was a security for US $904,000 (or the equivalent thereof in other convertible currencies). We are unable to say that he erred.

In our view, therefore, the Trial Judge rightly found that the Registrar's certificate of discharge of the debenture was invalid in as much as it was based on Calico Textile's false declaration that the debenture was satisfied when it was not. Consequently it was open to the learned judge to set aside, as he did, the purported discharge certified by the Registrar because it was in fact no discharge at all; it was simply void. We reject Mr *Ismail's* contention that the proper thing for TDFCL to have done was to apply to Court to have the charge restored in the first instance. For, as we have amply demonstrated, the charge had not in fact been discharged; and as will be shown later, it was not necessary to bring separate actions, first for setting aside the purported discharge of the debenture and then for rectification of the misstatement.

That disposes of the first ground of appeal. The second ground appears to be a necessary corollary of the first ground. It alleges that the application by TDFCL was legally incompetent because, as we understand it, the applicant was seeking for rectification of errors in respect of a debenture which no longer existed as it had already been discharged. We have already held that the debenture in question has not been discharged and that it is still subsisting. The application was, therefore, legally competent, and this ground of appeal equally fails.

On the third ground alleging that the application was time barred, there was evidence that the debenture was registered in 1985 while this application was brought in 1992, that is, over six years later. Mr *Ismail* rightly pointed out that under the Companies Ordinance (Cap 212) no time limit is provided for within which such application should be brought. However, counsel for both sides rightly took the view that in those circumstances para 21 of Part III of the First Schedule to the Law of Limitation Act applied, in which case the application should have been brought within 60 days of the registration of the debenture. Mr *Ismail* charged that the application was not brought within that time limit, nor was there an application to the Court for the extension of that period. Learned counsel, therefore, contended that the application was wrongly entertained and it ought to have been thrown on a preliminary objection.

In response to that submission *Captain Kameja* contended that the application was not time barred. In his view the period of limitation did not begin to run against TDFCL, his client, until on 16 April 1992 when the Registrar wrote to TDFCL following its appointment of a receiver in respect of Calico Textile concerning the debenture in question. That, according to *Captain Kameja*,was the time when TDFCL learnt for the first time of the misstatement of the registered particulars of the debenture and that that was when time started to run. However, counsel went on, as soon as it was practicable thereafter, ie on 2 June 1992, TDFCL filed this application. All this was duly supported by the affidavit sworn on behalf of TDFCL by its then company secretary, Mr R C J Pesha, and no counter affidavit or affidavit in reply was filed in response thereto. Then, relying on the provisions of s 26*(c)* of the Law of Limitation Act, *Captain Kameja* submitted that the application was brought within 60 days of his client's becoming aware of the misstatement and, therefore, the application was timeous.

Section 26 says that:

> '26. Where in the case of any proceeding for which a period of limitation is prescribed—
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> *(a)* the proceeding is based on the fraud of the party against whom the proceeding is prosecuted or of his agent, or of any person through whom such party or agent claims; or
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> *(b)* the right of action is concealed by the fraud of any such person as aforesaid; or
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> *(c)* the proceeding is for relief from the consequences of a mistake, the period of limitation shall not begin to run until the plaintiff has

discovered the fraud or the mistake, or could, with reasonable diligence, have discovered it:' A

There follows a proviso which, however, is not relevant to the facts of the present case.

We think that *Captain Kameja* relied on the wrong paragraph of B
s 26. In our view the relevant provision here was para *(a)*. First of all it is to be noted that the matter involving this case started off as an innocent misstatement, but at a later stage it assumed the character of fraud. It began when the Registrar registered the particulars of the debenture as being a security for Shs 16,626,500/= only. This C
information appeared for the first time on the cover page of the debenture which, as already noted, stated that the debenture was for US $904,000 (or the equivalent thereof in other convertible currencies) being approximately Shs 16,626,500/=. It again appeared on Form No 9, being the particulars of the charge sent to D
the Registrar for registration, and showing that the debenture was for US $904,000 being approximately Shs 16,626,500/=. In registering the debenture, the Registrar obviously misstated the particulars thereof as being security for Shs 16,626,500/= only when in the loan agreement and in the body of the debenture itself there was no E
reference whatsoever to Tanzania Shillings, and indeed it was made clear therein that the loan was a foreign currency loan and the debenture was the security for such loan. However, the misstatement by the Registrar was innocent because the Registrar is not shown to be a party who stood to gain from such misstatement or F
who assisted another party to gain from such misstatement. So that if the story had ended there then in our view, *Captain Kameja* for TDFCL could properly have invoked s 26*(c)* above quoted to say that this was a proceeding for relief from the consequences of a mistake or misstatement. G

The situation, however, changed when Calico Textile, acting on that innocent misstatement, declared in its memorandum to the Registrar that the debenture had been satisfied when, as shown already, it knew fully well that it had not. Such false declaration was not an innocent misstatement or mistake on the part of Calico H
Textile. It was a deliberate act whereby Calico Textile took advantage of the Registrar's innocent misstatement of the terms and effect of the debenture and sought to extinguish its liability under the debenture to the detriment of TDFCL. Such conduct was fraudulent. It could not possibly be said to amount to an innocent mis- I
statement or mistake in the light of the full knowledge by Calico

A Textile that the foreign currency loan, for which the debenture in question was a security, had not been fully repaid.

Thus in terms of s 26*(a)* above quoted the proceeding involves or is based on the fraudulent conduct of Calico Textile. In other words this proceeding necessarily arose out of Calico Textile's fraudulent
B misrepresentation to the Registrar that the debenture had been satisfied. Therefore the issue of limitation in bringing such proceeding must be considered in the light of such fraudulent conduct of Calico Textile. Incidentally it is appropriate to point out here that it would be unnecessary to bring two separate actions, as canvassed
C by Mr *Ismail*, first to set aside the Registrar's purported certificate of discharge which was based on the fraudulent misrepresentation of Calico Textile, and then another one for the rectification of the misstatements or errors. That would amount to a multiplicity of actions involving unnecessary expense in terms of time and money
D while the end result would be exactly the same. Not only that. Calico Textile's fraudulent misrepresentation to the Registrar and the misstatement in the particulars of the charge (Form No 9), and in the Registrar's certificates of registration (Form C2) and of discharge are so closely connected that one could not meaningfully talk
E about them separately. We are increasingly of the view that it was open to the learned High Court judge to entertain the application for the rectification of errors and, in the process, to consider the validity or otherwise of the Registrar's certificate of discharge and make the appropriate order.

F The question now falling for consideration is, when did the period of limitation begin to run in this case? The relevant part of s 26 cited above says that:

> 'the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, or *could, with reasonable*
G *diligence, have discovered it*' (The emphasis is supplied.)

The view was taken that the period of limitation began to run on 6 May 1986 when Mr *Pesha* on behalf of TDFCL received the Registrar's certificate of registration containing the misstatement,
H because at that point Mr *Pesha* could, with reasonable diligence, have discovered the misstatement and hence the fraud underlying the said certificate. We think, however, that that view is untenable. In our view the expression '.. could, with reasonable diligence, have discovered it' refers to mistake only; it does not refer to
I fraud. We say so because in our opinion s 26 above quoted, and indeed the law in general, seek to protect victims of fraud, not the

perpetrators of fraud. Now if the above quoted expression is to be given literal interpretation, it would mean that the period of limitation begins to run when the victim of fraud could, with reasonable diligence, have discovered the fraud. So that a perpetrator of fraud could then set up a defence saying: 'Yes, I committed the fraud, but I am not liable because the victim thereof did not discover the fraud within the limitation period even though he (the victim) could, with reasonable diligence, have done so.' That, in our view, would be totally unacceptable. It is contrary to all principle and good conscience to allow the perpetrator of fraud to enjoy the fruits of his own vice.

Such interpretation runs counter to the long established principle laid down, inter alia, by the Court of Appeal for Eastern Africa in the case of *Lolkilite Ole Ndinoni v Netwala Ole Nebele* (2) wherein it was stated: 'A cardinal rule of interpretation is that one must, whenever one can, place such interpretation on a statute as will not lead to an absurdity.' More recently in the English case of *Nothman v London Borough of Barnet* (3) the Court of Appeal said in effect that the literal rule of statutory construction has been replaced by the purposive approach. That the Courts should adopt such a construction as will promote the general legislative purpose underlying the statute. And that whenever the strict interpretation of a statute gives rise to an absurd and unjust situation, the judges can and should use their good sense to remedy it, by reading words in, if necessary, so as to do what parliament would have done had they had the situation in mind.

We are of the settled view that the expression under review in this case is one where literal interpretation of it would lead to absurdity by enabling a perpetrator of fraud to benefit from his own vice, and to cause gross injustice to the victim of the fraud. It cannot have been in the contemplation of the Legislature to enact such a provision. Consistent with the approach in *Nothman's* case above cited, therefore, we consider it necessary to read words into the provision to mean that the period of limitation does not begin to run until the victim of fraud has discovered the fraud. The words '... could, with reasonable diligence, have discovered it' in that provision are to be limited to mistake. We think this is what Parliament would have done had they had the situation in mind.

We now apply this interpretation to the facts of the present case. As stated before, this was a matter which started off as an innocent misstatement but later developed into a fraud which eventually sparked off this litigation. In our view the limitation period started

to run after the discovery of the fraud which sparked off the litigation.

Mr *Pesha* discovered the fraud through the Registrar's letter dated 16 April 1992. According to that letter Calico Textile had misrepresented to the Registrar that it had discharged its obligation under the debenture. It is that discovery which led to the institution of this proceeding by TDFCL's application dated 2 June 1992. We therefore uphold *Captain Kameja's* submission that the application was timeous because it was brought within 60 days of the discovery of Calico Textile's fraudulent misrepresentation to the Registrar that it had discharged the debenture, knowing fully well that it had not.

Mr *Ismail* referred us to s 3 of the Law of Limitation Act and strenuously contended that once the application was found to be time barred, the Trial Judge had no power to extend the time on his own and proceed to hear it on the merit as he did. In support of such submission learned counsel referred us to the decision of the Court of Appeal for Eastern Africa in the case of *Osman v The United India Fire and General Insurance Company Ltd* (4). With due respect to the learned counsel, however, the provisions of the law he has cited and his submissions on the point are all irrelevant because, as we have endeavoured to show, the application here was timeous and, therefore, the question of the Trial Judge extending the time did not arise. The third ground of appeal, therefore, also fails.

Ground 4 criticises the Trial Judge for issuing decrees which are not enforceable in law. There is some merit in this ground. The learned judge granted the application as prayed, meaning that *(a)* Form No 9 being the particulars of the charge delivered by Calico Textile to the Registrar for registration be rectified, and *(b)* Form C2 being the certificate of registration of the charge issued by the Registrar also be rectified. It is clear that Form No 9 is to be rectified by its author, Calico Textile while Form C2 is also to be rectified by its author, the Registrar. The learned judge, therefore, erred when he went on to order the Registrar to rectify Form No 9; that form is to be rectified by Calico Textile. However, the error was not fatal because no one was prejudiced thereby. The error is accordingly corrected as indicated above while the rest of the award is affirmed.

In the final analysis, and for the reasons set out herein before, the appeal fails and it is dismissed with costs.