

Luigi Ambrosini, Limited - - - - - *Appellants*

v.

Bakare Tinko and another - - - - - *Respondents*

FROM

THE SUPREME COURT OF NIGERIA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL, DELIVERED THE 15TH OCTOBER, 1929.

Present at the Hearing :

LORD DARLING.

LORD TOMLIN.

SIR LANCELOT SANDERSON.

[*Delivered by* LORD DARLING.]

Allen, one of the defendants, was a man in the employment of the plaintiffs, and he together with the second and third defendants—Tinko and Bickersteth—had entered into a bond in these terms :—

“ Know all men by these presents that we Victor Ade Allen of 9 Adam Street, Lagos, Nigeria (hereinafter called the Principal Obligor) of the one part, and (1) Bakare Tinko, Trader of Tokunboh Street, Lagos (2) Charles Togonu Bickersteth of Tokunboh Street, Lagos, Nigeria (hereinafter called the Sureties) of the other part, are held and firmly bound to Luigi Ambrosini their heirs administrators and assigns in the sum of Five hundred pounds sterling (£500) for which payment well and truly to be made we jointly and severally bind ourselves and each of us our and each of our heirs and executors and administrators by these presents sealed with our respective seal dated the 15th day of January, 1924.

“ Whereas at the request of the Principal Obligor and the Sureties the said Luigi Ambrosini has agreed to engage the Principal Obligor as Produce Buyer at Lagos or elsewhere in Nigeria upon the said Principal Obligor and the said Sureties entering into a Bond and giving the said Luigi Ambrosini a security in the above mentioned sum of Five hundred

pounds sterling (£500) with such condition as is hereunder written for the faithful discharge by the said Principal Obligor of his duties as such Produce Buyer.

“ Now the Condition of the above written bond or obligation is such that if the said Principal Obligor shall faithfully discharge his duties as such Produce Buyer or the Sureties their heirs administrators and assigns shall of all times hereafter indemnify and keep indemnified the said Luigi Ambrosini their heirs administrators and assigns against all losses costs shortages damages and expenses which the said Luigi Ambrosini may pay sustain or be put into by reason of any act of embezzlement mismanagement, neglect, reclamation [*sic*] of business secrets, or default of or by the said Principal Obligor whilst in the employ of the said Luigi Ambrosini.

Then in any of the cases the above written Bond shall be void otherwise the same shall be and remain in full force and virtue.

“ (Sgd.) ADE ALLEN (Seal).

“ (Sgd.) B. TINKO (His X Mark). (Seal).

“ (Sgd.) C. T. BICKERSTETH (Seal).

“ Signed, Sealed, and Delivered by the within named parties the foregoing Bond having been first read over and explained to Bakare Tinko in the Yoruba language when he seemed perfectly to understand the same before affixing his mark thereto in the presence of :

“ (Sgd.) ?

Solicitor's Clerk,

10, Campos Square, Lagos.”

The action was brought against Allen for money said to be due from him to the plaintiffs, and against the second and third defendants, the present respondents, who were sued as sureties for Allen.

At the trial on the 17th March, 1926, the bond was put in, and the second and third defendants admitted themselves to be liable to the extent of the liability of the first defendant. On the 19th March, 1926, according to the note of the trial judge, Van der Meulen, J. :--

“ Irving—counsel for the Plaintiffs—here states that without admitting any legal liability he is prepared to accept judgment for £600 if this is agreed to by the defendant. After Counsel have conferred Doherty—Counsel for defendant Allen—states that his client accepts judgment for £550 against him.”

“ Adjourned to 22.3.26 for the two sureties to consider their position.”

The words of plaintiffs' Counsel, “ without admitting any legal liability ” appear to refer to the counter-claim of defendant Allen.

On the 23rd March, 1926, Van der Meulen, J., gave judgment, of which the note is :--

“ The Court states that in view of the defendant's admission of liability for £550, and the plea of the 2nd and 3rd Defendants that they are liable to the extent to which the 1st Defendant is liable, such amount not exceeding the amount for which they have given security, there must also be judgment against 2nd and 3rd Defendants for £500 the amount for which they have given security.

“ The Court therefore gives judgment for the Plaintiffs against the 1st Defendant for £550 on the claim and against the 2nd and 3rd Defendants jointly with the 1st Defendant for £500 of that amount.”

From this judgment the second and third defendants appealed, a ground of appeal being that the learned judge was wrong in holding that the second and third defendants were bound by the first defendant's submission to a judgment by consent, to which they refused to assent.

After various vicissitudes the case came before the Supreme Court of Nigeria on the 12th January, 1927, when that Court directed that the case be sent back to the Court for re-trial as between the plaintiffs and the second and third defendants.

The re-trial began on Friday, the 21st October, 1927, before Petrides, J. Several adjournments took place. On the 18th January, 1928, after a final hearing the Court adjourned to consider the judgment.

On the 1st February, 1928, Petrides, J., gave judgment. The learned judge recounted the proceedings which had taken place and then said :—

“ At the re-trial before me further evidence was taken and judgment reserved.

“ While considering my judgment I found that while the account Ex. ' A ' filed by the plaintiffs showed that a balance of £732 15s. 4d. was due by the 1st Defendant on the 31st January, 1925, this amount was arrived at by taking an account between the Plaintiffs and the 1st Defendant from the 4th April, 1923, to the 31st January, 1925. The Bond Ex. ' B ' on which the 2nd and 3rd Defendants were sued was not, however, executed till the 15th January, 1924, from which date the Plaintiffs suffered no losses, costs, shortages, damages and expenses by reason of any act of the 1st Defendant. In fact, far from the Plaintiffs suffering any loss after the execution of the Bond the 1st Defendant reduced his liability to them by a sum of £499 15s. 4d.

“ It seemed to me that in view of the facts stated in the preceding paragraph the Plaintiffs had failed to establish that the 2nd and 3rd Defendants were liable as sureties under the Bond.”

The learned Judge thereupon gave judgment for the second and third defendants. From this judgment the plaintiffs appealed on the 29th March, 1928, alleging as a ground of appeal :—

(1) Judgment was wrong in law in that the learned Judge after reserving judgment decided the case in the defendants' favour on an issue or plea that had not, throughout the proceedings, been raised or tried.

Judgment was delivered by the Supreme Court of Nigeria on the 31st May, 1928. There was much argument as to whether the defendants should be allowed to amend their plea so as to raise the defence discovered by Petrides, J., and ultimately the Court of Appeal allowed the amendment, but directed that the second and third defendants should pay all costs as the price of so great an indulgence. The Court of Appeal then, by a majority, dismissed the plaintiffs' appeal; the Court taking the view that the point discovered by Petrides, J., was a good one entitling the sureties to judgment.

It may be that the point discovered by Petrides, J., is one which was, as he himself regarded it, fatal to the plaintiffs' claim ; and the Court of Appeal agreed with him ; but in their Lordships' opinion that point has not necessarily all the consequences which they imputed to it ; since it ignores the rule in *Clayton's* case 1 Merivale 572 as to the appropriation of subsequent payments in a running account to previous items of debit in that account. That rule may, for all they knew, be applicable in this present case. It appears to their Lordships that the account between the plaintiffs and Allen was one to which, from its nature, the rule in *Clayton's* case would be applicable ; but evidence might be called to show that properly this cannot be so ; and, were such evidence given, it is obvious that it would then be permissible to the plaintiffs to call evidence in rebuttal. In their Lordships' view Petrides, J., in the course of his consideration of his judgment, discovered a point until then unargued and unsuspected. It was in the course of his judgment sprung upon the plaintiffs, who had no chance of dealing with it, nor, from that moment, with the merits of the case. He gave judgment for the defendants, the present respondents. The plaintiffs, the present appellants, thereupon appealed, as shown, from that judgment ; and the Supreme Court in the course of the hearing of that appeal amended the record in favour of the defendants the sureties. No opportunity was thereafter given to the plaintiffs of dealing with the matters involved on the new basis which that amendment established : yet, certainly, this should have been afforded them.

In the opinion of their Lordships the judgment of Petrides, J., in favour of the second and third defendants and the order of the Supreme Court of Nigeria should be discharged, and a new trial ordered. They would suggest that this trial should be had on pleadings in writing—as the case is not a simple one

Further, in their Lordships' opinion, there should be no order as to costs in either of the proceedings below, except that the costs of the first trial up to the production of Exhibit G, should be in the discretion of the trial judge who may re-hear the case. No costs of this appeal should be allowed.

Their Lordships will humbly advise His Majesty accordingly.

In the Privy Council.

LUIGI AMBROSINI, LIMITED,

v.

BAKARE TINKO AND ANOTHER.

DELIVERED BY LORD DARLING.

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