IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

CIVIL APPLICATION NO. 54 OF 1999

DR. EPHRAIM NJAU .... APPLICANT

VERSUS

TANZANIA PHARMACEUTICAL INDUSTRIES LIMITED ... RESPONDENT

(Application for Review from the Judgment of the Court of Appeal of Tanzania at Dar es Salaam

(Samatta,J.A, Lugakingira,J.A And Nsekela, J.A)

dated the 21ST day of May, 1999 in Civil Appeal No. 6 Of 1998

....

RULING

26th May, 2003 & 27th June, 2007

NSEKELA, J.A.:

This is an application invoking the inherent powers of the Court to review its own decision dated the 21.5.99 in Civil Appeal No. 6 of 1998. The applicant/respondent, one Dr. Ephraim Njau was the losing party. The respondent, Tanzania Pharmaceutical Industries Limited was the successful party.

The affidavit in support of the application was sworn by Mr. Colman Mark Ngalo, learned advocate who represented the applicant

in Civil Appeal No. 6 of 1998. For reasons which will become apparent later, we take the liberty to reproduce paragraphs 3 to 7 inclusive which provide as follows-

> "3. That the applicant has instructed me to make an application for REVIEW of the said judgment by the full bench on the following among other grounds:-
>
> 3.1 That between Civil Appeal No. 3/96 and Civil Appeal No. 6/98 there are conflicting matters of law in respect of company law, law of contract and labour laws which require resolution by the full bench.
>
> 3.2 There are factual errors in the judgment and these errors need to be addressed by the full bench.
>
> 3.3 That in Civil Appeal No. 6/98 the Court observed that:
>
> (a) The Board of Directors of the Respondent had-
>
> "RESOLVED that Dr. E. Njau the present Quality Control Manager be and is hereby appointed to the post of General Manager Counterpart with effect form 4.10.83 with a probationary period of six months;
> ADVISED that the candidate should be informed by NCI about his weakness and be advised to improve on his public relations with his colleagues and subordinates and avoid cliques" .... See pg 16 of the CAT judgment in Civil Appeal No. 6/98. The

said judgment is annexed hereto and marked "A".

(b) The relationship between NCI and its subsidiaries was that the subsidiaries were to pay management fees to the parent company NCI, see page 10 of the judgment in CAT 6/98.

(c) NCI wrote a series of letters informing Dr. E. Njau, the applicant, about his appointment and terms and conditions therein.

(4) The Court relying on Civil Appeal No. 3/96, held that all Holding Companies or Corporations are always employers of staff posted to group or subsidiary companies, hence Dr. E. Njau was employed by NCI and not TPI, as manifested from the series of letters to Dr. E. Njau from NCI. See page 16 of 3/96 is annexed hereto and marked "B".

(5) That in Civil Appeal No. 3/96 the Court observed unlike in Civil Appeal No. 6/98 that:-

(i) The evidence on admission showed that the respondent on Yonah Mapenzi was from the beginning employed by the Holding Company i.e. B.I.T in its individual capacity and then posted to the subsidiary company.

(ii) It was the established regulation which was known to all other companies under BIT that Senior Personnel are appointed by BIT under its individual capacity and then posted to Group Companies.

(6) That the facts in the two cases are completely different.

(7) That I believe on reading both judgments that:-

(a) Had the Court considered the effect of the RESOLUTION of the respondent appointing the applicant as General Manager together with the fact that the NCI were the Management Agent of the respondent, the Court would have arrived at a different conclusion, or alternatively;

(b) Had the Court considered the series of letters written by the General Manager of NCI to the applicant as having been written by an Agent of the respondent, the Court would have arrived at a different conclusion."

The exercise of the powers of review by this Court was explained in the case of **Transport Equipment Limited** v **Devram P Valambia**, Civil Application No. 18 of 1993 (unreported) and more recently in **Tanzania Transcontinental Trading Company Limited** v **Design Partnership Limited** Civil Application No. 62 of 1996 (unreported) and **Chandrakant Jushubhai Patel** v **R** Criminal Application No. 2 of 2000 (unreported). The Court can be moved to exercise its inherent review jurisdiction in the following circumstances-

(i) where there is a manifest error on the face of the record which has resulted in a miscarriage of justice,

(ii) where a party is wrongly deprived of an opportunity to be heard;

(iii) where the decision was obtained by fraud.

Mr. C.M. Ngalo, learned advocate for the applicant, clarified to the Court that although the affidavit in support also refers to Civil Appeal No. 3 of 1996, an appeal from the decision of Msumi, J. (as he then was), the application before the Court related only to Civil Appeal No. 6 of 1998 arising from a decision of Munuo, J. (as she then was) . With that clarification, the learned advocate submitted that the only issue before the Court was whether or not the applicant was an employee of the respondent or of the Holding Corporation, National Chemical Industries (NCI). The learned advocate contended that the applicant was not appointed by NCI. The conclusion by the Court was contrary to the evidence before and this resulted in an error apparent on the face of the record. He added that NCI were the Managing Agents and not the Principal. He strongly criticized exhibit P3, a letter from NCI appointing the applicant as General Manager of the respondent, arguing that it was wrongly considered by the Court. The Court should have taken into consideration a resolution of the 16th Meeting of the Board of Directors of the respondent, exhibit P2. In addition, he submitted that exhibit P3 was different from the resolution of the Board, and this was the source of the confusion.

Mr. Mwaluko, learned advocate for the respondent strongly countered the submissions made by Mr. Ngalo. He submitted that the applicant did not point out any of the established instances of review as enunciated by this Court in its decisions including Civil Application No. 18 1993, **Transport Equipment Limited** v **Devram P Valambia** (unreported). In addition, Mr. Mwaluko contended that paragraph 7 of the affidavit in support was inviting the Court to re-evaluate the evidence and come to different conclusions. That a decision is erroneous in law is no ground for ordering review.

With respect, we are in agreement with Mr. Mwaluko's submissions. The applicant did not come out clearly as regards the ground being relied upon to move the Court to invoke its inherent review jurisdiction. For what we could glean from the affidavit in support, the applicant was complaining that there a manifest error on the face of was the record which has resulted in a miscarriage of justice. What was that error? He alleged that the Court misconstrued exhibits P2 to P4 and came to an erroneous conclusion that the applicant was not an appointee of the respondent. This Court stated, inter alia, that-

> "................. it is clear that the Board of the appellant company could only recommend to the appointing authority, the Holding Corporation NCI, which then actually appointed the respondent and as it were

> posted him to the appellant company as its General Manager. The role of the appellant company ended with recommending the candidate. After this all subsequent steps, i.e appointment and confirmation of the candidate were out of his hands. These were done by NCI without reference to the appellant company."

In **Patels'** case, supra, this Court stated three ingredients that have to co-exist in order for the error to be capable of grounding a review. First, there ought to be an error; secondly, the error has to be manifest on the face of the record and thirdly, the error must have resulted in miscarriage of justice. In **Mogha's Law of Pleadings in India** (15th edition) the learned authors had this to say at page 366-

> "What is apparent error may differ from case to case or from one judge to another. The test should be that no error would be apparent unless it was self-evident. It should not require any elaborate argument to establish it and there could reasonably be no two opinions entertained about it. An error apparent on the face of the record must be such error which must strike on mere looking at the record. The Court should not be required to look in into other evidence. In the expression "error apparent on the face of it" the emphasis is on the word "apparent" and not on the "error". The error should be such as can be found out from the record..... However, a mere failure to interpret the law

> correctly is not an error apparent on the face
> of the record".

As correctly submitted by Mr. Mwaluko, the applicant, as is evident in paragraph 7 of the affidavit in support, wants the Court to reappraise the evidence on the record in order to establish the error. It is clear from the exposition of the law above, the error must be "obvious" and the Court should not look into other evidence to find out the error. It would appear that Mr. Ngalo, would like the Court to re-read the exhibits, particularly exhibits P2 to P4 in order to discover the error. This, in our view, would amount to an exercise in appellate jurisdiction. Even if the judgment proceeds on an incorrect exposition of the law, it is no ground for review. If the Court applies its mind to a particular fact or law and then comes to a conclusion after conscious reasoning, it can never be contended even if the conclusion was wrong, that the error is one apparent on the face of the record.

In the result, and for the foregoing reasons, we dismiss the application with costs.

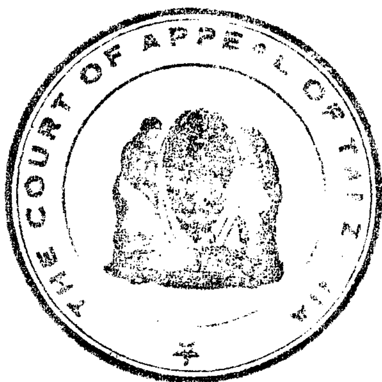
DATED at DAR ES SALAAM this 14th day of June , 2007

B.A. SAMATTA
CHIEF JUSTICE

JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

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



S.M. RUMANYIKA
DEPUTY REGISTRAR