IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: RAMADHANI, J.A., MROSO, J.A., And MUNUO, J.A.)

CIVIL APPEAL NO. 54 OF 2002

BETWEEN

INDEPENDENT POWER TANZANIA LIMITED ..... APPELLANT

AND

VIP ENGINEERING AND MARKETING LIMITED .... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Dar es Salaam District Registry, at Dar es Salaam)

(Chipeta, J.)

dated 12th March, 2002
in
Misc. Civil Cause No. 49 of 2002

J U D G M E N T

MROSO, J.A.:

This is an appeal against a ruling and order of the High Court, Chipeta, J., dated 12th March, 2002, after leave was duly obtained from the High Court under Section 5 (1) (c) of the Appellate Jurisdiction Act, 1979.

During a dispute between the appellant and the respondent, the latter petitioned the High Court for the winding up of the appellant company. But the appellant intended to refer the dispute

to arbitration and considered that the winding up proceedings would prejudice the intended reference to arbitration. So, it applied under section 6 of the Arbitration Ordinance, Cap. 15 for stay of the winding up proceedings. It was prayed that the application for stay of proceedings be heard and decided before the respondent's application was heard. The court obliged and ordered the application for stay to be heard three days later, that is on 7th March, 2002. On that date the High Court ordered the parties to file written submissions, the last such submissions to be filed by 29th March, 2002, and that the ruling would be on notice.

Before the court could adjourn to await the filing of written submissions as ordered Mr. Ndyanabo, learned advocate for the respondent, made an oral application to court for the appointment of an "Interim Provisional Liquidator" or in the alternative, payments known as capacity charges be ordered to be deposited into court. The amount involved, according to Mr. Ndyanabo, was USD 195.0 million which he feared the appellant might use to pay for dubious liabilities.

Mr. Kesaria, learned advocate for the appellant, resisted that prayer, arguing that it would be more appropriate to wait for the decision in the application for stay of proceedings because, if that application were allowed, all proceedings including those relating to the appointment of an "interim provisional liquidator" would be stayed.

Regarding that oral application by Mr. Ndyanabo the court fixed a ruling to be delivered five days later, 12th March, 2002. In the ruling the High Court ordered the appellant to deposit into the court the amount of the capacity charges, as an interim measure. It is that order which the appellant intends to challenge in this appeal.

Mr. Kesaria filed and argued three grounds of appeal. First, that the learned High Court Judge erred in hearing and ruling on the respondent's oral application prior to the disposal of the appellant's application for stay of proceedings. Second, that the judge erred in hearing and determining the respondent's oral application "without first establishing whether or not it was fit to entertain the oral application ... in contravention of the *proviso* to Rule 2 of Order XLIII of the Civil Procedure Code, 1966". Third, that the learned

judge erred in hearing and determining the respondent's oral application which in effect amounted to the disposal of an earlier application to the court which the judge had agreed should be heard after the application for stay of proceedings had been disposed of.

Regarding the first ground of appeal Mr. Kesaria's main bone of contention was that since the parties had agreed to a submission to arbitration it would be prejudicial to him to take part in the petition for winding up and the ancillary prayers made in it and that that was the reason he applied to court under section 6 of the Arbitration Ordinance, Cap. 15 of the laws for stay of those proceedings. In entertaining the oral application after the same court had agreed to hear first the application for stay of proceedings, the court was contradicting itself and was in effect forcing the appellant to take a step in the proceedings which the respondent had filed in court.

Mr. Nassoro, learned advocate who appeared with Mr. Ndyanabo, contended that the appellant cannot claim to have been guarding itself against taking any steps in the winding up proceedings because it had in fact already taken part by praying for

extension of time to file a counter-affidavit to the petition for winding up.

As for the second ground of appeal Mr. Kesaria argued that conditions for allowing an oral application in terms of the *proviso* to rule 2 of Order XLIII did not exist and, therefore, the court had no valid grounds for allowing the respondent to prosecute the oral application. He cited the case of **Cooperative and Rural Development Bank v. Filton (Tanzania) Limited** [1996] TLR 122 to support his argument that an oral application is allowed only in rare, non-contentions litigation, which the application made to the judge was not.

In response Mr. Nassoro said that the case which Mr. Kesaria cited was authority that an oral application may be entertained if there is need for prompt action to protect the interests of a party. The oral application which the respondent made and which the court entertained was intended to address a situation which could not wait for the formal procedure of filing a chamber application supported by an affidavit which would be met by a counter-affidavit and a formal hearing. The prevailing circumstances were such that an interim

order of the court was immediately needed. The formal procedure entailed a delay of an indefinite nature before a remedy was made available, which would prejudice the interests of the respondent, more so because the court had observed intense mutual distrust between the parties. Since the order sought was only interim it did not pre-empt a subsequent full hearing of the main application or the application for stay of proceedings.

In arguing the third ground of appeal Mr. Kesaria submitted that the High Court had acted on bare allegations which were not substantiated by any evidence, even by an affidavit, and that the appellant who could not advance before the judge arguments to oppose the oral application for fear of contravening section 6 of the Arbitration Ordinance, was condemned unheard, contrary to the rules of natural justice.

Mr. Nassoro informed the Court that the petition by the respondent did not contain a prayer for an interim appointment of a liquidator. The interim order sought and granted in the oral application was merely preservatory. It was to expire as soon as the application for stay of proceedings was decided. It was therefore

proper, according to Mr. Nassoro, for the High Court to grant the order for the capacity charges to be deposited into court where they would be safe from use by either of the parties.

During the proceedings before Chipeta, J. there was no denial that there had been an agreement between the parties to submit to arbitration in the event of a dispute between them. A dispute had arisen and the respondent petitioned the High Court for, *inter alia*, a winding up order. How was the appellant to react? Section 6 of the Arbitration Ordinance reads as follows –

> 6. Where any party to a submission to which this Part applies, or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance, and before filing a written statement, or taking any other steps in the proceedings, apply to the court to stay the proceeding; and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the

> proceedings were commenced, and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The appellant intended to submit the dispute to arbitration in accordance with clause 18 (a) of the Promoters/Shareholders Agreement. In that case he had to avoid appearing to be taking a step in the winding up proceedings and to apply to the High Court for stay of the winding up proceedings. We think that the oral application for the appointment of "an interim provisional liquidator" is a part of the winding up proceedings and the appellant was entitled to desist from taking part in that application in order not to prejudice his right to refer the dispute to arbitration. In view of the application by the appellant for stay of proceedings the High Court should not have entertained the oral application by the respondent before deciding on the application for stay of proceedings. With respect, we agree with the appellant that the High Court erred in allowing the respondent to make the oral application for an interim order and in hearing it and deciding on it, more so because if the

court granted the stay order it would mean that all proceedings relating to the petition for winding up would be stayed pending the submission by the parties to arbitration.

Going by what is seen in the record, there was no justification for the High Court to entertain an oral application rather than a formal application by chamber summons supported by an affidavit. But even if the respondent had made a formal application under Order XLIII rule 2 it would still be improper in the circumstances for the court to hear and decide on the application. The appellant would not be able to canvass fully its objection to the application without compromising its right to submit the dispute to arbitration. The court should have known that the appellant was handicapped and could not be heard.

Mr. Nassoro contended that the appellant did in fact address the court in the matter. The record shows that indeed Mr. Kesaria addressed the court albeit briefly. He is recorded as having said –

> My Lord there is already such application. If proceedings are stayed everything would be stayed. My Lord, submissions are made from

> the Bar and not on oath. It is already in the application. The money will be used for recurrent costs. Payments from TANESCO are required for costs of producing power. If a provisions (sic) liquidator is pointed (sic) TANESCO will terminate the agreement with I.P.T.L. under para 16.1 (e) of the Agreement.

It may be argued that the brief address to court by Mr. Kesaria might have amounted to taking a step in the proceedings but that issue is not before this Court at present. Besides that in itself goes to show the difficult position the appellant was put into, being forced, as it were, to say something in connection with the unexpected oral application which the High Court had wrongly entertained. Mr. Kesaria believes he was still refraining from participating in the unscheduled hearing of the oral application. Be that as it may.

We are satisfied that the judge erred in hearing the oral application and since Mr. Kesaria could not advance full arguments against the oral application the appellant was in effect condemned unheard.

For what we have said is sufficient for us to dispose of the appeal in favour of the appellant. The observations that follow are made merely for the sake of completeness.

We agree with the appellant that the prerequisites for entertaining an oral application under the *proviso* to Rule 2 of Order XLIII of the Civil Procedure Code, 1966 had not been met. The Court had to consider if a fit situation existed before it could decide to entertain the oral application. The only reason given by Mr. Ndyanabo for the oral application was that it was feared that the appellant would use the capacity charges to pay for dubious liabilities. The record shows that there was no elaboration of that serious allegation which was made from the bar. Had the High Court applied its judicial mind to that bare allegation it would have found that no proper circumstances were put before it to give justification for it to decide that it was fit to entertain the oral application. In the case of **CRDB Bank v Filton** cited by the appellant the High Court found that an oral application which was made because a written application had not been admitted by the court did not meet the requirements of the *proviso* to rule 2 of order XLIII of the CPC, 1966

because no grounds had been given to show that it was a fit matter for an oral application.

We also agree that the normal procedure for making an application in the High Court and the subordinate courts is by way of a chamber application supported by affidavit and that oral applications have to be justified before they can be entertained. The reasons which Mr. Nassoro gave before us as to the urgency of the intended order for the appointment of an interim provisional liquidator do not appear to have been given before Chipeta, J. So, even if it were assumed that the Judge could have entertained an oral application the grounds for it had not been laid.

We do not agree with the appellant that the oral application pre-empted an earlier application by the respondent which was filed on 25th February, 2002. The oral application was for the appointment of an interim liquidator. If the High Court ruling is anything to go by it seems that the interim order sought related to the month of March, 2002 only. The judge said –

> Mr. Ndyanabo, learned counsel for the petitioner, made an oral application for an interim order appointing a provisional Liquidator or, in the alternative, an interim order that Capacity Charges due to be paid to the respondent by TANESCO at the end of this month be paid into court so as to protect the petitioner's interests because it is feared that the Respondent could use the money to pay dubious liabilities (our emphasis).

If, therefore, what was said in the ruling was correct, it cannot be said that the oral application pre-empted the prayers in the petition. Even so, as we have already held, the oral application ought not to have been entertained in any case.

For the reasons which we have given the appeal is allowed. The proceedings and the ruling of the High Court regarding the oral application are quashed and the order to deposit the capacity charges in court is set aside. The appellant to get its costs.

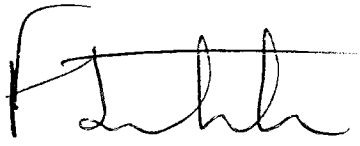
DATED at DAR ES SALAAM this 24th day of November, 2003.

A.S.L. RAMADHANI
JUSTICE OF APPEAL

J. A. MROSO
JUSTICE OF APPEAL

E. N. MUNUO
JUSTICE OF APPEAL

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



(F. L. K. WAMBALI)
DEPUTY REGISTRAR