

IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR ES SALAAM

COMMERCIAL CASE NO. 85 OF 2003

TANZANIA SUGAR PRODUCERS'  
ASSOCIATION.....PLAINTIFF  
VERSUS

THE MINISTRY OF FINANCE  
OF THE GOVERNMENT OF  
UNITED REPUBLIC OF TANZANIA.....1<sup>ST</sup> DEFENDANT  
THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT  
21<sup>ST</sup> CENTURY FOOD AND  
PACKING COMPANY LTD.....3<sup>RD</sup> DEFENDANT

R U L I N G

KIMARO, J.

The plaintiff's suit is founded on a tax remission which was granted to the third defendant. The plaintiff's pleadings show that the plaintiff is a company limited by guarantee. Members of the plaintiff are Kilombero Sugar Company Limited, Mtibwa Sugar Estate Limited, TPC Limited and Kagera Sugar Limited. The members are the former parastatal sugar Companies.

The Presidential Parastatal Sector Reform Commission (PSRC) did, on behalf of the Government of the United Republic of Tanzania enter into

sale agreements with the sugar companies wherein the Government sold either complete interests or controlling interest in the former parastatal sugar companies.

The plaintiff avers that, the negotiations which led to the sale of the sugar parastals , made it clear, and there was an understanding that the viability of the sugar industries would require the government through the 1<sup>st</sup> Defendant to institute and maintain measures which would prevent the dumping of sugar into Tanzania by countries which have oversupplies of sugar. In other words it was an implied fundamental term of the sale agreement that the government would take measures to prevent anti-dumping.

The plaintiff avers further that working on this spirit, the government did introduce duties and taxes on imported sugar as follows: Import duty 25% - Suspended Duty of 20% VAT 20% MDU of USD 390 per tone of imported sugar.

The plaintiff's complaint is that the tax remission which was granted to the 3<sup>rd</sup> Defendant by the 1<sup>st</sup> Defendant to import 7,000 tones of Industries/refined sugar vide GN 68 of 28<sup>th</sup> March 2003 would enable the 3<sup>rd</sup> Defendant to import thousands of tones of refined sugar under reduced taxes without taking into consideration the spirit guiding the sale

agreements. The imported sugar under the tax remission is being used for blending purposes to produce sugar for domestic consumption, thus unfairly competing with sugar produced locally.

The plaintiff's further complaint is that the 3<sup>rd</sup> Defendant does not fall within the definition of an Industrial User of sugar as defined by Section 2 of the Sugar Industry Act No.26 of 2001 and does not qualify for tax remission.

It is also averred by the plaintiff that if the 3<sup>rd</sup> Defendant's application for importation of 36,000 tones of industrial/refined sugar pending before the Technical Committee of the Sugar Board of Tanzania is granted on a preferential industrial tariff, it will discourage the efforts to promote sugar production in Tanzania and will contravene the government Policy to promote and protect the sugar industry in the country. It will also blatantly breach the obligations which the government undertook under the sale agreement.

The plaintiff prays for:

*“ (a) Permanent injunction/order restraining the 1<sup>st</sup> Defendant from issuing tax remissions to any body corporate, natural persons or*

*whosoever for importation industrial/refined sugar for blending purposes.*

*(b) Declaration that any issuance of tax remission for industrial sugar for blending purposes by the 1<sup>st</sup> Defendant is against the government policy hence null and void.*

*(c) Costs of this suit.*

*(d) Any other and further relief(s) that this Honourable Court may deem fit and just to grant.”*

Although the defendant admitted some of the facts pleaded by the plaintiff they disputes some of the allegations and prayed for the dismissal of the suit.

The 3<sup>rd</sup> Defendant also raised preliminary objections on the following grounds:

*“ (i) The Plaintiff does not have locus standi to institute the suit.*

*(ii) That the suit is not based on a commercial matter and thus the court lacks jurisdiction.*

*(iii) That the suit is res judicata in that the issue of the right of the 3<sup>rd</sup> Defendant to import white sugar as industrial sugar has already been finally and conclusively determined by the High Court in Miscellaneous Civil Cause No. 114 of 2002.”*

.The Learned Advocates appearing for the parties:- Kato, Kashonda and Mnguto Advocates for the plaintiff, Mr. Kamba Principal State Attorney for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and Dr. Lamwai for the 3<sup>rd</sup> Defendant were directed to file written submissions in respect of the preliminary objections. The 3<sup>rd</sup> Defendant and the plaintiff complied. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not respond. It may be because their role is not vital in the determination of the objections raised.

Dr. Lamwai's submissions in support of the first point of objection on the locus standi of the plaintiff to institute the suit is that in the first place, the alleged agreements for sale of the sugar parastatals have not been annexed to the proceedings. Even if they were annexed, they must have been separate agreements for each of the companies which constitutes membership to the plaintiff. The plaintiff cannot sue to enforce the agreements because it is not a party to the agreements. It is neither a necessary party nor a proper party in the suit. Its presence in the suit is not necessary so as to have an effective decree so as to constitute it into

a necessary party. There is no right of relief vested on it. Dr. Lamwai submitted further that the plaintiff is not a proper party and has not even been appointed an Attorney for the different companies so as to be regarded as a Recognised Agent under Order III rule I of the Civil Procedure Code, 1966. The plaintiff does not have a right of action in law to sue the defendants; it being jointly or severally.

The plaintiff's Advocate submitted in reply that the status of the plaintiff confers upon it the right to sue and be sued. This status is derived from its registration under the Companies Ordinance Cap.212. It is registered as a company limited by guarantee. As regards the sale agreements between PSRC and the various sugar producing companies, it was submitted that they were annexed to the plaint and dully served on the 3<sup>rd</sup> Defendant.

The plaintiff argued that since the plaintiff is an association which represent the various sugar producing companies which were parties to the sale agreements with the Tanzania Government, it has a direct interest in the matter and has acquired the title of the beneficiary to the contracts. The plaintiffs advocate acknowledged the fact that under the doctrine of the privity of the contract it is only the parties to the contract who can enjoy the benefits of the contract. However, it was submitted that third party beneficiary, like the plaintiff can sue on quasi contract based

upon a public right brought about by a statutory provision. The plaintiff's advocate said that the plaintiff is challenging a mischief brought about by a statutory instrument namely the Government notice which seeks, to bring unfair trade practice as it grants exemption to other persons involved in the trade, and since it is centred on both the Sale Agreement and statutory instruments, then any person whether involved in the sugar trade or sugar industry including a consumer, producer, importer and others has a right of action in public law and tort as the doors in tortious liability claims are not closed.

In reply Dr. Lamwai submitted that he was not disputing the capacity of the plaintiff to sue and be sued. What he is disputing is the capacity of the plaintiff to sue under the agreements upon which the cause of action is founded. Dr. Lamwai said the plaintiff's cause of action is that the government has breached one of the fundamental terms of the agreements. It then means that the necessary and proper parties to sue should be the individual member companies of the plaintiff but not the plaintiff. Dr. Lamwai submitted further that since the members of the plaintiff are several, each of the members must have a separate agreement. In terms of the decision of **Lunjo Estates Ltd Vs Yowana Kahere**, (1959) E.A 319 parties to the contract have to institute separate suits since in one suit, there will be a misjoinder of parties and causes of

action. Dr. Lamwai reiterated the fact that the plaintiff is a stranger to all the agreements and it can not sue on those agreements.

Referring to the argument raised by the plaintiff that “the plaintiff has a direct interest in the matter acquiring the title of the beneficiary to such contracts,” Dr Lamwai said it amounted to indirect admission that the plaintiff is not a party to any of the contracts and cannot sue on them. He referred to the case of **Midland Silicones, Ltd Vs Scruttons Ltd, [1962] 1 All E.R 1** where the principles stated were as follows:

*“ (a) It is a fundamental principle that a stranger to contract cannot sue on it; and*

*(a) That a stranger to a contract cannot, in question with either the contracting parties, take advantage of the provisions of the contract even if they were already intended to benefit him.*

Dr. Lamwai said the case was followed in East Africa in the case of **Halal Shipping Co. Ltd Vs Securities Bremer Allegemeine and Another, [1965] E.A 690 at 693**. His conclusion was that the plaintiff is a stranger to the contracts and there is no quasi contract to which it has vested rights at all. The Government Notice does not give the Plaintiff any right to sue on the contracts. Also there is no question of public law in this case. Those



were the arguments from the advocates in respect of the first point of objection.

I will support Dr. Lamwai that the plaintiff has not annexed the agreements upon which the plaintiff's cause of action is founded. Although reference is made to the sale agreements under paragraph 7 of the plaint and it is stated that they are annexed and marked "TSPS-IA" they have not in fact been annexed. The amended plaint refers to five annexures but none of them has been filed in court. Dr. Lamwai submitted correctly that the plaintiff is suing on sale agreements entered into between the Presidential Parastatal Sector Reform Commission (PSRC) on behalf of the Government and the several sugar companies. This come up very clearly in paragraphs 5,6,7,8,9,10,11 and 14 of the plaint.

Although the sale agreements have not been annexed to the plaint, the plaint specifically mentions that the contracts were between the PSRC and the Kilombero Sugar Company Limited, TPC Limited, Mtibwa Sugar Estate Limited and Kagera Sugar Limited. The sale agreements were not made between PSRC and Tanzania Sugar Producers Association.

Under the doctrine of privity of contract it is only the individual sugar company who can sue on the sale agreements and each sale agreement should have formed a separate cause of action, otherwise there would be

a misjoinder of parties. The case of **Lunjo Estate Ltd** (supra) refers to by Dr. Lamwai is a good supporting authority on this point.

Since the plaintiff is not a party to the several agreements it has referred to, it is a stranger to the agreements and it does not have the capacity to sue the 1<sup>st</sup> Defendant on the agreements. I also refer to the case of **Midland Silicones, Ltd Vs Scruttons Ltd** (supra) also cited by Dr. Lamwai. Regarding the argument raised by the Advocates for the plaintiff on how the plaintiff acquired the title to sue, I must say with respect, that under the circumstances of the case the plaintiff has not even pleaded that it is suing under public law and on a quasi-contract. Let me remind the parties and their Advocates that the parties are bound by their pleadings. The cases of **Vidhyarti V Ram Rakha [1957] EA 527** and **Agro Industries V AG.[1994] TLR 43** are good authorities on the point. What the plaintiff has pleaded is that it is suing on the sale agreements and not otherwise.

Since the suit is based on sale agreements to which the plaintiff is not a party, it is a stranger and therefore it has no capacity to sue any of the defendants on those agreements.

The plaintiff could have a claim but that claim cannot be based on the contracts to which it is not a party.

The first point of objection on the locus of the plaintiff to sue the defendants is upheld. Since it suffices to dispose of the suit, I do not consider it worthy dealing with the other points. The plaintiffs suit is dismissed with costs.

N.P.KIMARO,

JUDGE

08/09/2004

Court: Ruling delivered this 13<sup>th</sup> day of September 2004 in presence of Mr. Lutema for Mrs. Kashonda for plaintiffs, Ms. Sehel for 1<sup>st</sup> and 2<sup>nd</sup> Defendants also holds Dr. Lamwai's brief for the 3<sup>rd</sup> defendant.

A.R. MRUMA

DRCC

2,537 – Words.

Jd.

I Certify that this is a true and correct  
of the original order judgement Ruling  
Sign Mr. M. M. M.  
Registrar Commercial Court DSM.  
Date 13/9/04