

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

**MISC. COMMERCIAL CASE NO. 39 OF 2003**

**PERSEROAN RERBATAS (P.T)  
WINGS SURYA.....APPLICANT/  
.....DECREE HOLDER**

**VERSUS**

**WILFRED MALEKIA  
MANAGING DIRECTOR SHOWELUX  
INDUSTRIES LTD.....1<sup>ST</sup> RESPONDENT  
SHOWELUX INDUSTRIES LIMITED.....2<sup>ND</sup> RESPONDENT\  
JUDGMENT DEBTOR**

-----

**R U L I N G**

**KALEGEYA, J:**

The Judgment – debtor/Respondent has raised preliminary objections that:

- (i) The affidavit in support of the application for contempt of court is defective, as such it should not be acted upon.
- (ii) The provisions of the law upon which the application is based are not relevant.

Arguing the objections, Mr. Kihwelo for the judgment – debtor/Respondent strenuously submitted that paragraphs 5 and 6 of the supporting affidavit by one Mr. Temu reflects information whose source has not been disclosed. On provisions of the law, he insists that, s. 68 CPC applies to supplemental proceedings unlike in here where the matter was fully determined; O. 43 (3) deals with costs by the party issuing the process; O. 21, Rule 35 CPC deals with arrest and detention of a defaulter in money payment concluding by fronting yet another ground that the

prayers sought are not related to the decree or orders handed down by the court in the main matter, making reference to **(CAT) Civil Appeal No. 43/2001, James K. Mapalala and BBC.**

Dr. Nguluma, responding argued that para. 5 of the said affidavit contains information as gathered by the deponent while the defect complained of in paragraph 6 has been cured by the same deponent's affidavit in reply to the counter – affidavit. He goes further to state that there is also an exhibit attached to the first affidavit playing same role. He sought assistance from **Sarkar on Civil Procedure, 8<sup>th</sup> Edition, 1992 print, pages 853 – 6.**

He added that if an affidavit is not clear, the defect can be cured by cross examination of the deponent by the adverse party. On complaints of defective affidavit Dr. Nguluma went further to urge that if so found, defective paragraphs of the affidavit are generally struck out but do not invalidate the whole affidavit.

Regarding the 2<sup>nd</sup> part of the preliminary objection, Dr. Nguluma insisted that the provisions of the law cited are proper; that s. 68 is applicable as the present application is not a stand alone but emanates from the main suit; conceded and corrected the applicable rule under O. 43, saying that the relevant rule is “2” and not “3”; that O. 21, Rule 35 CPC was properly cited as by then the Respondent's cheque was yet to be cleared though now cleared (yesterday) and that breach of a permanent injunction attracts only imprisonment as the CPC is silent on any other alternative remedy and the Respondents have not proposed any. He concluded by stating that the last part of the argument goes to the merits of the application.

In rejoinder, Mr. Kihwelo insisted that para.5 of Mr. Temu's affidavit does not disclose "that Company" while para.6 and the reply to the counter – affidavit disclose the name of just one retailer.

Further to the above, Mr. Kihwelo argued that in both verifications (in the supporting affidavit and reply to the counter – affidavit) nothing is said of "source of information"; that reference to **Sarkar** is not relevant to the issue at hand; that examination of a deponent does not cure a defective affidavit; that the cheque had already been paid though not cleared and that although he does not attack the application for arrest and imprisonment he challenges other prayers made and that if the court cannot grant the orders made, then the application is incompetent.

Starting with the first preliminary objection, let us look at the contents of the paragraphs attacked. Para. 5 provides:

*"5. That in the course of my investigation in the month of July 2003 I found in various shops and kiosks in Dar es Salaam numerous pieces of beauty soap bearing the Trade Mark "GIV Beauty Soap manufactured by Showerlux Industries Limited. That Company bought samples of GIV Beauty Soap which I compared to the samples I bought from the 2<sup>nd</sup> Respondent which were the same with those manufactured by the 2<sup>nd</sup> Respondent",*

while para.6 has the following:

*“6. That some of the whole sale traders shops I contacted revealed that the source of the particular GIV Beauty Soap I bought originated from Showerlux Industries Limited, whereas retail traders revealed that they bought the GIV Beauty Soap from wholesale traders.”*

While I am of the view that the said paragraphs could have been better drafted, for example, in para.5 the words “That Company” are superfluous as they are left hanging (a kiosk cannot be called a Company and neither could the 2<sup>nd</sup> Respondent have bought soaps from itself!) and names of retail and wholesale shops could have been revealed for clarity, as they stand however they cannot be impugned for failure to disclose the source of information. Paragraphs 1 – 4 clearly show that the deponent is the very person who investigated the matter hence his disclosure of what he unearthed. He is categorical that he gathered the information from wholesale and retail shops. As rightly urged by Dr. Nguluma, the Respondents have an open latitude at their disposal to get clarity through cross examination of the deponent. The first objection lacks merits.

As regards the objection on the relevant provisions of the law, save for the wrongly cited Rule (O. 43, Rule 3) and which was corrected in the course of arguments to read O. 43, Rule 2 CPC and s. 68, I find no basis of the quarrel launched by Mr. Kihwelo on others.

Indeed s. 68 is not applicable – the current situation is not covered under any of subsections (a) – (e) enumerated thereunder. Dr. Nguluma’s insistence that it applies, with respect, is surprising. O. 21, Rule 35 CPC was sufficiently explained: they believed that they were yet to be paid (whether this belief was true or false would have been subject of

evidence). Otherwise, as rightly submitted by Dr. Nguluma, there being no specific provision in the CPC which caters for a violator of a court order in a form of permanent injunction, reliance on s. 95 CPC is but proper. Citing irrelevant sections in an application which is otherwise proper, has never, legally, been a basis of invalidating the application. The complaint on this is also groundless.

On the last element belatedly fronted by Kihwelo, that is, a complaint that some orders sought are not part of the decree, cannot be argued as a preliminary objection. That goes to the merits of the application.

In conclusion, for reasons disclosed, both preliminary objections stand dismissed.

**L.B. KALEGEYA**  
**JUDGE**

Delivered

**L.B. KALEGEYA**  
**JUDGE**  
**20/11/2003**

**1,117 WORDS**

I Certify that this is a true and correct  
of the original order Judgement Ruling  
Sign *L.B. Kalegeya*  
Registrar Commercial Court Dsm.  
Date 20/11/03