IN THE COURT OF APPEAL OF TANZANIA
AT DODOMA

(CORAM: LUBUVA, J. A., MROSO, J. A. AND NSEKELA, J. A.

CIVIL APPEAL NO. 115 OF 2005

1. **TANZANIA MOTOR SERVICES LTD.....1ST APPELLANT**
2. **PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION.....2ND APPELLANT**

VERSUS

MEHAR SINGH t/a THAKER SINGH.....RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania at Dodoma)

(Kaji, J.)

dated the 25th day of November, 2004
in
Civil Case No. 20 of 2002

R U L I N G O F T H E C O U R T

26 May & 21 July 2006

NSEKELA, J. A.:

The 1st appellant, Tanzania Motor Services Limited, entered into a contract with the respondent, Mehar Singh t/a Thaker Singh, under

which the 1st appellant was to build a house on Plot No. 6, Central Business Park, Dodoma Municipality. The contract contained an arbitration clause whereby the parties agreed to refer any dispute or difference arising between them to the arbitration and final decision of a person chosen according to a procedure. The 2nd appellant, the Presidential Parastatal Sector Reform Commission, was joined as the statutory Official Receiver of the 1st appellant. A dispute having arisen between the parties, the respondent instituted in the High Court Civil Case No. 20 of 2002 seeking to recover from the appellants outstanding monies under the contract.

The appellants, instead of filing a written statement of defence, applied by way of petition for a stay of the proceedings in terms of Section 6 of the Arbitration Ordinance, Cap. 15; Rule 5 of the Arbitration Rules, 1957 and Rule 18 of the Second Schedule to the Civil Procedure Code, 1966. The learned judge dismissed the petition, hence this appeal.

At the commencement of hearing the appeal, we had to hear the respondent's preliminary objection challenging the competence of the appeal by reason of Section 5(2)(d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002 on the ground that the decision in question was interlocutory, that is, it did not finally determine Civil Case No. 20 of 2002 and therefore not appealable.

Mr. Mpoki, learned advocate for the respondent, submitted that the appeal before the Court was incompetent because Section 5(2)(d) of the Appellate Jurisdiction Act, 1979 (the Act) as amended by Act No. 25 of 2002 bars appeals against preliminary or interlocutory decision or order unless such decision or order has the effect of finally determining the suit. The learned advocate added that the decision of the High Court did not finally determine the suit since no rights of the parties under the suit were determined. He was of the view that the petition was not an independent suit since the rights of the parties rested on the main suit and not on the petition.

On his part, Mr. Mwandambo, learned advocate for the appellants, strongly resisted the preliminary objection. He submitted that the petition for stay of proceedings under the Arbitration Act Cap. 15 was a suit in its own right. The appellants were asserting a right arising out of the arbitration agreement to which both parties had agreed. The parties had agreed to refer disputes arising out of the contract to arbitration as prescribed in the arbitration clause under the contract. Under the circumstances, the decision of the learned judge implying that the parties did not need to go to arbitration was not an interlocutory one. It finally determined the rights of the parties by circumventing the recourse to arbitration.

The sole issue to be determined is what was the effect of the decision of the learned judge by refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration. But before we do so, it is necessary to explain the nature of an arbitration clause in a contract. The true nature and function of an arbitration clause was well-explained by Lord Macmillan in the case of

Heyman v. Darwins Ltd. (1942) AC 356 at page 375 as follows–

> "I venture to think that not enough attention has been directed to the true nature and function of an arbitration clause in a contract. It is quite distinct from other clauses. The other clauses set out the obligations which the parties undertake towards each other but the arbitration clause does not impose on one of the parties an obligation in favour of the other. It embodies the agreement of both parties that if any dispute arises with regard to the obligation which the one party has undertaken to the other, such dispute shall be settled by a tribunal of their own constitution. And there is this very material difference, that whereas in an ordinary contract the obligation of the parties to each other cannot in general

> be specifically enforced and breach of them results only in damages, the arbitration clause can be specifically enforced by the machinery of the Arbitration Acts. The appropriate remedy for breach of the agreement to arbitrate is not damages, but is enforcement."

The respondent had instituted Civil Case No. 20 of 2002 before invoking the arbitration clause in the contract and the appellant on his part filed the petition in order to enforce and bring into play the arbitration clause stipulated in the contract. The learned judge was of a different view and refused to enforce the arbitration clause. A question that has arisen is, was the decision of the learned judge an interlocutory decision in terms of Section 5(2)(d) of the Appellate Jurisdiction Act, 1979 as amended and therefore not subject to appeal? This takes us to a consideration of Section 5(2)(d) which provides –

"(2) Notwithstanding the provision of Subsection (1) –

(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit".

The first issue to determine is whether or not the petition was a suit? Neither the Appellate Jurisdiction Act nor the Civil Procedure Code, 1966 has defined what a suit is. In Civil Application No. 103 of 2003 between **Blueline Enterprises Limited** and **East African Development Bank** ***(unreported),*** a single judge of this Court (Mroso, J. A.) had occasion to construe the word "suit" as used in section 5(1)(a) of the Appellate Jurisdiction Act. One of the issues

raised therein was whether or not a petition brought under the Arbitration Act was a "suit" under the Civil Procedure Code, 1966. The learned single judge came to the conclusion that although the proceedings in the High Court were by petition "they were also in a broad sense a suit". We have also sought guidance from the Law Lexicon, The Encyclopaedic & Commercial Dictionary, 2002 (Reprint) at page 1831 where it is stated –

> "The term "suit" is a very comprehensive one and is said to apply to any proceeding in a Court of Justice by which an individual pursues a remedy which the law affords him. The modes of proceedings may be various; but if the right is litigated between the parties in the Court of Justice the proceeding in (sic) is a suit".

It is evident that the word "suit" is a word of comprehensive import and we subscribe to the view that the appellant's petition falls

within the ambit of the word "suit". This, however is not all. The appellant has to show that the decision had the effect of finally determining the suit. The "suit" under consideration is not Civil Case No. 20 of 2002. We pointed out before that an arbitration clause in a contract is distinct from the other clauses and that its breach can be specifically enforced by the machinery of the Arbitration Act. This is the decision we are concerned with. The fundamental question is whether the issues concerning the appellant's petition were fully canvassed and finally determined by the court below. We have sought guidance from the case of **Bozson v. Artrincham Urban District Council** (1903) IKB 547 wherein Lord Alverston stated as follows at page 548 –

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final

order; but if it does not, it is then, in my opinion, an interlocutory order".

The test adopted in **Bozson's** case is in accord with the language used in section 5(2)(d) of the Appellate Jurisdiction Act, 1979 as amended. In the present case, the decision of the learned judge refusing to stay the proceedings in Civil Case No. 20 of 2002 pending a reference to arbitration finally determined the petition by barring the parties from going to arbitration. The decision closed the door to arbitration thus rendering provisions in contracts for arbitration meaningless. They are meant to serve a purpose.

In the result, we dismiss the preliminary objection with costs.

DATED at DAR ES SALAAM this 21st day of July, 2006.

D. Z. LUBUVA
JUSTICE OF APPEAL

J. A. MROSO
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