IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MZIRAY, J.A., KWARIKO, J.A., AND LEVIRA, J.A.)

CIVIL APPLICATION NO. 190 OF 2013

MECHMAR CORPORATION (MALAYSIA) BERHAD (IN LIQUIDATION) ..... APPLICANT

VERSUS

1. VIP ENGINEERING & MARKETING LIMITED
2. INDEPENDENT POWER TANZANIA LIMITED (IPTL)
3. THE ADMINISTRATOR GENERAL ..... RESPONDENTS
4. PAN AFRICA POWER SOLUTIONS (T) LIMITED

(Application for a revision from the ruling and order of the High Court of Tanzania at Dar es Salaam)

(Utamwa, J.)

dated the 5th day of September, 2013
in
Consolidated Miscellaneous Civil Cause No. 49 of 2002 and Miscellaneous Civil Cause No. 254 of 2003

RULING OF THE COURT

10th & 21st May, 2019

KWARIKO, J.A.:

Formerly, the applicant and 1st respondent were shareholders in the 2nd respondent company. The shareholders were involved in a dispute in which the 1st respondent filed a petition vide Miscellaneous Civil Cause No. 49 of 2002 in the High Court of Tanzania at Dar es Salaam (the trial court)

for winding up of the 2nd respondent company. This petition was consolidated with another petition Miscellaneous Civil Cause No. 254 of 2003 which was filed by a firm of advocates, Law Associates Advocates who claimed to have interest in the 2nd respondent company. During the pendency of the suit, the applicant which was a company incorporated in Malaysia went into liquidation where Messrs Heng Ji Keng and Michael Joseph Monteiro were appointed its joint liquidators (the joint liquidators).

Further, on 24/4/2013 when the matter was called on for hearing, there arose confusion as to the authorized legal representation of the applicant. While Mr. Seni Songwe Malimi, learned advocate, informed the trial court that he was instructed by the joint liquidators to represent the applicant, Mr. Melchisedeck Sangalali Lutema, learned advocate, opposed that contending that he had instructions to represent the applicant.

Following the dispute, the trial judge ordered Mr. Malimi to file a formal application in order for the court to resolve the dispute. In compliance, Mr Malimi filed the application on 3/5/2013, which application was ordered to be disposed of by way of written submissions. The written submissions were duly filed. Despite that step, the application was not determined. Instead,

on 26/8/2013 the 1st respondent filed a notice to withdraw the petition for winding up following a share purchase agreement between it and the 4th respondent. While Mr. Malimi did not object to the withdrawal, he opposed the orders prayed for by the 1st respondent. Nonetheless, the petition was marked withdrawn and orders prayed for were granted. The orders are:

> *"1. That this court marks the petition for winding up the IPTL as duly withdrawn with no order as to costs.*
> 2. *That the appointment of the Provisional Liquidator is hereby terminated.*
> 3. *That the Provisional Liquidator shall hand over all the affairs of IPTL Power Plant (the Plant) to PAP, which has committed itself to pay off all legitimate creditors of IPTL and to expand the plant capacity to about 500Mw and sell power to TANESCO at a tariff between US cents 6 and 8/Unit in the shortest possible time after taking over in public interests.*
> 4. *Parties are free to commence new independent claims in any court with competent jurisdiction against any party should they fail to reach amicable settlement out of court on any issue which arose in IPTL.*
> 5. *That the court has taken judicial notice of the agreement between VIP and PAP."*

Having been aggrieved by the orders, the applicant came before this Court by way of revision against the trial court's ruling. In opposition to the application, the 1st and 4th respondents filed preliminary objections consisting of a total of nine grounds. In the end, this Court overruled all grounds except one. This is;

> *"The application for revision is incompetent and bad in law for being preferred as an alternative to appeal."*

However, instead of striking out the application for being incompetent, the Court proceeded to consider the issue whether or not there was good cause for the applicant to prefer revision instead of an appeal. The Court was satisfied that the applicant has good cause to apply for revision of the trial court's ruling instead of an appeal. Our decision dated June, 2016 was based on the unresolved dispute as to who was the authorised legal representative of the applicant between Mr. Lutema and the joint liquidators.

The 2nd and 4th respondents were further aggrieved by our decision hence they filed an application for review of that decision. They essentially complained that, parties were not given opportunity to address the issue as to whether the applicant has a good cause to apply for revision instead of

an appeal. In the end, on 29/10/2018 the Court granted the application for review and re-opened the hearing so as to enable the learned counsel for the parties to address the Court on that issue.

When the application was called on for hearing on 10/5/2019, Messrs. Charles Morrison and Gasper Nyika, learned advocates, appeared for the applicant while Mr. Cuthbert Tenga learned advocate, appeared for the 1st and 2nd respondents and Messrs. Benson Hosea and Samuel Mutabazi, learned State Attorneys, represented the 3rd respondent. The 4th respondent did not appear though duly served on 15/4/2019 through MSL Attorneys as evidenced by the affidavit of the process server one Mambulu Idd. For the non-appearance of the 4th respondent, the Court decided to proceed with the hearing in her absence in terms of Rule 63 (2) of the Tanzania Court of Appeal Rules, 2009.

The Court invited the learned counsel for the parties to address the issue whether the applicant has good cause to file revision instead of an appeal.

Mr. Morrison argued that since it was the 4th respondent who had raised the preliminary objection, they were in good position to address it. In

their absence, he implored the Court to dismiss the preliminary objection. However, in the alternative, Mr. Morrison argued that the Court has powers to entertain revision even where the right to appeal exists. He urged us to follow our first decision which found that the applicant has good and sufficient cause to prefer revision instead of an appeal. This is because the trial judge erroneously issued orders against the applicant while there was unresolved issue in respect of its authorized legal representative.

On his part, Mr. Tenga submitted that preliminary objections are matters of law and that it does not matter who raises them. That Mr. Lutema learned advocate rightly raised preliminary objection and the Court gave the parties, not specifically Mr. Lutema, an opportunity to address the said issue. He agreed that there was unresolved issue of the applicant's representation.

Mr. Hosea only said that the 3rd respondent was discharged by the trial court on 5/9/2013.

The Court has considered submissions by the counsel for the parties. We are of the settled view that the impugned order having resulted from consent of the parties is appealable under section 5 (2) (a) of the Appellate Jurisdiction Act [CAP 141 R.E. 2002]. Now, the applicant has applied for

revision instead of an appeal. Mr. Morrison contended that, there was good cause why the applicant preferred revision. This is the unresolved issue of who is the authorized legal representative of the applicant between Mr. Melchisedeck Sangalali Lutema and the joint liquidators. Mr. Tenga supported this issue. In this respect, we have considered our decisions in **Transport Equipment Ltd v. D.P. Valambia** [1995] T.L.R 161 and **Moses Mwakibete v. The Editor- Uhuru and Two Others** [1995] T.L.R 134. In **Moses Mwakibete** (supra) it was held *inter alia* that;

> *"The Court of Appeal can be moved to use its revisional jurisdiction under s. 2 (3) [now section 4 (2)] of the Appellate Jurisdiction Act 1979 only where there is no right of appeal, or where the right is there but has been blocked by judicial process, and lastly, where the right of appeal existed but was not taken, good and sufficient reasons are given for not having lodged an appeal."*

The question to be answered is whether the applicant has good and sufficient cause for applying for revision instead of an appeal. We have taken account of the peculiar circumstances of this case that, as the applicant's legal representative remains unknown following the trial court's failure to

resolve that question, it is obvious that the applicant is unable to pursue an appeal against the trial court's decision. It is arguable, in our view, that the trial court's failure to address the representation question can only be addressed in this revision as recourse to appeal is clearly not feasible.

Consequently, we overrule the preliminary objection. The main application will be heard on the date to be fixed by the Registrar. Costs to abide the outcome of the main application.

Order accordingly.

DATED at **DAR ES SALAAM** this 16th day of May, 2019.

R. E. S. MZIRAY
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

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

E. F. FUSSI
DEPUTY REGISTRAR
COURT OF APPEAL