**IN THE COURT OF APPEAL OF TANZANIA**
**AT DAR ES SALAAM**

**(CORAM: MROSO, J.A., NSEKELA, J.A., And KAJI, J.A.)**

**CIVIL APPLICATION NO. 163 OF 2004**

**VIP ENGINEERING AND MARKETING LIMITED ……… APPLICANT**
**VERSUS**
**MECHMAR CORPORATION (MALAYSIA)**
**BERHARD OF MALAYSIA ………………………………… RESPONDENT**

**(Application for Revision of proceedings in**
**the High Court of Tanzania at Dar es Salaam)**

**(Ihema, J.)**

**dated the 3rd day of December, 2004**
**in**
**Misc. Civil Cause No. 254 of 2003**
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**R U L I N G**

**10 & 26 July 2006**

**MROSO, J.A.:**

When the application for revision of High Court Miscellaneous Civil Cause No. 254 of 2003 was called for hearing on 29th April, 2005 the Court *suo motu* pointed out to Mr. C. Tenga and Mr. Ndyanabo, respectively learned counsel for the applicants, that the High Court record sought to be revised had not been filed along with the Notice of Motion. Mr. Tenga conceded that fact but thought it was the Court which was to call for such record. He then said that if the Court considered that the record should be filed, he needed an adjournment so that he could comply with that requirement and that he was making the application to file the missing record under Rule 3 (2) (b) of the Court Rules, 1979.

The Court did not decide on the oral application by Mr. Tenga because there was then before the Court a Notice of Preliminary Objection filed by Mr. Kesaria for the respondents that the revision application was "expressly and specifically prohibited" and also an abuse of the process of the Court. The Court, therefore, said it would proceed to hear the Preliminary Objection and if eventually we overruled it we would thereafter decide on whether or not a record of the proceedings to be revised should be filed by the applicants. In other words, the oral application for leave to file a supplementary record comprising the proceedings in the High Court in Misc. Civil Cause No. 254 of 2003 could only be entertained if we overruled Mr. Kesaria's Preliminary Objection to the application for revision.

The Court heard the Preliminary Objection and eventually overruled it. We ordered that the substantive application for revision could be heard on a date to be fixed by the Registrar.

Before the substantive application for revision could come for hearing the applicant filed in Court a record comprising three huge volumes, the first volume containing 513 pages, the second volume containing 765 pages and the third volume 629 pages, making a total of 1897 pages. Two smaller volumes, one containing 368, were also filed. In all, documents containing over 2300 pages were filed. All the volumes read "Record for Revision (With suo moto (sic) leave of the Court, Mroso, J.A., Nsekela, J.A., And Kaji, J.A. dated

29th April, 2005)"

When the application was called for hearing on 10th July, 2006 the Court had to deal with yet another Notice of Preliminary Objection filed by Mr. Kesaria for the respondents. It had two grounds for objecting to:-

1. The basis, form and content of the purported Record of Revision comprising three volumes filed herein on 25th January, 2006.

2. The inclusion of extraneous matter in the record not forming part of the proceedings of the lower court sought to be revised.

At the hearing of the Preliminary objection the applicants were represented by Mr. C. Tenga and Mr. Ndyanabo; the respondents were again represented by Mr. Kesaria, learned advocate. Mr. Rugonzibwa, learned advocate, represented the Administrator General as an interested party.

In arguing the first ground of objection Mr. Kesaria said that the three volumes of record referred to earlier in this ruling had been prepared and filed without any court order or direction. The claim on the front cover of each of the

volumes that there had been *suo motu* leave of the Court to the applicant to prepare and file them was not true, he stressed. He said that apart from the fact that the records were filed without leave of the Court, most of them were irrelevant to the revision application before the Court. For example, Volumes II and III related to Civil Appeal No. 54 of 2002. Even in Volume I, items 11 to 15 and 32 to 65 as listed in the index contained extraneous matter relating to the period after the revision application was filed and a reply affidavit to the applicants' affidavit in support of the Notice of Motion had been filed. There could not have been a reply affidavit to the respondents' reply affidavit without the leave of the Court sought and obtained.

As regards a record of a list of Supplementary Authorities which the applicants also filed Mr. Kesaria attacked the inclusion of paragraph D on Judicial Notice. The Court was being asked to take judicial notice of a "Working Paper by a Management Programme in Infrastructure Reform and Regulation of the University of Cape Town Graduate School of Business:", and "Extracts from the Class Action in Re-Parmalat Securities Litigation filed in the United States District Court of New York on 18th October, 2004 against Citigroup, Citibank, Bank of America and Credit Suisse First Boston." He submitted that this Court could not be expected to take judicial notice of such documents.

Mr. Tenga in replying to the submissions of Mr. Kesaria tried to demonstrate the nexus between the impugned records and the revision application before the Court. He argued that all the records which they filed and to which Mr. Kesaria is taking exception were thought to be helpful to the Court, at least to make the Court aware of the background to the application in order to reach a correct decision. He also claimed that Miscellaneous Civil Cause No. 254 of 2003, the subject of the revision, made reference to the documents in Volumes I, II and III. He said that he believed most of the applications by the respondents in the High Court were made with a bad motive. On their part however, they were trying to comply with Rule 89 of the Court Rules, which although it related to appeals it also applied to revisions. Furthermore, when the Court on 29th April, 2005 said it might give an order regarding the need for a supplementary record containing the record of the proceedings to be revised, they believed in good faith that it was a direction from the Court to file the missing records, even though the direction was not in the ruling the Court gave on the Preliminary Objection.

As regards the second ground of objection Mr. Tenga submitted that items 11 to 14 in the contents page in Volume I were relevant to the revision application. Item 15 could be struck out from the list although its retention was not prejudicial to anyone. As for items 30 to 65, Mr. Tenga tried to show that items 30 and 36 were relevant and that items 44 to 65 were intended to give the Court as full

information as practicable and also that they were filed in compliance with Rule 89 of the Court Rules.

Finally, Mr. Tenga asked the Court to dismiss the Preliminary Objection and accept the records as filed. But in the event the Court found Volumes II and III unnecessary, it could ignore them and no injustice would be caused to anyone.

As for the matters for the Court to take judicial notice, they were intended to help the Court whether or not it took judicial notice of them.

In winding up his submissions Mr. Kesaria said the inclusion of extraneous matters in the application was a departure from the rules and if unchecked it could lead to chaos in Court proceedings. The Court can be informed properly and within the confines of the rules and that it should be borne in mind the only proceedings before the Court for revision were Miscellaneous Civil Cause No. 254 of 2003. As for Rule 89, Mr. Kesaria submitted that they related to appeals only. He conceded that item 36 in Volume I of the filed record was relevant to the revision application.

We have given full consideration to the submissions from both counsel. We do not think, however, that the lengthy submissions need detain us. It is not in dispute that as at 29th April, 2005 when the revision application was first

called for hearing the High Court record in Miscellaneous Civil Cause No. 254 of 2003 was not before the Court as it should have been. Mr. Tenga made an oral application, as he could have done under Rule 45 (1) of the Court Rules, 1979, for leave to file the missing record. The application could not then be heard because there was before the Court a Notice of Preliminary Objection which was intended to have the revision application struck out. It would have been a futile exercise to hear an application promoting the impugned revision when it might be struck out if the Preliminary Objection succeeded. So, the oral application was put on hold until a ruling on the Preliminary Objection was out. If the Preliminary Objection was overruled it would be open to the applicants to pursue the application to file a supplementary record which would contain the record to be revised.

As it turned out, the respondents' preliminary objection was overruled but the applicants did not pursue the application to file the supplementary record. Instead, they assumed, with respect wrongly, that it was open to them to file the volumes I, II and III on purported *suo motu* leave of the Court.

The claim on the covers of the three volumes that the Court had *suo motu* granted leave to the applicants to file the three volumes has no basis at all and Mr. Kesaria is correct that no order or directive was given by the Court to the applicants to do what they did. With respect, it is they who had acted *suo motu*.

Rule 92 (1) of the Court Rules permits a respondent in an appeal to file a supplementary record of the appeal if he is of the opinion that the record of appeal is defective or insufficient for the purposes of his case. Sub-rule 3 of the same rule allows an appellant "at any time" to lodge copies of a supplementary record of appeal. Apparently, there is no requirement for prior leave of the Court. Even so, Rule 92 relates to appeals and there is no similar specific rule relating to an applicant or respondent in a revision application to Court, let alone the procedure to be employed.

Mr. Kesaria mentioned Rules 45 (1) and 53 (2) of the Court Rules. Rule 45 permits oral applications to Court in certain circumstances and Rule 53 (2) permits a respondent (a person served with a notice of motion) to file supplementary affidavit if leave of the Court or of the applicant has been obtained. With respect, we do not think Rule 53 is relevant to the dispute before the Court. Suffice it to say that if on 29th April, 2005 the applicants considered that they needed the leave of this Court so that they could file relevant and needed supplementary records, such application is yet to be heard and granted and the applicants' presumption that there was *suo motu* leave of the Court was misconceived. We uphold Mr. Kesaria's first ground of Preliminary Objection. The three volumes are excluded from the revision record at this juncture. It is unnecessary for us at this stage to consider the merits or

otherwise of the other matters which Mr. Kesaria canvassed, including the second ground of Preliminary Objection. The respondents to get their costs.

DATED at DAR ES SALAAM this 26th day of July, 2006.

J.A. MROSO
**JUSTICE OF APPEAL**

H.R. NSEKELA
**JUSTICE OF APPEAL**

S.N. KAJI
**JUSTICE OF APPEAL**

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

( S.M. RUMANYIKA )
**DEPUTY REGISTRAR**