

TANZANIA / JUDGMENT

milo constraction coltd vs nbs ltd

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IN THE HIGH COURT OF TANZANIA (COMMERCIAL DIVISION) AT DAR ES SALAAM MILO
CONSTRUCTION CO. LTD PLAINTIFF/APPLICANT VERSUS

1. NBC LIMITED 1st DEFENDANT/RESPONDENT
2. SADOCK DOTTO MAGAI 2ND DEFENDANT/RESPONDENT KALEGEYA, J: ((a) The Honourable Court be pleased to issue an order of temporary injunction restraining the 2nd Respondent from acting or conducting himself as a receiver and manager of Milo Construction Co. Ltd pending determination of the suit.
(b) The Honourable Court be pleased to issue an order of r temporary injunction against the t Respondent restraining it from appointing any person or persons as receivers or receivers in lieu of or in addition to the rt Respondent.
(d) Any other or further relief deemed fit. " The applicant is represented by Mr. Msafiri, Advocate, while the Respondents are represented by Mr. Kabakama and Mr. ~amugisha, Advocates (for the 1st and 2nd Respondent, respectively). I will start by stating that though the Counsel made lengthy written submissions, in my view the centre piece of the controversy is fine indeed which did not entail going into all that. Facts undisputed are as follows. Sometime in the year 2000, the 1st Respondent extended an overdraft facility to the Applicant. To secure the same, parties executed a debenture instrument. This was on 17/6/2000. The Applicant/Plaintiff having not serviced the overdraft as required, at least in the eyes of the 1st Respondent, sometime in 2002, the latter appointed the 2nd Respondent as Receiver and Manager of the Applicant/Plaintiff. The appointment was duly registered on 7/10/2002. On 28/11/2002, the 1st Respondent proceeded and filed Commercial Case No. 293/2002 against Applicant/Plaintiff in respect of the very liability accruing from the overdraft facility. Now, the Applicant/Plaintiff is before this Court, in this case (not Commercial Case No. 293/2002), urgmg that the 1st Respondent/Defendant has no colour of right under the debenture instrument to appoint a receiver or Receiver and Manager; that the appointment is invalid; that 2nd Respondent's actions have been detrimental and prejudicial to their affairs, interfering with their smooth operation of their account with CRDB Bank, bringing their operation almost to a standstill. Paragraph 4 of the plaint puts

bear what the applicant seeks. "4. That the claim by Plaintiff against the Defendants jointly and severally is for declaration that the purported appointment of the 2nd Defendant by the 1st Defendant as a receiver and manager of the Plaintiff (Milo construction Co. Ltd) is null and void; declaration that the 1st Defendant has no power to appoint any receiver under, by virtue of or in pursuance of the Debenture dated 1st June 2000; that the purported acting of the 2nd Defendant as a receiver and manager of the Plaintiff is a trespass to its property, interests and affairs; an order of permanent injunction against the Defendants restraining them jointly and severally from so trespassing; an order of restitution of the properties of the Plaintiff which have been received, seized or taken by the Defendants herein pursuant to the purported receivership; payment of general damages for trespass as may be assessed by the Court, interest and costs. " Pending the final determination of those prayers, Applicant seeks orders as quoted at the beginning of this ruling. The Applicant is supported by an affidavit of one Tematema, Applicant's Principal Officer. The said affidavit however has deplorably mixed up Respondents although interestingly if not surprisingly, the Counsel for the Applicant purports to amend/rectify the same by way of written submissions! It is opposed by the counter affidavits of one Mr. Mbepera, 1st Respondent's Principal Officer and that of Mr. Magai, the 2nd Respondent himself. Principles governing in determining whether or not an applicant is entitled to an order for temporary injunction have aptly been laid down by Courts - *Giella vs Cassaman Brown & Co. Ltd* [1973] E.A 358, *Atilio vs Mbowe* [1969] HCn 284 and *American Cyanamid Co. vs Ethicon Ltd* [1975] AC 396, just to mention a few of the relevant cases. And I should mention that the Counsel have fully brought them out in their submissions. First, there must be a serious triable issue between the parties with a probability that it may be decided in the applicant's favour. Secondly, the circumstances should be such that if the Court does not issue the order the Applicant would suffer irreparable loss even if he subsequently succeeds in the action. Thirdly, that on a balance of convenience the Applicant stands to suffer more if the injunction is refused than what would Respondent suffer if granted. And, it is the law of the land also that all the three conditions must be fulfilled. I should pose here and observe that the Applicant's Counsel impressed that it is not necessary that the three conditions should co-exist. He relied on paras 41 and 43 of the Halsbury's Laws of England, 2nd ed. Vol. 18 which run as under:- Para 41:- "It is not necessary that the court should find a case which would entitle the Plaintiff to relief at all events; it is quite sufficient if the court finds a case which shows that there is a substantial question to be investigated and that matters ought to be preserved in status quo until that question can be finally disposed of" Para 43:- " where the application is to restrain the exercise of an alleged right, the Plaintiff should show that there are substantial grounds for doubting the existence of such right. " The above notwithstanding, the standards set in our jurisdiction are as already expressed. The Plaintiff/Applicant's Counsel may detest the same but that is the position of the law. Let us start with issue one - triable Issue with probability of success by the Applicant. I should however hurriedly add that the latter element should not be looked at and treated wholesale. As I had an occasion to state in Commercial Case No.5 of 1999, *Tanzania Tea Packers Ltd vs The Commissioner of Income Tax and Another*; " although *Atilio* case shows that there should exist a probability of Applicant's success in the

main matter, in my view, this should not be interpreted to mean that the facts at hand should declare the applicant a winner. To conclude as such would be to pre-empt the trial and would militate against the basic principles of justice. It will tantamount to pre-judging parties before they are heard on the controversy. In my view therefore, what is meant is that the applicant should show that though evidence has not been given, the allegations so far made by him, prima facie portray him as having been aggrieved by the Respondent entitling him to the reliefs being sought in the main suit. " The centrepiece of the Applicant IPlaintiffs argument is that the Debenture instrument duly executed by parties does not empower 1st Respondents to do what they did - appoint a Receiver. We can only get an answer by looking at what the said instrument provides. The relevant clauses are Nos. 8-10. Clause 8:- "The principal moneys and interest hereby secured shall immediately become payable without demand:

- (a) (not applicable) (b) (c)
 - (e) if the Company commits or attempts or purports to commit any breach of the covenants herein contained.
9. At any time after the principal moneys hereby secured become payable either as a result of lawful demand being made by the bank or under the provisions of Clause 9 hereof the bank or any officer of the bank duly authorised in that regard or not to be a receiver and manager or joint receivers and managers of the property and assets hereby charged or any part thereof upon such terms as to remuneration or otherwise as the bank shall think fit and may in like manner from time to time remove any receiver and managers so appointed and appoint another or others in his or their stead.
10. Every receiver and manager so appointed (hereinafter called a {(Receiver"}) shall be the agent of the Company and the Company shall alone be liable for his acts, defaults and remuneration and he shall have authority and be entitled to exercise the powers hereinafter set forth in addition to and without limiting any general powers conferred on him by law: " . The clause then goes on to enumerate various tasks/duties that a Receiver can perform. The Respondents/Defendants rely on the above clauses as being sufficient authority for the appointment of a Receiver and Manager. The I st Respondent urges and adds: "The word "not" in line five of clause 9 refers to the qualification of the officers to be appointed as receivers/managers and not the powers of the r Respondent to appoint such receiver(s) and t manager(s). There is a missing phrase however, between the word "not" and "to be" which were inadvertently omitted during the typing of the debenture and these are; "may appoint in writing any person or persons whether an officer or officers of the bank") which when added to the clause can bring the intended meaning. " The said Respondent insists further that the instrument should be construed as a whole as there exists ambiguity so as to give it the intended meaning. The 2nd Respondent joins issues with the 1st Respondent adding that there is no serious triable issue between the parties as the Applicants have defaulted on the facility attracting the 1st Respondent's appointment of a Receiver in terms of their contract and that therefore no legal rights of the Applicant have at all been infringed. In rejoinder the

Applicant very strongly attacked the assertion by 1st Respondent that some words were inadvertently omitted in the debenture instrument insisting that they cannot be introduced now as that was not included in the pleadings and that, in any case, that would be violative of s. 100 - 101 of The Law of Evidence Act. Having carefully considered the competing arguments in relation to the pleadings and the debenture instrument in question I am of the considered view that the 1st condition has not been established. Although the Plaintiff/Applicant does not admit in so many words, reading the plaint and the supporting affidavit of Mr. Tematema as whole leaves no one in doubt that an overdraft facility was extended by the 1st Respondent to them and that a debenture was created and executed in favour of the latter. While I am appreciative of the law as referred to by the Applicant/Plaintiff that documentary evidence excludes oral evidence (s.100 - 104 of The Law of Evidence Act) and that the few exceptions provided thereunder do not capture the facts at hand, and that the alleged omitted words cannot be imported into the debenture, reading clauses 8 to 10 thereof together, clearly show that the parties provided for the appointment of a Receiver or Receiver and Manager. For sure, clause 9 leaves some desired elements but it is clear enough to show that there would be a receiver/manager of the property and assets charged. Whose assets? Obviously, of the person to whom the facility was extended and in this case, undeniably, the Applicant/Plaintiff. Again, clause 10 clearly shows that the Receiver shall be the agent of the Company. The Company herein is no other than the Applicant/Plaintiff. While I have to tread carefully lest I find myself invading the trial Court's domain, I have but to observe that it is unlikely that a finding would be made along the Applicant's seemingly proposition - that the debenture instrument provided when to be appointed and his duties but that the Receiver was never to be appointed! In other words, that the part concerning Receiver(s) is of no use at all and that it was just cosmetic in the instrument! Yes, as it is being contested, the question of Receiver's appointment by the 1st Defendant is a triable issue but I am satisfied, on grounds already explained, that it is unlikely that it will be resolved in Applicant's favour. The above disposes the matter because, as stated already, an injunctive order can only be secured once all the three conditions are met. Condition one having not been met it would be a futile exercise to consider the other two. However, for sake of completeness let me touch another argument fronted by the Applicant. "It is our humble submission that irrespective of whether, though we strongly dispute that, the 1st Respondent has powers to appoint the 2nd Respondent as a receiver and manager of the Applicant, the Applicant should not be treated to be under receivership unless and until the issue in the Commercial Case No. 293 of 2002 are determined. " My answer to this, as rightly countered by the 2nd Respondent, is that an injunction cannot be issued in this case to bar proceedings in Commercial Case No. 293/2002. If that was their intention they should have filed the present application in the same case, and indeed, looking at the issues framed therein (as provided by the Applicants in their submissions), that is: "(a) Whether the Milo Construction Co. Ltd was granted a loan facility by the NBC Ltd,

- (b) If issue No. 1 is in the affirmative, what was the amount of the loan that was advanced?

- (c) Whether Milo Construction Co. Ltd had defaulted to repay the loan", L.B. KALEGEYA JUDGE Delivered in the presence of Mr. Msafiri for Applicant/Plaintiff and Ms. Masele and Mr. Kamugisha for the 1st and 2nd Defendant/Respondents respectively. L.B. KALEGEYA JUDGE 27/1/2004
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