

TANZANIA / JUDGMENT

fabec investment ltd vs mes international financial services another 2023 tzhccomd 27 15 february 2023

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TZHCCOMDDECIDED
15 February 2023

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE TANZANIA (COMMERCIAL DIVISION)
AT MWANZA REGISTRY MISC.COMMERCIAL APPLICATION NO.02 OF 2023 (Arising from
Commercial Case No.07 of 2022) FABEC INVESTMENT LIMITED.....APPLICANT
VERUS MES INTERNATIONAL FINANCIAL SERVICES (PTY) LTD..... 1ST
RESPONDENT MES MINE SERVICES TANZANIA LTD.....2ND RESPONDENT Last Order:
14/02/2023 Ruling: 15th February 2023.

RULING

NANGELA, J.:, This application was brought to the attention of this Court under Order XXXVI Rule 6(1) (a), (b), Rule 6(2) and (3); Rule 7 (1) and (2) and section 68(b) and Section 95 of the Civil Procedure Code, Cap.33 R.E 2019. The Applicant had filed it under a certificate of extreme urgency. The urgency of the matter as stated in the Certificate is that, the Respondents herein are on the verge of removing two equipment, namely:

1. JAW Crusher- MES-001, PREMIERTRAK 400X, PIDPT40XPOMKB1648, and
2. SCEEN Crusher- MES-002, WARRIOR 1400X, PID00133ED GL83286 (Crushers), Page 1 of 12 (hereafter referred to as “Equipment”) from the local limits of this honorable Court. It is sated under the certificate of urgency that, the said removal, will obstruct and delay execution of the Decree in Commercial Case No.07 of 2022 these being the only properties belonging to the Respondents which the Applicant is aware of, and, that, the Applicant will be subjected to pay deferred Value Added Tax that she guaranteed herself during the importation of the said equipment. The Application is supported by an affidavit of one Joel Makyao, sworn at Dar-es- Salaam and the Applicant prays for the following:
 1. That, this honourable Court be pleased to make an order that for attachment and sale before judgement of the Respondent’s Equipment namely: Jaw-Crusher- MES 001, PremierTrak 4000X, PIDPT40XPOMKB1648 and SCEEN Crusher- MES-002, WARRIOR 1400X, PID00133ED GL83286 (Crushers) and the amount be deposited in Court’s Account pending determination of Commercial Case No.07 of 2022or order the Respondent to deposit in this Honourable

Court the amount of TZS 22,639,571,442.62 as security for the performance of any decree that may be passed against them in Commercial Case No.07 of 2022. Page 2 of 12

2. Costs of this Application be provided for; and
3. Any other relief this Honourable Court will deem fit and just to grant. On the 13th day of February 2023, the Respondents filed their counter affidavit to challenge the application at hand. The Applicant elected not to file a reply and since the Respondent had called upon the Applicant to prove his averments this matter proceeded to a full hearing on the 14th February 2022. At the hearing of this application, the Applicant enjoyed the legal services of Mr. Jerry Msamanga, learned advocate, while Mr. Bernard Msalaba and Mr. Benson Bernard, learned advocates represented the Respondents. Submitting in support of the application, Mr. Jerry Msamanga, learned advocate for the Applicant commenced by adopting the contents of the affidavit of Mr. Joel Makyao filed in this Court as forming part of his submissions. Having recited the law upon which the application is premised, the submitted that, the conditions set out in Order XXXVI Rule 6 (1)
 - (a) and (b) and well as Rule 6 (2) and (3) together with 7 (1) and (2) and section 68 (b) of the CPC have been fully met, which conditions are as follows:
 - (a) That, the 1st Respondent is about to dispose of the whole or part of his property; and is also intending to remove the whole or part of his property from the local jurisdiction of the Court.
 - (b) That, the said disposal/removal or movement of the said property is Page 3 of 12 intended to obstruct or delay the execution of any decree of the Court. Mr. Msamanga submitted that, as regards the first condition, paragraph 11 of the supporting affidavit sworn by Mr. Joel Makyao it is clear that the 1st Respondent is bent to remove the equipment which are the only known properties of the 1st Respondent here in Tanzania, as her representatives had applied for a get pass from the Mine Site (Geita Gold Mine Ltd (GGML)) for removal of the said equipment. As he argued that, that act alone constitute an intention to part away with the equipment to destination which is far from the reach by this Court jurisdictionally. He contended that, since the 1st Respondent is a foreign company resident in the Republic of South Africa, and if the equipment which are the subject of a suit pending before this Court are removed from the premises of the Plaintiff's client, they will be destined to South Africa as per the VAT Deferment conditions attached to the affidavit of Mr. Joel Makyao as Annexure -FIL-9. As regards the second condition, Mr. Msamanga contended that, the same has been fulfilled in the sense that, if the suit, Commercial Case No.07 of 2022 is won by the Applicant who is a Plaintiff therein, as shown in the affidavit supporting this application, any movement of the equipment which are subject of the pending suit, will affect the Applicant's ability to execute any decree obtained there under. Mr. Msamanga submitted that; the Respondents have not been able to state any fact materially controverting the averments made by the Applicant in the supporting affidavit of Mr. Makyao. As such, he urged this Court to grant the prayers as sought. Page 4 of 12 Responding to the submission made by Mr.

Msamanga, it was Mr. Msalaba's submission that, the Respondents do vehemently oppose this application. Having adopted the counter affidavit file in opposition to the granting of the orders sought in the chamber summons, it was his submission that, the Applicant has not been able to fulfil the stated condition for the granting of an application like the one at hand. He contended that, there must have been shown evidence that the first Respondent has intent to obstruct or delay execution. Mr. Msalaba refuted the averments made under paragraph 11 of the supporting affidavit arguing that, as per Annexures 7 and 8 of the supporting affidavit of Mr. Makyao, there is clearly shown that, the 1 st Respondent was responding to an email sent by the Applicant and, that, the GGML letter (Annex-FIL-7) was directed to both parties and took into account a letter dated 13 th January 2023 by the Applicant. He submitted that; it was GGML who had insisted for the removal of the stated equipment for security and other reasons, including that, they occupy a space which GGML wants to use. He as well refuted the submission that the stated equipment were to be moved away to South Africa arguing that, nowhere was it shown or stated, neither in the supporting affidavit nor in the submissions of the learned counsel that the equipment were being hauled to South Africa. He labeled such allegation as mere speculations by the Applicant or her opinion. He submitted that; the Applicant has also failed to show that conditions exist in this application which would warrant the Court to issue an order of deposit for security for costs. He contended that, as Page 5 of 12 per the affidavit and the counter affidavit file in this Court, the 2 nd Respondent is a resident company registered and doing its business in Tanzania and her offices are well known. To support his submission, Mr Msalaba referred to this Court its own decision in s similar application between Buraq Logistics Limited and Prime Cement Limited, Misc. Commercial Application No. 171 of 2021, (unreported) where this Court, (Magoiga, J) rejected the prayers of the applicant for failure to meet all set conditions for the grant of an application as this one before this Court. He, therefore, urged this Court to dismiss the Application with costs. In a brief rejoinder, Mr. Msamanga rejoined by reiterating his earlier submission in chief and added on rejoinder that, under Annexure FIL-2, it is only the Applicant and GGML who are parties to it, and that, anything to do with the Applicant's client was and must have been dealt with by the Applicant. He rejoined that, the 1 st Respondent's conduct of interfering with that relationship shows the Respondent's an ill-intent. Referring to Annexure FIL-3, he also rejoined that, that clause 1.1 of that annexure does indicate that, the 1 st Respondent's address is in South Africa and if the equipment are to be removed, they will be sent to South Africa. He contended that, the equipment in question are the only known assets of the 1st Respondent in Tanzania. He distinguished the decision of this Court in Buraq's case (supra) stating that, the dismissal order was given because the affidavit relied upon failed to disclose the required conditions and the Respondent's offices were known to be Page 6 of 12 within the country. With such observations, he urged this Court not to rely on this decision but proceed to grant the prayers sought. I have given a careful consideration of the rival submission from the learned counsels and the affidavits filed in this Court. The issue to address is whether the prayers sought in this Application should be granted as they are or be dismissed as the Respondents urge me to do. In the first place, while I am well aware of the decision of this Court in the

case of Buraq Logistics Limited vs. Prime-Cement Ltd (surpra), I am aware, as well, of the principle which was once stated in the case of Jovet Tanzania Ltd vs. Bavaria N.V (Misc. Commercial Cause 39 of 2019) [2020] TZHCComD 52 to the effect that, each case must be heard on its own merits. The circumstances obtaining in one particular case may differ with another case. In the application at hand, the Applicant seeks for an order of attachment and sale before judgement. In an application as the one at hand, care and caution together with the wisdom of the Court needs to be taken aboard in order to ensure that a harmonious balance is created on both parties and no more harm is occasioned that what might be occasioned if the application was to be refused. Ordinarily, however, if an order for attachment was to be made, before such an order for attachment before judgement is issued, a Defendant or Respondent for that matter should first be afforded opportunity to show cause why he should not furnish security before his property is attached. This is provided for under the following provisions: Order XXXVI Rule 6 (1): Page 7 of 12 “Where, at any stage of a suit the court is satisfied, by affidavit or otherwise, that the defendant, with intent to obstruct or delay the execution of any decree that may be passed against him:-

- (a) Is about to dispose of the whole or any part of his property; or
- (b) That the defendant is about to remove the whole or any part of his property from the local limits of the jurisdiction of the court, the court may direct the defendant ... to appear and show cause why he should not furnish security. 7(1) where the defendant fails to show cause why he should not furnish security the court may order that the property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, be attached.” See also the case of Sea Saigon Shipping Ltd vs. Mohamed Enterprises (T) Ltd, CIVIL APPEAL NO. 37 OF 2005 (Unreported). In the present application, there is yet another dimension added which is sale of the attached property. Well, as I said, I do not think that harsh approach will be warranted while the case is still pending and no one is sure who is going to win it. What if the sale is ordered and the Page 8 of 12 Respondent wins the case? Would that not be more calamitous to both of parties given that the Respondent might not have the interest of partying away with the property in question? By and larger, I do find that, the law, as I see it under Order XXXVI Rule 6 and 7 upon which the application is premised, did not go to that extent which the Applicant wants me to go. In Rule 11 of the Order XXXVI, there is a room to exercise a right of sale of a property which is subject to an attachment order but the exercise of that right is solely reserved to a claimant who wield an existing right to do so or a decree issued against a Defendant/Respondent prior to the Order. As regards the fulfilment of the conditions set out under the provisions of Order XXXVI Rule 6 (1) of the Civil Procedure Code, Cap.33 R.E 2019, it has been the contention of Mr. Msamanga that, the Applicant has fulfilled them. I have gone through the supporting affidavit of Mr. Joel Makyao, in particular its paragraph No.11 and the attachment to it. In that paragraph he has deponed as follows: “That, on 27th January 2023, the 1st Respondent’s representative Mr. Chris Corns responded to the email expressing their intention to remove the equipment from the premises of the Applicant’s client. A copy of the e-mail from the 1st Respondent’s Representative dated 27 th January 2023 is hereby attached and marked as

annexure FIL-8 forming part of this Affidavit.” Page 9 of 12 The relevant e-mail attached as Annexure PIL-8 to the affidavit supporting this application reads as follows: From: Chris Corns chriscorns@mesfin.co.za Date: Fri, Jan 27, 2023 at 9:41 AM Subject: DEMOBILIZATION OF CRUSHER To: Silas Shija shija@anglogoldshanti.com CC: Simon Makata <simon.makata1@gmail.com.... Good day. Our attached letter refers. Please advise from whom we can obtain necessary gate releases to load and remove the equipment in question. Regards. Chris Corns. As I examine the above email, there is a clear indication that, the 1st Respondent was/is determined to demobilize and remove the respective equipment from the mine site where it is currently situated. As such I am in agreement with the Applicant's submission that, the email had expressly revealed that intention. Indeed, I take note of what Annexures FIL-6 and 7 provides and that, although it does not tell out where exactly the equipment will be sent after it is demobilized, it is however, pretty clear, taking into account Annexure FIL-9 that, the equipment I for re-export to where it was obtained, which under Annexure FIL-3, clause 1.1 should be in the Republic of South Africa. According to Order XXXVI Rule 6 (1), (2) and (3) of the Civil Procedure, Cap.33 R.E 2019, the Court is given other options as well. This includes a temporary attachment. As I stated, there is no issue of sale under those provision. From the foregoing considerations, since I am satisfied that the requisite conditions for making the orders sought Page 10 of 12 (except that of sale of the equipment) are made, the appropriate mode is that, either the Respondent should show cause why she should not furnish security within the time to be specified by this Court or an order of temporarily attaching the respective equipment pending judgment of this Court should be made. As regards the first option, the learned counsel for the Respondent argued that the Applicant was not able to demonstrate whether the conditions for furnishing security were met or not. In actual fact he did not appropriately state why the Respondent should not furnish security, which means that, there is failure on the part of the Respondent to show cause. That being said, and since it was a prayer by the Applicant, the only option is to grant an order of attachment of the respective equipment pending determination of the pending suit, Commercial case No.07 of 2022. In the upshot of all that, this Court settles for the following

Orders:

1. That, the Respondent's Equipment namely: Jaw-Crusher- MES 001, PREMIERTRAK 4000X, PIDPT40XPOMKB1648 and SCEEN Crusher- MES-002, WARRIOR 1400X, PID00133ED GL83286 (Crushers) are/is hereby ATTACHED BY ORDER OF THIS COURT from the date of this ORDER, Pending hearing and determination of Commercial Case No.07 of 2022. Page 11 of 12
2. THAT, upon attachment of the specified equipment, the Applicant shall forthwith be responsible at her own costs to its removal from the respective locality where it the equipment is currently placed and station it at a safer and secure place until this Court finally disposes of the Pending Commercial Case No.07 of 2022.

3. THAT, the costs of this application shall be in the main cause. It is so ordered. DATED AT DAR-ES-SALAAM ON THIS 15TH DAY OF FEBRUARY 2023 DEO JOHN NANGELA JUDGE Page 12 of 12
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