

TANZANIA / JUDGMENT

prism badr jv vs tanzania roads agency another 2011 tzhc 2061 8 april 2011

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8 April 2011

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IN THE HIGH COURT OF TANZANIA AT DAR ES SALAAM CIVIL CASE NUMBER 90 of 2008 PRISM-BADR J.V..... PLAINTIFF VS TANZANIA NATIONAL ROADS AGENCY (TAN ROADS).....
1ST DEFENDANT EPHRAEM MREMA, THE CEO TANROADS... 2ND DEFENDANT Last Order:
21-03-2011 Ruling: 08-04-2011

RULING

JUM A, J. After finding myself in a position of a successor judge who is not as good a position as my predecessor judge was, to evaluate the ex parte oral submissions made before predecessor judge and prepare a Ruling thereon, I ordered the main application to be heard inter parte by way of written submissions. In the main application, the Plaintiff/Applicant had sought orders to restrain the Defendant/1st Respondent TANROADS from receiving any payment from the Guarantor National Bank of Commerce or benefitting from Bank Guarantee No. 671512/L.36/2007 and No. 671512/L.47/2007 pending determination of Civil Case No. 90 of

2008. The Plaintiff/Applicant on 9th March 2009 moved this Court under Order XXXVII Rule 2 (2) of the Civil Procedure Code, Cap. 33 seeking the following orders- 1

- i) attachment of the property of both TANROADS (1st Defendant/1st Respondent herein) and of Mr. Ephraem Mrema, the CEO of TANROADS (2nd Defendant/2nd Respondent herein); and ii) detention of Mr. Ephraem Mrema, the CEO of TANROADS as a civil prisoner for six months for disobeying an interim order of this court dated 11th June 2008. The background giving rise to this application traces back to 23rd February 2007 when the Applicant/Plaintiff PRISMO-BADR J.V. operating in partnership with others, entered into a contract with the Tanzania National Roads Agency (TANROADS). In that contract the Applicant/Plaintiff was given the task of upgrading to the level of bitumen the roads from Marangu to Rombo Mkuu, Mwika and Kilacha. As required by that Contract, the Applicant secured Performance Guarantee and Advance Payment Guarantee from the National Bank of Commerce. According to the Respondents, the Applicant/Plaintiff referred the dispute to a Dispute Review Expert. It was in response to Respondents' demand on payment of Guarantees which made the Applicant/Plaintiff to file this present HC Civil Case No. 90 of 2008 on 10 June 2008. The following day on 11 June 2008, Shaidi, J. (as he then was) after hearing an ex parte

application lodged by the Plaintiff granted a temporary restraining order against the Defendants pending hearing of the main application. Shaidi, J. scheduled the main application for temporary injunction to be on 25-07-2008. On 9th March 2009 the Plaintiff/Applicant filed a chamber summons subject of this Ruling seeking attachment of properties respondents and detention of 2nd Respondent as a civil prisoner for six months. According to the supporting affidavit sworn by one Denis 2 Venier who had a special Power of Attorney, accused the 2nd Respondent of disobeying the interim order dated 11 June 2008 of this court after 2nd Respondent had pressed for payment of money held by the National Bank of Commerce the Guarantor of the Applicant. In the written submissions he filed on behalf of the Applicant/Plaintiff, Mr. Kisusi prayed for attachment of properties respondents and detention of 2nd Respondent as a civil prisoner for six months. Mr. Kisusi drew the attention of this court to a letter ref. TRD/HQ/L/20/162 dated 13th October 2008 annexed to the affidavit of Denis Venier as ANNEX DV-2. In this letter, the 2nd Respondent was demanding of the Senior Legal Counsel, National Bank of Commerce to pay the Respondent a Guarantee sum of Tshs 2,329,298,175.29 arising under the contract between the Applicant/Plaintiff and 1st Respondent/1st Defendant. Mr. Kisusi is in no doubt that the letter clearly disobeyed an interim order of this court dated 11th June 2008 and Respondents are in contempt of this court. 1st and 2nd Respondents' replying submissions were filed on 15th February 2011 by the Law Associates Advocates. Respondents basically submitted that Applicant/Plaintiff cannot in law seek orders against the respondents under Order XXXVI Rule 2 (2) of CPC. It was contended on behalf of respondents that under Order XXXVI Rule 2 (2) contempt only arises where there is disobedience or breach of terms of injunction granted. The terms in which the injunction was granted were essentially that the status quo was to subsist until final determination of the arbitration proceedings. Since no arbitration proceedings have so far been initiated the Applicant/Plaintiff cannot rely on any orders under Order XXXVI Rule 2 (2) of CPC. Respondents finally contends that it is not proper for the Applicant's interlocutory application of 10 June 2008 to seek on ex parte basis the reliefs which are the Applicant is at the same time seeking in its main suit. I have considered the submissions made on either side and perused the materials available on record. In my opinion, many issues arising from submissions of the learned Advocates should better be left to be determined in the main Civil Case Number 90 of 2008. For instance, the question of whether the dispute between the Applicant/Plaintiff and Respondents/Defendants was ever referred to arbitration is better left to be determined in the main pending suit. Similarly the alleged failure of the joint venture to register with the Contractors' Registration Board as required by the Public Procurement Act, 2004 should be determined in the pending suit. A particular note has been taken of the fact that the power of this court under Order XXXVII Rule 2-(2) of the CPC is permissive but not compulsive,

- (2) In case of disobedience or of breach of any such terms, the court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached and may also order such person to be detained as a civil prisoner for a term not exceeding six months, unless in the meantime the court directs his release. I must at the very outset point

out that 1st and 2nd Respondents' replying submissions should in my opinion have adequately addressed the issue whether the letter ref. TRD/HQ/L/20/162 dated 13th October 2008 which Mr. Ephraem Mrema wrote to the National Bank of Commerce amount to disobedience of the interim orders this court issued on 11 June 2008. Respondents' submissions have only made very tangential references to this letter and only to justify what Respondents regard as their correct interpretation of applicable law, "2.10. The letters Annexure, DV-2 and DV-3 to the Affidavit in support of this Application demanding payment under the guarantees and which form the basis of this Application were written on 13/10/2008 and 25/11/2008, respectively. This was well after seven (7) days from the date of the Final Recommendation. page 4. In paragraph 3.4 of their submissions, Respondents audaciously contend that as long as the Respondents were acting in compliance with the recommendations made by the Dispute Review Expert their letter to the National Bank of Commerce was not in contempt. In my opinion, the contents of the letter dated 13th October 2008 which the 2nd Respondent wrote to the National Bank of Commerce is to say the least disturbing and cannot escape the attention of this court. The letter clearly shows that Mr. Mrema was well aware of existence of an ex parte interim order of this court restraining TANROADS from enforcing the Performance Guarantee. Yet he haughtily went on defy that interim order of this court by imperatively obliging the National Bank of Commerce to step into the shoes of Prismo-Badr JV and pay TANROADS within two weeks that very guarantee which this court had restrained by an interim order dated 11th June 2008. The effect of any such payment would have been to scuttle and defeat the whole Civil Case Number 90 of 2008 which is still 5 pending in this court. The second and third paragraphs of the letter Mr. Mrema addressed to the bank are a telling disregard of interim orders of this court, "In civil case No. 90 of 2008 filed in the High Court of Tanzania at Dar es Salaam, Prismo-Badr JV sought and obtained an ex parte interim order restraining TANROADS from enforcing the Performance Guarantee and the Advance Payment pending conclusion of arbitration proceedings. We wish to inform you that no party in the above case had at any point in time commenced any Arbitration Proceedings and the prayer for the interim order was wrongly premised and incorrectly granted. By then the only proceedings that were pending were those before the Dispute Review Expert which have been concluded." Lord Donovan in AG v. Butterworth [1963] 1QB 696 is quoted by Msumi, J. (as he then was) in the case of Yasini Mikwanga V. R. 1984 TLR 10 (HC) to have stated that the question to be decided in all cases of contempt of court, is whether the action complained of is calculated to interfere with proper administration of justice. I will with respect agree with Mr. Kisusi that Mr. Mrema's letter to the National Bank of Commerce interferes with the interim ex parte order of this court designed to maintain the status quo till inter parte hearing of the application and also Civil Case Number 90 of 2008. There are many decisions of this Court emphasizing the duty of all and sundry to obey orders of court without fail. Mr. Kisusi referred me to the case of Tanzania Bundu Safaris Ltd vs. Director of Wildlife and Another [1996] TLR 246 where Mapigano, J. (as he then was) held that civil contempt does not require immediate imprisonment because it is also punishable by imposition of a fine. The case of Kundan Singh Construction Co' Ltd Vs. Tanzania National Roads Agency, HC DSM Civil Case No. 1 of

2009 was also referred to me where F.A.R. Jundu, JK found that Mr. Ephraim C.M. Mrema had disobeyed this court's interim injunction order dated 23rd March 2009 that had restrained TANROADS from terminating a Contract with Kundan Singh Construction Co. Ltd. This court proceeded to impose on Mr. Ephraem Mrema a fine of TZS 5 million to reflect the gravity of contempt that had been committed. There is the remaining question of requested attachment of the property of both TANROADS (1st Defendant/1st Respondent herein) and that of Mr. Ephraem Mrema, the CEO of TANROADS (2nd Defendant/2nd Respondent herein). I must point out that while the Applicant/Plaintiff has successfully shown the instrumentality of the 2nd Respondent in the interference with an ex parte order of this court, no similar attempts were made to directly link 1st Respondent TANROADS as a whole to justify the attachment of the property of TANROADS. I therefore decline the request to attach the property of 1st Defendant/1st Respondent. Taking into account the whole picture, I have no hesitation to and I hereby hold Mr. Ephraem C. M. Mrema to be in contempt of the interim order of this court. In so far as punishment for the contempt is concerned, Mr. Mrema's contempt which led to the case of Kundan Singh Construction Co' Ltd Vs. Tanzania National Roads Agency (supra) arose from his letter dated 23rd March 2009. This present application before me arises from Mr. Mrema's much earlier letter dated 13th October 2008 which he addressed to the National Bank of Commerce. From these sets of facts I am of the opinion that the 2nd respondent should in the present application before me receive a more lenient punishment than the one he received in the case of Kundan Singh Construction Co' Ltd Vs. Tanzania National Roads Agency (supra). In the upshot, the integrity of court orders and court proceedings is of paramount importance. To that end, I hereby order Mr. Ephraem C.M. Mrema to pay a fine of shillings one million (TZS1,000,000/=) for disobeying an interim order of this court dated 11th June 2008. This fine shall be paid within six months from the date of this Ruling. In case of default, he should be committed to civil prison for six (6) months. Mr. Mrema shall also pay the costs of this application. Otherwise the interim injunction issued by this Court on 11th June 2008 against the Defendant/1st Respondent TANROADS from receiving any payment from the Guarantor National Bank of Commerce or benefitting from Bank Guarantee No. 671512/L.36/2007 and No. 671512/L.47/2007 shall subsist pending final determination of Civil Case No. 90 of 2008. It is so ordered. I.H. Juma JUDGE 08-04-2011 Delivered in presence of: Mr. Kisusi Advocate (for the Applicant) and Mr. Mbwambo, Advocate) for Re ' ' l.h. juma JUDGE 08-04-2011 8

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Prepared on 13 October 2026 · Esheria