

TANZANIA / JUDGMENT

19930204 TZHC Arusha

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- v IN T~IE HIG=r C01JRT OF Tli.IBA1'1TA AT ARUSHA. MISC. CRL'-HYJAL A:iPLICATION NO. 4/1993 C/F CRfrIINAL APPEAL NO. 11 OF 1993 (Fror.1 the decision of the District Court of Arusha at Arusha in Ee. Crine Cas~ No. 21/1989) HANS U. LUETTI CJJ •• o o .l o .o o o .. o Q ~ o o o o o o o • o o o o • o • o o • o o o o :- o • o o .• APP LI C.A.NT VERSUS THE REI)UJ3LI c . 0 0 • 0 o •• 0 o o =, o O o o C ~ • o o O • 0 0 0 o o O • o • 0 0 0 o o o o o •• ~s~:::io£JDD}JT R U L I N Gg This is an 2 _l.)lication for bail pending the determin:::dion of an . appeal, which ·the !.lf)licont has filed to -f..his court challonGin:3 the decision of the trial subordinate court at Arusha. The apJlication has been filed by one :.J~\rJS UIBICH LEUTTICII, a Gerrilan national, who was charged before tho court of the Resiiient Magistrate at Arusha with two _counts unjer the :E:xchange Control Statute, Cap. 2;4 of the Laws. The said counts were-set out in the charge sheet as follows: 1st count: State;;ent of o f f e ~ Failure to coll::-c~t certain: debts c/s 24(1) and paragl'aph 1(1) .of Part II of the 5t~1 Schedule of the Exphange· Control Ordinance, Cap.· 294! ' Particulars of offenceg . ~ ----- Hans Ulrich Leuttich :.Jetween the first day of Janm1ry, 1930 and the 24th Septcu')e,i:' , 9 1984 while at Arusha Region as the i.liana:3"ing Director of Tanz6,nite Wildlife Tours Linitec.1, a subsidiary Company of Zapa~c:::. !Iolclin6 s Lir.li ted (Group of Co,:lpanies) , po:::-s;nally failed to coll~bt U,S \$110,214.61 which was equivalent to T. Shs. 1,808,732/= fror.i ABC Munich 9 a German Tours Operatorsp in West Gernan'y. • 2nd Count g •••••••/2 (•• 2 •• Failure to collect certain debts 9 c/s 24(1) and parat;raph 1(1) of Part 11 of tho lifth Schedule of the Exchange Control Ordinance Cap. 294 as read together with section 56(1) and paragraph l{a) of t:10 First Schedule of the Econoi:1ic and Organized Crine Coffcrol Act No. 13 of 1984. Particulars of offenceg Hans Ulrich Leuttich between 24th July, 1985-and 16th .Fe!)l"llary 9 1987 while at Arusha RG 0 ion as the l"Janagi_ng Director of Tanzanite 1:lildlife Tours Linit'ed, a Stlbsidiary coLij)al'l.y of Zapata Holdings Limited (Group of ConpaniGs), personally failed to collect US\$ 163,049.55 which was equival0nt to T. Shs. 3 9 751 9 515.10 from .A:BC Munich, a Germany Tour Operators, in ~"fest Geruan¥. The applicant/accused was convicted of the said counts an~7-. was sentenced to two years ir:::prisonnont on 1st -count and to 10 years _ir.1priso111lent on 2nd count~ The sentences. were 1>rdere_d_to run concurrently. He was further orJ.ered to pay the amount of the outstanding debt L,. e2.ch count, which c_a.Be te: a total ru~lount of US \$ 273,264.16 or the equivalent of the present rate with ;interest from 1981 to th:::, date of the final i payuent. The order J~rected that the properties of a conpmiy named Big Gar.ie Saf2ris h:::i.1J8d in Arusha be irJDedately attached in satisfaction of the

outstantlin15 ~7-.ebt in question. However, the order c7-.id not sta.te to whor,1 this
 outsto..ndin[; · a:::1ourit should be paid, thnt is 9 whether the sai:1e be ;;iaid to tho Republic
 which_ is the complainant in this co.se~ or to Tai-izani te Wildlife Tours Lir.:iited. It is t~1is
 whole decision of the trial subordinate court that the applicant/accused is challenging
 before this court by way of appeal vide crininal appeal No. 11/1993 which is still pending
 before this court. This applicaticm. has been filed under the enablin 6 section 368(1) of the
 Cri1:1inal ProceJ.ure Act No. 9/1985. · The application is supported by an affidavit deposed.
 to by Nr. Ngalo one of the·two learned counsel who represented the applicant/accused in
 this application. The other advocate ,Tllo also represented the applicnnt/accusec1 jointly
 with Mr. Nc;alo is'li:r. Hahatane. It is •••• "/3 " 3 It is Hr. Mahatane ii1. fact who also
 represented the ap;,_Jlicant/a.ccused at the trial in the subordinate court. Mr. Lundup
 learned S'!:ate Attorneyp who also featured at the trial and conducted the prosecution
 therein, also appeared for the Republic .,in this application. I must hasten to state that this
 application was hotly constested, and for that reason the same has been exhaustively argued
 by cotmsel for both parties. I to.lee the opporhmi ty to thank counsel for the parties for their
 invaluable assistance they have rendered to this court through their able submissions.
 Indeed, the suhuissions that have. been made by the cou;:_1sel for the. parties in this case
 are q_uite exhaustive, but the same did not go beyond what is contained in the record of the
 trial court. For t:12.t reason, without necessarily going over tl10se extensive subrnissi,ons; , I
 will only, for purposes of this.application, discuss and consider juGt the salient points which
 h4ve been brought out from those submissionss and which points inevi tatly fall .for
 consideration and determinatmn by t~1is court when it sits to hGar and decide the
 applicants pending appeal. I Before proceecing with my discussion leading to the doteriina
 tion .1 • t . for • . t . of this application, I must remind r'.iysel of the ~.onlll. ions · gran, +AG
 an application of this nature as are contained in section 368(1} ·c.P.A. 85 9 under which tili3
 application has been filed. There is only one condition under the said section which will
 entitle a court to c;rant bail to an accused person or a convict pcmding the c1:t\,1ri!;irn~tiuh
 of his appeal. That condition is that 9 there 1:iust be reasonable c2use to be recorded by the
 cou:d in writing to justify the granting of s1-.1.cb bail. My immediate task in this application
 is therefore to see from the evidence and the sub,dssions made by counsel for the part:L0s 1
 whether reasonable cause exists in this case to entitle this court to 0 rant this application. I
 will now go over the salient legal points in this cas0, .. wh.:i,•h stand out clearly lilrn
 iJromontories in the vast sea of eviclenco in this case. I will •••••••• /4 •

- Cl 0 4 I will of necessity have rocourse to th2 sections of the laws cited in the chc:::rge 9
 which t:10 proseoution allege to create the o.ff onces in the , I two counts in this case. In fact
 the two counts in the c}1cr0 e are like iwin counts, with the only difference that the first
 coun:t is an ordinary offence under the Bxolmnge Control Statute, and punishable
 therGunder with an ordinary 1,"ii..minluont, while the socond count is 8Jl ordinary- cum-
 extraordinary ofl"once, that is, economic offence 9 punisho.,ble with an extraordinary
 pu.Ylishuont unrl.er the Economic and Organized Crine Control Act No. 13/19134, The first
 salic ;t legal point that stands out cleo.rly o.n:::l which 0 shall hEl.ve to be d&t2ruined by this

court on appeal is that of interpretation of section 24 of the Exchange Control Ordinance, Cap. 294 under which the two counts in this case were preferred. The learned counsel for the applicant submitted that that section does not create any offence punishable under paragraph 1(1) of Part II of the 5th Schedule to Cap. 294, all that that section does is merely to define or describe the person who is covered under that section, and the circumstances which give rise to the prohibition set out therein. In the same section, the legislature, in its wisdom, prescribed under subsection 2 the steps or measures to be taken, where the prohibition in question has been contravened. It is to be noted that section 24(1) (a) or by cessation (s. 24,1) (b) • The learned counsel for the applicant strongly argued that the punishment provided under paragraph 1(1) of Part II of the 5th Schedule to Cap. 294, is not relevant for defaulters who are described in section 24 Cap. 294, otherwise the provision under subsection 2 of section 24 would be rendered meaningless. It will, I believe, be of advantage to set out in full the whole provisions of section 24 Cap. 294. 11 24(1) Except with the permission of the Treasury no person resident in the Territory shall have a right (whether present or future, whether vested or contingent) to receive any specified currency, or to receive from a person outside the Scheduled territories a payment in East African

- shall, if he is a person, shall do or refrain from doing, any act which is in connection with or shall do any act which involves him in association with or is preparatory to any transaction securing
- (a) that the receipt by him of the whole or part of that currency or, as the case may be of that payment in East African shillings is delayed; or (b) that the currency or payment ceases, in whole or in part, to be receivable by him. Provided that nothing in this subsection-
- (i) shall unless the Treasury otherwise directs require on any person any obligation, in relation to any debt arising in the carrying on of any trade or business to procure the payment thereof at an earlier time than it is customary in the course of that trade or business; or (ii) shall, unless the Treasury otherwise directs, prohibit any transfer to a person resident in the Territory and not elsewhere of any right to receive any specified currency or payment in East African shillings.
- (2) Where a person has contravened the provisions of subsection (1) of this section in relation to any specified currency or payment in East African Shillings, the Treasury may give to him or to any other person who appears to the Treasury to be in a position to give effect thereto (being a person in or resident in the Territory) such directions as appear to the Treasury to be expedient for the purpose of obtaining or expediting the receipt of the currency or payment in question, and, without prejudice to the generality of the preceding provisions of this subsection, may direct that there shall be assigned to the Treasury or to such person as may be specified in the directions the right to receive the currency or payment or enforce any security for the receipt thereof. 11 Indeed, the 2.1.106 quoted

section provides in its subsection 2 a corrective measure where a person violates the prohibitions in that section, which are the subject of the charge in this case. It is then a pertinent question for one to ask whether it is permissible and lawful for the prosecution, and for the court at that time to prosecute and punish with imprisonment a defaulter of the prohibitions contained in section 24 cap. 294, in reliance on the provisions of paragraph 1(1) of part II of the 5th Schedule to Cap. 294, instead of taking action as provided under subsection 2 of section 24 Cap. 294. This question which is very crucial was not resolved by the trial court. Mr. Lundu, learned State Attorney, readily conceded that section 24 Cap. 294 is merely a prohibitory section; it does not by itself create an offence. However, Mr. Lundu urged that the said section creates an offence when it is read together with paragraph 1(1) of Part II of the 5th Schedule to Cap. 294. So the whole scenario on this point reverts us back to the academic legal arena of interpretation of statutes. Mr. Ngalo submitted that, it is legally incorrect to permit section 24 Cap. 294 to be read together with paragraph 1(1) of Part II of Cap. 294 as to do so gives rise to an ambiguity. He urged that Cap. 294 which is a penal statute, has to be strictly interpreted, and any ambiguity in that law has to be accorded to the benefit of the accused – the applicant in this matter. Mr. Mahatane and Mr. Ngalo also pointed out to this court errors of law, which are present on the record and which Mr. Lundu, learned State Attorney, does not object to. The first error is that the Prosecution did not indicate in the charge sheet which specific arm or paragraph of section 24(1) the applicant/accused transgressed. Mr. Hichilo and Mr. Mahatane urged that the said section has paragraphs (a) and (b) each of which defines a definite and distinct mischief or prohibition. Paragraph (a) relates to delay, while paragraph (b) relates to harassment. Mr. Ngalo and Mr. Mahatane submitted that the omission by the Prosecution to make the said specification renders the charge defective and incurable as it misled the applicant. Mr. Ngalo and Mr. Mahatane also argued that the charge uses the term "harassment" whereas the term is not used in section 24 cap. 294. This means the applicant/accused was charged with some other offence the commission or omission of which is not covered under section 24 cap. 294. Mr. Lundu, learned State Attorney, strenuously contended that these errors are nonetheless curable under section 388 of the Criminal Procedure Act, 1975. Mr. Lundu said "I say that the applicant may be right or wrong depending on what the court will rule on appeal which still has yet to come." Mr. Ngalo and Mr. Mahatane also argued that the applicant/accused has not been proved beyond reasonable doubt that he falls under any of the type or categories of persons – who are defined and described both under section 24 cap. 294 and in paragraph 3(L)(2) of Part II of the 5th Schedule to Cap.

294. Mr. Ngalo once again Mr. Mahatane contended that the applicant was not an employee of Tanzanite Wildlife Tours (TWT LTD). Applicant was neither a manager nor a managing director with TWT. Mr. Ngalo and Mr. Mahatane referred this court to Exhibits 3 and D on this point. They also cited Regulation 68 of the Companies Ordinance, Cap. 21:2 in substance to say that there was no documentary evidence to prove that the applicant had been appointed to any one of those positions in TWT company. It is

only one A.1<1.X. D1 souza (PW.1) who alleged so in hie, evL\,ence at the 11 trial. The positions or titles referred to Clre cre.cited'by statute; they cannot just be inpliGd o r . ~ ~ by the-wish of the C112irman of TWT Company, thc1.t, is PW. Ill 1 applicant 1 s counsel ar,,u,"':d. Then Mr. Ngn,lo c1i1d Mr. Mahatane submitted that the exact amount of money owed by AJ3C company to TWT is not known and proved. This is so-because PW.1 admitted in his 0vidence thc..t he had, at least ;:i.t one occasion, instructed anc1 authorised ABt coL1pany .to pay 30 1 000/= DM to his sister-in- ·law in London. Th0rc were other items which PW.1 admitted to have.received fror;i ABC on beh 0,lf of '11WT in payment of debts thot were oljtst-1J1ding against ABC. :8ven 2w.9 so adnitted. Mr. lifgalo 3.ml Il":r.-. Mahatane also subrni tted. that the applicant was disr:lissed fro11 a.ny cngagew.ent with TWT. This was in 1987 b,~fore these charges were filed in court against the applicant in 1989,. I:1x. Ngalo asked and wondGrec7. why only the applicant and not n,ny other p:Jrson in TWT, in particul:1r PW.1, wt.ts charged with these offences. Hr. Ngalo subLlitted thn,t what the Republic did to the accused in this cc..se is I prejudicial, it 2.r.:101-mts to a misco.rriage of justice thereby rendered tho proceedings il;1proper c111d unfair 9 hence null and void. "l"lis point was not advert eel to ;Jy the tri.:11 court, but the sarile · is quite crucial on appeal. With " " ... / 0 ... 8 • • • t With reg2.rd. to the averr.ient in Mr. Lundu coun; . ±er affi-:~:::ivi t that the applicant/q,ccused is a person.of dangerous conduct in that ho was wielding his first towards PW.1 when he was testifying at the trial, cincl. that the applicant/accused tried to open his brief case immediately after he was

- I sentenced, Mr. N~o..lo countered that- the allegation o.bout wiving a fia:tr· in court by the applicant/accused cannot be raised before this court; the same ought to he:ve been retised before the trial court which was OIJpowerad to take the a;_::;propriate action on the applicant/accused. I qilite agree with :Mr. Ngalo on that subnission. As to applicc.nt I s act of opening his brief case in col.1.rt as soon as he was sentenced~ tho.,t act cannot be interpreted as a wron;; o..ct 1 or that the accused intencl.od to barn anyone by nerely opening his brief case. Afterall, Mr. Ngalo o.rgued, there were several polipenen whc surrounded the applicant/accused c.t that material tir.1e so that any suspicion that the applicant had intcmcl.ed to do harm to anybody right in the col.1rt room is unrrrn:1son2ble and ili-conceived and, above all, quite malicious. The foregoi::; salient points or issues which I have sin~::;led out and discussed a.bove, ;-111cl upon most of which the lectrned trin,l Resident Magistrate r;hierely Glossed over nnd neyer resolved, are quite crucial to the just decision of this cn.se. The sa:o.e issues or points will be hmi11-,:iered at the, pending applicant I s a;;rueaL Those issues cannot be decided or determined in this application. Nor is it feasible at present to foresee what this court on appeal will decide about those issues. The applic6.nt's appeal is a first appeal, in which the first appellnte court has a siular duty ·like the trial cou:::~:~t of reassessing and reevaluo.ting the evic'e1~ce on record in relation to tho law applicable to those issues. There is the evidence of PW .1 upon which -cb8 trial court he:wily based its decison. One may, however, wish to c.sk on appeal whether PW .1 was not an &0000:plioe .,or a.t least a parson with an interest of his own to serve in the mr-tter, _ thereby requirin 0 corroboration to his t:vidence! The foregoing points in sum, in my view,

1:1clce up to a reason:~ble cause envisaged ,J..1.Jer section 368 of the C.P.A., 85 to entitle this court to grant bail to the ap:!)lico.nt pending the deterr,unci,tion of his a~peal. This • /9 (• ,. v• • . -...- • • • • • ',-t l This finding of r;iiine subsumes r.iy rul:Lnc which I had rese:rved 0;1 the arguments which Mr. Lundu had n:::ide to the effect that the a.j_)licant's criminal appeal l~o. 11/19939 which is pending before this court, is legally incomvetent as the same has been inpropGrly file~ to this court. It is LiY considered view, and I find, that Mr., Lundu I s arc,"lmcnt on that point and in that directionp is premature as this court is not coDpctent at present to entertain and. cl.ecii1.e the validity or otherwise of the Sc'.id pending appeal. Lastly, therG ,r:::w. the prayer in this application for ::i. temporary stay order. After he~ring learned counsel for the applic~nts I llade an ordiar staying the execution of the order of attachment th2.t wns :oade by the trial court aGc...Lnst the properties of a liraited liability company styled as Big Gaue Sa.faris, which was not a party to this case. The stay order which I r.lade vas tenporary pending the hearing and dotcm~imtion of the ap~licant's apJeal to this court. On the foregoing deliberations I grant applicant I s a:r.?lication as prayed. I order t)x1.t the ap;_Jlicant be released on co.sh lx:2.il worth 3 million Tanzanian shillin,.,8 'to be deposited with the court. Also tlJ.e D.JJj_)li cant should secure two suJ~uties who are Tanzania citizens resi::~ent in Arush,a town with land...d 1,ro:pcrty in Arushn. town who should sign n. bond. ea.ch worth 10 million r118.~1.za1lian ~billings. 'fuc sureties and tbair landed properties should be scrutinized and approved by the .J)istr:i.ct fo.?gistrar before sis>nines t:leir surety bonds. The accused/ applicant should also, surrender his passport or any other travel documents to the police at Arusha. The a;;,i)lic.:mt/accused slould inform and report botll to the court and to th-:? police station at Arusha whenever he wishes to trc-nrcl outside the circur:1ference of Arusha and,ICilimanjaro regions. It is o:-c:::l.ered accordingly. Application granted as prayed together with the bail co:1cli tions as set out above. / t~ ~ M.D. li!C;J'.ALLA, JUDGE. 4/2/1993 I \ ' \ • • • 10 • • • I 4.2.1993 Coram~ M.D. Nchallap J. For Ap})licnnt/Accusedg M/s Ngc:.lo and l'fu:thatane, Advocates. For Republic/Respon:lent g Mr. Mwaimu State Attorney. 'l - Mr. Kigingi~ C.C. Courti Ruling delivered in open court at Arusha in the presence of the parties, this the 4th day of February, 1993. wd~ B.igu:t of n.ppeal explainad. H~D. NC1:f:tr1JLA 9 JUDGE. 4.2.1993 (M.D. NC:IALLA), JUIJG)1. 4/2/1993. Cora.mg S.J. Lawena Ag. DR. Court: The matter cor:ies for approval of sureties:

1. IVir. Musli11 i'J.ohc.;-,1edtahi Re1:1tula a businessman of Arusha owner of passport No. A 0017089 approved surety for the accused.
2. Mrs. Faye Cecelia, Sims a business woman of Arushn. Holi:::e:r: of passport Noo A 0051013 (identified to the court by Hr. l;alo Advocate) approved surety for the accused. (.S.J. LAWENA), AG. DBTHICT m--;GI,3TRJ\Rp 4/2/1993. MDN/JJM

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