

TANZANIA / JUDGMENT

vivo energy tanzania limited vs alchemist energy trading dmcc and 2 others 2021 tzhccomd 3297 9 july 2021

COURT
TZHCCOMDDECIDED
9 July 2021

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IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA (COMMERCIAL DIVISION) AT DAR-ES-SALAAM MISC.COMMERCIAL APPL. NO.94 OF 2021 (Arising from Commercial Case No.76 of 2021) VIVO ENERGY TANZANIA LIMITED ■ APPLICANT VERSUS ALCHEMIST ENERGY TRADING DMCC-x-!* RESPONDENT NATIONAL BANK OF COMMERCE<TD-^2^'RESPONDENT ODDO BHF AKTIENGESELLCffAFT^X .3Rx RESPONDENT

RULING

Date of Last Order: ^9/07/2021 Date of Ruling ^""^09/07/2021. NANGEU,^^>>^.;;;^ K XX \This is rulingps in respect of an application filed by the Appljcgnt^ under a certificate of urgency. The application was brought under Order XXXVII Rule 2 (1) and Section 68(e) of the Civil Procedure Act, Cap.33 RE

2019. It was filed on this 9th day of July 2021 and, noting that it was filed as an urgent matter, I called it on for its hearing ex-parte. Mr Josiah Noah Samwel and Mr Dismas Mallya, learned advocates, appeared for the Applicant. Mr Joseph Page 1 of 8 Nuwamanya learned Advocate, appeared from the 2nd Respondent while the 1st and 3rd Respondents were absent. Submitting before the Court, Mr Samwel requested this Court to adopt the facts stated in the affidavit of Natasha Galabawa which supports the application. Briefly, it is averred, as facts which led to this application for interim orders that, ori^22nd September 2021, the Petroleum Bulk Procurement Agency, (PBPA) executed a contract for importation ofj^various^quantities of petroleum products ^vtfitk variousC OilyMarketing Companies (OMCs). TheT-BPA^acShi^s. an agent of the OMCs advertised a<zTender\;No.PBPA/CPP/PMS/C3- KOJ/02/2021^for\suppl^ofsuch' various quantities of Following)jtie floatipg of such a tender and the com^pieto^^f^e-/tendering processes, the 1st Respondent emerged a winner. Subsequently, a shipping and Supply^Cpcontract dated 5th January 2021 was signed between the PBPA and the 1st Respondent. That contract was attached as annex VIVO-AF1. Based on the existing arrangements between the PBPA and the OMCs, and, the Applicant being one of the OMCs, the latter ordered a consignment of the intended petroleum products valued at USD 201,398.44 (7iw Page 2 of 8 Hundred and one Thousands Three

Ninety Eight, Forty Four Cents'). The Agreed delivery date was between 27th February 2021 and 1st March 2021. The dates were later changed to be between 3rd March and 5th March 2021 and further between 14th March and 16th March 2021. According to Mr Samwel, it was a condition for the supply that, the Applicant should issue a Letter of Credit via its bankers in favour of the 1st Respondent, this being one of the means by which the transaction was secured. As such, on 23rd February 2024, the Applicant complied with that condition, issuing, 'a Letter of Credit (the 2 Respondent) a Letter of Credit No. /A. 'C \ 002LCNB210540001 (attached to the affidavit as 1 A X Annex, VIVO/AF2). for Settlement of a sum of the X X... \ petroleum products of the 1st Respondent, the USD 201,398.44. , . X ...X r -rd Respondent as the Confirming bank. \ ■ \ Mr Samwel submitted that, the maturity date of this Letter of Credit (LC) was 30th April 2021 in which the 1st Respondent would have encashed it upon meeting the conditions there under. It was Mr Samwel's submission that, despite the Applicant's compliance with the conditions for the supply of the petroleum products, the 1st Respondent breached the contract as nothing was supplied on the agreed dates. Page 3 of 8 It was further submitted that, upon interventions, on 22nd March 2021, the 1st Respondent wrote a letter and undertook to remedy the situation by promising to supply the requisite amount by 15th to 17th May 2021. As such, the maturity date for the LC was extended from 30th April 2021 to 13th July 2021. To date, however, nothing has been delivered. It was Mr Samwel's submission that, despite such a fact, the 1st, 2nd and 3rd Respondents have initiated a process of encashing the Letter of Credit. When it comes to maturity on 13th July 2021. He informed this Court that, after notifying the 1st Respondent, the Applicant notified the 2nd Respondent to have the Letter of Credit cancelled since the consideration upon which it was issued has never been fulfilled. He submitted, that upon receipt of such notice, the 2nd Respondent communicated with the 3rd Respondent requesting the latter to seek consent of the 1st Respondent to cancel the Letter of Credit. However, neither the 3rd Respondent nor the 1st Respondent agreed to the cancellation. Instead, he submitted that, in the process, the 1st Respondent has submitted the Provisional Invoice and a Letter of Indemnity to the 2nd Respondent for the purposes of seeking to encash the Letter of Credit on its Page 4 of 8 maturity date, i.e. on 13th July 2021 despite the fact that the 1st Respondent is well aware that it is in breach of the agreement. It is on the basis of such facts that the Applicant has come to this Court to seek for an interdict Order. The question that comes to my attention is whether this Court should grant the prayers sought. Essentially, an injunctive order, as the one sought by the Applicant herein, is an equitable remedy. It is a rule of equity that, he who comes to equity, must come with clean hands. Looking at the submission by the Applicant's learned counsel; I find that the Applicant has come with clean hands. There has been a fulfillment of some of the conditions in the submission by the Applicant. First, the facts disclosed, in the affidavit, tell me that there is a prima facie case in the pending application. That is one of the requirements for one seeking for interim orders as the ones sought herein. Second, it is clear that, if the orders are not granted, the Applicant stands to suffer irreparably. Taking into account that the 1st Respondent is a foreigner residing outside the jurisdiction of the Court, it will even be

more difficult on the part of the Applicant to seek for and recover monetary compensation for the impending losses he might suffer, if such an eventuality is to unfold. Page 5 of 8 In the case *Hussein Khalid Shoumar and Another v Ali Tohme*, Civil Application No.54 of 2004 (unreported) the Court of Appeal emphasized on the rationale of granting an application like this one to avert the danger on the part of the Applicant, of losing its monies and suffer an irreparable loss, especially when the Respondent is residing outside the jurisdiction of this Court. Thirdly, on the balance of convenience, it is the Applicant who stands to be prejudiced if this application is to be rejected. In view, there are all reasons as to why an application like the one at hand should be granted. There are several cases that could have referred to. *ASAC Care Unit Ltd. and 2 Others* Civil Revision of 2012 (D'SM) (unreported), *T. A. Kaare v General Manager Mara Cooperative Union (1984) Ltd* [1987] JILR 17 (HC), the case of *Total Tanzania Ltd vs. River Oil Petroleum (T) Ltd and Another*, Misc. Land Appl. No. 03 of 2020, HC (MZA Registry) (unreported) and in the case of *Atilio vs. Mbo we*

(1969) HCD 284, are a few of such cases. But more recently, is the case of *OILCOM Tanzania Ltd v Alchemist Energy Trading DMCC* Page 6 of 8 and 30 others, Misc. Commercial Application No. 73 of 2021 (dated 8th July 2021) which is quite illustrative. For the reasons as stated herein, this Court makes the following orders, that:

1. Having read the documents constituting the application and the facts disclosed in the supporting affidavit, and taking into account the urgency of this matter and the imminent peril at which the Applicant is exposed if his application is not granted, this Court does hereby order that the requirement of serving notice to the Respondents in respect of this ex-parte application be, ... IV, and is hereby dispensed with.
2. That, the 2nd and 3rd Respondents, their respective agents (if any), and any other person acting in that behalf be interdicted and restrained from encashing, issuing or giving the 1st Respondent, and, also "the 1st Respondent, its servants, agents or anybody acting in that behalf, is hereby interdicted and restrained from receiving or performing any act calculated to receive any monies payable under or encash the Letter of Credit No. 002LCNB210540001 to the tune of USD 201,398.44 or any part thereof, Page 7 of 8 pending the hearing and determination of the present application inter-partes.
3. That, the 1st Respondent, its servants are interdicted and restrained from receiving, accepting, initiating or engaging into any act or process or anything calculated to receive from the 2nd Respondent or anybody else acting in that behalf, any monies payable under the Letter of Credit No. 002LCNB210540001 to the tune of USD 201,398.44 or any part thereof, pending the hearing and determination of the present application inter-partes. It is so Ordered DATED at DAR-ES-SALAAM, this 09 JULY 2021 Page 8 of 8

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