IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CAUSE NO. 591 OF 2022

IN THE MATTER OF THE JUDICATURE AND APPLICATION OF LAWS ACT [CAP 358 R.E. 2019]

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) ACT [CAP 310 R.E. 2019]

AND

IN THE MATTER OF THE LAW REFORM (FATAL ACCIDENTS AND MISCELLANEOUS PROVISIONS) (JUDICIAL REVIEW PROCEDURE AND FEES) RULES, 2014

AND

IN THE MATTER OF THE FAIR COMPETITION ACT NO. 8 OF 2003

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

CHALINZE CEMENT COMPANY LIMITED ..... APPLICANT

VERSUS

FAIR COMPETITION COMMISSION ..... RESPONDENT

RULING

29th, & 30th December, 2022

ISMAIL, J.

The applicant in this matter intends to apply for prerogative orders of *certiorari* and prohibition of the implementation of the decision of the Fair

Competition Commission (FCC). The decision is allegedly in the form of a communique, issued in December, 2022. As a prelude to such application, the applicant has instituted an application for leave, consistent with the provisions of section 18 (1) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) Act, Cap. 310 R.E. 2019; Rule 5 (1) and (2) of the Law Reform (Fatal Accidents and Miscellaneous Provisions) (Judicial Review Procedure and Fees) Rules, 2014; and section 2 (3) of the Judicature and Application of Laws Act, Cap. 358 R.E. 2019.

When the matter came up for orders on 29th December, 2022, Ms. Dora Mallaba, learned counsel for the applicant, made a prayer for issuance of an interim injunctive order to restrain the respondent from implementing its decision. The decision allegedly contradicts the decision of the Fair Competitions Tribunal (CFT) in Consolidated Appeals Nos. 6, 10 and 12 of 2022. The latter prohibited a merger between Scancem International DA and Tanga Cement.

Ms. Mallaba argued that, since the application is for leave under rule 5 (6) of GN. No. 324 of 2014, then the Court is empowered to grant such orders. She added that the ground for the order of interim injunctive order is demonstrated in paragraph 2 of the affidavit affirmed in support of the application.

Mr. Ayoub Sanga, learned State Attorney, was opposed to the granting of the order. He stated that, section 18 (1) and (3) of Cap. 310 provides that where orders sought are against the government, the Attorney General must be summoned, meaning that such application cannot be heard *ex-parte*, unless the Attorney General defaults in appearance. On the application of Order XXXVII (2) of the CPC, learned counsel argued that this provision is inapplicable, unless a separate application if instituted, as it was held in the ***Halima Mdee Case***. Such decision, he argued, would enable the Court gauge if the principles in ***Atilio v. Mbowe*** (1969) HCD 284.

Regarding rule 5 (6) of GN. No. 324 of 2014, Mr. Sanga's contention is that the prayer is misplaced as interim orders are grantable where leave has been granted, and not before or at this stage. He argued that the prayer for interim injunction is not found anywhere in the application. He prayed that the prayer for interim injunction be dismissed.

Ms. Mallaba maintained in rejoinder that she had invoked the right provisions of the law, arguing further that what FCC intends to do has adverse effects on the applicant and other entities, including the consumers. She submitted that FCC's impending action was censured by FCT. She contended that paragraph 14 of the affidavit states all of these facts.

The singular issue for resolution in this matter is whether the applicant's prayer for interim injunction has what it takes to succeed.

As I address this issue, it behooves me to underscore that an interim injunction is a provisional measure sought during legal proceedings, before trial. It is an order of the court that requires a party either to do a specific act, or to refrain from doing a specific act. Underlining the role that an interim injunction plays, the High Court of Jammu & Kashmir in Indian held in the case of ***M. Ashraf v. Z.A. Qureshi***, as follows:

> *"Object of an injunction is to prevent the doing of an apprehended wrong and to protect a party against any unlawful invasion of his rights. Therefore, an injunction necessarily operates upon unperformed and unexpected acts and prevents an injury which is threatened, though non-existent at the time of the suit. This relief is available to a party that is vigilant and seeks protection from a Court before an injury is done."*

Thus, as the Court of Appeal of Tanzania held in ***African Trophy Hunting Ltd v. The Hon. Attorney General & 4 Others***, CAT-Civil Appeal No. 25 of 1997 (unreported):

> *"An interim injunction is still more temporary, and remains in force only until a named day …."*

It remains an established position, therefore, that interim injunction is often sought where the other party - often the respondent - if unrestrained, might cause irreparable or immeasurable damage by continuing the conduct which has led to the dispute.

As it is with other forms of restraint, in interim injunctions, exercise of the court's discretion to grant an interim injunctive order is dependent on the ability of the applicant to persuade the court that there is a good reason why the respondent's rights should be restricted before the court knows whether the applicant will succeed at trial. The applicant does not have to prove its underlying claim at the injunction hearing, but it must show that it has a good arguable case. The court will not pre-judge the litigation, but must be persuaded that there is a serious question to be considered. If this is established then the court has the discretion to grant the injunction (See: ***Halsbury's Laws of England***, 3rd Edition, Volume 21, page 343, paragraph 716). It was reasoned in particular, as follows:

> *"A plaintiff is entitled to an interim injunction if he satisfies the Court, in inter alia, the following Respects first, that there is a substantial or a serious question to be investigated ...."*

Equally true, is the fact that grant of interim orders does not require establishment of principles laid down in ***Atilio v. Mbowe*** (supra) as the objective, at this early stage of the proceedings, is to maintain the status *quo* and let the parties tussle over the substance of the dispute in the subsequent stages of the proceedings (See: ***Jitesh Jayantilal Ladwa v. House and Homes Limited & 5 Others***, HC-Misc. Civil Application No. 97 of 2022 (unreported)).

Through Ms. Mallaba, the applicant has demonstrated, sufficiently, in my view, that there is a substantial or serious question that merits investigation by the Court. This is evident through the pending application for leave. This fact is acknowledged by Mr. Sanga, though he has some reservations on the whether what is to be challenged is a decision in its proper sense. There is also a qualm or two on the competence of the application itself, and whether this Court is a proper forum to entertain the matter. In my view, these issues are pertinent but they are a subject for another day. They do not blur the fact that "there is a good reason why the respondent's rights should be restricted before the Court knows whether the applicant will succeed at trial."

Ms. Mallaba has argued that rule 5 (6) of GN. No. 324 of 2014 permits granting of interim injunction pending determination of the matter and that

her application is predicated on that provision. With respect, this is a flawed contention. Restraint orders under the cited provision are granted when leave has been granted, awaiting the filing of the substantive matter, and, as Mr. Sanga rightly contended, this application is yet to get to that level. Nonetheless, this reality does not take away the fact that restraint orders may be issued at any stage of the proceedings.

The respondent's counsel has argued that the prayer for interim injunction ought to have been in a written form, made through a separate application, and the ***Halima Mdee Case*** was singled out as an example. While I appreciate that this is a laudable and encouraged practice, I know of no law which obligates the applicant to apply for such orders through a formal application. Not even the ***Halima Mdee Case***. In any case, the provisions of Order XLIII rule 2 of the CPC permit preference of applications for orders in a manner other than written applications. This includes an oral application for such orders. I find nothing blemished in the method preferred by the applicant in this matter.

There is also a contention that the prayer is not reflected in the chamber summons. I subscribe to this contention and hold the view that none of the prayers in the chambers summons embodies a quest for interim injunction. I, however, agree with Ms. Mallaba that, though not reflected in

the chamber summons, the supporting affidavit (paragraph 14) exhibits the applicant's desire and intention to move the Court to grant the interim restraint orders. The applicant's oral application was an emphasis to what was already deposed in the affidavit that supported the application for leave, and I find that to be perfectly in order.

In the upshot of all this, I find merit in the application and I grant it. Accordingly, the FCC, the respondent herein, is ordered to refrain from implementing the decision reflected in the communique, pending determination of the application for leave to apply for prerogative orders. For avoidance of doubt, any impending decision to effect a merger of the said entities is restrained pending determination of the application for leave.

Costs to be in the cause.

It is so ordered.

DATED at **DAR ES SALAAM** this 30th day of December, 2022.

M.K. ISMAIL

JUDGE

30.12.2022