

IN THE COURT OF APPEAL OF TANZANIA

AT TANGA

(CORAM: MAKAME, J.A., RAMADHANI, J.A., And LUBUVA, J.A.)

CIVIL APPEAL NO. 17 OF 1995

BETWEEN

M/S TANZANIA MINING COMBINE LTD. . . APPELLANT

AND

THE BOARD OF TRUSTEES OF RESPONDENT
THE NATIONAL PROVIDENT FUND

(Appeal from the decree of the High
Court of Tanzania at Tanga)

(Msumi, J.)

dated the 30th day of November, 1993

in

Civil Case No. 5 of 1992

JUDGEMENT OF THE COURT

LUBUVA, J.A.:

In terms of Order XXXV Rule 2 of the Civil Procedure Code, under summary procedure, the respondent instituted a suit against the appellant claiming the sum of shillings 1,250,000/=. That was High Court Civil Case No. 5 of 1992 at Tanga Registry. When summoned to obtain leave to defend, the appellant filed an application supported by affidavit seeking leave to defend the suit. The High Court (Msumi, J.) in dismissing the application for leave to defend, held that there was no triable issues as the appellant had no defence to offer. A decree was granted to the respondent under Order 35 rule 2 (2) (a) of the Civil Procedure Code. Aggrieved by that decision the appellant has appealed to this Court.

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Four grounds of appeal were filed. In essence however, it is our view that there is only one issue of substance. That is whether the learned trial judge erred in holding that the application did not disclose any triable issues. For the appellant, Mr. Tahir Ali, learned counsel gallantly contended that the suit filed by the respondent did not disclose a cause of action. In elaboration, he stated, the suit was based on the dishonoured cheque on which there was no cause of action. In other words, it was Mr. Tahir Ali's submission that there was no right to sue on the particular cheque. Furthermore, Mr. Tahir Ali also strongly complained that the post dated cheque was presented by the respondent contrary to the agreed arrangement that it was to be presented to the bank on a date after 6.12.1991 and not before.

In this appeal we think the main single issue is whether there were triable issues. Mr. Komba, learned counsel for the respondent was of the view that there was none. He advanced the following reasons: First, that the cheque dated 6.12.1991, was presented on 13.12.1991 and again on 17.12.1991. On these two occasions, the cheque bounced. Second, that there was no other arrangement reached between the appellant and the respondent changing the time schedule for presenting the cheque to the bank.

From the submissions made by Mr. Tahir Ali, learned counsel, it appears to us that Mr. Tahir Ali is of the view that the cause of action in this suit is based on the cheque. With great respect, we think that is erroneous because it is common ground that the appellant owed the National Provident Fund, the respondent, the suit amount shs. 1,250,000/=. In our considered opinion, the cheque, if anything at all is indicative of a process of effecting payment by the appellant. It was, as it were, a means to an end and not

an end in itself. Furthermore, we agree with Mr. Komba, learned counsel for the respondent that it is not true as Mr. Tahir Ali, learned counsel urged us to accept that the cheque was presented much earlier than it was agreed. From the record, the cheque dated 6.12.91 was not presented to the bank earlier than that date. To the contrary, and as already pointed out, it was presented on 13.12.1991 and 17.12.1991 which is later than 6.12.1991. Then there was the argument that the respondent should not have filed the suit until the expiry of six months from the date of the cheque i.e. 6.12.1991. We find this submission ridiculous and untenable. The cheque having been returned by the bank twice marked "Refer to drawer" the respondent still exercised such indulgence as to write the appellant a letter dated 25th February, 1992. This letter sought to request the appellant to settle the outstanding amount before legal action was taken.

In the circumstances, we are unable to accept Mr. Tahir Ali's submission that there were other arrangements agreed in connection with the time schedule for presenting the cheque to the bank. At any rate, even Mr. Tahir Ali, learned counsel was unable to elaborate on what those other arrangements were. Consequently, like the learned trial judge, we are satisfied that there were no triable issues.

With regard to the appellant's dissatisfaction with the costs and interest awarded at the bank rate, we find no merit in it. From the plaint, it is common ground that costs and interest at the bank rate were among the reliefs sought. The learned trial judge properly granted that which was prayed for. The complaint is without foundation.

For these reasons, the appeal is dismissed with costs.


DATED at TANGA this 26th day of SEPTEMBER 1997.

L.M. MAKAME
JUSTICE OF APPEAL

A.S.L. RAMADHANI
JUSTICE OF APPEAL

D.Z. LUBUVA
JUSTICE OF APPEAL

I certify that this is a true copy of the original.


(M.S. SHANGALI)
DEPUTY REGISTRAR