IN THE COURT OF APPEAL OF TANZANIA

AT DAR-ES-SALAAM

(CORAM: SAMATTA, C.J., RAMADHANI, J.A., And LUGAKINGIRA, J.A.)

CIVIL APPEAL NO. 31 OF 1999

BETWEEN

MOBRAMA GOLD CORPORATION LTD. ..... APPELLANT

AND

1. MINISTER FOR WATER, ENERGY & MINERALS
2. THE ATTORNEY GENERAL
3. THE COMMISSIONER FOR MINERAL RESOURCES
4. AFRIKA MASHARIKI GOLD MINES LTD. } RESPONDENTS

(Appeal from the Decision and Order of the High Court of Tanzania at Dar-es-Salaam)

(Mapigano, J.)

dated the 19th day of February, 1999

in

High Court Misc. Civil Cause No. 42 of 1995

JUDGMENT OF THE COURT

LUGAKINGIRA, J.A.:

This appeal comes from the decision of the High Court (Mapigano, J.) refusing an application for prerogative orders. Although it raises a number of issues, its disposal turns on only one.

The Appellant, MOBRAMA GOLD CORPORATION LIMITED, and the Fourth Respondent, AFRIKA MASHARIKI GOLD MINES LIMITED, are, as their names indicate, gold mining companies presently locked in a dispute over two pieces of land in Tarime district. By an agreement dated 6 August, 1994 between the Appellant and the Minister for Water, Energy and Minerals (First Respondent), made under section 15 of the erstwhile Mining Act, 1979, the Appellant acquired the sole and exclusive right to undertake gold operations on, in and beneath an area of approximately 150 square kilometres as defined in Annex "A" to the Agreement and referred to as the Contract Area. The Agreement

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was, subject to the Act, to subsist during the prospecting period to be stipulated in a prospecting licence. Article 25 of the Agreement also provided for the suspension of the obligations thereunder in the event that non-performance or delay was caused by force majeure and the suspension was to operate to extend the time for the performance of any obligation or the exercise of any right dependent thereon.

On 6 September, 1994, the Minister granted the Appellant a Prospecting Licence (PL) No. 217/94 for a period of 36 months from that date. Annex A to the Licence redefined the Contract Area, now termed as the Licence Area, to exclude registered claims as well as two blocks of land described as TR1 and TR2. The exclusions reduced the Licence Area to approximately 112 square kilometres and it is understood that TR1 and TR2 constituted the crown jewels of the area. On 15 May, 1995, the Commissioner for Mineral Resources (Third Respondent) communicated to the Appellant the demarcations of TR1 and TR2, and on 29 August, 1995, the Appellant was informed that the Minister had directed the granting of titles over TR1 and TR2 to small-scale miners operating there. These developments disturbed the Appellant which, on 15 September, 1995, filed an application in the High Court for leave to apply for certiorari to quash the Commissioner's letter; a declaration that the grant of TR1 and TR2 to unidentified small-scale miners was null and void; and mandamus prohibiting the Minister from issuing further claims or licences that conflicted with the Agreement. It was to be contended that the exclusion of TR1 and TR2 was ultra vires the Agreement and section 15 of the Mining Act.

The Ministry was undeterred. On 13 June, 1996, six small-scale miners were granted Prospecting Licence No. 388/96 over TR1 and TR2. Five days later on 18 June, the Licence was with the consent of the Minister transferred to the Fourth Respondent (then known as East

African Gold Mines Limited), and on 30 June, a Mining Licence (ML) No. 18/96 was granted to the Fourth Respondent over areas covered by PL 388/96. Meanwhile, the application for leave had come up for hearing on 19 October, 1995, but it was stayed pending reference to arbitration pursuant to an objection raised by the Attorney General (Second Respondent). For one reason or another arbitration was not pursued, hence the Appellant applied for the application for leave to proceed to hearing. This was granted and, there being no objection, leave to apply was also granted. The substantive application was lodged on 17 April, 1997. The appellant was praying for certiorari to quash (a) the Commissioner's letter of 16 May, 1995, and (b) the Minister's decision to grant PL 388/96 to small-scale miners; mandamus commanding the Minister to withdraw or cancel any claims issued in respect of the disputed areas and to withdraw or cancel PL 388/96 and his approval of its transfer to the Fourth Respondent; and prohibition preventing the Minister from further issuing or renewing claims or licences to third parties in the disputed areas. This litigation came to the attention of the Fourth Respondent which, in order to safeguard its interests, successfully applied to be joined in the proceeding as an intervenor.

It will be noted that there were apparent variations in the prayers between the application for leave and the substantive application. First, the substantive application contained no prayer for a declaration; second, certiorari in the substantive application was extended to quashing PL 388/96; third, the purpose of mandamus was now to command the Minister to withdraw or cancel PL 388/96 and any third-party claims over the disputed areas; fourth, the substantive application introduced a prayer for prohibition. In the light of these apparent variations, one of the issues argued in the High Court was whether the substantive application was not something for which

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leave had not been properly obtained. Also argued was whether, as regards certiorari to quash PL 388/96, the substantive application was within the prescribed period of limitation, considering that PL 388/96 was granted more than six months before the date of the Applicant's Chamber Summons of 17 April 1997. There was also a general argument whether the dispute, arising, as it was, from an alleged breach of a term of the Agreement, was amenable to prerogative orders.

Mapigano, J. answered the last question affirmatively and said the case was basically one against the Minister and the Commissioner for wrongs allegedly committed by them in the discharge of their statutory functions, and therefore involved an element of public law, although the relationship between the Appellant and the Government was contractual. Regarding the first and second questions, the learned judge observed, first, that the hub of the dispute was the exclusion of TR1 and TR2 from PL 217/94 and everything else, such as the grant and transfer of PL 388/96 and its conversion to ML 18/96, derived from and revolved around that exclusion. If the exclusion was held ultra vires, the acts deriving therefrom would automatically be invalidated. Although not expressly saying so, he then seemed to argue that since, according to him, the application for quashing the exclusion of TR1 and TR2 was in time, it was illogical to speak of quashing PL 388/96 as being out of time. Next, he stated that although there was no specific prayer for prohibition in the preliminary application, it was obvious from the accompanying statement that the term mandamus was inaptly used, the intention being to apply for prohibition. He accordingly concluded that there was nothing fatal about the Appellant's pleadings that leave was properly obtained and that the application as it concerned the order of certiorari was not time-barred. In the end,

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however, he declined to grant the prerogative orders for two reasons. First, he held that the force majeure clause in Article 25 of the Agreement derogated from the Mining Act as it virtually took away the discretion of the Minister under section 36 (2) to grant or not to grant a suspension of obligations under the Agreement. Since the Article was thus void, it could not operate to extend the prospecting period and, therefore, PL 217/94 which was granted for three years from 6 September, 1994, expired on 5 September, 1997. The same was true with the Agreement whose life depended on the prospecting period. There was accordingly no basis upon which the prerogative orders could be issued at the time of the ruling on 19 February, 1999. Second, the judge held that the exclusion of TR1 and TR2 from PL 217/94 was not ultra vires the powers of the Minister since the Agreement, which had to be consistent with the Mining Act, could not take away the Minister's powers under section 28 (2) to prescribe the shape, orientation and dimensions of the area of land over which a prospecting licence is granted.

The decision triggered off a flurry of appeals. The Appellant appealed contending that the learned judge erred in law and misdirected himself in holding -

1. that the force majeure clause was ultra vires the Mining Act; and

2. that the prescription of the shape and dimensions of a prospecting area could not be the subject of agreement under section 15 of the Act.

The Fourth Respondent cross-appealed seeking, among other things, the variation or reversal of the decision where the judge held -

1. that the Appellant had properly obtained the leave of the High Court to institute the proceeding; and

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2. that the Appellant was not out of time to apply for or to obtain an order in the nature of certiorari to quash PL 388/96.

The Attorney-General, representing also the Minister and the Commissioner, similarly cross-appealed seeking the variation or reversal of the decision where the judge held -

1. that the Appellant's application was amenable to prerogative orders; and

2. that the Appellant had obtained leave to institute the proceeding.

When the Court sat on 29 September, 1999, it was agreed that parties present written submissions and learned counsel were directed to draw up a consent order setting out the time-frame for presentation of the submissions. When the consent order was presented to the Court later on the same day, it transpired that the Attorney-General had quit the contest. This judgment is therefore directed at the appeal and cross-appeal of the Appellant and the Fourth Respondent respectively.

As indicated at the beginning, the disposal of the appeal turns on one ground, and that ground is whether, on the assumption that the dispute was amenable to prerogative orders, the application for certiorari was within time. If the answer is in the negative, it will render irrelevant the other grounds in the appeal and cross-appeal.

Rather curiously, the application proceeded on two wrong premises before the High Court and the same misconceptions plagued the appeal almost to the end. In the first place, it was assumed that the exclusion of TR1 and TR2 from PL 217/94 was effected by the Commissioner's letter of 16 May, 1995. Secondly, it was assumed

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that the time of limitation was to be reckoned with reference to the substantive application. Hence, in his affidavit of 16 April, 1998 before the High Court, and in the submissions in the cross-appeal, learned counsel for the Fourth Respondent, Dr. Wilbert Kapinga, stated and states:

> ... all the alleged actions of the First Respondent complained of in the Application occurred more than six months before the date of the Applicant's Chamber Summons of 17 April 1997 namely:-
>
> 1.2.5.1 the introduction of the areas TR1 and TR2 into the Applicant's Prospecting Licence occured on 6 September 1994 when the Licence was issued;
>
> 1.2.5.2 the issue of claims in respect of the Intervenor's Prospecting Licence occurred in September 1995; and
>
> 1.2.5.3 the issue of Prospecting Licence No. 338 of 1996 occurred on 14 June 1996.
>
> Accordingly, the Applicant was out of time to commence any fresh Application for Prerogative Orders in respect of those matters in the manner set out in the Chamber Summons of 17 April 1997.

In elaboration, Dr. Kapinga argues that Rule 21 of the English Crown Office Rules, 1906, makes it clear that an application for an order of certiorari has to be made within six months from the date when the grounds for the application arose, unless the court extends the time. He submits that the Appellant was clearly outside that time limit, and, in the absence of any explanation for the delay, the application ought to have been rejected. He cited R. v. Stratford-

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on-Avon DC /1985/ 3 All ER 769, which considers the time-limit imposed by the Rules of the Supreme Court in England, and Pollock House Ltd. v. Nairobi Wholesalers Ltd. /1972/ E.A. 172, on the desirability of an explanation for a delay.

In reply thereto the Appellant through Mr. A.K.S. Mujulizi of Ishengoma, Masha, Mujulizi and Magai, Advocates, contends that there is a local statute providing for the matter and submits that citation of foreign legislation, and subsidiary legislation at that, is irrelevant. It cites Hamis Ally Ruhondo v. Tanzania Zambia Railway Authority, Civil Appeal No. 1 of 1986, where this Court (Makame, J.A.) said:

> under the Law Reform Act, No. 55 of 1968, an application for an order of certiorari should normally be made within six months of the event ...

It is apparent, however, that, initially, the Appellant's impression was not different from the Fourth Respondent's as regards the event on which the application had to be derived and the application to which the limitation of time applied. It seems that on reflection the Appellant realised the error, at least is part, and hastened to point out in an addendum that there are two stages to a judicial review, beginning with an application for leave, and to contend that the application for leave was in this case made in time. It did not demonstrate how the application was made in time apart from adding that as a matter of common sense and the law, an application for leave must be made within six months. The Appellant then cites a passage from Stratford-on-Avon (above) where the Court of Appeal in England held that although on a literal reading RSC Order 53, rule 4 (1) appeared to refer to the substantive application for judicial review, in practice the courts treated the application

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referred to as being the application for leave. This submission by the Appellant made the Fourth Respondent similarly to realise the wrong footing on which the case had proceeded. In a rejoinder the ~~First~~ Fourth Respondent says that as to whether the application for leave was out of time, this Court has power to review the issue because the point was argued before the trial judge. Regarding the exclusion of TR1 and TR2, the Fourth Respondent observes that that was expressed in the original grant of PL 217/94 on 6 September, 1994, yet the application for leave was not filed until 15 September, 1995. It adds that the six months limit provided for by Act No. 55 of 1968, "is not a period for quiet reflection by an intending applicant." At last the parties landed on the right track.

To begin with, Act No. 55 of 1968 introduces into the Law Reform Ordinance, Cap. 360, section 18 which provides for matters pertaining to applications for prerogative orders. Subsection (1) thereof permits the Chief Justice to make rules of procedure for making the relevant applications, subsection (2) provides that in specified proceedings the rules may provide for the application for leave to be brought within six months or less of the act or omission complained of, but subsection (3) stipulates that in the case of certiorari to quash any judgment, order, decree, conviction or other proceeding, an application for leave will not be granted unless it is brought within six months of the proceeding sought to be quashed or such shorter period as may be prescribed under any law.

We wish to make two observations in connection with the above provisions. First of all, the Mining Act, 1979, made no provision for applications for prerogative orders. Part VI of the Act which dealt with disputes was irrelevant in this context because it was devoted to settlement by the Commissioner of disputes

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between persons engaged in reconnaissance, prospecting or mining operations, either among themselves or in relation to themselves and third parties other than the Government. The other observation is that subsection (3) applies to applications for certiorari to quash proceedings of a judicial or quasi-judicial nature, i.e. "any judgement, order, decree, conviction or other proceeding. The phrase "or other proceeding" has to be construed ejusdem generis with judgement, order, decree and conviction as having reference to a judicial or quasi-judicial proceeding as distinct from acts and omissions for which certiorari may be applied for under subsection (2). Although in Hamisi Ally Ruhondo (above) no particular provision was cited, that case fell under subsection (3) because it involved a quasi-judicial proceeding before the erstwhile Permanent Labour Tribunal.

In the case before us, the act of the Minister of excluding TR1 and TR2 from the Licence Area was neither judicial nor quasi-judicial; it was therefore an act falling under subsection (2), assuming it to be an act to which prerogative [illegible] could be brought to bear. Although the Chief Justice is yet to make rules under subsection (1), we think that should not be cause for uncertainty as to the applicable law. The effect of subsection (2) is to place a ceiling beyond which the Chief Justice cannot go when he turns to make the rules. Those rules may only prescribe that applications may be made within six months or less as the Chief Justice may consider appropriate in specified proceedings; in other words, whether with or without rules, the time of limitation cannot exceed six months. The absence of rules is therefore no reason or excuse for recourse to foreign legislation or precedent but we are of the view, and so hold, that until the rules, when made, provide otherwise, an application for [illegible] to

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a matter falling under subsection (2) has to be made within six months after the act or omission to which the application relates.

In the instant case, the decision which triggered off the dispute was the exclusion of TR1 and TR2 from PL 217/94 and that event took place on 6 September, 1994. Annex "A" to PL 217/94 was unambiguous, unequivocal and immediate in terms. After setting out the coordinates of the licence area in Clause A.1, it further stated:

> A.2 Without prejudice to the generality of Clause A.1 above, the following sub-areas are excluded from the Licence Area unless otherwise approved as per section 48 of the Mining Act, 1979:
>
> All claims registered pursuant to sect. 74 of the Mining Act, 1979; and Gold-Small Scale Blocks TR1 and TR2.

The date of reckoning was therefore 6 September, 1994 when the exclusion took place, but not 16 May, 1995 when the Commissioner communicated the demarcations of TR1 and TR2 ~~on~~ or 13 June, 1996 when PL 388/96 was granted. As Mapigano, J. had occasion to observe early in his ruling, the Commissioner's communication simply reiterated the Government stand that the blocks were excluded from (the) licence area." There is no doubt, either, that the Appellant understood that to be the position from the very beginning because in a letter to the Principal Secretary five weeks later on 14 October, the Appellant said:

> We read on page 4 Annex "A" - under A.2 that certain areas within the limits of the concession, as defined by the corner boundary coordinates in LDSs 5/4 and 6/3, are excluded from the licence area or Contract Area ...

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The letter went on to seek further information about these "certain areas" and added: "This will be very useful in order to avoid trespassing on the territory granted to the small scale claims." It concluded stating that the information was needed "as soon as possible so we can discuss these issues with the Ministry." We think that while there was nothing wrong with discussing the issues with the Ministry, that did not preclude or excuse the Appellant from applying for leave within six months of 6 September, 1994. We would observe, as Windham CJ. did in Parry v. Corson [1963] E.A. 546, that the wise and sensible thing to have done was for the Appellant to file its application for leave within the six month period, without prejudice to its discussions with the Ministry, and to withdraw the application later if the discussions had succeeded.

In our judgment, therefore, and assuming, as we have said, that the dispute was amenable to prerogative orders, the application for leave made on 15 September, 1995, was both mis-conceived and hopelessly out of time. It ought to have been rejected for being incompetent. In the premises, we allow the cross-appeal, reject the appeal and quash the proceeding. As the parties finally discovered, the limitation issue was not correctly addressed before the High Court, but this Court was invited to use its powers and review the same since the point was argued before the trial judge. In the circumstances, we do not consider this a proper case in which to saddle any party with costs, but each party will bear its costs. Since it was common ground that the relationship between the Appellant and the Government is contractual, the Appellant is at liberty to pursue its remedies in contract if it can satisfy the High Court on the delay.

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DATED at DAR-ES-SALAAM this 12th day of May, 2000.

B. A. SAMATTA
CHIEF JUSTICE

A.S.L. RAMADHANI
JUSTICE OF APPEAL

K.S.K. LUGAKINGIRA
JUSTICE OF APPEAL

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

(A.G. MWARIJA)
DEPUTY REGISTRAR