IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MUNUO, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL APPEAL NO. 117 OF 2004

PRESIDENTIAL PARASTATAL SECTOR REFORM COMMISSION..... APPELLANT

VERSUS

AZANIA BANCORP LIMITED..... RESPONDENT

(Appeal from the decision of the High Court of Tanzania – (Commercial Division) at Dar es Salaam)

(Kalegeya, J.)

dated the 23rd day of July, 2004
in
Commercial Case No. 277 of 2002

JUDGMENT OF THE COURT

NSEKELA, J.A.:

This is an appeal against the judgment of Kalegeya, J., in Civil appeal No. 277 of 2002 in which he entered judgment jointly and severally against the first defendant, Building Hardware and Electrical Supplies Limited (BHESCO) and the second defendant, Presidential Parastatal Sector Reform Commission (now appellant) BHESCO did not prefer any appeal. The facts leading to this appeal may be briefly stated as follows. The plaintiff/respondent, Azania Bancorp Limited extended credit facilities to BHESCO a specified public corporation who purportedly accepted an offer from the respondent amounting to Shs. 250,000,000/= on the 6.2.2001. There was an additional credit facility dated the

8.3.2001 for Shs. 50,000,000/= thus making a total of Shs. 300,000,000/=. To secure this credit facility, BHESCO executed a Mortgage of a Right of Occupancy, Certificate of Title No. 186066/76 & 186066/70 Plot No. 70 & 76 Gerezani Industrial, Dar-es-Salaam. BHESCO defaulted in the repayment of the credit facility leaving an outstanding liability of Shs. 352,798,513/40 due and owing to the respondent. Consequently, the respondent filed a summary suit under Order XXXV of the Civil Procedure Code, 1966. The High Court, Commercial Division, (Dr. S.J. Bwana, J.) granted to both the defendants leave to appear and to defend the suit.

The decision of the High Court was challenged on three grounds, namely that –

> " 1. The court erred in law in holding that the credit facility agreement between the plaintiff and the 1st defendant was valid and therefore enforceable in law;
>
> 2. The court erred in law in finding that the lack of the defendant's approval was incapable in itself of vitiating the

transaction executed between the plaintiff and the 1st defendant.

3. The court erred in law in holding that the 2nd defendant had given consent to the mortgage transaction impliedly."

At the hearing of the appeal Mr. Fungamtama, learned advocate for the appellant, argued the three grounds of appeal generally rather than arguing one ground after another. The cornerstone of the appeal however seemed to revolve around section 40A (1) (g) and (m) of the Public Corporations Act, 1992 as amended (the Act). The learned advocate contended that under the Act, a specified public corporation is debarred from doing certain prescribed transactions without the approval of the appellant. He added that the learned judge did not specifically refer to section 40A (1) (g) of the Act in his judgment. The learned advocate was of the opinion that the use of the word "express" in this provision indicated that it was mandatory for BHESCO to seek and obtain such approval before entering into the prescribed transactions, which are the subject matter of this appeal. Furthermore, the learned advocate submitted that when the Letter of Offer and Acceptance; Mortgage of a Right of Occupancy were executed, Act No. 17 of 1999 had already been enacted and

so the respondent was well aware of the requirements of the Act.

Mr. W. Chipeta, learned advocate for the respondent, strongly countered Mr. Fungamtama's contentions. He was of the view that the learned judge correctly found that the appellant had impliedly consented to BHESCO entering into the disputed transactions. BHESCO did not ask for the necessary approvals but the agreement between BHESCO and the respondent remained intact. The anchor of Mr. W. Chipeta's submissions, was the decision of this Court in Misc. Civil Appeal No. 1 of 1999, **Abualy Alibhai Aziz v. Bhatia Brothers Limited** (unreported). In conclusion, the learned advocate submitted that the appellant as Official Receiver, was jointly and severally liable to settle the liability of BHESCO.

Before we proceed to consider and determine the merits or otherwise of the appeal, we think that it is desirable that we should first examine the sequence of the proceedings upon which the judgment of the High Court was founded.

On the 26.3.2003, an amicable settlement of the dispute was not achieved during the final pre-trial and scheduling conference. Then Order VIIIB rule 3 (4) came

into play and the High Court framed and recorded issues according to the provisions of Order XIV of the Civil Procedure Code. The following four issues were framed and recorded, namely –

> " 1. Whether the credit facility agreement between the plaintiff and the 1st defendant is valid and thus enforceable in law.
>
> 2. Whether the plaintiff had a duty to ascertain that the approval of the 2nd defendant had been sought and actually obtained before entering any agreement with the 1st defendant.
>
> 3. Whether upon being declared a specified public corporation the 1st defendant became incapable of owning property as the property was vested onto the 2nd defendant, and thus had no property to offer as security.

4. To what reliefs are the parties entitled to.

By consent of the parties hearing of the case was scheduled to be held on the 13th – 14th/5/2003. For various reasons, hearing of the case did not take place as scheduled until the 30.3.2004. We take the liberty to reproduce the proceedings on this date.

30.3.2004

Coram: L.B. Kalegeya, J.

For the Plaintiff: Mr. Baravuga

For the 1st Defendant: Mr. Ngasala

For the 2nd Defendant: Mr. Nassor

CC: Kanyochole, S.H.

Mr. Nassoro: We are agreed that the factual situation is not disputed. We pray that instead of calling witnesses, we submit on points of law with the 4 issues so far drawn up in mind.

Mr. Ngasala: That is our consensus

Mr. Baravuga: I am on all fours with my learned friends.

L.B. Kalegeya

Judge

Court: As the dispute stands, I am satisfied that the Counsel are very correct in their proposition. However, for record purposes, the Counsel should first draw up and file a joint memorandum of facts not disputed.

L.B. Kalegeya

Judge

Order:

- By consent, joint memorandum to be filed by 2.4.2004
- Defendants to file their written submissions by 16.4.2004
- Plaintiffs to file their written submissions by 30.4.2004
- Rejoinder, if any, by 7.5.2004
- Judgment on notice

L.B. Kalegeya

Judge

30.3.2004”

The learned judge did not indicate in this Order upon what provision of the Civil Procedure Code he derived powers for the parties to file a joint memorandum of facts not in dispute, then skip the taking of evidence from witnesses. Instead, the parties were required to file their respective written submissions, on the basis of which judgment was pronounced by the learned judge. The learned advocates

duly complied with the time frame as prescribed by the court. However, the first document to be filed, that is, the joint memorandum, was not filed. This meant that the purported agreed facts not in dispute were not before the court. Obviously, as night follows day, all the facts were then in dispute!

Order XII Rule 3 of the Civil Procedure Code provides as follows –

> "3. Any party may by notice in writing at any time not later than nine days before the day fixed for hearing, call on any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice; and in case of refusal or neglect to admit the same within six days after service for such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the court otherwise directs!"

(Proviso omitted)

We have not been able to find on the record that any party to this suit, by notice in writing, did call on any party to admit for the purposes of this suit any fact or facts. In any event, Order XII Rule 3 above does not provide a procedure of jointly filing a memorandum of agreed facts by the parties. Even then, the learned advocates did not file any joint memorandum as per court order. This means that there were no agreed facts before the court.

We now come to Order XIV rule 2 of the Civil Procedure Code. It provides as under –

"2. Where issues both of law and fact arise in the same suit, and the court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined."

The question is, what were the issues of law that the court wanted to dispose of first? It will be recalled that on the 30.3.2004 the learned advocates for the parties put forth an intriguing proposal to the court that the facts before the

court were not in dispute and so based on the issues framed, the court should decide the issues of law. We however now know for a fact that there were no such issues of fact agreed upon. The issues of law were apparently the four issues framed and recorded by the Court on the 30.3.2004. Issues 1 and 2 are at the core of the dispute. The question of approval of the agreements in dispute is a very contentious issue in the pleadings. These issues cannot in our considered view, be decided as purely legal issues without recording the evidence. The court was enjoined to make findings of fact first and then apply the law to the facts as established by evidence. The issue of whether or not the appellant gave approval to BHESCO goes to the root of the case and this cannot be disposed of as an issue of law only under Order XIV rule 2 of the Civil Procedure Code. In the absence of evidence, disputed matters of mixed law and fact cannot be resolved by considering written submissions of learned advocates only (see: (CAT) Civil Appeal No. 4 of 1983, **Board of Internal Trade v. M/S G.B.L. & Associates Limited** (unreported)).

In the course of his judgment, the learned judge proceeded to answer the question, what is meant by “approval of the Commission”. After seeking inspiration on the meaning of the words “approval; “confirmation” “consent” and “implied consent” from Black’s Law

Dictionary, (6th edition) the learned judge had this to say namely -

> " The term "approval" therefore has very wide ambit and in my view, the extent thereof differs from one usage to another. In our case however, the underlined wording in ss 42 and 40A enjoins the Boards of specified public corporations to seek and obtain approval of the 2nd defendant for various intended actions as outlined including entering agreements and charging assets/properties. **In this case, it is beyond doubt there is no evidence of any formal approval by the 2nd defendant regarding the transactions forming the basis of this action".** (emphasis added)

With respect, we are in total agreement with the learned judge that there was no evidence of any formal approval by the appellant. The question we ask ourselves, is, where could the learned judge get such evidence when on the 30.3.2004, he inexplicably acceded to the learned

advocates' prayer that witnesses were not necessary even after framing the issues. On our part, we are not persuaded in the least that the resolution of the suit involved questions of law only. We fully appreciate that the words "without approval" will give rise to interesting questions of law, but it is clear to us that the issues framed by the court cannot be answered without ascertaining the factual background and surrounding circumstances.

We are of the settled view that the procedure adopted by the learned judge of dispensing with witnesses was highly irregular. Now the issue for consideration and decision is whether or not the findings and judgment of the High Court are valid in law. With respect, we do not think so. We have already stated that the learned judge made findings on disputed matters of mixed law and fact without evidence. In the absence of evidence such disputed matters cannot be determined on the basis of written submissions by learned advocates. Yet in his judgment, the learned judge was freely referring to "evidence" when there was none both oral and documentary.

In the result, we have no option but to declare the proceedings of the court from the 30.3.2004 and the judgment of the court a nullity. The omission to call witnesses was a fundamental procedural error. We order the

hearing of the case to resume before another judge. Since no party is really the winner in this appeal, we make no order as to costs.

DATED at DAR ES SALAAM this 7th day of June, 2005.

E.N. MUNUO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

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

(S.M. RUMANYIKA)
DEPUTY REGISTRAR