IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CORAM: MROSO, J.A., MUNUO, J.A. And OTHMAN, J.A.

CIVIL APPLICATION NO 107 OF 2006

SGS SOCIETE GENERALE DE
SURVELLANCES A .....1ST APPLICANT
SGS TANZNIA SUPERINTENDENCE
COMPANY LTD ..... 2ND APPLICANT

VERSUS

VIP ENGINEERING & MARKETING LTD ..... 1st RESPONDENT
TANZANIA REVENUE AUTHORITY ..... 2nd RESPONDENT

RULING

8th May, & 19th June 2008

OTHMAN, J.A:.

This is a preliminary objection raised with due notice by the 1st respondent on 21.08.2006 against the applicants' application for revision instituted on 16.08.2006 and taken under section 4 (2) of the Appellate Jurisdiction Act, 1979 (Cap 141, RE. 2002), Rules 3 (2) (a) (b) and (c), 45 (1) and 46 (1) of the Court of Appeal Rules, 1979. Therein, the applicants move this Court to exercise its power of

revision and to nullify the proceedings in High Court Commercial Case No. 16 of 2000.

The following are the points on which the preliminary objection has been taken:

1. That Civil Appeal No. 65 of 2006 on which the present revision is premised has no competence to be called for hearing.
2. That the application is misconceived and/or incompetent.
3. That the application is an abuse of the process of the Court.
4. That the applicants have not demonstrated any circumstances or otherwise to move this Court to exercise its powers of revision on grounds which could not have been pleaded in Civil Appeal No. 65 of 2006.
5. That the application is time barred.
6. That the affidavit of Stephen Roman Urassa in support of the notice of motion is incurably defective for relying upon information the sources of which have not been disclosed therein.

7. That the applicants did not and/or obtain leave of the Court for introducing fresh evidence in the proceedings on an issue which was not before the trial court.

Having closely examined the entire material including the abundant authorities cited to us and the 1st respondent and the applicants written and oral submissions, we are of the view that the points mostly raised in grounds 2 , 3 and 5 of the preliminary objection that specifically deal with this Court's revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act, 1979 are central to its determination. Ultimately, when all are analysed the preliminary objection is best taken in ground 2 on the competency or otherwise of the application to move the Court to exercise its revisional jurisdiction under that provision. That being the situation, it is unecessary for the present purpose to deal with the other contested grounds of objection.

Mr. Tenga and Mr. Ngalo, learned advocates for the 1st Respondent, relying, *interalia*, on section 4(3) of the Appellate Jurisdiction Act, 1979; ***Moses Mwakibete v. The Editor Uhuru***

Shirika la Magezeti ya Chama and National Printing Co. Ltd, 1995 T.L.R 134 (CAT); Hallais Pro Chemie v. Wella A.G. 1996 T.L.R. 269 (CAT); Citibank Tanzania Ltd. v. Tanzania Telecommunication Co. Ltd and 4 Others, Civil Application No. 64 of 2003 (CAT) (unreported) and **Tanzania Telecommunications Co.** Ltd and 3 others v ***Tritel Telecommunications Tanzania Ltd,*** Civil Revision No 62 of 2006 (CAT) (unreported) vigorously submitted that the present application for revision cannot be allowed as the applicants are at the same time pursuing an appeal process in Civil Appeal No 65 of 2006 against the very judgment whose revision they now also seek. That they were riding two horses at the same time, which was improper and an abuse of the court process.

In reply, Mr. Chandoo and Mr. Malimi, learned advocates for the applicants, pointed out that the 1st respondent's submissions based on section 4 (3) of the Appellate Jurisdiction Act, 1979 were misconceived. That they were irrelevant to the application. They stressed that the application invoked this Court's revisional

jurisdiction under section 4 (2) thereof. They distinguished ***Moses Mwakibete, Hallais ProChemie and Tanzania Telecommunication Co. Ltd cases*** on the basis that they all dealt with revisional jurisdiction under section 4 (3) of the Appellate Jurisdiction Act, 1979. They urged that the principle of law enunciated therein that revision cannot be preferred as an alternative to an appeal unless there were exceptional circumstances, is not applicable to the Court's revisional jurisdiction under section 4 (2) on which the instant application is based. That accordingly, there was no need to demonstrate any circumstances special or otherwise for the Court to exercise its revisonal jurisdiction on that provision.

That apart , Mr Chandoo and Mr. Malimi, forcefully submitted that the application is contingent to Civil Appeal No 65 of 2006 instituted on 1.08.2006 and that it was for all purposes of and incidental to that appeal. They argued that there is no requirement for the application and the appeal to be heard simultaneously. That it was quite in order for the application to be heard prior to the

appeal, and if successful it would obviate the need to proceed to the hearing of the appeal.

Learned advocates for the applicants also emphasized that the application is incidental to Civil Appeal No. 65 of 2006. That section 4(2) of the Appellate Jurisdiction Act, 1979 was crystal clear that the Court's powers granted therein are also exerciseable incidentally to the hearing of the appeal. They relied on the definition of the word "incidental" in **Blacks Law Dictionary,** 6th Edition, which is stated to mean:

> *"Depending upon or appertaining to something else or primary, something necessary, appertaining to, or depending upon another which is termed the principal, something indicated to the main purpose"*

Furthermore, Mr. Chandoo and Mr. Malimi submitted that the criteria for revision under section 4(2) and 4(3) of the Appellate Jurisdiction Act, 1979 was different. That the sine *qua non* of a revisional application under section 4(2) is the institution of an appeal. That the applicants had met this condition as Civil Appeal 65

of 2006 was on record. That therefore, the application was not a parallel hearing to the civil appeal. Metaphorically, they put it that there were no two horses, but only one, i.e the appeal and that this application was its saddle.

The 2nd Respondent, not party to the preliminary objection and represented by Mr. Beleko, did not wish to make any submissions.

In rejoinder, Mr. Tenga and Mr. Ngalo pointed out that the applicants had provided no authority to the effect that a person who has initiated an appeal can also file an application for revision under section 4(2). They were of the view that that provision is only used or is exclusively available to the Court, *suo motu,* to move itself in revision in the course of hearing an appeal. That it gives powers to the Court while dealing with an appeal to also revise High Court proceedings where the former finds it necessary to do so. It was, they submitted, unavailable to a party who has filed an appeal to also move the court in revision on the same matter.

Learned Counsel for the 1st respondent additionally underlined that it was wrong for an applicant to come to this court both by way

of appeal and revision at the same time. That section 4(2) and 4(3) of the Appellate Jurisdiction Act, 1979 were mutually exclusive and can only be used in expectional circumstances. That the applicants argument that if they succeed on the application the Court need not deal with the appeal showed that the application was being used as an alternative to the appeal process. That the applicants are hiding under section 4(2). That it was the intention of parliament that a person is not to be allowed to file an appeal and an application for revision under section 4(2), together. That if it were so, it would bring chaos to the administration of justice. They also indicated that the admission by the applicants that they were actively and separately pursuing both an appeal and a revision together, represented a classical case of an abuse of the court process to circumvent the principles of revision as affirmed in ***Shahida Abdul Hassanal Kassim v Mahedi Mohamedi Gulamali Kanji,*** Civil Application No. 42 of 1999 (CAT) (unreported); ***Hallais Pro Chemie*** *and* ***Tanzania Telecommunication Co. Ltd*** cases, cited *supra*.

Putting forward a separate argument, Mr. Tenga and Mr. Ngalo faulted the application made under section 4(2) of the Appellate Jurisdiction Act 1979 as it is predicated upon Civil Appeal No. 65 of 2006, which has not yet been called for hearing.

Furthermore, they submitted that the meaning of the word "incidental" to the hearing and determination of any appeal in section 4(2) of the Appellate Jurisdiction Act, 1979 is that the Court may find out errors committed by the courts below while hearing an appeal and it has inherent jurisdiction to correct those mistakes.

Having carefully considered the material and the rival submission by learned Counsel, to our minds the threshold question that divides the parties is whether or not the Court can be moved by the current application under section 4(2) of the Appellate Jurisdiction Act, 1979 to exercise its revisional jurisdiction thereunder and in the manner pursued by the applicants, i.e by a formal application by way of notice of motion under the same provision? The issue one of competence, goes to jurisdiction.

It is common knowledge that this court's revisional jurisdiction is exercisable under sections 4(2) and 4(3) of the Appellate Jurisdiction Act 1979. They provide:

> *"4.(2)*
> ***For all purpose of and incidental to the hearing and determination of any appeal*** *in the exercise of the jurisdiction conferred upon it by this Act, the Court of Appeal shall, in addition to any power, authority and jurisdiction conferred by this Act, have the power of revision and the power, authority and jurisdiction vested in the court from which the appeal is brought.*
> *(3). Without prejudice to subsection (2), the Court of Appeal shall have the power, authority and jurisdiction to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision made thereon and as to the*

regularity of any proceedings of the High Court" (Emphasis added).

It is common ground that Civil Appeal No. 65 of 2006 against the judgment of the High Court in Commercial Case No. 16 of 2000 and its decree was instituted on 1.08.2006. On 16.08.2006, they also sought, *interalia,* under section 4 (2) of the Appellate Jurisdiction Act, 1979 an application for revision. That citation visible on the face of the notice of motion it was not open to 1st respondent's learned counsel to contend that the application was moved under section 4 (3).

That clarified, we consider that the most convenient approach in determining the preliminary objection is to collate the circumstances and conditions for the court's exercise of its revisional jurisdiction under section 4 (2) of the Appellate Jurisdiction Act, 1979 and then closely examine whether or not the present application properly falls under them.

It is an elementary proposition that the revisional jurisdiction vested in the court is granted by statute, namely, under sections 4(2)

and 4(3) of the Appellant Jurisdiction Act, 1979. Coming to section 4(2), the **first** requirement is that there must be a duly initiated appeal. That is, the court must have been seized with an appeal having been duly lodged.

Second, the revisional jurisdiction under section 4(2) is to be invoked in the course of the hearing and determination of an appeal. It is not sufficient that an appeal is pending or awaits to be called for hearing. In ***Moses Mwakibete's case,*** *supra,* the court stated.

> ***"The jurisdiction in ss (2) is exercisable either in the course of hearing an appeal or incidental to an appeal (see also, Citibank Tanzania Ltd case,*** *supra)* (Emphasis added).

That position was reiterated by the Court in **Renatus Ambrose Haule v Tanzania Railways Corporation and P.S.R.C,** Civil Application No 108 of 2004 (unreported) thus:

> ***"The Court's revisional powers can be exercised in one of two ways – (i) under***

section 4(2) in the course of hearing an appeal *and (ii) under section 4(3) ....."*
(Emphasis added).

An example suffices. In **Executive Secretary Wakf and Trust Commission Zanziabar v. Hemed Abdalla Hemed**, Civil appeal No. 13 of 2000 (CAT) (unreported), while adjudicating an appeal the Court discovered that the High Court had issued an order granting leave to sell wakf property in Civil Case No 37 of 1990 which power was exercised illegally as section 14 of the Wakf Property Decree, Cap 103 vested in the relevant Minister that power. The Court paused this question:- "Would this court wring its hands in utter desperation and let an illegality stand?". It said no, and held that it was appropriate for the ends of justice to invoke its power of revision under section 4(2). It quashed the order, nullified the sale of the house and ordered that leave be obtained from the appropriate Minister under section 14 of the Wakf Property Decree.

In our considered view and on the authorities cited with which we are in agreement, the court's revisional jurisdiction under section

4(2) is excisable in relation to any duly instituted appeal **and** in the course of its hearing and determination. It is only by reading in section 4(2) the words "in the course of" that the legislative intention of that provision can be properly captured.

Third, it is a well settled principle of construction that the words of a statute are first understood in their ordinary meaning unless that leads to some absurdity or there is something in the context or in the object of the statute to suggest the contrary (see, **G.P. Singh, Principle of Statutory Construction,** 9th Ed; pp. 78 – 79; **Duport Steels Ltd and Other v. Sirs and Others**, [1980] 2 All ER 529 at p.541). It is equally an established principle that no part of a statute and no word therein can be construed in isolation (see, **Prakash Kumar Bhutto v state of Gujarat** [2005] INSC 35). It is trite law that the legal duty of the court is only to give effect to the parliamentary intention as expressed in the Act **(Lampitt and Another v Poole Borough Council** [1990] 2 All ER 887 d at p. 892).

The key words in section 4(2) are that revisional jurisdiction thereunder is exercisable *"for all purposes of and incidental to the hearing and determination of any appeal".* The Oxford English Dictionary, 11th Ed; defines the word "incidental" to mean.

> *"occurring as a minor, accompaniment, occurring by chance in connection with something else, liable to happen as consequence of."*

Apart from the definition of that word in **Black's Law Dictionary** cited earlier, **Strouds Judicial Dictionary of Words and Phrases**, 2000 Ed, states:

> *"a thing is incidental to another when it appertains to, or follows on, that other which is more worthy or principal".*

Upon a close consideration of the scheme and objectives of the Act, and construing section 4(2) purposively and consistently with the other provisions, as well as reading the words *"and incidental to the hearing and determination of any appeal"* in their context as a whole, in our view their true import is that the power of revision is

exercisable on the occasion of the matter arising, cropping up, surfacing or discoverable in the course of the hearing and determination of the appeal. For example, the matter could be one either not canvassed in the memorandum of appeal or one which no one thought of or was unforeseen until the appeal was being heard and determined. What is incidental to an appeal being heard and determined is not what is altogether separate or parallel to it. The first conjunction "and" in section 4(2), i.e. "for all proposes of **and** incidental" fortifies that view, which in our considered opinion is consistent with the legislative intention as expressed by those words.

In **Selemani Makumba v R**, Criminal Appeal No. 94 of 1994 (CAT) (unreported) the Court in the course of hearing and determining an appeal found after its attention had been drawn to it by the learned State Attorney that the learned High Court judge had no jurisdiction to hear a chamber application that was intended for the Court of Appeal. That point was not in the memorandum of appeal. The court invoked its revisional jurisdiction under section

4(2) of the Appellate jurisdiction Act, 1979 and nullified the proceedings of the High Court.

In **Dar es salaam Education and Office stationary V. National Bank of Commerce**, Civil Application No. 64 of 1995 (CAT) (unreported) the Court explained:

> ***"It is quite clear that section 4(2) of the Appeilate Jurisdiction Act, 1979 can only be invoked by the court when the court is in the process of adjudicating an appeal from the Courts below. That is, the exercise of such jurisdiction is incidental to the hearing and determination of an appeal".***

Fourth, the revisional jurisdiction under section 4(2) is invokable by the Court itself (see, **Dar es salaam Education and Office stationary case,** *supra).* For clarity, it is not excluded that a party may draw the court's attention to an illegality or irregularity occasioning a miscarriage of justice in the lower court's proceedings

or judgment and on which the court may decide to invoke its revisional jurisdiction under section 4(2). It is open to the court to take cognizance of it through the parties and for it to call upon their views on it. The discretion in the exercise of revisional jurisdiction under section 4(2) is preeminently one for the court. It is not of any right to the parties.

Fifth, the revisional jurisdiction under section 4(2) is not raised formally by way of notice of motion and in advance of the hearing and determination of an appeal. The point or issue for which it is to be invoked must arise while the appeal is being adjudicated.

Next, we advert to the decisive question whether or not the application has met the required conditions in order to properly move the court to exercise its revisional jurisdiction under section 4(2) of the Appellate Jurisdiction Act 1979? It was uncontentions that Civil Appeal No. 65 of 2006 was instituted by the applicants on 1.08.2006. It has not yet been called to a hearing. It was also undisputed that the applicants have a right of appeal against the

judgement of the High Court in Commercial Case No. 16 of 2000 and its decree under section 5 (1) of the Appellant Jurisdiction Act, 1979. The formidable argument submitted by Mr. Chondoo and Mr. Malima was that the institution of that appeal was sufficient to move the Court under section 4(2); that being its *sine qua non.* With respect, that is only half the answer. Much as the due institution of an appeal is a condition precedent for the Court's exercise of its revisional jurisdiction under section 4(2), as we had observed earlier, the complete requirement is that that jurisdiction is excercisable in the course of the hearing and determination of an appeal, duly instituted.

It is plain, therefore, that the instant application, instituted in advance of, and not in the course of the hearing, and determination of the appeal, itself not being heard and determined before us now and on this application, was erroneously lodged. That aside, section 4(2) is invokable only by the court. It could not have been validly invoked by the applicants.

Furthermore, learned counsel for the applicants strongly contended that the application filed on 16.8.2006 was incidental to Civil Appeal No. 65 of 2006 lodged on 1.08.2006. They strenuously argued that it was in order for it to be heard **prior to** the appeal and that if successful it would obviate the need to hear and determined the appeal. The two they said could be heard simultaneously.

With great respect, bearing in mind the conditions we have earlier collated and the true meaning of the phrase "and incidental to the hearing and determination of any appeal" in section 4(2) of the Appellate Jurisdiction Act, 1979, the applicants' contention stems from a miscostructition of that provision. Under its terms, the current application cannot be incidental to Civil Appeal No. 65 of 2006 itself neither in the course of being heard and determined now nor has the former occurred or cropped up while that appeal is being adjudicated. With the occasions envisaged under section 4(2) patently absent and not having arisen it cannot be maintained that this application is incidental to Civil Appeal No. 65 of 2006.

All considered, the applicants have wrongly invoked section 4(2) of the Appellate Jurisdiction Act, 1979 and in any event it could not have been correctly invoked in the manner pursued, formally by way of notice of motion and in advance of the hearing and determination of Civil Appeal No. 65 of 2006.

In the result and for the reasons explained above, we uphold the preliminary objection on the ground that the application made under section 4(2) of the Appellate Jurisdiction Act, 1979 is misconceived and incompetent. It is hereby struck out with costs.

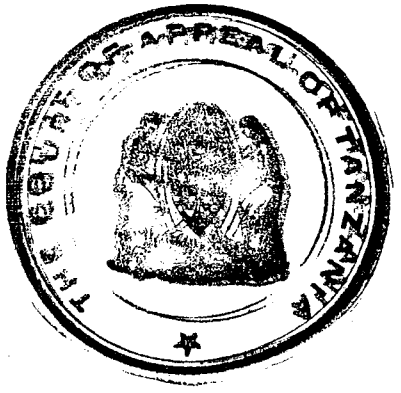
DATED at DAR ES SALAAM this 19th day of June, 2008.

J.A. MROSO
JUSTICE OF APPEAL

E.N. MUNUO
JUSTICE OF APPEAL

M.C. OTHMAN
JUSTICE OF APPEAL

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



(F.L.K. WAMBALI)
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