

**IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM**

(CORAM: MUNUO, J.A., KIMARO, J.A., And MBAROUK, J.A.)

CIVIL APPLICATION NO. 160 OF 2008

MABIBO BEER WINES AND SPIRITS LTD. APPLICANT

VERSUS

**1. LUCAS MALLYA aka BARAKA STORES
2. COMMISSIONER FOR CUSTOMS
TANZANIA REVENUE AUTHORITY** } **RESPONDENTS**

**(Application for revision of the whole proceedings
of the Fair Competition Tribunal)**

(Sheikh, J.)

dated the 30th day of September, 2008

in

Civil Appeal No. 2 of 2008

RULING OF THE COURT

11 February & 2 March 2009

MBAROUK, J.A.:

This is an application filed under section 4 (3) of the Appellate Jurisdiction Act, Cap. 141 R.E. 2002, Rules 3 (2) (a), 3 (2) (b), 45 (1) of the Court of Appeal Rules, 1979, Cap. 141 R.E. 2002 and any other enabling provisions of law. The Notice of Motion filed in Court on 24th October, 2008 seeks to move the Court for the following orders:

1. There are special circumstances in the material irregularities of the proceedings at the Fair Competition Tribunal No. 2 of 2008 which call for the immediate invocation of the Revisional jurisdiction of the Court of Appeal of Tanzania.
2. The material irregularities in the said proceedings are not appealable with or without leave of the court.
3. The appellate process of the Fair Competition Tribunal has been blocked by the judicial process in that the Fair Competition Tribunal which is an Appellate body has assumed original jurisdiction in Civil Appeal No. 2 of 2008 without showing any exceptional good reasons for doing so.
4. By the Fair Competition Tribunal not determining the issue of non-disclosure of the cause of action and the issue of the incompetence of Appeal No. 2 of 2008 conceded by the Appellant, the Fair

Competition Tribunal breached the statutory mandatory requirements of Order 64 rule 2 of the Civil Procedure Code, Cap. 33 (R.E. 2002) which directs that all legal issues capable of disposing the suit without enquiring into issues of fact shall be determined first.

5. The Fair Competition Tribunal has no jurisdiction to entertain the incompetent Appeal No. 2 of 2008 against the Applicant.

When the application came up for hearing, Mr. James Bwana assisted by Mr. Kamugisha, learned advocates for the 1st Respondent raised a preliminary objection for which they had earlier given notice. The objection raised was based on two reasons, namely:

1. The Application for Revision is incompetent and should be struck out with costs for contravening the provisions of S. 5 (2) (d) of the Appellate Jurisdiction Act, as Amended by Act No. 25 of 2002.

In the alternative, but without prejudice thereof:

2. The Supplementary Affidavit filed by the Applicant be struck out, with costs, for contravention of provisions of Rule 46 (2) of the Court Rules.

In support of the 1st point of preliminary objection, Mr. Bwana submitted that Section 5 (2) (d) clearly states:

“(d) no appeal or application for revision shall lie against or be made in respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the Criminal Charge or suit.”

Mr. Bwana further submitted that the decision intended to be revised which is that of Hon. Sheikh, J. dated 30.9.2008 in Fair Competition Tribunal Appeal No. 2 of 2008 has not finally determined the appeal. He added that Sheikh, J. ordered that “the appeal will proceed on merit on a date to be fixed by the Registrar.” To his

interpretation the order issued by Sheikh, J. in that appeal did not finally determine Tribunal Appeal No. 2 of 2008.

Mr. Bwana noted that the applicant seems to have been aggrieved with the decision in Tribunal Appeal No. 2 of 2008, hence has preferred this revision application to challenge the ruling delivered by Sheikh, J. dated 30th September, 2008. He added that the applicant's intention has been shown on his notice of motion and his affidavit in support of it, where the ruling of Sheikh, J. dated 30.9.2008 is challenged.

For that reason, he submitted that the challenged ruling dated 30.9.2008 has not finally determined the appeal before it. The learned advocate for the 1st Respondent urged us to sustain their 1st preliminary objection. He then referred us to the decisions of this Court in **Karibu Textile Mills vs. New Mbeya Textile Mills Ltd. & 3 Others**, Civil Application No. 22 of 2006, CAT at Dar es Salaam, and **Tanzania Heart Institute vs. The Board of Trustees of NSSF**, Civil Application No. 109 of 2008 (both unreported).

Mr. Kamugisha then submitted on the 2nd point of preliminary objection by concisely pointing out that as far as there is no consent given by the 1st Respondent, that renders the filed supplementary affidavit incompetent for violating Rule 46 (2) of the Court of Appeal Rules, 1979 (Rules). For that reason he urged us to strike out the supplementary affidavit with costs.

On his part, Mr. Kyabukoba Mutabingwa, learned advocate for the second Respondent submitted that the preliminary objection is not tenable. He said this is because the matter before the Fair Competition Commission was conducted without giving them a chance to put their defence.

Responding to the 2nd point of objection, Mr. Mutabingwa submitted that he did consent to the filing of the applicant's supplementary affidavit as directed by Rule 46 (2) of the Rules.

Finally, he prayed for the preliminary objection to be overruled with costs.

On the other hand, Mr. Ngalo, learned advocate for the applicant vehemently argued against the preliminary objection. Mr. Ngalo contended that there were no proceedings before the Fair Competition Commission, because the parties were not heard. For that reason, Mr. Ngalo added, justice requires that in any complaint parties have to be heard before reaching a decision. He urged us to invoke section 4 (3) of the Appellate Jurisdiction Act, 1979 to revise the decision of the Fair Competition Tribunal dated 30.9.2008 for contravening the rules of natural justice.

Furthermore Mr. Ngalo submitted that the cases cited by the advocate for the 1st Respondent can be distinguished from the current situation in this case. He noted that in the case of **Karibu Textile Mills Ltd.** and **Tanzania Heart Institute** (supra), the parties were properly heard. But in the instant case, the Fair Competition Commission reached a decision without hearing the parties which is a pre-requisite condition before arriving to a decision. For such non-compliance of the rules of natural justice Mr. Ngalo urged us to declare that the appeal before the Fair Competition

Tribunal was null and void. He then prayed for the 1st preliminary objection to be overruled.

In his reaction to the 2nd point in the preliminary objection, Mr. Ngalo submitted that they have opted to acquire the 1st Respondent's consent so as to comply with Rule 46 (2) of the Court of Appeal Rules, 1979. In doing so, he said, they wrote a letter dated 20.11.2008 to the respondents – Annexure MAB.DM – 1 to the supplementary affidavit. However, Mr. Ngalo submitted that since then no consent has been given by the 1st Respondent. The 2nd Respondent gave his consent on 19.1.2009 – Annexure MAB.DM 4.

Ms. Dosca Mutabuzi, learned advocate for the applicant assisting Mr. Ngalo submitted that the decision of the Fair Competition Tribunal contained irregularities by ordering the appeal before it to proceed for hearing without considering that no defence was taken at the Fair Competition Commission. She maintained that that was a serious irregularity which requires an intervention because the rules of natural justice have been violated. In the event, she

urged us to perceive the preliminary objection filed by the 1st Respondent as misconceived and issue an order that section 5 (2) (d) of the Appellate Jurisdiction Act, as amended by Act No. 25 of 2002 was not applicable. In support of their urgent prayer for the revisional proceedings, Ms. Mutabuzi referred us to the decision of this Court in **VIP Engineering and Marketing Ltd. v. Mechmar Corporation of Malaysia Behard**, Civil Application (Revision) No. 163 of 2004 (unreported).

The matter before us was lodged under the provisions of section 4 (3) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993. Under the above cited provision, the Court has powers 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 proceedings of the High Court.

In Civil Revision No. 1 of 1999 between (1) **Fahari Bottlers Ltd. v. The Registrar of Companies** (2) **The National Bank of Commerce (1997 Ltd.** (unreported) quoted in **VIP Engineering and Marketing Ltd. v. Mechmar Corporation (Malaysia) Berhad of Malaysia** (supra) the Court observed:

“ the accompanying confusion in our view are not amenable to the appellate process for remedy. They are amenable to the revisional process.”

(Emphasis added)

The matter before us, we think, contains not only a confusion but a serious irregularity against the rules of natural justice. We are of the considered view that remedial measures by way of revision are imperative at this stage, because the irregularity occasioned at the Fair Competition Commission and latter maintained by the High Court are of a serious character and call for remedial measures. Hence we invoke Section 4 (3) of the Appellate Jurisdiction Act to deal with the matter.

As per the complaint submitted earlier by all the parties (the 2nd Respondent and the applicant in particular) neither of them were heard at the Fair Competition Commission. The rules of natural justice require that there shall be no decision of a complaint before hearing the parties.

Underscoring the importance of adherence to the principle of natural justice of the right to be heard, H.W.R. Wade and C.F. Forsyth in **Administrative Law** (Eighth Edition) at page 469 state that:

“It is fundamental to fair procedure that both sides should be heard audi alteram partem, ‘hear the other side”. This is the more far reaching of the principles of natural justice, since it embraces almost every question of fair procedure, or due process, and its implications can be worked out in great detail. It is also broad enough to include the rule against bias, **since a fair hearing must be an unbiased hearing”**.

(Emphasis added)

Furthermore this Court in the case of **Abbas Sherally and Another v. Abdul Sultan Haji Mohamed Fazalboy**, Civil Application No. 33 of 2002 (unreported), held that:

“The right of a party to be heard before adverse action or decision is taken against such a party has been stated and emphasized by the Courts in numerous decisions. That right is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of the principles of natural justice”.

Also, in the decision of **Bank of Tanzania v. Said A. Marinda and Others**, Civil Application No. 62 of 1999, (unreported), this Court stated that:

“In a number of cases, this Court in applying the principle (the right to be heard) has taken the view that failure to

afford an opportunity of being heard to a necessary party vitiates the proceedings.”

(Emphasis added)

In dealing with the matters before the Fair Competition Commission, the Fair Competition Act No. 8 of 2003 (hereinafter referred as the Act) under Section 70 (2) (a) of the Act, it is stated that:-

“S. 70 (2) The Commission –

- (a) **shall give the respondent a reasonable opportunity to be heard,** having regard to the urgency of the proceedings.”

(Emphasis added)

In the instant case which started at the Fair Competition Commission, neither the 2nd Respondent nor the other party was heard. Section 70 (2) (a) of the Act uses the word “shall”. The Interpretation of Laws Act, Cap. 1 R.E. 2002, Section 53 (2) defines the word “shall” to mean:

“Where in a written law the word “shall” is used in conferring a function, such word shall be interpreted to mean that the function so conferred must be performed.”

(Emphasis added)

In so far as the word “shall” has been used in Section 70 (2) (a) of the Act, the obligation of hearing the respondent is imperative. In other words, it is mandatory for the Commission to give the respondent in a complaint before it **a reasonable opportunity to be heard**. Absence of such a reasonable opportunity to be heard renders the proceedings/decision before the Commission a nullity. (See, **Bank of Tanzania v. Said A. Marinda and Others**) (supra).

Apart from that, looking at the purported decision of the Fair Competition Commission it would appear to us that it is just a mere letter which gave an advise. It is not and cannot be said to be an order of the Commission. That purported decision is found in a letter

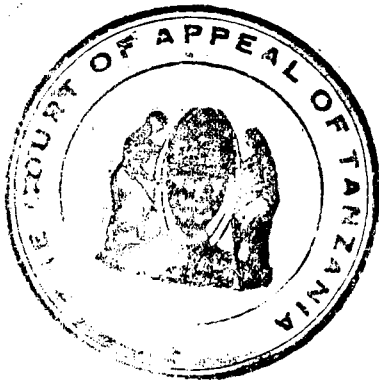
with Ref.No.CAE. 64/91/02/78 dated 9/05/2008. We hold that the letter written by the Commission was not a decision; but an advise.

Failure by the Fair Competition Tribunal to consider such a serious irregularity constrains us to invoke section 4 (3) of the Appellate Jurisdiction Act, 1979. The respondents in the complaint before the Fair Competition Commission were not given their right to be heard. Surely, that is a violation of the principle of natural justice. Furthermore, the Fair Competition Commission did not comply with the mandatory condition under Section 70 (2) (a) of the Fair Competition Act, which expressly provides that the respondent shall be provided with a reasonable opportunity to be heard. With respect, the Fair Competition Tribunal failed to notice such a serious omission of the mandatory requirements of the law.

In the event, and for the reasons stated above, we nullify and quash the proceedings and decision of the Fair Competition Tribunal. The revision is allowed to the extent that the complaint be initiated

afresh and determined in accordance with the law. The preliminary objection is overruled. We make no order as to costs.

DATED at DAR ES SALAAM this 23rd day of February, 2009.



E.N. MUNUO
JUSTICE OF APPEAL

N.P. KIMARO
JUSTICE OF APPEAL

M.S. MBAROUK
JUSTICE OF APPEAL

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

A handwritten signature in black ink, appearing to read "P.B. KHADAY", is written over a horizontal line.

(P.B. KHADAY)
DEPUTY REGISTRAR