IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 379/16/2019

DECORTECH TANZANIA LIMITED .... APPLICANT

VERSUS

ZENITHSYS SPACE COMPANY LTD. .... RESPONDENT

(Application for extension of time within which to apply for leave to appeal from the Decision of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Mruma, J.)

dated the 26th day of March, 2019

in

Miscellaneous Commercial Cause No. 407 of 2017

....

RULING

26th September & 7th October, 2019

NDIKA, J.A.:

The applicant, Decortech Tanzania Limited seeks by way of a second bite under Rule 10 of the Tanzania Court of Appeal Rules, 2009, (hereinafter referred to as "the Rules") an extension of time to apply for leave to appeal to this Court from the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (Mruma, J.) dated 26th March, 2019 entered in favour of Zenithsys Space Company Ltd., the respondent herein, in Miscellaneous Commercial Cause No. 407 of 2017. The application is supported by an affidavit deposed by Mr. Gurbachan Singh Obhan, applicant's Managing Director. As it turned out, the

respondent filed no affidavit in reply, implying that the averments in the founding affidavit are uncontested.

For the purpose of appreciating the issues involved in this matter it is necessary to give a factual background to the matter, albeit very briefly.

Before the High Court, Commercial Division at Dar es Salaam, the applicant petitioned against the respondent in Miscellaneous Commercial Cause No. 407 of 2017 for setting aside a final arbitral award of Mr. Deogratius William Ringia, a sole arbitrator, on several grounds. In its decision dated 26th March, 2019, the court (Mruma, J.) dismissed the application. Put out by that outcome, the applicant duly manifested its intention to appeal to this Court from the aforesaid decision by lodging a notice of appeal on 25th April, 2019. On the same day, it submitted to the Registrar a written request for a copy of proceedings, ruling and drawn order, a copy of which is annexed to the founding affidavit. The other essential step towards appealing that had to be taken at the same time was seeking leave to appeal within thirty days of the decision intended to be challenged as prescribed by Rule 45 of the Rules as amended by the Tanzania Court of Appeal (Amendment) Rules, 2017, GN. 362 of 2017.

It is averred on behalf of the applicant that on 25th April, 2019, its advocate, Mr. Denis Michael Msafiri, attempted to upload an application for

leave constituted by a chamber summons and an accompanying affidavit in the required "PDF format" but the court's online filing system dubbed as the JSDS2 system repeatedly rejected the upload. A little later, Mr. Msafiri changed the format and successfully uploaded the application in a "Microsoft Word" format but the admission confirmation was not immediately generated by the system. Four days later, that is, on Monday 29th April, 2019 at 12:24 hours, Mr. Msafiri received a notification on his cellphone number +255754267366 from the court's JSDS2 system that the submitted application had been returned for correction. That notification prompted him log onto the system from which he then learnt that the application was returned on account of being uploaded in a non-supported format and was advised to edit and resubmit it by attaching the documents in the supported PDF format.

In Paragraph 7 the founding affidavit, it is further averred that Mr. Msafiri edited the application as directed by the system but his effort ended in vain as the application, then in the supported PDF format, was rejected over and over again. He then went to the court's Registrar, Mr. Rumisha, and informed him of what befell the application when he attempted to lodge it online on 25th and 29th April, 2019. The narrative goes further, in Paragraph 8 of the affidavit, that Mr. Rumisha, in response, called the

attention of the court's IT official who then indicated that the editing portal system was not operational but promised that it would soon be active. He thus asked Mr. Msafiri to upload a fresh application. The effort to have both Mr. Rumisha and the said IT official depose respective affidavits on the matter bore no fruit, it is added.

On 2nd May, 2019, the applicant applied to the High Court, Commercial Division for extension of time to apply for leave to appeal but that quest was barren of fruit as Fikirini, J. dismissed it on 27th August, 2019. On 9th September, 2019, the applicant duly lodged the present application, as a second bite, in terms of Rule 45A (1) of the Rules as amended by G.N. No. 362 of 2017. The main justification for the extension prayed for is that the delay to lodge the intended application for leave to appeal arose from the technical glitch in the court's online filing system.

Before proceeding further with the application on the merits, I find it necessary to remark on the unusual manner in which I heard this matter.

On 19th September, 2019, this matter came up before me for expedited disposal as it had been certified as an application of extreme urgency. The hearing could not proceed as scheduled as the respondent had not been served with the application. At the request of Ms. Pendo Charles, learned counsel for the respondent, which was supported by Mr.

Mudhihir A. Magee, learned counsel for the applicant, I adjourned the hearing to 26th September, 2019 at 8:30 a.m. It was, however, quite startling that when the matter was called on for hearing on 26th September, 2019 at 8:30 a.m. as had been appointed, only Mr. Magee for the applicant appeared. Mr. Magee stated that both he and Ms. Charles had the impression that the time appointed for the hearing was 12:00 noon, not 8:30 a.m. on that day. Although on my part the alleged confusion on the appointed time was incomprehensible, I found it judicious to adjourn the hearing to 12:00 noon on that day. Meanwhile, the said Ms. Charles was swiftly served with a notice of the hearing as scheduled. The record shows that she was personally served with the notice at 11:00 a.m. on that day.

When the Court reconvened at 12:00 noon, only Mr. Magee appeared. Upon his prayer under Rule 63 (2) of the Rules, I ordered the hearing to proceed in the absence of the respondent.

In his oral argument, Mr. Magee restated that the delay to apply for leave to appeal arose from the court's online filing system not being in a good operating state resulting in the uploaded documents being rejected as averred in the founding affidavit. He submits that the application discloses good cause for extension of time because, first, the length of the

delay is too short. While the prescribed period of thirty days for applying for leave, reckoned from 26th March, 2019 when the decision intended to be challenged was made, elapsed on or about 25th April, 2019, the applicant promptly approached the High Court, Commercial Division for extension on 2nd May, 2019 after learning on 29th April, 2019 that the application had been returned by the system. Secondly, that said short delay was due to a technical glitch in the court's online filing system. Thirdly, that the respondent would not be prejudiced should the application be granted. And finally, that the impugned decision of the High Court is fraught with an illegality in that the High Court Judge was biased as he did not determine the sixth, seventh and ninth grounds in the petition for setting aside the arbitral award. That course abrogated the applicant's right of fair hearing.

Having dispassionately considered the notice of motion and the founding affidavit in the light of the uncontested submissions of Mr. Magee, it behooves the Court to determine whether this matter discloses a good cause for enlarging time.

At the outset, I think it is instructive to reiterate that the Court's power for extending time under Rule 10 of the Rules is both extensive and discretionary but it is exercisable cautiously and judiciously upon good

cause being shown. Without doubt, it cannot be possible to lay down an invariable or constant definition of the phrase "good cause", but the Court consistently considers factors such as the length of the delay involved; the reasons for the delay; the degree of prejudice, if any, that each party stands to suffer depending on how the Court exercises its discretion; the conduct of the parties; and the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal: see, for instance, this Court's unreported decisions in **Dar es Salaam City Council v. Jayantilal P. Rajani**, Civil Application No. 27 of 1987; **Tanga Cement Company Limited v. Jumanne D. Masangwa and Amos A. Mwalwanda**, Civil Application No. 6 of 2001; **Eliya Anderson v. Republic**, Criminal Application No. 2 of 2013; and **William Ndingu @ Ngoso v. Republic**, Criminal Appeal No. 3 of 2014. Another crucial factor is whether there is a point of law of sufficient importance such as the illegality of the decision sought to be challenged: see **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** [1992] TLR 185; and **Lyamuya Construction Company Limited v. Board of Registered Trustees of Young Women Christian Association of Tanzania**, Civil Application No. 2 of 2010 (unreported).

In the instant matter, I wish to observe, at first, that although Mr. Magee contends that the delay involved is too short and that it arose from the technical malfunction in the court's online filing system, I note that in Paragraph 10 of the supporting affidavit a different, but contradictory cause of the delay is given. It is averred in that paragraph that the delay was due to technical problems from "the newly introduced online court system that we are still practicing to be acquainted with, otherwise the applicant's documents were ready to be filed within time." This averment is, by any yardstick, a concession by the deponent that the delay involved arose from the failure by the applicant or its advocates to come to grips with the newly introduced court's online filing system. It is manifestly not a case of a system malfunction.

The foregoing apart, if it were assumed that, indeed, the applicant encountered technical difficulties in the course of uploading its application, I think this matter, overall, brings to question the applicant's conduct in taking steps to pursue its intended appeal to this Court. It is plain to me that the applicant's advocates acted at the eleventh hour without any due care and caution, implying that the delay that resulted in applying for leave to appeal, even though short, was not due to a bona fide cause. Let me demonstrate.

At the start, in order for the applicant to appeal against the decision of the High Court, Commercial Division it had to lodge a notice of appeal, request for a copy of the proceedings and apply for leave to appeal within thirty days of the delivery of the said decision in terms of Rules 45, 83 (2) and 90 (1) and (2) of the Rules. There is no doubt that the applicant's advocates put off everything until 25th April, 2019, which was the last day of the prescribed limitation period reckoned from 26th March, 2019, the date on which the said decision was handed down. While the applicant managed to lodge its notice of appeal and submit its letter applying for a copy of the proceedings on that final day, good fortune was not on its side with the intended application for leave to appeal. In my view, the applicant's advocates were not entitled to put off things to the last moment expecting that everything will go on smoothly. They had themselves to blame; for, they simply acted without due care and caution. In this regard, I wish to quote, with approval, the following opinion by Dawson-Miller, C.J. in an Indian case of **Jahar Mal v. Pritchard**, AIR 1919 Pat 503:

> *"Sufficient time in all these cases is granted to the parties for doing whatever may be necessary for furthering their suit,* ***and if they choose to put off until the very last minute either the filing of the appeal or the taking of any other steps***

> ***which are a necessary part of the prosecution of their case, they run a very great risk*** *and it does not seem to me that it is sufficient for a party to come to Court and say that if everything had gone absolutely smoothly and if no unexpected accident had happened, he would have been in time in taking the steps required for his appeal.* ***One is not entitled to put things off to the last moment, and hope that nothing will occur which will prevent them from being in time.*** *There is always the chapter of accidents to be considered, and it seems to me that one ought to consider that some accident or other might happen which will delay them in carrying out that part of their duties for which the Court prescribes a time limit, and* ***if they choose to rely upon everything going absolutely smoothly and wait till the very last moment, I think they have only themselves to blame if they should find that something has happened which was unexpected but which ought to be reckoned with, and are not entitled in such circumstances to the indulgence of the Court.****"* [Emphasis added]

I fully subscribe to the above observation and find it making a lot of sense. The applicant, in the instant matter, must, therefore, accept the

consequences of a mishap at the eleventh hour having taken the obviously objectionable course of putting off to the last moment what ought to have been done earlier at ease. In addition, since the applicant, as indicated earlier, gave in its supporting affidavit what in my view is a contradictory cause of the delay, the alleged technical mishap seems to be nothing but an afterthought. It is a ruse designed to escape the web of effluxion of time.

I also recall that Mr. Magee predicated the prayer for extension of time on the contention that the impugned decision of the High Court is fraught with an illegality in that the High Court Judge was biased; that he did not determine the sixth, seventh and ninth grounds in the petition for setting aside the arbitral award; and that the course taken by the learned Judge abrogated the applicant's right of fair hearing. Certainly, in **Principal Secretary, Ministry of Defence and National Service v. Devram Valambhia** (supra) at page 188, this Court held that:

> "... *where, as here, the point of law at issue is the illegality or otherwise of the decision being challenged, that is of sufficient importance to constitute 'sufficient reason' within the meaning of rule 8 of the Rules [now rule 10 of the 2009 Rules] for extending time. To hold otherwise would amount to permitting a decision, which in law might*

not exist, to stand. In the context of the present case this would amount to allowing the garnishee order to remain on record and to be enforced even though it might very well turn out that order is, in fact a nullity and does not exist in law. That would not be in keeping with the role of this Court whose primary duty is to uphold the rule of law."

See also: **VIP Engineering and Marketing Limited, Tanzania Revenue Authority and Liquidator of TRI-Telecommunications (T) Ltd v. Citibank (T) Ltd**, Consolidated Civil References No. 6, 7 and 8 of 2006; and **Eliakim Swai and Frank Swai v. Thobias Karawa Shoo**, Civil Application No. 2 of 2016 (both unreported).

In **Lyamuya Construction Company Limited** (supra), Massati, J.A. as a single Judge of the Court elaborated that a point of law alleging illegality of the impugned decision must not only be of sufficient importance but it must also be apparent on the face of the record. The relevant passage reads thus:

*"Since every party intending to appeal seeks to challenge a decision either on point of law or fact, it cannot in my view, be said that in **VALAMBHIA's** case, the Court meant to draw a general rule that every applicant who demonstrates that his intended appeal raises points of law should as of right be*

granted extension of time if he applies for one. The Court there emphasized that ***such point of law must be that 'of sufficient importance' and, I would add that it must be apparent on the face of the record, such as the question of jurisdiction; not one that would be discovered by long drawn argument or process."*** [Emphasis added]

Guided by the above authorities, I examined the ruling of the High Court intended to be challenged. Admittedly, it would be a serious error apparent on the face of the record if a judicial decision does not effectively deal with or determine an important issue in the case – see, for instance, the decision by the Supreme Court of India in **Basselios v. Athanasius** (1955) 1 SCR 520. But in the instant matter, no such error exists. It is notable that at page 15 of the typed ruling of the High Court, the learned High Court Judge clustered several grounds enumerated in Paragraph 13 (a), (b), (c), (d), (e), (f) and (g) of the petition and dealt with them conjointly. These included those alleged by Mr. Magee to have not been considered and determined. His complaint is, therefore, without any justification; for, the learned Judge considered the clustered grounds collectively and ultimately dismissed them holding that they raised no manifest error on the face of the impugned arbitral award. It is, therefore,

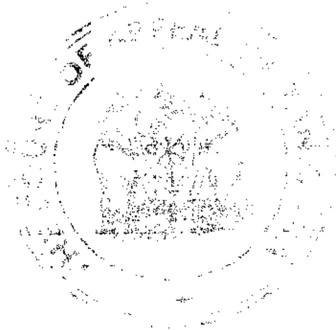
not apparent on the face of the impugned ruling that there is any important issue or question that was not dealt with or determined amounting to a substantial error or illegality warranting this Court to enlarge time.

In the final analysis, I find this matter unmerited. It stands dismissed with costs.

DATED at **DAR ES SALAAM** this 2nd day of October, 2019.

G. A. M. NDIKA
JUSTICE OF APPEAL

The Ruling delivered this 7th day October of, 2019 in the presence of Mr. Mudhihir Magee, counsel for the Applicant. Counsel for the Respondent absent duly served, is hereby certified as a true copy of the original.



S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL