IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., NDIKA, J.A., And LEVIRA, J.A.)

CIVIL APPLICATION NO. 190 OF 2013

MECHMAR CORPORATION (MALAYSIA) BERHAD (IN LIQUIDATION) ..... APPLICANT

VERSUS

1. **VIP ENGINEERING & MARKETING LIMITED**
2. **INDEPENDENT POWER TANZANIA LIMITED (IPTL)**
3. **THE ADMINISTRATOR GENERAL**
4. **PAN AFRICA POWER SOLUTIONS (T) LIMITED**

.... RESPONDENTS

(Application for revision of the Ruling and Order of the High Court of Tanzania at Dar es Salaam)

(Utamwa, J.)

dated the 5th day of September, 2013
in
Consolidated Misc. Civil Causes No. 49 of 2002 and No. 254 of 2003

.....

RULING OF THE COURT

15th March & 30th July, 2021

NDIKA, J.A.:

In this matter, the applicant, Mechmar Corporation (Malaysia) Berhad (In Liquidation) moves the Court to revise the ruling and order of the High Court of Tanzania at Dar es Salaam (Utamwa, J.) in Consolidated Miscellaneous Civil Causes No. 49 of 2002 and 254 of 2003 dated 5th September, 2013. The application is by way of a notice of motion, as amended, made under section 4 (3) of the Appellate Jurisdiction Act, Cap.

141 RE 2002 (now RE 2019) as well as Rules 4 (1), (2) (a), (b) and (c) and 65 of the Tanzania Court of Appeal Rules, 2009. The amended notice of motion is supported by an affidavit deposed to by Mr. Seni Songwe Malimi avowing to be duly appointed counsel for the applicant.

Opposing the application, the first respondent, VIP Engineering & Marketing Limited, filed an affidavit in reply duly sworn by its authorized officer, Mr. James Burchard Rugemalira. The application is also resisted by Independent Power Tanzania Limited (IPTL) and Pan Africa Power Solutions (T) Limited, the second and fourth respondents respectively, through an affidavit in reply deposed to by their counsel, Mr. Meichisedeck Sangalali Lutema, as well as a supplementary affidavit affirmed by Mr. Harbinder Singh Sethi, the Chief Executive Officer of the second and fourth respondents. The third respondent filed no affidavit in reply.

The brief background to this application as can be deciphered from the affidavits on record is as follows. Mechmar Corporation (Malaysia) Berhad is a Malaysian company incorporated on 19th December, 1972 under the laws of Malaysia ("Mechmar"). Mechmar operated worldwide including in Malaysia and Tanzania where it invested in the second respondent by holding 70% of the latter's shares. The first respondent was the other investor in the second

respondent, holding the remaining 30% of the shares. Following a disagreement between the two shareholders, the first respondent instituted proceedings in the High Court at Dar es Salaam vide Miscellaneous Civil Cause No. 49 of 2002 for winding up of the second respondent. Subsequently, Mechmar also instituted in the same court Miscellaneous Civil Cause No. 254 of 2003 against the first respondent. The two matters were later consolidated.

While the consolidated matter remained pending, the High Court of Malaya in Malaysia granted a petition by Mechmar's creditors and ordered that Mechmar be wound up under its supervision, with Messrs. Heng Ji Keng and Michael Joseph Monteiro appointed to serve as joint liquidators. According to the affidavit in support of the application, following their appointment, the joint liquidators engaged Mr. Malimi, learned counsel, to represent them in the consolidated cause still pending in the High Court at Dar es Salaam.

On 24th April, 2013, Mr. Malimi appeared before the High Court at Dar es Salaam in the consolidated cause and intimated that Mechmar was under liquidation in Malaysia, its country of incorporation; that the joint liquidators, Messrs. Keng and Monteiro, were the sole representatives of Mechmar; and

that he (Mr. Malimi) had instructions to take over the conduct of matter in respect of the consolidated cause for and on behalf of Mechmar. The claim was countered by Mr. Lutema, who until then had the conduct of the matter for and on behalf of Mechmar. He contended that he had instructions to represent Mechmar.

In a bid to resolve representation predicament, the High Court ordered Mr. Malimi to file a formal application. The learned counsel complied with the order by filing a formal application on 3rd May, 2013. On 9th July, 2013, the High Court ordered that the application be argued by way of written submissions as per a fixed schedule. Although written submissions were duly filed and as of 13th August, 2013 what remained was a ruling on the matter, it is on record that no ruling was handed down eventually.

Meanwhile on 27th August, 2013 the first respondent filed in the High Court a notice withdrawing the winding up proceedings along with the ancillary applications. The notice was grounded upon a Share Purchase Agreement ("SPA") between the first respondent, on the one hand, and the fourth respondent, on the other. In terms of the SPA, the first respondent transferred its shares in the second respondent to the fourth respondent. When the High Court considered the notice of withdrawal on 3rd September,

2013, Mr. Lutema, still holding himself as counsel for Mechmar, consented to the withdrawal prayed for. On the other hand, Mr. Malimi, claiming to be standing for the applicant herein, consented to withdrawal of the matter but forcefully resisted the consequential orders sought by the first respondent. Ultimately, the High Court handed down its ruling on 5th September granting the withdrawal of the first respondent's winding up petition along with the consequential orders prayed for. According to the drawn order attached to this application, the granted orders are as follows:

> *"1. This Court marks the petition for winding up the IPTL as duly withdrawn with no order as to costs.*
>
> *2. The appointment of the Provisional Liquidator is hereby terminated.*
>
> *3. The Provisional Liquidator shall hand over all the affairs of IPTL including the IPTL Power Plant (the Plant) to PAP, which has committed itself to pay off all legitimate creditors of IPTL and to expand the plant capacity to about 500 MW and sell power to TANESCO at a tariff of between US cents 6 and 8/unit in the shortest possible time after taking over in public interests.*
>
> *4. Parties are free to commence new independent claims in any Court with competent jurisdiction*

against any party should they fail to reach amicable settlement out of Court on any issue which arose in IPTL.

5. The Court has taken note of the agreement between VIP and PAP.

6. IPTL shall as soon as possible consider paying Law Associates Advocates the undisputed claim of monies to honour the commitment by PAP as shown under the VIP prayer No. (3) herein above."

The applicant now challenges the above orders on three main grounds stated on the amended notice of motion. We find it necessary to reproduce them at length as follows:

a) *The High Court permitting Mr. Lutema of Asyla Attorneys to continue to appear (and make submissions) on behalf of the applicant on 03/09/2013 and 05/09/2013 despite the Court's order of 24th April, 2013 that the dispute in relation to the representation (and the authority to act on behalf) of Mechmar (the applicant) be argued by way of formal application (the "representation application"). The representation application was argued by way of written submissions and as of 5th September, 2013 was still pending for ruling.*

b) *The High Court's ruling and order of 5th September, 2013 has the effect of transferring the affairs of the 2nd respondent into the*

management and/or total ownership of the 4th respondent despite the fact:

i. *That before the trial court was only a notice of withdrawal of the petition for winding up of the 2nd respondent and no other material or basis or application whatsoever upon which the said court could order transfer of the affairs of the 2nd respondent to the third party, the 4th respondent.*
ii. *That the 4th respondent was not a party to the proceedings at the High Court nor was it part of any record thereof the first respondent to warrant the reliefs and/or rights granted to it.*
iii. *That the Share Purchase Agreement (SPA) dated 18th August, 2013 between the 1st respondent and the 4th respondent which was the basis of the notice of withdrawal filed in the High Court did not involve the applicant and thus anything agreed therein or touching upon the interests of the applicant was only a presumption and could not be relied upon as the applicant was not a party to the said agreement.*
iv. *That the Share Purchase Agreement (SPA) alleges that Mechmar's (the applicant's) shares in the 2nd respondent were transferred to Piper Link Investment Limited and the 4th respondent was the owner of the said shares. This allegation is a mere statement and no such transfer has taken place and since the applicant was not party to the SPA, hence the High Court ought not to have entertained such a notion.*
v. *The applicant owns 70% of the shareholding of the 2nd respondent and that any decision regarding management*

and/or ownership of the 2nd respondent ought to involve it and not be usurped by any unilateral decision of the 1st respondent as contained in the Share Purchase Agreement (SPA) forming the basis on the notice of withdrawal before the trial court.

vi. *That owing to the dispute of representation of the applicant, the High Court ought to have resolved this before ordering substantive issues affecting the 2nd respondent where the applicant is a majority shareholder.*

vii. *The Share Purchase Agreement (SPA) between the 1st respondent and the 4th respondent which was the basis of the notice of withdrawal of the petition for winding up of the 1st (sic) respondent is a sham and is fraught with irregularities in that the 3rd respondent (the then provisional liquidator of the 2nd respondent) was involved in the preparation and/or approval of the same and as such counsel for the said 3rd respondent acted in the preparation of the same (purportedly acting for and on behalf of the 1st respondent). It is apparent that the 1st respondent and the 3rd respondent colluded and/or conspired to defeat the claims and/or interests of the applicant and hence justice has not been seen to be done.*

viii. *That the ruling and order of the High Court dated 5th September, 2013 Utamwa, J. rendered the representation application (in respect of Mechmar) before the High Court nugatory and condemns the interests of the applicant without being heard.*

ix. That the applicant is a Malaysian incorporated company and had been wound up by the High Court of Malaya. The trial court was informed of this fact but ignored and/or remained oblivious of the same to the detriment of the applicant's interests.

c) The High Court's ruling and order of 5th September, 2013 (Utamwa, J.) that the 2nd respondent's affairs be transferred to the 4th respondent was granted without any inquiry into the justification or legal propriety of the SPA purportedly effecting the same, the application of the 1st respondent seeking the same or ultimate order of the trial court."

At the hearing of this matter, Mr. Gaspar Nyika, learned counsel appeared for the applicant while Mr. Michael T.J. Ngalo, learned advocate, represented the first respondent. Mr. Melchisedeck Lutema, learned counsel, teamed up with Ms. Dora Mallaba and Mr. Joseph Sungwa, both learned counsel, to represent the second and fourth respondent. For the third respondent, Messrs. Benson Hoseah and Samwel Mutabazi, learned State Attorneys, appeared.

In his oral argument, Mr. Nyika moved us to grant the application based on the written submissions he had filed in support thereof. Beginning with the first ground, Mr. Nyika faulted the High Court for allowing Mr. Lutema to appear and act for Mechmar on 3rd and 5th September, 2013 as if

no objection had been raised against him and in total disregard of the pending representation application. Consequently, matters that affected the interests of the applicant in the proceedings fell in the hands of Mr. Lutema who had opposing interests in the petition. The learned counsel added that the representation application was therefore rendered nugatory denoting that the applicant was effectively denied of its right to be heard. To buttress the point, the case of **Bank of Tanzania v. Said A. Marinda and 30 Others and the Attorney General**, Civil Application No. 74 of 1998 (unreported) was cited on the effect of not affording a party an opportunity to be heard.

Regarding the second ground, Mr. Nyika censured the High Court for ordering the transfer of the affairs of the second respondent to the fourth respondent, then a third party to the proceedings, in the wake of the withdrawal of the petition. He contended that the prayer for that order was a mere statement from the bar as it was not based upon any material before the court. It was an extraneous matter, so to speak, lacking any legal basis. It was further claimed that by entertaining and granting such a casual prayer, the High Court denied interested and necessary parties such as the applicant the right to be heard on the matter.

On the third ground, Mr. Nyika assailed the notice of withdrawal and the SPA that they were fraught with irregularities and illegalities arising from collusion and/or conspiracy aimed at defeating the applicant's interests. He particularly pointed an accusing finger at the third respondent who, in its capacity as the provisional liquidator of the second respondent, was alleged to have connived with the first and fourth respondents to facilitate the improper transfer of the affairs of the second respondent to the fourth respondent. Citing **Fahari Bottlers Limited v. Registrar of Companies and NBC (1997) Limited and Others** [2001] T.L.R. 6, the learned counsel argued that the third respondent was so conflicted that it had to be disqualified as a provisional liquidator. Further reference was made to an English case of **Rondel v. Worsley** (1967) 3 All ER 993 on the role of an advocate.

Replying for the first respondent, Mr. Ngalo, at first, adopted the contents of the affidavits in reply. He supported the High Court's ruling withdrawing the petition and the consequential orders made, contending that they were proper as the court granted a request for withdrawal made by the party that had instituted the matter in the first place. He underlined that the present applicant was duly represented by Mr. Malimi and that none

of the respondents in the matter objected to the withdrawal prayed for. It was his further contention that the High Court made no consequential order adverse to the interests of the applicant and thus the present matter lacks any practical purpose.

Mr. Ngalo went on cautioning that if the Court were to revive the proceedings before the High Court, it would be impossible for the matter to proceed as there are currently no proceedings to speak of in the High Court, the relevant record having been closed on 5th September, 2013 upon the matter being marked withdrawn. To bolster his submission, he relied on **Kitinda Kimaro v. Anthony Ngoo and Another**, Civil Appeal No. 67 of 2014 (unreported). Accordingly, the learned counsel moved us to dismiss the application.

On the part of Mr. Lutema, he based his oral argument on the affidavit in reply, a supplementary affidavit and written submissions lodged for and on behalf of the second and fourth respondents. As regards the first ground of the application, Mr. Lutema argued that as long as the first respondent who had instituted the matter before the High Court had prayed for the withdrawal of the matter as *dominus litis*, it would have been wrong for the High Court to ignore such plea on the ground that there was a

"representation application" yet to be resolved. He contended that it was significant that the applicant does not contest the withdrawal, implying that its claim that it was condemned unheard does not have any legal basis.

Coming to the second ground, it was Mr. Lutema's essential submission that the applicant no longer has standing to sue as a shareholder in the second respondent. He elaborated that the ground at hand was predicated on the fact that the applicant had 70% shareholding in the second respondent. Citing Annexure IPTL 8 referred to in paragraph 15 of the second and fourth respondents' affidavit in reply that the applicant had unsuccessfully challenged the deletion of its name and the substitution thereof by the name of the fourth respondent as a shareholder in the second respondent, Mr. Lutema argued that the applicant was no longer a shareholder. He made further reference to paragraph 16 of the same affidavit that the applicant's challenge in the High Court, Commercial Division ended in vain as it was settled and withdrawn with no option to be reinstituted.

As regards the complaint in the third ground, Mr. Lutema argued so tersely that the matter was *res judicata* as the underlying action was dismissed by the High Court, Commercial Division for want of prosecution

and that the said decision has not been vacated by any other judicial process. He stressed that a closed matter cannot be a subject of fresh litigation. All in all, Mr. Lutema urged us to dismiss the application.

For the third respondent, Mr. Hoseah declined to make any submission on the ground that the third respondent was no longer an interested party following being discharged from the position of provisional liquidator upon the withdrawal of the petition by the High Court.

In a brief rejoinder, Mr. Nyika countered that the matter was not overtaken by events and maintained that the order for the transfer of the affairs of the second respondent to the fourth respondent was adverse to its interests. On the application of the decision in **Kitinda Kimaro** (*supra*), he contended that it was taken out of context as it would be absurd that whenever the proceedings in the High Court are terminated, this Court cannot exercise revisional powers over the said proceedings. He insisted that the High Court in the present matter irregularly handled the representation application and that it issued untenable consequential orders as it marked the petition withdrawn.

Mr. Nyika went on submitting that the applicant does not challenge the SPA but is aggrieved by the consequential orders made essentially

transferring the affairs of the second respondent to the fourth respondent to the detriment of its interests. As regards the applicant's complaint in the High Court, Commercial Division referred to by Mr. Lutema, he replied that it was irrelevant to the present matter.

We examined the notice of motion, the affidavits and the authorities relied upon by the parties in the light of the contending submissions of the learned counsel. In our considered view, the matter can be disposed of mainly on the question whether it was proper for the High Court to make consequential orders complained of following its grant of the withdrawal of the petition as prayed.

Before we deal with the above issue, we feel constrained to address the complaint in the first ground, albeit very briefly, that the High Court wrongly allowed Mr. Lutema to hold himself out as Mechmar's counsel before it on 3rd and 5th September, 2013 prior to the resolution of the representation application.

Whether it was Mr. Lutema or Mr. Malimi who had proper instructions to represent Mechmar, we think, it was irregular that the High Court went ahead and allowed Mr. Lutema to appear before it on 3rd and 5th September, 2013, on behalf of Mechmar while at the same time it recorded Mr. Malimi

as counsel claiming to be representing the joint liquidators of Mechmar. The High Court ought to have resolved the impasse by delivering its ruling on the matter, which it had reserved since 13th August, 2013. We can only wonder if Mechmar was effectively represented especially at the hearing on 3rd September, 2013. We say so as we noted from the High Court's ruling of 5th September, 2013 that the two counsel took apparently opposing positions on the matter. While at pages 3, 6 and 18 of the typed ruling, Mr. Malimi, who did not object to the withdrawal prayed for, is depicted to have valiantly resisted the proposed consequential orders especially the one intended for transferring the affairs of the second respondent to the fourth respondent, Mr. Lutema was contented that the said orders be made. This unfortunate situation could have been averted had the court resolved the issue before it considered the first respondent's prayer for the withdrawal of the matter. We need not say more on this issue. We leave it at that.

We now advert to the main question on the propriety and tenability of the consequential orders made on the back of the withdrawal of the petition. To begin with, we would agree with both Mr. Ngalo and Mr. Lutema that the first respondent, being the party who instituted the petition in the first place, had the right to seek its withdrawal. It is common ground that the

withdrawal prayed for by the first respondent was not resisted by any of the parties. However, as hinted earlier and also noted by the learned High Court Judge at pages 3, 6 and 13 of the typed ruling, Mr. Malimi objected to the consequential orders sought on the ground that the first and fourth respondents had no mandate to execute the agreement (SPA) and pray for any consequential orders to give effect to that agreement. The learned Judge dismissed Mr. Malimi's challenge as well as certain preliminary issues which had been raised by the other parties and ruled, at page 14 of the ruling, as follows:

> "... ***I find no reason as to why this court should not consider the notice [of withdrawal] positively and grant the orders prayed [for] by***
>
> ***VIP [the first respondent] and agreed by all other interested parties to the petition***. *It is in fact, more so considering the fact that all other interested parties, if any, including the applicants, can still have other avenues to pursue their rights against IPTL [the second respondent] or VIP. In fact, the withdrawal of the petition will not extinguish the existence of those two companies according to the notice and the prayed orders. The only change will be effected by the agreement by VIP and PAP is on*

> *the shareholders of IPTL.* ***Again, one of the purposes of the prayed orders upon withdrawal of the petition as agreed by the parties is to honour the commitment of PAP to pay off all legitimate creditors of IPTL****. And all the parties to not dispute the applicants' claim against IPTL. What they dispute is only the argument that the same can act as an impediment to the notice and the orders prayed therein."* [Emphasis added]

The learned Judge went on, at page 15 of the ruling, to *"order and mark the petition withdrawn as prayed"* without any order as to costs. He then granted all the consequential orders prayed for by the first respondent. But, were the consequential orders proper and tenable?

We think the effect of a withdrawal of a legal action is to place the parties in the same position as if no such action had been brought to the court. In our research we did not readily find any local precedent aligned to or contradicting this view. Gratefully, we found a number of decisions handed down by the courts in India on the question, to which we subscribe. In **Hare Krishna Sen v. Umesh Chandra Dutt and Others,** 62 Ind Cas 962, it was held that:

"... the effect of the withdrawal of the suit is to leave the rights of the parties undetermined in so far as they were asserted in that suit ...."

It was stated more elaborately in **(Rani) Kulandai Pandichi and Another v. Indran Ramaswami Pandia Thevan**, AIR 1928 Mad. 416 that:

*"**Permission to withdraw a suit decides no matters in controversy and does not confer any rights on a party, and the fact that the person withdrawing is precluded from bringing a fresh suit on the same cause of action cannot be said to have that effect**. It has been held that an order permitting a withdrawal of a suit or appeal is not a decree within the meaning of the Civil Procedure Code. We need only refer to **Patlogi v. Ganu** (1891) I.L.R. 15 B. 370 **Jogodindra Nath v. Sarat Sundari Debi** (1891) I.L.R. C. 322 and **Abdui Hussain v. Kasi Sabu** (1900) I.L.R. 27 C. 362."* [Emphasis added]

Furthermore, in **Smt. Raisa Sultana Began and Others v. Abdul Qadir and Others,** AIR 1966 All 318, it was held that:

"Next it is to be noted that no act is required to be done by the Court to effectuate a plaintiff's

withdrawal of his suit. There is no provision for any act to be done in the suit by the Court for making the withdrawal effective or even after the withdrawal it is not required to pass any order. ***Withdrawal of a suit is itself its end. A plaintiff withdrawing his suit is liable for such costs as the Court may award; so the Court is empowered to pass an order only in respect of the costs****. The liability for costs arises out of the plaintiff's withdrawing his suit; the suit has been withdrawn and consequently he becomes liable."* [Emphasis added]

From the above decisions, three points are clear. First, that withdrawal of a legal action, be it a suit or a petition or an appeal, is itself its end. Secondly, that withdrawal of a legal action leaves the rights of the parties undetermined in so far as they were asserted in that action. Finally, a party withdrawing his action is liable for such costs as the court may award. So, the court is empowered to pass an order only in respect of the costs.

Applying the above position to the instant case, we find no difficulty to endorse Mr. Nyika's submission that the High Court's issue of the consequential orders was a palpable error. While the termination of the appointment of the third respondent as the provisional liquidator was understandably and naturally consequential to the withdrawal of the petition,

the order for the transfer of the affairs of the second respondent to the management and/or total ownership of the fourth respondent was manifestly improper. For it purported to pronounce and confer rights on the fourth respondent as if the court had heard and determined the petition on the merits. Most disquietingly, the fourth respondent was a third party as it was not a party to the proceedings before the High Court. Equally irregular and improper are the High Court's orders for *"taking judicial notice of the SPA"* and that the second respondent should *"as soon as possible consider paying Law Associates Advocates the undisputed claim of monies to honour the commitment by PAP as shown under the VIP prayer No. (3) herein above."* These appear to have been mistakenly issued as if the order permitting the withdrawal was a decree within the meaning of the Civil Procedure Code, Cap. 33 R.E. 2002 (now R.E. 2019) but it was not. We are firm in our mind that the High Court should not have embedded the withdrawal order with any other consequential order save for the order in respect of costs. The consequential orders in this matter simply did not have any legs to stand on.

In view of the foregoing discussion, we find merit in the second ground of the application. As this determination is sufficient to dispose of the application, we find no pressing need to deal with the third ground.

All said and done, we find merit in the application, which we hereby grant. In consequence, we quash and set aside all the consequential orders made by the High Court. For avoidance of doubt, the High Court's order of 5th September, 2013 remains to the effect that "the petition was marked withdrawn with no order as to costs." Given the circumstances of this matter, we make no order as to costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 29th day of July, 2021.

A. G. MWARIJA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

M. C. LEVIRA
JUSTICE OF APPEAL

The ruling delivered on this 30th day July, 2021, in the presence of Mr. Gaspar Nyika, learned counsel for the applicant, Mr. Michael Ngalo, learned counsel for the 1st Respondent, Ms. Consensa Kaindaguza, learned counsel for the 3rd respondent and Ms. Dora Malaba, learned counsel for the 2nd and 4th respondents, is hereby certified as a true copy of the original.

THE COURT OF APPEAL OF TANZANIA

F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL