IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 55 OF 2006

TRANSNET LTD t/a SPOORNET.....PLAINTIFF

VERSUS

COMAZAR (PROPRIETARY) LTD .....1ST DEFENDANT

TRANS AFRICA RAILWAY
CORPORATION (TANZANIA) LTD.....2ND DEFENDANT

RULING

Date of Submissions – 25/9/2006

Date of Ruling – 4/10/2006

MASSATI, J.

This suit was filed on 25/8/2006 in which the Plaintiff prays for an order directing the Defendant to immobilize and deliver the locomotives to the Plaintiff at Dar es Salaam port or wherever they may be and for general damages, costs of repair and maintenance against the 2nd Defendant. On the same day the Plaintiff also filed an application for temporary order of the same nature as the principal prayer in the plaint which is: -

"This Honourable Court be pleased to order immediate immobilization of the locomotives the subject of this suit by

the Second Defendant and hand over the same to the Plaintiff pending hearing of the main suit."

On 28/8/2006 I issued an interim order exparte in favour of the Applicant. On 31/8/2006, the 2nd Respondent successfully applied for variation of my order of 25/8/2006. On 5/9/2006 the 2nd Respondent applied for a review of that order, but in my ruling of 14/9/2006, I rejected the application for review and advised the parties to prepare for hearing of the application inter partes. That task was accomplished on 25/9/2006 from which this ruling emanates.

First, let me review the affidavit evidence as presented by the parties. The Applicant's application was supported by the affidavit of KENETH LEONARD DIEDRICKS. According to paragraph 2 of that affidavit, there was a lease agreement of railway locomotives between the parties, which has since been repudiated, resulting into litigation on monetary claims in South Africa. It is alleged in paragraph 4 that since the determination of the Lease Agreements in April 2005 the locomotives have not been handed over by the Second Defendant to the 1st Defendant or the Plaintiff and the same are exposed to vandalisism or misuse. In paragraph 5 the Applicant says that if the locomotives are not immobilized and handed over to the Plaintiff they are bound to degenerate into a state of disrepair. There is also fear that the 2nd Respondent

intends to start using the locomotives and may possibly relocate them to the Democratic Republic of Congo.

These allegations are countered by the 2nd Respondent through a counter affidavit filed by its General Manager one JOSEPH RUTATINA. According to paragraph 4 of the counter affidavit the Respondent admits that the parties are embroiled in a dispute over the locomotives' lease agreement, but disputes that the said lease agreement has been repudiated, It is averred that the 2nd Respondent is in lawful possession of the locomotives pursuant to a locomotive sublease agreement between the 2nd Respondent and the 1st Respondent dated 20th June 1997 and replaced by a Settlement Agreement dated 2002 in which only the 1st Respondent could terminate upon obtaining a Court Order or on arbitration.

He said the dispute in South Africa is in respect of overpaid rentals. He further said there is also pending in South Africa, litigation between the Applicant and the 2nd Respondent in which the Second Respondent has applied for an injunctive order to prohibit the Applicant from attaching the locomotives the subject of this application pending the determination of the suit in South Africa. In paragraph 8 the 2nd Respondent disputes that the Lease Agreement was terminated in April 2005 or at all, and that the Applicant is a stranger to the agreement between the 1st and 2nd

Respondents. It is also disputed that the agreement between the 2nd Respondent and Tanzania Railways Corporation has come to an end. On the danger of deterioration the deponent states that it has been servicing the locomotives and is capable of continuing to do so. On the possibility of relocating the said locomotives to the Democratic Republic of Congo the deponent states that since the rail gauge in the Congo is different, the locomotives cannot be taken to the said Congo. Lastly, Mr. Rutatina, depones that it would be inimical to public interest if the locomotives were immobilized because it would cause hardship both to the Second Respondent and the nation as a whole and expose the 2nd Respondent to great financial risk for breach of contract with the Tanzania Railways Corporation. He attached a copy of the said lease Agreement between the 2nd Respondent and Tanzania Railways Corporation.

JUVENATIS NGOWI also filed a counter affidavit to oppose that of Mr. Diedricks. According to paragraph 3 of the counter affidavit the Lease Agreement between the Applicant and the 1st Respondent allowed the 1st Respondent to sublease the said locomotives to the 2nd Respondent. That in the course, there was a dispute between the Respondents which was amicably settled by an agreement which adopted the lease agreement with the Applicant with some additions. According to the Settlement Agreement there was an arbitration clause, and the law applicable was that of South Africa.

The two counter affidavits were not spared. They were attacked by affidavits in reply filed by DIEDRICKS, DR ALEX NGULUMA, and DR. FAUZ TWAIB. Briefly Mr. Diedricks insists that the Applicant is the owner of 11 locomotives which it leased to the 1st Respondent, and the lease agreement has since been repudiated/terminated and that Transnet Ltd (the Applicant) was not a party to the Settlement Agreement, neither is it a party to the litigation between the Respondents pending in South Africa. It is also contended by the Applicant that as they have already entered into a memorandum of understanding for the Tanzania Railways Corporation to purchase the locomotives it would be in the national interest if the locomotives were to be sold to the concessionaire to be facilitated by the Tanzania Railways Corporation.

DR. ALEX NGULUMA, revealed that as attorney for TANGA CEMENT CO LTD, and authorized to take an affidavit by the said TANGA CEMENT to state that the company had contracted the 2nd Respondent to provide railway transport for its cement to specified points on the central line, and that it performed poorly due to inadequate maintenance and availability of locomotives and so in 2005, TANGA CEMENT resolved not to renew the lease and haulage agreement that subsequently expired in April 2005. In its stead TANGA CEMENT contracted EAST AFRICA RAIL HAULERS to haul its

cement and that the latter leased 11 locomotives from the Applicant, under licence of the 2nd Respondent when there was a dispute between it and TANGA CEMENT. Lastly that TANGA CEMENT was now in the process of negotiation to purchase the locomotives from the Applicant.

The affidavit in reply of Dr. Fauz Twaib, was in respect of the counter affidavit of JUVENTUS NGOWI.

According to paragraph 4 of the Reply, Dr. Twaib is informed that there is no existing lease agreement between the Respondents and if any the same has been terminated. He is informed that wheels of locomotives can be changed to fit into wider rail gauge of the railway in the Democratic Republic of Congo. Lastly that the Applicant is not a party to the settlement agreement and so the Second Respondent cannot derive any rights therefrom against the Applicant even if the said settlement agreement had adopted the Lease Agreement between the Applicant and the 1st Respondent. Similarly, the Applicant is not bound by the arbitration clause contained in the said settlement agreement.

In his submission, DR. TWAIB learned Counsel for the Applicant adopted the contents of all the affidavits and affidavits in reply as part of his submission. DR TWAIB, submitted that since the lease agreement between the

Applicant and the 1st Respondent was repudiated and finally came to an end, the sublease between the 1st Respondent and the 2nd Respondent also came to an end. In terms of the lease and the sublease, the 2nd Respondent was to hand over the locomotives to the 1st Respondent and the latter in turn, to the Applicant. Although the 1st Respondent had asked the 2nd Respondent to hand over the locomotives the latter had not heeded, and in fact expressly refused to do so. This is what necessitated the filing of the suit.

DR TWAIB submitted that the application for injunction was necessitated by the fear that the 2nd Respondent has continued to use them without any valid agreements. Besides, without adequate services and maintenance which the 2nd Respondent is not capable of, the locomotives might go into deterioration. The proceedings in South Africa between the Respondents is over rentals which means the 2nd Respondent is now using the locomotives without praying rentals. So the Applicant would not gain anything if the 2nd Respondent is allowed to continue using the locomotives. To avert any fear of financial loss on the part of the 2nd Respondent the Applicant was willing to provide a banker's guarantee to be deposited in court to cover him.

With these submissions, Dr. Twaib submitted that the Applicant had succeeded in showing that there was a prima

facie case, that there is a serious issue to be tried, and that the Applicant is likely to suffer irreparable injury if the Applicants were not granted, than the 2nd Respondent if it was granted. Therefore he prayed that the application be granted.

Mr. Mbwambo, learned Counsel appeared and argued the application for the 2nd Respondent. He started off by stating the principles for the grant of injunctions. He said for a temporary injunction to issue, three conditions must be satisfied, namely: -

(i) There must be a prima facie case.

(ii) The Applicant must show that he will suffer irreparable injury, and lastly.

(iii) That the balance of convenience is such that the Applicant is likely to suffer more by not granting the injunction than would the Respondent by granting it.

Mr. Mbwambo submitted that the Applicant has not established a prima facie case nor shown that it will suffer irreparable injury.

On the first criterion Mr. Mbwambo submitted that if the Applicant's contention was that the sublease has been repudiated there is no provision in the said agreement for repudiation. Even if there was such provision, there is no provision for the consequences of repudiation. Besides the reliefs sought in the main suit and this application are the same.

Mr. Mbwambo further submitted that the suit was founded on Addendum 4 which is not signed by the Respondents and so, has no evidential value. Furthermore, Clause 2.6 of the Addendum allows the Applicant to immobilize the locomotives pending arbitration proceedings. So this relief is only available upon commencement of arbitration proceedings. Even paragraph 5 of the plaint, relates the Applicant's cause of action to the 1st Respondent ceasing to have interest in the 2nd Respondent's Company but again the Addendum is unsigned and so, not worthy its name. With these the learned Counsel submitted that no prima facie case was made out.

On the question of irreparable injury, Mr. Mbwambo submitted that, by its very nature if the application is granted, the suit will have been determined, and so it is the Second Respondent who would suffer more than the Applicant. On this subject, Mr. Mbwambo further submitted that the

Respondent has been in possession of the locomotives for 9 years; has been maintaining and servicing the same, and there is currently a claim pending in South Africa on overpayment of rentals. Even the Applicant has a case against the 1st Respondent for non payment of rent it collected from the 2nd Respondent. Denying the 2nd Respondent of the use of the locomotives would cause irreparable injury to it, which cannot be met by a mere undertaking from the bar to deposit a bank guarantee. The 2nd Respondent has also shown that it has incurred up to 3 million South African Rand, in maintaining the locomotives and it is still incurring further costs and would incur more if the locomotives are not put to use. The said guarantee would not cover the financial losses of the 2nd Respondent if the application was granted. So it was his view that the Applicant has failed to establish that it would suffer irreparable injury if the application would not be allowed.

On the criterion of the balance of convenience Mr. Mbwambo submitted that the 2nd Respondent will suffer more than the Applicant. Since 1997 the locomotives had been subleased to Tanzania Railways Corporation to service various customers who use the central line up to the neighboring countries. As such the 2nd Respondent plays the role of a savior to the commuters of the central line. The services are important to the national interests. So, granting the orders sought would not only cause inconvenience to the Second

Respondent but also to the nation at large. So he urged the court to dismiss the application with costs.

In rebuttal, Dr. Twaib, submitted that the gist of the suit will be discerned from reading the whole plaint, not just paragraphs 5 and 6. He submitted that read as a whole, it is clear that the Applicant's case is built on the fact that both the lease and the sublease have expired and currently both invalid, and so the locomotives must be returned to their owner, the Applicant. He said the Addendum is irrelevant because it is not the basis of the Applicant's case.

He said, he did not agree with the Respondent's submission that the reliefs in the main suit and the application were the same because the reliefs in the application were temporary in nature and in law they can't last more than 6 months. On the other hand the reliefs in the main suit are permanent. The aim of the application is to preserve the subject matter of the suit.

He submitted that while, if not serviced, the Applicant would irreparably suffer if the locomotives went into disrepair, all that the Respondent would suffer, was loss of business. He said even if there was an agreement between the Tanzania Railways Corporation and the 2nd Respondent, it was absurd to imagine that it bound itself to serve TRC for 20 years by

locomotives owned by the Applicant who is a stranger to that Agreement. That is so, notwithstanding that there was or there was no national interest, but in any case this has been put in issue by the Reply to the counter affidavit by DR. ALEX NGULUMA. Besides, the Applicant has shown that the Applicant has itself entered into a Memorandum of Understanding with the Tanzania Railways Corporation for the sale of the locomotives. It was therefore his submission that of the two, the Applicant would suffer more in terms of deterioration of the locomotives and financial loss, but the 2nd Respondent could be compensanted from the deposit that the Applicant is willing to raise. Lastly, Dr. Twaib said that the allegation of having spent 3 million rand for servicing is unsubstantiated, and if so one would have expected the 2nd Respondent have raised a counterclaim in this suit or lodge a claim in South Africa none of which has happened. But even if it were so, the question is why should the 2nd Respondent be reluctant to hand over the locomotives so as to easen its Respondents burned? With these, Dr. Twaib, reiterated his prayers for the grant of the application.

This application is made under Section 68 (e) Section 95 and Order XXXVII rr 1 and 2 of the Civil Procedure Code Act. There is, I think, no doubt that an injunction is equitable in origin and its object is primarily to prevent or protect against unperformed and unexecuted future rather than past acts. It

is also now settled that to grant a temporary injunction the following conditions must be established.

(1) The applicant must present an arguable case that the defendant's act or omission is wrongful.

(2) The applicant must show that he will suffer damages as a result of the defendant's acts or submission during the pendency of the trial of the suit.

(3) The remedy of damages must be shown to be inadequate to compensate for the threatened injury. That is to say, it must be shown that the Applicant will suffer irreparable injury if the injunction is not grated.

After finding that the above minimum conditions exist, the court then considers whether or not to exercise its discretion. There, also several factors have been formulated by the courts as being relevant; although, really each case would be decided on the peculiarity of its own circumstances. These may be summarized as follows: -

(i) The probability of success at the trial.
(ii) The balance of convenience.

(iii) The conduct of the parties.

(iv) Balance of justice, which entails the court considering other alternative remedies.

Applying the above principles to the present case, I find that there is no dispute that the Applicant is the owner of the 11 locomotives in question. I also find as a fact that the 11 locomotives were initially leased to the 1st Respondent who in turn subleased them to the 2nd Respondent. It is alleged by the Applicant that the sublease came to an end in March 2005, so that the 2nd Respondent was bound to immobilize and hand over the locomotives to the Plaintiff. In their counter affidavit the 2nd Respondent disputes this. This puts the matter in contest, but so far there is no dispute that the Applicant owns the locomotives.

I am satisfied that the Applicant has managed to establish an arguable case against the 2nd Respondent's continued use of the locomotives.

On the question of the Applicant suffering damages as a result of the 2nd Respondent's continued use of the locomotives the Applicant has alleged that the Respondent has been using the locomotives without paying rentals to the Applicant. On the other hand, the 2nd Respondent, without disputing the Applicant's allegations, has submitted that it

has in fact overpaid rentals on the locomotives to the 1st Respondent and that the dispute is now in court in South Africa. I would say that this type of damages may be compensated for by payment of the rentals. But the Applicant has also complained that if not immobilized and handed over, the locomotives might not be serviced and may be exposed to vandalism. In his view, this kind of injury would be irreparable. With respect, I do not entirely agree with the Applicant. If the Applicant can service and maintain the locomotives, the Respondent can also be ordered to do so. If the locomotives can be vandalized while in possession of the Respondent they can also be vandalized while in the Applicant's possession. What can be done by the Applicant to prevent vandalism, the Respondent can also be ordered to do. So, I do not agree that the Applicant is likely to suffer the kind of injuries that cannot be atoned for by way of damages in terms of clause 9.1.

I have also considered the other discretionary factors. Although it has been said that it is not desirable at this stage to express any opinion on the probability of success of the Plaintiff's case at the trial nonetheless courts have infrequently been influenced by this fact in deciding whether or not to grant a temporary injunction, despite the House of Lords' non binding decision in **AMERICAN CYNAMID V ETHICON** [1975] 1 All ER. 509 to the contrary. In Tanzania it has been held in

ATILIO VS MBOWE [1969] HDC n. 284 and followed meticulously by our courts that an applicant must not only establish a prima facie case, but also with a probability of success.

In the present case, I have already found that the Applicant has established a prima facie case. Now on the affidavit evidence alone, without, of course, the benefit of tested veracity or mature arguments, I can also safely conclude that the Applicant as the undisputed owner of the locomotives has a good case to ask for their repossession. I will thus answer that issue in the affirmative.

On the question of balance of convenience, the first consideration is that the Applicant as owner of the locomotives has the inherent right of their possession and determination as to their use. Although the Applicant may be compensated for loss of use of the locomotives, deprivation of her rights as an owner is in my view irreparable. So as between the two the balance of convenience is in favour of the Applicant.

But the conduct of the parties is also a relevant factor. I am aware from Annexure RI of the counter affidavit of RUTATINA that is case No. 05/23471 is in the High Court of South Africa (Witwatersrand Local Division) in which the present Applicant has sued the 1st Respondent for payment of

rental arreas and for it to deliver the said locomotives. Since the Applicant has filed the present suit to seek also for the immobilization of the locomotives, one may be tempted to conclude that the action is instituted in abuse of the court process. However in its defence (DEFENDANT'S PLEA) the 1st Respondent pleads in the South African case: -

7.1.1 - "It was an express term of the lease agreement that the plaintiff would cooperate with and assist the defendant by maintaining physical control and possession over the locomotives and in decommission the locomotives should this be required by the defendant.

7.1.2 - Consequent upon the defendant terminating the sublease with TARC the defendant called upon TARC to surrender possession of the locomotives and return the locomotives to the plaintiff's Dar es Salaam depot.

7.1.4 The Defendant requested the Plaintiff to decommission the locomotives to prevent TARC from continuing to utilize the locomotives.

7.1.5 Despite this demand the Plaintiff has failed and/or refused to decommission the locomotives.

7.1.6. The Plaintiff's failure and/or refusal aforesaid is a breach of the agreement annexure A which excuses the defendant from making any payments to the plaintiff in terms of the agreement."

From the pleadings of the Plaintiff and the 1st Respondent it would appear that the Applicant was actuated to take the present action against the Respondents not only as owner, not only because the lease agreement had been repudiated; but as a contractual obligation. So it is not an abuse of process.

Mr. Mbwambo, learned Counsel has also strenuously argued that the immobilization of the locomotives would be tantamount to deciding the main case and that as the locomotives are being used in the Tanzania Railways Corporation's central line, it would be against public interest.

I have carefully considered the rival arguments of the learned Counsel. I will first begin with the issue of national/public interest. In **TAHFIF SUPERMARKET VS B.P.(T) LTD** [1992] TLR. 189 it was held that the court could

consider the public importance of the services rendered by the subject matter of the dispute in deciding whether or not to grant a temporary injunction. Although in that case, the order was sought pending appeal, I think the principle is immutable and equally applicable in an application such as the present one. However according to Annexure R4 to the counter affidavit of RUTATINA, which is a memorandum of understanding between TANZANIA RAILWAYS CORPORATION and SPOORNET of Transnet Ltd (the Applicant) it appears that the Second Respondent had posed to the Tanzania Railways Corporation as owner of the locomotives, that the locomotives had not been in use since January 2006, and the Applicant's actions would not adversely affect TRC's concession strategy or their business. This information shows that the Second Respondent made some misrepresentations to the Tanzania Railways Corporation and still continue to misinform the court that the locomotives are being used by the TRC, and that the order would adversely affect the public carrier's operations. That this is not so, is further corroborated by the affidavit in reply filed by DR. ALEX NGULUMA. This in itself weights heavily against the Second Respondent.

On the question of similarity between prayers in the main suit and the application for temporary injunction, the position, is, in my view, correctly stated by KULOBA in his book **PRINCIPLES OF INJUNCTION** (OUP 1987) at p. 3 –

"A temporary injunction is a provisional order to restrain the doing of a certain act or to require a certain state of affairs to be altered for the time being either until the trial of the suit, or until further order, or until a new date. In sharp contrast a perpetual injunction, which is a decree, a temporary injunction is an order only. In practical terms, however, it may finally dispose of the main matter in controversy and settle the rights as between the plaintiff and the defendant."

So, the difference is in the span of its life. Mr. Mbwambo has not suggested any authority why the court cannot issue a temporary injunction and issue orders similar to those in the main suit. I can find no such restriction in the wording of O. XXXVII rr. 1 and 2 of the Civil Procedure Act. 1966. The wording of these provisions is wide enough and permits of such course even if in practical terms, the order may finally dispose of the main matter in controversy. Whatever is the case the distinguishing feature is that an order of temporary injunction is just an order, not a decree. It is only provisional, not final.

So, in fine having carefully considered all the rival arguments, I am satisfied that overall, the Applicant has established a prima facie case; has shown that on the whole, it

will suffer more irreparable damage by not granting the injunction than would the 2nd Respondent if the injunction was granted. I have also considered other factors such as public interest, and I am satisfied that no public interest is at stake in the matter, because according to TRC, the immobilization would not jeoparalise or affect its business or strategy in concessioning the carrier, and that in any case the locomotives have not been in use since January 2006.

For all the above reasons, I will allow the application. I will order that the 11 locomotives be immobilized and handed over to the Applicant pending the determination of the main suit. But this will be subject to the following conditions:-

(a) The said locomotives shall not be relocated away from the jurisdiction of this court.

(b) The Applicant shall deposit in court a bank guarantee in favour of the Second Respondent in the sum of Tshs.50,000,000/= for any damages that the 2nd Respondent might be awarded.

(c) The order shall last for only 6 months from the date of this order or to the date of disposal of the suit, whichever is earlier.

(d) The Applicant shall expeditiously work towards the disposal of the suit in the shortest possible time.

(e) Costs shall be costs in the suit.

Order accordingly.

S.A. MASSATI

JUDGE

4/10/2006

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