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

COMMERCIAL CASE NO. 71 OF 2004

TANZANIA FERTILIZER CO. LTD.....PLAINTIFF
VERSUS
NATIONAL INSURANCE CORPORATION OF
TANZANIA LIMITED.....1ST DEFENDANT

PRESIDENTIAL PARASTATAL SECTOR
REFORM COMMISSION.....2ND DEFENDANT

RULING

Date of Hearing – 13/12/2006

Date of Ruling - 18/12/2006

MASSATI, J:

This suit was filed on 19/11/2004. By 30/3/2005 it was reported that all pleadings were complete. In a scheduling conference order dated 30/3/2005 the case was assigned to speed track No. one. The deadline for finalization of the suit was fixed for 25/11/2006. Mediation having not succeeded, the case was assigned to me for trial.

After framing the issues, trial began on 30/5/2006 with the testimony of 2 witnesses for the Plaintiff. The case was then adjourned thrice, once, I was away on some other official

assignment and twice at the instance or absence of the Plaintiff. It was last fixed for hearing on 13/12/2006.

On 13/12/2006, Mr. Duncan informed the court that he had one witness but was advised by his colleague that we were already out of the scheduling order. So he prayed for leave to depart from the scheduling order and extend time under s. 93 of the Civil Procedure Code.

Mr. Mbamba, learned Counsel, quickly pointed out that the application was time barred, as it ought to have been made within 60 days before the expiry of the scheduling order which was 25/11/2006. He submitted further that extension of time could only be made under the Law of Limitation Act and not under s. 93 of the Civil Procedure Code, because speed tracks are set by law and not by the court. Therefore an application for departure ought to be made under the Law of Limitation Act. He said, besides, since O. VIII r. 4 of the CPC requires the party seeking departure to assign good reasons for departure and since the delay was caused by the Plaintiff no good cause had been shown. So he prayed for its dismissal.

This ruling has caused me considerable anxiety, as the wording of O. VIII A r. 4, is clear in some aspects but not clear in others. It clearly prohibits departure from the scheduling

order without leave of the court and for good reasons. It is not clear as to when should a court be moved for such leave, and as to the consequences of failure to obtain such leave for departure and as to the fate of any proceedings conducted after the expiry of the deadline for the finalization of the case, which in my short experience is more frequent the case than not.

On VIII A r. 4 of the Civil Procedure Code Act 1966, reads: -

> *"Where a scheduling conference order is made no departure from or amendment of such order* ***shall be*** *allowed unless the court is satisfied that such departure or amendment is necessary in the interests of justice and the party in favour of whom such departure or amendment is made shall bear the costs of such departure or amendment, unless the court directs otherwise."*

As can be seen the rule is couched by using the term *"shall"*. The first question is whether the rule is mandatory or merely directory. If it is mandatory an act done in breach thereof will be invalid, but if it is directory the act will be valid although the non compliance may give rise to some other penalty if provided by statute. The question as to whether a provision is mandatory or directory depends upon the intent of the

legislature, as can be discerned from the phraseology, its nature, its design and the consequences which would follow from construing it the one way or the other; but above all whether the object of the legislation will be defeated or furthered. If the object of the legislation will be defeated by holding the same directory, it will be construed as mandatory, whereas if by holding it mandatory serious general inconvenience will be created to innocent persons without very much furthering the object of enactment, the same will be construed as directory.

In my view, the object of enacting O. VIII A of the Civil Procedure Code is to speed up and minimize delays in the disposal of civil cases by setting different speed tracks for different types of cases. In real terms and in my experience, those speed tracks are more observed in their breach than in their compliance. Some of the reasons for non compliance are genuine, but some are not. So construing the rule as mandatory would lead to nullification of all the proceedings conducted beyond the scheduling order. And this will have dire consequences for those with genuine causes. Taking into account the phraseology of the rule, the consequences that would follow if it is construed as mandatory, and the penalty provided for non compliance and the intention of the legislature, I have to conclude that r. 4 of O. VIII A of the Civil

Procedure Code, is merely directory, although the wording is prima facie mandatory.

However, although directory, and without losing sight of the intention of enacting O. VIII A, I agree that the rule must be construed strictly, if the parties are to be put on alert. And that takes me to Mr. Mbamba's objection. Apart from the absence of good reasons for departure, the learned Counsel's second objection was on limitation. It will be recalled that he said the application for departure was time barred, as it ought to have been brought within 60 days before the expiry of the scheduled deadline. Mr. Duncan's response was that this was an application under s. 93 of the Civil Procedure Code 1966.

It is true that s. 93 of the Civil Procedure Code grants power to the court to enlarge time granted or fixed by it for the doing of any act prescribed or allowed by the Code. In **PATEL V SINGH** [1959] EACA 209 it was held that this provision only applied to periods fixed by the court in its judicial capacity. It would not therefore apply to periods fixed by statute. In my opinion, s. 93 read together with s. 80 of the Code leads one to the conclusion that O. VIII A has that force of law as if enacted in the body of the Code. So they must be read conjunctively and not in isolation. Once that is done, it is my considered view that O. VIII A substantively modifies the scope and application of s. 93; in that the court's discretion to enlarge

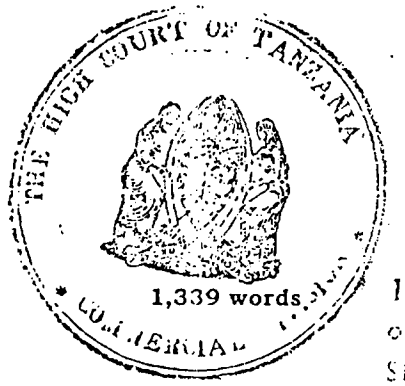
time cannot now be done from time to time. That discretion is now fettered by the speed tracks and the consequent scheduling conference orders. As a corollary it is also true that parties cannot now ask for enlargement of time from time to time or at any time as a matter of course. They must do so in line with the limitations set by the scheduling order. That means that if a party finds that the deadline for the finalization of his case is about to expire, he is, I think, legally bound to seek extension or amendment of the scheduling order well before the expiry. And if it expires, his duty is to apply for extension of time for filing an application for departure..

In the present case the deadline expired on 25/11/2006. The Plaintiff ought to have filed an application for departure before the deadline. Mr. Duncan made an oral application on 13/12/2006 well past the deadline. To that extent I agree with Mr. Mbamba that the application for departure is time barred.

But Mr. Duncan has also applied for extension of time. If understood him, by that, he meant extension of the deadline, which is just the same application for departure put in other words. It was not an application for extension of time within which to apply for departure. So my answer cannot be different.

In the upshot and for the above reasons, I will uphold Mr. Mbamba's objection that the application for departure is time barred and ought to be dismissed with costs. The only remedy left for the Plaintiff is for him to first apply for extension of time within which to apply for departure or amendment of the scheduling order. Application dismissed with costs.

Order accordingly.



S.A. MASSATI

JUDGE

18/12/2006

I Certify that this is a true and correct of the original Order Judgement Ruling
Sign ..... Registrar Commercial Court Dsm.
Date 18/12/2006

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