IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

EXECUTION NO. 24 OF 2021

(Arising from Civil Case No. 50 of 2017)

PROMON CONSULT LIMITED ..... APPLICANT

VERSUS

INDEPENDENT POWER (T) LTD ..... 1ST JUDGMENT DEBTOR
PAP AFRICA POWER SOLUTION (T) LTD .... 2ND JUDGMENT DEBTOR

RULING

29th September, & 27th October, 2022

ISMAIL, J.

This application has been preferred under a certificate of urgency. The prayer is for issuance of an order for arrest and detention of Harbinder Singh Seth as a civil prisoner. His involvement allegedly stems from the fact that he is the 1st and 2nd respondents' Managing Director.

The prayer arises from Civil Case No. 50 of 2017, in which a claim was levelled against non-payment of professional fees that the applicant allegedly rendered to the judgment debtors, the respondents in the instant

application. The Court ordered that the said fees, amounting to USD 102,537.75, be paid plus interest thereon. The averment is that the judgment debtors have not made good the said payment, and that the efforts to execute the decree through attachment and sale of the respondents' assets have proved futile. Efforts to reach out the judgment debtors' principal officer have not yielded the desired fruits, hence the decision to move the Court to issue a warrant of arrest of Mr. Harbinder Singh Seth and eventual detention as a civil prisoner.

The application has been resisted by the respondents. They are denying that they owe any monies to the decree holder, and that the decision that bred the decree is subject to a challenge, vide Miscellaneous Civil Application No. 378 of 2022, that seeks to extend time to set aside the *ex-parte* judgment which gave rise to the decree sought to be executed. The deponent, Mr. Harbinder Singh Seth averred that the decision in the matter was made while he was in incarceration at Ukonga Prison. As such, he could not be aware of what was going on during his four-year confinement.

In the applicant's submission in support of the application, the contention is that other modes of execution of the decree have failed, and that the application represents the last of the options. She added that conditions set out in the law, and as exemplified in ***Grand Alliance Limited***

v. Wilfred Lucas Tarimo & Others, CAT-Civil Application No. 187 of 2017; and ***Zhang Zaiguo v. Epoch Mining (T) Ltd***, Misc. Labour Execution No. 26 of 2021 (both unreported), had been fulfilled. Mr. Reginald Martin, learned counsel for the applicant, further argued that preference of an application for extension of time to set aside the *ex-parte* judgment would not serve as a bar to execution of the decree. Only appeals could stop execution of executable decrees, he contended. On this, learned counsel relied on the decision in ***Alex Daudi Chibunu v. Saraphine Kamara & 3 Others***, HC-Miscellaneous Civil Application No. 584 of 2020 (unreported).

On non-renewal of EWURA's license, Mr. Martin's contention is that such act does not make the company extinct, arguing further that Mr. Seth participated in another settlement agreement for the company, in respect of Civil Case No. 90 of 2018 between ***Attorney General & Another v. Independent Power Tanzania Limited***. The learned advocate took the view that the respondents' stance in this case was a refusal or neglect to pay which triggers the application of Order XXI rule 39 (2). He urged the Court to grant the orders.

Ms. Dora Mallaba, counsel for the respondents, began by arguing that the established principle of company law is that liabilities of the company are separate from those of its members. On this, she cited the old case of

Salomon v. Salomon & Co. Ltd (1897) AC 22. She contended that where corporate veil is not lifted then such liability cannot shift, adding that, in the instant case, nothing of the sort was done. Discounting the contention on the lifting of a corporate veil that the applicant contends that it did, Ms. Mallaba argued that this was a new point which was not pleaded in the affidavit. She took the view that the law is clear that issues which were not raised in the pleadings should not be considered. She cited the decision in ***Fatma Idha Salum v. Khalifa Khamis Said***, CAT-Civil Appeal No. 28 of 2002 (unreported). Ms. Mallaba argued that the applicant has not proved existence of any of the incidents enumerated in Order XXI rule 39 (1) of the CPC. She concluded that circumstances of this application do not warrant exercise of the discretion under the law.

The applicant's rejoinder submission was, by and large, a reiteration of what was submitted in chief, save for citation of other cases to cement the arguments. Noting that nothing novel arises from the said rejoinder, I choose not to reproduce its contents.

As I move to dispose the matter, it should be understood that it is common knowledge that the holder of a decree enjoys the right to reap the benefits of the decree passed in his favour. Where satisfaction of the decree entails enlisting assistance of the court then such satisfaction can take

different modes as provided for under Order XXI of the CPC. One of such modes is what Order XXI rules 35 and 39 provides, and it is what the applicant has opted. Thus, whilst this right is available to a decree holder, the question that follows is whether the applicant has demonstrated existence any or all of the factors. The view held by the Mr. Martin is that they exist, while Ms. Mallaba isn't convinced that they do and I agree with her. I will explain.

To begin with, it should be underscored that Order XXI rule 35 (2) which deals with arrest and detention, and one under whom the instant application ought to have been preferred, effectuates what is provided for under section 42 (c). The latter grants power to courts to order execution of decrees by arrest and detention in prison. Rule 35 (2) provides as hereunder:

> *"Notwithstanding anything in these rules, where an application is for execution of a decree for the payment of money by arrest and detention as a civil prisoner of a judgment debtor who is liable to be arrested in pursuance of the application, the court may, instead of issuing a warrant for his arrest, issue a notice calling upon him to appear before the court on a day to be specified in the notice and show cause why he should not be committed to prison."*

While the cited provisions serve as the enabling law in moving the Court to hear and determine the application, it is what obtains under rule 39

which determines granting or otherwise of the application. Specifically, the decision to accede to the prayer by an applicant of such orders must be predicated on any or all of the grounds set out in rule 2, which stipulates as hereunder:

> *"Before making an order under sub rule (1), the court may take into consideration any allegation of the decree-holder touching any of the following matters, namely-*
>
> *(a) the decree being for a sum for which the judgment debtor was bound in any fiduciary capacity to account;*
>
> *(b) the transfer, concealment or removal by the judgment debtor of any part of his property after the date of the institution of the suit in which the decree was passed, or the commission by him after that date of any other act of bad faith in relation to his property, with the object or effect of obstructing or delaying the decree-holder in the execution of the decree;*
>
> *(c) any undue preference given by the judgment debtor to any of his other creditors;*
>
> *(d) refusal or neglect on the part of the judgment debtor to pay the amount of the decree or some part thereof when he has,*

or since the date of the decree has had, the means of paying it;

(e) the likelihood of the judgment debtor absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree."

Mr. Martin has contended in his affidavit and in his submission that the applicant's relentless effort in tracing the respondents' assets for attachment have become barren. He has also contended that, whereas the applicant's claim remains due and unsatisfied, the respondent's principal officer has entered into an agreement to settle the respondents' liabilities with third parties.

The contention by the respondents is that such agreement is shrouded in some illegalities that revolve around voluntariness of the respondents, and that the same is being challenged. By citing this revelation, the applicant is making a case that item (c) of rule 39 (2) has been triggered, in that the respondents have given an undue preference to other creditors. This argument would have some potency and warrant some consideration if it was pleaded or averred in the affidavit that supported the application. It wasn't, and it came in the course of the submission and, as Ms. Mallaba

contended, such argument would not be considered as it defies the legal position, which is to the effect that only pleaded facts are to be considered and nothing else. This position stems from the fact that, "*an affidavit is evidence, unlike submissions which are generally meant to reflect the general features of a party's case and are elaborations or explanations on evidence already tendered"* (See: ***The Registered Trustees of Archdiocese of Dar es Salaam v. Chairman Bunju Village Government and Others***, CAT-Civil Application No. 147 of 2006 (unreported)). It would be a grave misconception, if the Court were to place its reliance on counsel's assertion from the bar and make a finding thereon.

Having taken this contention out of the equation, my conviction is that conditions set out in rule 39 (2), that would warrant exercise of the powers under the provisions of Order XXI rule 35 of the CPC, are yet to be fulfilled as to trigger a resort to this mode of execution. Specifically, I base my contention on the following:

(i) That there is no evidence of transfer, concealment or removal, by the judgment debtors, of any part of their assets; any act of bad faith; or intention of obstructing or delaying execution of the decree;

(ii) There is no evidence of any undue preference given by the judgment debtor to any of their other creditors, if any, as to create the impression that the applicant's claims are being marginalized;

(iii) There is no evidence of refusal or neglect, by the respondents, to pay the decretal sum, despite the respondents' ability to liquidate the sum;

(iv) There is no evidence of any likelihood of the judgment debtors absconding or leaving the jurisdiction of the court with the object or effect of obstructing or delaying the decree-holder in the execution of the decree. In my considered view, failure to locate the judgment debtors' place of abode would not serve as evidence of abscondment; and

(v) In the presence of the uncontroverted fact that the judgment debtors have suspended operations due to suspension of an operating license, I find nothing that creates the impression that failure to satisfy the decree is of the judgment debtors' own making or a pre-meditated conduct laden with an ulterior motive.

In consequence of all this, I take the view that a case has not been made out to warrant granting of the application for arrest and detention of the respondents' principal officer. Accordingly, the application is dismissed with costs.

Order accordingly.

DATED at **DAR ES SALAAM** this **27th** day of **October, 2022.**

M.K. ISMAIL

JUDGE

27/10/2022