

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

DAR ES SALAAM SUB-REGISTRY

AT DAR ES SALAAM

MISCELLANEOUS. CIVIL APPLICATION NO 5251 OF 2024

(Originating from Civil Case No 5087 of 2024)

TAHMEED COACH TZ LIMITED APPLICANT

VERSUS

POSEIDON OPERATIONS SA RESPONDENT

RULING

Date of Last Order: 20.03.2024

Date of Ruling: 22.03.2024

NGUNYALE, J.

This is a ruling in respect of the preliminary objections raised by the respondents that:

- 1. This Honorable Court lacks Jurisdiction to entertain this matter as the relationship of the Parties to the dispute has been subjected to foreign Laws and Courts.*
- 2. The application is defective and futile in law for the failure of the verification clause to disclose the source of information.*

The applicant herein moved this court through an application under certificate of urgency seeking ex-parte and inter-parte orders against the respondents as follows;

A: Ex-Parte at A d- Interim Stage Only

- 1. To avoid unnecessary delay and untold losses and damages, this Honorable Court be pleased to dispense with the requirement of serving the notice to the Respondent and proceed to hear and determine this application ex-parte, and*
- 2. This Hon. Court be pleased to issue an order of attachment of the Respondent's Consignment, to wit; the copper loaded onto the Applicant's Truck and Trailer with registration Nos. T843DNH and T357DNP respectively, pending hearing and determination of the application inter-parties.*

B: Inter- Parties.

- 1. This Honorable Court be pleased to grant an order requiring the Respondent to furnish security or to deposit into the Hon. Court an amount of money equivalent to the claim of the Applicant in the main suit, i.e., USD 124,425.00, and that is loaded onto the Applicant's Truck and Trailer with registration Nos. T843DNH and T357DNP respectively, pending hearing and determination of the main suit.*

2. Costs of this application be provided for.

3. Any other order(s) that the Honourable Court may deem fit to grant.

The Applicant was represented by Mr. Josiah Samwel Noah, Advocate while the respondent was represented by Mr. Benedict Magoto Mayani, Advocate.

The objection was heard viva voce and at the hearing the respondent abandoned the 2nd point of objection and only submitted on the 1st ground of objection.

While submitting supporting the objection on jurisdiction, Mr. Mayani, prayed to adopt their counter affidavit in respect of the application and submitted that the issue of jurisdiction is fundamental therefore the courts must be certain and sure before commencement of trial as to whether they have jurisdiction or not. He insisted that parties are bound by their contract. He cited the case of **Fanuel Mantel Nunda vs. Herman Mantel Nunda and two others** [1995] TLR 155 where the question of jurisdiction was discussed by the court of appeal. He also cited the cases of **Cyprian Mahuu versus Emmanuel Mwamahonja & another**, Land appeal no. 59 of 2021, also the case of **Michael Joachim Tumain Ngalo vs. Jitesh Jayantilal Ladwa**, Civil case No.18 of 2021.

Basing on the relationship between the applicant and the respondent in this case, he submitted that they entered into a business contract accompanied by terms and conditions to govern their relationship. Under item 16 and 17 of the terms expressed the governing law and jurisdiction. The parties agreed that the terms and conditions of their relationship to be interpreted by the laws of Mauritius and South Africa. The court with jurisdiction to be the supreme court of South Africa and Mauritius. Therefore, as the parties chose the laws of South Africa and Mauritius, he invited the court to look at the pleadings and annexures to the counter affidavit and assess whether it has jurisdiction to determine this matter. He prayed the court to dismiss the matter with costs.

Replying on the submission, Mr. Josia submitted that it is a general rule that the High Court of Tanzania has exclusive jurisdiction to administer justice thus any clause to the contract which derogate from the general rule or public policy are of no effect. He referred to Article 108 (2) of the constitution of the United Republic of Tanzania 1977 insisting that the jurisdiction of the High Court cannot be ousted by agreement of the parties. He also referred to section 2 (1) (2) of the Judicature and Application of Laws Act Cap 358 R. E 2019 which provides that the High Court with full jurisdiction will serve territorial jurisdiction. Again, he

refereed the court to section 7 (1) of the Civil Procedure Code which provides that the courts including the High court shall have jurisdiction to try every suit of civil nature except the suits which are barred by law.

He insisted that clause 16 and 17 are void as they oust the jurisdiction of the court. He added that section 28 of the Law of Contract Act provides that agreements which prevent or restraint legal proceedings are void. As the parties chose to subject themselves to the laws and institution of suits to South Africa and Mauritius, there are two agreements both attached to the counter affidavit. The 1st agreement states that the applicable laws are from South Africa where the respondent has registered offices and place of institution of suit to be in South Africa. The other agreement mentioned the place of filing a suit be in Mauritius where the respondent has registered offices. To him, this brings uncertainty of the laws to be applied and place of instituting the suit in case there is a dispute between them. Such confusion made the applicant to seek justice in this court as the cause of action rouse within the jurisdiction of this court. He cited the case of **Scova Engineering S. P. A versus Mtibwa Sugar Estates Limited & 3 others** Civil appeal No. 133 of 2017. He prayed the court to dismiss the objection raised with costs.

On his rejoinder Mr. Kifunda submitted that the applicant failed to

appreciate the issue of choice of law in international transactions. The parties to the suit are from different jurisdictions and they chose their relationship to be governed as per their two agreements which they freely entered. In case of dispute the parties agreed to invoke laws of Mauritius or South Africa, therefore the proper forum for the case is in South Africa or Mauritius.

Appreciating the submissions made by both parties, I have keenly considered the rival submission advanced by the learned counsels for the parties concerning the issue of jurisdiction raised, it is now an opportunity for the court to make deliberation on whether it has jurisdiction to entertain the matter or not.

In the case of **Commissioner General TRA versus JSC Atomredmetzoloto**, consolidated civil appeals no. 78 &79 of 2018 pg 26 the court had this to say:

"We are fortified in that account because jurisdiction is a creature of statute and as such, it cannot be assumed or exercised on the basis of the likes and dislikes of the parties. That is why the Court has in a number of occasions insisted that, the question of jurisdiction is fundamental in court proceedings and can be raised at any stage even at the appeal stage".

The respondent has submitted that this court has no jurisdiction to

entertain the matter as the parties had entered an agreement where they agreed that the laws that shall regulate their relationship are those of South Africa and Mauritius. In any dispute between them the jurisdiction of the supreme courts of South Africa or Mauritius will be used. Therefore, the parties should be bound by their agreement. I agree with the respondent's advocate that parties are bound by their agreement. This principle is well encrusted in the case of **Simon Kichele Chacha versus Aveline M. Kilawe**, Civil appeal no. 160 of 2018.

*"It is settled law that parties are **bound by the agreements they freely entered into and this is the cardinal principle of the law of contract**. That is, there should be a sanctity of the contract as lucidly stated in *Abualy Alibhai Azizi v. Bhatia Brothers Ltd [2000] T.L.R 288 at page 289* thus: 'The principle of sanctity of contract is consistently reluctant to admit excuses for non-performance where there is no incapacity, no fraud (actual or constructive) or misrepresentation, and no principle of public policy prohibiting enforcement' With the same spirit of the principle of sanctity of contract and being mindful with the clauses of the Exhibit PI, we are reluctant to accept the appellant's excuse for non-performance of the agreement which he freely entered with sound mind." [emphasis added]*

The applicant submitted to the effect that the agreement mentioned laws and jurisdiction of South Africa and Mauritius the fact which is confusing the applicant. In the other side he said that those agreements oust the

jurisdiction of this court which is provided for under the constitution of the united Republic of Tanzania.

Section 7 of the Civil Procedure Code which was referred by the applicant provides that:

"(1) subject to this Act the courts shall have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

Now, looking at the terms and conditions governing the relationship between the parties it is obvious that this court is barred from entertaining their dispute as they had already freely made a choice of the law to govern their relationship and the jurisdiction of the courts.

The applicant also added that section 28 of the law of contract Act provides that agreements which prevent or restraint legal proceedings are void. Basing on the terms and conditions signed by the parties I did not come across anywhere where the parties were barred to initiate legal proceedings. The agreement allowed the parties to initiate legal proceeding but such proceedings should be confined to the laws and courts of either Mauritius or South Africa.

The court of appeal in the case of **Sunshine Furniture Co. Ltd versus Maersk (China) Shipping Co. Ltd & another**, civil appeal no. 98 of 2016

"We subscribe to that proposition and find that the learned High Court Judge properly interpreted the provisions of s. 7 (1) of the CPC. The argument that clause 26 of the bill of lading contravenes the provisions of s. 28 of the LCA is, in our view, equally devoid of merit..... The parties agreed on the court at which the dispute shall be referred for determination. In the same vein, we are unable to agree with the argument made in support of the contention that the learned High Court Judge wrongly considered the said clause of the bill of lading as an agreement ousting the jurisdiction of the trial court"

The court of appeal in Sunshine case (supra) stated further that:

"Basically therefore, the parties did not, by agreement, oust the jurisdiction of the courts in Tanzania. They only chose the law and the court at which a dispute arising from their shipment contract shall be determined. Where in a bill of lading, the parties express choice of forum of a court, that agreement has always been found to be binding on them"

In the premises I do hereby uphold the preliminary objection and hold that the instant suit is improperly filed in this court as it lacks jurisdiction. I proceed to sustain the preliminary objection by dismissing the application with costs; the applicant is advised to seek remedies through an appropriate channel.

Regarding the order issued on 15th March 2024 for maintenance of status quo pending hearing and determination of this application in relation to the copper minerals loaded into the applicant's truck and trailer with registration no. T843DNH and T357 DNP respectively is hereby vacated.

It is so ordered.

Dated at Dar es Salaam this 22nd day of March, 2024.



D. P. Ngunyale

JUDGE

Ruling delivered this **22nd** day of **March, 2024** in presence of Gloria Kibona for the applicant and Mr. Benedict Magoto Mayani both learned Counsels.



D. P. Ngunyale

JUDGE

