

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

COMMERCIAL CASE NO. 41 OF 2000

BETWEEN

BRUMET V.O.F.....APPLICANT/PLAINTIFF

VERSUS

- 1. VICTORIA FISHERIES LIMITED.....1ST RESPONDENT/DEFENDANT**
2. FRANK L. MAREALLE.....2ND RESPONDENT/DEFENDANT
-

R U L I N G

KALEGEYA, J:

This application by the Plaintiff/Applicant seeks orders as follows:-

- “ (i) *That pending the hearing and disposal of the suit a temporary injunction be granted restraining the defendants by themselves or by their directors or servants or agents or any of them or otherwise howsoever from wasting, removing or disposing the plants and equipments, machines and boats or until further order.*
- (ii) *That the defendant be ordered to produce all the books and files of accounts and store locked by the defendant in the factory which is now under their control on the grounds that they are essential to the just disposal of this suit.* ”

Arguing in support thereof and for the plaintiff, Mr. Mkatte, Advocate, is on record urging that as the Defendants are challenging the allegations of being indebted at all, and as there is evidence that sometime in July 2000 some machinery and equipment were removed from the factory, an injunctive order against any further such act is



necessary and so is the order to get access to books of accounts and stores by ordering for their production.

On the other hand, Mr. Masha, Advocate, for Defendants strongly argues against the application. He states that grounds upon which an injunctive order can be issued have not been made out; that the Plaintiff has no proprietary interest in the plant and machinery of the factory intended to be restrained; that the 1st Defendant is a local Company while the 2nd Defendant has other assets within the jurisdiction hence both are capable of meeting whatever is adjudged at the termination of the controversy; that contrary to the allegations that the plant and machinery are being moved, the 1st Defendant's Factory is undergoing renovation, which process entails removal or replacement of some of them, and lastly, that seizing the "books and files of Accounts and stores" would paralyse Defendants' activities when they are ready to tender the same as Exhibits at the stage of hearing.

First, we should look at the nature of controversy between the parties as can be discerned from the pleadings.

Starting from mid 1995, one Anthonius Bronkhorst was appointed to operate and manage the 1st Defendant Company (for the purposes of this application, the capacity and terms are irrelevant). In mid 2000, his appointment was terminated (again, for what reason or whether the termination was legal or illegal are irrelevant at this stage).

In the Management of the 1st Defendant Company also was one Sophie Bronkhorst. At the sametime, during the said period the said Anthonius Bronkhorst was a Director of the Plaintiff firm. Currently, he is a Principal officer of the said Plaintiff Firm. The Plaintiff firm is situated in Holland.

The above stands undisputed as between the parties. However, what transpired between the said periods is the centrepiece of the controversy between them.



The plaintiff contends that during the period, Mr. Anthonius Bronkhorst made **“business connections with the Plaintiff to secure a market for the sale of fish fillet and also ordered various goods from the Plaintiff”** out of whose price, equivalent of Tshs.452,565,336.023 (NLG 1,367,008.02), is still outstanding and for which this action has been instituted. In defence, the defendants urge that if the goods were bought at all that was done in the personal capacities of Mr. Anthonius Bronkhorst and Sophia Bronkhorst because they had no authority to so act from Defendants; that the circumstances **“surrounding the purchase of the goods appear to be fraudulent as Company records left by Mr. Anthonius Bronkhorst and Ms Sophia Bronkhorst neither reveal the terms of the order, mode of intended payment or whether at all the goods have not already been fully paid for”**; that, apart from **invoices indicating dates post their terminations**, the other feature is that they undervalued the price of fish by quoting US dollars 1.75 per kg instead of US dollars 3.75 as will be supported by invoice books and export declaration forms, while they continuously reported to 2nd Defendant that they were running 1st Defendant’s business at a loss when in actual fact they were using the profit to run their own parallel business.

Now, let us turn to the issues presented. I will start with the one concerning issuance of temporary injunction. The chamber summons makes reference to O. 37(1) of the Civil Procedure Code. The said provision runs as under:-

“ 1. Where in any suit it is proved by affidavit or otherwise:-

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit or suffer loss of value by reason of its continued use by any party to the suit, or wrongly sold in execution of a decree, or*
- (b) that the defendant threatens, or intends, to remove or dispose of his property with a view to defraud his creditors,*

the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting,



damaging, alienation, sale, loss in value, removal or disposition of the property as the court thinks fit, until the disposal of the suit or until further orders."

On the facts at hand, Rule 1 (a) is not applicable because whatever property may be involved, as per pleadings and submissions as summarised above, its ownership is not subject of controversy – the dispute is as regards its purchase price. Although Anthonius Bronkhorst who swore the affidavit as the Principal officer of the Plaintiff had the audacity of stating,

" The machines in the Defendant's factory were purchased by the applicant who holds lien on the same for non-payment of the price thereof",

on the face of pleadings, the alleged condition or encumbrance attached to the property is not legally supported. So, the relationship, if any, remains being that of a simple contract where the price of the goods supplied is the one which is being claimed.

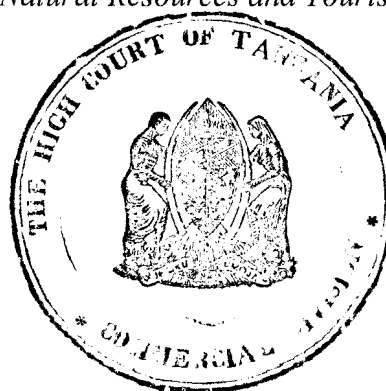
If the Plaintiff establishes the supply of the goods, the legality of the transaction and non-payment for the same, it matters not whether the said property does exist or is in good working condition: the (Plaintiff) would still be entitled to the outstanding purchase price.

What about Rule 1 (b)? Yes, if it can be established, first, that there are threats or intentions by Defendants to remove or dispose of their property; secondly, that the threats or the intention aim at defrauding creditors, a Court, using its discretion would issue an injunction.

In the supporting affidavit before us we have only one alleged incident of property removal, in the following words:-

" ...on 29th or thereabout, in July, 2000 on instructions of Frank Marrealle one big Machine was removed from the factory. The defendant are continuing to remove machines and files from the factory to another place."

In the counter-affidavit, the Defendants strongly maintain that they cannot vandalise their own property and that they are involved in renovation of the factory as recommended by *" the Ministry of Natural Resources and Tourism in order to comply*



with the European Union standards...” The Plaintiff supports the statement regarding renovation.

With respect to Mr. Mkatte for the applicant, that being the case, issuance of a temporary injunction cannot even be considered by this court on the set of such facts. Why? The threat or intention to remove or dispose of the property as envisaged under O.XXXVII (1)(b) is not proved, and even if the single property removal incident is accepted as having taken place the “*intention to defraud*” creditors will not have been proved as in actual fact it cannot exist in the face of an admission that the 1st Defendant’s Factory is being renovated. If anything, renovation adds value to the subject, which is a positive element because it means that in the event of plaintiff’s success in the suit there will be in existence valuable property to attach and sell in satisfaction of the Decree.

For reasons discussed above I need not even consider whether the legal principles for the granting of an injunction were met, for, we were yet to arrive at that stage (after the required elements under O. XXXVII (1) CPC have been satisfied). Application dismissed.

I now turn to the 2nd prayer. O.XI, Rule 12 CPC, under which the prayer was brought provides:

“12. It shall be lawful for the court, at any time during the pendency of any suit, to order the production by any party thereto upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the court shall think right; and the court may deal with such documents when produced, in such manner as shall appear just.”

Again with respect, this prayer is untenable. The claim is for the purchase price of goods allegedly supplied to Defendants by Plaintiff. The dispute is not about “share holding” in the Company or profit thereof. Parties are different entities. In the circumstances, I cannot see how relevant is the production of the books of account and stores referred to. That apart, I should observe that acceding to such prayer the court would be giving an order that leads to absurdity. The prayer sought is for production of



“ all the books and files of accounts and stores locked by the Defendants in the factory... ”!

This general blanketed prayer means that all the books of accounts and stores within the 1st Defendant's premises, in relation to all matters and issues not even connected to the controversy at hand (even those belonging to any other Company or person which may happen to be there just for custody), should be produced! Naturally, this would cover books in use at any given time, including the period prior to and after Mr. Bronkhorst's management term, to date! Need I stress the absurdity in which this is imbued? The answer is clear. Such unsupported and wild prayer can't be granted. The consequences are that this prayer also can only earn a dismissal, which it deserves and which is accordingly registered.

For reasons discussed above the application stands dismissed in entirety.

L.B. KALEGEYA
JUDGE

Delivered today the 3rd October, 2000

L.B. KALEGEYA
JUDGE



I Certify that this is a true and correct
of the original as signed by me
.....
Registrar

Commercial Court
Dar es Salaam

Dated 16/10 of 2000