

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

COMMERCIAL CASE NO. 15 OF 2005

BRUMBY OIL (T) LIMITED.....PLAINTIFF
VERSUS
THE TANZANIA PETROLEUM
DEVELOPMENT CORPORATION.....DEFENDANT

R U L I N G

KIMARO, J

On 2nd July, 2004 the Plaintiff/Applicant, the Defendant/Respondent (TPDC) and the Ministry of Energy and Minerals of the United Republic of Tanzania (MEM) made a Memorandum of Understanding. The Memorandum of Understanding was made after the Applicant submitted a preliminary proposal to MEM and TPDC for carrying out a technical evaluation and other related matters prior to entering into a Production Sharing Agreement (PSA) in respect of Kisangire and Mandawa Concession Areas. The areas are collectively referred to as Contract areas. The three parties undertook to negotiate in good faith and reach an understanding on the main terms and conditions on the Production Sharing Agreement between the parties which had to be concluded at a later date in respect of the Contract Area. The

administration of the PSA had to be taken in accordance with the Petroleum (Exploration and Production) Act 1980 and the Model Production Sharing Agreement had to form the basis of the PSA terms.

The Plaintiff is now before this court with a claim that the Defendant has unilaterally sought to terminate the MOU without legal justification and further that it did not intend to proceed with the negotiations for Production Sharing Agreements (PSA(s)) on the Contract Areas as envisaged under MOU. The plaintiff is represented by Maajar, Rwechungura, Nguluma and Makani Learned Advocates.

The plaintiff is asking for the following prayers:

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- 1. Declaration that the attempted termination of the MOU is unlawful hence null and void.*
- 2. Orders that the Defendant shall immediately terminate any and all memorandum of understanding or other agreement(s) concerning the Mandawa and/or Kisangire Petroleum concession areas that may have been entered into between the Defendant and any third party investor that is not the Plaintiff.*

3. *Orders that the Defendant should immediately resume negotiations with the Applicant for production sharing agreement on the Mandawa and Kisangire Petroleum concession areas in good faith and to reach an understanding on the main terms and conditions on such production sharing agreement as envisaged under the MOU.*
4. *Costs of this application be provided for.*
5. *Any other orders(s) that the Honourable Court may deem fit."*

Meanwhile, the plaintiff has also filed a Chamber Application in which the following prayers are being requested.

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1. *This Honourable Court may be pleased to issue an inter-parte order that the Respondent should stay activities on the Mandawa and Kisangire petroleum concession areas including, but not limited to the provision of data held by the Respondent on the Mandawa and Kisangire petroleum concession areas and the negotiation of production sharing agreements on the Mandawa and Kisangire petroleum concession areas which are subject to an exclusive memorandum of understanding between*

the Applicant and the Respondent until determination of this application inter partes.

2. *This Honourable Court may be pleased to issue an inter-parte order that the Respondent shall immediately terminate any and all memorandum of understanding or other agreement(s) concerning the Mandawa and/or Kisangire petroleum concession areas that may have been entered into between the Respondent and any other investor that is not the Applicant.*
3. *This Honourable Court may be pleased to issue an inter-parte order that the Respondent should immediately resume negotiations with the Applicant for production sharing agreements on the Mandawa and Kisangire petroleum concession areas in good faith and to reach an understanding on the main terms and conditions on such production sharing agreements as envisaged by the MOU.*
4. *Costs of this application be provided for.*
5. *Any other orders(s) that the Honourable Court may deem fit."*

The application is supported by a very long affidavit sworn by Craig David Bond. The affidavit gives a narration of sequence of events which has taken place between the plaintiff/applicant and the

Defendant/Respondent, the evaluation and assessment of those events and a conclusion that the attempted termination of MOU is unjustified.

Mr. G.M. Kilindu Learned Advocate who appears for the Defendant/Respondent has raised preliminary objections on the following points of law:

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i] *The Affidavit filed by GRAIG DAVID BOND is incurably defective as the jurat of attestation does not state **when** the Affidavit was made or taken, contrary to the mandatory provisions of Section 8 of the Notaries Public and Commissioners for Oaths Ordinance [Cap 12] and the same should be struck out.*

ii] *The orders sought in the Chamber Summons will affect and interfere with the functions of the **MINISTRY OF ENERGY and MINERALS** as envisaged under the provisions of the Petroleum [Exploration and Production] Act 1980 while the said **Ministry** is not a party to these proceedings.*

iii] *The provisions of law cited, which relate to restraining orders, do not support the prayers for **stay and related orders** sought in the Chamber Summons and the said prayers are likely to affect persons who are not parties to the suit.”*

Working under the direction of the court, the Advocates filed written submission in respect of the preliminary objections.

To support the first objection on failure to indicate the date in the jurat of attestation when the affidavit was taken, Mr. Kilindu said stating the date of the attestation was a mandatory requirement. He cited Section 8 of the Notaries Public and Commissioners for Oath Ordinance - Cap 12 as well as the case of **Fares Munema and Asha Munema** Civil application No. 9 of 2003 (Court of Appeal) (unreported) where the decision in the case of **D.B.Shapriya Ltd V Bish International B.V.** Civil Application No.35 of 2002(Court of Appeal) (unreported) was followed. Mr. Kilindu prayed that the affidavit be struck out.

The response by Dr. Nguluma, Learned Advocate for Plaintiff/Applicant is that the search which he conducted in the court records on 10th March 2005 after receipt of the submissions from Mr. Kilindu, showed that the jurat of attestation indicated that attestation was done on 20th February 2005. This is evidence that there was compliance with Section 8 of Cap 12 so the case cited to support Mr. Kilindu's preliminary objection is irrelevant. Dr. Nguluma made reference to Order XIX of the Civil Procedure Code 1966 and Black's Law Dictionary 7th edn. West Group St. Paul, Minn, 1999 arguing that an affidavit is a voluntary declaration of facts written down and sworn by the declarant before an Officer authorized to administer

oaths and the term does not connote copies served upon or retained by the parties in a suit. He argued that so long as the copy which was filed in court showed the date of attestation, if the respondent was served with a copy which inadvertently did not indicate the date of attestation, it is immaterial. He prayed that the objection be overruled.

In as far as this objection is concerned, it is obvious that there is a variance on the copy of the affidavit in the court file and that one which was served on the defendant. The court copy bears a date after the words Commissioner for Oaths. The copy served on the defendant bears no date. The jurat of attestation is reproduced for purposes of showing how it looks like:

<p><i>" SWORN at DAR ES SALAAM)</i> <i>by the said CRAIG DAVID BOND)</i> <i>who is identified to me by)</i> DR. ALEX T. NGULUMA) <i>The latter known to me personally)</i></p>	<p><i>SIGNED BY</i> <i>.....</i> <i>Deponent</i> <i>(Craig David Bond)</i></p>
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<p>MYSTICA MAPUNDA NGONGI Advocate, Notary Public & Commissioner for Oaths P.O.BOX 2148 DAR ES SALAAM</p>
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Signed _____

Commissioner for Oaths - 20/2/2005"

The submissions made by Mr. Kilindu in reply to Dr. Nguluma's submissions is that parties to the suit must be served with copies of documents replica to those filed in court. I totally agree with this position and I harsen to say that this is what has always been the practice. The argument given by Dr. Nguluma that parties can be served with document which are not a replica of those filed in court is absurd. If this was to be allowed, how would parties be certain of the exact nature of the case against them? Parties are entitled as a matter of right to know the exact nature of the case against them.

Coming back to the jurat of attestation, this court wonders what makes Dr. Nguluma to believe that it was a matter which could be solved by searching the court record without both Advocates making appearance before the Judge so that the problem could sorted out. In such a circumstances how can collusion be ruled out? Why should the court copy and the copy of the Advocate bear a date and that of the Respondent/Defendant miss a date. If at all the jurat of attestation showed the date of attestation from the very beginning, why should the date be inserted at the bottom of the Stamp of Commissioner for Oaths and not in the space which shows who swore the affidavit and the place where the affidavit was sworn? The space where the date is inserted suggests that the date must have been inserted there after the objection was raised. Otherwise the matter had to be solved by an application before the judge for clearing out the problems which the Advocate for the Applicant

thought it existed, but not on his own by examination of court records. I upheld the objection and struck out the affidavit of Graig David Bond following the authority of the case of **D.B.Shapriya Ltd V Bish International B.V.** Civil Application No.35 of 2002 (unreported).

As for the second ground of objection it was submitted by Mr. Kilindu that given the nature of the orders sought, the Ministry of Energy and Minerals (MEM) is likely to be adversely affected while it has not been made a party to these proceedings. Mr. Kilindu referred to the document which is being relied upon by the plaintiff (MOA) in filing this suit. He said the request for orders to stay activities on the contract areas, termination of all Memorandum of Understanding and other agreement concerning the contract areas as well as resumption of negotiations with the Applicant in respect of a Production Sharing Agreement literally amounts to asking the court to issue such orders against the Ministry of Energy and Minerals while it is not a party to the proceedings. He cited the case of **National Bank of Commerce Vs Dar-Es-Salaam Education and Office Stationary** Civil Appeal No.16 of 1995 (unreported) saying that temporary injunctions cannot be issued against strangers to the suit.

Mr. Kilindu submitted further that Dr. Nguluma has deliberately avoided suing the Ministry of Energy and Minerals to

avoid Section 11 (1) (a) of the Government Proceedings Act, No.16 of 1967 which does not allow issuance of temporary injunctions and orders of specific performance against the Government. He prayed that the preliminary objection be sustained.

In reply to this objection, Dr. Nguluma relied on the case of **Mukisa Biscuit Manufacturing Co. Ltd Vs Westend Distributors Ltd [1969] EA 676-701** and argued that the submission made by Mr. Kilindu touches on matters of fact whereas preliminary objections are confined to matters of law. Dr. Nguluma said all matters submitted by Mr. Kilindu on the effects of the orders sought in the chamber application against the Ministry of Energy and Minerals are matters of fact and not law. Evidence will have to be led in establishing the effects of the orders.

It was submitted further by Dr. Nguluma that in terms of order 1 rule 6 of the Civil Procedure Code it is the plaintiff who has to make a choice of who is to be sued. He wondered why Mr. Kilindu was speaking for the Ministry of Energy and Minerals while it is not indicated anywhere that the Respondent was acting jointly with the Ministry of Energy and Minerals. He said if the Ministry wants to be joined into the proceedings or that the Respondent wants to join the Ministry into the proceedings, there are provisions of the Civil Procedure Code which allow such an exercise. Dr. Nguluma said the case of National Bank of Commerce (*supra*) referred to is irrelevant

because it was dealing with an appeal in which a temporary injunction had been issued against the Registrar of Titles and a Purchaser of the house who were not made parties to the suit. He prayed that the objection be overruled.

After a careful consideration of the orders which are being sought by the applicant and the submission made by both Advocates together with the case of the **National Bank of Commerce Vs Dar-Es-Salaam Education and Office Stationary** Appeal No.16 of 1995 (supra) I am satisfied that the temporary orders which are being sought by the Applicant if granted, will adversely affect the Ministry of Energy and Minerals while it has not been made a party to these proceedings. The plaintiffs pleadings are quite clear. The basis for filing this suit is the Memorandum of Understanding. The Memorandum of Understanding was made between three parties as indicated at the beginning of this ruling. I do not agree with Dr. Nguluma that the submission which Mr. Kilindu made on how the orders are going to adversely affect the Ministry of Energy and Minerals are matters of fact. In the first paragraph of this ruling I gave a summary of how the Memorandum of Understanding was made and what was intended to be achieved from that Memorandum. All those matters are contained in the Memorandum of Understanding. It is a cardinal principle of law that a party should not be condemned unheard. Advocate Kilindu said he was giving this information to this court as an Officer of the Court. This court

thanks him for performing his noble duty as an Officer of the Court. At this juncture I would like to remind the Advocates what Lord Denning said in the case of **Ronald V Wosley** [1967] 3 All ER 993:

“
An Advocate is a Minister of Justice equally with a Judge... he has a duty to the court which is paramount...”

While I do agree with the decision of the court in the case of **Mukisa Biscuit Manufacturing C. Ltd Vs Westend Distributors** (supra) I do not think that in this case Dr. Nguluma has relied on it in proper context. It is the plaintiff who has relied on the MOA to file the suit and MOA shows what was envisaged by the parties. While the plaintiff reserves the right of option on who has to be sued, the effect of the orders prayed for on the document relied upon in the filing of the case must also be foreseen by the applicant. The consequences have then to determine whether it is appropriate to exclude other parties for an activity that was taken as a joint venture. The decision of the National Bank of commerce (Civil Appeal No.16 of 1995) is clear on whether temporary injunction which are likely to affect strangers to the suit can be issued. The decision says such orders should not be given against parties who have not been joined into the suit

Under the circumstances, I uphold the second objection as well.

The third objection is that the provisions of the law cited in support of the Chamber Application are not in conformity with the prayers sought. Mr. Kilindu again relied on the case of the National Bank of Commerce (*supra*) to show intention of granting temporary orders.

Mr. Kilindu submitted that the prayers for termination of the Memorandum of Understanding or other agreements on the contract areas, an order for immediate resumption of negotiations and stay of activities on the contract areas do not serve the purpose intended by temporary injunctions. He prayed that this objection too, be upheld. A brief reply by Dr. Nguluma is that this preliminary objection is misleading and touches on the main application. His considered view is that it is a matter which cannot be argued as a preliminary objection. He also said that the case of the National Bank of Commerce (*supra*) is irrelevant.

Frankly speaking, I do not think that Dr. Nguluma is right. As pointed out, temporary injunction are intended to preserve the status quo of the parties as they were at the time of filing the suit. Any order which tends to have an effect of determining the rights of the parties before the suit is heard and determined cannot be granted. Looking closely at the prayers which are being sought, they are prayers which are likely to have an effect on the eventual determination of the rights

of the parties. As such they are not prayers which can be sought by way of temporary orders. They are prayers suitable for consideration after the suit has been heard.

Given the analysis made, the preliminary points raised are all upheld. The nature of the prayers sought is an indicator that this is not a case in which an application for temporary orders in the nature of the prayers made can be granted. The Chamber application is dismissed with costs.

N.P.KIMARO,
JUDGE
19/04/2005

Date: 29/04/2005

Coram: Hon. N.P.Kimaro, Judge.

For the Plaintiff/applicant - Absent.

For the Defendant/Respondent - Mr. Kilindu.

CC: R. Mtey.

Court: Ruling delivered today.

Order: The preliminary objections are upheld. The chamber application is dismissed with costs.

N.P.KIMARO,
JUDGE
29/04/2005

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I Certify that this is a true and correct
of the original order Judgement Rulling
Sign Mr. Mtey
Registrar Commercial Court Dsm.
Date 29/4/05