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

COMMERCIAL CASE NO. 55 OF 2006

TRANSNET LTD t/a SPOONET.....APPLICANT
VERSUS
COMAZAR (PROPRIETARY) LTD.....1ST RESPONDENT

TRANS AFRICA RAILWAY
CORPORATION (TANZANIA) LIMITED.....2ND RESPONDENT

RULING

Date of Hearing – 23/10/2006

Date of Ruling – 30/10/2006

MASSATI, J:

This is an application for stay of proceedings filed by TRANSAFRICA RAILWAY CORPORATION (T) LTD, who appears as the Second Defendant in Civil Case No. 55 of 2006, in which the First Respondent herein, is the Plaintiff. The petition is verified by JOSEPH MUTATINA and is opposed by an answer to the petition filed by the 1st Respondent. The 2nd Respondent who is the 1st Defendant in the suit has neither appeared in the suit, nor filed any answer to the present petition.

According to the petition there are several agreements of lease and settlement between the parties herein in which there

is a clause that calls on the parties to submit to arbitration in case of any dispute between them. As the petitioner has not taken any step in the proceedings and is ready and willing to do everything possible to proceed with the arbitration the petitioner prays that the suit be now stayed pending arbitration. On the other hand, the 1st Respondent's answer points out that the 1st Respondent is not a party to the submission to the arbitration clauses, and since the petitioner has already appeared and taken steps in the proceedings the petition cannot succeed.

Elaborating on the petition Mr. Mbwambo, learned Counsel for the petitioner, submitted that clause 14 of the lease agreement (Annexure TARC – 1) dated 14/11/96, clause 14 of the agreement dated 20/6/97 (Annexre TARC 2) clause (2) of the Agreement of 27/8/2002 Annexure TARC 3 (settlement) all require parties to the agreement to submit to arbitration in case of any disputes. He said as the petitioner was ready and willing to go to arbitration and has not taken any step in the proceedings, this suit should be stayed pending arbitration.

On the other hand, Dr. Twaib, learned Counsel for the 1st Respondent, submitted that as the 1st Respondent is not a party to any of the agreements referred to above, he cannot be said to have submitted to arbitration. Besides, since the

petitioner has already appeared and taken steps in the suit in question the suit cannot be stayed now. He elucidated that by appearing in court, arguing for variation of this court's interim order and resisting and arguing the application for interlocutory orders interpartes, the petitioner should be taken to have taken steps in the proceedings and for the purposes of s. 6 of the Arbitration Act (Cap 15) the petitioner is now precluded from applying for stay. Dr. Twaib cited several cases to illustrate his point. The cases cited were: **KISUMUWALLA OIL INDUSTRIES LTD VS PAN ASIATIC COMMODITLES (PRV) LTD AND ANOTHER** (No. 2) 1995 – 98 1 EA. 153, **TM AM CONSTRUCTION GROUP (AFRICA) VS ATTORNEY GENERAL** (Commercial Case K) 2001 Vol. 1 EA 291 **MOTOKOV AUTO GARAGE LTD** [1970] E.A 249, and lastly **COVEL MATHEWS PARTNERSHIP VS TANZANIA RAILWAYS CORPORATION** Civil Case No. 106 of 1996 (Unreported). He also quoted a passage from **CHARLESWORTH MERCHANTILE LAW** 14th ed. [1984] at p. 691.

For those reasons the learned Counsel prayed for dismissal of the petition with costs.

In rebuttal, Mr. Mbwambo submitted that s. 6 of the Arbitration Act covers not only direct parties to an agreement but also any person claiming under a party to an agreement.

Although the 1st Respondent may not be a party to the agreements cited it has a claim under the 2nd Respondent. For this proposition, he cited **ROUSSEL – UCLAF CS G.D. SEAR E & CO LTD** [1978] Vol. 1 Llyod Rep. 225 where it was held that the expression claiming under or through a party to a contract includes an assignee or trustee or representative or any other person who has an interest in the subject matter against a party to a contract. Since the subject matter in the suit, are the locomotives, and since the 1st Respondent is the owner of the locomotives, he is an interested party and therefore subject to s. 6 of the Arbitration Act. On the issue of having taken steps in the proceedings Mr. Mbwambo submitted that the cases cited by Dr. Twaib were either distinguishable, or at least one of them **COVELL'S** supported the petitioner's case. He submitted that in **ROUSSEL – UCLAF** case it was held that responding to interlocutory orders, was not taking a step in the proceedings and the courts both in COVELL'S and ROUSSEL'S cases granted stay of proceedings. For these reasons Mr. Mbwambo reiterated his prayers for stay of the proceedings.

Section 6 of the Arbitration Act (Cap 15) under which the petition is filed provides:

> *"6. Where a party to a submission to which this Part applies, or a person claiming under him commences a*

legal proceeding against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may at any time after appearance and before filing a written statement of defence or taking any other steps in the proceedings apply to the court to stay the proceedings and the court if satisfied there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing, to do all things necessary for the proper conduct of the arbitration may make an order staying the proceedings."

There is no dispute that for an application under this section to succeed, it must be established that:-

(i) A party commencing the legal proceedings or any person claiming under him must be a party to a submission.

(ii) The other party or person claiming under him must also be a party to the submission.

(iii) The other party may apply for stay of proceedings before filing a written statement of defence or taking any other step in the proceeding.

(iv) There is no sufficient reason why the matter must not be referred to arbitration in accordance with the submission

(v) The Applicant must demonstrate that he is ready and willing to submit to arbitration.

In the present case the learned Counsel have furiously argued on two issues:-

"(i) Whether the 1st Respondent/Plaintiff is a party to the submission in question? And

(ii) Whether the Applicant has taken a step in the proceedings"?

Dr. Twaib has submitted that the 1st Respondent is not a party to a submission. Mr. Mbwambo has submitted that although not a direct party to any of the Agreements referred to in the petition, the 1st Respondent was an interested person as owner of the locomotives and was suing under the 2nd

Respondent who is a party to the submission. Mr. Mbwambo has relied on **ROUSSEL'S** case as authority.

Mr. Mbwambo's argument is attractive. However the facts in **ROUSSEL'S** case are distinguishable. In that case the party was a subsidiary company of a parent company, carrying on trade on the same products. It was held that for purposes of s. 1 of the 1975 Arbitration Act the subsidiary was claiming through or under the party to what in fact it was doing. There is no relationship of parent and subsidiary company between the 1st and 2nd Respondents in the present case. Here there was an independent lease agreement between the Respondents. I am aware that according to paragraphs 5, 6, 7 and 8 of the plaint it appears that the Plaintiff's cause of action is based on both the lease and the sublease agreements. Paragraph 5 is of particular significance:-

> *"It was a term of the locomotive Lease Agreement that the 1st Defendant could sublease the locomotives to a party under the same terms and conditions and subject to the Plaintiff's right of repossession in the event the 1st Defendant or the Third Party become in default and subject further to the 1st Defendant having registered interest in the Third Party."*

But to my understanding the Lease Agreement is only binding between the 1st and 2nd Respondents, whereas, although it might contain the same terms and conditions the sublease agreement is only binding between the petitioner and the 2nd Respondent. I do not therefore see the basis of contractual arbitral authority on which the dispute between the petitioner and the 1st Respondent can be referred. It would, I think be different if the petition was made by the 2nd Respondent, or between the petitioner and the 2nd Respondent in which the parties are bound by the respective agreement. Therefore, I do not agree with Mr. Mbwambo, but I agree with Dr. Twaib that the 1st Respondent is not a party to the submission to arbitration as there is no agreement between them, neither could it legitimately be said that the 1st Respondent is claiming under the 2nd Respondent because to be held to be claiming through another party, the party claiming so must first be a party to a submission.

ROUSSEL'S case is also authority that apart from the Arbitration Act, this court also has inherent jurisdiction to order stay. This position was also taken by Katiti J in **COVELL MATHEWS PARTNERSHIP V TANZANIA RAILWAYS CORPORATION** Civil Case No. 106 of 1998. A passage from **LORD HALSBURY'S LAWS OF WNGLAND**, 3rd ed. at pp 444 – 445 was cited.

> *"The High Court, has inherent jurisdiction to make an order for reference to arbitration in any case, where the parties desire that the cause, or other matter should be decided by an arbitrator instead of by the court..."*

So, in my view, the court's inherent jurisdiction to order stay and refer to arbitration can only be invoked if the parties so desire, even in the absence of an arbitration agreement. But it has been held that inherent powers can only be invoked if there is no statutory provision to that effect. Fortunately we now have in place statutory provisions governing the exercise of such powers. It is the Civil Procedure (Arbitration) Rules – Second Schedule to the Civil Procedure Code Act (Cap 33 – RE 2002). According to Rule (1) (1):

> *"Where in any suit all the parties interested agree that any matter in difference between them shall be referred to arbitration they may at any time before judgment is pronounced, apply to the court for an order of reference."*

There is also Rule 17, which relates to the parties filing in court an agreement to refer to arbitration, and Rule 18 empowers the court to stay the suit in case of agreement to refer to arbitration. So in short apart from the Arbitration Act this court has other statutory powers to refer any suit to arbitration provided that the parties agree to do so. In the

present case, there is no such agreement between the petitioner and the 1st Respondent to refer the matte to arbitration. Therefore this court cannot exercise its jurisdiction and force the parties to do what they have not agreed. Neither is the present petition filed under the Second Schedule to the Civil Procedure Code Act.

The next question is whether the petitioner has taken a step in the proceedings. There is no dispute that on being served the petitioner has appeared in court by Counsel, applied to vary the interim order and participated in hearing the application for interlocutory order interpartes. He has not filed any written statement of defence but has filed and argued an application for review of the interlocutory interim order. The issue is whether these amount to a step in the proceedings? As seen above, the learned Counsel have sharply differed in their views.

The term "a step in the proceedings" has not been statutorily defined but has been considered judicially. In **COUNTRY THEATRES AND HOTELS LTD VS KNOWLES** [1907] I KB. 358, Ridley J, considering the import of s. 4 of the English Arbitration Act 1889 which is in parimateria with s. 6 of the Arbitration Act of Tanzania, defined that term to mean:-

"Some step which indicates an intention on the part of a party to the proceedings that he desires that the action should proceed and no desire that the matter should be referred to arbitration."

In **MOTOKOV VS AUTO GARAGE LTD** [1970] EA. 249, the term was defined to include: -

"any application to a court for an order in respect of the proceedings."

These authorities were considered and followed by Onyiuke J in **KASSAM AHMED VS MOHAMED DEWSHI & SONS LTD**. [1973] LRT. n. 42.

In the present case, Mr. Mbwambo has submitted that as there is no written statement of defence the other acts were only aimed at repelling the assault inflicted by the 1st Respondent and so it could not amount to a step in the proceedings. In **MOTOKOV** the Plaintiff Counsel had argued that the term a step in the proceedings connected a move which carried the proceedings further ahead. He submitted that an application to obtain information so that a decision could be made was not a step in the proceedings. Responding to that argument Georges CJ (as he then was) said:

"A step is no less a step because it is sideways rather than forward...an application for particulars is a step forward because it brings the proceedings nearer to completion to the point where the action will be ready for trial.

He concluded:

"I would hold that any application to a court for an order in respect of the proceedings can be described as a step in the proceedings."

I am mindful that in the present case the petitioner not only applied to vary the interim order, filed a counter affidavit to oppose the application for interim injunction, and appeared to argue it interpartes, but also prior to that filed and argued an application for review of the interim order. In the Memorandum of Review the Petitioner raised among other points:

(1) That the Application is res judicata.

(2) That there is also an apparent error on the face of the record in that the Respondent had no locus standi to institute the main suit so does this Application."

To me the application for review not only brings the suit nearer to the trial, but also to its determination in the sense that if the objections above were upheld, the suit would have come to an end. That, to me, is a step in the proceedings.

So, in the upshot, I agree with Dr. Twaib, Counsel for the 1st Respondent that in this case the 1st Respondent is not only not a party to the submission, but also that although the petitioner has not filed a written statement of defence, he has nevertheless, taken a step in the proceedings. As such s. 6 of the Arbitration Act (Cap 15) does not apply. Neither is it a fit case to invoke the court's other powers to refer the matter to arbitration.

The petition therefore stands dismissed with costs.

S.A. MASSATI

JUDGE

30/10/2006

2,528 words

I Certify that this is a true and correct of the original Order, Judgement Ruling
Sign _____
Registrar Commercial Court Dsm.
Date 1/11/2006