

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

MISC. COMMERCIAL CASE NO. 36 OF 2005

**SHELL TANZANIA LIMITED.....APPLICANT
VERSUS
SCANDINAVIAN EXPRESS SERVICES LTD.....RESPONDENT**

R U L I N G

1. Date of Hearing – 4/6/2007
2. Date of Ruling – 5/6/2007

MASSATI, J:

Sometime in 2005, **SHELL TANZANIA LIMITED**, filed in this court, a petition under the Companies Act for winding up **SCANDINAVIAN EXPRESS SERVICES LIMITED**, the present applicant. On 20/7/2006, Kimaro J (as she then was) dismissed the petition with costs. This was Misc. Commercial Case No. 36 of 2005. In that case as in the present application, SCANDINAVIAN **EXPRESS SERVICES LTD** (hereinafter referred to as the Applicant) was represented by Mr. Mfalila, learned Counsel.

In that petition, **STANDARD CHARTERED BANK TANZANIA LIMITED** (hereinafter referred to as the

Respondent) appeared as one of the 5 creditors who opposed it. It was represented by Mr. Mwandambo, learned Counsel. In the present application, the Respondent is represented by Ms. Fatma Karume, learned Counsel.

In refusing to issue a winding up order, however, Kimaro J (as she then was) proceeded to make the following order: -

“This court has refused a winding up order. However it has held that the Respondent is heavily indebted. It has high liabilities which must be discharged. It is given a period of nine months within which it must work up a plan with its creditors or arrangements for repayment of the liabilities and report to this court.”

There is no dispute that the petitioner had filed a notice of appeal against the whole of that decision. As we speak now, an appeal is pending in the Court of Appeal.

Be that as it may, on 29/5/2007 the Applicant filed an application in this court under a Certificate of Urgency. The application is for the following orders: -

- (1) (a) that the respondent be restrained from trespassing on all the applicant's business properties.*

- (b) *that the respondent be restrained from interfering with the applicant's operations at all its work places by refraining from sealing off all the applicant's premises, removing all its security personnel, the police and all its agents from the applicant's premises.*
- (c) *that the purported appointment of the official receiver by the respondent is null and void.*
- (d) *that all the purported notices issued by the respondent to the applicant are null and void.*

2. *that the costs of this application be provided for.*

Section 68 (e) of the Civil Procedure Code was cited in support of the application.

On the other hand, Ms. Karume opposed the application, by not only filing a counter affidavit, but also a notice of preliminary objections. She raised two objections against the application, and they are:

- (a) *This Honourable Court is functions officio.*

(b) *The application before this Honourable Court contravenes the provisions of the Civil Procedure Code 1966 (R E 2002) which confers this Honourable Court with the jurisdiction to entertain applications for interlocutory orders.*

Arguing on the first objection, Ms. Karume submitted that since the present application was brought under the umbrella of Misc. Commercial Case No. 36 of 2005, and since there is a judgment on that matter in which the petition was dismissed, this court was now *functus officio* to sit and deliberate on the matter again. She referred to the court to **MULLA, CIVIL PROCEDURE CODE** 16th ed. Vol. 11 at p. 2363; **BLACK'S LAW DICTIONARY** on the definition of the term "*functus officio*" and the Court of Appeal decision of **SCOLASTICA BENEDICT VS MARTIN BENEDICT** [1993] TLR.

1. On the other hand, Mr. Mfalila, learned Counsel, while agreeing with Ms. Karume on the definition of the term "**functus officio**", and even referred the court to the decision of the High Court in **MEDARD VS MINISTER FOR LANDS** [1983] TLR. 250, forcefully argued that as the application does not seek to ask the court to revisit the decision in the petition, but only to supervise the sanctity of its judgment, the question of *functus officio* does not arise. It was his view that this court was not *functus officio*.

On the second objection, Ms. Karume submitted that the application was not properly filed under s. 68 (e) of the Civil Procedure Code alone. It was her considered view that s. 68 (e) alone cannot support such an application. It must be accompanied by O. XXXVII. For that proposition, she referred the court to **MULLA** (op cit) Vol. 1 p. 1030 and the Court of Appeal decision in **TANESCO VS IPTL AND OTHERS** Consolidated Civil Applications No. 19/99 and 27/99 (unreported). Learned Counsel also went on to submit that for s. 68 (e) to be invoked, there must be a suit pending, as the section is only supplemental in nature. She also wondered which rule of O. XXXVII would apply in the present case. But Mr. Mfalila, learned Counsel had different views. He submitted that this was a unique situation, where the Applicant finds itself unable to protect its interests under any of the rules of O. XXXVII. It had to resort to the court's residual, inherent powers under s. 68 (e) which enables it **"to make any other interlocutory orders"**. In his view this section was not merely cosmetic and it would be dangerous to interpret the provision and **TANESCO's** case literally; as to do so would leave open to abuse situations not catered for by the law. It was for this reason that he felt that the application was properly launched under s. 68 (e) of the Civil Procedure Code 1966. With these rival arguments, Counsel prayed for dismissal of the application and dismissal of the preliminary objection respectively.

Before the learned Counsel wound up their submissions, I brought to their attention the decision of the Court of Appeal of Tanzania in **AERO HELICOPTER (T) LTD VS F.N. JANSEN** [1990] TLR. 142. After reading to the learned Counsel the holdings of the Court of Appeal, and eliciting their comments, Ms. Karume fully supported the position, that once there is an appeal pending, this court lacks jurisdiction to entertain any matter pertaining to the subject matter. On the other hand, Mr. Mfalila was of the view that that decision should not prevent this court from taking any measures aimed at checking any flouting of its decision, even if it is in the Court of Appeal.

He was further of the view that so long as this court is not asked to do anything in respect of the judgment the subject of appeal, this court is clothed with jurisdiction. But, by way of rejoinder, Ms. Karume, submitted that while it was not disputed that the court had powers to see that orders are not flouted, the proper way would have been by instituting contempt proceedings, and not by way of temporary injunction.

I am thankful to the learned Counsel for their very illuminating submissions. I do appreciate that the learned Counsel are all at one, as to the position of the law with regard

to the doctrine of *functus officio*, and as to the manner of applying s. 68 (e) of the Civil Procedure Code 1966. If there is any difference, it is a narrow one; whether s. 68 (e) alone could be invoked in support of any application, which Mr. Mfalila, thins it can.

In **TANZANIA ELECTRIC SUPPLY COMPANY LTD** case (op cit) Samatta J.A. (as he then was) observed on p. 14 of the typescript: -

“Section 68 does no more than summarise the general power of courts in regard to interlocutory proceedings, the details of which are set out in the First Schedule to the Code. Applications under the section are intended to assist the applicant in the prosecution of his case whether before or after final judgment or to enable the court to protect the subject matter of the primary proceedings before the right of the parties are finally determined.”

But even more recently, the Court of Appeal made the position even clearer. In **SEA SAIGON SHIPPING LIMITED VS MOHAMED ENTERPRISES (T) LTD**; Civil Appeal No. 37 of 2005 (unreported) at p. 27 the Court of Appeal said:-

*“Since section 68 merely summarises the general powers of the court in regard to interlocutory proceedings **whoever***

applies for a specific order must cite the order which he is applying for - (underlining provided).

As Mr. Mfalila, has not cited any authority for his proposition, and since I am bound by the decisions of the Court of Appeal, I am afraid, and with the greatest respect to the learned Counsel, who, will no doubt go down in history as one of the eminent judges who have served this country, I would not agree with him. I would instead align with Ms. Karume, that on the authorities, s. 68 (e) of the Civil Procedure Code 1966 cannot stand alone to support any application.

That, however, is, in my view, beside the point. The real question is whether with the existence of an appeal against Misc. Commercial Case No. 36 of 2005, this court has jurisdiction to entertain any further matters in respect of that same matter. Mr. Mfalila has strenuously argued that the application was merely intended to ask the court to protect its orders from being flouted. I agree with Ms. Karume, that the court has powers to protect the sanctity of its decisions by way of contempt proceedings. The present one is an application under s. 68 which governs interlocutory orders.

By sheer logic I think it both undesirable and impossible for one court to grant orders to prevent the flouting of a matter

which is pending in another court of concurrent jurisdiction, let alone a court of appeal. Why? The reasoning is provided by the Court of Appeal in **AERO HELICOPTER LTD** (supra) at p. 145 where Kisanga J.A. argued: -

“... Once appeal proceedings to this Court, have been commenced, I think that such proceedings do not come within the ambit of s. 2 of the Code...”

That is to say, in my view, they are proceedings in the Court of Appeal and not proceedings in the High Court to which, in terms of section 2, the provisions of the Code would apply. Therefore the High Court could not properly apply section 95 of the Code for the simple reason that, in my opinion; the proceedings are no longer in that court.”

Although in the present case the Applicant has sought to invoke s. 68 and not s. 95 of the Civil Procedure Code 1966, I think, the reasoning equally applies even if s. 68 is resorted to. Principally, once appeal proceedings are commenced, by way of filing a notice of appeal, the provisions of the Civil Procedure Code 1966 cease to apply. So in my view, once it is acknowledged that there is an appeal pending in respect of Misc. Commercial Case No. 36 of 2005 it is improper to bring or reactivate any proceedings in respect of that same matter in this court under the Civil Procedure Code 1966. It follows

therefore that s. 68 (e) of the Civil Procedure Code 1966, was not properly invoked.

It is for the above reasons that I must uphold the preliminary objections. On the authorities, I entirely agree with Ms. Karume that this Court lacks jurisdiction, express or inherent, to deal with the application. The application is accordingly struck out with costs.

Order accordingly.

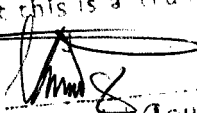
SGD

S.A. MASSATI

JUDGE

5/6/2007

1,904 words

I Certify that this is a true and correct
 of the orig.  ment Rulling
 Sign _____
 Registrar Commercial Court Dsm.
 Date 6/6/07