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

MISC. COMM.CASE NO. 3 OF 2006

IN THE MATTER OF THE ARBITRATION ORDINANCE CAP.15

BETWEEN

HON. ATTORNEY GENERAL OF THE GOVERNMENT
OF THE UNITED REPUBLIC OF TANZANIA
("GoT").....PETITIONER

AND

IMPRESA ING. FORTUNATO FEDERICI
S.p.A ("IFF").....RESPONDENT

AND

IN THE MATTER OF THE ARBITRATION ACT (CAP.15
R.E.2002)

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# R U L I N G

Date of deadline for submission: April 17, 2007.

Date of ruling May 14, 2007.

MJASIRI, J.

This application arises out of proceedings brought under section 18 of the Arbitration Act Cap 15 [R.E. 2002]. The Applicant has filed an application under Order 1 rule 10(2)

and Order XLII Rule 2 of the Civil Procedure Act [R.E.2002] to be enjoined as a necessary and interested party whose presence before the court is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the proceedings. The application is supported by the affidavit of Maurice De Souza, a Director and Group Contracts Manager of the Applicant.

The application is opposed by the Respondent. The Respondent's counter affidavit was sworn by Leopold John Nsigazi Mujjungi, the Director of Truck Roads in the Ministry of Infrastructure Development and a Principal Officer of the Respondent.

Mr. Kesaria Advocate appeared for the applicant and Professor Mwaikusa Advocate and Ms Olotu State Attorney appeared for the Respondent.

Mr. Kesaria Advocate strongly argued in support of his application. According to Mr. Kesaria all the government is seeking in the petition is the removal of the Arbitrators for misconduct pursuant to section 18 of the Arbitration Act. There is no prayer in the Petition for setting aside or remission of the award under section 15 and 16 of the Arbitration Act. This means that the government has accepted the award and its related findings namely the substitution of Sterling Civil

Engineering Limited ("SCEL") the Applicant as the claimant in place of Impresa Ing. Fortunato Federici S.p.A ("IFF"). This means irrespective of the outcome of the government petition, the Arbitration proceedings will continue in the name of Sterling Civil Engineering Limited. It is therefore important that any proceedings relating to that Arbitration enjoins Sterling Civil Engineering Limited as a necessary party. The government has only enjoined IFF as the Respondent, whereas Sterling Engineering should have been joined as a second Respondent.

Mr. Kesaria further submitted that it is necessary for this court to hear all the parties interested or connected to the Arbitration proceedings before making a decision on the petition for removal of Arbitrators on the grounds of misconduct. Mr. Kesaria cited various Court of Appeal decisions on the right to be heard.

1. Civil Appeal No.91 of 2003, ***Twenty first Century Food and Packaging Limited V Tanzania Sugar Producers Association and two others*** (unreported) where it was stated that any party whose interests are directly affected in a matter must be given an opportunity to be heard.

2. Civil application No.133 of 2002 ***Abbas Sherally V Abdul Fazal Boy*** (unreported). The court reiterated the right of a party to be heard.

3. Civil Application No.72 of 2002 ***Chief Abdalla Saidi Fundikira V Hilal L.Hilal*** (unreported). A party's right to be heard was considered not being elementary but a fundamental rule of fairness.

4. Civil Application No.20 of 2003 ***Khalifa Selemani Saddof V Yahya Jumbe and Others*** (unreported). The Court of Appeal emphasised the rule of natural justice which requires a person to be given a hearing before any decision is taken which is likely to affect his interest.

5. Civil Application No.175 of 2005, ***Selcom Gaming Limited V Gaming Management Tanzania Limited & another*** (unreported) The Court of Appeal criticized the H.C. decision refusing the Appellant's right to be joined.

Mr. Kesaria further argued that the outcome of the petition will affect the applicant who is the claimant and the court should therefore not deny the applicant the right to be heard.

Professor Mwaikusa learned Counsel for the Respondent strongly opposed the application. Professor Mwaikusa argued that IFF was not a competent party to commence arbitration proceedings. The petition seeks to remove the Arbitrators for misconduct by assuming jurisdiction to proceed with arbitration proceedings not validly commenced. The Arbitrators assumed jurisdiction to arbitrate in proceedings with a party that never appointed them. SCEL the competent party never took part in appointing arbitrators. An arbitrator cannot have jurisdiction to arbitrate if he or she is appointed by strangers.

The application is opposed because SCEL never took part in appointing Arbitrators who are sought to be removed. SCEL may have an interest in the contract, however SCEL never initiated arbitration proceedings though it had the competence to do so. The Petition before the court is not a petition on the contract but on Arbitration proceedings initiated by somebody else and not SCEL. The orders sought in the Petition would not prejudice, take away the rights of SCEL. SCEL never wanted to arbitrate and would lose nothing. SCEL has no locus standi on the petition. The Arbitrators sought to be removed were never appointed by SCEL.

Professor Mwaikusa further argued that the Arbitrators did not come up with a finding that IFF did not exist but IFF was

not a competent party to commence proceedings. SCEL did not take any steps to enable it to be a party to any arbitration proceedings arising from the contract. SCEL would lose nothing by not being a party to the petition.

The substitution of the parties in the arbitration proceedings is the reason why the government came to court.

According to Professor Mwaikusa the only question to be resolved by the court is whether the arbitrators committed a misconduct. In order to resolve the said question effectively and completely the presence of SCEL is not necessary and or desirable.

Professor Mwaikusa also argued that only the parties with a valid interest in the petition should be heard. SCEL has no interest in the petition. It did not take part in appointing Arbitrators.

With regards to the emphasis made by the Counsel for the applicant on the right to be heard. Professor Mwaikusa submitted that the right to be heard is not for every busy body, the right is available only to a person whose rights or interests are coming up for determination. SCEL only has its rights and interests in the contract which are not coming up

for determination in the petition. Counsel also wished to adapt the entire counter affidavit as part of his submissions.

I have carefully reviewed the affidavits and counter affidavit filed by the parties and the submissions by both Counsels made before the court. The arbitral process commenced in 2004 in which the claimant was IFF and the Respondent the government of the United Republic of Tanzania. During the Arbitration proceedings the Arbitrators overruled the preliminary points raised by government and ordered that the Applicant SCEL be substituted as the correct claimant in place of IFF, the original claimant. The Arbitrators were of the view that the correct claimant should have been SCEL. In view of this finding the order substituting SCEL in place of IFF was made. As a result of this order the government has filed a petition before this court under section 18 of the Arbitration Act seeking the following orders:

1. *an order revoking the authority of the Arbitrators on the ground of misconduct.*

2. *an order for the Respondent to pay the costs of these proceedings.*

3. *any other such orders as the court may deem fit.*

Taking the totality of the circumstances into consideration, I am of the view that it is in the interest of justice that the Applicant be enjoined as a party. The Petition filed in court seeks to remove the arbitrators in respect of arbitration proceedings which the Applicant is a party.

I am inclined to agree with the argument raised by the Counsel for the Applicant that the Applicant being the claimant in the arbitration proceedings should be given a right to be heard on the petition to remove arbitrators on the ground of misconduct. The decision of the court in respect of the petition would definitely affect SCEL.

The argument raised by the Counsel for the Respondent that the applicant did not appoint the arbitrators and therefore cannot be joined as a party, cannot be considered at this stage. The issue currently before the court is not the appointment of Arbitrators. What we are concerned in this application is whether the outcome of the Petition filed in court would directly affect the Applicant.

The Respondent does not seek to set aside or to remit the award under the Arbitration Act. This means that the substitution of SCEL as claimant in place of IFF would still be in place. SCEL would still be a party to the arbitration proceedings. It follows that, it is in the interest of justice that

SCEL be given the opportunity to be heard by being enjoined in the petition. I need not emphasise the position taken by the Court of Appeal of Tanzania in according an opportunity to a party to be heard in a matter which directly affects the party.

Civil Case No.175 of 2005 ***Selcom Gaming V Gaming Management (T) Limited and Another*** (Unreported) and Civil Application No.91 of 2003, ***Twenty First Century Food and Packaging Limited V Tanzania Sugar Producers Association and two others*** (unreported) relevant.

On the strength of the affidavits filed by the Applicant and on the strength of the arguments raised by Counsels and in view of the emphasis laid down by the Court of Appeal of Tanzania on the right to be heard, the Application by the applicant to be enjoined as a necessary and interested party before the court is hereby granted as prayed. Applicant to be enjoined as a second Respondent to the petition. Costs to be costs in the cause. It is so ordered.

Sauda Mjasiri

Judge

May 12, 2007

Delivered in Chambers this 14th day of May 2007 in the presence of Mr. Kesaria Advocate and Ms Panzi State Attorney and in the absence of Prof. Mwaikusa Advocate.

Sgd.

Sauda Mjasiri

Judge

May 14, 2007

2,365 – words.

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I Certify that this is a true and correct of the original/order Judgement Ruling

Sign .....

Registrar Commercial Court Dsm.

Date 21st/May/2007