

**IN THE HI
COMMERCIAL DIVISION
AT DAR ES SALAAM**

COMMERCIAL CASE NO.67 OF 2010

BP TANZANIA LTD.....PLAINTIFF

VERSUS

TSN OIL TANZANIA LTD.....DEFENDANT

BRIGHTON RUTTA EURO-PRODUCTS LIMITED.....THIRD PARTY

Date of the Last Order: 08/04/2011

Date of final submissions: 05/05/2011

Date of Ruling: 30/05/2011

RULING

MAKARAMBA, J.:

This is a ruling on a preliminary objection raised by the Third Party in its Written Statement of Defence filed in this Court on February 21, 2011 on a point of law that the suit does not disclose any cause of action against the Third Party.

The preliminary objection by consent was disposed of by way of written submissions. The Third Party was represented by GF LAW

CHAMBERS, ADVOCATES. The Defendant was represented by the LLOYD ADVOCATES and the Plaintiff by IMMA ADVOCATES.

The Plaintiff's Counsel rightly submitted, while raising concerns over which suit the preliminary objection raised by the Third Party related to, given that in terms of Order 1 Rule 21(b) of the Civil Procedure Code [Cap.33 R.E. 2011] before this Court there are two suits. The first suit is that which is between the Plaintiff and the Defendant, the relevant facts of which as could be gathered from paragraphs 3 and 4 of the Plaint are that on 8 January 2008, 20,000 litres of MSP and 20,000 litres of diesel were stolen from the Plaintiff's depot at Kurasini in Dar es Salaam and that the stolen petroleum fuel was delivered to the Defendant.

In its written statement of defence, the Defendant claims that the stolen petroleum products came into the possession of the Defendant through the Third Party whom the Defendant claim that they had such kind of business dealings for the past two years before the occurrence of this event, the Plaintiff's Counsel further submitted.

It was the further submissions of the Plaintiff's Counsel that it is clear that given these set of facts raised by the Defendant, they give the Defendant a right of relief against the Third Party as far as the Plaintiff's claim against the Defendant is concerned. Amplifying further on this point, the Plaintiff's Counsel further submitted that the term "*cause of action*" is not defined in the Civil Procedure Code as it was noted by the Court of Appeal in **JOHN M. BYOMBALIRA VS AGENCY MARITIME INTERNATIONAL** [1983] TLR 1 at page 4, the term may mean "*essential facts which it is necessary for the plaintiff to prove before it can*

succeed in the suit." Relying on ***Mulla's Code of Civil Procedure Seventeenth Edition, Volume 1*** at page 453 defining the term cause of action to mean a "*bundle of facts taken with the law applicable, gives the Plaintiff a right to relief against the Defendant,*" the Plaintiff's Counsel submitted further that it must include some act done by the Defendant since in the absence of an act no cause of action can possibly accrue. It is not limited to actual infringement of right sued on, but includes all the material facts on which it is founded, the Plaintiff's Counsel further submitted, and surmised that the Defendant did disclose a cause of action by pleading essential facts which are necessary for it to prove against the Third Party before it can succeed to be indemnified, and that the Plaintiff pleaded all necessary facts related to the merits of suit and which are necessary for the Court to decide.

The main contention in the submissions of the Counsel for the Third Party I support of the preliminary objection is that since the Defendant in its Written Statement of Defence filed in this Court on the 21st day of August 2010 contesting the claim of the Plaintiff mentions the Third Party to have been involved in a police case following the alleged stolen fuel but without any documents or receipt or police report indicating the involvement of the 3rd Party in the said illegal transaction which have been attached to the Plaintiff's Plaint nor the Defendant's defence, then neither the Plaint nor the defence disclose a cause of action against the 3rd Party. The Counsel for the Third Party further argued that the Third Party Notice issued by the Defendant does not give the actual facts which details the involvement of the 3rd Party to the claim made by the Plaintiff in such a

way as to give the Defendant an opportunity of being indemnified by the 3rd Party in the event liability is established thereon. The Counsel for the Third Party argued further that the Defendant claims that the Defendant did pay the 3rd Party TZS 25,000,000/- in respect of the petroleum fuels as indicated in paragraph 1(a), (b) and (c) but no documents have been attached by the Defendant or Plaintiff indicating the involvement of the 3rd Party to the aforesaid transaction and claim made thereof.

The Defendant's Counsel in his reply to the submissions by the Counsel for the Third Party on the preliminary objection raised by the Third Party argued that in the Defendant's written statement of defence it is stated that the Defendant used to purchase petroleum products on regular basis from BRIGHTON RUTA, trading as EURO PRODUCTS LIMITED, the Third Party, herein. It was the further statement of the Defendant's Counsel that during the week running from January 7, 2008 to January 13, 2008, the Defendant purchased petroleum products from the said Company, EURO PRODUCTS LIMITED, on four different occasions, including the products alleged in the suit. That the Defendant purchased the petroleum products from the Third Party, worth **TZS 45,000,000/-**, the purchase which the Defendant's Counsel claims that it was made in good faith and belief that they were purchasing petroleum products legally and properly obtained. That after purchasing the said products, Defendant paid BRIGHTON RUTA TZS 20,000,000/- leaving a balance of TZS 25,000,000/- It was the further submissions of the Defendant's Counsel that suspecting that the petroleum products purchased from the Third Party match the description of the petroleum products reported to have

been stolen from the Plaintiff, took the liberty in good faith to notify the Plaintiff's Company of the said purchase, and as it turned out later in a police investigation, in which the Defendant assisted, confirmed that the petroleum products purchased by the Defendant from EURO-PRODUCTS LIMITED managed by BRIGHTON RUTA, the Third Party, marched the stolen petroleum products from the Plaintiff's company. It was the further submission of the Defendant's Counsel that as a way of mitigating the loss caused to the Plaintiff, following a series of police investigations and meetings, BRIGHTON RUTA who had been put under police custody, agreed that he would pay the amount paid to him in advance by the Defendant and the Defendant agreed to pay the remaining sum of money **TZS 25,000,000/-**, which he paid, and that there was no agreement between the Plaintiff and the Defendant that the Defendant will pay the whole amount of the petroleum products rather than the remaining balance. Since none of this happened, the Plaintiff instituted a suit against the Defendant and the Defendant in turn instituted a Third party proceedings against the Third Party who sold the petroleum products to the Defendant.

The Defendant's Counsel submitted further that the preliminary objection raised by the Third party does not meet the test of pure point of law as set out by Newbold, VP in **MUKISA BISCUITS MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD (1969) EALR 696** at **page 700**, and restated by Justice Nsekela in decision of the Court of Appeal in **CITIBANK TANZANIA LTD VS TTCL & OTHERS** **Civil Application No.63 of 2003**, amplifying on the three conditions to be met

before a preliminary objection can be said to be a preliminary objection. I will come later to this point due counsel

Let me first address myself to the substantive points on the preliminary point made by the Defendant's Counsel. Relying on the decision of this Court in **STANBIC FINANCE VS GIUSEPPE TRUPIA & ANOTHER Commercial Civil Cause No.42 of 2000**, that a cause of action reflects "*the claim as presented in the plaint and not as weighed against the defense statement*", and Rule 3 of Order VI of the Civil Procedure Code, that pleadings "*shall contain only facts but not evidence*", the Counsel for the Defendant submitted that one cannot look at the plaint alone and conclude that it does not disclose a cause of action because a plaint does not contain evidence from which a cause of action is established. The Defendant's Counsel also cited in his submissions the decision of this Court in **SERAFIN ANTUNES AFFONSO VS PORTAIN ENT. LIMITED & OTHERS Commercial Civil Cause No.217 of 2000**, where the Court cited with approval the case of JERAJ **SHARIFF & CO. VS. CHOTAI FANCY STORES (1960) EA 375** and **EAST AFRICAN OVERSEAS TRADING CO. VS. TANSUKH S. ACHARYA (1963) EA 468** to the effect that since at the stage of determining whether or not a cause of action, the court is not seized of evidence, the Court only has to "*cast its eyes within the four corners of the plaint*", a rather limited ambit where the Defendant is simply alleging that the Third Party has a duty to indemnify the Plaintiff for which he believes is actionable, and hence the at this stage the court has "*to assume that the factual allegations thus made, whether expressly or impliedly, are true.*"

The Defendant's Counsel putting to test the three conditions to be met before a preliminary objection can be considered as such as laid down by Nsekela, JA in **CITIBANK TANZANIA LTD VS TTCL & OTHERS Civil Application No.63 of 2003** submitted that, first, that the points of law raised in the preliminary objection must either be pleaded or must arise as clear implication from the pleadings. The Defendant's Counsel submitted further that the Defendant has clearly showed the cause of action against the Third Party in paragraph 3 of its written statement of defence by stating facts as to the Defendant purchasing petroleum products from the Third Party which later turned out to have been stolen products, and the fact of the Third Party agreeing to pay the Plaintiff the advance paid to him by the Defendant while the Defendant agreeing to pay the remaining balance, which he has honoured but only to be sued later on for the remaining balance, which was supposed to be paid by the Third Party, and which is why the Defendant brought the Third Party into the suit so that he can indemnify the Plaintiff.

As to the second condition that the preliminary objection must be pure points of law which do not require close examination or scrutiny of documents, the Defendant's Counsel submitted that the Third Party has failed to meet this condition in that in the preliminary objection raised by the Counsel for the Third Party in part A paragraph 2 as well as part B paragraph 2, the Counsel for the Third Party mentioned that there is no documents, receipts or police reports showing the connectivity or involvement of the Third Party in the said transaction, something which requires this Court to conduct a close examination or scrutiny of

documents, which is done at the hearing stage not this stage where the court is not seized of any evidence.

I have carefully gone through the submissions of Counsel for the parties. The preliminary objection raised by the Third Party is in respect of the Third Party Notice the defendant lodged under Order 1, Rule 14 of the Civil Procedure Code [Cap.33 R.E. 2002]. The said Order 1 Rule 14 stipulates as follows:

"(1) Where in any suit a defendant claims against any person not a party to the suit (hereinafter referred to as "the third party")–
(a) any contribution or indemnity; or
(b) any relief or remedy relating to or connected with the subject matter of the suit and substantially the same as a relief or remedy claimed by the plaintiff,
the defendant may apply to the court for leave to present to the court a third party notice."

On the force of Order 1 Rule 14 of the Civil Procedure cited above, in Third Party proceedings, the claim of the defendant is against a person not a party to the suit, and hence the term "third party." It means that there is already in court a suit between the Plaintiff and the Defendant who has applied for the Third Party Notice. As such, as far as the Third party proceedings are concerned the written statement of defence filed by the Defendant in answer to the claim against him by Plaintiff becomes a plaint as against the Third Party and the answer by the Third Party to the claim against him by the Defendant raised in the Third Party Notice becomes a written statement of defence. Essentially, as rightly argued by the Plaintiff's

Counsel, it is as if there are two suits in court. Furthermore, the Third Party proceedings are by way of contribution or indemnification.

As rightly submitted by both Counsel for the Defendant and Counsel for the Plaintiff, in terms of paragraph 1(a) of the Third Party Notice, the Defendant by stating the facts relating to the Defendant purchasing in good faith and through legal channels 20,000 litres of diesel and 20,000 litres of MSP from the Third Party, products which as the Defendant claim were apparently obtained from the Plaintiff by the Third Party and sold to the Defendant which products as the Defendant further claims have never been paid for in terms of the claim raised in the Plaintiff by the Plaintiff against the Defendant, in my view, the Defendant has clearly established that it is entitled to indemnification as required under the law.

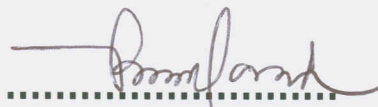
As it was rightly stated by Leon, J. in the case of **YAFESI WALUSIMBI VS THE ATTORNEY GENERAL OF UGANDA (1959) E.A** at page 225, which the Plaintiff's Counsel cited in its submissions, in order that a third party may be legally joined the subject matter of the suit must be the same and the original cause of action must be the same. In the instant case, on the strength of the "four corners of the pleadings", I am satisfied that the subject matter of the suit and the cause of action are the same.

As submitted by both the Plaintiff's Counsel and the Defendant's Counsel, and with due respect to the Counsel of the Third Party, his (Third Party Counsel's) argument that the Plaintiff and the Written Statement of Defence do not disclose the cause of action because there is no document, receipt or police report attached to connect the Third Party, these are

matters which go to proof but do not establish cause of action. As rightly submitted by Plaintiff's Counsel, the Defendant has pleaded the fact of the alleged stolen petroleum products were sold to the Defendant by the Third Party and therefore if the Plaintiff's claim were to succeed, the Defendant is entitled to indemnity by the Third Party.

Furthermore, as rightly submitted by the Defendant's Counsel, the preliminary objection as raised has failed to meet two of the three conditions for a preliminary objection restated by Nsekela, JA in **CITIBANK TANZANIA LTD VS TTCL & OTHERS Civil Application No.63 of 2003**, by touching on matters which require evidence at the hearing stage thus making the argument by the Counsel for the Third Party that lack of documentary evidence connecting the Third Party to the claim misconceived and misplaced. As rightly submitted by the Plaintiff's Counsel, proof will have to wait until the matter is finally determined.

In fine, for the foregoing reasons the preliminary objection raised by the Third Party is hereby dismissed with costs, which costs shall be in the cause. It is accordingly ordered.

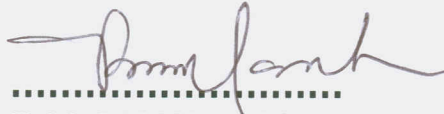


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R.V. MAKARAMBA

JUDGE

30/05/2011

Ruling delivered in Chambers this 30th day of May 2011 in the presence of Miss Sama Salah, Advocate for the Plaintiffs and in the absence of the Defendant and Third Party.



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R.V. MAKARAMBA
JUDGE
30/05/2011

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