IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL REVIEW NO. 1 OF 2016

(Arising from Miscellaneous Commercial Cause No. 240 of 2014)

THE COMMISSIONER OF INSURANCE ..... APPLICANT

VERSUS

MWANANCHI INSURANCE COMPANY LTD ..... RESPONDENT

16th June & 3rd August, 2016

RULING

MWAMBEGELE, J.:

This is a ruling in respect of an application for review filed by the Commissioner of Insurance. The application is made under the provisions of rule 2 (2) of the High Court (Commercial Division) Procedure Rules, 2012 – GN No. 250 of 2012 (henceforth "the Rules"), sections 78 (b) and 95 and order XLII rule 1 (b) of the Civil Procedure Code, Cap. 33 of the Revised Edition, 2002. It has been brought by way of Memorandum of Review. The application seeks to review the ruling and order made by this court [Mwarija, J. (as he then was); now Justice of Appeal] on 05.10.2015 in Miscellaneous Commercial Cause No. 240 of 2014. The ground upon which the applicant beckons this court to review its ruling and the flanking order is couched thus:

> "that there is a material error on the face of record in the said Ruling and Order interpreting that the applicant is a financial creditor under the Companies Act (Cap, 212 R.E 2002) rather than a regulator under the Insurance Act 2009 thus required to fully comply with section 280 (a) of the Companies Act (Cap. 212 R.E 2002)"

The application was argued before me on 16.06.2016. Both parties were represented. The applicant was represented by Mr. Vincent Tango, learned Principal State Attorney, Mr. Hangi Chang'a, learned Senior State Attorney and Mr. Paul Ngwembe and Mr. Arthur Mbena, learned advocates whereas the respondent was represented by Mr. Imam Daffa and Mr. Hussein Kitta Mlinga, learned advocates. It is worth noting here that the two learned counsel for the respondent represent the interest of two sets of different shareholders of the respondent who are in a serious conflict. While Mr. Daffa represents the interests of Elias Nyang'oro and Edna Nyang'oro, Mr. Mlinga represents the interests of Mr. Mrema, Gem Oil (T) Ltd and Innocent Jusuit Gasper Macha.

Mr. Daffa, learned counsel had no objection to the prayers sought by the applicant in the application. Mr. Mlinga, strenuously objected it.

The issue on which Mr. Tango learned Principal State Attorney for and on behalf of his team lawyers and Mr. Mlinga, learned counsel have seriously locked horns on, is whether there is a material error apparent on the face of the record on the ruling complained of to warrant the grant of the orders sought by the applicant. Mr. Tango, learned Principal Sate Attorney, is of the view that there is, whereas Mr. Mlinga, learned counsel is of the view that there is none.

The arguments of the parties are found in the skeleton arguments they earlier filed for and against the application pursuant to the provisions of rule 64 of the Rules as well as their arguments at the oral hearing before me on the said 16.06.2016.

The genesis of all this, as already alluded to above, is that on 05.10.2015, this court struck out the petition filed by the applicant herein vide Miscellaneous Commercial Case No. 240 of 2014 for the reasons that it was premature and therefore incompetent. In that ruling, His Lordship Mwarija, J. (as he then was), after a thorough analysis of the provisions of the Companies Act and the Insurance Act, held that the Commissioner of Insurance was a normal Financial Creditor who was supposed to comply with the letter of section 280 (a) to issue a twenty-one days' notice to the respondent to demand for payment of the debt; just like other Financial Creditors would be required to do. This is what irked the applicant who was, and still is, of the view that the Commissioner of Insurance is not a normal Financial Creditor but a Statutory Regulator of Insurance Business in Tanzania as per section 6 of the Insurance Act and therefore not bound to issue a twenty-one days' notice to the respondent as stipulated by the provisions of section 280 (a) of the Companies Act.

Mr. Tango, for the applicant argues that this is an error apparent on the face of record by which the court ended up misinterpreting section 153 (7) of the Insurance Act and the legal requirements provided in section 280 (a) of the Companies Act and rules 92, 93 and 94 of the Companies (Insolvency) Rules, 2005 - GN No. 43 of 2005 (henceforth "GN No. 43 of 2005") that the respondent applicant was duty-bound to issue a twenty-one days' notice to the respondent.

The applicant has extensively elaborated the point in a five-page discussion (from page 3 through to 7 of the written submissions) on who the financial creditor is, the meaning of the term "deems", the functions and duties of the Commissioner of Insurance and circumstances under which this court may review its decision or order. The same efforts were dutifully employed at the oral hearing.

The learned Principal State Attorney has argued that the court ought not to have applied the provisions of section 280 (a) of the Companies Act because the petition before the trial Judge was made under the provisions of section 153 (5), (6) and (7) of the Insurance Act and sections 279 and 281 of the Companies Act. There was no petition before the trial Judge filed under section 280 of the Companies Act. The use of that provision was therefore an error as section 280 provide for a procedure which is quite different from the procedure under section 281 of the Companies Act, he argued. Distinguishing the procedure under the two provisions, the learned Principal State Attorney stated that under section 280, a creditor must give a statutory demand but under section 281 when the Commissioner of Insurance wishes to file a petition for winding up is required to advertise the winding up under rule 99 of GN No. 43 of 2005. As the petition was filed by the Commissioner, he argued, the Judge ought to have adopted the procedure under section 281 of the Companies Act. Rule 92 of GN No. 43 of 2005 expressly excludes the application of the requirement of giving a twenty-one days' notice. The learned Principal State Attorney went on to argue that after exclusion of the requirement of a demand notice, the Judge erred by going ahead under section 280 of the Companies Act hence falling into a trap of treating the Commissioner as a normal creditor which is not the fact. After treating him as a Financial Creditor, His Lordship

used section 153 of the Insurance Act which deems the Commissioner of Insurance as a Creditor when filing a petition for winding up. The learned Principal State Attorney submitted that the Commissioner of Insurance should not be treated as a normal financial creditor because of the use of the terminology "deemed" in the provision.

Having so argued, the learned Principal State Attorney prayed that the court should correct the error and determine the matter on merits (which were not determined) by using the submissions (skeleton written submissions) which had earlier been filed.

To hammer the point home, the learned Principal State Attorney relied on a number of authorities. These are: **Black's Law Dictionary***, Shimimana Hisaya & another Vs R.*, Criminal Appeal No. 6 of 2004 (unreported), *Transport Equipment Limited Vs Devram P. Valambhia* [1998] TLR 89, *Edison Kanyabwera Vs Pastori Tumwebaze*, Civil Appeal No. 6 of 2004 (Supreme Court of Uganda unreported), *East African Development Bank Vs Blueline Enterprises Tanzania Limited* [2014] 3 EA 95, *Commissioner of Insurance Vs Turdo Insurance Corporation & another*, Miscellaneous Commercial Cause No. 1 of 1999 (unreported) and *Ally Linus And 11 Others Vs Tanzania Harbours Authority & The Labour Conciliation Board of Temeke District* [1998] TLR 5.

On the other hand, Mr. Mlinga, learned counsel for the respondent is very brief in his submissions. He argues in the main that the application filed by the applicant is not based on a mistake or error apparent on the face of record but on an allegation of the misinterpretation of the law by the learned trial judge. The learned counsel for the respondent argues that there is a plethora of

authorizes holding to the effect that an error in law which is based on an arguable point of law is not an error apparent on the face of the record. In the instant case, the error complained of is on the allegation of misinterpretation of the law by the learned trial judge. He thus beckons upon this court to dismiss the application with costs.

The learned counsel for the respondent has relied on the authorities of the ***East African Development Bank*** case (supra), ***Hemed Hussein & others Vs Nyembela Gandawega***, Miscellaneous Civil Application No. 66 of 2003 (unreported) and ***Boniface Sigaye & 72 others Vs Tanzania Revenue Authority***, Civil Application No. 185 of 2002 (unreported) for the proposition.

The basic question this ruling must answer is whether there is a manifest error apparent on the face of the record of this case to warrant the grant of the orders sought by the applicant; that is, to review the ruling and order of this court dated 05.10.2015 and thereafter decide the matter on merits basing on the skeleton written arguments which had earlier been filed before the impugned ruling and order.

There seems to be no dispute by the learned counsel for the parties that this court decided that the application was premature. Also undisputed is the glaring fact that the learned judge relied on the provisions of section 280 (a) to arrive at a conclusion that the course of action taken by the applicant was premature. Equally undisputed is the fact that the learned judge held that the Commissioner of Insurance was supposed to comply with the requirement of issuing a twenty-one days notice to the respondent just like a normal financial creditor would do. The million dollar question which pops-up is whether that error, if at all, is manifestly apparent on the face of the record.

What constitutes an error manifestly apparent on the face of the record is not a virgin territory. It has been traversed before in this court as well as the Court of Appeal. I will therefore not re-invent the wheel today in this ruling.

What constitutes a manifest error apparent on the face of record was discussed better by the Court of Appeal in *Nguza Vikings @ Babu Seya & another Vs R* Criminal Application No. 5 of 2010 (unreported) in which the Court of Appeal speaking through Massati, JA relied on its earlier decisions of *Chandrakant Joshubhai Patel Vs R.* [2004] TLR 21 and *Tanganyika Land Agency Limited And 7 Others Vs Monogar Lal Aggarwal*, Civil Application No 17 of 2008 (unreported) observed:

> "There is no dispute as to what constitutes a manifest error apparent on the face of the record. It has to be such an error that is an obvious and patent mistake and not something which can be established by a long drawn process of reasoning on points which there may conceivably be two opinions. [See **CHANDRAKANT PATEL** and **TANGANYIKA LAND AGENCEY LIMITED** (supra)]. On the other hand there is a "miscarriage of justice" if the error leads to a grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite a lack of evidence on an essential element of the crime. (See **BLACK'S LAW DICTIONARY**) 8th ed. p. 1019."

And relying on **Sarkar on Civil Procedure Code**, 10th Ed. Vol. 2 at p. 2291, the Court of Appeal went on:

> "There is no hard and fast rule that can be laid down to declare or point out which or what error is apparent on the face of the record. The exercise of this power of review will depend upon the peculiar facts of each case …"

And, giving instances which may not be termed as falling within the basket of manifest errors apparent on the face of the record, the Court went on:

> "… the Court has in many instances refused to treat as manifest errors on the face of the record … in the following cases:-
>
> (a) **If the error is not self evident and has to be detected by the process of reasoning**;
>
> (b) **If there are two possible views regarding the interpretation or application of the law**;
>
> (c) **Any ground of appeal**;
>
> (d) **Any erroneous decision**;
>
> (e) **A mere error or wrong view**; and
>
> (f) **A different view on a question of law or an erroneous view on a debatable point or a wrong**

exposition or wrong application of the law."

[Emphasis mine].

Armed with the foregoing principle, the question comes; does the ruling (and order) of this court in Miscellaneous Commercial Case No. 240 amount to a manifest error apparent on the face of the record? I think I am in agreement with Mr. Mlinga, learned counsel for the respondent that the answer should be in the negative. I would therefore hasten to answer the question in the negative. I say so because an answer to this question would entail a rigorous discussion and consideration of the provisions of the Companies Act, GN No. 43 of 2005 as well as those of the National Insurance Act. To get an answer thereof, therefore, an uphill task is apparent. This approach disqualifies the point to be one for review, for, it falls within the purview of items (a) to (f) in the *Nguza Viking* case above. For the avoidance of doubt, I have subjected the ruling and order of this court to items (a) to (f) in the *Nguza Viking* case (supra). Having so done, I am convinced that the ruling and order of this court falls in all fours with those items. That is to say, the error, if at all, is not self-evident and has to be detected by the process of reasoning to unearth the fact that the Commissioner of Insurance should in the circumstances not be treated as a normal financial creditor thus not subject to the requirements under section 280 (a) of the Companies Act; there are two possible views regarding the interpretation or application of the law as submitted by the opposing counsel for the parties and the error complained of, if any, amounts to an erroneous decision or just a mere error or wrong view by this court which befits to be resolved by way of appeal.

The learned Principal State Attorney has burnt a lot fuel in justifying that the decision is reviewable. I have stated above that he has used about five pages for justifying that course. He equally spent quite some considerable time to justify the proposition during the oral hearing. That endeavour by the learned Principal State Attorney vindicate the fact that the ruling and the flanking order is not reviewable. As would be appreciated by the parties, and as already observed above, to answer the question as to whether the error made by this court in Miscellaneous Commercial Case No. 240 has a manifest error on the face of the record, one would have to go through a rigorous procedure of discussing the procedure under the provisions of sections 280 of the Companies Act and 153 (7) of the Insurance Act as well as the legal requirements provided in rules 92, 93 and 94 of GN 43 of 2005 as against the procedure under section 281 of the same Act and rule 99 of GN 43 of 2005. If anything, the error complained of is not one manifestly apparent on the face of the record but rather an error expressing one view by the trial judge supported by Mr. Mlinga against another view the learned Principal State Attorney would have thought appropriate. The proper forum is in my view not review but an appeal.

I also wish to state by way of postscript that even if I would have agreed with the applicant that the ruling and its consequent order were reviewable, I would not have proceeded to decide on the matter on merits basing on the skeleton written arguments earlier filed by the parties in that application as the learned Principal State Attorney ushered me to do. The learned Principal State Attorney must be aware that skeleton written arguments filed under the Rules are not written submissions which constitute a hearing. While skeleton written arguments are filed prior to an oral hearing which oral hearing will not necessarily be adjourned for their not being filed, written submissions amount

to a hearing and a party which does not file them will be taken that it has failed to prosecute or defend the case – see: *Tanganyika Motors Ltd Vs Bahadurali Ebrahim Shamji*, Civil Application No. 65 of 2001 (CAT unreported), *Athumani Kungubaya & Another Vs PSRC & TTCL,* Miscellaneous Civil Appeal No. 1 or 2001 (HC unreported), *Maria Rugarabamu Vs National Housing Corporation and Another,* Civil Appeal No. 32 of 1996 (HC unreported) and *Perpetua H. Kirigini & another Vs Dr Msemo Diwani Bakari*, Land Appeal No. 3 of 2005 (HC unreported), to mention but a few. Skeleton written arguments, therefore, are quite distinct in intent and purpose as well as in their consequences of non-filing. Proceeding to determine the matter on merits using skeleton written arguments as the learned Principal State Attorney would have wanted me to do, would therefore have been inappropriate before the eyes of the law.

On the basis of the foregoing, I find this application wanting in merit. I would consequently dismiss it with costs.

Order accordingly.

DATED at DAR ES SALAAM this 3rd day of August, 2016.

J. C. M. MWAMBEGELE

JUDGE