

**IN THE HIGH COURT OF TANZANIA  
(COMMERCIAL DIVISION)  
AT DAR-ES-SALAAM  
MISC.COMMERCIAL CAUSE NO.20 OF 2020  
(Arising from Misc. Commercial Cause No.6 of 2020)**

**DAMATICO GENERAL SUPPLY LIMITED .....APPLICANT  
v  
MAWENI LIMESTONE LIMITED..... RESPONDENT**

**RULING**

*12/03/2020 & 27/03/2020*

**NANGELA, J.:**

This is an application for interim/injunctive orders. It arises from the main case, a **Misc. Commercial Cause No.6 of 2020**, which is a Winding Up Petition, pending in this Court. The current application has been filed under a "**Certificate of Extreme Urgency**", and, by way of a Chamber Summons which is supported by an affidavit of one Dankton Ludovic Rweikila.

The Chamber summons filed in this Court, was made under section 68 (c) and (e), and Order XXVII rule 1 (a) and (b); rule 2

(1) and rule 4 of the Civil Procedure Code, Cap.33 [R.E 2002], as well as Rule 2 (2) of the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 (as amended by GN. 107 of 2019), and Section 283 (b) of the Companies Act, Cap. 212, [R.E 2002].

According to the certificate of urgency, which was filed in this Court on the 19<sup>th</sup> of February 2020, it was claimed that, the Application was a "**matter of very extreme urgency and should be heard immediately**". The reasons assigned were, that, the Respondent is in the process of selling its shares and dispose its property, and, if that is to happen, the winding up petition before this Court will be rendered nugatory.

In the Chamber Summons, the Applicant sought the following orders or reliefs:

**EX-PARTE**

1. That this honourable Court be pleased to dispense with the requirement of notice and proceed ex-parte to grant interim/injunctive order restraining the Respondent, its agents, associates, or assignees from disposing the assets/property or transferring its shares

to any legal or natural person pending inter-parte hearing.

### **INTER-PARTE**

2. That, this honourable Court may be pleased to grant interim/injunctive order restraining the Respondent, its agents, associates, or assignees from disposing the assets/property or transferring its shares to any legal or natural person pending hearing and determination of the winding up petition.
3. Costs of this application.
4. Any other reliefs that this honourable Court may deem fit to grant.

On 21<sup>st</sup> February 2020, when this application was called for its hearing, *ex-parte*, Mr. Joseph Samweli, learned advocate, appeared for the Applicant. He proceeded *ex-parte* seeking to be granted the first prayer before the matter turns out for hearing *inter-partes*. Having made his submissions in support of the Applicant's *ex-parte* prayer before me, I declined to grant the Applicant's prayer.

In my brief ruling made on 21<sup>st</sup> February 2020, I found that, the Applicant, having brought its application under a certificate of urgency, should have provided, as a matter of prudence, a full

disclosure, in the affidavit of the Applicant, all the facts which would have necessitated the granting of such interim reliefs/orders sought *ex-parte*.

Having declined to grant the reliefs sought *ex-parte*, this Court, therefore, made an order to the effect that, the application should proceed and be heard *inter-partes*. Further, the hearing of the parties's oral submission regarding the application was fixed to be held on 27<sup>th</sup> February 2020, at 11.00 am.

On the 27<sup>th</sup> February, 2020, Mr. Joseph Samwel, the Applicant's legal counsel, appeared before this Court. The Respondent was represented by Ms. Mariam Said, learned advocate.

At the beginning of the hearing of the application, Mr. Samwel informed the Court that, the Respondent was yet to be served with the pleadings constituting the application, the reason being that, attempts to serve them was unsuccessful, because the process server found the Respodent's offices closed. He therefore prayed to have the hearing put on hold for a while, as he attempts to serve the Respondent. He proposed that a single day adjournment would suffice.

For her part, Ms Mariam Said, who appeared for the Respondent, did not object to the prayer, though she had preferred the matter to be fixed on 18<sup>th</sup> March 2020. This Court settled on 9<sup>th</sup> March 2020 as the date for the hearing of the matter. Meanwhile, the following directives of the Court were made:

1. That, the Respondent be served with the documents relevant to the application on the same date, i.e., 27/2/2020.
2. That, the Respondent should file its counter affidavit on or before 4<sup>th</sup> March 2020, and reply if any, (by the Applicant) be filed on 6<sup>th</sup> March 2020.
3. Hearing of both Parties' oral submissions, be on the 9<sup>th</sup> March 2020 at 8.30 am.

On the 9<sup>th</sup> March, 2020, the parties appeared before me and their representation was as before. The Respondent had been served with the relevant documents as ordered by this Court, and had filed its counter affidavit. However, the Applicant had not filed its reply to the counter-affidavit, but there was a prayer to be made.

In particular, Mr. Samwel, the learned advocate for the Applicant, informed this Court that, having received the Counter Affidavit from the Respondent, he noted a very recent decision of

the Court of Appeal involving the parties, which was attached to the counter affidavit, and, which made him see that, there was no need to proceed with the application at hand. As such, he was intending to withdraw it from this Court.

His prayer, however, was for an adjournment of the matter, as he had not communicated to his client regarding the new developments, which, according to him, he was unaware of.

Ms Miriam Said, learned counsel for the Respondent objected to the prayer for adjournment. She said that, the referred-to decision of the Court of Appeal, was made available to the Applicant on the same day it was made, and that, the Applicant is playing delay tactics in this Court.

In the alternative, she prayed that, should this Court grant the adjournment sought by the applicant's counsel, but the same should be granted with costs to the Respondent in accordance with Rule 46 (2) of the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 (as amended by GN. 107 of 2019).

Since Mr. Samwel had submitted that he only knew of the decision of the Court of Appeal recently before the hearing date

fixed by this Court, and given that he has not been able to communicate with his clients regarding its implication to the application at hand, this Court overruled the objection. It proceeded to grant the prayer for adjournment without costs, for reasons which I need not reproduce here. The matter was, therefore, fixed for hearing on the 12<sup>th</sup> March 2020.

On the material date fixed for the hearing of this application, the Applicant continued to enjoy the services of Mr. Samwel, while Ms. Mariam Said appeared for the Respondents. At the hearing of the parties, Mr. Samwel prayed to withdraw the application from the Court under Order XXXIII rule 1, and 2 (a) and (b) of the Civil Procedure Code. His reference to Rule XXXIII of the CPC was due to the fact that the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 (as amended by G.N. 107 of 2019) do not contain a specific rule on which such a prayer could be based.

Indeed, the of the High Court (Commercial Division) Procedure Rules, GN. 250 of 2012 (as amended by G.N. 107 of

2019), have given room to rely on the Civil Procedure Code in case there is a *lacuna* in the Rules.

Mr. Samwel submitted that, the prayer to have the matter withdrawn from this Court was triggered by the Court of Appeal Decision, in the Case of **Maweni Limestone Limited v DAMATICO General Supply, Civil Appeal No. 28 of 2018 (Unreported)**, which was delivered on 17<sup>th</sup> February 2020. He stated that, this decision was served on him on the 5<sup>th</sup> of March 2020, when he received the Respondent's counter affidavit.

Mr. Samwel submitted that, the decision has pre-empted the application by reducing the decretal sum (**TZS 4,350,221,674**) which the Applicant was entitled to be paid by the Respondent, to **TZS 273,000,000/=**. Initially, the Applicant had succeeded in a Civil Case, **DAMATICO General Supply v Maweni Limestone Limited**, Civil Case No.5 of 2016. It was submitted, therefore, that, already, the Applicant had been paid **TZS 387,000,000/-** by way of a garnishee order absolute dated 2<sup>nd</sup> January 2019, and which was executed on 25<sup>th</sup> January 2019.



Responding to Mr. Samwel's submission, Ms Mariam submitted that, while she was not opposed to the prayer to have the application withdrawn from the Court, the same is to be with costs to the Respondent.

Her prayer for costs was based on the fact that, the appeal case which was filed in the Court of Appeal to challenge the Civil Case No.5 of 2016, between the Respondent and the Applicant herein, was a fact known to the Applicant. It was known from the time when it was instituted, to the time when its judgement on appeal was handed down on 17<sup>th</sup> February 2020.

Ms Miriam submitted, further, that, the Applicant was duly represented in that appeal and was well aware of that fact, yet the applicant proceeded to file a **Miscellaneous Commercial Cause No.6 of 2020** in this Court, from which this Application arose. She thus pressed for costs to be paid to the Respondent who had gone ahead to the extent of filing a counter affidavit on 4<sup>th</sup> March 2020.

In a brief rejoinder, Mr. Samwel submitted that, he was not made aware of the Court of Appeal's Appeal No. 28 of 2018 prior to the filing of the Application because he was not engaged to

represent the Applicant in the Court of Appeal. He only knew of the decision after being served the counter affidavit by the Respondent.

Mr. Samwel further submitted that, since the Applicant has acted promptly, the prayer to withdraw the application from this Court should be granted without costs. Besides, he submitted that, when the parties appeared last time before this Court, he had communicated with the counsel for the Respondent that, they were intending to withdraw the matter from the Court. However, Mr. Samwel did not produce any evidence to that effect.

I have carefully considered the submissions made by the learned counsel for the parties herein. The only issue I am faced with is whether the Respondent is entitled to costs. The question of costs arose as a result of an unopposed application by the Applicant's Counsel to withdraw the current application from this Court.

I am reminded of a Kenyan decision in the case of **Pacis Insurance Company Ltd v Francis Njeru Njoka [2018] eKLR**, where Madam Justice Ngetich, held that:

"A party, having been caused by the other to participate in a suit, is entitled to costs incurred in the event the party

instituting the suit decide to withdraw it unless the parties agree otherwise or Court on exercising its discretion decide otherwise after giving the parties opportunity (sic) to submit on costs."

Indeed, as a general rule, it is trite that an award of costs will generally follow the results of a litigation, whether such was withdrawn from the Court or it was prosecuted to its finality. However, it was as correctly pointed out by this Court in the Case of ***CMA CGM (Tanzania) Ltd v Insignia Limited; Misc. Commercial Application No. 168 of 2016***, an award of costs is at the discretion of the Court.

In that particular case, the Court had the following to say, on page 10 of the typed ruling:

" ... in the adversarial system of adjudication to which our country belongs, the position is that costs are awardable at the discretion of the Court and, the general rule [is] that, an unsuccessful party must be condemned to pay costs in favour of the successful party. That principle can be gleaned in section 30 (1) of the CPC and, under sub-section (2) thereof. Where the Court directs that any costs shall not follow event, it shall state its reasons in writing."

The Court expounded further as to what does the usual phraseology: "*Cost shall follow the event*", mean. Quoting what this

Court (Biron, J.) said, in the case of **Hussein Janmohamed & Sons Vs. Twentsche Overseas Trading Co. Ltd. [1967] 1E.A, 287 at pg. 289 – 290**, relying on *Mulla: the Code Mulla, 18<sup>th</sup> Edition*, 2011, his Lordship observed as follows:

"The general rule is that costs shall follow the event unless the Court, for good reason, otherwise orders. This means that, the successful party is entitled to costs unless is guilty of misconduct or there is some other good cause for there not awarding costs to him. The court may not only consider the conduct of the party in the actual litigation, but the matters which led up to the litigations."

For more on this, see also: **In the matter of Independent power Tanzania Ltd and In the matter of a Petition by a creditor for an Administration Order by Standard Chartered Bank (Hong Kong) Ltd, Miscellaneous Civil Cause No. 112 of 2009 (Utamwa, J., (Unreported).**

In the application before me, it is clear that the same is being withdrawn from this Court because it has been overtaken by events. However, as rightly stated by Ms. Mariam, the event prompting its withdrawal was not something unknown to the Applicant.

In fact, since there was a pending case in the Court of Appeal to challenge the High Court, Civil case No.5 of 2016, which was the root cause of the decree from which the **Misc. Commercial Cause No.6 of 2020** arose, and, thereafter, this application, it was improper, on the part of the Applicant to file this Application or even the **Misc. Commercial Cause No.6 of 2020** upon which it is based. Such fact was not even disclosed to this Court by the Applicant.

The Applicant's learned counsel has submitted that he was unaware of the fact concerning the Appeal filed at the Court of Appeal, and, whose decision was handed down by the Court of Appeal on 17<sup>th</sup> February 2020. Indeed, the legal learned counsel might have been unaware, but his client was well informed.

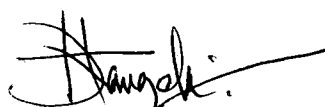
Since the case filed by a client belongs to that client and not the legal counsel representing such a client, it follows that, Mr. Samwel's submission regarding lack of knowledge of the appeal, which was being prosecuted in the Court of Appeal, cannot be used to shield the client who knew about it very well, and, yet, proceeded to file this Application in this Court.

In view of the above, the Court finds that, the submissions by Ms. Mariam regarding costs are cogent and costs must follow the event. That being said, this Court proceeds to pronounce the following orders:

(a) That, upon the Applicant's prayer, **Misc. Commercial Cause No.20 of 2020**, is hereby marked "**Withdrawn**".

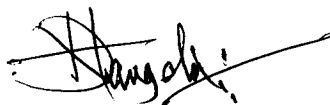
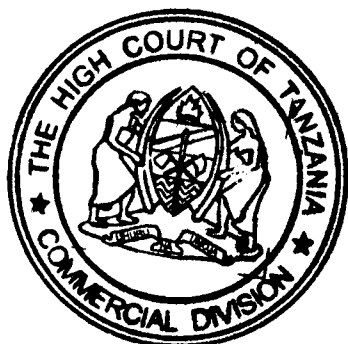
(b) That, the Order of withdrawal is entered with costs to the Respondent's counsel.

**It is so ordered.**



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**D. J. NANGELA**  
**JUDGE, HIGH COURT OF TANZANIA**  
**27/03/2020**

Ruling delivered on this **27<sup>th</sup>** day of **March 2020**, in the presence of the Mr. Joseph Samwel, Advocate for the Applicants and also holding brief for Ms. Mariam Said, Advocate for the Respondent.



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**D. J. NANGELA**  
**JUDGE, HIGH COURT OF TANZANIA**  
**27/03/2020**