

IN THE HIGH COURT OF UNITED REPUBLIC OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISC COMMERCIAL APPLICATION NO. 77 OF 2023

(Arising from Consolidated Commercial Reference No. 16 and 19 of 2022)

EXIM BANK (TANZANIA) LIMITED.....APPLICANT

VERSUS

M& FIVE B HOTELS AND TOURS LTD.....RESPONDENT

RULING

Date of last ruling: 20/07/2023

Date of ruling: 08/09/2023

AGATHO, J.:

This ruling in respect of applicant's application for leave to appeal to the Court of Appeal of Tanzania (CAT) against the ruling of this court in Consolidated Commercial References No. 16 and 19 of 2022 which ended in favour of the respondent. The applicant being unimpressed with the ruling wish to appeal to the CAT hence this application for leave to appeal to the CAT. The application was by way of chambers summons supported by an affidavit sworn by Mr Gaspar Nyika, the counsel for the applicant. The respondent protested it through a counter affidavit deposed by her counsel Mr Mpaya Kamara.

The parties were under legal representation of counsel Mr Gaspar Nyika, for applicant, and Mr Emmanuel Saghana and Mr Mpaya Kamara, for the respondent. The hearing of the application was conducted by way of written submissions. And the parties complied with filing schedule set.

In determining this application regard was given to the affidavits, the law and submissions made by the learned counsel. Admittedly, the court could not reproduce in verbatim the counsel's submission. But it suffices to say that the same were taken into consideration.

In his written submission to support the application Mr Nyika submitted that, the application at hand has presented six points of law or issues of general importance worth to be examined by the CAT. He referred this court to the grounds set out in paragraph 15(a) to (f) of the affidavit in support of the application and argued that they present an arguable case before the CAT. He identified the following issues for determination by the CAT:

- (1) Whether a suit for specific and general damages on the alleged breach of a credit facility agreement (contract) where parties had not agreed in the contract on the specific amount of damages applicable in case of breach is a suit for liquidated damages.
- (2) Whether a taxing Officer is vested with jurisdiction to determine taxation proceedings after a notice of appeal has been filed at the CAT.
- (3) Whether an order by a trial Judge in the judgment awarding costs to two advocates is as good as the certification required by the provision of Rule 49 of the Advocates Remuneration Order, 2015.

- (4) Whether different schedules of the Advocates Remuneration Order, 2015 can be applied in taxation proceedings for the same matter.
- (5) Whether attendance fees can be issued in addition to instruction fees on the same matter; and
- (6) Whether the amount of TZS 190,000,000/= awarded as instruction fees was not excessive or exorbitant in the circumstances of the case.

In the views of the applicant's counsel the above are legal issues arising from the matter which are worth being brought to the attention of the CAT. He invited the court to consider the decision of the CAT in **Hamisi Mdida Said Mbogo v Registered Trusteed of Islamic Foundation, Civil Appeal No. 232 of 2018 CAT at Tabora, at page 11**, the case of **MS Airport Properties Limited v The Registrar of Titles and AG, Civil Application No. 389/17 of 2019 CAT at DSM** at page 6 and the case of **Rutagatina C.L. v the Advocates Committee and Clavery Mtindo Ngalapa, Civil Application No. 98 of 2010 CAT** where it was held that, it is trite law that in an application for leave the applicant must demonstrate that there are some arguable points of law or matters of general importance emanating from the impugned decision to convince the court to exercise its judicious discretion to grant it.

To impress the court, Mr Nyika, the counsel for the applicant cited another CAT case of **Wambele Mtamwa Shamte v Asha Juma, Civil Application No. 45 of 1999 CAT**, which held that, what is crucially important is a determination that there are prima facie grounds meriting an appeal based in the material put forward by the applicant in notice of motion

and the supporting affidavit there exist a legal point that deserve consideration by the CAT. He reiterated his submission that legal points raised in paragraph 15 of the affidavit in support of the application there exist legal points that deserve consideration by the CAT.

Submitting further the learned counsel for applicant submitted that, the application for leave does not involve a rehearing of the matter for which leave to appeal is being sought but the court should decide whether the said proposed grounds are worthy of the consideration by the CAT. He reasoned that the court does not have to determine the merit of the grounds stated in paragraph 15 of the affidavit, but it should rather assess whether there are arguable grounds meriting an appeal as it was held in **Hamisi Mdida Said** (supra). To cement his argument the learned counsel for applicant supported his submission by referring to the case of **Bulyanhulu Gold Mine Limited and Two Others v Petrolube (T) Limited and ISA Limited, Civil Appeal No. 364/16 of 2017 CAT at DSM** at page 15 where the court held that deciding at the stage of applying for leave whether the grounds raised have merits or not is to travel beyond the mandate of the court faced with such an application. Such a court should confine itself to the determination whether the proposed grounds raise an arguable issue(s) before the Court and leave it to the appellate court in the event leave is granted to determine the merits or otherwise of such proposed issues.

Submitting on the issue of allowing taxation to be conducted under different schedules of Advocate Remuneration Order, the learned counsel attacked the decision of this court which allowed the taxation to be conducted under different schedules, and the issue whether instruction fees

can be granted together with attendance fees. To support his argument, he referred this court to the case of **Jireys Nestory Mutalemwa v Ngorogoro Conservation Area Authority, Civil Appeal No. 154 of 2016, CAT at Arusha** at page 15. To Mr. Nyika all issues raised at paragraph 15 of the affidavit supporting the application can only be tested if leave is granted by this court as they are matters of law worth being determined by the CAT. He prayed that leave to appeal to the CAT be granted.

Mr Saghan and Mr Kamara, advocates for the respondent in their reply to the submission by the applicant's counsel began by giving a brief background to the application. The learned counsel for the respondent submitted while citing the case of **Justice Njunwa Majula v Eustidia Lweikiza Majula Misc. Civil Application No.01 of 2022 HCT at Bukoba** at page 7 where it was held that:

"This court must warn itself that its duty is not to correct its own errors in law or facts through the impugned High Court judgment but rather to see if the applicant has really registered the pure points of law worthy to be considered by the Court of Appeal in the intended appeal."

While this court finds the above excerpt to be a correct position, in the application it is concerned with a determination whether the legal points raised by applicant have substance that ought to be examined by the CAT.

The respondent's counsel submitted that the preconditions for grant of leave to appeal are: first, grounds of appeal raise issue of general importance

or novel point of law. Second, the applicant must show that there is prima facie case of arguable appeal. Third, the applicant must show that the grounds of appeal raise issue of public importance as per **Hamisi Mbogo** and **Bulyanhulu's cases** (supra). The learned counsel submitted further that, the question for determination is whether the grounds adduced under paragraph 15 of the applicant affidavit meet those prerequisites for grant of leave to appeal to CAT.

According to Mr. Saghan and Mr Kamara none of grounds raised in paragraph 15 of the affidavit in support of application meet the above stated criterion. To demonstrate this, they submitted against the first ground for leave that the applicant is merely seeking CAT's interpretation of the term liquidated sum and determination whether the contentious proceedings for liquidated sum includes a suit for specific and general damages arising from an alleged breach of credit facility agreement or a contract in which parties had not agreed on the amount of damages payable in case of breach. In the respondent's view interpretation of such terminology has been done in the case of **Southern Highland Earthworks Company Ltd v UAP Insurance Tanzania Ltd, Taxation Reference No. 01 of 2021 HCT at Songea**. It is the counsel for respondent's submission that interpretation of liquidated sum already has a precedent. On this point, the applicant rejoined that the precedent cited is the decision of the High Court not of the CAT. Moreover, there are conflicting decisions of the High Court such as that of **Well Worth Hotels and Lodges Limited v East Africa Canvas Company Limited and 4 Others, Taxation Reference No. 5 of 2022** where the court held liquidated claim resulting from the parties' agreement

or else it should be that which can precisely be determined by operation of law. That in the applicant's view is contrary to what was held by this court in the **Exim Bank (Tanzania) Limited v M & Five B Hotels and Tours Ltd, Consolidated Commercial References No. 16 and 19 of 2022** (impugned ruling) which found that the claim based on credit facility agreement under the original suit is a claim for liquidated sum. Again, they cited **Southern Highland Earthworks Company's** decision as being a correct position that liquidated sum is different from a claim of specific damages, and that liquidated claim must be agreed by the parties in advance and must be included in a contract.

The respondent's counsel admitted that they are aware that, at this stage courts should not determine the merits of the grounds, but to test the grounds adduced against the criteria or conditions for grant of leave to appeal to the CAT.

Opposing the second ground whether a taxing officer is vested with jurisdiction to determine proceedings when a notice of appeal has been filed at the **CAT**, the respondent's counsel submitted that this court correctly held that the law does not categorically bar taxation to be entertained even if there is notice of appeal. The court cited **Rose Mkeku (the Administratrix of the estate of the late Simon Mkeku) v Perex Shabbirdin, Misc. Land Application No. 89 of 2021 HCT Sub registry of Mwanza**. The applicant in her rejoinder submitted that the issue to be determined at this stage is whether the point raised is a pure point of law or a point of general importance and not its merit which will be determined by the CAT. The court subscribes to the applicant's view that the issue is worth to be determined

by the CAT as it is a point law. So far it is the HCT that has examined the matter and there is no consensus yet.

The applicant's third ground which was equally resisted by the respondent was whether an order by the trial judge in the judgment awarding costs to two advocates is as good as certification required under Rule 49 of the Advocates Remuneration Order, 2015. While the respondent is protesting that ground under the guise that the court has given correct interpretation, the applicant holds a different view that the certification under Rule 49 of the Advocate Remuneration Order lacks a prescribed form. The question to be clarified by the CAT is whether the trial judge's holding that the suit is dismissed with costs to two advocates is a certificate as per the Rule 49 of the Advocated Remuneration Order. In the court's view, this point too is of general importance that the CAT should provide guidance.

The applicant's fourth ground for seeking leave is whether it is proper taxing under different schedules and charging instruction fees and attendance fees separately and in the same proceedings. This was blasted by Mr. Saghan and Mr Kamara that such issue need not to be tested by the CAT. The respondent's counsel interestingly submitted that the 8th and 9th schedules provide for different items. The court separate instruction fees and attendance fees. The ninth schedule to the Advocates Remuneration Order provides for instruction fees. But it does not provide for attendance fees. In the respondent's view, that is the reason why the court invoked the 8th schedule which is for items whose scale have not been provided for. It includes costs for attendance. The respondent counsel cited the case of

Ujagar Singh v Mbeya Cooperative Union (1968) H.C.D 173 which held that:

"An instruction fee is for work done in preparing a case before trial."

On the same point, they cited **Juma Mganga Lukobora and Others v Tanzania Medicine and Medical Devices Authority (TMDA) and Others, Misc. Civil Application No. 642 of 2020 HCT at DSM** where the court held that:

"Instruction fee is charged for legal representation in the court. There are other activities of which the Advocates Remuneration Order has provided for specific fees scale."

The learned counsel for the respondent submitted that using two schedules in the same taxation proceedings and grant attendance fees separately from instruction fees is not a new notion. In rejoinder Mr Nyika, Advocate for the applicant, submitted that the cases cited by the respondent are High Court decisions, there are no CAT precedents on that issue. One can hardly disagree with the applicant's caution that the court at this stage is not determining the merits of these grounds as that will be done by the CAT on appeal.

Lastly, the sixth ground was that whether the amount of TZS 190,000,000 awarded as instruction fee was excessive. The respondent disagreed with the applicant's contention that the amount was excessive, and to them the court was right in granting it. The basis of their argument was that the amount awarded is 3% of the suit amount and the same is in accordance with the law, which is the 8th item of the 9th schedule of the Advocates Remuneration Order. The applicant rejoined that the issue is not

merit of this ground rather whether the point raised is of general importance. The applicant opined that the point is arguable and hence worth to be examined on appeal at the CAT. Indeed, this court sides with the applicant, and it is of the settled view that the air will be cleared on this point if the CAT provides guidance.

Now having sketched the learned counsel's submissions and the position of the law as held in various cases include **Hamisi Mdinda Said Mbogo's case** (supra) at page 9 and reiterated in the case **Bulyanhulu Gold Mine Limited v Petrolube (T) Limited** at page 9, the court is enjoined to answer the question whether the grounds averred in the affidavit indeed raise issue of general importance or novel point of law, whether the applicant has shown that there is prima facie case of arguable appeal, and whether the applicant has shown that the grounds of appeal raise issue of public importance. Without meandering, and as hinted herein above, it is the court's considered view that paragraph 15 of the affidavit in support of application contains key grounds worth grant of leave to appeal to the CAT, to enable it to examine those novel points of law and or issue of general importance and provide guidance. These issues are:

- (1) Whether a suit for specific and general damages on the alleged breach of a credit facility agreement (contract) where parties had not agreed in the contract on the specific amount of damages applicable in case of breach is a suit for liquidated damages.

- (2) Whether a taxing Officer is vested with jurisdiction to determine taxation proceedings after a notice of appeal has been filed at the CAT.
- (3) Whether an order by a trial Judge in the judgment awarding costs to two advocates is as good as the certification required by the provision of Rule 49 of the Advocates Remuneration Order.
- (4) Whether different schedules of the Advocates Remuneration Order, 2015 can be applied in taxation proceedings for the same matter.
- (5) Whether attendance fees can be issued in addition to instruction fees on the same matter, and
- (6) Whether the amount of TZS 190,000,000/= awarded as instruction fees was not excessive or exorbitant in the circumstances of the case.

For the foregoing reasons, the court order as follows:

- (1) That the leave to appeal to the Court of Appeal is granted.
- (2) That applicant is given 14 days from the date of receiving a copy of this ruling to file their appeal to the Court of Appeal.
- (3) Given the circumstance of this case, each party shall bear its costs.

Order accordingly.

DATED at **DAR ES SALAAM** this 8th Day of September 2023.



U. J. AGATHO
JUDGE
08/09/2023

Date: 08/09/2023

Coram: Hon. U.J. Agatho J.

For Applicant: Idrissa Juma, Advocate

For Respondent: Idrissa Juma, Advocate holding brief of Emmanuel Saghan, Advocate

C/Clerk: Cosmas

Court: Ruling delivered today, this 8th September 2023 in the presence of Idrissa Juma, counsel for the Applicant, also holding brief of Emmanuel Saghan, counsel for the Respondent.



U. J. AGATHO
JUDGE
08/09/2023