IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: MROSO, J.A., NSEKELA, J.A., And KAJI, J.A.)

CIVIL APPLICATION NO. 163 OF 2004

BETWEEN

VIP ENGINEERING AND MARKETING LTD. ..... APPLICANT
VERSUS
MECHMAR CORPORATION (MALAYSIA)
BERHAD OF MALAYSIA..... RESPONDENT

(Application arising from the proceedings of the High Court of Tanzania at Dar es Salaam District in Misc. Civil Cause No. 254 of 2003
Before Honourable Ihema, J.)

R U L I N G

NSEKELA, J.A.:

In this Notice of Motion, the applicant seeks to move this Court under Rule 4 (3) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993 to exercise its revisional jurisdiction to revise the proceedings in Miscellaneous Civil Cause No. 254 of 2003. The applicant had six grounds for seeking the revisional jurisdiction of the court including –

1. There exists serious irregularities that amount to exceptional circumstances in the conduct of the High Court proceedings in Miscellaneous Civil Cause No. 254 of

2003 which call for the immediate intervention of the highest Court before justice is irretrievably hijacked.

2. The High Court cannot be seized with jurisdiction to proceed to the oral hearing of the matters before the relevant pleadings are completed, because both the Arbitration Rules and the Civil Procedure Code require the Court first to give notice to the opposite party to show cause why the relief sought should not be granted to the other party.

3. The High Court cannot have the time to make an accurate and complete record of the proceedings if all the applications are simultaneously argued together orally.

4. Since there was an order of the Court made by the 1st Judge, namely Madam Judge Oriyo and which was known to the present Judge, namely Hon. Ihema, J. to the effect that the

> proceedings in Misc. Civil Cause file No. 49 of 2002 to the High Court from the Court of Appeal, and as the present judge claims that he was not aware that Misc. Civil Case file No. 49 of 2002 had already been returned from the Court of Appeal, the present judge had no jurisdiction to proceed with hearing of the matters in Miscellaneous Civil Case No. 254 of 2003 in contravention of the Order of the Court before determining the present applicant's prayer for consolidation."

The hearing of the application could not proceed because the respondent, through the learned advocate, D. Kesaria, took a preliminary objection based on two reasons, namely –

> (1) Pursuant to the Written Laws (Misc. Amendments) Act (No. 25 of 2002) the application herein for revision is expressly and specifically prohibited.
>
> (2) The application is an abuse of the process of the Court

intended to derail and delay the High Court proceedings.

Mr. Kesaria, learned advocate for the respondent, very forcefully submitted that Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002 was a complete bar to an application for revision since it is prohibited. The learned advocate submitted to the effect that the respondent filed in the High Court Misc. Civil Cause No. 254 of 2003 for the enforcement of an arbitration award. However, these proceedings could not proceed since the applicant had filed applications for setting aside the award. He added that the parties had appeared on the 1.12.2004 before Ihema, J., who ordered that the learned advocates appear before him on the 7.12.2004 for hearing of submissions. This was not possible since the applicant had already filed revisional proceedings before this Court. The learned advocate also complained that the application was an abuse of process of court. Mr. Kesaria could not comprehend under what provision of the law the applicant could seek direction and guidance from the Court. He added that there are no decisions of the High Court that can come before the Court for revision. The learned advocate bitterly complained that the application herein was aimed at derailing, as he put it, the proceedings before the High Court.

On his part, Mr. C. Tenga learned advocate for the applicant, with equal force, vigorously countered the submissions made by Mr. D. Kesaria. The learned advocate contended that Mr. Kesaria had completely missed the import of the application for revision. He submitted that the applicant did not target any particular interlocutory decision or order of the High Court. Rather, it was the apparent total disregard by the High Court of the procedural rules thus leading to confusion. For instance, he added, two judges have dealt with Misc. Civil Cause No. 254 of 2003 and had made certain Orders which have not been complied with. Mr. C. Tenga concluded that this is the sort of procedural disorder which has to be sorted out now and this can only be done by way of revisional proceedings in this Court. Mr. Tenga strongly relied on the decision of this Court in Civil Revision No. 1 of 1999 between **(i) Fahari Bottlers Ltd. (2) Southern Highlands Bottlers Ltd. v. (1) Registrar of Companies (ii) National Bank of Commerce (1997) Ltd.** (unreported).

Mr. Kesaria's preliminary objection is based on Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 25 of 2002. It provides as follows –

> " (d) no appeal or application for revision shall lie against or be made in

> respect of any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the criminal charge or suit." (emphasis added)

Under Section 4 (3) of the Appellate Jurisdiction Act, 1979 as amended by Act No. 17 of 1993, the Court is empowered to call for and examine the record of any proceedings before the High Court for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, order or any other decision and as to the regularity of any proceedings of the High Court. Mr. Tenga, very seriously complained that the proceedings in the High Court were fraught with irregularities rendering them difficult to follow. Consequently remedial measures by way of revision were imperative without waiting for a final decision at the end of the trial of the suit.

It is evident that Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended bars appeals or applications for revision against any preliminary or interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. So the first hurdle that the applicant has to jump over is whether or not the application for revision is competent.

It is common ground that so far the High Court has not made any preliminary or interlocutory decision or order in respect of this matter. A question we ask ourselves, does section 5 (2 (d) of the Appellate Jurisdiction Act as amended bar all applications for revision even where the High Court has not made any interlocutory order or decision? With respect, we do not think so! Assuming, without deciding anything since we do not have the full facts placed before us, if the purported irregularities are in fact present, should the proceedings in the suit still continue unremedied? This Court, in Civil Revision No. 1 of 1999 between **(1) Fahari Bottlers Ltd. (2) Southern Highlands Bottlers Ltd. v. The Registrar of Companies (2) The National Bank of Commerce (1997) Ltd.** (unreported) made the following pertinent observations:

> "It is obvious to us that the proceedings in the High Court were affected by confusion and that the confusion was deepened by the changes of judges who presided over the proceedings. Three judges were involved at various stages of the proceedings. When such a situation occurs, there is likely to be confusion, unless the succeeding judges thoroughly study the record of previous

> proceedings. This does not seem to have been done in this case. Moreover, no reasons are given on the record to explain change of judges, especially when the individual calendar system requires that once a case is assigned to an individual judge or magistrate, it has to continue before that particular judge or magistrate to its final conclusion, unless there are good reasons for doing otherwise. The system is meant not only to facilitate case management by trial judges or magistrates, but also to promote accountability on their part. The unexplained failure to observe this procedure in this case is certainly irregular, to say the least. Such irregularities and the accompanying confusion in our view are not amenable to the appellate process for remedy. They are amenable to the revisional process."

This Ruling was delivered on the 12.3.99 some three years before Act No. 25 of 2002 came into force. The prohibition brought about by Act No. 25 of 2002 was in respect of appeals or applications for revision against any

interlocutory decision or order of the High Court unless such decision or order has the effect of finally determining the suit. There is no interlocutory decision or order which is being sought to be revised. There is a serious general complaint by the applicant that so far the proceedings in the High Court are in a state of confusion and being conducted in a haphazard manner. Apparently the parties do not know what Court Order to follow!

With this background information, though scanty for obvious reasons since we are only dealing with the preliminary objection, we are of the view that Section 5 (2) (d) of the Appellate Jurisdiction Act, 1979 as amended, is not applicable to such proceedings. We therefore overrule the preliminary objection with costs. Hearing of the substantive application for revision will be heard on a date to be fixed by the Registrar.

DATED at DAR ES SALAAM this 12th day of May, 2005.

J.A. MROSO
JUSTICE OF APPEAL

H.R. NSEKELA
JUSTICE OF APPEAL

S.N. KAJI
JUSTICE OF APPEAL

I certify that this is a true copy of the original.

(S.M. RUMANYIKA)
DEPUTY REGISTRAR