

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM**

MISC. COMMERCIAL APPL. NO. 173 OF 2021

LOCUS DEBT MANAGEMENT LIMITEDAPPLICANT

VERSUS

SYMBION POWER TANZANIA LIMITED.....RESPONDENT

Date of Last Order: 19/11/2021

Date of Judgment: 22/11/2021

RULING

NANGELA, J.:

The Applicant herein has brought an application under a certificate of urgency. The Application is brought under Order XXXVI, Rule 1, Order XXXVII, Rule 2 (2), section 68 (e) and section 95 of Cap. 33 R.E 2019.

The applicant is praying for orders of this Court as follows, that:

- (a) This Honourable Court be pleased to issue arrest warrant to arrest

the Respondent's Principal Officers in the name of Magresvaran Subramaniam, Mr. Paul David Hinks and Mr. Shailen Shashkant Salgaonkar, who are the directors of the Respondent, and bring them before the Court to show cause why they should not furnish security for appearance.

(b) The Honorable Court be pleased to attach before judgment of the Respondent's second tranche payment by the Government of the United Republic of Tanzania (henceforth "the Government") which is due in satisfaction of the Deed of Settlement entered into between the Respondent and the Government in May 2021.

(c) Cost of this Application be upon the Respondents.

(d) Any other relief(s) this Honourable Court deems fit and just to grant.

The Applicant's chamber summons is supported by an affidavit deposed by one Crispin T. Meela which was filed on the 17th day of November 2021. The Respondent contested the application by filing her counter affidavit.

Before I go to the essence of this application, I find it apposite, as per the pleadings filed in this Court, to set out its factual background, albeit in brief. Applicant is a private entity incorporated under the laws of Tanzania. The Respondent is, as well, a private entity incorporated under the laws of Tanzania and carries out its business of electricity power generation, transmission and distribution.

It is the Applicant's averment that, the Respondent owes the Applicant a sum of **USD (\$) 30,000,000/-**, being outstanding balance debt for the goods and services offered to the Respondent.

It is the Applicant's assertion that, while on its part there was 100% performance of its obligations, the Respondent failed, neglected or refused to discharge her obligations to settle the claims held by the Applicant on the pretext that the latter was yet to be paid monies it was owed by the Government of the United Republic of Tanzania.

On the 21st day of May, 2021, however, the Respondent entered into a Deed of Settlement with the Government and the Tanzania Electricity Supply Company Limited, (TANESCO), wherein the Applicant herein formed part of the said Deed of Settlement.

In the said Deed, it is alleged that the Respondent agreed to settle its accounts with the Applicant, immediately upon being paid the first tranche meant for catering for payments of debts of the Respondent's local creditors.

It is a stated fact that, in August 2021, the Respondent was paid the first tranche by the Government

but for unknown reasons, the Respondent failed to settle its accounts with the Applicant.

Noting that the 2nd tranche is about to be paid to the Respondent anytime from now, the Applicant has approached this Court contending that, its business if being put on a frustrating path by the Respondent, whose Directors are all foreigners.

It is averred, however, that, the Respondent's Directors are about to leave the country and, under that circumstance, and if it is to be allowed to happen, the Applicant shall be delayed or denied access in the course of execution of any orders/ decree of this Court.

I think it is important to point out that, the Applicant has a pending matter before this Court, **Misc. Commercial Cause No.63 of 2021**. It is thus from those premises the application at hand was preferred.

On the 19th November 2021, the date when this application was set for hearing, the Applicant was represented by Mr. Flordious Mutungi, learned Advocate,

while the Respondent enjoyed the services of Advocates. Mr. Emmanuel Makene and Mr. Boniface Meli. I invited the learned counsels to address the Court by way of oral submissions.

In his oral submissions, Mr. Mutungi adopted the affidavit of Mr. Meela and told this Court that, the Applicant has brought this matter as an urgent one because, the Respondent is a foreign entity and, its directors are non-citizens of Tanzania with no immovable properties in the country.

He contended that, having undertaken to pay its local creditors their amounts due, once paid 50% of an amount of money owed by the Government of Tanzania under a settlement Deed which the Respondent signed with the Government (on behalf of TANESCO), the Respondent was supposed to pay the local creditors, including the Applicant, a fact which was not the case.

Mr, Mutungu contended that, since the Applicant was not paid from the first tranche amounting to 50%,

which the Respondent received under the said Settlement Deed signed with the Government, and given that, the second tranche is likely to be paid within 7 days from now, then, there is all possibilities that the Respondent's Directors will leave the local limits of this Court's jurisdiction without paying its local creditors, the Applicant being one of them.

In view of those possibilities and their resultant effects, it was Mr. Mutungi's submissions that, the Applicant is seeking for an order that the Respondent's directors be made to furnish security or in the alternative, an order of attachment before judgment, of the second tranche payable by the Government to the Respondent.

He contended, therefore, that, in the absence of such orders as prayed in the chamber summons, the Applicant stands to suffer loss and hardship if the Respondent's directors leaves the local limits of this Court's jurisdiction.

For his part, Mr Makene contested the application partially. I say partially because, he did not, in principle, approve of the view that an arrest warrant should be issued against the Directors of the Respondent and bring them before the Court. In his view, that first prayer, in the chamber summons is uncalled for at this stage.

Mr. Makene contended that, the Respondent is fully committed to pay off its local creditors and, to show that commitment, the Respondent is ready to do so in lieu of the Order of arrest. He referred to this Court, a Deed of Settlement which the Respondent is said to have entered into with the Government of Tanzania, and, contended that, the Respondent has committed herself to ensuring that all local creditors are paid.

Before I go any further regarding what was submitted by the Respondent, let me take a pose and state that, although this Court was referred to the said Deed of Settlement all along, the same was not availed to the Court. That was a very unfortunate circumstance and

I did make an order that the Respondent counsel should, if he wanted to rely on the said Deed of Settlement, to bring it to the attention of the Court.

I did so because, although he claimed that it was confidential, if any court is to come up with informed decisions, it must be availed with all documents which the parties are referring to in their submissions.

I am glad that, the documents were made available to the Court. Having said that, Mr. Makene did also submit on the aspect of costs and urged this Court to make no orders as to costs.

In a rejoinder submission, Mr Mutungi noted that, in principle Mr. Makene was not objecting to the prayers sought in the Chamber Summons, save for the order calling for the arrest of the Respondent's Directors.

He observed, therefore, that, the Respondent seem to be ready to furnish security asked for by the Applicant, which, according to the affidavit in support of the Application, is a sum of **USD (\$) 30,000,000 (Thirty**

Million United States Dollars). However, Mr Mutungi pressed that; costs should be paid for this application because already the applicant has incurred costs.

Having heard submissions from both learned counsels and having looked at the affidavit and the supporting documents availed to me, including those which I ordered that they be made available to the Court, the issue is whether I should grant the application and, if I do so, whether I should order costs.

To start with the issue whether I should grant the application or not, I am inclined to grant the application but not in the manner the first prayer is couched since, as it might be seen in the submissions by the Respondent, the Respondent is ready to furnish security any time as may be ordered by this Court.

As regards costs, it is a trite law that costs are awarded at the discretion of the Court. Section 30 (1) and (2) of the Civil Procedure Code, Cap.33 R.E 2019 is very much alive to that. In any case, if costs are to be refused,

then, there must be reasons advanced in support of that refusal.

Otherwise, where there are no reasons advanced regarding why the Court should not award costs, costs will normally follow the event. That is in essence, the gist of what section 30 (1) and (20) of the Civil Procedure Code, Cap.33 R.E 2019 provide in respect of award of costs. For an elaborate discussion on costs, see the cases of **Njoro Furniture Mart vs. Tanzania Electricity Supply Company Ltd** [1995] T.L.R 205 and **Kioka Ltd vs. De Angelis** [1969] EA 7; **Gulf Aggregate (T) Ltd vs. China Railway Contraction Engineering Group Co. Ltd**, Commercial Case No.135 of 2019, (unreported) and **Joseph Eliuta Mahawi and Another vs. Serengeti Breweries Limited**, Misc. Comm. Appl. No.138 of 2021 (unreported).

As I stated in this ruling, the Respondent counsel has not said why each party should bear its own costs. In the cases of **Gulf Aggregate** (supra) and **Joseph Eliuta**

Mahawi and Another vs. Serengeti Breweries Limited, (supra), this Court, referring to a holding of the Court in **Pacis Insurance Co. Ltd vs. Francis Njeru** [2018]eKLR, was of the view that:

"A party having been caused by the other to participate in a suit, is entitled to costs incurred ... unless parties agree otherwise or Court on exercising its discretion decide otherwise after giving the parties opportunity to submit on costs."

In view of the above, I cannot accede to the prayers made by Mr Makene to the effect that costs should be waived. Since the acts of the Respondent have necessitated the Applicant to incur costs of engaging an advocate to file and defend this application, then upon granting this application, interest of justice would demand that costs should follow the event.

For that reasons as aforesaid, this Court settles for the following orders, to wit, that:

1. This Application is hereby granted to the extent that, the Respondent is hereby ordered to deposit, with the Registrar of this Court, a sum of **USD (\$) 30,000,000 (Thirty Million United States Dollars)** by **24TH November 2021 end of business hours**, pending determination of Misc. Commercial Cause No.63 of 2021.
2. If the order of this Court stated in No.1 above is not fulfilled, then, subsequent orders adverse to the Respondent's directors shall follow without further recourse, once this Court is so notified by the Applicant.
3. Costs of this Application are to be borne by the Respondent.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 22nd DAY OF
NOVEMBER 2021





DEO JOHN NANGELA
JUDGE