

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

CIVIL APPLICATION NO. 73 OF 2002
In the Matter of an Intended Appeal

BETWEEN

TANZANIA REVENUE AUTHORITY. APPLICANT

AND

TANZANIA BREWERIES LTD. RESPONDENT

(Application for stay of execution of
the decree from the decision of the
High Court of Tanzania (Commercial
Division) at Dar es Salaam)

(Kalegeya, J.)

dated the 7th day of June, 2001

in

Commercial Case No. 260 of 2001

R U L I N G

RAMADHANI, J.A.:

The respondent company is a joint venture with the Government of the United Republic of Tanzania managed by a foreign company called BAVEMEN on a payment of a management fee. The respondent company has been granted a certificate of approval as an investor and was given a tax holiday of five years. Under the Income Tax Act, the respondent company is required to charge a withholding tax of 20% on the management fees and pay it to the applicant authority.

The question is the interpretation of section 22 of the National Investment Promotion and Protection Act, 1990, (NIPPA) now replaced by the Tanzania Investment Act, 1997: whether the tax holiday applies also to the withholding tax.

The respondent company's impression is that the tax holiday applies to the withholding tax, too. The applicant holds a different view that it does not and so claimed the withholding tax of the previous five years. That amount came to Shs. 4,742,794,531/=. So, the respondent company went to court and KALEGEYA, J. upheld them ordering the applicant to refund that amount. The applicant has appealed to this Court. Meanwhile, the applicant has filed this application to stay the execution of that decree pending the appeal.

For the applicants was Mr. Teemba, learned advocate, while Dr. Tenga appeared for the respondent. Mr. Teemba claimed that there is an important point of law to be decided in the intended appeal. As his second ground for seeking stay of execution Mr. Teemba submitted that the appeal has great chances of success. A third reason advanced was that the applicant would suffer irreparable injury if stay of execution is denied. Mr. Teemba said that the applicant is a Government Agent for collecting revenue used in running the country. He argued that if that amount is refunded then a colossal sum of money would be withdrawn from national development and that would cause irreparable injury.

I do not agree with Dr. Tenga in his submission that there has not been shown that there is an important point of law to be decided by this Court. Dr. Tenga conceded that KALEGEYA, J. has decided differently from KAPITI, J. in Mufindi Tea Co. v. Tanzania Revenue Authority, Misc. Civil Cause No. 139 of 1999 (unreported). That means that there are two opposing decisions of the High Court on the interpretation of section 22 of NIPPA. Undoubtedly that is an

important point of law to be settled by this Court. However, the existence of an important point of law, in itself, is not a compelling reason for staying execution.

I always find it difficult to say whether or not an appeal stands an overwhelming chance of success. Experience has shown me that there are a number of times you think that an appeal would be determined in a certain way but only to change mind after the hearing of all the submissions. So, I will not hazard a guess more so as I do not have details of the two opposing decisions of the High Court.

I do not agree with Mr. Teemba that the applicant would suffer irreparable injury if stay of execution is not granted. The money the applicant collects does not belong to it but goes into the Government coffers. Admittedly, as Dr. Tenga conceded, the applicant might have its own projected goals of amounts to be collected but failing to meet those is not irreparable injury.

On the other hand, Dr. Tenga claimed that it is the respondent who would suffer irreparable damage if that colossal sum is withheld from being used to advance its business. But all that I can say is that the respondent has already parted with that amount for some time now, anyway.

There is another reason which this Court uses in deciding whether or not to grant stay of execution, that is, balance of inconvenience: as between the two parties which one would be more inconvenienced if stay is granted. The two learned advocates, unfortunately, did not canvass this reason directly.

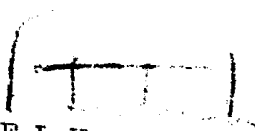
Dr. Tenga, from the bar, gave his experience of the difficulties involved in getting refunds from the applicant authority while stating that the respondent has always been prompt in meeting its payment obligations. Mr. Teemba also bragged on the ability of the applicant to refund whatever sums of money should that be ordered but did not allege that the respondent is a difficult taxpayer.

After hearing both sides and considering the fact that the amount of money involved is colossal, the best solution, in my opinion, is to order the applicant to pay that sum into the Court which will not have any inhibitions to surrender it to either party after the conclusion of the appeal. I make no order as to costs.

DATED ~~in~~ DAD ES SALAAM this 19th day of December, 2002.

A.S.L.RAMADHANI
JUSTICE OF APPEAL

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


(F.L.K. WAMBALI)
DEPUTY REGISTRAR