

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)
AT DAR ES SALAAM

CIVIL CASE NO. 99 OF 2003

MAUNGA SEED COMPANY (T) LIMITED PLAINTIFF

VERSUS

THE SECRETARY TO THE TREASURER
MINISTRY OF FINANCE & NATIONAL
PLANNING GOVERNMENT OF
THE REPUBLIC OF ZAMBIA 1ST DEFENDANT

THE SOLICITOR GENERAL
MINISTRY OF LEGAL AFFAIRS
GOVERNMENT OF THE
REPUBLIC OF ZAMBIA 2ND DEFENDANT

RULING

SHANGWA, J.

On 16th May, 2003, the plaintiff filed a suit against the defendants for breach of Memorandum of Understanding and for breach of Agreement. The memorandum of understanding

was made between the **GOVERNMENT OF THE REPUBLIC OF ZAMBIA, THE FOOD RESERVE AGENCY** on the one part, and **MAUNGA SEED COMPANY** and selected Millers on the other part. It is dated 7th February, 2002. The Agreement was made between the **GOVERNMENT OF THE UNITED REPUBLIC OF TANZANIA** and the **GOVERNMENT OF THE REPUBLIC OF ZAMBIA**. It is dated 22nd April, 2002.

The memorandum of understanding concerns the importation and supply of maize to cover a maize shortfall in Zambia during the 2000/2001 crop production season. The Agreement concerns the supply of maize. Under **clause 1.2** of the Agreement it is provided that the Memorandum of Understanding shall be deemed to form and be read and construed as part of this Agreement. In this Agreement, the Government of the United Republic of Tanzania is referred to as

the “seller” and the Government of the Republic of Zambia is referred to as the “purchaser”.

On 11th September, 2003 the defendants presented a written statement of defence in which they raised four points of Preliminary Objections. These are as follows:

1. That the plaint is incompetent and bad in law as it does not disclose a cause of action against the defendants.
2. That the plaint is incompetent and bad in law as the defendants are not the proper parties to the suit.
3. That the suit is improperly before the court as proper procedure to sue a foreign government has not been complied with.

4. That the suit is improperly before the court, as the procedure to dispute settlement provided in the Memorandum of Understanding between the parties has not been exhausted.

Going through the above listed points of preliminary objections, it will be seen that on the first and second points, the court is invited to look at the competency of the plaint and on the third and fourth points, the court is asked to consider as to whether or not the suit is properly before the court.

In order to save time of the court, I will only deal with the third and fourth points of preliminary objections which are sufficient to dispose of the matter.

On the third point, it was submitted by learned Counsel for the defendants **M/s Maajar, Rwechungura, Nguluma and Makani, Advocates** that the procedure to sue the Government of the Republic of Zambia which is a foreign country was not complied with by the plaintiff. They said that the plaintiff did not notify the Government of the United Republic of Tanzania who is part of the Agreement about its intention to sue the Government of the Republic of Zambia.

They contended that the plaintiff's failure to notify the Government of the United Republic of Tanzania which was involved in the transaction about its intention to sue the Government of the Republic of Zambia is likely to result into embarrassment to both countries economically and politically.

I entirely agree with the submission and contention made by learned Counsel for the defendants on this point. It was quite unprocedural and undiplomatic on the part of the plaintiff to sue the Government of the Republic of Zambia without notifying and or consulting the Government of the United Republic of Tanzania which was the High powered contracting party in the Agreement for supply and sale of maize to the Government of the Republic of Zambia when the peoples of Zambia were experiencing some shortage of maize during 2000/2001 crop production season.

The suit is an embarrassment to the Government of the United Republic of Tanzania as it was filed without consultation or notice to the Attorney General.

Whereas the Attorney/Solicitor General of the Government of the Republic of Zambia was notified by learned Counsel for the plaintiff **M/s Bwahama and Company, Advocates** vide their letter with reference **YKB/NS/CIM/MSC/ZRP/1** dated **26/3/2003** i.e. **annexture 'G'** to the plaint, the Attorney General of the Government of the United Republic of Tanzania who is its legal adviser was not notified.

The suit is also an embarrassment to our Government as it was filed after the Government of the Republic of Zambia through its Permanent Secretary (Planning), Ministry of Finance and National Planning **Mrs. Mukuka L.N. Zimba** had written a letter with Ref. **MFAL/101/18/19** dated **16/12/2002** addressed to the Managing Director of the Plaintiff's Company

informing him that the Government of the Republic of Zambia was unable to settle the outstanding amount of US\$195,224.39 in respect of the supply of Mt.4,540.10 of maize before the close of the year due to revenue constraints, and that it is aware of its obligations as stipulated in the Memorandum of Understanding and endeavours to settle its outstanding dues as soon as funds are available.

Due to the fact that the Government of the United Republic of Tanzania was the High Powered Contracting Party in the Agreement for the supply and sale of maize to the Government of the Republic of Zambia, the procedure which ought to have been followed by the plaintiff before instituting the suit against the Government of the Republic of Zambia for breach of the Memorandum of Understanding and the Agreement was to notify the Attorney General of the Government of the United Republic of Tanzania about its

intention to do so. Such notice ought to have been made after consultation with him and the **Food Security Department of the Tanzania Ministry of Agriculture** "the seller". Also, before instituting the suit, the plaintiff had to follow the detailed procedure laid down in the relevant Government Proceedings Legislation of Zambia which has to be followed by any one who wants to sue it. As the aforesaid procedure was not followed, I uphold the third point of preliminary objection.

I now proceed to the fourth point of preliminary objection. On this point, it was submitted by learned Counsel for the defendants that as clause 9 of the Agreement for supply and sale of maize entered between the **Government of the United Republic of Tanzania** on the one part, and the **Government of the Republic of Zambia** on the other part, provides for Arbitration, the parties had to go for **Arbitration** before taking any other course of action.

I also agree with the above submission by learned Counsel for the defendants. Clause 9 of the Agreement for supply and sale of maize made between the two Governments is crystal clear. It reads as follows:

“9 Arbitration.

This contract shall be executed by the parties in good faith, and in case any dispute arises concerning interpretation or execution of the contract, such matters shall be settled through mutual consultations by the parties”.

A careful reading of the above quoted clause will show that the parties to the contract are required to execute it in good faith and any dispute arising therefrom regarding interpretation or execution has to be settled through mutual consultations by the parties.

In my view, the manner in which the plaintiff sought to execute this contract is contrary to the said clause. Instead of applying good faith, it applied threats to sue the Government of the Republic of Zambia for payment of US\$195,224.39 for the maize delivered by it to Zambia Government in July and August, 2002. Due to the fact that the Government of the Republic of Zambia was willing to pay the said amount and had promised to pay when the funds are available, such application of threats was contrary to good faith and mutual understanding. Also, instead of settling the dispute through mutual consultations, the plaintiff resorted to have it settled through adversarial court system. As the Agreement gives room for Arbitration, it was unnecessary for the plaintiff to resort to court action. Such unnecessary step is not only embarrassing but it is also likely to interfere with the **noble** commitment by both Governments to improve food security in their respective countries as expressed in the preamble to the Agreement signed by both of them.

The question as to whether or not this court has jurisdiction to entertain the suit was not raised in the preliminary objection. For this reason, I have decided to avoid any comment on it. In general, I agree with learned Counsel for the defendants that the suit is improperly before this court and I hereby dismiss it with costs.



A. SHANGWA

JUDGE

13/10/2004

Delivered this 13th day of October, 2004 in the presence of the parties representatives.



A. SHANGWA

JUDGE

13/10/2004