IN THE COURT OF APPEAL OF TANZANIA
AT DAR ES SALAAM

(CORAM: NSEKELA, J.A., KILEO, J.A., And KIMARO, J.A.)

CIVIL APPEAL NO. 130 OF 2005

LALAGO COTTON GINNERY AND
OIL MILLS COMPANY LIMITED ..... APPELLANT

VERSUS

CONSOLIDATED HOLDING CORPORATION ..... RESPONDENT

(Appeal from the Judgment of the LART Loans Recovery Tribunal at Dar es Salaam)

(Msoffe, J.)

dated the 12th day of June, 2002
in
Tribunal Case No. 13 of 2001

JUDGMENT OF THE COURT

16th December, 2009 & 11th February, 2010

NSEKELA, J.A.:

In the LART Loans Recovery Tribunal Case No. 13 of 2001 (Tribunal), the appellants herein, Lalago Cotton Ginnery and Oil Mills Company Limited, were the losing party. They lodged an appeal to this Court on the 23.12.2005 against the decision of the Tribunal. Due to changes in the law from the time the matter was heard and determined by the Tribunal, the respondent in the appeal is now Consolidated Holding Corporation.

At the hearing of the appeal, the appellant was represented by Dr. Masumbuko Lamwai; Mr. Buberwa and Mr. B. Ngatunga, learned advocates. The respondent was represented by Mr. W. Mnzava and Mr. Mbwambo, learned advocates. The appellant filed fifteen (15) grounds of appeal. These were –

"1. That the Honourable LART Tribunal erred in fact and in law in entertaining this matter, as it was time-barred;

2. The Honourable LART Tribunal had no jurisdiction to entertain the matter;

3. That the trial LART Tribunal erred in fact and in law by making a decision which exceeded its powers conferred by the Loans and Advances Realization Trust Act, No. 6 of 1991 and the LART Seizure and Disposal of Asset Rules, 1993;

4. The trial LART Tribunal erred in fact and in law by its failure to determine the Appellant-Claim under the Counter-Claim, which has been sufficiently demonstrated in the pleadings;

5. The trial LART Tribunal grossly misdirected itself by holding that Annexture TCC4, (an affidavit of one Fidelis Mkwavi) which was attached to the respondent's written submission without leave of the Tribunal can be accepted and entertained as part of the pleadings and used as evidence;

6. That the trial LART Tribunal erred in fact and in law in awarding special damages to the respondent, as it did despite the fact that there was no evidence adduced in the Tribunal to support such damages;

7. The Honourable LART Tribunal erred in fact and in law in granting liquidated damages when neither the relevant agreement (subject matter of the suit) nor the pleadings had mentioned liquidated damages;

8. That the Honourable trial LART Tribunal erred in fact and in law in including extraneous matters and the claims of persons who were not parties to the proceedings;

9. That the trial LART Tribunal misdirected itself for failure to direct parties to adduce evidence before it by way of oral evidence rather than by way of

affidavits which is contrary to the law in any judicial proceedings.

10. That the trial LART Tribunal erred in fact and in law in failing to hold that the material facts before it amounted to a variation of the sale agreement between the parties because of the Ministerial letter and directive of a statutory body as LART, and the Appellant's Deed of Undertaking.

11. That the trial LART Tribunal erred in fact and in law by taking into consideration the respondent's annextures as evidence and by holding that there was breach of the Sale Agreement on the part of the appellant by virtue of the Deed of Undertaking, and without oral evidence being adduced to support such a breach;

12. .....

13. .....

14. The quality and quantity of evidence tendered in the scale did not warrant the decision arrived at by the trial LART Tribunal.

15. The appellant will also appeal on the grounds that neither the proceedings nor the judgment and decree conformed with the principles of fairness, natural justice or equity.

The appellant did not pursue grounds of appeal no. 12 and 13. Dr. Lamwai argued grounds no. 1, 2, 3, 4 and 9. On the first ground of appeal, the learned advocate submitted that the issue before the Tribunal was based on breach of sale agreement between the liquidator and the appellant. In the said sale agreement, there was a prescribed mode of payment and the last payment was to be effected on the 31.12.2000. He added that in terms of Rule 4 (1) of the LART Loans Recovery Tribunal Rules, Cap 258 2002 RE (S) – GN 309 of 1997, the petition should have been filed within 15 days of the breach date. According to his calculations, the breach date was the 31.12.2000 but the petition was filed on the 3.12.2001, out of time. In addition, Dr. Lamwai contended that the appellant raised a preliminary objection to the effect that the petition was time-barred, but the Tribunal did not make a decision on the matter claiming, wrongly, that the issue had been abandoned. Since the matter was time-barred, the Tribunal had no jurisdiction to entertain it. Dr. Lamwai also made

reference to section 19 (1) of the LART Act which gives the Tribunal jurisdiction to non-performing assets as defined under section 3 (a) of the LART Act. He submitted that the liquidator was not acting on behalf of the Trust but on behalf of MUTEX. Therefore the sale was a normal commercial transaction and did not fall under the ambit of section 19 (1). Dr. Lamwai also complained to the effect that the Tribunal did not determine the counter-claim. There was no evidence taken by the Tribunal or the petition or on the counter-claim. He added that the Tribunal made its decision on the strength of annextures which were not admitted in evidence. In support of this, Dr. Lamwai cited the case of **Mount Usambara Hotels Limited and Nyembela Gandawega**, Civil Appeal No. 77 of 1999 (unreported) for the proposition that annextures to the plaint are not part of the evidence unless they are tendered during the trial.

Mr. Buberwa, learned advocate, submitted on grounds 6; 7; 8; 10 and 14. Essentially these grounds of appeal concerned matters of evidence on liquidated damages; special damages. Mr. Buberwa contended that there was no evidence adduced before the Tribunal in order to prove special damages. They had to be pleaded,

particularized and strictly proved. To bolster his case, the learned advocate referred to Civil Appeal No. 26 of 2000, **Tanzania Electric Supply Company Limited and Timber Enterprises** (unreported) for the proposition that where special damages are claimed, they must be proved in evidence.

Mr. Ngatunga, learned advocate, submitted on grounds 5 and 11. This was basically a complaint on the admission of affidavit evidence which was attached to the written submissions. The learned advocate submitted that the affidavit was not part of the pleadings and no sufficient reason was advanced in terms of Order XIX rule 1 of the Civil Procedure Code, and he cited the case of **Faizen Enterprises Limited v Africarriers Limited**, Civil Appeal No. 38 of 1997 (unreported).

Mr. Mnzava, learned advocate for the respondent, stoutly resisted the appeal. He submitted that the petition before the Tribunal was not time-barred. The petition was filed in terms of section 5 of the Law of Limitation Act. It was a suit founded on contract and hence the period of limitation under item 7 of the First Schedule, was six

years. He conceded however that in terms of Rule 4 (1) of the LART Tribunal Rules a petition must be filed within fifteen (15) days after the cause of action has arisen. According to the learned advocate, there was a conflict between the Limitation Act and the Tribunal Rules but the LART Act binds the Tribunal to follow the Civil Procedure Code. As regards the jurisdiction of the Tribunal, the learned advocate submitted that MUTEX was a non-performing asset in terms of section 19 (1) of the Loans and Advances Realisation Trust Act and hence the Tribunal had jurisdiction to deal with the matter.

On the specific issue of admission of evidence, Mr. Mnzava referred to Rules 15, 16, 17 and 18 of the LART Loans Recovery Tribunal Rules, GN 309 of 1997 and submitted that under the said Rules, the Tribunal had jurisdiction in the conduct of its own proceedings. He added that it was a special procedure. The Tribunal could receive evidence by affidavit in addition to or in substitution for oral evidence. The Tribunal was not obliged to call any witnesses. He added that the parties had agreed upon the issues and the procedure to be followed. The parties could not now resile from what they had agreed upon. According to Mr. Mnzava, the evidence before the

Tribunal were pleadings, annexures and submissions as provided for under the Tribunal Rules. There was also an affidavit which was evidence to be taken into account. In his view, there was nothing wrong with the proceedings of the Tribunal and that the appellant should be estopped from challenging the proceedings in the Tribunal.

In his reply, Dr. Lamwai, submitted that in terms of section 3 (1) of the Law of Limitation Act, Cap 89 matters instituted outside the limitation period shall be dismissed, whether limitation is pleaded or not. The Tribunal was put on notice that limitation was an issue and so had a duty to make a decision on it. The issue of limitation was raised by way of preliminary objection. The Tribunal stated wrongly that the issue had been abandoned and this was not true. As regards the purported conflict between the Rule 4 (1) of the Tribunal Rules and the Civil Procedure Code, Dr. Lamwai submitted that there was no such conflict in terms of section 43 (f); 46 of the Limitation Act read together with Section 2 of the Civil Procedure Code and Section 4 of the Interpretation of Laws Act Cap 1 RE 2002. He concluded by submitting to the effect that failure to call evidence during the trial was fatal and the entire proceedings were a nullity.

The appellant's first ground of complaint challenged the competency of the petition because it was allegedly time-barred. Rule 4 (1) of the LART Loans Recovery Tribunal Rules provides that the Tribunal should not entertain a petition after the expiry of fifteen (15) days of the act, being complained of was done. This issue had been raised by the appellant during the trial as a preliminary objection. The Tribunal ordered that the parties should submit written submissions according to an agreed schedule and that Ruling would be delivered on the 13.3.2002. Apparently, the parties did not comply with this order and hence on the 19.3.2002, the Tribunal made this Order –

> "On 14.2.2002 we gave time to learned counsel to argue the Notice of Objection by way of written submissions. To date none was filed. **In the circumstances, we are entitled to accept that it has been abandoned, it is accordingly so marked.**"
>
> (Emphasis added.)

Pursuant to Section 19 (3) of the LART Act, the Minister made the LART Loans Recovery Tribunal Rules, GN No. 309 of 1997. It provides as under –

> "Notwithstanding the provisions of subsection (2), the Minister may, by rules published in the Gazette, provide for the rules of procedure to be applied to any matter before the Tribunal **and the civil procedure rules provided in subsection (2) shall cease to apply to any such matter filed thereafter**" (emphasis added.)

It is evident from the above provision that the civil procedure rules do not apply where the Minister has published rules in the Gazette to that effect. This has been done vide GN 309 of 1997 to which Mr. Mnzava made reference as well in a different context. In terms of Rule 4 (1) of the Tribunal Rules a petition shall be entertained in the Tribunal not later than fifteen (15) days after the act being complained of was done. However this is not the end of the matter. Mr. Mnzava strongly submitted that the law of Limitation Act governed the dispute. Sections 43 and 46 of the Law of Limitation Act Cap 89 RE 2002 provide as follows –

"43. This Act shall not apply to –

(f) any proceeding for which a period of limitation is prescribed by any written law, save to the extent provided for in section 46.

46. Where a period of limitation for any proceeding is prescribed by any other written law, then, unless the contrary intention appears in such written law, and subject to the provisions of section 43, the provisions of this Act shall apply as if such period of limitation had been prescribed by this Act."

If we examine section 43 (f) above, Rule 4 (1) of the LART Loans Recovery Tribunal Rules has prescribed a period of limitation in petitions under the LART Act, and there is no contrary intention in the said sub-rule. There is no conflict as suggested by Mr. Mnzava, learned advocate of the respondent. We now have to move to the next stage – from what date is the period of limitation to be reckoned? Dr. Lamwai was very categorical. He submitted that the breach date was on the 31.12.2000 and the limitation period commenced from that

date in the absence of an application for enlargement of time. Since the petition was instituted on the 3.12.2001, it was instituted hopelessly out of time. On his part Mr. Mnzava contended that the petition was not time-barred since the matter had been abandoned and could not be raised at the appeal stage.

With respect, we agree with Mr. Mnzava that the issue was not argued before the Tribunal. The parties did not comply with the Tribunal's order to submit written submissions. However, we part company with the learned advocate, that the issue was abandoned. It was not. The preliminary objection filed on 13.2.2002 had two grounds, namely –

> "(i) That in view of the provisions of rule 4 (1) of the LART Loans Recovery Tribunal Rules, GN 309 of 1997 the petition is out of time and accordingly the same be dismissed with costs.
>
> (ii) That the amended petition being violative of the right to be heard before the amendment was made is incompetent and the same be rejected."

On the 14.2.2002, Mr. Magongo learned advocate for the respondent withdrew the second limb of the Notice of Objection and the Tribunal acceded to the prayer. Hence the first ground of preliminary objection remained intact. The Tribunal then made an order to the effect that the parties submit written submissions and that the Tribunal would deliver its Ruling on 13.3.2002.

As of now, the Tribunal has not made a decision on the appellant's preliminary objection. We are constrained to say that there is merit in the first ground of appeal. In fact the Tribunal did not make a decision in an issue which was squarely before it. It is unfortunate since the Tribunal has now ceased to exist.

We now proceed on to consider grounds 2 to 15 together. There is a common issue which runs through all these grounds of appeal. This issue emanates from the proceedings and order of the Tribunal dated the 19.3.2002. For the sake of clarity, we quote the relevant proceedings –

> "Mrs. K. Oriyo: My Lord and Hon. Members, a look at the pleadings will show

that this matter can be disposed of without necessarily calling for factual evidence.

Mr. Magongo: My Lord and Hon. Members, I agree.

Order: We too think that this matter could be disposed of without necessarily calling for factual evidence. Hence by consent of the parties we will proceed to determine it on that basis. We do so in line with the spirit and intent of the provisions of Rule 16 of the LART Loans Recovery Tribunal Rules, 1997 – GN 309/97. In this regard the parties will address us on the following issues which are framed and agreed upon as follows:-"

The Tribunal then framed four (4) issues, and went on to order that oral evidence would be dispensed with. The parties were required to file written submissions on an agreed time frame.

This matter has caused us considerable anxiety. The Tribunal purportedly acted under Rule 16 of the LART Loans Recovery Tribunal

Rules in adopting the cause of action it did. We quote below Rules 15 to 18 for ease of reference –

> "15. (1) If after hearing the petitioner and the reply by the respondent, the Tribunal is of the opinion that evidence be produced or witness summoned.
>
> (2) The Tribunal shall order the parties to produce such evidence or call witnesses to clarify on issues raised which the Tribunal may by order seek to be clarified.
>
> 16. Where the Tribunal requires any evidence to be produced or witnesses to be called, it shall record its reasons for so doing.
>
> 17. When the Tribunal orders evidence to be produced or witnesses to be called, the Tribunal shall specify the points to which the evidence is to be confined, and record on its proceedings.
>
> 18. The Tribunal may, in its discretion, receive evidence by affidavit in addition to or in substitution for oral evidence."

The Tribunal invoked Rule 16 above to dispense with the calling of witnesses and production of evidence. With respect, we do not read anything in this rule to warrant its application. If the Tribunal wanted evidence to be produced or witnesses to be called, the Tribunal should have stated so and this would have been the correct way of applying Rule 16. Instead, the Tribunal ordered the opposite. For instance, how could the Tribunal resolve the question of the petition being time-barred? Oral and documentary evidence was certainly, required to establish when the petitioners cause of action arose! This would require the Tribunal to construe the Sale Agreement, Annexure "A" to the petition as well as Annexure "B" the Deed of Undertaking. Indeed, the Tribunal two of the four (4) issues framed read –

> "2. Whether there was a variation of the Sale Agreement;
>
> 3. Whether there was a breach of the Sale Agreement;"

The mere framing of the issues to us indicates that the parties were at loggerheads. The four (4) issues on page 124 of the record of

appeal were all contentious which could not be resolved without the aid of evidence being adduced by the parties. The issues framed were culled from the petition and reply thereto and reflected divergent viewpoints of the parties.

During the trial issues two and three were on the variation of the Sale Agreement and breach of the Sale Agreement respectively. As regards the second issue, the Tribunal had this to say in its judgment –

> "No evidence was put forward to show agreement on variation or debt-swap negotiations but by the Petitioners' re-possession of MUTEX assets the parties would appear to us to have reverted to their original positions. Nor was proof of express agreement on variation demonstrated. The Minister's letters were Minister's letters, not from any of the parties. There was no evidence of acknowledgement of the Minister's letters as letters sealing agreement on variation of the Sale Agreement. More fundamentally with the respondent's holding that more negotiations sealed the deal and varied the Sale Agreement, not even an attempt was made to vary the

> Agreement. For these reasons, we are unable to agree that the Sale Agreement was varied."

With respect, we are not surprised that the Tribunal reached this conclusion. As the Tribunal had earlier on observed –

> "no evidence was put forward in proof of compliance with these conditionalities for variation."

The root cause of this problem was the Tribunal's misinterpretation of Rule 16 for the parties to dispense with evidence.

There was a complaint by the appellant that there was no evidence on special damages. The Tribunal had awarded special damages as prayed. It is a trite principle of law that where special damages are claimed, they must be proved in evidence. (See: (CAT) Civil Appeal No. 26 of 2000, **Tanzania Electric Supply Company Limited v Timber Enterprises Limited** (unreported); **Cooper Motors Corporation (T) Limited v Arusha International Conference Centre** [1991] TLR 165. Since there was no evidence tendered to prove special damages, this relief could not be awarded.

The cumulative effect of the non-production of evidence by the parties during the trial as ordered by the Tribunal vitiated the entire proceedings. The matters in controversy in the memorandum of appeal were of mixed law and fact. We are of the settled view that disputed matters of mixed law and fact could not be resolved on the strength of written submissions alone, from learned advocates, however profound!

In the event, we allow the appeal and order a retrial in the appropriate forum, without payment of fees. Costs to be in the cause.

DATED at DAR ES SALAAM this 1st day of February, 2010.

H. R. NSEKELA
JUSTICE OF APPEAL

E. A. KILEO
JUSTICE OF APPEAL

N. P. KIMARO
JUSTICE OF APPEAL



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

(J. S. MGETTA)
DEPUTY REGISTRAR