

**IN THE FAIR COMPETITION TRIBUNAL
AT DAR ES SALAAM**

TRIBUNAL APPEAL NO. 1 OF 2013

MSAE INVESTMENT CO. LTD.....APPELLANT

VERSUS

SURFACE AND MARINE TRANSPORT REGULATORY

AUTHORITY (SUMATRA).....RESPONDENT

JUDGMENT

Decision subject for challenge before the Tribunal, originates from the Surface and Marine Transport Regulatory Authority (SUMATRA) contained in its letter with reference No. DB/279/02 dated 27/12/2012.

The appellant, a limited liability company, is the owner of a passenger vehicle bus No. T.789 BAX and also the service provider licenced by the respondent to provide road passenger transport services between Dar es Salaam and Arusha in sector regulated by the respondent (SUMATRA) which comprises rail transport, maritime transport, public passenger road transport and commercial road transport.

The respondent (SUMATRA) a regulatory authority is a body corporate established under section 4 of the Surface and Marine Transport Regulatory Authority (SUMATRA) Act No. 9 of 2001,(hereinafter referred to as SUMATRA Act,) charged under section 5 of the act, with the duty in carrying out its functions as a regulator to strive to enhance the welfare of Tanzania Society by promoting effective competition and economic efficiency and protecting the interest of consumers and efficient suppliers, *inter alia*.

In this matter, the appellant is challenging the respondent's decision of revoking operating licence No. A4A014199 on 27th December, 2012 in respect of the appellant's vehicle with registration Number T.789 BAX operating between Dar es Salaam and Arusha. On 23 December, 2012 the, appellant's vehicle with registration No. T. 789 BAX while on its daily schedule safari from Dar es Salaam to Arusha, got breakdown at Mbezi – Kibamba. The appellant stayed for more than 8 hours without providing alternative transport to the passengers on board, contrary to licensing conditions under which the appellant was operating. Despite instructions by the respondent to remedy the situation, the appellant did not comply with the directives. Passengers were not refunded their fare, nor did the appellant provide alternative transport for more than 8 hours.

The appellant being dissatisfied by the respondent decision of suspending licence No. A4A014199 preferred appeal raising 4 grounds of appeal, namely:

1. The respondent erred in laws and facts by condemning the appellant without giving the appellant an opportunity to defend, hence failed to comply with the cardinal principle of natural justice.
2. The respondent failed to comply with provisions of section 32(2) of the SUMATRA Act, 2001.
3. The respondent erred in facts by claiming that the bus licence of which was revoked was on safari from Dar es Salaam from Dar es Salaam to Arusha on 24th of December, 2012 while in fact the said bus was on that safari a day before.
4. The respondent erred in facts by not taking into consideration accident that occurred along Morogoro road between Vigwaza on 23rd of December, 2012 which caused traffic jam and delay of the bus in question.

Then the appellant requested the Tribunal to grant the following orders:

- (a) To quash the decision of SUMATRA from revoking operating licence No. A4A014199 of a bus with registration No. T.789 BAX.
- (b) Payment of specific damage of Tanzanian Sh. 48,100,000/= as compensation for lost income for 30 days.
- (c) Payment of general damages of Tanzanian Shillings Two Billion for damaging the good name of the Company intentionally.

The Respondent on his part filed a reply to the memorandum of appeal and record of appeal in terms of rule 15 of the Fair Competition Tribunal Rules in response to the grounds of appeal. In short, respondent claimed to act in accordance with the powers vested by Transport Licensing Act, Cap. 317 of the laws, and further that respondent was not bound by section 32(2) under the circumstances of this case, attaching general correspondences directed to the appellant requiring compliance of alternative transport or return of the passengers bus fare.

It is worth noting that, the respondent agreed with the appellant that the incident took place on 23rd December, 2012 and not 24th December, 2012 as alleged by respondent's letter.

At the hearing of the appeal Mr. Wilbert Mtenga, majority share holder, Managing Director, and Legal Officer of MSAE Investment Co. Ltd, represented the appellant, while the respondent was represented by Ms Tumaini Silaa, Director of Legal Services, and an advocate of the High Court.

In support of the appeal, Mr. Wilbert Mtenga submitted that, on 27/12/2012 the respondent wrote a letter to the appellant with reference number DB/146/279/2002 addressed to Managing Director, Metro Bus Dar, to revoke and suspend the operations of bus with registration number T.789 BAX licence No. A4A014199 for 30 days, without evidence and without following the law. Mr. Mtenga contended that bus No. 789 BAX did not travel on 24/12/2012 from DSM to Arusha. It was further submitted by Mr. Mtenga that although senior officer of the respondent visited the area where the breakdown of the bus occurred yet they made a mistake. The bus Registration No. T.789 BAX traveled on 23/12/2012 from Dar es Salaam to Arusha and not 24th December, 2012 as claimed by the respondent. Despite all the records yet, the respondent did not write to apologize, so the respondent intended to damage the name of the company, lamented Mr. Wilbert Mtenga for the appellant.

It was submitted by the appellant's counsel that following revocation of the licence, for 30 days, they lost Tanzanian

Shillings forty eight million one hundred thousand only (48,100,000/=) per month. The licence expired on 17/12/2013. The licence was cancelled in December, 2012 to date, it is period of 22 months. Consequently Mr. Mtenga prayed for compensation of Tanzanian Shillings forty eight million one hundred thousand only (48,100,000/=) being 30 days loss, for appellant failure to conduct business as scheduled. Mr. Mtenga submitted further that, appellant is the only company with Metro bus that are operated by UTRACT System from South America, and he being the 1st owner and representative of Metro bus, there is justification of awarding general damages together with costs of appeal.

The respondent's counsel, Ms Tumaini Silaa, submitted that the respondent filed replay to the memorandum of appeal, and agreed on the issue of bus No. T.789 BAX travelling on 23/12/2012 from Dar es Salaam to Arusha and not on 24/12/2012, and disputed the rests of the claim. The respondent's counsel submitted that, the bus in particular travelled on 23/12/2012, while at Kibamba – Mbezi broke down at around 8 am in the morning. Acting Director General by then, received call from passengers and went to the scene, witnessed the incident, and spoke to the crew, on the importance of proceeding with the journey as planned. In the course, the acting Director General called Mr. Mtenga to notify him on the

importance of having alternative bus for passengers to travel as scheduled. However, Mr. Mtenga could not provide another bus for more than 8 hours. Acting Director General, tried to call Mr. Mtenga several times, but his phone was switched off. Later, acting Director General, sent text message, attached to the reply of Memorandum of appeal annexure "A" which reads as follows:

"Tafadhali rejea mazungumzo yetu ya simu (Mtenga/Kilima) kuhusu kuharibika kwa basi lako. Inasikitisha kuwa hadi sasa basi lako halijatengenezwa na abiria hawajui hatima yao masaa manane baada ya basi kuharibika. Ninasikitika kukuarifu kuwa umekiuka kanuni za leseni na Mamlaka italazimika kuchukua hatua stahiki dhidi ya Kampuni yako. Inasikitisha kuwa hata simu hupokei".

Ms Silaa insisted the text message sent to Mr. Mtenga, proves that, Mr. Mtenga was aware of the fact but failed to act within the law.

The respondent's counsel further submitted that, the breakdown of the car is also admitted by the appellant, at page 3 of skeleton arguments when he said, there was FAN BELT replacement at Mbezi that took 45 minutes. Again on the same page he said there was accident at Wami and Vigwaza that blocked the road. Ms Silaa submitted that, there was no record of accident on 23/12/2012 that blocked the roads for 8 hours. There was no

any reporting of accident either at Wami or Vigwaza as claimed by the appellant. It is also not true that, the bus came back to Dar es Salaam and proceeded to Arusha through Bagamoyo to Msata, as submitted by appellant at page 3 of skeleton arguments. The bus proceeded through the same route via Chalinze to Arusha at very late hours in the evening, and during the night while knowing that traveling during the night is contrary to the law.

Ms Silaa insisted that, according to Annexure E, attached to the appellant skeleton arguments, it is true that when respondent Chief Executive Officer visited the scene at Mbezi Kibamba was able to identify one passenger Mzee M.J. Gwao appearing in number 46 of the passenger manifest sheet. Mzee Gwao on his return he submitted his bus ticket and the same is attached to respondent's skeleton arguments.

Appellant having admitted that, there was replacement of FAN BELT at Mbezi is a clear evidence of breakdown witnessed by the respondent's Chief Executive, after receiving a call from passenger. Appellant by not providing alternative transport for more than 8 hours it is a breach of regulation 22 of Transport Licensing (Road, Passenger Vehicle) of 2007. The section obliged the owner of the vehicle, to provide alternative services within

two hours, or he shall refund the fare paid by passengers, insisted respondent's counsel.

It was submitted for the respondent that, section 33 of the Transport Licencing Act, gives respondent power to revoke or suspend the licence on the ground that either **condition** of the licence has not been complied with. Ms Silaa submitted that, under SUMATRA Act, Act No. 9 of 2001 part VI on disputes and complains, in particular section 32, applies to a person complaining to the authority. The sections provides for procedure of handling complains to the Authority. However, this particular case is different. In the matter at hand, Director General by then acting, witnessed breakdown of the bus, it was not a complaint lodged to SUMATRA. If SUMATRA was not in the scene, the situation would have been taken differently.

The respondent's counsel further submitted that, appellant attached dispatch book in the list of documents to show that he submitted the licence as requested, annexure marked "**E3**" a dispatch book reveals the following:

- (i) SUMATRA had no office at Ubungo
- (ii) There is no licence number intended to be surrendered
- (iii) Time table does not show serial number.
- (iv) There is no bus Registration number and Trade name.

The respondent's counsel, argued that, looking at exhibit E3 the dispatch book the rest of other documents on the same page particulars are clearly written, while on the same page, licence purporting to be surrendered to SUMATRA particulars are not written. Ms Silaa was of the view that this is the evidence to show the licence was not surrendered as per SUMATRA letter dated 27/12/2012. The same documents were to be submitted before 05/01/2013. The dispatch book purporting to surrender the licence was written on 07/01/2013. It was further insisted by the respondent's counsel that, appellant did not comply with SUMATRA letter dated 27/12/2012. Appellant was obliged to comply with section 22 of Transport Licensing (Passenger Vehicles) GN. No. 218 of 26 October, 2007. Ms Silaa finally submitted that, the respondent is mandated by Act No. 9 of 2001 to carry on its functions in accordance with section 6 of the Act. On the same act section 15 gives the respondent general powers to do all things which are necessary for, or in connection with performance of its functions or to enable it to discharge its duties, which respondent discharged.

On the prayer for specific damage of Tshs. 48,100,000/= the respondent's counsel submitted that appellant is not entitled because:

- (1) There is no proof of such damage.

- (2) There is no proof of surrender of the licence and time table, so bus was operating, therefore there cannot be any loss caused by the respondent.

On general damages of 2 billion, the appellant has not shown how the good name of the company was damaged, by the respondent. The letter complained off was addressed to the police only. There is nothing like damaging the reputation of the company. The bus has already been sold, if it had bad name then, it would have not been sold, insisted respondent's counsel.

On several articles on constitution of the United Republic and principle of natural justice Ms Silaa submitted that, respondent acted within the mandate given by the law, SUMATRA witness the breakdown, so there was no need of invoking section 32 of SUMATRA Act. In totality the respondent's counsel argued for dismissal of the appeal with costs.

In rejoinder, Mr. Wilbert Mtenga submitted that, the letter from the respondent referring bus to travel on 24/12/2012 must be declared null and void. It was insisted by Mr. Mtenga that the licence and Time Table were submitted to SUMATRA office at Upanga and not Ubungo. SUMATRA acted against the law in that, they were a Judge and witness. Appellant was not given opportunity to be heard. Chief Executive of the respondent is not

above the law, the fact that he visited the scene where breakdown of bus at Kibamba occurred does not waive the appellant right to be heard.

Having heard both parties the following facts are not in dispute:

1. The bus travelled on 23/12/2012 and not 24/12/2012.
2. The respondent suspended the appellant licence on 27/12/2012.
3. The appellant was given specific directive by the respondent to remedy the passengers from staying for more than 2 hours without alternative transport or refund of their fare.
4. Appellant proceeded with the journey up to late hours and night while the bus in questioned was not suppose to travel at night.
5. Following suspension, appellant was supposed to surrender the licence to the Respondent.
6. The licence No. A4A014199 expired on 16/07/2013.
7. The suspension period was for 30 days ie by end of January, 2013.

8. Appellant sold the bus subject of licence suspension, bus Reg. No. T.789 BAX 20/9/2013.

9. The respondent were not informed officially by the appellant on the sale of the bus.

10. SUMATRA (the respondent) have no office at Ubungo Bus Terminal.

The issue to be determined is whether:

(a) The respondent erred in law in not affording the appellant with an opportunity to be heard before suspending his licence.

The respondent's mandate to suspend the licence emanates from its functions stipulated under section 6A of the Transport Licensing Act Cap. 317 and powers conferred to it by section 15 of the SUMATRA Act. In the same manner the respondent has an obligation of protecting the consumer's interests as provided by section 5(b) of SUMATRA Act.

From the records it is clear that, appellant's vehicle registration No. T.789 BAX operating between Dar es Salaam and Arusha got breakdown at Mbezi – Kibamba as admitted by the appellant that the car had Fan Belt problem, which they fixed after 45 minutes and then proceeded with journey. The appellant arguments that there was accident at Vigwaza and Wami without there being

evidence, is unacceptable. The appellant submission that, the bus had to return to Dar es Salaam and proceeded with the journey via Bagamoyo Msata is also not backed up with evidence. The evidence that, respondent Managing Director visited and witnessed the breakdown, and that, the appellant directed to take appropriate steps is not disputed. Failure by the appellant to remedy the situation and further communication by message to Mr. Wilbert Mtenga requiring compliance by finding alternative transport for the passenger is not also disputed by the appellant. Failure by the appellant to provide for an alternative transport or refunding the full fare to passengers who got stranded for more than 8 hours after the vehicle breakdown despite several reminders from the respondent was a serious breach of the licensing conditions.

Regulation 22(1) and 2 of the Transport Licensing (Road Passengers Vehicle) Regulation 2007 provides as follows:

- 22(1) Where in the event of mechanical breakdown, a passenger vehicle is not in a fit condition to start or proceed with the journey, the licensee or crew of the vehicle shall-
- (a) Remove the vehicle from the road immediately.
 - (b) In case a motor vehicle is providing urban transport service secure an alternative transport within 10 minutes or refund the fare, and

(c) In the case of a motor vehicle which provides inter urban transport services repair the motor vehicle for a period not exceeding two hours.

22(2) If after effecting repair of a passenger vehicle under sub-regulation 1(b) the motor vehicle is still not in a fit condition to start or to continue with journey, the licensee or crew shall provide alternative transport or refund the full fare to passengers

Annexure "A" print out of sms to Mr. Mtenga Principal Officer of the appellant from respondent Principal Officer, attached to replay to the memorandum of appeal by the respondent is a clear evidence of breach and there is no any evidence by the appellant to refute that piece of evidence. Thus, the appellant did not comply with Regulation 22(1) (c) and 22(2) of Transport Licensing (Road Passengers Vehicle) Regulation 2007. In the circumstances the respondent correctly acted by cancelling the licence in accordance with the law.

This takes us to the issue, whether, the respondent complied with regulation 32(1) of the Transport Licencing Road Passener Vehicles Regultion before canceling the licence.

Regulation 30 of Transport Licence (Road Passenger Vehicles) GN No. 218 of 2007 provide as follows:

- (1) Where a licencee or permit holder is in violation or default of the forms and conditions in respect of which a licence was issued, the Authority may serve on the holder a default notice in writing specifying the nature of default.
- (2) Upon receipt of default notice the holder shall make representation in writing to the Authority within seven days from the date of notice regarding a remedy or notification of default.
- (3) Where the holder has failed to remedy or rectify the default within the time specified in the default notice or has not made a presentation which is not satisfactory to the Authority, the Authority shall suspend or revoke the licence or permit.

The wording of Regulation 30(1) of Transport Licensing (Road Passenger Vehicle) clearly use the word **Authority may serve on** the holder a default notice. Implies that **not mandatory**. The fact that, the respondent Principal Officer witnessed the breakdown and issued instructions to remedy the situation, and the fact that, sms sent to Mr. Mtenga reminding him of their earlier telephone conversation, and the contents of the sms attached to the reply to memorandum of appeal shows that appellant had sufficient knowledge/notice of respondent action.

It is worth nothing that, visiting by the respondent Principal to witness the breakdown is not disputed. Instructions to remedy the situation are not disputed. Message written by the respondent principal officer attached in the reply to the memorandum of appeal, not disputed.

Thus, to this Tribunal, the respondent acted fairly and reasonable as evidenced by annexure "A" attached to the memorandum of appeal which read as follows:

"Tafadhali rejea mazungumzo yetu ya simu (Mtenga/Kilima) kuhusu kuharibika kwa basi lako. Inasikitisha kuwa hadi sasa basi lako halijatengenezwa na abiria hawajui hatima yao masaa manane baada ya basi kuharibika. Ninasikitika kukuarifu kuwa umekiuka kanuni za leseni na Mamlaka italazimika kuchukua hatua stahiki dhidi ya Kampuni yako. Inasikitisha kuwa hata simu hupokei.

The above words clearly indicate the respondent reasonableness in handling the matter. Respondent fulfilled their duty imposed by section 5 to strive to enhance the welfare of Tanzania Society by promoting effective competition and economic efficiency and protecting the interest of consumers and efficient suppliers. The respondent acted diligently they cannot be blamed. Instead the appellant is to blame as all what happened is his own making.

Failure to provide alternative transport or return of fare as per Regulation 22 within 2 hours is a breach of licencing condictions.

To make the matter worse the appellant's further breached the licencing condictions by:

- (i) Continuing with the journey after 8 hours of breakdown, appellant further violated Regulation 11 of the Transport Licencing (Road Passenger Vehicle) Regulation, 2007 providing intercity transport, in accordance with the approved time table.
- (ii) Non compliance to the suspension order: According to Regulation 29(2) of Transport Licensing Road Passenger Vehicle) Regulations, 2007, once the licence has been suspended, the licensee is required to surrender the said licence to the Authority. The evidence to prove that the licence and time table were surrendered to the respondent.
- (iii) Disposition of the motor vehicle without notifying the authority: In terms of Regulation 39 of the Transport Licensing (Passengers Vehicles) Regulations, 2007 the Appellant is required to notify the authority of any disposition effected to the Licenced Vehicle which the appellant he did not.

- (iv) Non transferability of the Licence: In terms of section 15 of the Transport Licensing Act, the Licence is not transferable. Thus so long as the motor vehicle was already sold, the Appellant has no claim of right over the Licence.

It is a trite rule that who alleges must prove the said allegations. Exhibit "E3" dispatch book lacks authenticity, thus, lacks evidence value to prove that, licence and time table was surrendered to the respondent. Having said so, is the appellant entitled to the damages as claimed?

It is a settled law that for one to succeed in an action for damages unless it is a question of strict liability, the injury being complained of must have resulted from the wrongful act of the defendant. In the case of January **Mayala versus Majige Mkangala (1983) TLR 268** at page 269 Lugakingira, J (as he then was) held that:

"Unless it is a question of strict liability civil liability must be based on proved actionable fault deviation from an expected and accepted standard of conduct by the defendant.

J.A. Taylor states at page 364 in his book Gingham's Motor claim cases 8th edition 1980 Butterworths, London that:

“The elementary principle is that it is for the plaintiff in an action for damages to prove case. To show affirmatively that damage under any particular head has resulted from. wrongful act of the defendant.

There is nothing wrong committed by the respondent to warrant payments of damages. The Legal Principles being that damages are the pecuniary compensation, obtainable by success in an action, for a wrong, which is either a tort or a breach of contract, the compensation being in the form of a lump sum, which is awarded unconditionally. The object of an award of damages is to give the plaintiff or injured party compensation for the damage, loss or injury he has suffered so as to put him in position he would have been in had the tort not been committed or had the contract been performed.

According to the sale agreement attached to the respondent’s skeleton arguments the appellant sold the bus with registration number T.789 BAX, licence number A4A014199 to Hajees Safaris Limited of Handeni Tanga on 20th September, 2013. Therefore the appellant is not affected by the loss of the use of the bus having passed interest to the buyer. Therefore the appellant is not entitled to any damages.

In the circumstances, apart from failure by the appellant to prove damages, the appellant is far from the reality that, the respondent is responsible for any damage. If any it is appellant own making.

Accordingly, appeal dismissed with costs. The appellant is ordered to surrender licence no. A4A014199 that expired on 16th July, 2013.

Judge Z.G. Muruke – Chairman

Dr. M.M P. Bundara – Member

Mr. Gregory L. Ndanu – Member

21/04/2015

Judgment delivered this 21st day of April, 2015 in the presence of Ms Mtulia assisted by Mr. Elisante for the applicant, Mr. Wilbert Mtenga for the respondent and Mr. Beda Kyanyari, Tribunal Clerk.

Judge Z.G. Muruke – Chairman

Dr. M.M P. Bundara – Member

Mr. Gregory L. Ndanu – Member

21/04/2015