IN THE FAIR COMPETITION TRIBUNAL OF TANZANIA

AT DAR ES SALAAM

TRIBUNAL APPEAL NO. 2 OF 2008

LUCAS MALLYA a.k.a BARAKA STORES.....APPELLANT

VERSUS

1. MABIBO BEERS, WINES & SPIRITS LTD.....1ST RESPONDENT
2. COMMISSIONER FOR CUSTOMS,
   TANZANIA REVENUE AUTHORITY .....2ND SPONDENT

RULING

TRIBUNAL

This is an appeal from a decision of the Fair Competition Commission made on 9/05/2008.

The brief historical background to this matter is that the appellant LUCAS MALLYA a.k.a. BARAKA STORES had in April, 2008 filed a complaint in the Fair Competition Commission in Dar es Salaam against MABIBO BEERS, WINES and SPIRITS LTD (1st respondent) and the COMMISSIONER FOR CUSTOMS & EXCISE , TANZANIA

REVENUE AUTHROTIRY (2nd respondent) alleging that the respondents had violated the competition law.

The complaint was brought under Section 69(2) of the Fair Competition Act No. 8 of 2003. In the statement of complaint it is alleged inter alia that an exclusivity agreement entered into by the 1st respondent and HEINEKEN BROUWERIJ B.V. and AMSTEL BROUWERIJ B.V. and which purports to confer upon the 1st respondent exclusive rights to import, distribute and market Heineken Beers in Tanzania has the effect of restricting/distorting competition and that the agreement contravenes the provisions of sections 8, 9 and 96(1) of the Fair Competition Act 2003. The complainant sought inter alia a declaration that the act of the respondents restraining the importation of Heineken Beers in Tanzania is unlawful, unfair and impeding competition. In its decision which apparently took the form of a letter the Fair Competition Commission (FCC) basically stated that the issue of exclusivity complained of was a matter/arrangement between the 1st respondent and the producer/proprietor of Heineken beer and that the FCC did not for that reason have jurisdiction to entertain or deal with the complaint. The FCC was clearly of the view that the issue raised in the complaint was not a competition issue.

The complainant was aggrieved with the aforesaid decision hence this appeal which was lodged in this Tribunal on 4/6/2008. The Memorandum of Appeal has advanced seven grounds of appeal. The

appellant is basically appealing against the finding that the FCC has no jurisdiction in the matter and the finding that the subject matter of the complaint was not a competition issue under the competition law. The appellant is also complaining that the FCC gave its decision without giving the parties the opportunity to be heard and that the decision was not based on any evidence.

The two respondents have resisted the appeal. By notice of preliminary objection the 1st respondent has taken objection to the appeal on the ground that this Tribunal has no jurisdiction to determine this appeal for the following reasons:

1. That the exclusivity granted by Heineken International to Mabibo Beers Wines and Spirits Ltd (1st respondent) to be the sole importer and distributor of Heineken Beer in Tanzania is statutorily mandated/protected by section 44(3) of the Trade and Service Marks Act. Cap.326 read together with section 42(1) of the Trade and Service Marks Act Cap. 326 of the Laws of Tanzania. (R.E. 2002)

2. That in the alternative, based on the applicant's own pleading in the Record of Appeal, the Applicant cannot seek the assistance/intervention of this Honourable Tribunal or any other Court of Justice when its own record/pleadings show it is

seeking for the assistance/intervention of the Tribunal with unclean hands.

3. That the appeal against the 1st respondent is incompetent because the appellant never served 1st respondent with a copy of the complaint to F.C.C. and the 1st respondent became aware of the complaints against her upon receiving the Notice of Appeal and the Memorandum of Appeal.

The 2nd respondent on its part has in the Reply to the Memorandum of Appeal filed on 9/6/2008 raised a preliminary objection to the effect that this Tribunal has no jurisdiction to determine the appeal on the following grounds:-

(a) That this matter contravenes the provisions of the Tanzania Revenue Authority Act Cap. 399 and the Tax Revenue Appeals Act, Cap.403.

(b) That this matter contravenes the provisions of the Trade and Service Marks Act Cap. 326.

(c) That based on the applicant's pleadings, this matter contravenes the provisions of the East African Community Customs Management Act, 2004.

On the hearing date the 2nd respondent abandoned ground (c) and with leave of this Tribunal the following ground was substituted therefore:-

(c) This appeal is not tenable as the appellant does not have locus standi.

The Preliminary Objections were argued by written submissions.

As regards the first ground Mr. Didace learned counsel for the 1st respondent submitted that this Tribunal has no jurisdiction to interfere with the exclusive rights granted by Heineken International to the 1st respondent because the appellant had not complained that the agreement between the 1st respondent and Heineken International is impeding the importation of other types of beer brands. Learned counsel asserted that the appellant had not shown that the exclusivity agreement places the 1st respondent in a dominant position in the market. He mentioned that the exclusivity agreement is statutorily mandated under the Trade and Service Marks Act and as the appellant had deliberately made false declarations to the Commissioner for Customs and Excise and thereby evaded payment of duties and taxes, it was not entitled to come before this Tribunal. Finally learned counsel argued that as the 1st respondent was not served with a copy of the complaint filed in the FCC the appeal is incompetent.

The 2nd respondent maintained that this Tribunal has no jurisdiction to determine this appeal, contending that the issue is one which arises from revenue laws administered by the Tanzania Revenue Authority (TRA) and that it is the Tax Appeals Board which is vested with the jurisdiction to hear appeals over tax matters. Secondly it is asserted by learned counsel for the 2nd respondent that this appeal contravenes the provisions of the Trade and Service Marks Act Cap. 326, that the exclusivity agreement is mandated by the Act and therefore the appeal is not maintainable, and that the appellant has not shown in his pleadings that the exclusivity agreement complained of places the 1st respondent in a dominant place as provided in sections 5 and 8 of the Fair competition Act. Finally it is argued that the appellant has no locus in this matter as the 2nd respondent has never transacted any business with Pius Lucas Mallya and the name Baraka Stores was registered and in use by another person.

Countering these submissions Mr. Bwana learned counsel for the appellant substantially maintained that the preliminary objections raised by the respondents are in fact allegations which need evidence and cannot therefore be disposed of by way of preliminary objections as sought by the respondents.

A lot more was argued by the respective learned counsel which in our view is not relevant to the matter before us, that is the preliminary objections.

We think there is merit in the submission by Mr. Bwana. From the submissions filed on behalf of the respective parties it is clear that all the learned counsel are in agreement that a preliminary objection on a point of law is one which is argued on the assumption that all the facts pleaded by the other side are correct. This was the position taken in the case of Mukisa Biscuits Manufacturers Co. Ltd. V. West Distributors Ltd (1969) E.A. 696 cited on behalf of both the 2nd respondent and the appellant. (See also Court of Appeal of Tanzania Civil Application No.64 of 2003, CITIBANK TANZANIA LTD V. TANZANIA TELECOMMUNICATIONS LTD) & others. (Unreported).

Going by the arguments advanced by learned counsel it seems to us that the preliminary objections raised by the two respondents involve contentious issues of fact which need to be ascertained by proof one way or the other, and which is only possible upon production of and evaluation of whatever evidence the parties have and which each of them rely upon. It is also clear that the parties, in particular the respondents, in arguing the preliminary objections have in their submissions even attempted improperly to argue the appeal on merit. We agree entirely with the appellant's counsel that the grounds of preliminary objections argued by the respondents attack the appeal on merit and cannot for that reason be disposed of by way of preliminary

objection. All the grounds of preliminary objection being clearly misconceived are overruled.

Having said that we must add without further ado that we are of the firm view that the Tribunal without doubt does under S. 61(3) and (4) of the Fair Competition Act have jurisdiction to determine this appeal. It is undisputed that the appeal arises from a decision of the Fair Competition Commission with which decision the appellant has a pecuniary and material grievance. The relevant part of Section 61 reads as follows:-

(Section 61(1) and (2) not applicable)

Section 61(3) - Any person that has a pecuniary and material grievance arising from a decision of the Commission other than a decision referred to in sub-section (1) may appeal to the Tribunal for review of the decision within 28 days after the notification of publication of the decision.

(4) The grounds for an appeal under sub-section (3) shall be that:-

(a) the decision made was not based on evidence produced;

(b) there was an error in law;

(c) ...

(d) ...

In his grounds of appeal the appellant is complaining inter alia that the decision was not based on evidence and that there was an error in law

in the finding that the FCC had no jurisdiction to entertain the appellant's complaint. We are satisfied for the above reasons that this is an appeal fit for the consideration by this Tribunal and that it was properly lodged before this Tribunal. Indeed the grounds of appeal advanced by the appellant fit squarely under Section 61(4)(a) and (b) of the Fair Competition Act. Clearly it is only upon hearing the appeal on merit can it be determined by this Tribunal whether or not the allegations and the grounds of appeal have merit. And even if as alleged the appellant's complaint was not heard by FCC Section 61(5) and (7) empowers this Tribunal to determine the appeal and make appropriate necessary orders.

The grounds of objections are therefore struck out.

Last but not least this Tribunal has been constrained to express its dissatisfaction with the tendency by contending learned counsel to use abusive language such as illiterate and stupid and name calling in their submissions when referring to the other party. This is most unbecoming of learned counsel who are cautioned to henceforth conduct themselves appropriately and refrain from using abusive or offensive language when referring to the opposing learned counsel or parties. Indeed by using abusing language the learned counsel concerned may place himself in a position whereby an ordinary person in fact may not be able to differentiate between learned counsel and a layman.

One last thing before we conclude. From the record it is clear that no Reply has been filed by the 1st respondent although he was served with a copy of the appeal in June 2008. Under Rule 15(1) a respondent is required to file a Reply within 14 days of being served with the Memorandum of appeal. In his written submission on the preliminary objections learned counsel for the 1st respondent has sought inter alia leave to file a Reply to the Memorandum of Appeal should the Tribunal find that it has jurisdiction to entertain this appeal. Needless to say this is most improper and unprocedural. In the first place the time to file a Reply has expired. Admittedly this Tribunal has jurisdiction under rule 23 to grant extension of time limited by the Rules or by its decision. However Rule 16(1) clearly requires that an application must be made by Chamber Summons supported by an affidavit. In the circumstances of this case the 1st Respondent ought to follow procedure and make application in accordance with the rules. The Tribunal not being properly moved to grant leave to file a Reply the prayer for leave is hereby is rejected and struck out.

Costs in the cause. The appeal will proceed on merit on a date to be fixed by the Registrar.

Hon. R. Sheikh, J.

Chairman

29/9/2008.

Dr. Ramesh Shah - Member

Victoria Makani - Member

Ruling read this 30/09/2008 in the presence of Mr. Kamugisha learned counsel for the appellant, Mr. Didas learned counsel for the 1st Respondent and Mr. Rutabingwa learned counsel for the 2nd Respondent and Beda B/C.

Hon. R. Sheikh, J.
Chairman
30/09/2008

Dr. Ramesh Shah - Member

Victoria Makani - Member