LEGAL UPDATE

FB ATTORNEYS

27 April 2021

Court of Appeal Illuminates on Jurisdiction of Courts in Tanzania

- **Confirms that the parties' express choice of forum of a Court is always binding**
- **Cements on the principle that jurisdiction is neither capable of being conferred nor ousted by agreement**
- **Holds that the Court in which the suit is instituted has discretion to stay the suit once it is known that the parties agreed to sue in a particular forum, whether foreign or not**

Background

The Court of Appeal of Tanzania (the Court) has recently, in the case of SCOVA Engineering S.p.A. and IRTEC S.p.A. vs. Mtibwa Sugar Estates Limited, Kagera Sugar Limited, Super Star Forwarders Company Limited and General Motors Investment Limited, Civil Appeal No. 133 of 2017 (unreported), pronounced a very progressive decision regarding respecting parties agreement to the choice of law and forum. This appeal emanated from the High Court of Tanzania (Commercial Division) after the High Court dismissed the Appellants' claims against the Respondents for lack of jurisdiction since the parties had agreed to Italian Law as choice of law and Italian Courts as the forum.

The High Court held that the role of the Court and particularly the Commercial Court is to enforce agreements of the parties. It further held that the Court can intervene and determine where a suit should be instituted where there is no prior agreement between the parties but where the parties have expressly agreed where to institute their dispute, the Court cannot intervene to vindicate one's wish to derogate from their agreement. Aggrieved by this decision, the Appellants preferred an appeal to the Court.

Judgment of the Court

In a classic judgment authored by Justice Ndika (other bench members comprising of Mkuye, JA and Mwambegele JA), the Court restated and emphasised the principle that the jurisdiction of the High Court or any Court for that matter, having been conferred by statute, is not capable of being ousted by agreement of the parties. In cementing this principle, the Court quoted with approval a paragraph from a commentary book by Pollock and Mulla (in the Indian Contract and Specific Reliefs Act) that:

"Where two or more Courts have jurisdiction to try a suit the agreement between the parties limiting the jurisdiction to one Court is neither opposed to public policy nor a contravention of s.28 of the Contract Act. So long as the parties to a contract do not oust the jurisdiction of all Courts which would otherwise have jurisdiction to decide the cause of action under the law, it cannot be said that the parties have by their contract ousted the jurisdiction of the Court and where the parties to a contract agreed to submit the

For further information on legal updates please contact:

E: info@fbattorneys.co.tz

About FB Attorneys
FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 1 by Chambers and Partners General Business Law.

FB Attorneys
8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

TOP RANKED Chambers GLOBAL 2020 FB Attorneys

IFLR 1000 TOP TIER FIRM 2020

The LEGAL 500 EMEA LEADING FIRM 2019

PROUD MEMBER OF LEXAfrica Lawyers for Africa • Advogados para África • Avocats/Conseils pour l'Afrique

dispute arising from it to a particular jurisdiction which would otherwise also be a proper jurisdiction under the law, their agreement to the extent they agreed not to submit to other jurisdictions cannot be said to be void as against public policy."

Further, although the Court dismissed the Appellants' appeal, yet it faulted the High Court in taking a position that the High Court's jurisdiction was ousted by a clause in the agreement and concluding that the High Court had no jurisdiction to try the matter. The Court borrowed a leaf from the Court of Appeal of Kenya where it was held that:

"Basically, therefore, the parties did not, by agreement, oust the jurisdiction of the Courts in Tanzania. They chose the law and the Court at which a dispute arising from their shipment contract shall be determined. Where in a bill of lading, the parties express choice of forum of a Court, that agreement has always been found to be binding."

Regarding the dismissal order issued by the High Court, the Court observed that the High Court slipped into error by dismissing the suit for dismissal connotes that a matter has been heard and disposed of on its merits. In providing a candid way forward on this, the Court endorsed its earlier position taken in Sunshine Furniture Co. Ltd. v. Maersk (China) Shipping Co. Ltd., Civil Appeal No. 98 of 2016 (unreported) that:

"When the attention of the Court, in which the suit is instituted, is drawn to a contractual stipulation to seek relief in a particular (foreign) forum, the Court may, in the exercise of its discretion, stay to try the suit. The prima facie leaning of the Court is that the contract should be enforced and the parties should be kept to their bargain."

Based on the foregoing, the Court dismissed the appeal with no order as to costs since parties must be held to their bargain of having chosen a foreign law and foreign forum for dispute resolution. Furthermore, the Court vacated the dismissal order of the High Court and stayed the proceedings at the High Court.

To read a copy of the SCOVA Engineering S.p.A's judgment click here.

For further information on legal updates please contact:

E: info@fbattorneys.co.tz

About FB Attorneys

FB Attorneys is an all service law firm based out of Dar es Salaam, Tanzania.

We cover all aspects of the law and specialise in all corporate and commercial matters including Mining, Oil & Gas, Tax, Litigation, Competition, Banking & Intellectual Property law.

FB Attorneys has been ranked as a tier 1 law firm by the IFLR 1000 in the Energy & Infrastructure and Financial & Corporate sectors, tier 1 by Legal 500 and band 1 by Chambers and Partners General Business Law.

FB Attorneys

8th Floor, Amani Place, Ohio Street
P. O. Box 19813
Dar es Salaam, Tanzania
T: +255 22 2135994/5
E: info@fbattorneys.co.tz
W: www.fbattorneys.co.tz

Disclaimer

TOP RANKED Chambers GLOBAL 2020 FB Attorneys

IFLR 1000 TOP TIER FIRM 2020

The LEGAL 500 EMEA LEADING FIRM 2019

PROUD MEMBER OF LEXAfrica Lawyers for Africa • Advogados para África • Avocats/Conseils pour l'Afrique