IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISC. CIVIL CAUSE NO. 292 OF 2019

BISMARK HOTEL MINING COMPANY LIMITED -------- APPLICANT

VERSUS

PANGEA MINERALS LIMITED ---------- 1ST RESPONDENT

CHERIE BLAIR ---------- 2NDRESPONDENT

TIM HARDY ---------- 3RD RESPONDENT

RULING

L. M. MLACHA, J.

The applicants, BISMARK HOTEL MINING COMPANY LIMITED filed an application against the respondents, PANGEA MINERALS LIMITED, MRS. CHERIE BLAIR QC and TIMOTHY HARDY seeking the following orders: -

1. An order of this court setting aside the ruling of the adjudicators, the 2nd and 3rd respondents dated 21st May, 2019 which orders the adjudication between the applicant and the 1st respondent to be decided on the basis of the papers filed by both parties to the adjudication.

2. An order of this court setting aside the ruling of the adjudicators, the 2nd and 3rd respondent dated 21st May, 2019 which allows the 1st respondent to pay costs of the applicant's Adjudicator in the adjudication between the applicant and the 1st respondent.
3. An order of this court setting aside the order of the adjudicators, the 2nd and 3rd respondents striking out the applicant's counterclaim in the adjudication following the applicant's inability to pay its cost.
4. An order that the applicant be given time to source and/or engage a third party funding in respect of its costs and/or expenses in the Adjudication Proceedings.
5. An order that the applicant be given time to engage Legal Counsel to represent in the Adjudication Proceedings.
6. Costs of this application be provided for;
7. Any other the Honourable Court may deem fit to grant in favour of the applicant.

The application is made under order XLIII rule 2, Section 68(e) and section 95 of the Civil Procedure Code Act, Cap. 33 R.E 2002 (now R.E 2019) and section 2(3) of the Judicature and Application of Laws Act, Cap. 358 R.E 2002

(now R.E 2019) and is supported by the Affidavit of LUGEMBE KAHUNGWA. The respondents resisted the application seriously. They lodged a counter affidavit in opposition. With leave of court, the application was heard by written submissions.

The applicants made a submission touching a number of issues widely but the summary of it can be put as follows; that, there is an Arbitration proceeding between them and the first respondent which is pending before the second and third respondents as arbitrators. That on 21/05/2019, the second and third respondents made an order ordering the hearing to proceed on the basis of the available documents without affording them an opportunity to be heard before the issue of the order. That, prior to that, the applicants had a problem with their **funder** who was a third party paying fees for their counsel and the arbitrator. This problem caused their counsels to pull out for lack of fees. They were thus obliged to seek for adjournment for a period of 4 months, so that they could look for another funder who could pay the fees of the counsel and the Arbitrator. They made this prayer to the arbitrators who rejected it. They instead ordered the matter to proceed for hearing on the

basis of the available documents and further that, the first respondent could pay both arbitrators, a decision which was against the interests of justice in the matter. It is on these basis that they prayed for the grant of orders contained in the chamber summons which has the effect of setting aside the orders of the arbitrators which in their view breached the principles of natural justice.

The respondents have given a background to the issue of the order of the arbitrators (Procedural Order No. 8) with emphasis that the applicants were fully heard before the order was issued. They proceeded to request the court to examine if it can set aside the order of the arbitrators in the absence of an appeal. They submitted that the provisions cited by the applicants give the court power to issue preservertory orders/measures in respect of the pending arbitral proceedings but the applicant's prayer to set aside the decision something which is not preservertory in nature. Further that, the order can only be set aside through appeal lodged in terms of Order XXXIX rule 32 of the CPC, counsel submitted.

Counsel went ahead and said that, according to Annexture

GHML – 4 to the affidavit of Mr. Lugembe, the applicant requested an adjournment for a period of 4 months to source a third party funder and legal counsel but since then, more than 4 months have elapsed but they not done anything. They thus argued that, what is being done by the applicants is an abuse of the court process which must be rejected. They referred the court to **Civil Case No. 165 of 2019** before this court between the same parties arguing that what is happening here is a manifestation of an abuse of the court process.

The applicants made a rejoinder and joined issued with the respondents on all issues. They referred the court to an earlier ruling of this court (Ngwala, J) on the question of jurisdiction and asked the court to follow it.

Having considered the matter carefully, I think this application has no merits and with respect to the counsel for the applicants, it must fail on 3 grounds. **One**, there is a problem of the enabling provisions of the Law. Having read the provisions and the ruling of this court (Ngwala J), I could not find difficult in accepting that this court can grant an injunction where there is no suit under section 2 (3) of JALA.

That is obvious particularly where the problem at hand cannot be resolved on the framework of the existing law in which case we are allowed to apply statutes of general application and principle of equity and common law which were in force in England on the 22nd day of July 1922. I have no problem with that. My problem is the way section 68 (e) of the CPC was invited to play. This provision envisages the existing of the main suit. The words used are very clear ***"the court may ... make such other interlocutory orders...."***. An interlocutory application comes with a main suit which is not existing here. It was therefore wrong, in my view, to cite section 68 (e) of the in line with other provisions. I think that was a wrong citation. The respondents were therefore correct to proceed to complain.

Two, an abuse of the court process. Looking at the events prior to the issue of Procedural Order 8 and what followed thereafter, one may see that these proceedings are nothing but an attempt to delay the Arbitration Proceedings for some advantages on the part of the applicants. It all started with a prayer for adjournment but the trend charged. The applicants sought to adjourn the matter saying that they needed time to get some documents. At

this point, there was no withdrawal of the funder or counsel. The withdrawal came after the refusal to adjourn the matter. One may ask himself why? The obvious answer is that the withdraw of funder and counsels have a relation to the adjournment. It was a move to frustrate the proceedings. And when they were ordered to proceed, they came to this court for the same purpose. These proceedings are therefore, an abuse of the court process. Further to that, as pointed out above, the applicants opened Civil Case No. 65/2019 on the same subject matter. One may ask himself why didn't they lodge this request in that case? That is what makes the matter worse and reveal the abuse clearer.

Three, the whole issue appears to be a confused matter. Civil litigations are matters which are purely private. Each party has to fight for his right. Each party has to plan, arrange and pay for his costs. This is the position of the law of this country. Now if the applicants had a problem of litigation costs, that was their own problem. They had to take it that way. It was not correct, in my view, to put it as a problem of each and every body. It was for them to find a way of negotiating through without necessarily taking steps

to frustrate the arbitration. This is not what is seen here.

Again, going through the orders, I could not see any place showing that the counter claim was ever dismissed or a specific order directing the first respondents to pay litigation costs for the applicants making the complaint on this area confused and baseless.

That said, on the reasons explained above, the application is found to be devoid of merits. It is dismissed with costs.

L. M. Mlacha

JUDGE

17/07/2020

Court: Ruling delivered this 17th day of July, 2020 in presence of Seni Malimi, Advocate for the applicant and the absence of the 2nd and 3rd respondents and Abachi Fredy, Advocate for the 1st respondent.

L. M. Mlacha

JUDGE

17/07/2020