IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

COMMERCIAL CASE NO. 20 OF 2004

VODACOM TANZANIA LIMITED.....PLAINTIFF
VERSUS

TANZANIA TELECOMMUNICATIONS COMPANY LIMITED.....DEFENDANT

RULING

KALEGEYA, J:

The following stand uncontroverted. On 7/10/2004 the Respondents filed **an amended Plaint** following a Court order dated 5/10/2004. The earlier claim, among others, was for US $ 3,220,281.50 allegedly being charges for International calls terminating on Plaintiffs' network from April 2002 to February, 2004. The amended Plaint increased the claim on this item to US $ 4,939,300 by pushing on the period covered to June 2004 from February, 2004 and introduced a further claim of US $ 3,267,441.50 allegedly being outstanding interconnection charges for national calls and USD 429,596.97 being underpayments for similar charges.

On 5/10/2004, when leave to amend the Plaint by 8/10/2004 was granted, it was further ordered that the Defendants file their amended written statement of Defence by 20/10/2004, while Reply, if any, was to be filed by 25/10/2004.

The Defendants did not file an amended written statement of Defence as ordered. Instead, on 22/10/2004 (2 days passed the scheduled date) they filed a

petition under s. 6 of The Arbitration Ordinance, Cap 15 and Rule 11 of the Arbitration Rules, 1957, praying to the Court, among others to,

> *"(a) Order a stay of the claims relating to national calls terminating on the Respondent's network instituted by Respondent."*

Subsequently, on the other hand, on 11/11/2004, the Plaintiffs/Respondents filed a chamber summons praying for exparte proof of their claims on the grounds that the Defendants had failed to file a written statement of Defence as scheduled.

For Arbitration, on which the Petitioner relies, the "INTERCONNECTION AGREEMENT BETWEEN TANZANIA TELECOMMUNICATIONS COMPANY LIMITED AND VODACOM TANZANIA LIMITED" has the following clauses:

> *"15.1 It is understood and agreed that the Parties hereto will carry out this Agreement in the spirit of mutual co-operation and good faith and that every endeavour will be made to resolve any differences that may arise between them as to the interpretation of or performance under this Agreement by amicable discussion. If however the disagreement has not been resolved within 60 days, the matter shall be referred to arbitration. Each Party shall appoint one arbitrator and the latter shall appoint a third arbitrator.*
>
> *15.2 Notwithstanding anything to the contrary contained in this clause 15, neither Party shall be precluded from obtaining interim relief from a court of competent jurisdiction pending the decision of the arbitrator appointed in terms of this clause 15. The Parties hereby consent to the jurisdiction of*

the High Court of Tanzania (or its successor) in Dar es Salaam in respect of such proceedings.

15.3 *The arbitration shall be held*

15.3.1 *in accordance with the rules applicable to arbitration in terms of the laws of the United Republic of Tanzania;*

15.3.2 *in Dar es Salaam;*

15.3.3 *with only the legal and other representatives of the Parties present,*

it being the intention of the Parties that the arbitration shall be held and completed as soon as possible.

15.4 *The decision of the arbitrators shall be final and binding on the Parties and may be made an order of the court referred to in clause 15.2 at the instance of either of the Parties.*

15.5 *The Parties agree to keep the arbitration including the subject matter of the arbitration and the evidence heard during the arbitration confidential and not to disclose it to anyone except for the purposes of an order to be made in terms of clause clause 15.4."*

The Petitioners' main argument is that though they had subjected themselves to Court's jurisdiction on the first claims regarding International Inter – connections, they have not regarding the 2nd part (national inter – connections) and that therefore the Arbitration clause should be invoked. They urge in the alternative that they should be extended time within which to file a written statement of Defence. They insist that the delay was caused by the fact that they had to seek the Board Members directions and some of the members are outside the Country.

The Respondents reacting thereto, argue that the Petitioners should have challenged the invoices upon receipt of the same hence creating a "dispute" in terms of clause 9 of the Agreement capable of being placed under Arbitration and that it is now late in the process to invoke Arbitration; that in any case, the Petition had to be filed within the very period ordered for the filing of a written statement of Defence and made reference to **TM AM Construction Group (Africa) vs. Attorney General EACR [2001] 1 at 293;** that by failing to file the written statement of Defence and filing the petition beyond the time scheduled for the filing of the said written statement of Defence automatically subjects them to the jurisdiction of the Court; that severing the claim would reverse the Court's ruling for amendment and that this would lead to a lot of *"difficulty, embarrassing and bring about confusion and uncertainty in the due process of Court as the two claims arise from the same transaction and same clause 9, of the Interconnection Agreement between the Petitioner and the Respondent",* that this would guard against multiplicity of actions or defence of res – judicata; that the petition has been brought in bad faith, referring to a dissenting judgment of Tunoi JA in **Niazsons (K) Ltd v China Road and Bridge Corporation, EALR 2, at 503** and insisted that a party who fails to take steps in compliance with Arbitration clauses, as did the Petitioner, cannot be said to be willing for Arbitration; that the prayer for extension of time from the bar and during submissions is legally no prayer and more so in view of the existence of the prayer to proceed exparte by the Respondents let alone the barrage provided by O. 13 Rule 6 CPC as amended by GN 422/94 whereby amendment cannot be made after 21 days had elapsed after the last order and made reference to **Civil Case 353 of 98 (HC – DSM) Deo P. Mackanza vs The Attorney General and The Chief Parliamentary Draftsman.**

The Petitioners distinguished, the **TM AM Construction Group (Africa) case** saying that the delay of 41days therein was clearly pronounced. They maintained the same on **Niazsons (K) Ltd case** because in there parties had already gone into Arbitration when one reneged, and insisted that the Petition is under the Arbitration Ordinance and not the Civil Procedure Code. On what should guide the Court when considering a petition of this nature, Petitioners made reference to **VIP Engineering & Marketing Ltd vs Societe Generalle de Surveillance (SA) and TRA, cc 16 of 2000 in which Food Corporation of India and another vs Yadav Engineer Contractor, AIR 1982 SC 1302 was cited; Roussel – UCLAF VS Searle & Co. Ltd [1978] 1 Lloyd Rep 225; Construction Engineers and Builders ltd vs Sugar Development Corporation [1983] TLR 13; The Norsad Fund vs Tanzania Investment Bank, (HC) Civil Case No. 316 of 1997; MIC Tanzania Limited vs Adam Messers & William Sangiwa, cc 265 of 2002 and Ashak Kabani & Africa Online (T) Ltd vs Ayisi Makatiani & 7 others, cc 265 of 2001.**

Although the parties made somehow lengthy affidavit (Mr. Kibola); counter affidavit (Mr. Ngeleja) and submissions (by Counsel, Dr. Nguluma for Petitioners and Mr. Mujulizi for the Respondents) I consider the key issues to be fine indeed.

I should start by stating that I am gratified by the Counsel's appreciation of the guiding principles in Petitions for invoking Arbitration clauses in contracts.

As I had an occasion to paraphrase the principles in **Ramada Investment Ltd vs Engen Tanzania Ltd, cc 211 of 2001** quoted in the **MIC TANZANIA LIMITED** case referred to by the Petitioner,

> *"Although generally parties cannot contract to oust court's jurisdiction or commit illegalities, the law recognizes that it is they who decide on how they should have their intentions carried out and if they so contract, courts should give effect to this, their intentions. If therefore, in a contract or agreement, parties plainly display that in the event of dispute the same should first be referred to Arbitration, the court, will generally give effect to that undertaking although it is not bound to. In deciding to give effect to the undertaking, the court will not simply act on any clause however drafted or any set of facts: it has to establish first the nature of the controversy between the parties and then relate this to the Arbitration agreement after satisfying itself of its existence and validity. The court should then satisfy itself that the former (the controversy) is covered under the latter. Only then would the court decide whether, on the set of facts and circumstances of the relevant case stay of proceedings should or should not be granted. This is important because an arbitration clause may be broad and comprehensive covering all types of disputes likely to arise out of the contract or parties may have decided to limit it to certain type of disputes or exclude others."*

And, the petitioner should be ready and willing to go for Arbitration. As to the burden, it is on the opposing party to establish that the effects of the Arbitration clause should be departed from.

In the said **Ramada case**, I went on paraphrasing the principles,

"However, a party cannot secure stay of proceedings where he has already taken a step in the process which may even include where a party responding to summons in a suit prays for time to effect a defence. A party who intends to rely on s. 6 of the ***Arbitration Ordinance*** *should immediately upon appearance before the court in response to summons or when a counter – claim is served upon him, express his intentions of relying on the Arbitration clause……*

On their powers, although Arbitrators can decide both on questions of law and facts, in certain situations where it is ascertained that the questions of law can best be decided once and for all by the court or that there is a possibility of conflict of decisions or that it is expedient that multiplicity of proceedings be avoided the court would not refer the matter to arbitration. Granting or refusing to give an order for stay is within the discretion of the court which should however be exercised judicially."

With the above stated principles let us delve into merits.

I should outrightly state that indeed clause 15 of the parties' Agreement sufficiently allows either party to go for Arbitration in the event of dispute. The said clause has been quoted in full above. It is wide enough to cover disputes on both International and National Interconnections. There is nothing amiss therefore with the Petitioner's attempt to utilize it.

The above said, with respect to Mr. Mujulizi, the argument that Arbitration should have been invoked the moment the Petitioners became dissatisfied with the invoices is neither here nor there because clause 6 of Arbitration Ordinance comes into play when one of the parties knocks at the Court's door with an action and not when the dispute(s) brews up or when it is registered as between the parties.

The above notwithstanding however, I hold that in this situation the petition is doomed to failure because of the following.

As already indicated, ordering for stay is discretionary but it should be reached judicially.

In the present case there is an order which allowed the Plaintiffs to amend the Plaint. That order effectively stands. It is the one which gave birth to the claim which the Petitioners now clamour to severe into two. In the circumstances, this is a proper case where the Court should exercise its discretion against Petitioners. To do otherwise, as rightly submitted by the Respondents, would defeat the order for the amendment of the Plaint. The Court would be acting absurdly to hold that part of the claim is okay as the Petitioners submitted themselves to the Court's jurisdiction and that the other one should be stayed and go for Arbitration. This would contradict the order already made, for a single suit hence single trial.

The above disposes the Petition. For completeness however, let me also deal with the other argument by the Respondents, that the Petition is time

barred because of having been filed beyond the scheduled time for the filing of the written statement of Defence.

I am on all fours with the Petitioners that we should not mix the procedures under the Civil Procedure Code and s. 6 of The Arbitration Ordinance. Under the Ordinance (Cap 15) there is no prescribed time limit within which a party has to petition for stay. S. 6 simply provides:

> *"6. Where any party to a submission to which this part applies, or any person claiming under him, commences any legal proceedings against any other party to the submission or any person claiming under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at anytime after appearance, and before filing a written statement, or taking any other steps in the proceedings, apply to the court to stay the proceedings and the court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration may make an order staying the proceedings."*

The said provision simply requires a party who wishes to take advantage thereof to file a petition before the filing of a written statement of defence or taking any step in the process.

It is not disputed that the Petitioner has taken no step in the process regarding National Interconnections.

While I agree with the Respondents that this does not mean that a party can ignore *"summons and or the order to file a written statement of defence and even come to Court to apply for stay at his own pace"*, I am of the settled view that legally the time limit is gauged from two angles.

One, by the otherwise Court processes –the other party may have applied for other allowable orders under the law. Inaction by the intending party would be rewarded by the passing of detrimental orders which would bar the filing of the petition. In this case there is no such application or order which would have barred the Petition from being filed on 22/10/2004.

Two, in my view, in an unlikely event, that the process stalled and no application or order is made, the Petitioner would be barred by the law of Limitation in terms of clause 21 of The 1st Schedule of The Law of Limitation Act (Act 10 of 1971) which fixes the period to 60 days for an *"Application under the Civil Procedure Code, 1966, the Magistrates Court Act, 1963* ***or other written law for which no period of limitation is provided in this Act or any other written law…"*** (emphasis mine)

That however would depend on the steps taken by the other party and orders passed by the Court.

If for example, the Respondent's application to proceed exparte had been heard and allowed there would be no dispute to be stayed if subsequently the Petition was filed. The 60 days' limit will not have assisted.

However, on the facts at hand, while one would wonder why delay that much, the Petitioner acted within time as the sixty days were yet to elapse and when they filed the Petition on 22/10/2004 there was no order which would be said to have barred them. Even the chamber summons praying for exparte proof was filed much later – 11/11/2004.

The TM AM Construction Group (Africa) case cited to us by the Respondents to back up the argument that a Petition has to be filed within the period scheduled for the filing of the written statement of defence is highly distinguishable because the wording in s. 6 (1) of The Arbitration Act, 1995, of Kenya, is different from that in s. 6 of our Ordinance. The opening paragraph in the **Kenya law** is very categorical:

> *"A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies* ***not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings,*** *stay the proceedings and refer the parties to arbitration unless it finds:"* (emphasis mine)

Under our law however, (s. 6 quoted above) a party may petition for stay

> *"at anytime after appearance and before filing a written statement, or taking any other steps in the proceedings",*

and that is what the Petitioners did.

The latter arguments notwithstanding however, for reasons canvassed in the earlier arguments, the Petition stands dismissed.

The next question is, what step should now be embarked upon?

In their submissions, the Petitioners had impressed,

> *"In the event this Honourable Court would be inclined to dismiss this Petition we pray that time to take steps into the proceedings by filing a written statement of defence be granted"*

and this had attracted the following response from the Respondents,

> *"With respect to counsel, this prayer, we submit, is not tenable at all. The proper procedure for seeking extension of time within which to file pleadings is well known. The Petitioner/Defendant ought to have a proper application for such in accordance with the Civil Procedure Code, 1966. Moreover, there is pending before this Court filed by the respondent an application seeking for necessary orders as a consequence of counsel failing to file for extension within the time prescribed by law. It is importune for counsel to seek to forestall those proceeding by way of a loose prayer made in passing from the bar. The prayer cannot be answered in these proceedings. That would be pre – empting the matter."*

With respect to Respondents' Counsel, the ambit by which a party can make an application is very wide indeed. The proviso to O. 43 (2) CPC is very clear on this. The said Order provides:

> *"Every application to the court made under this Code shall, unless otherwise provided, be made by a chamber summons supported by affidavit:*
>
> *Provided that the court may where it considers fit to do so, entertain an application made orally, or where all the parties to a suit consent to the order applied for being made, by a memorandum in writing signed by all the parties or their advocates,* ***or in such other mode as may be appropriate having regard to all the circumstances under which the application is made."*** (emphasis mine)

If it weren't for the existence of the application by the Respondents to proceed exparte I was inclined to consider the application though made through submissions because in my view, the last 21 words in the proviso to O. 43, Rule 2 are wide enough to cover the situation.

Although, for the reason stated, I cannot make a decision thereon, I hold that it is an application properly presented before the Court. We thus have now two applications before us – an application to proceed exparte and an application to extend time for filing a written statement of defence. I hereby hold that both applications be argued together.

L.B. KALEGEYA

JUDGE

Order:

(i) The Petition to stay proceedings in respect of claims for national interconnection charges stand dismissed.

(ii) The application for extension of time to file a written statement of Defence is proper in terms of O. 43 (2) CPC.

(iii) Both applications – an application by Respondents to prove their claims exparte and an application for extension of time to file Defence to be argued today (22/2/2005).

L.B. KALEGEYA

JUDGE

Delivered

L.B. KALEGEYA

JUDGE

22/2/2005

3,305 words

I Certify that this is a true and correct of the original order Judgement Ruling
Sign ____
Registrar Commercial Court Dsm.
Date 22/2/05