IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 128 OF 2015

(Arising from Commercial Case No. 168 of 2014)

IN THE MATTER OF THE ARBITRATION AND IN THE MATTER OF THE ARBITRATION ACT

AND

IN THE MATTER OF SECTION 6 OF THE ARBITRATION ACT [CAP 15 OF THE RE 2002]

AND

IN THE MATTER OF A PETITION TO STAY PROCEEDINGS PENDING REFERENCE TO ARBITRATION

BETWEEN

SYMBION POWER LLC ..... DEFENDANT/PETITIONER

VERSUS

SALEM CONSTRUCTION LIMITED ..... PLAINTIFF/RESPONDENT

15th September & 30th November, 2015

RULING

MWAMBEGELE, J.:

This petition has been filed by Symbion Power LLC after the previous one (Miscellaneous Commercial Cause No. 12 of 2015) was struck out following a

successful preliminary objection raised by the respondent Salem Construction Limited. The facts giving rising to this petition are simple. They can briefly be stated as follows: on 29.12.2014, the respondent filed in this court Commercial Case No. 168 of 2014 against the petitioner praying for the following orders:

a) A declaration that the Defendant breached the Service Agreement;
b) An order against the Defendant to pay the Plaintiff US $ 466,482.73 being principal outstanding payment for work done;
c) An Order against the Defendant to pay the Plaintiff US $ 87,414.44 being interest on delayed payment;
d) An order against the Defendant to pay the Plaintiff US $ 50,000.00 being compensation for costs incurred for legal services in pursuit of the claim;
e) An order against the Defendant to pay the Plaintiff interest on decretal sum at Court's rate of 12% per annum from the date of institution of the suit until payment in full;
f) An order that the Defendant pay the Plaintiff costs of and incidental to this suit; and
g) An order that the Defendant should pay the Plaintiff interest on costs at the Court's rate 12% per annum from the date of judgment until payment in full.

On 26.01.2015, the defendant (the petitioner herein), filed a petition under the provisions of section 6 of the Arbitration Act, Cap. 15 of the Revised Edition, 2002 (henceforth "the Arbitration Act") praying for, *inter alia*, stay of the said Commercial Case No. 168 of 2014 pending reference of the dispute

between the parties to arbitration as dictated by the agreement between them. That petition, as already stated, was struck out on 04.05.2015 after a successful preliminary objection by the plaintiff (the respondent herein).

Undeterred, the petitioner has filed this petition claiming for the same reliefs as in Miscellaneous Commercial Cause No. 12 of 2015 but this time rectifying the ailments which were apparent therein and which made it incompetent. The present petition was filed on 02.06.2015.

When the petition was called on for hearing on 15.09.2015, Mr. Mponda, the learned counsel who appeared for the petitioner was not feeling well and thus proposed that the petition be disposed of by way of written submissions. The prayer met no objection from Mr. Fungamtama, the learned counsel who appeared for the respondent. That being the position, the court granted the prayer and proceeded to schedule the submissions dates to which both learned counsel have dutifully complied. To appreciate the good work well done by both learned counsel, I shall summarise their submissions as under.

The kernel of the petitioner's submission and which is the central issue that this ruling must determine is that Commercial Case No. 168 of 2014 instituted by the respondent should be stayed pending reference of the dispute between the parties to an arbitrator. The reasons why this prayer is made is that the parties had so agreed in the execution and performance agreement as well as the subcontract agreement between them. The clause under reference is 19.1 of the Subcontract Agreement as appearing in the Subcontract for the Civil and Building Works for the Msamvu Substation appended to the Petition and marked as Annexture SP-2.

The learned counsel for the petition submits that the law on the staying proceedings pending arbitration is clear in that section 6 of the Arbitration Act empowers the court to stay proceedings once there is a submission to arbitration. The learned counsel relies on the definition under section 2 of the Arbitration Act which defines submission as a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not. The learned counsel also relies on section 6 of the Arbitration Act which reads:

> "**Power to stay proceedings where there is a submission**
>
> Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time 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 for the

proper conduct of the arbitration, may make an order staying the proceedings."

The learned counsel also cites ***WiA Group Limited Vs Convergence Wireless Networks (proprietary) Limited and Others***, Miscellaneous Commercial Cause No. 13 of 2012 (unreported) in which ***PTA Bank and another Vs Musoma Dairy Limited (in receivership) and others***, Commercial Case No. 83 of 2003 (unreported) was relied upon to restate the following six conditions to be met before the court stays proceedings:

i) There must be submission as defined under Section 2 of Cap. 15, and that there must be a written agreement between the parties to submit present and future disputes and/or differences to arbitration;

ii) That the questions in dispute are covered by the agreement and such questions should therefore be referred to arbitration;

iii)That the Petitioner is one covered by the reference to the arbitration clause in agreement. And so is the Respondent;

iv) That the Petitioner has not taken step that is in contravention of the procedural requirement as outlined under Section 6 of Cap. 15 that no further steps have been taken here after entering appearance. Such steps including the filing of written statement of defence or taking of other steps in the proceedings;

v) The Petitioner is willing and ready to arbitrate; and

vi) That there are no sufficient reasons before the court to make it refuse granting the stay.

The learned counsel for the petitioner concludes that the conditions and the law and as restated in the ***WiA Group*** and ***PTA Bank*** cases (supra) have been met and thus Commercial Case No. 168 of 2014 should be stayed pending reference of the dispute to arbitration.

On the other hand, the application is strenuously opposed by the respondent's counsel on all fronts. The assault against the written submissions by the petitioner has been done in a well elaborate fourteen-page written submission. The learned counsel for the respondent is at one with the learned counsel for the petitioner on the position of the law and the conditions to be met before a suit is stayed pending reference to arbitration as set out in the ***WiA Group*** and ***PTA Bank*** cases (supra). However, the learned counsel for the respondent submits that the learned counsel for the petitioner has miserably failed to come within the four corners of the provisions of section 6 of the Arbitration Act and the ***WiA Group*** and ***PTA Bank*** cases (supra) on which he made heavy reliance. The learned counsel for the respondent submits further that the learned counsel for the petitioner has not sufficiently demonstrated that the petitioner is ready and willing to do all what is necessary for the proper conduct of the arbitration. And further that the learned counsel for the petitioner has not shown that there is in fact a dispute between the parties which may be a subject for reference to arbitration. He complains that the learned counsel for the petitioner is importing arbitration clauses which have either no connection with the claim

for which Commercial Case No. 168 of 2014 has been brought or "simply void".

The learned counsel for the respondent submits further that the provisions of section 6 of the Arbitration Act are not couched in mandatory terms thus the relief sought by the petitioner cannot be granted as a matter of judicial generosity nor can it be claimed as of right. All the conditions stated in the ***WiA Group*** and ***PTA Bank*** cases (supra), he submits, must be satisfied so that a stay order can be given. In the instant case, he submits, only one condition has been satisfied; forbearance to take steps in the proceedings such as filing a written statement of defence, and therefore this petition cannot succeed.

It is further submitted that clause 19.1 of Annexture SP-2 relied upon by the petitioner is in respect of Msamvu substation only while Commercial Case No. 168 of 2014 is in respect of works in Morogoro, Iringa and Mbeya.

Annexture SP-3 has been attacked by the counsel for the respondent that it simply has no force of law because it was not executed.

The learned counsel has submitted on other grounds to substantiate why the dispute should not be referred to arbitration. He has given three reasons - the issues of settlement of Final Accounts hence nonexistence of the dispute calling for an arbitration clause into operation, the oppressiveness and unconstitutionality of the arbitration clause relied upon by the petitioner. The learned counsel cites Rowlatt, J. in ***London and N. W. Railway Vs Jones*** [1995] 2 KB 35 at 38 where His Lordship stated:

> "**The mere refusal to pay upon a claim which is not really disputed** does not necessarily give rise to a dispute call an arbitration clause into operation"
> [Emphasis supplied].

The learned counsel submits that the petitioner has not disputed anywhere the agreed final account which is the gist of Commercial Case No. 168 of 2014 and as appearing in Annexture SCL-1 to the Answer to the Petition and cites ***Day Vs William Hill (Park Lane) Ltd*** [1949] 1 KB 632 to buttress the proposition that agreeing to an account amounts to acknowledgement of a debt or obligation to be due from defendant constitute a promise to pay to discharge the same.

The fact that the petitioner has not established whether there is any dispute between the parties worth being referred to arbitration, in terms of section 110 of the Evidence Act, Cap. 6 of the Revised Edition, 2002 and ***TM AM Construction Group (Africa) Vs Attorney General*** [2001]. 1 EA 291, the prayer to have the suit stayed should not be granted in that the course is a delaying tactic to forestall payment of the claim and will entail unnecessary expenses by the parties.

On the requirement that a party might demonstrate readiness or willingness to do all things necessary to the proper conduct of the arbitration, the respondent's counsel states that the petitioner has not shown such readiness or willingness from the outset. If the petitioner had wished to arbitrate this

matter, the learned counsel argues, it would have issued a notice of a dispute to the respondent as provided for by clause 19.1 of Annexture SP-2 or should have responded to the respondent's pre-action letter; Annexture SLC-3 to the Answer to the Petition thus giving a green light to the respondent for the contemplated legal action. To buttress this proposition, the learned counsel has cited ***United Bank of Africa PLC Vs Tridend Consulting Limited*** (2013) 119 and ***Piercy Vs Young*** (1879) 14 Ch. D 20.

On the grounds submitted, the respondent submits that the petition be dismissed with costs.

The petitioner, in its rejoinder, submits that Annexture SP-2 to the petition covered works carried out in Morogoro, Iringa and Mbeya and that the respondent has not disproved this fact in that it has relied on Annexture SCL-2 to the Answer to the Petition which is not a contract but a handing over certificate. The petitioner also states that the contract the respondent refers to as MCA-T/Com/0048/0281 and relies on it, but has not appended the same for the court to see. It is submitted that the respondent was supposed to bring to the fore the said contract in terms of section 112 of the Evidence Act.

The petitioner rejoins further that the shortcomings of Annexture SP-3 unveiled by the respondent do not render the contract invalid and after all the fact that the contracts are disputed by the parties does not preclude the court from making a stay order.

As for the existence of sufficient reason why the matter should not be referred to arbitration, the learned counsel for the petitioner has rejoined that

it is absurd to say that there is no dispute between the parties in that it is alleged that the petitioner had refused to pay the purported settled accounts and the fact that the respondent instituted Commercial Case No. 168 of 2014; these point to the fact that there is a dispute between the parties worth referring to arbitration hence need for a stay order of this court.

As to the costs and unfairness of the submission, the petitioner rejoins that the submission gives room to the parties to settle the dispute amicably, first by referring the dispute to local arbitral adjudication and later to an international forum. The process by arbitration, is stated, will be less expensive than prosecuting Commercial Case No. 168 of 2014 filed by the respondent and which is sought to be stayed.

On the question of failure to demonstrate any readiness or willingness to do all things necessary to the proper conduct of the arbitration as required by section 6 of the Arbitration Act and the ***WiA Group*** and ***PTA Bank*** cases (supra), it is rejoined that the petitioner has shown such readiness and willingness by filing this petition. On the requirement of notice, the petitioner states that that was not done by both parties; the respondent issued a demand letter which was unprocedural.

The petitioner has brandéd the cases cited by the respondent as inapplicable in that the law in this jurisdiction is settled by section 6 of the Arbitration Act and the ***WiA Group*** and ***PTA Bank*** cases (supra).

The main issue for determination by this ruling is whether the petitioner has demonstrated sufficient grounds to justify the grant the prayer sought; to

stay Commercial Case No. 168 of 2014 pending reference of the dispute between the parties to arbitration. As rightly submitted by the learned counsel for petitioner, and conceded by the respondent's counsel, in order for a stay order to be given, the petitioner must satisfy the conditions laid down by section 6 of the Arbitration Act and as articulated in the ***WiA Group*** and ***PTA Bank*** cases (supra).

I start with the premise that this court is bound to respect an agreement of the parties. That is to say, this court will respect what has been agreed upon by the parties unless there are good reasons not do so. As was held by Mackinnon, LJ in ***Racecourse Betting Control Board Vs Secretary of State for Air*** [1944] Ch 114, courts should adhere to the general principle that the courts make people abide by their contracts. This notwithstanding, courts jealously guard its jurisdiction to dispense justice- see ***Cargo Lately Laden on Board the Fehmarn (Owners) Vs Fehmarn (Owners)*** [1958] 1 WLR 159. In this case – also cited as ***The Fehmarn*** [1958] 1 WLR 159 - at 162, Lord Denning held:

> "Then the next question is whether the action ought to be stayed because of the provision in the Bill of Lading that all disputed are to be judged by the Russian courts ... it is the matter to which the courts of this country will pay much regard and to which they will normally give effect but it is subject to the overriding principle that **no one by his private stipulation can oust these courts**

of their jurisdiction in a matter that properly belongs to them".

[Emphasis supplied].

Thus this court will not hesitate to try a case in the interest of justice despite intention by the parties to a dispute to ouster its jurisdiction.

Likewise, this court has power to order stay of proceedings when conditions stated in section 6 of the Arbitration Act as well as the conditions set out in the ***WiA Group*** and ***PTA Bank*** cases (supra) are satisfied. The conditions to be satisfied as set out in section 6 of the Arbitration can be deciphered in the provision whose marginal note reads "power to stay proceedings where there is a submission" and for ease of reference I reproduce the section as under:

> "Where a party to a submission to which this Part applies, or a person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him in respect of any matter agreed to be referred, a party to the legal proceedings may, at any time 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 for the proper conduct of the arbitration, may make an order staying the proceedings."

In the case at hand it is obvious that the parties had agreed under clause 19.1 of Annexture SP-2 to the Petition. For easy reference, I reproduce the clause as under:

"**If a dispute of any kind whatsoever arises between the Contractor and the subcontractor in connection with, or arising out of, the Subcontract or the execution of the Subcontract Works, whether during the execution of the Subcontract Works or after their completion and whether before or after repudiation or other termination of the Subcontract**, then the Contractor or the Subcontractor may given a notice of such dispute to the other party, in which case the parties shall attempt for the next fifty-six days to settle such dispute amicably.

Any Dispute arising out of this Agreement, which cannot be amicably settled by the parties, shall be referred to an Adjudicator who shall be suitably qualified person to be appointed jointly by the parties. In the event

of failure to agree upon the adjudicator, the adjudicator shall appointed by the Executive Secretary of the National Construction Council. The terms of the remuneration of the adjudicator shall be mutually agreed upon the parties when agreeing the terms of the appointment. Each party shall be responsible for paying one half of this remuneration.

Any dispute which cannot be settled after adjudication shall be finally settled under the Rules of Conciliation and Arbitration of the International Chamber of Commerce by one or more arbitrators appointed under such Rules. Arbitration may be commenced prior to or after completion of the Subcontract Works, provided that the obligations of the Contractor and the Subcontractor shall not be altered by reasons of the arbitration being conducted during the progress of the subcontract Works".

[Emphasis supplied].

The learned counsel for the respondent has submitted that the claim instituted in this court vide Commercial Case No. 168 of 2014 does not fall within the ambit of the arbitration clause relied upon by the petitioner. He avers that Annexture SP-2 which contains the arbitration clause was meant for Msamvu substation and not for other projects in Morogoro, Iringa and Mbeya Regions which is the subject of Commercial Case No. 168 of 2014

which is sought to be stayed. I partly agree with the respondent's counsel. I partly agree because Annexture SP-2 is titled "Subcontract for Civil and Building Works for the Msamvu Substation". I take judicial notice that Msamvu is located in Morogoro which is among the regions under which relief is sought in the Commercial Case No. 168 of 2014. This is also shown in the letter of acceptance dated 23.11.2011 by the petitioner to the respondent confirming the latter as a "Civil Works Subcontractor for the works at Msamvu Substation, Morogoro." This therefore connotes that the claim in Commercial Case No. 168 of 2014 which is sought to be stayed comprises the projects in Morogoro region which, as per Clause 19.1 of Annexture SP-2, ought to be subjected to arbitration as shown in the clause quoted above. It is a fact, and the petitioner does not seem to dispute, that the projects in Iringa and Mbeya Regions have not been stated anywhere to be a subject of arbitration.

With the foregoing position in mind I pose to myself a question whether in the circumstances it will be appropriate to refer the dispute between the parties to arbitration while the claim in Commercial Case No. 168 of 2014 includes only one project which may be fit to be referred to arbitration. This is the question to which I now turn.

As rightly pointed out by the learned counsel for the respondent, the way the arbitration clause is couched, it does not make it mandatory to issue a notice of dispute. But it is mandatory to settle the dispute amicably. This is suggested by the manner in which the words "may" and "shall" are used in the clause.

Thus, when the petitioner was written a demand letter, and the fact that it (the petitioner) remained silent after receiving it and the fact that Annexture SCL-1 has never been objected by the petitioner constitutes concession to the claim – see the ***Day*** case (supra) cited by the counsel for the respondent. As was stated by Rowlatt, J. in the ***London and N. W. Railway*** case (supra); a case cited by the learned counsel for the respondent:

> "The mere refusal to pay upon claim which is not really disputed does not necessarily give rise to a dispute calling an arbitration clause into operation"

The foregoing statement by Rowlatt, J. was emphasized in an article titled **Stay of Litigation Pending Arbitration** (available at http://www.sal.org.sg/digitallibrary/Lists/SAL%20Journal/Attachments/110/1994-6%281%29-SAcLJ-061-Sornarajah.pdf). In this legal work, the author has also this to say:

> "Litigation will seldom be brought unless there is a dispute between the parties. However, it may be brought with the purpose of enforcing a claim or recovering a debt the existence of which both parties accept. Such litigation cannot be stayed even in situations where the claim is covered by an arbitration clause, for it is pointless going to the arbitrator with such a claim as he does not have the power of ensuring that relief is granted

> the party making the undisputed claim. Only the courts can make effective enforcement orders in respect of indisputable claims and staying litigation in such instances may only postpone the inevitable and add to the costs."

It follows therefore that the fact that the petitioner has refused or neglected to pay the amount claimed in Commercial Case No. 168 of 2014 does not necessarily call for the operation of the arbitration clause in Annexture SP-2 to the petition. This is further vindicated by the fact that, as already alluded to above, the claim in Commercial Case No. 168 of 2014 is not limited to the projects in Morogoro region only but in respect of the projects in Iringa and Mbeya regions as well – see para 5 of the plaint. And as if to clinch the matter, nothing has been clearly stated by the petitioner that the projects in Iringa and Mbeya regions are also subject of reference to arbitration.

There has been fronted an argument by the respondent's counsel that bringing the matter to arbitration will entail unnecessary expenses to the parties. This is not conceded by the learned counsel for the petitioner stating that prosecuting Commercial Case No. 168 of 2014 will be more costly than referring the matter to arbitration. I, respectfully, do not agree with the learned counsel for the petitioner. It does not seem to me that handling this dispute on arbitration at both national and international levels can be less expensive than prosecuting Commercial Case No. 168 of 2014. The learned counsel for the respondent has state at p. 9 of his written submission as follows:

> "The petitioner/defendant is an American multinational company and has vast economic clout. The expenses involved in arbitration are high. An arbitration in a claim of this kind, **US $ 466,482.73**" in part would be very much expensive to the Respondent than would a hearing in this court. That apart, refusal by the Petitioner/Defendant to pay the respondent has reduced the latter to financial doldrums making it unable to participate in the arbitration in a meaningful way."

This averment by the learned counsel for the respondent has not meaningfully been countered by the petitioner. What is stated, as alluded to above, is just a statement to the effect that the arbitration proceedings will not be expensive than prosecuting Commercial Case No. 168 of 2014 without any substantiation. I therefore entirely agree with the learned counsel for the respondent that subjecting this dispute to arbitration would entail unnecessary expenses to the parties and the petitioner, having a huge financial muscle, may be in a better position to arbitrate than the respondent.

Likewise, it does not appear the petitioner is indeed ready and willing to have this matter arbitrated. If the petitioner had indeed intended to have this matter arbitrated, it would have shown this readiness and willingness by responding to the demand letter (or pre-action letter as referred to by the counsel for the respondent) and perhaps issuing notice of dispute to that effect. That has not been done and the petitioner only claims that the

procedure of issuing a demand letter by the respondent was not appropriate. That, as rightly submitted by the learned counsel for the respondent, was tantamount to being ready to the legal machinery that the respondent proposed to initiate.

I am alive to the statement of the counsel for the petitioner that the law on the issue is now settled and that the cases referred to by the learned counsel for the respondent cannot be applicable. However, with utmost respect to the learned counsel for the petitioner, I am not at one with him on that stance. The law cannot be said to have been settled while the decisions relied upon the point are not ones by the highest court of record. The ***WiA Group*** and ***PTA Bank*** cases (supra) are decision of this court which, admittedly, is a court of record, but not the highest court of record in this jurisdiction. This being the case, it seems to me to be inappropriate to say the law is settled as the decisions may be reversed by the highest court of record, opportunity allowing. In the premises, it is not correct to say that the law on this point is settled in this jurisdiction.

I, for one, find the authorities cited by the learned counsel for the respondent of highest persuasive value. I am saying so because they were decided in England after the reception clause see section 2 of the Judicature and Application of Laws Act, Cap. 358 of the Revised Edition, 2002 or decided elsewhere but interpreting a section which is *in pari materia* with our section 6 of the Arbitration Act. It is a universally known rule of interpretation that similar statutes must be interpreted similarly.

The sum total of the foregoing discussion is the conclusion that the facts of this case are such that the dispute between the parties is better dealt with and resolved in this court than referred to arbitration. The petitioner has not demonstrated sufficient reasons to the satisfaction of the court why the matter should be referred to arbitration than proceeding with Commercial Case No. 168 of 2014. The arbitration clause relied upon by the petitioner is in respect the Msamvu project only and which cannot be brought into play while the claim is somewhat admitted and thus reference to arbitration may entail unnecessary expenses on the parties.

In the upshot, the prayer to have Commercial Case No. 168 of 2014 kept at abeyance pending reference of the dispute between the parties to the arbitrator is refused. This petition is therefore dismissed with costs to the respondent. It is hereby ordered that Commercial Case No. 168 of 2014 filed by the respondent should proceed with necessary steps on a date to be slated today.

Order accordingly.

DATED at DAR ES SALAAM this 30th day of November, 2015.

J. C. M. MWAMBEGELE
JUDGE