IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 61 OF 2021

GOLD AFRICA LIMITED ..... APPLICANT

VERSUS

REEF GOLD LIMITED ..... RESPONDENT

Date of Last Order: 05/04/2022

Date of Ruling: 28/04/2022

RULING

MAGOIGA, J.

This ruling concerns a call through letter dated 30th March, 2022 written by Mr. Abdiel Mengi who introduced himself a director of Gold Africa Limited that I recuse myself from presiding over this matter and all other matters pending between the parties and EB HANCE COMPANY LIMITED.

In the said letter Mr. Mengi intimated to have lost faith in the way I am conducting the matter by showing biasness and taking sides with the minority shareholder - the respondent and as such endanger the affairs and interest of the Joint Venture Company (the Respondent). Mr. Mengi to substantiate his call cited a number of incidences which caused him and others not mentioned in the letter to lose trust in my ability to handle

this matter for the interest of justice. The incidences cited, if I may gather them not verbatim but by paraphrasing them are:-

1. declining to grant ex-parte prayers in the application by the applicant and instead ordered that Sylivia Mushi, company secretary and Mr.Elias Bulaya- minority shareholder with conflicting views to file counter affidavit on behalf of the respondent and later in my ruling referred to affidavit filed by Slyvia Mushi as strange.
2. Without having heard the application on merits, ordered meetings be conducted without specifying the agenda thereof. This according to him, gave the minority shareholder an opportunity to advance agendas that are not part of the application before me and by ordering the company secretary to bring reports to court on what was conducted in the meetings amounts to turning myself into mediator between parties.
3. Nullification of the report of the company secretary on reason that meetings were conducted against my orders and punishing lawyers of the respondent with no reason after being moved by letters by Mr. Bulaya;

4. Depending on my experience in mining industry which I gain as private advocate expressed out of record discussion rather than depending on facts pleaded before the court;
5. Out of record utterances interrelating Winding Petition No 38 of 2021, Misc. Commercial Cause No. 61 of 2021 and Commercial Application No.181 of 2022, instead of basing on the facts only pleaded for the particular case as such distortion of justice;
6. Entertaining Mr. Bulaya's letters as if are pleadings written to me directly instead of being addressed to the Deputy Registrar.
7. Mr. Bulaya's letters are copied to other institutions with a view to interfere with the proceedings before the court without any warning on him but admonished Company secretary and Mr. Roman Masumbuko advocate.
8. As trial judge has brought in more complication to the case rather than helping the company resumes its smooth operations which is the intention of section 137 of the Companies Act.

The facts pertaining to this application are imperative to be stated. By way of chamber summons made under section 137 of the Companies Act, No. 12 of 2002, section 95 of the CPC and Rule 2(1) and (3) of JALA [Cap

358 R.E.2019 and accompanying affidavit of ZOEB HASSUJI, the applicant hereinabove filed to this court an application for an ex-parte orders of ordering the respondent to conduct a meeting of the company in the manner provided by articles of association with sole agenda to appoint the directors of the company representing the applicant namely; Abdiel Mengi and Benjamin Mengi, costs and any other relief this honourable court shall deem fit to grant.

Upon this matter assigned to me, as I always do, save for very special and exceptional circumstances, I declined to entertain ex-parte orders and directed that Company secretary (Sylivia Mushi) and Mr. Bulaya (Director), I knew of from Winding up petition No. 38 of 2021 to be served and scheduled the matter for orders on 16/11/2021. On that day when the matter was called on for orders, Mr. Philimon Rutakyamirwa and Mr. Roman Masumbuko, learned advocates appeared for the respondent. Mr. Rutakyamirwa instructed by Mr. Bulaya and Mr. Masumbuko instructed by Company secretary and each filed a counter affidavit. The counter affidavit of Mr. Rutakyamirwa opposed the grant of the application. And the counter affidavit of Mr. Masumbuko fully agreed with the grant of the orders as prayed.

On 06/12/2021, having examined the parties both on record and out of record discussions, considered the provisions under which it was made and the need for court's intervention, I granted the prayer for calling meetings not with one agenda as prayed but that each shareholder to bring on table any agenda so that after the meetings, parties can iron out their long standing differences with a view of having a permanent solution to the management of the company. I further directed that all what is discussed be filed in court for further guidance because, I noted a very serious mistrust between parties and even the representation of the advocates clearly indicated of what is on the ground between parties. I scheduled the matter on 15/02/2022. On that day, when the application was called on for orders, I had not gone through the report, so I schedule it on 21/02/2022.

On 21/02/2022, I examined the learned advocates for parties and made a ruling 17/03/2022 based on what I observed not only from the meeting but that my directions were completely shelved and the company secretary with the guidance of Mr. Roman Masumbuko, decided to conduct the meetings contrary to what the court directed. I admonished them not to repeat to disregard and disobey court directions and ordered

a fresh meeting to be called, which was done and report filed in this court showing the magnitude of the problem between the parties. I fixed the application for further orders on 31/03/2022. On that date, a letter subject of this ruling was placed before me. Since Mr. Abdiel Mengi the author of the letter was absent, I adjourned the matter and fixed it on 05/04/2022 for further orders including the determination of the fate of his request.

After hearing him and parties' learned advocates, I fixed a date for ruling, hence, this ruling.

Mr. Mengi when orally probed by the court to substantiate his allegations on few issues fumbled and told the court that all he wants is me to recuse from the conduct of the matter as stated in the letter. Mr. Killey Mwitasi, learned advocate for the applicant fully supported the letter. Mr. Mwitasi cited the case of GOLDEN INTERNATIONAL SERVICES AND ANOTHER vs. QUALITY GROUP LIMITED, CIVIL APPLICATION NO.195 OF 2017 in which at page 11 and 13 underscore the point that what a judicial officer should do when his/her integrity on the matter is called into question. On that note, Mr. Mwitasi urged me to disqualify from the conduct of all matters between parties.

Mr. Masumbuko as well fully subscribed to the letter. According to him, the proceedings have been mishandled and the order has brought more confusion than it was before and the minority shareholder has been using my ruling to cause more confusion to other institutions. Mr. Masumbuko cited the case of LEIGHTON OFFSHORE PTE LIMITED vs. D.P. SHAPRYA MISC. COMMERCIAL APPLICATION NO. 225 OF 2015 and strongly urged me to be guided by the same wisdom and accept recusal as prayed.

Mr. Rutakyamirwa on his part started by saying on their part are questioning the directorship of Mr. Abdiel Mengi as director of Gold Africa Limited. Mr. Rutakyamirwa pointed out that a complaint on mishandling the proceedings is not ground for disqualification of the judicial officer but one can appeal, if aggrieved by any order. The learned advocate cited the case of ISAACK MWAMASIKA AND 2 OTHERS vs. CRDB BANK CIVIL REVISION NO. 6 OF 2016 in which it was held that flimsy and imagery fears cannot be a ground for disqualification.

On his part, Mr. Rutakyamirwa told the court that he does not support the letter with all grounds set therein for recusal which are flimsy and fears. On that note, Mr. Rutakyamirwa argued that if any party is aggrieved with the order he can file revision in the Court of Appeal rather than

asking recusal based on ruling alone and urged the court to reject the prayer and proceed with the matter by guiding parties accordingly.

I hasten to say and point out that, in our jurisdiction, a call for judicial disqualification from the conduct of the proceedings is not new. In a number of decisions both by the Court of Appeal and High Court it has been regarded as very sensitive subject that draws into question the fitness of a judicial officer to carry out fundamental role of his/her position – the fair and impartial resolution of judicial proceedings. And the guidance to litigants is **one to take careful consideration before making such move because it questions not only the impartiality of an individual judge but the whole system of adjudicating dispute.** See the cases of Isaack Mwamasika and 2 others vs. CRDB Bank, Civil Revision No.6 of 2016 CAT (DSM) (unreported) and Dhirajlal Walji Ladwa and 2 others vs. Jitesh Jayantilal Ladwa and another, Commercial Cause No.2 of 2020.

I wish further to point out that parties and their learned advocates to proceedings have right to call a judicial officer to disqualify from the conduct of any matter but that call must be exercised with great care and with reasonable ground and not perceived flimsy and fears. This is in line

with persuasive South African case of THE PRESIDENT OF REPUBLIC OF SOUTH AFRICA AND ANOTHER vs. SOUTH AFRICA RUGBY FOOTBALL UNION AND OTHERS 1999 (4) S.A. 147 in which the court observed at paragraph 10 as follows:-

> ***"At the very outset we wish to acknowledge that a litigant and her or his counsel who find it necessary to apply for recusal of a judicial officer has an unenviable task and propriety of their own motives should not lightly be questioned. Where the grounds are reasonable it is counsel's duty to advance the grounds without fear. On the part of the judge whose recusal is sought there should be a full appreciation of the admonition that he or she should not be unduly sensitive and ought not to regard an application for his or her recusal as a personal affront."***

The spirit behind the above decision which I fully subscribe to is that everyone is entitled to a fair trial which includes impartial adjudicator.

But there are situations where a judicial officer is without even an application for recusal can safely and is obliged to disqualify, if for instance, the judicial officer has personal interest in the matter in dispute.

To the judicial officers, it was stated in the case of ATTORNEY GENERAL vs. ANYANG' NYONG'O AND OTHERS [2007] 1 EA 12 that **"judicial impartiality is the bedrock of every civilized and democratic judicial system. The system requires a judge to adjudicate disputes before him impartially, without bias in favour of or against any party to the dispute.**

In both situations, therefore, it is my considered opinion that both the judicial officers and the litigants have high correspondent legal duty to each other to act within the law when dealing with the matter. To judicial officers to always act impartially and, to the litigants not lightly throws unwarranted and unsubstantiated allegations against judicial officers out of flimsy and fears but where necessary after careful consideration with reasonable grounds is justifiable. The reason for the above stance was clearly stated in the case LADWA above (supra) that any careless or baseless allegations which are bent on scandalizing or lower the authority

of the court may end up being tantamount to contempt of court, which is punishable under the law.

Also is my further considered opinion that court ordered meeting is a special meeting and the application under section 137 is not a normal application because shareholder/directors are normally expected to hold meetings in a normal way as provided for in the Articles of Association. Any application to court or where the court suo motto takes up the matter, the court is not just enjoined to pick it up like normal application but the court has to consider the form and content of the meeting. The reasons for not conducting meetings in a normal way have to be gauged from both sides. Further, it is a serious misconception to think that application under section 137 is a simple matter of ordering meeting without due regards to the cause of not holding normal meetings by parties.

With the above background in mind and now back to the present prayer for recusal, Mr. Abdiel Mengi in his letter raised eight grounds which, having gone through them, I am of the considered opinion that are flimsy and fears, unsubstantiated and misconceived on his part together with the learned advocates in support of him. I will endeavours to explain.

One, Mr. Abdiel Mengi in his first point is questioning my refusal to grant the application ex-parte and instead I ordered that Ms. Slyvia Mushi, company secretary and Mr. Elias Bulaya to be served and each filed a conflicting affidavit and later in my ruling I referred the affidavit of Sylvia Mushi as strange. It should be noted that the order subject of this complaint was delivered on 06/12/2021 before advocates for parties and was dully served to the company secretary as well. Since then, none of the parties nor their advocates complained why I did not entertain the application ex-parte. Why now? This is other than an afterthought on anyone in support of this point. I am guided by wisdom in the case of LITEKY vs. United State, 510 U.S. 540 554-55 (1994) in which it was held that:-

"judicial ruling alone almost never constitute a valid basis for a bias or partiality motion. ...Almost invariably, they are proper grounds for appeal, not for recusal. Secondly, options formed by a judge on the basis of facts introduced or events occurring in the course of the current proceedings or of prior proceedings, do not constitute a basis for bias or partiality

motion unless they display deep-seated favouratism or antagonism that would make fair judgement impossible."

Based on the above reasons, the first reason calling for my recusal, in my view do not constitute a point for recusal and is rejected in its face value. Mr. Mwitasi and Masumbuko, learned advocates knows very well that the discretion to entertain ex-parte application is vested to the court and refusal to entertain it, at any given time and rate cannot at any strength of imagination be reason to call a judicial officer to recuse from the conduct of the proceedings.

The second point raised is that without having heard the application on merits, I ordered the meeting be conducted without specifying the agenda thereof. This according to him, gave the minority shareholder an opportunity to advance agendas that are part of the application before me and by ordering the company secretary to bring reports to court on what was conducted in the meeting as if the intention of the meeting was to mediate parties. This point has as well to fail, with due respect to Mr. Mengi, because as earlier noted the court ordering meeting is not just a normal meeting but a special meetings which the court has to guide the company. On the basis of facts gathered along in the course of these

proceedings, the reasons for not conducting meeting was parties not to agree on the agenda and my wisdom was to allow each party to bring forth any agenda and by so doing I acted within the law. This cannot be and it will never be a ground for recusal by any judicial officer.

Yet one can pose and ask this question, what is the basis of majority shareholders' fear in entertaining any agenda and bring a report to court for guidance? There is a lot to say but not now.

Much as I granted the order for meetings and I directed parties to form the contents of the meeting and none of the parties complained since then, it cannot validly be a ground for recusal of a judicial officer because one cannot seek court's assistance and when given deny to follow the right guidance and because the guidance you wanted is not granted.

This takes me to the third point that I nullified the proceedings of meetings for being conducted against my order and admonished lawyers of the company with no reason. This point is equally baseless to form any reason for calling a judicial officer for recusal. I gave reasons why I warned the advocates and if anyone was aggrieved with my order of warning them, the best way was to appeal or filed a revision before the

Court of Appeal because I have to control my proceedings and anyone not obeying court orders will not be safe and may find himself or herself laboring under the contempt of court. Even this recusal application was made by a letter and much as is relevant, I cannot ignore it at all. So saying that I was moved by letter by Mr. Bulaya, I see nothing wrong if the letter was relevant.

So, no way this can be a ground for recusal of judicial officer and same is rejected as wanting in the circumstances of this application.

Next and fourth point was that I have experience in mining industry and I am coming not far from the area of the respondent own mining site. I must hasten to say this kind of ground is in its face value bare and unwarranted ground to constitute a reasonable ground for asking a judicial officer for recusal. It is in my view, an imagery fears advanced recklessly intended and calculated to do what my learned sister Mansoor, Judge held at page 14 in the case of LEIGHTON OFFSHORE PTE LTD (T) vs. D.B. SHAPRYA & CO LTD (supra) that:-

"in fact, the act of advocate Ishengoma is nothing but consciously calculated act of forum shopping, or bench hunting

or bench hopping or bench avoiding, so that the present judge who is well versed with the entire facts of these matters could be intimidated, so that the case could be assigned to another judge of the liking."

This is one of the ground that was fully supported by two seasoned advocates that is a ground for recusal. Nothing was put forward that where I came from is near and even if it can be said to be near which nearness are they talking about. What Mr. Mengi with the help of the two advocates supporting him on this point are trying to portray is that the mining site of the respondent are in Mwanza city and near my home! What a blatant lie with no iota of evidence. Bare, vague and general contentions of bias based on this kind of allegations cannot and will never be a ground to mount application for recusal. Nothing was advanced by both Mr. Mengi and the two learned advocates behind his letter to specify how my being an advocate in Mwanza, is related to the matter before me now without logical connections how being an advocate in Mwanza and the experience in mining industry have any bearing to the matters before me.

I have given careful thought to the letter and noted that some of the points raised by Mr. Mengi were so raised because of lack of familiarity with legal process and heightened sensitivity to any appearance of bias but it clicked my mind a great deal when seasoned advocates supports such a ground with all enthusiasm and zeal calling for judicial officer to recuse. This is not what is expected of from officers of the court who are expected to display confidence in and respect for the working of the judiciary. A due consideration and where no evidence, should be avoided, especially, where advocates are involved. If we allow judicial officers be subjected to recusal because are from certain geographical areas without any evidence of connection in the matter will amount to abuse of the court process and will not be accepted at all. This is what is seen in this ground, which in the end, I find it very wanting for recusal application.

The fifth ground raised was that I have uttered the relationship between the two applications before me. Be it as it may be, it is a fact that the two application are interrelated and this cannot be denied and do not constitute a ground for recusal of the judicial officer so to speak. So is rejected for unfounded but reckless accusation to the judicial officer using

unwarranted utterance from the learned advocates who are actors behind the curtains of this letter.

Next is the sixth and seventh grounds which are that entertaining Mr. Bulaya's letters as if are pleadings written to me directly instead of being addressed to the Deputy Registrar and failure to warn Mr. Bulaya on his conduct for writing letters. These grounds will not detain me much. I orally warned Mr. Bulaya on 17/03/2022, and since then, no letter has been written. On the same spirit I am entertaining your letter now while you equally have an advocate representing you. I cannot turn a blind eye of what is complained of, if is relevant. I see no biasness on this point because my ruling was not solely based on the letters but on what transpired in the meetings by deliberately defying my directions.

It is very unfortunate that, if my directions to include other agendas than what was prayed for, was not comfortable to you and the advocates, the best approach was for your advocates to file a review of my directions or to file revision in the Court of Appeal. This, in my own view, cannot be basis for judicial officer to recuse unless otherwise proved. After all the decision to have meetings was in your favour, why then, turn to be a ground for recusal. This ground lacks merits too.

The last point was that I have created more complication to the case rather than helping the company resume to its smooth operations which is the intention of section 137 of the Companies Act, 2002 by failure to consider the affidavit and skeleton arguments in support of the same. On this point, which was fully supported by Mr. Masumbuko argued that the proceedings have been mishandled. My ruling dated 17/03/2022 has brought more confusion to the way of handling the case than not. The minority shareholder has been using it to cause confusion in other institutions.

This point like other discussed above is devoid of any useful merits to mount recusal to judicial officer. In the case of LITEKY vs. UNITED STATES (supra) this point was clearly made that judicial officers' rulings alone almost never constitute a valid basis for a bias or partiality motion but can be proper grounds for appeal, not for recusal.

In the letter subject of this ruling, apart from blatant, vague and bare allegations neither Mr. Mengi nor Mr. Masumbuko and Mwitasi none pointed out any confusion but what I gathered on the alleged confusion is the warning that was given by this court to Slyvia Mushi and Roman Masumbuko. Before the ruling no element of bias was raised by any of

the parties, and indeed, my ruling was due to what I quoted at page 5 of the ruling. The remedy, if any, to the parties was, either, to appeal against that ruling or take other appropriate measure rather than mounting unsubstantiated call for recusal.

Guided by the provisions of section 137 of the Companies Act, when a court is faced with this kind of application, the court must before ordering a meeting establish from the parties any reason which made it impracticable to call meetings and this is done by ordering meetings and allow parties to bring forth any reasons. This is want I deed and was within the law. So my ruling, which was in accordance to the dictates of the law, I noted that directors are avoiding each other and there is no agreement of what should be the agenda.

The second meeting which was conducted according to my directions can bear me out on this point and it showed this court the extent of the mistrust between parties in their relationship. While I was prepared to unfold the deadlock, I met this letter. Unless, the parties listen to court's directives, otherwise, the whole purpose under section 137 cannot be achieved.

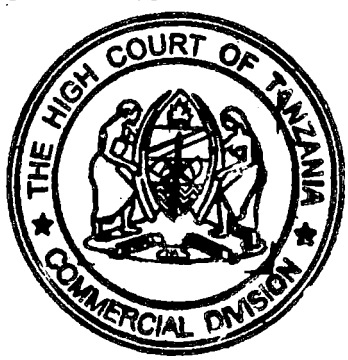
My observation is that Mr. Mengi and the learned advocates in support of the letter having found my ruling will unveil the reasons for not conducting normal meeting are using recusal to intimidate me and have a veto powers by engaging into forum shopping of the sitting judge. This was what was held in the case of UNITED STATE vs. ROBERT COOLEY 1 F.3d 985 at Page 49 where it was held that the rules as to recusal are not intended to give litigants a veto power over sitting judge, or to provide a means of obtaining a judge of their choice.

I have carefully considered the grounds raised by Mr. Mengi and fully supported by Mr. Mwitasi and Masumbuko, learned advocates but with due respect a fair minded and informed observer would not conclude that, even if challenged as they have done but as seen above their grounds are inaccurate and unfair allegations agitated by my ruling and are devoid of any biasness as alleged. My judicial oath and conscience would not permit me, in any case even I have been shown to be biased which is not the case here. The allegations as seen above are bare, vague and were intended to intimidate my mandate to handle the matters before me.

For the reasons assigned on each ground raised, I found that the grounds raised by Mr. Mengi seeking for my recusal are without merits and have fallen short of what is required to satisfy the test for apprehension of bias, to compel me to recuse myself from presiding over the application and other related matters before me.

In the event, I declined to allow the prayer.

It is so directed.



S. M. MAGOIGA

JUDGE

28/04/2022