IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 66 OF 2021

IN THE MATTER OF THE ARBITRATION ACT, 2022

AND IN THE MATTER OF COMMERCIAL CASE NO.128 OF 2021 PENDING

ARBITRATION

NORTH MARA GOLD MINES LIMITED ..... PETITIONER

AND

KIRIBO LIMITED ..... RESPONDENT

Date of Last Order: 07/03/2022

Date of Ruling: 14/03/2022

RULING

MAGOIGA, J.

The Petitioner, NORTH MARA GOLD MINES LIMITED petitioned against the above named respondent in this court under the provisions of section 15(1) (2) and (3) of the Arbitration Act, [R.E. 2020] and Regulation 63(1) of the Arbitration (Rules of Procedure) Regulations, 2021 praying for the following orders, namely:-

1. The proceedings in Commercial Case No. 128 of 2021 be stayed to allow the dispute between the Petitioner and the Respondent to be

referred to arbitration in accordance with the Rules of Arbitration of the Foundation of South Africa;

2. Costs of this petition; and
3. Any other relief that this honourable court may deem just and fit to grant.

In the petition, the petitioner stated the reasons why this petition should be granted.

Upon being served with the petition, the respondent filed reply to petition opposing the grant of the petition stating the reason why this petition should not be granted.

The facts pertaining to this petition are not complicated. It is averred and stated that the petitioner and respondent had Agreement of Haulage of Materials from Portal (Agreement No. CO-NMA-2015-020) dated 18th August 2015 which was proceeded by Variation Agreements dated 1st March 2016, and 13th February, 2019 and Acknowledgement of Debt Agreement dated 13th September, 2019. Under the Agreement and in terms of clause 40 (as amended by Variation Agreements dated 1st March 2016 and 13th February 2019) stated that all disputes arising out of or in connection with

the Agreement are to be resolved by amicable settlement between parties by arbitration. The Acknowledgement Debt Agreement dated 13th September, 2019 changed the forum or arbitration agreement, among others, to Tanzania.

Further facts were that the contract was terminated on 4th June 2020 by the petitioner. Upon termination of the Agreement, the petitioner continued to hold the equipments of the respondent for one year and lately released them to the respondent. The respondent as such instituted Commercial Case No.128 of 2021 claiming, among others, damages for unlawful holding the equipments for one year without lawful cause.

The facts went on that, upon being served with the plaint, the petitioner acknowledged the suit by filing defence and sequel to that, instituted this petition praying, among others, for stay of the proceedings in Commercial Case No.128 of 2021 and parties resort to arbitration in South Africa as agreed in the Haulage Agreement, hence, this ruling.

At all material time the petitioner is enjoying the legal services of Dr. Wilbert Kapinga, learned advocate, whereas the respondent was equally enjoying the legal services of Mr. Michael Peter Mahende, learned advocate.

Before oral hearing took off, parties' learned counsel by virtue of Rule 64 of the High Court (Commercial Division) Procedure Rules, G.N. No.250 of 2012 filed written skeleton arguments in support of their respective stances.

In support of the petition, Dr. Kapinga readily adopted the contents of the petition, rejoinder to the reply to petition and written skeleton arguments. According to Dr. Kapinga, under section 15(3) of the Arbitration Act, 2020 there are three or four matters which the court need to consider, namely:

i. The acknowledgement of the legal proceedings and the petitioner has taken steps to answer the suit i.e file defence;

ii. There must be a legal proceedings and in this case, Commercial Case No.128 of 2021;

iii. The existence of Arbitration clause as pleaded under paragraphs 3 and 4 of the petition;

iv. The willingness to conduct arbitration for a party who is seeking stay and has issued a notice of arbitration under the Rules of Arbitration.

The learned advocate for the petitioner went on to submit that under sub section 4 of section 15 of the Arbitration Act, 2020, there are three grounds which court is empowered to refuse stay, namely:

i. The Agreement is null and void;

ii. The arbitration agreement is inoperative;

iii. Incapable of being performed.

According to Dr. Kapinga, the Arbitration Act, 2020 gives narrow grounds for court to refuse to grant petition of this nature and which is not what the respondent is opposing this petition. The learned advocated pointed out that the petitioner has satisfied the conditions for grant under section 13 (3) of the Arbitration Act, 2020.

Dr. Kapinga cited the case of G.K. HOTELS AND RESORTS (PTY) vs. BOARD OF TRUSTEE OF LOCAL AUTHORITIES PROVIDENT FUND, MISC. CIVIL CAUSE NO.1 OF 2008 (HC) DSM (UNREPORTED) in which it was held that arbitration clause survives termination of agreement. Also is the case of BAHADURALI E. SHAMJI AND ANOTHER vs. THE TREASURY REGISTRAR-MINISTRY OF FINANCE- TANZANIA & OTHERS, MISC. COMMERCIAL CASE NO. 14 OF 2001 (HC) DSM (UNREPORTED) in which it was held that the

court would direct what parties should do before the specified tribunal and should not resort to court.

And lastly, Dr. Kapinga cited the case of TANZANIA MOTORS SERVICES LIMITED AND ANOTHER vs. MEHAR SINGH t/a THANKER SINGH, CIVIL APPEAL NO. 115 OF 2005, (CAT) DODOMA (UNREPORTED) in which it was held that parties are bound by their forum of choice in their Agreement in case of dispute.

Based on the petition, rejoinder to reply and both written skeleton and oral submissions, Dr. Kapinga urged this court to find and hold that this petition is merited and grant it as prayed.

On the other hand, Mr. Mahende, equally adopted the style of his opponent by readily adopting the reply to the petition and written skeleton arguments. According to Mr. Mahende, the claims by the respondent in Commercial Case No 128 of 2021 have nothing to do with the Haulage Agreement and its variations subject of this petition, hence, the application is unjustified by all intents after termination of the contract on 4th June, 2020. Mr. Mahende went on to submit that, the respondent claims nothing out of that agreement and its variations save for damages arising from

unlawful withholding of the equipments for one year without lawful cause. On that note, the learned advocate for the respondent prayed that the petition be dismissed with costs.

In the alternative, Mr. Mahende argued that even if this court finds out that the matters complained of were matters arising out of and in connection with the 2015 Haulage Agreement, a fact which he strongly denies, it was his strong submissions that the last variation to the Haulage Agreement was in September 2019 through **'Acknowledgement of Debt Agreement'** dated 13th September 2019 in which under clause 8.2 superseded all previous oral or written agreements including the Haulage Agreement and the law chosen by parties to apply was Tanzania Laws, hence, forum of dispute resolution changed to Tanzania and to courts of this land. In support of this, the learned advocate cited the case of SCOVA ENGINEERING S.P. AND ANOTHER vs. MTIBWA SUGAR ESTATE LIMITED AND 3 OTHERS, CIVIL APPEAL NO. 133 OF 2017 CAT DSM (UNREPORTED) in which it was held that parties choice of forum need to be respected.

Lastly Mr. Mahende submitted that the petitioner's intention is to oust the jurisdiction of this court by parallel process to this petition which is irregular and will amount to abuse of the court process.

In the fine, Mr. Mahende strongly urged this court not to grant this application on reasons given above and proceed to dismiss the same with costs.

In rejoinder, Dr. Kapinga mostly reiterated his earlier submissions and asked the court to make a correct interpretation of the word 'inoperative' which is new in our laws. The learned advocate for the petitioner argued that the Acknowledge of Debt Agreement dated 13/09/2019 was not an addendum to Haulage Agreement and as such did not cancel the arbitration clause as argued in clauses 3:1, 2, 3, 4 and 5 in his written skeleton arguments.

In the fine, Dr. Kapinga humbly prayed for the grant of this petition.

That marked the end of hearing of this hotly contested petition for and against its grant.

Up to this juncture, the noble task of this court now, is to determine the merits or otherwise of this petition. Therefore, having dispassionately considered the petition, the reply to the petition, the rejoinder to the reply, both written skeleton and oral arguments for and against the grant of the petition and most important the law ie the Arbitration Act,[R.E. 2020] in

particular, section 15 of the Act, in my respective opinion, I find two issues emerge for the determination in this petition. **One,** is whether the claims by the respondent has any bearing to the Haulage Agreement dated 2015 as such covered with the Arbitration clause; and **two,** is whether the arbitration agreement in the main agreement dated 2015 is operative after the Acknowledgement of Debt Agreement dated 13th September 2019, the subject of notice to arbitration to South Africa.

I find it imperative to start with the second issue because if I find it inoperative, it suffices to dispose off this petition without necessarily looking into the first one. But if it fails, I will go to the first one which is more factual.

However, I before I venture into the second issue, I noted some factual and legal issues which are trite law now in our jurisdiction based on case law cited and will assist this court to narrow down my determination of the petition. These are: **one,** The arbitration clause/agreement survives termination of the contract and can equally be enforced unless expressly stated otherwise. **Two,** no dispute that parties had Haulage Agreement, which was severally varied in 2016 and 2019 and consequently resulting into Acknowledgement of Debt Agreement 2019.

Now back to the second issue, it was the submissions of Dr. Kapinga that, yes, there were variations, in 2016 and September 2019 but which were not an addendum to the Haulage Agreement and no way touched the arbitration clause.

On the other hand, Mr. Mahende submitted that the variations, in particular, that of 2019, titled **'Acknowledgement of debt Agreement'** parties changed the forum as stated in clauses 7 and 8.2 whereby the applicable law are the Tanzania laws and courts. According to Mr. Mahende, Commercial Case No 128 of 2021 is at home and dry with the choice of forum by the parties.

I have seriously gone through the September 2019 'Acknowledge of Debt Agreement' which was dully signed by parties, subject of this contention and the notice of arbitration to South Africa, and I found out that, the notice specifically refers to Haulage Agreement of 2015 (CO-NMA-2015-2020) and the Acknowledgement of Debt Agreement dated 2019 as stated in clauses 3.3, 3.4, 3.5 and 3.6 in the notice. Given this background, I am entitled to find and hold that the dispute mechanism resolution is, among the matters that parties agreed and changed over time. Under that Acknowledgement of Debt Agreement, no doubt the arbitration agreement

was changed from South Africa to Tanzania by virtues of clauses 7 and 8.2 as correctly argued by Mr. Mahende. The arbitration agreement thus in the Haulage Agreement 2015 ceased to operate and is in law inoperative in the circumstances we have. I will endeavour to explain. **One,** the claims which the petitioner wants to enforce by way of arbitration are direct result of the Acknowledgement of Debt Agreement in which in clause 8 as correctly argued by Mr. Mahende, and rightly so in my opinion, it superseded and cancelled any and all previous written/or oral agreements between parties with respect to matters covered by this agreement. This is evidently clear under the Acknowledgement of Debt Agreement which provides for choice of law and jurisdiction to be in Tanzania. For easy of reference clause 7 provides as follows:

7. LAW AND JURISDICTION

7:1 This agreement is governed by and shall be construed in accordance with laws of Tanzania

7:2. In the vent of dispute or different arising out of or relating to this Agreement, the parties shall use their best efforts to settle such dispute or difference amicably; to this end they shall consult

and negotiate with each other, in good faith and understanding of their mutual interest, to reach a just and equitable solution.

7:3 Any dispute, controversy or claim arising out of or relating to this Agreement or the breach, termination or invalidity which cannot be settled amicably under clause 7:2 above shall be referred to a panel of three persons such persons appointed by Directors of the parties and neutral person to be appointed by the Directors of the parties.

7:4. The neutral person nominated under clause 7:3 above shall be the chairman and shall have a casting vote

7:5 The decision of the panel shall be final and binding upon parties.

Going by the above provisions of clause 7, it cannot be said that the arbitration agreement in the old Haulage Agreement 2015 survived. But what we see now is, new forum was created as such making the arguments by Dr. Kapinga that arbitration agreement in the 2015 agreement still survives in this petition misconceived. Much as parties changed forum of dispute resolution, including the claimed amount in the notice, then, the

Rules of Arbitration of the Foundation of South African are inoperative in the circumstances we have here since when the 13th September, 2019 Agreement was signed and become operative between parties.

Two, The Arbitration Act, 2020 do not define the word inoperative. However, according to Black's Law Dictionary, Tenth Edition by Bryan A. Garner defined the word **"inoperative"** to mean having no force or effect; not operative. So with the introduction of another forum in the September, 2019 Agreement, in my strong considered opinion, was enough, and indeed, it makes the former arbitration clause in the agreement inoperative. The argument by Dr. Kapinga that is a narrow ground for refusal to grant the petition was made in ignorance of the facts that a clause in an agreement, including arbitration agreement clause, can be inoperative in a number of ways ranging from variation, amendment or by public policy or outlawed by law. In this case it was made inoperative by September 2019 Agreement as stated above.

Three, no way as correctly argued by Mr. Mahende, in one issue parties can have two ways in solving the dispute. In my view, therefore, the moment parties resolved to the new way of solving their dispute, the former

one becomes inoperative. This is what is meant under section 15(3) of the Arbitration Act, [R.E. 2020].

Four, looking at the notice of Arbitration is based on claim that was acknowledged in the September 2019, which not only altered the choice of forum but made the 2015 Agreement in terms of arbitration agreement changed from South Africa to Tanzania. This is reflected in clause 3:3 to 3:6 inclusive, of the notice of arbitration. Therefore, I increasingly find the arbitration agreement in 2015 which contract has been point of reference to be inoperative in the circumstances we have here.

Five, the argument by Dr. Kapinga that the grounds of refusal to grant stay are narrowly drafted far from convincing this court to find otherwise to the obvious that parties themselves committed to change the arbitration agreement clause in the September, 2019 Agreement. Not only that but even the choice of forum chosen is for a panel of three and not arbitration even if the matter has to be under the Tanzania laws.

Six, I have had time to go through the case laws cited by Dr. Kapinga, but I hasten to point out that, I have no problem with their holding, but with due respect to Dr. Kapinga, are distinguishable in all intents with the

circumstances we have here because in this petition, parties decided to change forum and it cannot be heard to ride two horses at a time.

From the foregoing above, I found the arbitration agreement subject of going to South Africa inoperative. Having so found, I find no plausible reasons to go on determining the first issue because it automatically becomes obsolete or will be doing unfruitful academic exercise.

That said and done, and on the basis of the above reasons, I hereby find the instant petition falls within grounds this court is barred to grant this petition. It is on that note, this petition must be and is hereby dismissed with costs.

It is so ordered.

Dated at Dar es Salaam this 14th day of March, 2022.

S. M. MAGOIGA

JUDGE

14/03/2022