

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 51 OF 2016

IN THE MATTER OF MISC. COMMERCIAL CAUSE NO. 25 OF 2016

AND

IN THE MATTER OF THE ARBITRATION ACT (CAP 15 R: E 2002)

AND

**IN THE MATTER OF PETITION FOR STAY OF PROCEEDINGS
PENDING REFERENCE OF THE DISPUTE TO ARBITRATION**

BETWEEN

NORTH MARA GOLD MINES LIMITED.....PETITIONER

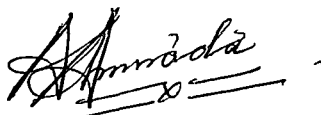
AND

DIAMOND MOTORS LIMITED..... RESPONDENT

RULING

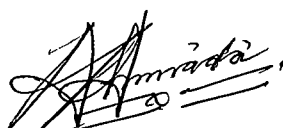
A.A. MBAGWA. J

This is a petition for stay of the winding up proceedings in Misc. Commercial Cause No. 25 of 2016. In brief, the facts leading to the present petition may be recounted as follows;



The petitioner and the respondent are both limited liability companies incorporated under the laws of Tanzania. Whereas the petitioner is dealing with gold mining business, the respondent is licensed to provide mining services including drilling. Sometimes in 2008 and 2010 the duo entered into agreements namely, surface drilling agreement (SDA) dated 19th December, 2008 and the pre-split agreement (SPA) dated 1st March, 2010 for the purpose of regulating the supply and consumption of services. The said agreements were followed by variation agreements dated 30th August, 2011 and 15th September, 2011 respectively herein referred to as DOV No. 1, effective from 1st October, 2010. Again, on 17th April, 2012 and 30th April, 2012 another set of deed of variation DOV2 of DSA and SPA was executed to be effective from 1st October, 2011.

According to the agreements in particular clause 33.2(b) of SDA and clause 34.2(b) of PSA respectively, parties agreed that all disputes arising out of or in connection with the agreement would be referred to arbitration. In the course of business, upon delivery of services, between November and December, 2015, the respondent issued invoices for August, September and October to the tune of USD 4,965,855.30 being costs for drilling services. The petitioner disputed the claims on the ground that the respondent used payment rates which were not in accordance

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with the agreement. Following the petitioner's refusal to pay, the respondent stood down the drilling services. The petitioner's General Manager made some strides to have the drilling services resumed but to no avail. Consequently, on 7th January, 2016 the petitioner issued notices of dispute in terms of clause 33.2 (b) of the surface drilling agreement (SDA) and clause 34.2(b) of the pre-split agreement (SPA) with the view to refer the dispute to arbitration. However, the respondent was not forthcoming about referring the dispute to arbitration. Instead, the respondent, **Diamond Motors Limited**, instituted Misc. Commercial Cause No. 25 of 2016 claiming, among other reliefs, winding up of respondent, **North Mara Gold Mine Limited** for inability to pay its debts and praying for the following orders;

- i. That North Mara Gold Mine Limited be wound up by Court in terms of the provisions of the Companies Act 2002.
- ii. That the assets of the respondent/debtor be sold in order to offset the creditor's/petitioner's claim of USD 3,519,247.69 plus interest thereto.
- iii. That the assets of the respondent/debtor be sold in order to offset the creditor's/petitioner's claim of USD 2,766,743.29 for

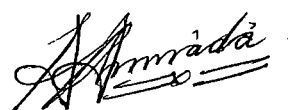


the November and December 2015 invoices plus accrued interests.

- iv. That the assets of the respondent/debtor be sold in order to offset the creditor's/petitioner's claim of USD 6,585,517.46 for the rate difference invoices for the period of October 2013 to July 2015.
- v. General damages at the rate to be assessed by the Court but not less than USD 5,000,000.
- vi. The respondent be ordered to pay costs of the Petition and
- vii. That such other orders as the Court thinks fit.

Upon being served with the petition for winding up, the petitioner acknowledged the suit by filing an answer to petition and sequel to that, instituted this petition for stay of winding up proceeding praying for the following orders, namely: -

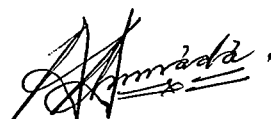
- i. The proceedings in Misc. Commercial Cause No. 25 of 2016 filed in the High Court (Commercial Division) be stayed.
- ii. Costs of these proceedings be borne by the respondent.
- iii. Such other order(s) be made as the Court shall deem fit and just petition.



When the respondent was served with the petition for stay of winding up proceedings, she filed an answer to petition opposing the stay of winding up proceedings. Concomitantly, the respondent filed a notice of preliminary objection against the competence of Misc. Commercial Cause No. 51 of 2016. Upon hearing of the preliminary objection, this Court (Hon. Songoro, J as he then was), upheld the objection and consequently dismissed the petition for stay of proceedings.

Aggrieved, the petitioner appealed to Court of Appeal vide **Civil Appeal No. 29 of 2017**. The Court of Appeal in its judgment dated 18th November, 2021 allowed the appeal, set aside the decision of this Court (Songoro J) and ordered the matter to be heard and determined on merits, hence this ruling.

When then matter was called on for hearing, the petitioner was in the legal services of Dr. Wilbert Kapinga, learned advocate whereas the respondent was ably represented by Messrs Yusuph Issa and Zaharan Sinares, learned advocates. Before oral hearing took off, the learned counsel, by virtue of Rule 64 of the High Court (Commercial Division) Procedure Rules, G.N. No. 250 of 2012, had filed written skeleton arguments in support of their respective stances.

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While arguing in support of petition, Dr. Kapinga adopted the contents of the petition, the reply to petition and written skeleton arguments. Mr. Kapinga started his submission by narrating the historical background which gave rise to this matter and went on telling the Court that, issues which the petitioner invites the Court to labour on are whether the petitioner meets the conditions set out under section 6 of the Arbitration Act (Cap 15 R: E 2002) and whether the debt between the parties is bonafide disputed. According to Dr. Kapinga, under section 6 of the Arbitration Act, 2020 there are three matters which the Court needs to consider, namely:

- i. The existence of arbitration clause
- ii. The existence of legal proceedings
- iii. The willingness of the parties to conduct arbitration.

Expounding on the existence of arbitration clause, Dr. Kapinga had it that it is not disputed between the parties that arbitration clause exists. He added that paragraphs 4 and 5 of the petition demonstrate the existence of agreements terms requiring all disputes arising out of or in connection with SDA and PSA to be referred to arbitration.

In respect of the existence of legal proceedings, it was Dr. Kapinga's submission that it is common cause that there are ongoing legal



proceedings to wit, Misc. Commercial Cause No. 25 of 2016 which was filed by the respondent seeking winding up of the petition. Regarding willingness to conduct arbitration, the learned counsel submitted that on 7th January, 2016, the petitioner issued the respondent with a notice of dispute indicating its readiness to refer the matter to arbitration but the respondent did not render cooperation.

Submitting on the 2nd issue whether the debt between the parties is bonafide disputed, the learned counsel for petitioner had it that, the entire amount of the debt that formed the basis of the winding up petition was disputed and the arbitral award of 2015 loudly expressed that parties were required to negotiate for rates post September 2013. According to Dr. Kapinga, the winding up proceedings are to be stayed because the debt is bonafide disputed between the parties. To cement his submission, the learned counsel placed his reliance on the case of **Sino Truck International vs TSN logistic Limited**, Misc. Commercial Cause No. 11 of 2020, HC (Commercial Division), Dar es Salaam (unreported) in which the Court held that existence of bonafide disputed debt between the parties is a ground for stay of winding proceedings.

Further, Dr. Kapinga contended that, for the Court to determine whether the petitioner consented to the rates of DOV3 or whether the debt is




bonafide is a matter of evidence to be determined by the tribunal because determining them will amount to the determination of the underlying dispute and will defeat the very purpose of the petition at hand. He further referred to the case of **Queensway Tanzania (EPZ) Limited vs Tanzania Took Garments Co. Limited**, Commercial Case No. 43 of 2020 (unreported) where the Court held that, the Court could either dismiss or stay the petition so as to compel the parties to resolve their dispute over the debt by their chosen methods of disputes resolution rather than requiring the Court to investigate whether or not the debt is bonefide disputed on the substantial ground. According to Mr. Kapinga, the debt is to arbitrated because the winding up can be enforced during execution of the award and since it is a statutory remedy, it does not prevent the Court from referring the underlying dispute to arbitration. To bolster his argument, he referred this Court to the case of **Tanzania Motors Ltd & Another vs Mehar Sigh t/a Thanker Singh**, Civil Appeal No. 115 of 2005 CAT at Dodoma in which it was held that parties are bound by their forum of choice in their agreement in case of dispute. According to Dr. Kapinga, parties are bound by the mode of dispute settlement agreed upon and they cannot depart from the mode of dispute settlement agreed unless both parties submit to the Court's jurisdiction or the respondent actively takes a step in the proceedings commenced by

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the Court. Lastly, Dr. Kapinga cited the case of **Heyman vs Darwin's (1942) AC 356 at page 372** and the case of **Salford Estate (No 2) Limited vs Altomart Limited (2015) Ch 289 [2014] EWCA Civil 1575** in which the court held that courts should not encourage parties to use the draconian threat of liquidation as method for by passing an arbitration agreement. He commented that to allow it happen, will be contrary to parties' agreement. Based on the petition, 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.

In rebuttal, Mr. Zaharani Sinare, learned counsel for the respondent equally adopted the style of his counterpart by adopting the reply to the petition and written skeleton arguments. According to Mr. Sinare, the issue for determination is whether a creditor's winding -up petition in **Misc. Commercial Cause No. 25 of 2016** before this Court should be stayed pending reference to the arbitration. And whether the rates in the deed of variation DVO3 that gave rise to respondent's claims have been referred to arbitration.

Mr. Sinare went on to submit that, parties entered into two agreements namely, surface drilling agreement dated 19th December, 2008 (SDA) and

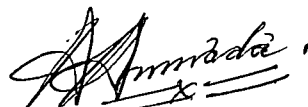
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the pre-split agreement (SPA) dated 1st March, 2010 which contain arbitration clauses.

It was further submission of Mr. Sinare that, on 22nd July, 2015, the arbitral tribunal issued its final award which fixed rates in DOV3 and thereafter, no dispute on rates for payments save only for DOV No. 4, DOV No. 5 and DOV No. 6 which parties are yet to agree. He added that, the rates agreed on DOV No. 3 are the ones used in the disputed invoices as such, the allegation that petitioner is willing to appear before arbitration is misconceived because the issue is the petitioner's ability to pay undisputed debt. In addition, the learned counsel for respondent contended that the rates applied by the respondent in raising the disputed invoices were settled by the arbitrator in 2015 arbitral award as such, there cannot be a re-litigation on the same matter.

According Mr. Sinare, the petitioner is unable to pay debts thereby leading to the creditor winding up as provided under Section 280 of the Companies Act. In fine, Mr. Sinare strongly urged this Court not to grant this application on the reasons given above and proceed to dismiss the same with costs.

Having canvassed the pleadings and the rival submissions, the noble task of this Court now, is to determine the merits or otherwise of this petition.

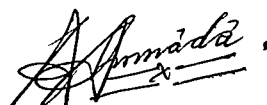
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In discharging this task, I find two relevant issues for the determination in this petition.

- i. Whether payment rates used by the respondent to raise invoices (debt) which is the ground for winding up petition in Misc. Commercial Cause No. 25 of 2016 were arbitrated and fixed by the arbitral tribunal in its final award dated 22nd July, 2015.
- ii. Whether Misc. Commercial Cause No. 25 of 2016 should be stayed pending reference of the dispute to arbitration.

Starting with the 1st issue which is whether payment rates used by respondent to raise invoices (debt) which is the ground for winding up petition in Misc. Commercial Cause No. 25 of 2016 were arbitrated and fixed by the arbitral tribunal in its final award dated 22nd July, 2015. The learned counsel for petitioner had it that the rates in DOV No. 3 were not fixed by the tribunal because the tribunal did not make any decision concerning the rates. On the contrary, the learned counsel for respondent contended that the rates were fixed by the tribunal and for that reason the same issue could not re-arbitrated.

I have strenuously gone through annexure 1 (the final award dated 22nd July, 2015) particularly paragraph 183 at page 56 and paragraph 378 at page 96 on the findings of the tribunal and finally noticed that the tribunal



did not fix the rates. Perhaps for ease of reference, it would be convenient to reproduce what was ruled by the arbitral tribunal. At paragraph 183 page 52 the arbitrator held;

'The tribunal will not make decision or determination on the facts, matters and /or law relevant to the question of the process and completion of rates review for both 2013/14 and 2014/15. However, the tribunal encourages the parties to set out a time for open and fair discussion on rates for these years and then to review the rates in reasonable and sensible fashion.'

Further, at paragraph 378 page 96 it was held;

'For the period of October, 2013 to September, 2014 and October 2014 to September 2015 the tribunal makes no decision or determination on the facts matters and/or law relevant to the question of the process and completion of these rates review periods.'

From the above excerpts, it is my construction that the tribunal did not set the rates for the October 2013 to September 2015 rather, it entrusted the parties to sit, discuss and review the rates in reasonable and sensible fashion. The duty to review rates for the period of 2013/14 and 2014/15 was therefore left to the parties. Therefore, the respondent's argument that the final award dated 22nd July, 2015 fixed rates is without backup. As such, much as the rates used by the respondent to invoice the



petitioner are contested, it is my considered findings that there is a dispute which, according to clause 33. 2 (b) of SDA and clause 34.2 (b) of PSA, requires reference to arbitration for determination of whether the disputed rates were reasonable and sensible as directed by the tribunal in its arbitral award dated 22nd July, 2015.

The 2nd issue i.e., whether **Misc. Commercial Cause No. 25 of 2016 (winding up petition)** should be stayed pending reference of the dispute to arbitration. Section 6 of the Arbitration Act (CAP 15 R: E 2002) enjoins this Court to stay the winding proceedings if it is satisfied that there is sufficient reason to refer the matter to arbitration and the applicant is ready and willing to do all the necessary things for proper conduct of arbitration. In this petition, the petitioner has demonstrated its readiness to conduct arbitration. This is exhibited through a notice of dispute dated 7th January, 2016 (annexure NMGML-3) in which she invited the respondent to refer the matter to arbitration. Indeed, having held that there is a dispute worth reference to arbitration coupled with the petitioner's willingness, it goes without saying that the petition meets the threshold set under section 6 of the Arbitration Act (CAP 15 R: E 2002).

It is the position of law that, where winding up petition is anchored on dispute which, by virtue of agreement, should be referred to arbitration,



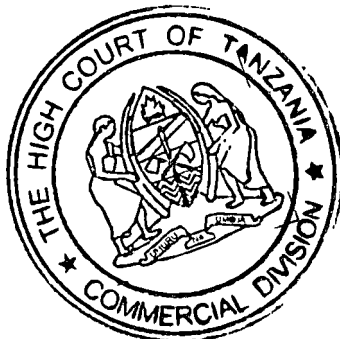
the Court is enjoined to stay the winding up proceedings and direct the parties to refer the matter to arbitration. See the cases of **North Mara Gold Mine Limited vs Diamond Motors Limited**, Civil Appeal No. 29 of 2017, CAT at Dar es Salaam and **Queensway Tanzania EPZ Ltd vs. Tanzania Tooku Garments Co. Ltd**, Misc. Commercial Cause No. 43 of 2020, HC (Commercial Division) at Dar es Salaam.

All the above considered, I find this petition meritorious and consequently grant it. I therefore order as follows;

- i. The proceedings in Misc. Commercial Cause No. 25 of 2016 pending in the High Court (Commercial Division) are hereby stayed for the period of six months from the date of this ruling.
- ii. Parties are hereby ordered to refer the matter to arbitration in terms of clause 33. 2 (b) of SDA and clause 34.2 (b) of PSA.
- iii. Each party to bear his costs.

It is so ordered.

The right of appeal is explained.




A.A. Mbagwa

JUDGE

04/09/2023