

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 61 OF 2021

GOLD AFRICA LIMITED APPLICANT

VERSUS

REEF GOLD LIMITED.....RESPONDENT

RULING

Date of last order: 03/11/2023

Date of ruling: 10/11/2023

AGATHO, J.:

The Applicant armed with a certificate of urgency brought the instant application ex parte under the provisions of Section 137(1),(2)and (3) of the Companies Act, Act No.12 of 2002, Section 95 of the Civil Procedure Code [Cap 33 R.E. 2019], Rule 2 (1) and (3) of the Judicature and Application of Laws Act [Cap 358 R.E. 2019] seeking a court order directing the Respondent to conduct a meeting of the company to appoint Abdiel Mengi and Benjamin Abraham Mengi as directors of the Respondent company representing the Applicant.

The court ordered the Respondent to file her counter affidavit. Subsequently and following the hearing of the application inter partes the court granted the order. The court also directed the parties after conducting the meeting the minutes be laid before it for further directions. I, being a judge successor following the transfer of Magoiga J to another duty station, I took over the matter. The parties had no objection whatsoever. No sooner had the court gave the directions on what transpired in the company's meeting than the Respondent counsel raised the preliminary objection. The objection is that this court lack requisite jurisdiction to entertain the application at hand due to existence of clause 14 of the JVA annexed as to the Applicant's supplementary affidavit as annexure GAL-2 and recent decision of this court in Misc. Commercial Cause No. 44 of 2022.

The parties were under legal representation of learned counsel. Whereas Mr Killey Mwitasi who appeared for the applicant, Mr Mutakyamirwa Philemon representing the respondent. The court directed the PO to be disposed by way of written submissions. The parties adhered to the scheduled set and filed their written submissions timely.

To determine the PO at hand the court considered the law, pleadings, and submissions of the parties. Besides all matters raised by the parties in

their affidavits and their submissions in relation to the PO, the central point of the application is that the applicant has invoked the court's intervention to order conducting of shareholders' meeting as in her view the attempts to convene the meeting have failed on several occasions because the directors do not want to call the meeting.

Two questions are pertinent: one, what law regulates company's meetings? And two, are disputes relating to company's meetings amenable to arbitration? If the course of answering these questions the PO will be resolved. One may further ask, is the application at hand falling in the purview of clause 14 of JVA? Is the ruling in Misc. Commercial Cause No. 44 applicable in the context of application at hand?

Dealing with JVAs is generally unproblematic. However, "It is the 'contract' between the company's shareholders and its directors which poses the most tricky questions." **Andrew Johnston, Arbitrability of Company Law Disputes, in Qiao Liu and Wenhua Shan (eds.), China and International Commercial Dispute Resolution, Koninklijke, BRILL NV, Leiden, 2016, pages 195-227** at page 196. As to whether a particular company's dispute is arbitrable or should be entertained in the court, the Canadian case of **Beattie v. E & F Beattie Ltd [1938] Ch. 708, CA** held

that the court is unwilling to handover its gatekeeping role to the arbitrator. The gate keeping role here implies the entertaining of disputes brought by shareholders or members to the court instead of referring them to arbitration to protect interest of the company and the minority members. That is an exception to the majority rule in **Foss v Harbottle (1843) 2 Hare 461**, which is a landmark case in company decision making.

Interestingly, according to Andrew Johnston in his book chapter “**Arbitrability of of Company Law Disputes**,” (supra) at page 212 “...the decision in **Beattie** prevents minority shareholders from circumventing the judge-made rules on derivative actions by forcing the company to bring proceedings before an arbitrator.” Although the applicant in the present case is majority shareholder the Canadian case appears to set a good approach.

Referring the matter to arbitration though provided in the party’s agreement may be challenged in certain instances. Moreover, there are some cases such as **Russell v. Northern Bank Development Corporation Ltd [1992] 1 WLR 588** indicating that the court would reject the validity of company’s agreement to a shareholders’ contract referring all disputes to arbitration. The emphasis here is on all disputes. Back to our case, the respondent’s view appears to suggest that clause 14 of JVA require all

disputes to be resolved via arbitration, which in my view and compatible with ***Russell's case*** (supra) is rejected. The matter of meetings that the company through its directors (management) is said to have constantly declined to convene cannot be resolved by arbitrator. The court has power if properly moved to order a meeting to be conducted by virtue of Section 137 of the Companies Act, Act No. 12 of 2002.

As to whether the respondent is bound by the JVA, one should consider who are the parties to the JVA, and what is contained in clause 14 of that JVA. The JVA between Gold Africa Limited and EB Hance was executed to form Reef Gold Limited (JV Company). The JVA on clause 14 stipulates that:

"In the event of any dispute occurring between the parties arising out of the terms of this Agreement or its interpretation, which cannot be resolved by negotiation, the parties shall submit such dispute for resolution by a single arbitrator under the rules of the International Court of Arbitration of the International Chamber of Commerce or such other non-judicial dispute resolution procedure as may be mutually agreed, and the decision of such arbitrator shall be final and binding upon both parties, not

subject to appeal to courts or any other tribunal. Such arbitration shall be conducted in Paris, or such other venue as agreed by the Parties, applying the laws of England as to contracts except where the subject matter of the dispute clearly dictates the applicability of Tanzanian laws."

There are two critical questions that interestingly the parties did not address them which could help to dispose the PO. First, whether the respondent is a party to the JVA? Is she party to the shareholding agreement? Second, are all the company's disputes as stated in clause 14 of JVA referring them to arbitration valid? In other words, are all company disputes arbitrable? In the context of the present case, can the arbitrator order the respondent to conduct shareholders' meeting?

Indeed, there are matter that can be arbitrable and those that cannot be. Matters of public law, or issues that are purely regulated by statutory law are not arbitrable. There are also matters that by their very nature require court intervention. Thus, depending on the circumstance of the case the matter may or may not be amenable to arbitration.

Moreover, the parties to JVA cannot prosecute the directors/management who are not party to it through arbitration. Further,

the unfair prejudice and derivative actions can be pursued through adjudication before the court. That is provided for under Section 233 and 234 of the Companies Act, Act No.12 of 2002. I am aware that in **Queensway Tanzania (EPZ) Ltd v Tanzania Tooku Garments Co. Ltd, Misc. Commercial Cause No. 43 of 2020** this court correctly ruled that winding up petition cannot be used as means to pre-empt arbitration proceedings. The parties' autonomy also known as sanctity of contract must be respected. But the case at hand is not about winding up. In my view company's meetings are matters regulated by statutory law and hence not arbitrable.

Referring to the question whether the respondent is a party to the JVA, looking at the JVA itself the respondent is not a party to it. Rather she was born out of the JVA. It is a JV company. In my view, and as informed by the **Russell's case** (supra) the respondent cannot thus be bound by the terms of JVA. Only the parties to the JVA are bound by the said agreement. In this case, the applicant and EB Hance. Hence the arbitration clause cannot bind the respondent.

Turning to the second issue whether the JVA clause 14 that all disputes between the parties are to be referred to arbitration is valid, the response is

that: one, the court has held the JVA does not apply to the respondent who is not a party to it. And two, as per **Russell's case** (supra) the court is reluctant to blindly sanction such clause because not all disputes between the parties are arbitrable. The issue of meeting to be conducted can be ordered by the court and not by the arbitrator. Although the companies MEMART may provide for shareholders meetings, Section 137 of the Companies Act, [Cap 212], Act. 12 of 2002 provides for the power of the court to order conduct of a meeting of the company. Such power is not given to the arbitrators. It should be remembered that arbitration is by very nature is a consensual matter between the parties signified by their agreement. Sanctity of contract does not supersede prescription of the law.

Turning to the respondent's reference to Misc. Commercial Application No. 44 of 2022, without beating around the bush the same does not apply to the present case. In the former (Misc. Commercial Application No. 44 of 2022) the parties to the JVA were also parties to that application. In this case the respondent is not a party to the JVA. Moreover, facts and issues central to Misc. Commercial Application No. 44 of 2022 differ from the facts and issues in the present case. The authority cited is thus inapplicable.

From the above disposition, the PO that this court lacks jurisdiction is without merit because clause 14 of the JVA, the arbitration clause does not bind the respondent. And the power to order company's meeting where the company has been reluctant to conduct it is given to the court and hence such matter is not arbitrable.

That said and done the PO is overruled. Each party to bear its costs. The main application to proceed from where it ended prior to the raising of the PO.

Order accordingly.

DATED at **DAR ES SALAAM** this 10th Day of November 2023.



U. J. AGATHO

JUDGE

10/11/2023

Date: 10/11/2023

Coram: Hon. U.J. Agatho J

For Applicant: Killey Mwitasi, and Farida Kerenge, Advocates

For Respondent: Jeddines Jasson, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 10th November 2023 in the presence of Killey Mwitasi, and Farida Kerenge, Advocates for the Applicant and Jeddines Jasson, Advocate for the Respondent.



U. J. AGATHO

JUDGE

10/11/2023