

IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MKUYE, J.A., SEHEL, J.A., And GALEBA, J.A.)

CIVIL APPEAL NO. 29 OF 2017

NORTH MARA GOLD MINE LIMITED.....APPELLANT

VERSUS

DIAMOND MOTORS LIMITED..... RESPONDENT

**[Appeal from the Ruling and Drawn Order of the High Court
of Tanzania (Commercial Division) at Dar es salaam]**

(Songoro, J.)

dated the 10th day of June, 2016

in

Miscellaneous Commercial Cause No. 51 of 2016

.....

JUDGMENT OF THE COURT

27th October & 23rd November, 2021

GALEBA, J.A.:

North Mara God Mine Limited and Diamond Motors Limited, the appellant and the respondent respectively, are both limited liability companies registered and existing under the law of Tanzania. In the transaction giving rise to this appeal, the appellant was a mining company and the respondent was a contractor with expertise and equipment to supply drilling services (the services, which the appellant needed for its mining operations. To regulate the parties in the supply and consumption of the services, parties entered into two agreements, the Surface Drilling Agreement (the SDA) and the Pre-Split

Agreement (the PSA). The SDA was entered into on 19th December 2008 and the latter on 1st March 2010. Both agreements had numerous clauses including dispute resolution provisions, in case any dispute was to arise.

According to the record of appeal, a dispute to which this appeal relates, arose between the parties in the months of November and December 2015. It was over non-payment for the services rendered as well as an uncertainty as to the amount due for payment by the appellant to the respondent. The respondent had invoiced the appellant an amount of USD. 4,965,855.30 for services rendered in August, September and October 2015, according to the appellant. The respondent put this amount at USD. 3,519,247.69 in its written submission. Nonetheless, around 4th December 2015 the dispute intensified and precipitated into a serious business impasse placing the parties' relationship at a brink of complete deadlock as the respondent suspended provision of the services. When that happened, the appellant issued instructions to its bankers for remittance of USD. 1,446,607.61 in favour of the respondent for the latter to resume provision of the services. As services were not restored, the appellant recalled the remittance instructions so that no money would any more be paid to the respondent's bank account.

Efforts of parties' representatives to convene around the table and resolve the stalemate which, at the time, was progressively mutating to maturity and threatening to get parties into a real business crisis, utterly failed. On 23rd December 2015, having deemed the appellant to be unable to pay its debts, the respondent issued a written demand under section 280(1) of the Companies Act [Cap 212 R.E. 2002] (the Companies Act) requiring the appellant to pay the amount due. On its part, in a quest to initiate the process of escalating the matter to the next level of dispute resolution as covenanted by parties in the agreements, on 7th January 2016, the appellant issued a notice of dispute to the respondent pursuant to clauses 33.2(b) and 34.2(b) of the DSA and the PSA respectively intimating to present the matter to arbitration.

As the notice by the appellant to initiate the arbitration process under the agreements was pending, on 24th February 2016, the parties' relationship took a completely different course. The respondent approached the High Court, Commercial Division at Dar es salaam and presented a Petition for liquidation of the appellant *vide* Miscellaneous Commercial Cause No. 25 of 2016, (the winding up petition or the winding up proceedings) on account of the appellant's inability to pay its debts. In the winding up petition the respondent was moving the court to grant the following reliefs:

"(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 should 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 should 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 should 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 a 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 may be made as the court thinks fit."

When the appellant was served with the winding petition, it filed Miscellaneous Commercial Cause No. 51 of 2016 moving the High Court to stay

the winding up proceedings pending reference of parties' dispute on the amount payable to arbitration. Against the application for stay of winding up proceedings, the respondent filed a notice of preliminary objection complaining that:

*"The Petition for stay of the winding up proceedings violates the law enunciated in **Rufiji Basin Development Corporation Authority v. Kilombero Holding Limited** – High Court of Tanzania Miscellaneous Commercial Cause No. 34 of 2006 (unreported) because upon commencement of winding up proceedings, an arbitrator has no jurisdiction to arbitrate parties to a submission."*

The High Court, (Songoro J.) heard parties on the above point of objection and agreed with the respondent's position. Consequently, the court dismissed the petition for stay of proceedings, and ordered the winding up proceedings to proceed. The order dismissing the application for stay of proceedings, is what is challenged before us in this appeal, which is premised on three grounds of appeal, namely:

"1. That the trial judge erred in law by holding that once there is a winding up petition nothing may be referred to an Arbitrator for adjudication;

2. The trial judge erred in law by ruling that the petition for stay of winding up proceedings contravenes section 275 of the Companies Act;

3. That the trial judge erred in law in failing to hold that there was an underlying dispute between the parties which had to be referred to arbitration before winding up proceedings could be initiated.”

In compliance with rule 106(1) and (7) of the Tanzania Court of Appeal Rules 2009 (the Rules), parties lodged submissions in support of their respective positions and when the appeal was called on for hearing on 22nd October 2021, the appellant was represented by Dr. Wilbert Kapinga, learned advocate and the respondent had the services of Mr. Zaharan Sinare, also learned advocate. Both counsel opted to exercise their rights under Rule 106(10)(a) of the Rules to elaborate their submissions.

In supporting the first and second grounds of appeal, Dr. Kapinga, at the outset, admitted that the arbitrator does not have jurisdiction to preside over winding up proceedings or make any company winding up related orders. However, he added, that the arbitrator had jurisdiction under the DSA and the PSA to preside over and resolve an underlying disputed issue of reconciling the appropriate amount payable by the appellant to the respondent, even in the

circumstances where there is in place winding up proceedings pending in the court. He contended that although the High Court in winding up proceedings has jurisdiction to determine the issue of the amount payable, that does not take away the arbitrator's jurisdiction to determine parties' dispute under the agreements.

It was Dr. Kapinga's position that the court erred in dismissing the application allegedly because it offended the provisions of section 275 of the Companies Act. He submitted that as there was a notice to initiate the arbitration process which had been issued before the winding up petition was presented to court, it was appropriate for the court to hear parties on the appellant's application for stay in order for parties to go to arbitration first, the contracted dispute resolution modality, while holding the winding up proceedings in abeyance, pending the outcome of the arbitration.

Dr. Kapinga's other point was that, whereas winding up measures were unnecessarily wider with far reaching and severe consequences threatening the very existence of the appellant, reconciliation and ascertaining the debt that the appellant owed the respondent, a relatively specific issue, was within the mandate of the arbitrator to handle. The issue did not need escalation to the level of liquidation of the appellant, he implied. In conclusion, he submitted

that winding up proceedings, were undesirable for the parties' relationship and business continuity as the proceedings would likely culminate into multiplicity of causes of actions, because if it was to continue, the court would have to advertise for all creditors and all interested parties to apply so as to join in the winding up proceedings. According to him, the winding proceedings were uncalled for in the circumstances, for there is an underlying dispute on a single issue, namely ascertaining the exact amount that the appellant owes the respondent. Dr. Kapinga, moved the Court to allow the first and second grounds of appeal.

As for the third ground of appeal, he implored us to consider his written submission and agree with him on the point as raised in the memorandum of appeal. We have however reviewed the written submission of the appellant, and it is clear that, counsel did not submit in support of individual grounds, rather the substance of his complaint throughout the submissions. Finally, Dr. Kapinga distinguished the case of **Rufiji Basin Development Authority v. Kilombero Holding Ltd**, Miscellaneous Commercial Cause No. 34 of 2006 (unreported) which was relied upon by the High Court, arguing that the court ought to have heard the parties and stayed the proceedings as held in the cases of **Goetze India Limited v. Pure Drinks (New Delhi) Limited**, 1994

80 CompCas. 340 OH, (1993) 104 PLR 745, **Salford Estates (No. 2) Ltd v. Altomart Ltd** [2014] EWCA Civ. 1575 and **Rusant Limited v. Traxys Far East Limited** [2013] EWHC Chancery Division (the foreign judgments). We will comment on these foreign decisions at the very end of this judgment.

The arguments were resisted by Mr. Sinare. After adopting the respondent's submissions filed earlier on, he was emphatic that the High Court was right in upholding the preliminary objection. He restated the position taken by the court, that once a petition for winding up is presented in court, the arbitrator has no jurisdiction to entertain any dispute between the parties to the winding up proceedings. As Dr. Kapinga was not disputing that it is only the High Court which has jurisdiction in winding up of companies and not arbitrators, then it would not be right to fault the Judge for upholding the objection, Mr. Sinare argued. He submitted that, before the High Court could make its decision, it considered its previous decision in the case of **Rufiji Basin Development Authority** (supra) which was interpreting section 275 of the Companies Act. He defended the High Court for having also relied on other Indian decisions before concluding that an arbitrator had no jurisdiction to entertain any dispute once a creditor's winding up petition is presented to the court for liquidation.

He contended that the cumulative effect of the provisions of sections 275, 283, 284, 285 and 286 of the Companies Act is that once a winding up petition is presented to court, all matters in other courts by or against the company targeted by the winding up, ought to be stalled and cannot be progressed in any manner before those courts, including arbitration.

Mr. Sinare admitted, however, that when the notice for commencement of arbitration was received by the respondent, the latter did not respond to it, instead it presented a creditor's winding up petition in the High Court to wind up the appellant. At clause 3.12 of the respondent's submission, the latter was also in agreement with Dr. Kapinga's submission that the winding up proceedings are peculiar statutory litigations prone to attracting numerous parties including other creditors and all parties with interest in the appellant, thereby making the proceedings, multiparty proceedings, to use the respondent's phrase in the written submission. As for the foreign judgments, it was commented in the written submission lodged on behalf of the respondent that, the authorities are not applicable because in this jurisdiction, we have sufficient statutory provisions which are sections 275 and 283 covering the scenario which has already been interpreted by the High Court in the case of **Rufiji Basin Development Authority** (supra). The basis of the

submission of the respondent being essentially that, the appellant failed to pay its debts which it was admitting, so the respondent had a right under the law to lodge the petition to wind up the appellant on that account. In the final analysis, Mr. Sinare, moved the Court to dismiss this appeal.

On our part, we have carefully considered the material on record as well as the submissions of parties, and we think that this appeal can be resolved by determination of two issues, although it is premised on three grounds as per the memorandum of appeal. The first, will be whether the application for stay of proceedings offended section 275 of the Companies Act and the second issue for our consideration will be whether upon presentation of a winding up petition to court, the law forbids filing of an application for stay of proceedings pending reference to arbitration of a dispute underlying the winding up petition.

We propose to start with the first issue which is corresponding to the second ground of appeal which is challenging the High Court for having held that the application for stay of winding up proceedings breached section 275 of the Companies Act. To do that, we will start from where the High Court ended its ruling. The court observed at page 302 of the record of appeal that:

"Bearing in mind that there is winding up proceedings which its jurisdiction is vested to this court by section 275 of the Companies Act No. 12 of 2002, honestly, I find the petition for stay of proceedings to go to arbitration is misconceived, and contravenes section 275 of the Companies Act which vests sole jurisdiction to this court."

Having made the above finding, the High Court dismissed the application for stay of proceedings as indicated earlier on. We will investigate whether the court was right in holding as such, because that is the substance of the appellant's complaint particularly in the second ground of appeal. We will start with section 275 of the Companies Act which provides that:

"275. The High Court shall have jurisdiction to wind up any company registered in Tanzania and a body corporate as mentioned in section 279(2)."

The meaning of this section does not call special expertise in statutory interpretation, for it is plain and straight forward. The section is to the effect that, it is the High Court that is vested with jurisdiction to wind up companies registered in this jurisdiction and also it may wind up companies referred to at section 279(2) of the same Act, which are companies registered abroad but with operations in Tanzania if winding up proceedings of such foreign

companies have been commenced in countries where they were incorporated or where they have established places of business. That is what the section is all about. To find out whether the application for stay of proceedings offended the above section, we will examine the prayers that the appellant was moving the court to grant in Miscellaneous Commercial Cause No. 51 of 2016. The reliefs sought in that application are contained at page 11 of the record of appeal where the appellant stated:

"WHEREFORE the petitioners pray for:-

- (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".*

At page 290 of the record of appeal, during the hearing of the application at the High Court, Mr. Alan Kileo, learned advocate for the petitioner submitted that the petitioner was not moving the High Court to cede or surrender the winding up proceedings to arbitration, but its prayer was to have the petition for winding up held in abeyance for a while so that an underlying issue touching

on the extent of the debt which is disputed be referred to arbitration for ascertaining the amount due.

In reply, Mr. Daniel Welwel learned advocate for the respondent told the High Court that the petition contravened the provisions of section 275 of the Companies Act, for it was seeking to refer the matter to arbitration. In the High Court, the judge at page 299 paragraph 3 acknowledged and appreciated the fact that the petitioner, did not intended to have winding up proceedings referred to the arbitrator because the later had no jurisdiction to preside over such proceedings, but a specific issue relating to reconciliation of disputed invoices. Thus, the court was made aware that what was to be presented to the arbitrator was not insolvency proceedings, but an issue of reconciliation of invoices. We will then determine whether an applicant for orders of stay of the proceedings in the High Court, breached section 275 of the Companies Act.

We have thoroughly scrutinized the record and the submissions, particularly those of the appellant before the High Court, and we are satisfied that, **first** there was no prayer before the High Court to surrender the petition and refer it to arbitration so that the winding up proceedings could be determined there. **Second**, the appellant did not make any submission moving

the court to hold that the court had no jurisdiction to entertain winding up proceedings.

Briefly stated, the petition for stay had nothing to do with the jurisdiction of the High Court under section 275 of the Companies Act. The purpose of the application for stay of proceedings was that, instead of processing a winding up of the appellant, as prayed by the respondent in the petition for winding up, what the appellant was requesting was a temporarily stay for the court to halt that process so as to afford parties space for them to go to arbitration, a special dispute settlement mechanism agreed by them and resolve one issue of reconciliation of the payable amount. Then, if possible, parties could resume the winding proceedings in the High Court, after the arbitration. With such a move we do not see any way the petition for stay of winding proceedings did take away or could have taken away the jurisdiction of the High Court or violated section 275 of the Companies Act. The High Court was therefore not right, in holding that the petition for stay of winding up proceedings breached section 275 of the Companies Act. Thus, we allow the second ground of appeal.

Next for our attention is the second issue which is matching with the first and third grounds of appeal. The complaint in those two grounds is that the High Court erred in holding that once a winding up petition is presented before

the court, no dispute between the parties can be referred to arbitration, for the arbitrator ceases to have jurisdiction. The appellant's argument was that if there is an underlying dispute as to the sum due, the winding up proceedings may be stayed and the only point of reconciliation of the amount of the debt can be referred to arbitration for ascertaining, while winding proceedings are held in abeyance before the court.

We indicated above that parties had entered into two agreements, the DSA and the PSA in which they covenanted to submit their disputes, in case they arose, to arbitration. It is significant to observe that, parties are bound by the submission, and they cannot depart from that mode of dispute settlement agreed upon by them unless both parties submit to the court's jurisdiction or the respondent actively takes a step in the proceedings commenced in court.

At the time of the dispute from which this appeal arises, the law applicable was the Arbitration Act [Cap 15 R.E. 2002 later R.E. 2019] (now repealed). According to section 4 of that repealed Act, a clause providing for arbitration as a mode of dispute settlement was irrevocable by parties as indicated above unless the court grants leave or unless the submission itself expresses a contrary intention. That section provides:

"4. Unless a different intention is expressed therein, a submission shall be irrevocable, except by leave of the court, and shall be deemed to include the provisions set forth in the First Schedule hereto, in so far as they are applicable to the reference under submission."

With that brief highlight on the prominence of the submission clause to arbitration in an agreement, we will now proceed to the specific point for our discussion, that is, whether no issue can be referred to arbitration once a petition for winding up is presented in the High Court. In this respect, the respondent cited the provisions of sections 275, 283, 284, 285 and 286 of the Companies Act to support its proposition that once a petition for winding up is presented to court, no reference of any matter can be made to arbitration as the latter would have no jurisdiction. Next is the scrutiny and examination of the above provisions cited by the respondent to ascertain whether they restrict reference of any issue to arbitration once a winding up petition is presented to court. Except section 275 of the Companies Act, which we have already covered when discussing the second ground of appeal, we will discuss the above sections one after the other until we will be done with them all, starting with section 283 which provides that:

"283. At any time after the presentation of a winding-up petition, and before a winding up order has been made, the company, or any creditor or contributory, may:-

(a) where any action or proceedings against the company is pending in the High Court or Court of Appeal apply to the court in which the action or proceedings is pending for a stay of proceedings therein; and

(b) where any other action or proceeding is pending against the company, apply to the court having jurisdiction to wind up the company to restrain further steps in the action or proceeding, and the court to which application is so made may, as the case may be, stay or restrain the proceedings accordingly on such terms as it thinks fit."

This section provides that matters pending in any court against the company subject of the winding up proceedings, may be stayed pending determination of the petition presented for winding up in the High Court. We do not find anything in the above section restricting or forbidding the court from entertaining an application seeking to stay the winding up proceedings before it and refer a specific disputed point to arbitration. Thus, this section, in our view, does not support the respondent's proposition he advanced in

resisting this appeal, that once a petition for winding up is presented to court, then neither party can refer any dispute to the arbitrator as the latter has no jurisdiction. This point is missing in section 283 of the Companies Act above.

Section 284 of the Companies Act, which is next, provides that:

"284. In a winding-up by the court, any disposition of the property of the company, including things in action, and any transfer of shares, or alteration in the status of the members of the company, made after the commencement of the winding-up, shall, unless the court otherwise orders, be void."

This section is to the effect that, any disposition of a company's assets or properties after presentation to court of a winding petition, is void unless the court directs otherwise. In the application before the High Court, the appellant was neither attempting to sell any of its properties, nor was it seeking to change its shareholding structure or membership after presentation of the winding up petition. Therefore, as the petition for stay had nothing to do with selling of any properties of the company or to alter its membership, and as the above section does not prohibit or outlaw an act of lodging an application for orders of stay of winding up proceedings pending reference of any point of

dispute to arbitration, the section is irrelevant in the circumstances of this appeal.

We now proceed to section 285, which provides that:

"285. Where any company is being wound up by the court, any attachment, sequestration, distress or execution put in force against the assets of the company after the commencement of the winding up shall be void."

The above section invalidates any attachment, sequestration, distress or execution of any kind levied on or targeting assets of the company in respect of which winding up proceedings have been commenced. In this matter there is no execution or any like process and the section does not bar any reference of any disputed issue to arbitration. Thus, the section is not relevant in the circumstances.

Next cited by the respondent, was section 286 on commencement of winding proceedings, which provides that:

"286.-(1) Where, before the presentation of a petition for the winding up of a company by the court, a resolution has been passed by the company for voluntary winding up, the winding up of the company shall be deemed to have commenced at the time of the

passing of the resolution, and unless the court, on proof of fraud or mistake, thinks fit otherwise to direct, all proceedings taken in the voluntary winding up shall be deemed to have been validly taken.

(2) In any other case, the winding up of a company by the court shall be deemed to commence at the time of the presentation of the petition for the winding-up."

Like with the other sections cited by the respondent's counsel and considered above, section 286 is irrelevant to the appeal before us. The section identifies the point at which a winding up is commenced or deemed to have commenced. In this matter, parties were not at dispute as to the point at which winding up proceedings commenced. The respondent's counsel cited it to support his proposition that no point of dispute can be referred to arbitration once winding up proceedings are presented to court. On our part, we do not read any such restriction in the section cited.

Thus, with due respect to Mr. Sinare, we do not only find nothing in the above provisions prohibiting a company being wound up by court from presenting a petition for staying proceedings pending arbitration on a specific underlying aspect of the dispute, but also, we do not read anything in those sections, prohibiting or forbidding the High Court presiding over winding up proceedings from hearing an application for staying such proceedings and refer

a specific matter to arbitration. The irrelevance of the above sections, could account for the reason why the sections were not referred to by Mr. Welwel for the respondent before the High Court, in both the skeleton arguments at pages 279 to 281 of the record of appeal and during *viva voce* submission before Songoro J, on 25th June 2016 at pages 288 and 290 to 291 of the record of appeal.

The other point which was relied upon by Mr. Sinare, was that the case of **Rufiji Basin Development Authority (supra)** decided that once arbitration proceedings are commenced, no matter can go to arbitration. Admittedly, we did not have the advantage of accessing and examining the record of the **Rufiji Basin** case, but the decision in that case is clearly distinguishable from the matter that was before Songoro J. In **Rufiji Basin** case, the petition seeking stay of proceedings, wanted the winding up proceedings stayed so that the same proceedings (winding up proceedings) can be referred or transferred for determination in arbitration proceedings.

This is the point that Massati J. (as he then was) did not agree to be the correct interpretation of section 6 of the repealed Arbitration Act, and correctly so, in our view. Because if that was to be the case, then, the petition would be offending section 275 which exclusively vests winding up jurisdiction

in the High Court. So, whereas in that case, the petitioner wanted the winding up proceedings to be ceded to arbitration for determination, in the case at hand, the petitioner was praying that the winding up matter be stayed in court and remain pending there without any reference of it to the arbitrator, save for an aspect of reconciliation of the due debt. In our view, the High Court in **Rufiji Basin Development Authority (supra)** was right in holding that the petition for stay was offending section 275 of the Companies Act because the petitioner wanted the High Court to surrender the winding proceedings to arbitration. The High Court (Songoro J.) was therefore not right to rely on the **Rufiji Basin** case to dismiss the petition for stay of proceedings on a preliminary objection. In the circumstances, we agree with Dr. Kapinga on the complaint in the first and third grounds of appeal and allow both of them.

Finally, we indicated earlier on that before penning off, we would make an observation in respect of the foreign judgments which were referred to us by the appellant's counsel. We have reviewed the authorities and appreciated the principles enunciated in the decisions. Nonetheless, considering that the ruling challenged in this appeal was on a preliminary objection and regard being had to the nature of the orders we are about to make in terms of the

Way forward, we consider it appropriate not to make any comment on the said judgments.

Consequently, as we have not found any valid reasons upon which the High Court could have legally dismissed the application for stay of proceedings, this appeal is allowed with costs. We further order that the ruling of the High Court challenged in this appeal be and is hereby reversed and set aside with orders that the record in Miscellaneous Commercial Cause No. 51 of 2016 be remitted to the High Court (Commercial Division) at Dar e salaam where that application will be set down for hearing and determination on merits according to law.

DATED at DAR ES SALAAM this 18th day of November, 2021.



R. K. MKUYE
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

Z. N. GALEBA
JUSTICE OF APPEAL

The Ruling delivered this 23rd day of November, 2021 in the presence of Mr. Wilbert Kapinga learned counsel for the appellant and Mr. Abdillah Hussein learned counsel for the respondent is hereby certified as a true copy of the original.


K. D. Mhina
REGISTRAR
COURT OF APPEAL