

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT MWANZA

MISC. COMMERCIAL CAUSE NO. 01 OF 2020

IN THE MATTER OF ARBITRATION

AND

IN THE MATTER OF ARBITRATION ACT [CAP 15 R.E. 2002]

AND

IN THE MATTER OF STAYING COMMERCIAL CASE NO. 15 OF 2019

PENDING ARBITRATION

BETWEEN

NORTH MARA GOLD MINE LIMITED1ST PETITIONER

BARRICK GOLD CORPORATION2ND PETITIONER

VERSUS

JOSEPHAT EDWARD MARWARESPONDENT

RULING

B.K. PHILLIP, J

The petitioner herein lodged this petition under the provisions of section 6 of the Arbitration Act, Cap 15, R.E. 2002 (hereinafter to be referred to as ("Cap 15")) and rules 5,6,7 and 8 of the Arbitration rules, 1957 (hereinafter to be referred to as "The Arbitration Rules") praying for the following reliefs:-

- i. The proceedings in Commercial Case No. 15 of 2019 be stayed to allow the dispute to be referred to Arbitration in accordance with the

rules of the Arbitration Foundation of Southern Africa as agreed by the parties.

- ii. Cost of this Petition be granted.
- iii. Any other relief that the Court may deem fit and just to grant.

A brief background to this petition is as follows; On 1st June 2018, the 1st Petitioner and the respondent entered into a sale agreement, for sale and purchase of goods intended to be disposed of by the 1st petitioner which were listed in the schedule to the agreement. Prior to the signing of the aforesaid sale agreement, the 1st petitioner invited bidders to buy various goods which were considered obsolete/ redundant. The respondent emerged as the highest bidder offering Tshs 1.8 Billion. On 3/8/2018 the respondent paid Tshs. 1,416,000,000/=. Thereafter documents for handing over the goods were executed between the 1st petitioner and the respondent. The purchased goods were kept in different warehouse at the petitioner's site. In the process of removing / taking the purchased goods disputes arose. The respondent claimed that he discovered that some of the purchased goods were missing. Also, 1st petitioner refused to allow the respondent to take some of the purchased goods.

On the other hand, the 1st petitioner claimed that goods involved in the tender were subject to verification, so, after verification, the 1st petitioner opted to retain some of the goods as they did not qualify to be obsolete and/ or redundant. The 1st petitioner alleged that all bidders were duly notified and invited to visit the site for reviewing their bids. All bidders including the respondent reviewed their bids. Consequently, the respondent reviewed his bid and ended up bidding a sum of Tshs.

1,200,000,000/= for the approved goods and still he emerged as the highest bidder.

It is due to the above narrated misunderstandings/disputes between the 1st petitioner and the respondent which caused the respondent to sue the petitioners vide Commercial Case No. 15 of 2019(henceforth "the Main case") praying for the following reliefs:-

- i. For an order of payment of TZS 4,179,931,560/= (USD 1,874,407.77) by the defendants jointly and severally for the missing items auctioned by the 1st defendant and purchased by the plaintiff.
- ii. For an order of payment of TZS. 1,574,527,353/= (USD 706,066.08) by the defendants jointly and severally for the withheld items auctioned by the 1st defendant and purchased by the plaintiff.
- iii. For an order of payment of TZS 9,000,000/= by the defendants jointly and severally for the loss incurred by the plaintiff for hiring three vehicles/trucks which were to carry the drums of steel balls and chemicals.
- iv. For payment of TZS 311,520,000/= as a special damages for the penalties accrued from the loan secured by the plaintiff from CMG investment LTD in purchase of the 1st Defendant items.
- v. For payment of interest on the total amount stipulated in paragraph (a) and (b) above at the rate of 21% per annum computed from the day of payment of the items was effected to the judgment of this suit.

- vi. For payment of interest on the total amount stipulated in paragraph (a),(b), (c) and (d) above at the rate of 21% per annum from the date of filing this suit to the date of full payment of the said sum.
- vii. For payment of interest on the purchased price plus VAT at the rate of 3% per month from the date of filing this suit to the date of full payment of the said sum.
- viii. General damages.
- ix. Costs of this suit to be borne by all defendants.
- x. Any other reliefs that this honourable court may deem fit and just to grant.

Upon being served with the plaint, the petitioners through the legal services of Caroline Kivuyo advocate of Pier Advocates Law Firm lodged this petition on the ground that sale agreement between the 1st petitioner and the respondent contains an arbitration clause which stipulates the procedure for settlement of disputes arising from the implementation of agreement, the same includes referring the dispute to arbitration. That agreed place and seat of arbitration is in Johannesburg South Africa.

In reply to the petition, the respondent who is represented by the learned advocate, Judith Nyaki of Hakikazi Advocate, Law Firm, stated that the clause relating to arbitration is very clear that the parties to the sale agreement may resolve their disputes arising out of the agreement where possible at the level where the dispute first arises. She enumerated the steps to be followed in dispute settlement as stipulated in the agreement which indicates that, the last step is referring the dispute to arbitration,

and the same was agreed to be conducted in accordance with the rules of the arbitration foundation of South Africa.

He alleged that the petitioners ignored to resolve the dispute as per the steps indicated in clause 16 of the sale agreement, which provides for the procedures for dispute settlement including referring the disputes to arbitration, despite the fact that they notified them on their claims several times. The respondent further alleged that the petitioners representatives were aware of the dispute as well as the respondent's concern regarding the missing goods and the ones with held, but they did not respond to any of the notice in respect of the dispute. Consequently, the respondent decided to institute a case in court against the petitioners vide Commercial case No. 15/2019.

At the hearing of this petition the learned advocate Malongo and Judith Nyaki appeared for the petitioners and the respondent respectively.

Submitting for the petitioner Mr. Malongo started his submission by adopting the contents of the petition, then, he proceeded to refer this court to paragraph four (4) of the plaint which states the amount claimed by the respondent and the cause of action. Basically, the same indicates that the respondent's claims and cause of action in the main case arise from the sale agreement between the 1st petitioner and the respondent. Mr. Malongo went on to submit that clause 16 of the said sale agreement provides that any dispute arising from the implementation of the agreement has to be resolved amicably, if amicable settlement fails, then the dispute has to be referred to arbitration.

Furthermore, he submitted that, the parties herein have submitted to arbitration and the question in dispute in the main case is covered under the sale agreement. Moreover, Mr. Malongo contended that the petitioners have not taken any step in the main case and are willing, and ready to refer the matter to arbitration.

He referred this court to the case of **Travelport International Ltd Vs. Precise System Ltd, Misc. Commercial Application No. 359 of 2017** and invited this court to grant the application.

In rebuttal Ms. Judith started her submission by adopting the contents of her skeleton arguments filed in court pursuant to rule 64 of the High Court (Commercial Division) procedural rules, 2012 as amended. She went on to submit that, the petitioners have not complied with the requirements stated in section 6 of Cap 15. She contended that the petitioners satisfied only few conditions stipulated in section 6 of Cap 15, such as the presence of the Arbitration clause in the sale agreement.

Furthermore, Ms Judith argued that not all petitioners are covered in the arbitration clause. That the 2nd petitioner is not a party to the sale agreement, thus, not a party to the arbitration clause. Relying on the case of **PTA Bank & another Vs Musoma Dairly Ltd & others Commercial Case No. 83 of 2003**, (unreported) and **Tanzania Breweries Limited and another Vs Oscar Shelukindo and 12 others, Misc Civil Application No. 6 of 2018**, Ms Judith submitted that the conditions for granting an order for stay of proceedings pending reference of the dispute to arbitration are as follows;

- i. There must be a submission as defined under Section 2 of Cap 15 (A Written Agreement between the parties) to submit present and future dispute and or differences to arbitration.
- ii. The question (s) in the dispute is covered by the Agreement and that such questions should therefore be referred to arbitration.
- iii. The petitioner is one covered by the reference to arbitration clause in the Agreement. And so the respondent.
- iv. That the petitioner has not taken step that are in contravention of the procedural requirements as outlined under section 6 of Cap 15 that no further steps have been taken after entering appearance. Such steps include the filing of a written statement of defence of the taking of other steps in the proceedings.
- v. The petitioner is willing and ready to arbitrate.
- vi. That there are no sufficient reasons before the court to make it refuse granting the stay.

Another argument raised by Ms. Judith is that, the petitioners have defended the suit because in paragraph 4, 5, 6, 7, 8, 9 and 11 of the petition they have disputed some of the allegations made by the respondent in the main case and raised some defence on the same. She contended that taking steps in proceedings is not limited to filing a written statement of defence, but entails anything done by the petitioner or his advocate regarding the case. She was of the view that the contents of the petition basically answers the respondent's allegations and claims in the main case. To buttress her arguments she referred this court to the case of **Travelport International Limited** (supra).

As regards the petitioners' willingness to refer the dispute to arbitration, she was of the view that the petitioners have never demonstrated the alleged willingness to refer their disputes to arbitration, since they have not issued any notice for the dispute to be referred to Arbitration, despite the fact that they were aware of the dispute for quite some time. She insisted that the willingness to refer the dispute to arbitration cannot be substantiated by just making a mere statement that a party is willing to refer the dispute to arbitration without taking any visible steps. She concluded her submission with a prayer for the dismissal of this petition.

In rejoinder, Mr. Malongo, reiterated his submission in chief. He contended that the argument raised by Ms Judith to the effect that the petitioners have taken steps in the proceedings is an afterthought. He insisted that the petitioners have not filed any written statement of defence in the main case, thus they have not taken any step in the main case.

Responding to the respondent's argument that the 2nd petitioner is not a party to the sale agreement, Mr. Malongo submitted that the respondent sued the 2nd petitioner as a parent company of the 1st petitioner. In the alternative Mr. Malongo submitted that even if it is found that the 2nd petitioner is not a party to the sale agreement, the same cannot be a bar to stay the proceedings in the main case and refer the disputes to arbitration on the strength of the arbitration clause contained in the sale agreement. He distinguished the case of **PTA** (supra) from the petition in hand on the ground that, the same had several causes of action which is different from the facts of the main case.

Also, Mr. Malongo insisted that the petitioner is willing and ready to go for arbitration and was of the view that it was the respondent's responsibility to refer the matter to arbitration after failing to settle the dispute amicably.

It is a common ground that the respondent's claims in the main case arises from the execution of a sale agreement which was entered into between the parties herein, upon the respondent emerging as a highest bidder for the purchase of various goods sold by the 1st petitioner. It is also a common ground that article 16 of the aforesaid sale agreement indicates that the parties agreed that any dispute arising from the execution of the sale agreement would be resolved amicably by following the steps stipulated in the agreement. The steps indicated in Article 16 of the sale agreement are to the effect that if amicable settlement is not reached in the first steps which involves mutual discussions between the parties at different managerial level of both the 1st petitioner and the respondent, the last resort is to refer the dispute to Arbitration. This explains the reason behind the submissions made by Ms. Judith that the petitioner satisfied three conditions for referring a matter to arbitration to wit;

- i. There must be a submission as defined under Section 2 of Cap 15 (A Written Agreement between the parties) to submit present and future dispute and or differences to arbitration.
- ii. The question (s) in the dispute is covered by the Agreement and that such questions should therefore be referred to arbitration.
- iii. The petitioner is one covered by the reference to arbitration clause in the Agreement. And so the respondent.

I have taken into considerations the respondent's arguments that what is stated in this petition amounts to a defence in the main case, as such it is tantamount to taking steps in the main case. With due respect to Ms. Judith, the pleadings in this petition are separate and different from the pleadings in the main case, thus, there is no way that what is pleaded in this petition can amount to a defence in the main case. The "steps" envisage in section 6 of Cap 15 refers to "steps" taken in respect of the main case and mainly refers to filing a written statement of defence or applications which in effect indicates that the defendant is participating in the process of the hearing of the main case. In this matter the petitioners have not filed any defence. Thus it is the finding of this court that the petitioners have not taken any step in the main case.

As regards the issue as to whether the petitioner is willing and ready to arbitrate, the fact that the petitioners lodged this petition and have not filed any written statement of defence in the main case shows that the petitioners are willing to arbitrate.

As regards the respondent's arguments that, the petitioner did not respond to the complaints raised by the respondent before filing the main case, the position of the law is that, both the 1st petitioner and the respondent had the responsibility to follow the steps stated in the sale agreement up to the last step of referring the dispute to arbitration, (See the case of **DP Shapriya and Co. Vs. Yara Tanzania Limited, Commercial Case No. 37 of 2016** (unreported), however, none of them followed those steps. Therefore, the petitioner cannot be held liable for not following the steps to the extent of denying what he prays in this petition.

As regards the respondent's argument that, the 2nd petitioner was not a party to the sale agreement, the position of the law is that, the presence of two defendants in a case, does not deprive the one who is a party to the agreement to submission to exercise his/her right to refer the dispute to arbitration. (See the case of **Travel port International Limited** (supra)

From the foregoing, it is the findings of this court that according to clause 16 of the sale agreement between 1st petitioner and the respondent, the parties thereto agreed to submit their disputes to arbitration and the 1st Petitioner has satisfied the conditions for grant of this application. I do not find any sufficient reasons to refuse granting the prayers sought in this petition.

I also wish to point out the following; That the 2nd petitioner being not privy to the sale agreement, has no right to petition for stay of proceedings since clause 16 of the sale agreement does not cover him.

In the upshot the prayers in this petition are granted. The proceedings in Commercial Case No. 15 of 2019, are hereby stayed for four months, pending of the reference of the dispute to arbitration. In view of the above order, the main case will continue to be called in court for necessary orders for keeping track of the same. Costs will be in course.

Dated this 6th day of October, 2020.



B.K. PHILLIP

JUDGE