IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMMERCIAL APPLICATION NO. 359 OF 2017

TRAVELPORT INTERNATIONAL LIMITED.....PETITIONER

VERSUS

PRECISE SYSTEMS LIMITED.....DEFENDANT

Date of Last Order: 18.03.2019
Date of Ruling: 12.04.2019

RULING

V.L. MAKANI, J

This is a ruling on a petition for stay of proceedings pending reference to arbitration. The petition is made under section 6 of the Arbitration Act CAP 15 RE 2002 and Rule 11 of the Arbitration Rules, 1957. The petitioner is seeking for orders that the proceedings in High Court Commercial Case No. 165 of 2017 be stayed pending reference of the dispute to arbitration in terms of Clause 38 of the Operators Agreement entered between the petitioner and the respondent. The petitioner also prays for costs of the proceedings and any further(s) order this court may deem just and fit to grant.

At the hearing of the petition the petitioner was represented by Mr. Waziri Mchome, Advocate from Bowmans Tanzania and the respondent was represented by Roman Masumbuko, Advocate from Roman

Attorneys. Both Counsel adopted their written skeleton arguments which were filed prior to the hearing of the matter.

Mr. Mchome emphasized, during the hearing, that the arbitration clause is found in Clause 38 of the Operators Agreement and in particular Clause 38.2. He said the arbitration clause survives the termination of the Substantive Agreement and referred the court to paragraph 2:3 of the skeleton submissions which stated that the doctrine of separability treats an arbitration clause as separate and severable from the contract in which it is contained, and he said this is universally accepted. He cited the case of **G.K. Hotels Limited & Resort (Pty) and Board of Trustees of the Local Authorities Provident Fund, Misc. Civil Cause No. 1 of 2008 (High Court-Commercial Division)** (unreported).

On the point that there were two defendants (the petitioner and another) Mr. Mchome stated that the fact that the respondent was sued with another party was not a bar for an order for stay pending arbitration (also paragraph 2.3.2. of the skeleton submissions). He sought support from the case of **Bulk Oil (zug) AG vs. Trans Asiatic Oil Ltd [1973] 1 Lloyd's Rep. 129** and further stated that the Respondent's decision to implead the third party (the First Defendant) in the suit against the petition could not deprive the petition of her contractual right to have the dispute arbitrated per the arbitration clause. Mr. Mchome went on claiming that the fact that the First Defendant had taken steps in Commercial Case No. 165 of 2017 should

not be of a consequence as the Written Statement of Defence filed is not joint.

It was also the petitioner's submission that the claim by the respondent that the reliefs sought in Commercial Case No. 165 of 2017 were not the same and were not covered under the arbitration clause were baseless. The petitioner argued that the arbitration clause 38 in the Agreement did not put any limit to the type and extent of relief that the arbitrator can grant, further, the respondent has not set out which reliefs that were claimed under the Commercial Case No. 106 of 2017 were not available in the arbitration. Lastly, the petitioner argued that stay will not be refused on the ground that a particular right or remedy might not be granted by the court will not be available in arbitration proceedings. The petitioner sought support in the case of **Societe Commeriale de Reassurance vs. Eras (International) Ltd and Others (1992) 1 Llyoid's Rep. 570, CA** and **Westlands vs. CLC Contractors [1992] Llyod's Rep. 739, CA.**

In his response Mr. Romani, emphasized that the skeleton submissions were threefold. Firstly, the matter before the court was under severability principle. Secondly, the third party bars the petitioner or any the matter to be referred to arbitration, and thirdly, the petitioner has taken any steps in the proceedings. Mr. Romani said the doctrine of severability cannot apply as clause 38:2 of the Operators Agreement talks about existed, validity and termination of the Agreement which are not issues before the court. He said the issues before the court are commission fees and a new operator taking over without payment; and

also specific damages because of the third party and his equipment's which are not part to the Operators Agreement. He said the circumstances of this case are different because there are items that passed over to a third party, so there is nothing to pass on to Arbitration. He said there is the Spiliada principle as enunciated in the case of **Spiliada Maritime Corp vs. Consulex Limited [1987] AC 640** which looks at the best forum considering the parties involved. He said the First Defendant has filed his Written Statement of Defence but it is not known why the petitioner cannot file his case in Tanzania. Mr. Romani said the **Bulk Oil** case (supra) was irrelevant considering the Spiliada principle. He went further to say that the petition has no merit for failure by the petitioner to give reasons as to why the matter cannot be best litigated in Tanzania in favour of a foreign forum.

As for the issue that the petitioner has not taken steps into the proceedings Mr. Roman referred the court to page 5 of the skeleton submissions. He said the First Defendant filed his Written Statement of Defence on 09/11/2017 and so he had taken steps to the proceedings. He said the lifespan of the suit was due to expire on September 2018 and on 07/09/2018 the petitioner and the plaintiff were present, and the petitioner never objected to the prayer and an order was given as such that was taking steps. Mr. Roman referred the court to the case of **East Africa Breweries Limited vs. GMM [2002] TLR 12**. He said the petitioner has therefore taken steps in the proceedings and the court's jurisdiction cannot be ousted.

Mr. Roman also said that section 6 of the Arbitration Act requires the petitioner to show that he is ready and willing and able to do all things necessary for the conduct of arbitration. He said the petition does not disclose that the petitioner is ready and willing and able to do all things necessary for the conduct of the arbitration. He termed this move as a delaying tactic and sought support of his argument with the case of **Ginscon Construction Company Limited vs. Mr. Tayo Amu, High Court of Abuja – Nigeria, Suit No. FCT/HC/CV/4046/11**. Mr. Romani prayed for the petition to be dismissed with costs.

In rejoinder Mr. Mchome was very brief. He said the wording in Clause 32:2 of the Operators Agreement covers any dispute arising out or in connection with the Agreement. He said the doctrine of severability can apply because a party can proceed with one party or both and further that, parties have chosen to refer their disputes in Arbitration. He did not agree that referring the matter to arbitration meant ousting this court's jurisdiction. He said during the prayer for extension of life span of the suit the petitioner could not have objected or made any prayer as it would have amounted into taking steps into the proceedings. He said the annexures to the petition show the readiness of the petitioner and willingness to go to arbitration. Mr. Mchome reiterated his prayers for the court to order stay of the proceedings pending arbitration.

I have listened to the oral submissions and gone through the skeleton written submissions by learned Counsel. Perhaps for ease of reference it would be of convenience before I embark on the analysis of the

arguments to reproduce section 6 of the Arbitration Act which this petition has been pegged. The said section states:

> *"Where a party to a submission to which this part applies or person claiming under him, commences a legal proceedings against any other party to the submission or any person claiming under him as respect of any matter agreed to be referred, a party to the legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings apply to the court to stay the proceedings; and the court if satisfied there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commences and still remains ready and willing to do all things necessary for proper conduct of the arbitration, may make an order staying the proceedings."*

In the case of **Wembere Hunting Safaris Limited vs. Registered Trustees of Mbomipa Authorized Association, Commercial Case No. 40 of 2013 (High Court Commercial Division-DSM)** (unreported) conditions were laid down for an application for stay of legal proceedings to be maintainable as follows that:

a) There are Legal proceedings commenced by the respondent and pending in court;
b) There is an arbitration agreement
c) No written statement of defence has been filed in response to the proceedings commence or taking any other steps in lthe proceedings.

I should hasten to add to these conditions another condition that the petitioner has to show his willingness and readiness to do things necessary for proper conduct of the arbitration.

Also, for ease of reference I will reproduce the arbitration (Clause 38) of the Operators Agreement as follows:

38.1 The Agreement is governed by and shall be construed in accordance with English law.

38.2 Any dispute arising out of or in connection with the Agreement including any question regarding its existence, validity or termination, will be referred to and finally resolved by arbitration in accordance with the Rules of `London Court of International Arbitration (LCIA) which rules are deemed to be incorporated by reference in this Clause 38.

38.3 The number of arbitrators shall be three. Each party will nominate one arbitrator, and the two arbitrators nominated by the parties will within 15 days of the appointment of the second arbitrator agree upon a third arbitrator who will act as Chairman of the Tribunal. If no agreement is reached within 15 days, the LCIA will nominate and appoint a third arbitrator to act as Chairman of the Tribunal.

I will now consider the submissions presented by the learned Advocates.

It was Mr. Roman's argument that the doctrine of severability could not apply as issues in the Operators Agreement are not issues before the court. He said the issues present before the court are different. I agree that the issues in the suit before the court might be different, but I agree with the petitioner's argument that an arbitration clause is separate and severable from the contract in which it is contained. I subscribe to the reasoning from the book **Russell on Arbitration**

quoted by Counsel for the petitioner, a reasoning which was also taken by this court in the case of **Wembere Hunting Safaris Limited** (supra). Hon. Nchimbi, J (as he then was) endeavoured to explain arbitration and arbitration clause in an agreement. He said:

> *"undoubtedly, arbitration is a dispute resolution mechanism agreed by the parties themselves. The arbitration process is constituted by the parties themselves. It is in other words, the parties own entity. It is also significant to state with emphasis that for a matter to be referred to arbitration there must be an arbitration agreement ordinarily in writing, which illustrates or expresses the intention of the parties to submit themselves to that process of dispute resolution".*

He went on saying:

> *"Equally important is the underlying tenet that an arbitration agreement is an independent agreement. It stands on its agreement even if it is just a clause in a contract. That means even if for example, the contract is not enforceable it has to be independently determined. It survives an illegality in the contract."*

It is apparent therefore that an arbitration clause in an agreement must be taken to be an independent agreement. Mr. Roman does not dispute that there is an arbitration clause in the Operator's Agreement but says the suit before the court has different matter and the said agreement was terminated. However, according to the **Russell on Arbitration** and **Wembere Hunting Safaris Limited** (supra) where there is an agreement and the parties have submitted themselves willingly to arbitration as a dispute resolution mechanism, then such arbitration clause cannot seize to operate on the mere fact

that what is being dealt with is different from what is in the Operators Agreement or the said agreement has been terminated. According to **Russell on Arbitration**:

> *"the doctrine of separability...enables an arbitral tribunal to enquire into and decide upon a dispute between the parties even though the contract containing the arbitration agreement has come to an end".* (see also **G.K. Hotels and Resorts (Pty)**(supra).

It is the court's position that where there is in existence an agreement between the parties for them to refer the dispute to arbitration regardless of the nature of the complaint the parties have to go before the Tribunal and not the court. (Also see **Shamji vs. Treasury Registrar Ministry of Finance [2002] 1 EA 273**). In view thereof the arbitration clause stands on its own and thus the principle of separability is applicable.

The other issue raised by the respondent is that the court cannot separate the defendants (that is the petitioner herein and the First defendant) by an order of stay as they are jointly and severally sued. According to **Russell on Arbitration**, having several defendants is not a bar for anyone of them to pray for an order of stay if there is in an agreement and an arbitration clause. In other words, a third party in the suit would not deprive a petitioner of his contractual right in an Agreement to submit to arbitration. In the present case, the fact that there are two defendants does not deprive the petitioner of his right in the Operators Agreement to refer the matter to arbitration. And even if though the First Defendant has taken a step by filing a Written Statement of Defence in Commercial Case No. 167 of 2017 this does

not bar this court from granting and order for stay pending arbitration.

Further, according to the persuasive case of **Bulk Oil** (supra) the court may order stay pending arbitration taking into consideration that the rights of the parties in terms of multiplicity of proceedings and costs are taken into account. Looking at the pleadings there would not be a multiplicity of proceedings if the order of stay is granted because the basis of the arbitration is the Operators Agreement between the petitioner and the respondent and there is also the alleged takeover by the First Respondent from the petitioner, which in my considered view would be imminent matters for consideration also before the arbitration tribunal. In other words, the relationship between the petitioner and the respondent would be primary and of course the alleged takeover of the transactions from the petitioner by the First defendant would also be relevant in the proceedings. For the reasons thereof, it is my considered view that no apparent multiplicity of proceedings is apparent and therefore this reason is not sufficient to cause the court not to grant an order for stay pending arbitration.

As for the principle in **Spilliada case** (supra) it is my view that it would not be applicable in the present situation because in the said case there were several parties and the court found it prudent and for the ends of justice for the matter to be heard in the local jurisdiction to accommodate these parties. In the present instance, there are only two parties and they categorically chose the law and

manner in which to resolve their disputes. I am therefore inclined to find that the parties herein knew and decided to submit to arbitration under the English law; and according to the case of **Board of Trustees of Natural Provident Fund vs Skortland Securities Limited [1996]1 NZR 4** (CA) which was quoted in **Wembere Hunting Safari Limited** (supra) the Court of Appeal of New Zealand stated:

> *"The parties particularly knowledgeable and experienced parties legally advised are to be taken as having intended what they said."*

For the reasons above, the petitioner is justified to seek for an order for stay pending arbitration.

It was Mr. Roman's argument that the petitioner and the First Defendant had already taken a step in the proceedings so the the petitioner cannot at this stage pray for stay pending arbitration. It is clear from the records that the First Defendant has already filed his Written Statement of Defence. But Mr. Romani's argument is that on 07/09/2018 the petitioner and the respondent were present in court and the prayer for extension for life span was never objected to by the petitioner. He said the silence by the petitioner meant that he has taken steps to the proceedings. This argument is misconceived. It was proper for the petitioner and or his Advocate not to raise or make any prayer or consent to any prayer as that would have amounted to taking steps into the proceedings. The silence by Advocate Kamuzora on the said date did not amount to taking steps into the proceedings, but in the contrary if the said Advocate had made a prayer, objected to a prayer and/or consented to any of the prayers raised on that date

then that would have amounted to taking steps into the proceedings. On the other hand, the filing of the Written Statement of Defence by the First Defendant should not mean that the petitioner herein has taken steps into the proceedings considering that the Written Statement of Defence is not a joint statement. I am of the settled view that the petitioner has not taken any steps into the proceedings and thus was competent to to apply for and pray for an order of stay pending arbitration.

Another condition to warrant stay pending arbitration as argued by Mr. Romani is for the petitioner to demonstrate that he is ready and willing to do all things necessary to the proper conduct of the arbitration. In the case of **Wembere Hunting Safaris Limited** (supra) the court held:

> *Though it is not easy to determine from these proceedings, I have no reason to disbelieve that the petitioner herein is desirous, ready and willing to do all things necessary to the proper conduct of the arbitration. The presumption in that regard is in favour of the petitioner because it has taken no step in the action"*

In a similar vein, since the petitioner has not taken any step in the proceedings, I find that the petitioner is desirous, ready and willing to do all things necessary for the proper conduct of the arbitration proceedings.

In the end result, the petition has merit and it is hereby granted. The matter is referred to arbitration in accordance with Clause 38 and in particular Clause 38.2 of the Operators Agreement and Section 6 of

the Arbitration Act. The petitioner is ordered to initiate the arbitration proceedings within two months from the date of this Order. The arbitration proceedings shall not take more than six months from the date it is referred to an arbitrator. The time frame for arbitration is intended to keep pace with Rule 32(2) of the High Court (Commercial Division) Procedure Rules, 2012 which requires that any matter instituted in the Commercial Division of the High Court should be finalized within a maximum period of 12 months. In view of the above directions and with the aim of keeping track of the matter, this matter shall be cause-listed for status.

It is so ordered.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

V.L. MAKANI
JUDGE
12/04/2019

Date: 12/4/2019

Coram: Hon. N.R. Mwaseba – DR

For the Petitioner : Mr. W. Mchome

For the Defendant: Mr. Msumbuko

CC: Bampikya Mrs.

Mr. Msumbuko

The matter is coming for ruling we are ready to receive it.

Court:

Ruling delivered on 12/4/2019 in the presence of W. Mchome for petitioner and R. Masumbuko for Respondent.

Sgd: N.R. Mwaseba

DEPUTY REGISTRAR

12/4/2019

Rights of Appeal is open.

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

N.R. Mwaseba

DEPUTY REGISTRAR

12/4/2019