

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC COMMERCIAL CAUSE NO. 15 OF 2019

(Originating from Commercial Case No. 143 of 2017)

IN THE MATTER OF THE ARBITRATION ACT, CAP 15 OF THE LAWS

AND

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

BETWEEN

THE ATTORNEY GENERALPETITIONER

AND

NIC BANK TANZANIA LIMITED.....1ST RESPONDENT

TANZANIA FEDERATION OF

COOPERATIVES LIMITED.....2ND RESPONDENT

RULING

B.K. PHILLIP, J

This petition is made under section 6 of the Arbitration Act, Cap 15 , R.E 2002 and rule 11 of the Arbitration Rules GN. No. 427 of 1957.The petitioner prays for the following orders;

- i. Stay of proceeding so that the matter shall go for arbitration as both parties are bound by the terms and condition of the contracts.
- ii. Costs be provided for
- iii. Any other order that the court may deem fit to grant in favour of the Petitioner under the circumstance of the Petition.

At the hearing of this petition, the learned State Attorney Ms Lucian Kikala appeared for the petitioner while the learned Advocates Tairo Makarios and Sylvester Shayo appeared for the 1st and 2nd respondents respectively. Let me state on the outset that the 2nd respondent is not objecting to the application.

A brief background to this petition is that this petition arises from Commercial case No 143 of 2017 (herein after to be referred to as "the main Case"), in which the 1st respondent sued the 2nd respondent and the petitioner was granted leave to join in the case as an intervener. In the main case the 1st respondent claims against the 2nd respondent for a declaration that the 2nd respondent is in breach of a term Loan Agreement between the 1st respondent/plaintiff and the 2nd respondent/defendant dated 19th September 2011 as restructured vide letter of offer with reference No NICBT/HO/AB/274/2014 dated 6th November, 2014 and NICBT/HO/TM407/2011 dated 8th December, 2011 and the Intercreditor Loan Agreement dated 3rd January ,2012, by her failure to discharge her obligation under those agreements. Thus, in the main suit the 1st respondent prays for the following reliefs among others;

- i. A declaration that the defendant is in breach of the term loan facility agreement and Intercreditor Loan Agreement by her failure to discharge her duties and obligations in accordance with those agreements.
- ii. That the defendant be ordered to immediately pay to the plaintiff the outstanding amount of Tzs. 2,897,526.588.26 (say Tanzanian Shillings Two Billion Eight Hundred Ninety Seven Million Five Hundred Twenty Six Thousand Five Hundred Eighty Eight and Twenty Six cents only).

Submitting for the petition, the learned State Attorney, Ms. Kikala, informed this court that she was adopting the contents of her skeleton arguments filed in this court pursuant to the provisions of Rule 64 of the High Court (Commercial Division) Procedure Rules 2012. In her skeleton arguments the learned state Attorney submitted that the 1st respondent has filed the main Case in this Court contrary to clause 12.1 and 12.2 of the Intercreditor Loan Agreement which makes it mandatory that where any dispute arises from the agreement it should be settled by arbitration. Furthermore, the learned state Attorney argued that paragraph 4 of the plaint in the main case states that the 1st respondent is claiming for declaratory order that the 2nd respondent is in breach of the term loan facility agreement and Intercreditor Loan Agreement dated 3rd of January 2012.

In addition to the above, the skeleton arguments highlighted on the application of the Arbitration clause, to the effect that once the parties have agreed to refer their dispute to arbitration, then the court has to

respect and give effect to the intention of the parties, in case dispute arises they must be referred to arbitration. The learned state Attorney referred this court to a number of cases among them being the case of **East African Breweries Ltd Vrs GMM Company Ltd, Civil Case No 67 of 1999, (2002) TLR No. 12**, and the case of **Travelport International Limited Vrs Precise Systems Limited, Misc Commercial Application No 3 of 2017** (unreported), in which the court stipulated the conditions for an order for stay of the suit to be granted, to wit;

- There must be legal proceedings commenced by the respondent pending in court.
- There must be an arbitration agreement.
- No written statement of defence has been filed in response to the proceedings commenced or taking any other steps in the proceedings.
- The petitioner has to show his willingness and readiness to do things necessary for proper conduct of the arbitration.

In conclusion the learned advocate invited this court to grant this petition.

In rebuttal, Mr. Makarios submitted that the basis of the claims in the main case is the term loan agreement which does not contain any Arbitration Clause. He contended that the arbitration clause relied upon by the petitioner in this application is found in the Intercreditor Loan Agreement which is for security sharing only. Mr. Makarios further argued that the term loan agreement is secured by mortgage among other securities. Since the security was shared it was necessary to include the

Intercreditor Loan Agreement, in the main case but the arbitrator has no powers to determine issues arising from the term loan agreement, contended Mr. Makarios.

In addition to the above Mr. Makarios argued that apart from the borrower, there are other parties to the Intercreditor Loan Agreement to wit; NIC Bank, Exim Bank and Umoja Unit Trust Scheme ("Umoja Fund"). Up to date it is only NIC Bank and Exim bank which have decided to enforce their specific loan agreements, Umoja Unit Trust Scheme (Umoja Fund) has not yet decided to do so, thus subjecting this case to arbitration is tantamount to forcing parties to sue, contended Mr. Makarios. He also argued that the breach of the Intercreditor Loan Agreement referred to in the plaint is in respect of the individual/specific loan agreement.

In conclusion of his submission Mr. Makarios referred this court to the case of **Tanzania Federation of Cooperatives Limited Vrs Exim Bank (TZ) , Misc Civil Application No 322 of 2017**(unreported) in which this court declined to grant an order for stay of proceedings that was sought by Exim Bank. He urged this court to dismiss this petition.

In rejoinder, the learned State Attorney reiterated the contents of her skeleton arguments.

Having analysed the submissions of the learned State Attorney and Advocate Makarios, I have noted that Mr. Makarios neither disputes the existence of the Arbitration clause in the Intercreditor Loan Agreement

nor denies that the relief prayed in the plaint includes a declaration that the 2nd respondent/defendant has breached the Inter creditor Loan Agreement. However, his main argument is that in the main case the 1st respondent/Plaintiff is enforcing its rights in the loan agreement and the same does not contain any arbitration clause. He also holds a view that the breach of the Intercreditor Loan Agreement referred to in the main case is in respect of a specific loan agreement concerning the 1st respondent only, not other parties therein. From the foregoing, I am of settled opinion that the issue for determination in this petition is whether the Loan Agreement can be implemented separately from the Intercreditor Loan Agreement and whether the Intercreditor Loan Agreement is the subject of determination in the main case?

Starting with the first issue, the Intercreditor Loan Agreement is well detailed and self explanatory in such a way that it gives a straight forward answer to this issue, that is it is inseparable from the loan agreement. I am saying so because, the preamble to the Intercreditor Loan Agreement refers to the loan agreement and article "E" states clearly that it was entered into as condition precedent to the disbursement of the loan amount granted to the 2nd respondent/defendant in the loan facility agreement. This explains why in the main case the 1st respondent has sued on both the loan agreement and the Intercreditor Loan Agreement. This two agreements go together because they are intertwined. This also takes care of Mr. Makarios's argument that the 1st respondent's claims is based on the loan agreement only.

I have read the case of **Tanzania Federation of Cooperative Ltd** (Supra) which was cited by Mr. Makarios. With due respect to Mr. Makarios, that case have a different set of scenario from the instant petition, as it involves other parties who were not part to the Inter-creditor Loan Agreement. For easy of understanding let me reproduce hereunder part of the ruling of this court in the case of Tanzania Federation Ltd (supra).

"At any rate, as submitted by Dr. Kyauke, the suit from which the application has been made involves several parties who are not privy to the intercreditor loan Agreement containing an arbitration clause. Strangers to the said agreement are not covered by the arbitration clause. That being so, despite Mr. Shayo's attempt to down play that aspect, the question which he did not answer is what practical purpose will the arbitration serve by dealing with a dispute covered by the arbitration clause between the applicant and the Respondent leaving the rest of the parties in limbo? In other words, what will happen to the suit as between the respondent and the rest of the defendants in the main suit? With those lingering questions remaining unanswered," I think much as the court will be more than willing to facilitate resolution of dispute through arbitration, this is not a fit case to order stay of the suit pending reference to arbitration."

In this case the parties to the main case are also parties to the Inter-Creditor Loan Agreement, thus the arbitration proceedings can be safely conducted in respect of the parties herein.

Not only that is it also worth pointing out here that parties are bound by their pleadings and this takes me to the second issue that is whether the Intercreditor Loan Agreement is the subject of determination in the main case. As rightly submitted by the learned State Attorney, the pleadings in the main case show clearly that the Intercreditor Loan Agreement is the subject of determination in the main case since the prayers therein includes an order for declaration that the 1st respondent has breached the Intercreditor Loan Agreement.

Having said the above, since, according to clause 12.1 and 12.2 of the Intercreditor Loan Agreement, the 1st respondent and 2nd respondent agreed to refer their dispute to arbitration, it goes without saying that this petition is properly done. I am certified that the conditions for stay of legal proceedings pending arbitration have been met and there was no any dispute on the same. Thus, this petition has merit.

In the upshot the petition is allowed. The main case is stayed pending arbitration. The parties are ordered to initiate the arbitration proceedings within thirty days for the date of this order. No order as to costs.

Dated at Dar es Salaam this 7th day of February, 2020.




B.K.PHILLIP

JUDGE