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

MISC. COMMERCIAL CAUSE NO. 43 OF 2020
IN THE MATTER OF THE COMPANIES ACT, 2002

AND

IN THE MATTER OF A PETITION FOR WINDING UP TANZANIA TOOKU GARMENTS CO.LTD

QUEENSWAY TANZANIA (EPZ) LTD .....PETITIONER

AND

TANZANIA TOOKU GARMENTS CO.LTD.....RESPONDENT

Date of Last order: 31/12/2020
Delivery of Ruling: 29/03/2021

RULING

NANGELA, J:.,

This is a winding up petition brought under sections 275; 279(1) (d), (e); 281 (1) and 294 of the Companies Act, 2002. The Respondent has filed a counter affidavit in opposition to the petition. Besides, the Respondent filed a Notice of Preliminary Objection, bringing to the front three

points in objection to the hearing and determination of this Petition. The three points are as here below, that:

1. *This matter is prematurely referred to this Court.*
2. *This Court lacks jurisdiction to entertain this matter.*
3. *The Agreement to which this matter emanates contravenes the laws of the United Republic of Tanzania.*

On 18th December 2020, this Court directed the parties to dispose of the preliminary objections by way of written submissions. A schedule of filing was given and the parties duly complied with that schedule.

On 24th November 2020, this Court extended time to the Respondent to file a rejoinder submission and fixed the matter for mention on 31st December 2020. When the parties appeared on the appointed date, it was agreed that the ruling on the preliminary objections be delivered on the 26th March 2021.

I will now consider the rival submissions filed by the learned counsels representing the parties. In his submission, learned advocate for the

Respondent, Mr. Johari Sinde, dropped the third ground of objection and made submissions on the first and the second grounds only.

Submitting on the first ground of objection, Mr Sinde contended that, the petition has been brought rather prematurely without first exhausting the available remedies.

Since the dispute between the parties originates from a sub-lease agreement, it was Mr Sinde's contention that, the parties under such an agreement had consented on the appropriate forum where they should refer their disputes whenever such occur. He submitted that, arbitration was one of the alternative dispute settlement means agreed to be pursued in case the parties failed to amicably settle their differences.

Mr Sinde referred this Court to Clause (i) and (ii) of the Sub-Lease Agreement, at page 7 which provides as follows:

> *"Any dispute which may arise out of or in connection with this Agreement, including any dispute as to the creation, validity, effect, interpretation, performance, breach or termination of, or legal relationship established by or any*

non-contractual obligations arising out of or in connection with, this dispute shall be resolved amicably. Failure to amicable settlement, the dispute shall be referred to and finally resolved by arbitration under the Arbitration Act, Cap.15 of the Laws of Tanzania."

Mr Sinde submitted that, as per the above clause, resorting to this Court was a deliberate breach or a sidelining of the arbitration route which was agreed upon by the parties. To strengthen his submission, he relied on the decision of this Court in the case of **Wembere Hunting Safaris Ltd vs Registered Trustees of Mbomipa Authorized Association, Commercial Case No.40 of 2013 (HC) CommDv (DSM) (Unreported).**

The learned counsel argued that, as a matter of principle, where there is an agreement between the parties to refer their dispute to arbitration regardless of the complaint, so the parties ought to have gone before a tribunal and not the Court.

To bolster that submission, reliance was placed on the case of **Construction Engineers and Builders Ltd vs Sugar Development Cooperation [2002] TLR 12.**

The Respondent's counsel submitted, therefore, that, since there was an agreement to arbitrate disputes, the matter has been brought before this Court rather prematurely, and must be struck out with cost.

Submitting on the 2nd ground of objection, the learned counsel for the Respondent was of the view that, on the strength of Clause (i) and (ii) of the Parties' sub-lease agreement, this Court cannot entertain the matters before it. He argued that, the parties had chosen a specific forum where they should refer their disputes.

Referring to section 7(1) of the Civil Procedure Code, Cap.33 R.E.2019, and to the book **Mulla, the Code of Civil Procedure, 18th Edn** (which considers section 9 of the Indian Code of Civil Procedure) it was submitted that, if parties under their own agreement have expressly stated that, their dispute shall be tried by specific forum, then it is not open for either party to again choose a different forum.

This Court was further referred to the decision of the Court of Appeal of Tanzania, in the case of **Sunshine Furtniture Co.Ltd vs Maersk (China)**

Shipping Co. Ltd and Nyota Tanzania, Civil Appeal No.98 of 2016, (CAT) (unreported).

In view of the above submissions, the Respondent's counsel urged this Court to refrain from exercising its jurisdiction over the Petition in disregard of the parties' choice of forum.

To counter the Respondent's submission, the Petitioner filed its reply. In the first place, the Petitioner questioned the propriety of the preliminary objections, noting that, they are not pure points of law. Reliance was placed on the case of **Mukisa Biscuits vs West End Distributors Manufacturing Co. Ltd [1969] E.A 696.** Reliance was as well placed on various Court of Appeal decisions which approve the case of **Mukisa Biscuits (supra).**

The Petitioner argued that, the preliminary objections are also misconceived and improperly raised. It was the reasoning of Mr Kameja who appeared for the Petitioner, that, if the Respondent intended to rely on the Arbitration Clause, the appropriate action would have been to lodge an application for Stay of Proceedings pending reference to the Arbitration.

To support the point raised, reliance was placed on the decision of this Court in the case of **Tanzania Union of Industrial Workers Association vs Mbeya Cement and Another [2005]TLR** and **Group Six International Company vs Central Paris Complex Co. Ltd, Misc. Civil Cause No.5 of 2020 (HC) Moshi, (Unreported).**

Mr Kameja argued, therefore, that, the Respondent has pursued an erroneous avenue in defending its rights. Referring to section 6 of the Arbitration Act, Cap.15 R.E.2002 (now repealed Act); Mr Kameja submitted that, it was improper to raise the Preliminary objections instead of applying for a stay of the proceedings.

He relied on the case of **Travelport International Ltd v Precise Systems Ltd, Misc. Commercial Case No 359 of 2017, HC CommDv (DSM) (unreported)**. He argued that since the Respondent has taken steps in the proceedings instead of filing a stay application, then the objections are unmerited.

Furthermore, Mr Kameja has pointed out that the nature of the proceedings at hand does not entertain that this Court should uphold the

Respondent's objection which are grounded on the fact that there is an arbitration agreement consented to by the parties.

Reliance was placed on the decision of this Court in the case of **Rufiji Basin Development Authority vs Kilombero Holdings Ltd, Misc. Commercial Case No.34 of 2006, HC CommDv, (DSM) (unreported).**

In a rejoinder submission, the Respondent contended that, the gist of its objection is about lack of jurisdiction to entertain the matter while the parties have chosen their own means through the dispute resolution clause.

Reliance was place on the decision of this Court (Nsekela, J (as he then was)), in the case of **Bahadurali E Shamji & Another vs The Treasury Registrar Ministry of Finance-Tanzania & 4 Others, Misc. Commercial Case No.14 of 2001 (unreported).**

In view of the above, the learned counsel for the Respondent urged this Court to uphold the objections and struck out the Petition with costs. I will examine the rival submissions before I make up a decision. The key issue to be addressed is: ***whether I should uphold the Preliminary***

Objections or I should overrule them. In the course of responding to this issue, however, I will address other auxiliary questions that will arise in the course of my deliberations.

As I stated herein above, the present Petition was brought under sections 275; 279(1)(d),(e); 281 (1) and 294 of the Companies Act, 2002. The underlying sections provides as follows:

> *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).*
>
> *279.-(I) A company may be wound up by the court if –:*
>
> *.....*
>
> *(d) the company is unable to pay its debts.*
>
> *(e) the court is of the opinion that it is just and equitable that the company should be wound up;*
>
> *281.-(I) An application to the court for the winding up of a company shall be by petition presented, subject to the provisions of this section, either by the company or by any creditor or creditors (including any contingent or prospective creditor or creditors), contributory or contributories, or by an*

administrator, or by all or any of those parties, together or separately:

294. *For the purpose of conducting the proceedings in winding up a company and performing such duties in reference thereto as the court may impose, the court may appoint a liquidator or liquidators.*

As it may be seen from the above, in essence, these provisions govern the winding up of a company that has failed to discharge its debts. However, there are two contending views here: the first view is postulated by the Respondent who contends that, since the parties agreed not to resort to courts as their initial place where they could remedy any of their grievances, their choice of forum must be obeyed.

In short, the Respondent is saying that, this Court has no jurisdiction to entertain the matter for which the parties have had a prior agreement regarding how their disputes should be entertained. Put differently, the Respondent is saying that the Parties' autonomy must be respected and this Court should not take cognizance of the matter before it. The objections raised by the Respondents have thus been premised in that context.

On the other hand, the second view is the one held by the Petitioner who viewed the Respondent's submissions differently. Apart from denying what the Respondent is asserting and denouncing the propriety of the objections, if measured by the standards set out in the **Mukisa Biscuits case (supra)**, the Petitioner is also stating that, what should have been done was to file for an application seeking for a stay of the case pending reference to arbitration. Besides, the Petitioner's submissions are to the effect that, the nature of the proceedings gives this Court powers to disregard the arbitration clause and proceed with the matter before it.

In essence, the Petition at hand, and the objections raised by the Respondent have brought to the light an important legal question, which may be stated as follows:

> *Is a court precluded from proceeding with determination of a Winding-Up Petition when it is alleged that its underlying dispute is governed by an arbitration agreement.*

Put differently, one may ask whether insolvency proceedings once initiated forecloses any prior agreed reference to arbitration. This question

has never been given a unanimous conclusion by courts in various jurisdictions. It suffices to state, for now, that this question is central, even at these preliminary stages. Therefore, I will consider it later on. Let me look at the other issues arising from the submissions made by the parties.

In my humble view, some of the issues set out by these two opposing parties' submissions are not hard to resolve. The first issue is with regard to the propriety of the objections raised by the Respondent. To me, this is not a hindrance and can be easily resolved.

In **Mukisa Biscuits case (supra)** the Court in that case stated that:

> *"..., a preliminary objection consists of a point of law which has been pleaded or which arise by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration." (Underline supplied).*

At page 701 of that decision, the Court stated that:

> *"a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion."*

Further, in the cases of **Chama cha Walimu Tanzania v Ezekel Tom Oluoch, Misc.Application No.49 of 2020 (unreported)** and **Shabida Abdul Hassanali Kassam v Mahed Mohamed Gulamali Kanji,** Civil Appeal No.42 of 1999 (unreported), the Court clarified further on the aim of a preliminary objection which is:

> *"to save the time of the court and of the parties by not going into the merits of an application because there is a point of law that will dispose of the matter summarily."*

As I look at the two points raised and argued by the Respondent, I find that they meet the standards set out in **Mukisa Biscuits case (supra)** and all other cases that have adopted the position regarding how a preliminary valid point of law should be. That conclusion, notwithstanding does not mean that I am upholding them. That is a different aspect altogether.

Having tackled the first question, the next one is the question regarding whether the appropriate route which the Respondent should have taken was to file for an application for stay of the proceedings instead of raising a preliminary objection.

The Petitioner has argued that way and cited the cases of **Group Six Case (supra)** and **Travelport (supra)**. The Petitioner has further argued that, even if the Respondent was to file for a stay, he will still be blocked given the decision of this Court in **Travelport (supra)**.

In the **Group Six case (supra)**, this Court (Massati, J., as he then was) reasoned that,

> *The point that the suit/application was prematurely instituted because it was not referred to arbitration is a matter sought in the exercise of judicial discretion and cannot be taken and decided as a preliminary objection. So a party has to move a court by an application to stay the proceedings and not raise a preliminary objection on the trial.*

However, as I pointed out here above when referring to the case of **Mukisa Biscuits (supra)**, it was made clear by the defunct East African Court of Appeal that, an objection may include:

> *an objection to the jurisdiction of the court, or a plea of limitation,*

or a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration." (Underline supplied).

The case of **Mukisa Biscuits (supra)** has been referred to extensively by the Court of Appeal of Tanzania in a number of its decisions as an authoritative decision on that point. That being said, the **Group Six case** (supra), referred to by the Petitioner, does not convince me to warrant that I should follow it.

Instead, I am rather convinced by what **Mukisa Biscuits case** set out an example of what a preliminary objection may be and looking at the case at hand, a submission that the parties are bound by the contract giving rise to the suit to refer the suit to arbitration, is a point of our concern.

Reference has also been made to the decision of this Court in **Travelport (supra)**. In that case, this Court (Makani, J.,) when commenting on the aspect of stay of the legal proceedings to pave way for arbitration, she was of the view that:

"In the case of Wembere Hunting Safaris Ltd vs Registered Trustees of Mbomipa Authorized Association, Commercial Case No 40 of 2013...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 commenced or taking any other steps in the proceedings.

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

The Petitioner has stated that, the Respondent has already taken various steps in relation to the proceedings at hand, including filing a counter affidavit and appearing in Court, thus, as per this Court's decision in the **Travelport case (supra)**, the Respondent can no longer apply for a stay of the proceedings. Further that, the Respondent has not shown to be "*desirous, ready and willing to do all things necessary to the proper conduct of the arbitration.*"

However, the Petitioner has not indicated that there was any effort on its part to bring the Respondent to that route of arbitration and the Respondent behaved other way to warrant the kind of conclusion made by the Petitioner.

Be that as it may, I am of the view that, the issue should be gauged by the parameter considered by this same Court in the case of **Bahadurali Shamji (supra)** where (Nsekela, J (as he then was)) stated that:

> *"As a matter of general principle ...where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the Court would direct that the parties should go before the specified tribunal and should not resort to courts."*

The above finding brings me to the more pertinent question I reserved at some point here above regarding whether, in the presence of an arbitration clause, this Court will be precluded from directing the parties to resort to their tribunal of choice simply because the proceedings before this Court are in the nature of insolvency proceedings.

As I stated earlier, the above question has never had a one size fits all answer. The judgments

in different Commonwealth jurisdictions show that the matter is far from being settled and, courts have reached at conclusions based on reasoning that differ to some extent.

In our context, the case of **Rufiji Basin Development Authority's case, (supra)** which was decided by this Court, agreed with a submission made by the Respondent's counsel that, for proceedings to be capable of being referred to arbitration, the arbitral tribunal must be seized with jurisdiction to hear and determine such matter sought to be stayed.

It was argued that, since what was sought to be stayed was winding up proceedings, the only court vested with jurisdiction over such proceedings was the High Court and not the arbitral tribunal if the matters were to be stayed.

This Court, Massati, J (as he then was), agreed with the Respondent holding that, once winding up proceedings are commenced an arbitrator has no jurisdiction to arbitrate the parties to a submission, even if there was such a reference in their agreement.

I have been asked to follow what Massati, J., (as he then was) stated. However, while I am in

agreement that the position taken by Massat, J., is correct, it is correct to some cases but not all cases. I therefore think I should depart from that position, albeit in respect of this matter at hand.

I find it to be so because; although it is true that an arbitrator, notwithstanding any agreement between the parties, would have no jurisdiction to order winding up of a company **(see Haryana Telecom Limited v Sterlite Industries India Ltd 1999 (5) SCC 688,** which was relied upon by Massati, J.), looking at the case at hand, the dispute arose from a breach of a sub-lease agreement, a dispute which, to me, was an arbitrable dispute. However, before the dispute was dealt with in accordance with the agreement, the Petitioner herein has opted for these insolvency proceedings. Was that a fair approach?

In my view, the approach taken was not a fair approach because, if an arbitral tribunal was to be formed, it would have specifically dealt with the issue of appropriateness of the termination or rather breach of the sublease agreement and not whether the Respondent was solvent or otherwise, the latter question being a reserve of this Court.

For better clarity, perhaps, I should turn to some other authorities in other jurisdictions to see what guidance may be found there from. In the English case of **Salford Estates (No.2) Limited v Altomart Limited** ***[2015] Ch. 589 [2014] EWCA Civ 1575,*** an alleged debtor invoked a stay provision under the English Arbitration Act in its application for an order to stay a winding up petition.

That provision, (which is section 9 of the English Arbitration Act 1996) requires it to stay legal proceedings which are brought before a court in respect of a matter which is governed by an arbitration agreement, unless the court is satisfied that the arbitration agreement in question is null and void, inoperative, or incapable of being performed. It was held, on Appeal by the English Court of Appeal, that, this provision is inapplicable to stay a winding up petition, which is not in itself a claim for payment due under a contract.

Even so, the Court upheld the original stay order on alternative grounds since, having found that its exercise of powers to order a winding up was discretionary in nature, it considered that it was appropriate to exercise that discretion by taking into

account the legislative policy behind the Arbitration Act, which is to uphold the principle of party autonomy and exclude a court's summary determination of a dispute that is the subject of an arbitration agreement.

In view of the above consideration, the English Court of Appeal concluded that, where a debt subject to an arbitration agreement is not admitted, the Court should stay or dismiss the winding up petition unless there are "*wholly exceptional circumstances*".

Moreover, the Court stated on paragraph 41 of its judgement that, Courts should not encourage parties to use "*the draconian threat of liquidation*" as a method for bypassing an arbitration agreement. To allow that to happen, it was said, "*would be entirely contrary to the parties' agreement as to the proper forum for the resolution of such an issue and to the legislative policy of the 1996 Act.*"

Without going to the merits of the Petition, and since I am still held up at its preliminaries, it is clear that the claims raised by the Petitioner were disputed, and that fact was definitely a recipe for

arbitration under the arbitration clause in the Sub-lease Agreement concluded by the Parties.

In the **Salford case (supra)** the Court stated on paragraph 41 of its decision as follows:

> *"There is no doubt that the debt mentioned in the Petition falls within the very wide terms of the arbitration clause in the Lease.* ***The debt is not admitted.*** *In accordance with the decision in Halki Shipping, that is sufficient to constitute a dispute within the 1996 Act, irrespective of the substantive merits of any defence, and, were there proceedings on foot to recover the debt, to trigger the automatic stay provision in section 9(1) of the 1996 Act. For the reasons I have given, I consider that, as a matter of the exercise of the court's discretion ...., the court [could] either ... dismiss or to stay the Petition so as* ***to compel the parties to resolve their dispute over the debt by their chosen method of dispute resolution rather than require the court to investigate whether or not the debt is bona fide disputed on substantial grounds.*** *(Emphasis added)."*

In **Parmalat Capital Finance Ltd v Food Holdings Ltd (in liq) [2009] 1 BCLC 274, at 278, paragraph 9,** Lord Hoffman, was of the view that,

> *"If a petitioner's debt is bona fide disputed on substantial grounds, the normal practice is for the court to dismiss the petition and leave the creditor first to establish his claim in an action. The main reason for this practice is the danger of abuse of the winding up procedure.* ***A party to a dispute should not be allowed to use the threat of a winding up petition as a means of forcing the company to pay a bona fide disputed debt.*** *This is a rule of practice rather than law and there is no doubt that the court retains a discretion to make a winding up order even though there is a dispute."*

Even if what Lord Hoffman expressed is "*a rule of practice rather than law*", I find it to be a sound rule of practice which augurs well with the purposes for which parties choose arbitration as an approach to be relied upon to assuage and resolve their disputes.

I am, therefore, inclined to adopt the English position as I find it to be more convincing in light of the circumstances of this Petition at hand and the issues that have cropped out from the preliminary objections filed before me. However, as I stated

herein above, there is as well a variant or departure from the above English position.

That variant position was expressed by a recent Hong Kong case of ***Dayang (HK) Marine Shipping Co Ltd v Asia Master Logistics Ltd*** **[2020] HKCFI 311**. In that case, the Hong Kong Court of First Instance departed from the position set out in the **Salford Estates'** ***case (supra).*** It is worth noting, however, that, in that case, the debtor did not dispute the unpaid debt but only raised a counter-claim.

In light of that fact, the Court held that, the existence of an arbitration agreement should be regarded as irrelevant to the exercise of the court's discretion to make a winding-up order and, that, a valid opposition to a winding up petition would require the debtor to show that its cross-claim gives rise to a *bona fide* dispute on substantial grounds. It also rejected the argument that mere presentation of a winding up petition *per se* amounted to a breach of an arbitration agreement and contravenes party autonomy.

As per the Court in the ***Dayang case*** **(supra)**, a creditor who petitions for a winding-up is not submitting a dispute for the determination

and/or resolution of the Court. Rather, the debt is eventually to be determined by the liquidator to whom the creditor submits its proof of debt, and it might be possible for the creditor to refer a liquidator's rejection of the proof of debt to arbitration.

That is a position fair enough to reckon. However, as I stated earlier herein, in the ***Dayang case* (supra)**, and, unlike position in the **Salford Estates' case (supra)** and in the present Petition, the debtor did not dispute the unpaid debt. As for me, that fact alone makes a lot of difference because, it is a dispute that triggers arbitration proceedings.

Second, if an award is to be issued where the arbitral process was properly and successfully set in motion, any failure to satisfy the award entitles the winner to seek recourse in the Court which may as well include filing for winding up proceedings. In so doing, the arbitration policy of upholding parties' autonomy would be upheld while, at the same time, the right of a creditor to file for winding up proceedings will still be respected. It is for that reason I do not find the Hong Kong Court's approach convincing.

In Singapore, in case of **AnAn Group (Singapore) Pte Ltd v VTB Bank (Public Joint Stock Company)** ***[2020] SGCA 33,*** the Singaporean Court of Appeal side with the English approach stated in the **Salford Estates' case (supra).**

The Court was of the view, as regards whether to order a stay or dismissal of a winding up petition, that, while it is crucial for a party to demonstrate existence of triable issue before obtaining such orders, where the disputed debt is subject to an arbitration agreement, the Court should adopt a "pro-arbitration" approach, unless there are exceptional circumstances to the contrary.

In view of the foregoing discussion which casts light on the pertinent legal issue I posed earlier herein above, I am confident that the same has addressed the concerns raised by the Respondent's counsel regarding the nature of the proceedings before me, i.e., what is before me is a Petition for Winding Up, which is a specialised mechanism provided for under the Companies Act, Cap.212.

I am inclined, therefore, as I stated earlier, to adopt the English and Singaporean approach that

seeks to uphold the party autonomy principle and the pro-arbitration policy approach which, together, seem to be well embraced within section 4 (a) (i),(ii) and (b) of our Arbitration Act, 2020.

Even so, there is even one more immediate question that follows from the above position which I seek to adopt. That is, according to section 12 of the Arbitration Act, 2020, there is a requirement that there be an application before this Court if it is to order that the parties be referred to arbitration. In the absence of such, can this Court make such an order requiring that the parties be subjected to the requirements of their Arbitral Agreement?

In the Petition at hand, the Respondent has not made an application but rather raised objections to the effect that the Petitioner should have honoured the arbitration clause which obligated the Petitioner to pursue that route. In fact, the Respondent's counsel has argued, in regard to the issue of referring all disputes to arbitrator, that, the words used in *Clauses (i): (i) and (ii), of the Agreement* is "**SHALL**".

Essentially, while I agree with the Respondent's counsel that the word "**SHALL**" has been used, I do also understand, as once stated in

the case of **Anzen Limited and Another (Appellants) v Hermes One Limited (Respondent) (British Virgin Islands)** [2016] UKPC 1, the use of the '*words "should" or "shall"* in an arbitration clause*:*

> *"cannot be taken entirely literally. There is no obligation to commence arbitration, if a party decides to do nothing. But the words "should" and "shall" do make clear that it is a breach of contract to litigate."*

With that in mind, I am of the view that, so long as the Respondent raised issues regarding the need to respect the arbitration agreement, of which the question of termination of the Lease Agreement ought to have been governed by it, and, taking into account that the Petition was filed under the previous Arbitration Act, Cap.15 R.E 2002, I find that this Court can still make orders that befits the circumstances of this case, be it a total striking out of the Petition or a stay of it.

As for its stay, if that be the order, section 13 (1) of the Arbitration Act, 2020 do also require that an application be made by a party desiring that stay order. The word "may" is used in that provision. Section 3 (3) of the Act further provides that, taking of the steps regarding stay order can only be

possible after an acknowledgement of the proceedings against that party and the Court shall grant the prayer.

In my view, the Respondent has fulfilled the requirements of this provision, if I was to order for a stay of these Proceedings. However, I do not find it pertinent to order for a stay of these proceedings. In my view, the more appropriate route is to order the parties to submit to an arbitral tribunal in line with the requirements of **Clause I-(ii) and (ii)** of their Agreement.

On that regard, I am fortified by the decision of this Court in the case of **Bahadurali Shamji (supra)** where, as noted earlier, (Nsekela, J (as he then was)) stated that:

> *"As a matter of general principle ...where a dispute between the parties has by agreement to be referred to the decision of a tribunal of their choice, the Court would direct that the parties should go before the specified tribunal and should not resort to courts."*

In view of the above, and taking into account the entire analysis/discussion I have endeavoured to undertake in this Petition, this Court settles for the following orders:

1. **THAT,** the preliminary objections raised by the Respondent are upheld, though on a different reasoning other than as argued by the Respondent.
2. **THAT,** the Parties are hereby Directed to embark on the arbitration route as per Clause I-(ii) and (ii) of their Agreement.
3. **THAT**, the Petition is hereby struck out as the underlying dispute between the parties from which this Petition arose is an '*arbitrable dispute*' under the Parties' Arbitration Agreement.
4. THAT, in the circumstance of this case, each party is to bear its own costs.

It is so ordered.

DATED ON THIS 29TH MARCH 2021

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DEO JOHN NANGELA
JUDGE,
High Court of the United Republic of Tanzania
(Commercial Division)