

TANZANIA / JUDGMENT

musoma dairy ltd under receivership 2 athers vs east african development bank another 2003 tzhccomd 33 27 august 2003

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TZHCCOMDDECIDED
27 August 2003

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I. fHE HIGH COl'RT OF T-\NZANIA (CO\l\TERCIAL DIVISION) AT OAR ES SAL.-.A,t I~ THE \1.-\ TTER OF THE ARBITR.A TION ORDr.--;.-\:'CE CAP \5 A); 0 G\ fHE ~ 1An'ER OF CO\l\IERCIAL CASE (\;0 83 OF 2003 BETWEEN \ PTA 8.-\ K .PE n rIOi\E~ FIRST DEFE:'D:\);T 2 RAPHAEL OYILE PETITIONE~'FOURTH DEFEi\DA\T AND \ ~lt'SO\1A D-\IR Y L TO } (L'nder R~cel\t:rshlp) :.Dr .?;DE? :V. M.L\,Z\RA.A j ES I ER K \L\ZAR.\ AND } I EA.S r AFRICAN DEVELOP\1ENT 8ANK 2 SOCIAL /\C nON fRUST FLfND .--/ Counsel: Ms Fatma Karum~ for [he Petltlon~rs Mr. Duncan for the Respondents Dr. H. Sinan: } Mr l'v1wandambo for third Defendant S,9.\):) jL:.. nd Dr Nguiuma for the 2 Def~ndant R U L i' (; (On Rcfl'rcncc to :rhitration) In order to grasp the matters involved in this Petition, It IS Important that \ give a summary of the issue.:>leadlllg to the present stage. The three Respondents herein filed a SUit against the two Petitioners and the other tv/O defendants - claiming against them the following:- 1 A declaratory order that the defendants' appointment of the Receiver Manager was ,,,rong at law; and for the nullification of the saId illegal anri its assets and management to its duly appointed and constituted Board of Directors.

3. Compensation for loss and damages occasioned by the defendants' actions and omissions of not heeding to their contractual liabilities in time thus causing enormous losses to the first plaintiffs Company and its shareholders and directors as enumerated in the plaint.
4. Compensation for loss and damages suffered by the plaintiffs jointly and/or severally following the illegal and unlawful appointment of the Receiver Manager.
5. Interest at the court's rate on the decretal sum, from the date of judgment until full payment.
6. General and punitive damages at the rate to be considered by the court.
7. Costs of this suit; and
8. Such other orders and reliefs as the court deem fit. Together with those prayers as raised in the plaint, the Respondents/Plaintiffs filed an application for injunction - "to restrain the Respondents (the two petitioners and two defendants as listed above), their Agents,

appointees, employees or servants from interfering, harassing, molesting and disturbing the Directors of Musoma Dairy Ltd in their management of the business and assets of Musoma Dairy Limited or the management of Its affairs, pending the hearing and determination of the suit. The Respondents/Plaintiffs also pray for costs of the application and such other reliefs. The application for injunction is supported by an affidavit of one Dr. Gideon Mazara (2nd Respondent herein) which gives a detailed analysis of the Issues before court. In brief, It details the relationship and Agreement entered into between the first Petitioner and first Respondent; what went wrong and how the other defendants came in. It also claims why the Respondents feel the second Petitioner was not properly appointed, hence he is illegally and unlawfully exercising the powers of a Receiver Manager. It is further alleged that being contributories to the first Respondent company's assets, the second and third Respondents shall suffer irreparably if the business of the first Respondent is allowed to collapse due to the acts of the defendants. When the matter came before me on 18 August 2003, Ms Karume rightly pointed out that she was entering appearance for purposes of formally informing the court of the need to stay these proceedings and refer the matter to arbitration as provided for in clause 16.2 of the Loan Agreement (between the PTA Bank and Musoma Dairy Ltd) dated 14 October 1998. Subsequent to that appearance, the present petition was filed pursuant to the provisions of section 26 of the Arbitration Ordinance, Cap 15 and sections 68 (e) and 95 of the CPC, 1966. Mr. Mwandambo and Dr. Sinare did enter appearance and informed the court that they intend to raise a preliminary objection (to be filed together with the Written Statement of Defence -the WSD). On his part, Dr. Ngulurfla did inform the court that the fate of his client - which steps to be taken next - will depend on the outcome of this petition. It was, therefore, finally Ruled that the Petition proceedings be conducted first and only thereafter and depending on the outcome thereof, the other parties will proceed. The above led to the petition which is the subject matter of this Ruling. I consider this Petition to have been properly filed that is - after Ms Karume had entered appearance but before she could file a Written Statement of Defence or take other steps in the proceedings. The petition is supported by an affidavit of one Premchand Mungar of Nairobi, who is a senior officer of the first petitioner. He adopts the contents of Para 1 to 11 of the Petition. Ms Karume presented well-researched submissions and rejoinder. In essence the petitioners rely on the provisions of Clause 16.2 of the Loan Agreement, provisions which are self explanatory. It is stated therein thus - "Any dispute or difference which may arise between the parties hereto or as to the rights or obligations of either party hereunder or otherwise in connection with this Agreement which shall not have been settled by mutual agreement of the parties, shall be finally settled under the laws of England by an Arbitration Tribunal consisting of three Arbitrators of whom one shall be appointed by each party separately and the third shall be appointed jointly by the first two Arbitrators. The arbitration award shall be final and binding to both parties" (emphasis mine). It is Important to note here that the clause quoted above covers three main issues namely - 1- Disputes or differences that shall arise between the parties that is the Musoma Dairy Limited and the PTA Bank, shall have to be settled by arbitration. 2- The English law of arbitration is to be applicable. 3- The structure of the Arbitration Tribunal. Which is why Ms

Karume filed this Petition under section 26 of Cap 15. It is also not in dispute that the arbitration requirement would cover only the parties to the Loan Agreement. They are the PTA Bank and the Musoma Dairy Ltd. The other parties are not covered by the Arbitration Agreement. The Respondents vehemently oppose the need for reference to arbitration. Their main areas of contention are the following:-

1. That the suit does not only arise from the Loan Agreement but also from the debenture, mortgage, deeds of guarantee and other instruments involving parties who are not parties to the said Agreement.
2. That since only a minority of the parties to this Suit are bound by the
3. That the debenture and mortgage deeds are in conflict with the Loan Agreement and more particularly with the need to refer the matter to arbitration.
4. That the dispute that has arisen is not covered under the arbitration agreement. Some of the issues raised in the submissions and which require my views are issues that form the basis of the main suit before this court. As such I will refrain from making any decision on them lest I prejudice subsequent events in this case. I will therefore restrict myself to the issue of reference to arbitration. As stated earlier, Ms Karume has followed the proper procedure as provided under section 6 and 26 of Cap 15. Again, I must add at the outset that there is no dearth of authorities on the subject of reference to arbitration. The Court of Appeal of Tanzania and the High Court of Tanzania (the Commercial Court inclusive) have come up with what I consider to be sound decisions on the issue. For purposes of easy reference I will list some of those recent cases:-
 1. SGS vs VIP Engineering & Marketing Coy. Ltd (Civil Application No. 84 of 2000). (Court of Appeal of Tanzania).
 2. Matoko Vs. Auto Garage Ltd & others (1970) HCD.
 3. Ramada Investment Limited vs Engen (T) Limited (Commercial Case NO.211 of 2001).
 4. East African Breweries Ltd vs G. M. M. Coy Ltd. Civil Case No. 67 of 1999 a (Mwanza High Court Registry).
 5. TDFC Ltd. Vs Expotone Limited (Commercial Case NO.1 of 2001)
 6. B.E. Sham and .rs Vs Ministry of Finance (Mise. Com. Case No. 14 of .. 2001).
 7. Social Action Trust Fund vs New Northern Creameries Limited (Commercial Case No. 74 of 2002). From the above cases - and from many others - the POSITION taken by the Courts seems to be that parties who wish to invoke the provisions of Cap 15 (sections 6 and/or 26) must establish the following, to the satisfaction of the court:-
 1. There must be a submission as defined under section 2 of Cap 15 - that is

- there must be a written agreement between the parties to submit present and future disputes and/or differences to arbitration.
- 2. That the question (s) in dispute are covered by the Agreement and that such questions should therefore be referred to arbitration.
- 3. That the petitioner is one covered by the reference to the arbitration clause in the Agreement. And so is the respondent.
- 4. That the petitioner has not taken steps that are in contravention of the procedural requirements as outlined under section 6 of Cap 15 - that is - no further steps have been taken after entering appearance. Such steps include the filing of a Written Statement of Defence or the taking of other steps in the proceedings.
- 5. That the petitioner is willing and ready to arbitrate.
- 6. That there are no sufficient reasons before the court to make it refuse granting the stay. Both Counsel have made lengthy submissions supporting their views and making references to authorities cited from England, India etc. It is agreeable that where parties to a contract accept to be bound by "the reference to arbitration clause," then courts of law would, generally, give effect to that undertaking unless there are prevailing reasons which, in the eyes of the court, it ought not stay the proceedings and refer the matter to arbitration. The court is not bound to follow the contents of the Agreement/submission. It has to take into account as well the six points enumerated above. What then, can be said of this Petition? After careful consideration, I am of the view that this matter should not be stayed and the parties referred to arbitration. My reasons for such decision are considered below by, again, analysing the six points (supra). Fundamental to the Issue are the provisions of clause 16.2 (supra). The differences or disputes that were agreed upon by the parties were those that touch on the rights and obligations of the said parties. Obviously "rights and obligations" are very widely used and could cover all the provisions of the Agreement, if not carefully analysed. In so far as points 1 and 4 are concerned, I do agree - as stated earlier - that the petitioners have complied with the requirements of section 6 of Cap 15. However, by the parties to the Agreement - it means - the PTA Bank on one hand and Musoma Dairy Limited, on the other hand. Counsel for the Respondents seems to be questioning the locus standi of the second petitioner. However, it is my view that he is enjoined in his capacity as Receiver Manager. But I am aware that the Respondents are challenging that appointment. That situation notwithstanding, I am of the view that the parties will have an opportunity to expound on the matter at a later stage of these proceedings. Apart from the two points (1 and 4), I am of the further view that the rest do not lead the parties to arbitration. I will now show why. The main suit touches on the terms and conditions in the Agreement as well as the contents of the Debenture and Mortgages. In the two latter documents, no reference to arbitration is made. Further and as repeatedly stated herein, the Loan Agreement, which is the subject matter of this petition, concerns only the PTA Bank and Musoma Dairy Limited. It does not involve the rest of the parties to this suit - parties that form the majority. That

being the position then, the said majority parties have also a right to proceed with their case and if necessary to have it disposed of fast. Therefore staying the proceedings may in strict sense, lead to either a delay of the main suit or multiplicity of proceedings. Not only that. Should multiplicity be allowed i.e. one side to the suit proceed to arbitration while the other proceeds with these proceedings, that may lead to plurality of proceedings and inconsistent findings, something which could be avoided. This position seems to have been taken by the court in the Tounton - Collins vs Cronle and another

(1964) 2 All. E.R. 332 thus: "I think that a serious risk would be run that our whole judicial procedure at any rate in relation to this claim, would be brought into disrepute if as I have indicated, there was a serious possibility of getting conflicting questions of fact decided by two different tribunals 1/ It cannot be legally ordered that the case against the rest of the parties await the results of the proposed arbitration - such parties being no signatories to the arbitration agreement. I am equally aware that clause 16.2 speaks of reference to the laws of England. However, I am mindful of the fact that certain elements of the entire suit are entirely governed by the laws of this country. It would, therefore, be fair and just that this suit be governed by a legal regime of one country- Tanzania. This is particularly important when the plaintiffs in the main suit will be challenging the appointment, place and role of the second petitioner herein. Another important point for consideration is whether the petitioners herein are willing and ready to arbitrate. This court is told that they are ready. However, their conduct gives a different impression. As per documents presented to court and as averred by Dr. Mazara in his affidavit, the defendants (the petitioners inclusive) have been frustrating the efforts of the first respondent to get started by denying it funds at crucial moments. Further it is claimed that the appointment of the second petitioner as Receiver Manager was made contrary to legally known procedures. It is uncontroverted that the said Receiver Manager intends to sell the Musoma Dairy plant on 29 August 2003. Notices and adverts to that effect are out and copies are annexed to the plaint in this suit. All that cannot be taken as demonstrating willingness and readiness to arbitrate. Lastly is whether there are good reasons to make this court not stay these proceedings. I entirely agree with the Respondents that since the agreement to refer the dispute to arbitration binds only a minority of parties to the suit and since it is equally important to take into account the interests of other parties to the suit, it is proper that the conduct of the main suit take place together without allowing multiplicity of proceedings, using multiple legal regimes which may lead to conflicting decisions. That is in addition to costs that may be involved and time consumed. This court stated in Commercial Case No. 74 of 2002 (supra) thus: "If therefore in a contract or agreement parties plainly display that in the event of dispute the same should be referred to arbitration the court will generally give effect to that undertaking although it is not bound to. In deciding to give effect to the undertaking, the court will not simply act on any clause however drafted or any set of facts: it has to establish first the nature of the controversy between the parties and then relate this to the arbitration agreement after satisfying itself of its existence and validity...only then would the court decide whether, on the set of facts and circumstances,

of the case, the stay of proceedings should or should not be granted ... "(emphasis mine). I have carefully considered this Petition and taken into account the views expressed above. For reasons stated herein however, this Petition must fail. It is dismissed with costs. / / t3:TB~}ma Sgd: Dr JUO'GE r 27/8/2003

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