THE REPUBLIC OF UGANDA

IN THE HIGH COURT OF UGANDA HOLDEN AT KAMPALA

IN THE MATTER OF ZIWA HORTICULTURAL EXPORTERS LIMITED

AND IN THE MATTER OF THE COMPANIES ACT

MISC APPLICATION NO. 1048 OF 2000

COMPANIES CAUSE NO. 11 OF 2000

EAST AFRICAN DEVELOPMENT BANK…… PETITIONER/RESPONDENT

VERSUS

ZIWA HORTICULTURAL
EXPORTERS LIMITED …….RESPONDENT/APPLICANT

BEFORE: THE HONOURABLE MR. JUSTICE R. 0O OKUMU WENGI

RULING

This is an application for stay of proceedings in a petition brought by a minority shareholder for certain reliefs including in the alternative a winding up order. The applicant is the company against which the orders are sought and the petitioner respondent is the minority shareholder in it. Before hearing of the petition could commence counsel for the applicant Ziwa Horticultural Exporters Ltd (Ziwa), Mr. Katende sought to stay the petition brought by the East African Development Bank (EADB). The reasons for the application are that a loan agreement whereby EADB financed ZIWA contained an arbitration clause. Further that ZIWA's articles of Association also provided for arbitration. For ease of reference the stated arbitration clauses are indicated in the loan agreement and articles as follows:

‘9.03 Any dispute or difference which may arise touching the meaning of this agreement or the rights or obligations of the parties hereunder or any other matter or thing in connection with this agreement shall be subject to arbitration in Uganda under provisions of the Uganda Arbitration Act or any statutory modification or re-enactment thereof for the time being in force.”

And the articles of ZIWA stipulated as follows:

“126. If and whenever any difference shall arise between the company and any of the members or their respective representatives touching the construction of any of the articles herein contained or any act or thing made or done or to be made or done or omitted or in regard to the rights and liabilities arising hereunder or arising out of the relation existing between the parties by reason of these articles or of the Act such difference shall forthwith be referred to two arbitrators one to be appointed by each party in difference or to an umpire to be chosen by the arbitrators before entering in the consideration of the matter referred to them and every such reference shall be conducted in accordance with the provisions of the laws of arbitration for the time being in force in Uganda.”

In arguing his application Mr. Katende contended that in terms of section 6 of the Arbitration and Conciliation Act (7) of 2000 the dispute ought to be referred to arbitration.

Section 6 of the Act provides:

“6(1) A Judge or Magistrate before whom proceedings are being brought in a matter which is subject of an arbitration agreement shall, if a party so applies after filing of a statement of defence and both parties having been given a hearing, refer the matter back to the arbitration unless he or she finds-

(a) that the arbitration agreement is null and void in operative or incapable of being performed; or

(b) that there is not in fact any dispute between the parties with regard to the matters agreed to be referred to arbitration.

(2) notwithstanding that an application has been brought under subsection (1) and the matter is pending before the Court, arbitral proceedings may be commenced or continued and an arbitral award may be made."

Mr. Katende further referred this Court to the Supreme Court authority in **Shell (U) vs. AGIP (U)** C.A 49 of 1995, to say that his applications satisfied all the conditions set out in that decision. Counsel further urged that the arbitration clauses he referred to in his application were not disputed by either side and were binding. He cited the English Court of Appeal decision in **Home Insurance Co. Ltd vs. Mentor Insurance *Co.* (U.K) Ltd** (in liq) (1989)3 All E R 74 to argue that commercial arbitration was imperative.

Dr. Byamugisha for the petitioner/respondent opposed the application for stay of proceedings and reference of the dispute to arbitration. Learned counsel contended that this was a dispute not between the petitioner against the company as such but between the minority and majority shareholders of the company. The minority were complaining, he, argued, of being oppressed by the majority who as such were not party to the loan agreement containing the arbitration clause. Counsel further contended that the oppression complained of did not arise by reason of the articles of association of ZIWA either. He also urged that the alleged stripping of the company assets by the majority shareholders had disabled the company from performing the arbitration agreement (in the clauses) rendering the same inoperative. He then pointed out that the stripping allegations which have been set out in the petition and repeated in affidavits in reply had not been controverted by the applicants. He further stated that the issue of winding up of ZIWA which was sought by EADB was no longer inter parties as third parties (seven in number) had come up to contest the original proceedings before court which should not shut them out by an inter parties arbitration. Learned counsel cited the House of Lords case of **JUREIDINI VS National British and Irish Millers Insurance Co. Ltd** [1914-1915] All ER Rep. 328 to say that where a fundamental breach of the underlying

contract had been breached then a party could not resort to a subordinate arbitration clause. Learned counsel prayed that the application be dismissed.

There is no doubt that both cases cited in support of the application state the law. The Shell vs. Agip case (supra) related to an arbitration clause worded differently in a way from the present ones but stated that "questions, disputes and differences arising between the participants out of under, or in relation to or in connection with (this) agreement" would be referred to arbitration. Justice Tsekooko in that case set out the law and emphasized that the decision whether, or not to grant a stay order by a court, is in its discretionary power. The learned Justice stated: -

> "From the provisions it appears that the following are the necessary conditions which influence a court in its exercise of discretion.
>
> 1. There is a valid agreement to have the dispute concerned settled by arbitration.
>
> 2. Proceedings in Court have been commenced.
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> 3. The proceedings have been commenced by a party to the agreement against another party to the agreement.
>
> 4. The proceedings are in respect of a dispute so agreed to be referred.
>
> 5. The application to stay is made by a party to the proceedings.

6. The application is made after appearance by that party, and before he has delivered any pleadings or taken any other step in the proceedings."

7. The party applying for stay was and is ready and willing to do all the things necessary to the proper conduct of the arbitration.

As in that case conditions 6 and 7 seem to be the bone of contention. At the same time conditions 3 and 4 above also seem to be in issue here. I must point out that both the arbitration clauses being invoked are found in annextures A and B to the Petition and I find it difficult to agree that the parties to them are not in effect the parties to the arbitration agreement and to the petition. This is inspite of the argument by counsel for the Petitioner seeking to lift the corporate veil to explain the dispute as arising between different classes of shareholders in order to bring the proceedings outside condition 3 above. I do not think that it is proper for me to accept that argument for the further reason as contained in article 126 of ZIWA's articles of association that makes reference to acts or omissions regulated by the Companies Act. I would like to think that the substance of the petition relates to these. I have the feeling that the petition also relates to matters governed by the company's Articles of association. As such I would not have any hesitation in allowing this application. This is principally because commercial arbitration as an alternative dispute resolution process should be encouraged to enable parties contract on their chosen forum without undue intervention by the formal court system. This is particularly so where the construction or implication of terms or trade practice are in issue and where the plaintiff seeks summary judgment in circumstances in which the chosen tribunal would not favour. (See **Home Insurance vs. Mentor** supra)

However the Arbitration and Conciliation Act 7 of 2000 under which this application has been preferred as well as the loan agreement on which arbitration is chosen indicate a few complications to this case which I would like to dispose of first.
In the first instance this Act seems to have firstly removed a perceived bar to Court proceedings where an arbitration was agreed on. Section 6 of the Act clearly envisages a situation where a stay of proceedings is sought in an inter parties suit. In other words the Court determines the propriety or otherwise of arbitration and this too is done inter parties.

And this is done at the discretion of the Court which must satisfy itself that the arbitration agreement is valid, operative and capable of being performed. To put it strictly the mandatory reference to arbitration is subject of the Court's decision on this question such that if Court finds the arbitration agreement null and void, inoperative or incapable of performance or that there is in fact no dispute with regard to matters agreed to be referred to arbitration then no such reference will be made. Then subsection 2 of section 6 of the Act goes further and provides that arbitration could still be commenced or continued and an arbitral award made whether or not a proceeding or application for stay of such proceeding is pending in court. This in my mind is the final green light to the parties if they still wish to proceed to arbitration despite the court proceedings. This is well and good since both options in dispute resolution are left open to the parties. But section 10 of the Arbitration and conciliation Act goes further to provide a bar to court intervention. It states:

> "10. Except as provided in this Act no Court shall intervene in matters governed by this Act."

According to its objects the Act seeks to "amend the law relating to domestic arbitration international commercial arbitration and enforcement of foreign arbitral awards, to define the law relating to conciliation of disputes and to make other provision relating to the foregoing." Matters governed by the Act are so wide-ranging that section 10 seems to amount to an ouster of the inherent jurisdiction of this Court. Firstly it appears to make arbitration and conciliation procedures mutually exclusive from Court proceedings as for instance to make Court based or initiated mediation or arbitration untenable. Secondly it seems to divorce or restrict alternative dispute resolution mechanisms from Court proceedings. Thirdly it tends to greatly curtail the court's inherent power which is fundamental in Judicature. By so doing the Judiciary is easily emasculated in its regulation of arbitration and conciliation as adjudication processes; its remedial power in granting and issuing prerogative orders of mandamus and certiorari is not addressed if not sidelined. Clearly, empowering people to adjudicate their own disputes need not oust the core mandate and function of courts in the context of governance. In this regard it is not clear how to give effect to section 10 of the Arbitration and conciliation Act in view of the power given to the Courts by relevant provisions of the Constitution of Uganda and the Judicature Statute 1996.

In this regard I envisage a myriad of situations when court intervention in arbitration generally may be fettered. For instance the English section 10 of the Arbitration Act 1950 (as amended) makes provision for Court to appoint an arbitrator in certain circumstances such as when parties to an arbitration agreement do not concur to an appointment or when an appointed arbitrator is incapable, this power is in the discretion of Court. See: **Tritonia Shipping Inc. vs. South Nelson Forest Products** (CA) (1966) I Lloyds Rep. 114.

The consideration here is not that the Court desires to intervene in all disputes but that circumstances do arise when court intervention is essential and may come about inherently.

For instance an arbitration may take so long and cause undue hardship. In **Emson Contractors Ltd vs. Protea Estates Ltd** (1988) 4 Construction LJ 119 a delay of 20 weeks was held to be excessive in relation to a 14 day time bar on a building contract. While the Centre established under the Ugandan Act may handle all such unforeseen circumstances the role of the court in dispute settlement would by that mandate not be wholly replaced in effect as provided in section 10 of the Act. There may in fact be a problem in which the centre itself or its officers or organs or their actions are called into question and the issues are governed by the Arbitration and conciliation Act. The Act or rules themselves may get entangled in litigation or come in question. For instance the First Schedule to the Act states in the marginal note that the Arbitration rules therein are made under section 73 of the Act. However section 73 of the Act provides:

> "73. The forms set out in the second schedule to this Act or forms similar to them with such variations as the circumstances of each case require, may be used for the respective purposes in that schedule, and, if used, shall not be called in question."

Secondly sections 5 and 6 of the said arbitration rules refer to the procedure when there is a case stated. It stipulates:

> "5. Where a special case has been stated under section 40 of the Act, the case stated and all relevant papers must be lodged with the Registrar or a district Registrar of the High Court as the case may be together with the necessary fees and the names of the parties interested and their address."

Section 6 of the arbitration rules then goes on to state the procedure the court shall follow to cause notice of the matter to be given to the parties. However looking at section 40 of the Act there is no provision for a case stated. It provides:

> "40(1) A "New York Convention award" means an arbitral award made, in pursuance of an arbitration agreement in the territory of a state (other than Uganda) which is a party to the convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention") adopted by the United Nations Conference on International Commercial Arbitration on 10th June 1958."

Having said the above I am however inclined to have an arbitration in this kind of matter and get answers specifically as regards whether the certificate No. 3 dated 2nd February 1993 was or was not in form and or substance in accordance with the agreement by which the Petitioner paid for 10,000 shares. Secondly there is the problem of the assets of the company. Finally this Court will deal with the remedies that only it can deal with after the arbitration which must be completed within 30 days from today to enable the Court deal with the matters within its jurisdiction. Costs will be in the cause.

R.O. Okumu Wengi

Judge

16/10/2000