IN THE COURT OF APPEALOF SIERRA LEONE

CIV. APP. 60/2017

BETWEEN:

TIMIS MINING CORPORATION (SL) LIMITED - -APPELLANT

-

AND

CAPE LAMBERT RESOURCES LIMITED - 1ST RESPONDENT

GRAIG DEEN - 2ND RESPONDENT.

GERALD METALS LIMITED 3RD RESPONDENT

FRANK TIMIS 4TH RESPONDEN

CORAM

1. HON. MR. JUSTICE SENGU M KOROMA – JSC- PRESIDING
2. HON. MR. JUSTICE REGINALD S FYNN – JA
3. HON. MR. JUSTICE ELDRED TAYLOR-CAMARA-JA

COUNSEL

ROWLAND S V WRIGHT -COUNSEL FOR THE APPELLANT

ADEWALE SHOWERS -COUNSEL FOR THE 1ST, 2ND & 3RD RESPONDENTS

BEFORE THE HON. MR. JUSTICE SENGU M. KOROMA JSC

JUDGMENT DELIVERED ON THE 15TH JULY, ~~2019~~ ٢٠٢١

RULING DELIVERED ON 30th JULY, 2021 BY THE HONOURABLE MR. JUSTICE SENGU MOHAMED KOROMA, JSC.

This is an appeal from the Ruling of the Hon. Justice M. Samba, J (as she then was) (LTJ) sitting as a Judge of the Fast Track Commercial Court (FTCC) dated the 29th day of June, 2017 on the following grounds:

GROUND A:

That the LTJ erred in law and/or in the application of the law as the Judge should have held (but did not) that:

i. An arbitration agreement contains within it, a negative promise not to bring foreign proceedings. The negative promise is enforceable by an injunction regardless of whether or not arbitration proceedings are on foot or proposed;
ii. A stay should be ordered unless strong cause for refusing a stay is shown by the plaintiff; and
iii. The Judge should then have gone on to consider (but did not) whether "strong cause" existed to refuse a stay, and should have found that no strong cause had been shown by the plaintiff.

3. Further or alternatively, in so far as the judge sought to identify a reason to refuse the stay, namely the plaintiff's alleged need for interim relief prior to the formation of the arbitral tribunal, the judge erred in law or in fact for the following reasons:

i. The LTJ misunderstood that whilst an application for interim or conservatory relief might be made to the court, this is not a ground for the court to refuse to stay the substantive proceedings, the claims in which fall to be determined in

accordance with the arbitration agreement reached by the parties;

ii. In any event, the LTJ erred in treating the plaintiff's application for interim relief (resulting in order numbered (3) made by the court) as an application for interim relief against the 4th Defendant which it was not;

iii. The Learned Trial Judge erred in concluding that the Plaintiff's need for interim measures could only be satisfied by an Order granted in High Court of Sierra Leone, in particular, the Judge failed to take into account the availability to the plaintiff of an application for interim relief to the English Court by virtue of Section 44 of the Arbitration Act, 1996 and the fact that the arbitration clause provided for London as the seat of the arbitration.

Particulars of this ground are to be found in page 195 of the Records.

GROUND B:

4. That the Learned Trial Judge erred in law by ordering the plaintiff and the 4th Defendant to proceed to Arbitration whilst refusing a stay of proceedings in the High Court of Sierra Leone thereby creating a situation where in two (2) parallel legal proceedings on the same issue will potentially be running simultaneously in two different jurisdictions to wit: Arbitration in the United Kingdom and the High Court action in the FTCC in Sierra Leone.
5. The particulars are to be found at page 195 of the records – Orders (1) and (2) of the Ruling of the learned trial Judge dated the 29th day of June, 2017 at page7 thereof.

GROUND C:

6. That the Learned Trial Judge erred in law and in excess of her jurisdiction when in the absence of an application made by the parties, she purely suo moto made an interlocutory injunction preventing the liquidation of the 4th Defendant. There are no legal or factual bases for the grant of an injunction.
7. The particulars can be found at page 196 of the records – page 7 Order (2) of the judgment dated the 29th June, 2017.

BACKGROUND:

8. The Plaintiff Company (Respondent) herein issued a writ of summons dated the 11th May, 2017 against the 4th defendant (Appellant) herein and three other Defendants seeking the following relief.
    I. As against the 1st and 2nd Defendants jointly and severally, damages for conspiracy to injure the plaintiff in its business activities, and/or unconscionable conduct.
    II. As against both the 1st and 2nd Defendants, Damages for conspiracy to induce a breach of contract.
    III. An injunction restraining the 1st, 2nd and 3rd Defendants by themselves and/or through their principals and agents from liquidating the 4th Defendant company, and an injunction also restraining it, and its servants and/or agents, from transferring the benefit of such agreement to the 1st and 2nd Defendants in particular, and generally to any other individual or entity whether connected one way or the other with the 1st and 2nd defendants
    IV. A Declaration to the effect that the letter dated 16th March, 2017 purporting to cancel the agreements the 3rd and 4th Defendants have with the Natural Mineral Agency (NMA) are null and void.
    V. General damages
    VI. Any further or other relief the court may deem fit; and
    VII. Costs.
9. On an application by the Plaintiff, interim injunction was granted against the Appellant on the 15th day of May, 2017.
10. The firm of Wright & Co. filed a Notice and Memorandum of Appearance for the 4th Defendant dated 26th day of May, 2017.
11. By a Notice of Motion dated the 7th June, 2017, the 4th Defendant applied to the FTCC for amongst others, a Stay of Execution of the Order of the FTCC dated 15th day of May, 2017, Stay of Proceedings of the matter intituled FTCC: 089/2017 2017 c. No.4 pending the hearing and determination of the proposed Arbitration proceedings after the parties have proceeded to arbitration in accordance with their mutually agreed contracted obligations, to wit: Clause 15.2 of the Royalty Agreement and clause 30.2 of the Loan Agreement between the Plaintiff and the 4th Defendant herein.
12. Mr. A. Showers for the plaintiff opposed the Application.
13. The Application was heard and Ruling delivered and the Learned Trial Judge ordered as follows:

    i. That the parties do proceed to arbitration in accordance with their mutually agreed contractual obligations, to wit, clause 15.2 of the

Royalty Agreement both between the Plaintiff/Respondent and the 4th Defendant/Applicant herein if they so desire.

ii. That the 4th Defendant's application for a stay of Proceedings of this matter is refused.

iii. An interlocutory injunction against the 1st, 2nd and 3rd Defendants whether by themselves, and/or through their principals, Servants, agents and howsoever otherwise known from liquidating the 4th defendant company herein pending the hearing and determination of this matter.

iv. Each party to bear his own cost.

14. The 4th Defendant subsequently filed two applications:
    a) Clarification of the ruling dated the 29th June, 2017 and
    b) Leave to appeal.
15. The learned trial Judge heard both applications and on the 25th July, 2017 reaffirmed her orders of 29th June, 2017 but granted leave to appeal.
16. It is against this ruling that the 4th Defendant, the Appellant herein has appealed to this court on the grounds hereinbefore listed.

THE APPEAL:

17. I shall deal with the grounds of Appeal in the order presented by the Appellant's Counsel, R.S.V Wright Esq., in his synopsis and oral submissions.

GROUNDS A & B

18. In his synopsis and oral submission, Mr. Wright argued that it is not in dispute that the claims against the Appellant in the court below fall within the ambit of an arbitration agreement in the contract between them. He submitted that the Appellant and the Respondent had agreed that disputes should be arbitrated in London under the Rules of the London Court of International Arbitration ("LCIA"). The parties also agreed that non-contractual obligations should be governed by English law. In the view of Mr. Wright, the question now is whether an arbitration clause applies; but given that the arbitration clause does apply, whether the proceedings should be permitted to continue notwithstanding the specific agreement between the parties to determine the dispute by arbitration, and notwithstanding their agreement not to seek the determination of the dispute in a foreign court including the Sierra Leone Court.
19. Mr. Wright further submitted that the Learned Trial Judge erred in determining the issue because she referred in her judgment to a number of

relevant authorities which demonstrate clearly that a stay should be ordered but then refused the application for a stay.

RESPONSE OF THE RESPONDENT:

20. In his response on this point, A. Showers Esq., in both his synopsis and oral submission, submitted that the court must first decide on the arbitrability of the claims presented to it before considering whether to grant a stay or not. To Mr. Showers, the Learned Trial Judge rightly referred to Section 5 of the Arbitration Act, Cap.25 (The Appellant's counsel also referred to this provision). He submitted that the claims of the 1st Respondent herein does not fall within the scope of the Arbitration clause. Mr. Showers based his arguments on the following points.

    i. The claims are against the Appellant and third parties jointly and severally. The third parties are not subject to the Arbitration clause. The doctrine of privity of contract applies in this particular instance, the non-signatories to the Arbitration cannot be "subjected" to Arbitration as they have not consented to refer any dispute between one another and the 1st Respondent to arbitration.

21. Learned counsel for the 1st Respondent concluded by referring again to his submission that the claims are very unique in nature, and they fall outside the scope of the Arbitration agreement. He referred to the averments in paragraphs 1 and 2 of the statement of claim and submitted that they claim in tort are not contemplated in the scope of clause 15.2 of the agreement. (the claims are for conspiracy to induce a breach of contract and conspiracy to injure the plaintiff's business activities.

22. On these grounds of appeal both Counsel relied on the following authorities: albeit for different reasons: -

- **KABIA –V- KAMARA (1967-68) ALR SL. 455;**
- **RE PHOENIX TIMBER CO. LTD'S APPLICATION (1958) 2 Q.B. 1; and**
- **SECTION 5 OF THE ARBITRATION ACT, CAP.25 OF THE LAWS OF SIERRA LEONE 1960.**

23. Counsel for the 1st Respondent submitted that for the reasons given above, the High Court of Sierra Leone is the most appropriate forum for the trial of the action. For this cited the case of **A.P. MULLER VS. HADSON TAYLOR TECNOSCAVI VS. CIVIL ENGINEERING & ANOTHER CC: 424/2007** (unreported).

ISSUES FOR DETERMINATION:

24. The foregoing ground of appeal is central to determining the main issue in dispute in his appeal to wit: whether the Arbitration clause in the Royalty Agreement dated 10th June, 2013 and funding Agreement dated 4th October, 2014 precluded the parties from seeking relief in the High Court of Sierra Leone. A subsidiary issue is whether the Learned Trial Judge had the power to grant interim measures notwithstanding the arbitration clause.

25. I shall start by reviewing the documents relied on and the cases cited by Counsel. The starting point is the **ROYALTY AGREEMENT** dated 10th June, 2013. The relevant provision is clause 15.2 which states as follows:

> **"Any dispute arising out of or in connection with this Agreement (including a dispute relating to the existence, validity or termination of this agreement or any non-contractual obligation arising out of or in connection with this agreement) shall be referred to and finally resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration) (The "Rules")**

26. This is the arbitration clause in the Royalty Agreement which clearly spells out that the parties should proceed to Arbitration on the occurrence of certain events. Mr. Showers argued that the clause does not apply in the action because firstly, the claims made in the statement of claim were not arbitrable and secondly that the existence of third parties precludes the settlement of any matter among them by Arbitration as they are not privy to the Royalty Agreement.

27. Let me start by determining the correctness of the first point. Black's Law Dictionary, 10th Edition defines arbitrability as "The status, under applicable law, of a dispute being or not being resolvable by Arbitrators". It goes further to state that "The status of a dispute being or not being within the jurisdiction of Arbitrators to resolve is based on whether the parties entered into an enforceable agreement to arbitrate, whether the dispute is within the scope of the Arbitration agreement, whether the procedural prerequisites to arbitrate have been satisfied and whether the applicable law permits the arbitrators to resolve the subject matter of the dispute".

28. There is no doubt that by clause 15.2 of the Royalty Agreement the parties have not only agreed to arbitrate but agreed on the seat, law and composition. This is a pre-dispute arbitration clause. It is the practice in arbitration that

the Arbitration panel has the power to rule on its own competence to hear the matter.

29. As regards the argument of Counsel for the Respondent that the following claims do not fall within the arbitration agreement, to wit: -

a) As against the 1st and 2nd Defendants, jointly and severally damages for conspiracy to injure the plaintiff in its business activities, and/or conscionable conduct; and

b) As against both 1st and 2nd Defendants damages for conspiracy to induce a breach of contract.

A quick look at the clause 15.2 of the Royalty Agreement would reveal that this is not so.

30. The relevant portion reads thus: "Any dispute arising out of or in connection with this agreement ... or any non-contractual obligation arising out of or in connection with this agreement...". Reference here to "non-contractual obligation", to my mind could cover tortuous actions. In support of this, I will refer to the following cases.

31. It was held in the case of ASTRO VENCENDOR COMPANIA NAVIERA S.A. -V- AMRANAFA GmbH (1971) 1 Lloyd's Rep.502, (1971) 2 QB 588 that if the agreement to arbitrate is drawn in sufficiently wide terms, it will give the arbitrator jurisdiction to decide a dispute arising from a claim in tort. In the instant case, the words used are "...non-contractual obligation arising out of or in connection with ..." These words have been given a wide meaning. It has been said that they cover every dispute except a dispute as to whether there was ever a contract at all – Per Pilcher J in **H E DANIEL LTD –V- CARMEL EXPORTERS AND IMPORTERS LIMITED** (1953) Lloyd's Rep. 103 (1953) 2 Q.B. 242. This is different from using the word "Under" which is apparently narrower in scope.

32. Let me close this point by referring to the case of **FILI SHIPPING CO. LTD & OTHERS –V- PREMIUM NAFTA PRODUCTS LTD & ORS**. (On appeal from FIONA TRUST AND HOLDINGS CORP & OTHERS –V- PRIVALOV & ORS (2007) UKHL 40. In this case, the Plaintiffs brought proceedings against the Defendants for the torts of conspiracy, bribery and breach of fiduciary duty. The Defendants sought to have the issue determined under the arbitration clause. Judgment was given in favour of the plaintiff at first instance. The Defendant appealed to the Court of Appeal which reversed the decision of the High Court. In the appeal to the House of Lords, it was held, dismissing the appeal, that "the construction of an arbitration clause should start from the assumption that the parties, as rational businessmen, were likely to have

intended any dispute arising out of the relationship into which they have entered or purported to enter to be decided by the same tribunal unless the language makes it clear that certain questions were intended to be excluded from the arbitration... and that accordingly, since the language of the arbitration clause contained nothing to exclude disputes about the validity of the contract on grounds of fraud and there were no grounds of challenge specific to the validity of the arbitration clause, the claims that the charter contracts had been induced by bribery fell to be determined by arbitration".

33. I will adopt the reasoning herein and hold that the claims brought by the Respondents are arbitrable and fall within the scope of the arbitration clause contained in Royalty Agreement. I further hold that the said clause is valid and enforceable.

34. Having held that the claims brought by the Respondent are within the scope of the Arbitration clause, was the Learned Trial Judge correct to refuse a stay? I should clarify that the Learned Trial Judge in her judgment whilst refusing a stay ordered the Appellant and Respondent to proceed to arbitration – Ground B.

35. On the first part – Ground B, the Learned Trial Judge in her Judgment referred to Section 5 of the Arbitration Act, Cap.25 of the Laws of Sierra Leone, 1960; Atkins Encyclopaedia of Court forms, volume 6, page 78, paragraph 14 where she held by reference that "the Court must grant the stay unless it is satisfied that the arbitration agreement is ....in operative or incapable of being performed or there is in fact no dispute between the parties with regard to the matter referred to – paragraph 2.7 of the first Judgment and the case of KABIA –V- KAMARA (1967-68) ALR S.L 455 Mr. R.S.V Wright for the Appellant submitted that all of these authorities were more reason why the Learned Trial Judge should have granted a stay. Mr. A. Showers on the other hand maintained his argument that the actions of the Appellant were not contemplated by the parties e.g. the breach of fiduciary duties.

36. I shall now endeavour to determine these grounds.

37. Section 5 of Cap 25 provides for the right of a party to a written contract with an arbitration clause to apply to the court after entering appearance, and before delivering any pleadings to stay those proceedings ... and that the court if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the written agreement to submit present or future disputes to arbitration .... may make such order staying the proceedings". This provision is useful to both domestic or non-domestic (i.e. international arbitration) arbitration as it clearly sets out the procedure to be adopted in applying for a stay of proceedings pending arbitration and the reasons for refusing such an application. That the Learned Trial Judge quoted

it clearly shows that she took it into consideration in her decision to refuse a stay.

38. In summary, Section 5 gives the right to a party to apply to the High Court for a stay where the other party commences litigation in breach of an arbitration agreement. The High Court can make an order staying the proceedings if:

    a. It is satisfied that there is no sufficient reason why the matter should not be referred to arbitration; and
    b. The Applicant is ready and willing to do all things necessary to the proper conduct of the arbitration and was ready at the time the proceedings were commenced.

39. In the instant case, the Learned Trial Judge found reason to Order the parties to proceed to arbitration but failed to grant a stay. Was this proper? The principle on this point was clarified in the **LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND** by Sr. Michael J. Mustill and Stewart C Boyd at page 123 under the rubric "Practical applications of the residual jurisdiction" "Proceedings brought in spite of arbitration agreement".

40. The principle is thus' "Where the claimant institutes an action in the Courts, unless and until an application is made to stay the action, the jurisdiction of the Courts takes effect in full; the action proceeds in precisely the said way as if there had been no arbitration agreement; and, equally, the judgment of the Court is unconditionally binding on the parties. The situation is precisely the same if arbitration is subsequently started by one of the parties. Until the court decides to grant a stay, it is the action which is the medium for determining the dispute since there cannot be two tribunals with co-existent powers to make binding decisions as to the rights of the parties".

41. Using the foregoing passage as a guide, the Learned Trial Judge should not have ordered the parties proceed to arbitration whilst at the same time refusing a stay. Both actions cannot proceed concurrently. The party with a grievance is the Respondent and so it would be he who would continue with the action in the High Court and at the same time initiate the arbitration proceedings. In such a situation, it will be natural for the Respondent to continue with his initial action and ignore the arbitration. The Appellant would be in a limbo because he cannot properly approach an arbitration panel whilst the action in the High Court is subsisting. The interest of justice would thus be cruelly starved in such a situation.

42. I would add here that quite apart from the power of the High Court under Section 5 to stay proceedings, it also has an inherent power to stay action which it considers should not continue. This power is independent of any

specific powers conferred by Statute. This power could in an appropriate case, be employed to deal with an action brought in breach of an agreement to arbitrate – Mustill and Boyd.

43. I am of the opinion further that the courts favour an approach that would grant a stay of judicial proceedings where there is evidence of an operative arbitration clause to enable the parties to avail themselves of the arbitration clause.

44. The decision in KABIA –V-KAMARA (Supra) is relied on by both sides. This case has controlled the question of the effect of an arbitration clause in our jurisdiction for the better part of 50 years. I am of the opinion that this case is often times wrongly interpreted. This court is of the opinion that it was decided on its own peculiar facts and was not intended to lay down a general rule that our courts are not bound to give effect to an arbitration clause.

45. A wholesome reading of the KABIA case relying as it does on the case of SCOTT-V-AVERY (1856) 10 ER 1121, must lead to the conclusion that the court did not intend to subvert this principle which it commended so avidly. This conclusion is unavoidable as SCOTT-V-AVERY, which incidentally is not on all fours with KABIA, is nonetheless authority for the general proposition that the arbitration clause must be given effect before resort can be made to judicial proceedings. The seeming contradiction in the KABIA case must be therefore due to the peculiar facts in that case which included; a) the party relying on the arbitration clause was at the same time denouncing the existence of a contract between the parties and b) the arbitration clause in that case had been framed in terms limited only to "disputes which will disrupt the progress of the work."

46. The court in the KABIA case referred to the arbitration clause as "a mere agreement to arbitrate" and concluded in terms set out in CHITTY ON CONTRACT 23rd edition under the rubric so titled because of the peculiar circumstances of that case. The said authors are clear in the immediately succeeding paragraph that "where there is a submission to arbitration and any party commences an action, a party to such legal proceedings may apply to the court to have such proceedings stayed..." This power to stay though discretionary in nature will be used unless fraud is alleged or where the judicial proceedings are in respect of interim or conservatory issues. Mr. Showers has referred us to several such cases where the discretion to stay proceedings was not used. These cases included REW&OTHERS- V- COX &OTHERS (1996) CLC and HEWMAN- V- DARWIN Ltd. In each of these however, and not unlike KABIA'S case, some peculiar operative circumstances will be observed, such as frustration, the risk of leaving out would be claimants or the need to protect the rights of whistle-blowers.

47. I should add that the arbitration clause in the instant case is not a "mere reference" to arbitration. The arbitration clause – clause 15.2 of the Royalty Agreement dated 10th June, 2013 clearly states that "any dispute.... shall be referred to and finally resolved by arbitration under the Arbitration Rules of the London Court of International Arbitration".

48. Having held that KABIA-V- [KAMARA is distinguishable from the present case, I hold that the said decision does not bind us.

49. There are two other issues arising in this appeal that I need to dispose of. One of them was raised in the alternative under Ground A – "further and/or in the alternative, in so far as the judge sought to identify a reason to refuse the stay, namely, the Plaintiff's alleged urgent need for interim relief prior to the formation of the arbitral tribunal".

50. I shall start by stating that as regards arbitration agreements and awards, one cardinal legal principle remains unimpaired: the jurisdiction of the courts cannot be wholly ousted by agreement of parties. This principles, the most distinctive feature of the English law of arbitration was expressed by **SCRUTTON L.J in CZARNIKOV –V- ROTH, SCHMIDT & COMPANY** (1922) 2 KB.478, 488 in the telling phrase, "There must be no Alsatian in England where the King's writ does not run".

51. In the course of my research, I came across the English case of **CHANNEL TUNNEL GROUP LIMITED –V- BALFOUR BEATY CONSTRUCTION LIMITED** (1992) 2 WLR 741 which was considered and applied in the Indian case of **SUNDARAM FINANCE LIMITED –V- NEPC INDIA LIMITED** (Supreme Court of India – 13 January, 1999) which dealt with the question of the Power of the English Court to grant an interim injunction in a case where the parties have agreed that the disputes shall be settled by arbitration. The English Court of Appeal referred to Section 12(6) of the Arbitration Act, 1950. Construing this, Scrutton LJ said as follows: -

> "In my view this power can be exercised before there has been any request for arbitration or the appointment of arbitrators, provided that the applicant intends to take the dispute to arbitration in due course.... I would hold that the power of the court in such a case would be exercised for the purpose of and in relation to a reference" In other words, the applicant would have to state it unequivocally relies on the Arbitration agreement and makes an averment that it would invoke the arbitration clause. This view corresponds to that expressed in **RUSSELL ON ARBITRATION** (21st Ed.) at page 386.

52. Whilst I agree with the Learned Trial Judge on the power of the Court to grant interim measures, the conditions precedent have not been met in this case. The Respondent is arguing that the arbitration clause does not apply and therefore has no intention to proceed to arbitration. As this court has held that the arbitration clause is valid, the Respondent's only remedy is to apply to the English Courts for relief under Section 44 of the English Arbitration Act, 1996. That is the agreement of the parties. Where there is no intention to proceed to arbitration, by the applicant, he cannot avail himself of interim relief. The Learned Trial Judge ought not to have refused a stay because of the application for interim relief in the circumstances. This is more so when the Learned Trial Judge ordered the parties to proceed to arbitration. A refusal to stay an action effectively nullifies any simultaneous arbitration. As Fletcher – Moulton LJ said, in **DOLEMAN & SONS –V- OSSETT CORPORATION** (1912) 3 K.B. 257, 269 "If the court has refused to stay an action, it follows, therefore, that .... the private tribunal if it has ever come into existence is functus officio".

53. Finally, the Respondent argued that Sierra Leone is the most convenient forum. If it was, why did it sign up to the arbitration agreement in which it is expressly agreed that any dispute shall be referred to and resolved under the Arbitration Rules of the London Court of International Arbitration and that the seat of arbitration shall be in London.

54. For the reasons given above, I will allow the appeal on all grounds and order as follows:

1. The Judgment/Ruling of the High Court dated 29th June, 2017 is hereby set aside.
2. That a stay of proceedings of the High Court against the fourth defendant in the matter: FTCC.089/17 2017 C. NO.4 is hereby granted.
3. Costs to the Appellant to be taxed if not agreed.

HON. MR JUSTICE SENGU M KOROMA. JSC

HON. MR. JUSTICE REGINALD S FYNN. JA----------