REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Miscellaneous Civil Application 636 of 2012

HERITAGE CONSULTANTS LTD. ……. APPLICANT

VERSUS

PERMANENT SECRETARY,

MINISTRY OF REGIONAL DEVELOPMENT ……..... RESPONDENT

R U L I N G

1. The application before the Court is brought pursuant to the provisions of **Section 12(2)** and **(3)** of the *Arbitration Act*, **Order 46 Rule 5** of the *Civil Procedure Rules* and **Sections 1A, 1B and 3A** of the *Civil Procedure Act*. In the Originating Notice of Motion application dated 16th October, 2012 the applicant seeks for orders *inter alia* for court mandated arbitration by the court appointing and/or nominating an arbitrator. In the grounds supporting the application, it is the applicant's contention that the Respondent was unwilling to participate in the arbitration process and further that no response has been received from the Respondent with regard to the approval, rejection or an otherwise alternative proposal of an arbitrator.

2. The application is supported by the affidavit of **Beatrice Makanga** sworn on 16th October, 2012. The deponent avers that the applicant entered into a contract for consultancy services on 14th January, 2008, Contract No. **MRDA/KOSFIP/003B/06-07** (hereinafter "the contract")in which it proceeded with its mandated obligations as set out therein until 15th September, 2010 when the Respondent issued it with a termination notice. The deponent further averred that the applicant wrote to the Respondent a demand letter dated 23rd May, 2011, in which it considered that the termination of the contract as a breach and admission of liability, to which the Respondent did not reply. Further, in a letter dated 25th July, 2011, the applicant requested the Respondent to have the matter referred to arbitration as per Clause 7.2, to which the Respondent also did not reply. The inaction by the Respondent necessitated the invocation of the arbitration clause and subsequent appointment of an arbitrator by the applicant. The Respondent was notified of the position in a letter dated 3rd April, 2012.

3. The application is opposed. In the Replying affidavit of **Nelson Kibet Korir** sworn on 21st November, 2012, the deponent averred that there was no dispute between the parties capable of being referred to arbitration and was as such, untenable, as an arbitrator could not be appointed to arbitrate on non-contractual matters. It was the Respondent's contention that applicant had not performed its part of the contract, which subsequently led to the termination of the contract by issuing a 60 day notice as stipulated therein. Further, the Respondent contended that it acted within its rights and had lawfully terminated the contract, pursuant to Clause 2.6.1(d) thereof.

4. In its submissions dated 25th March, 2013, the applicant commenced by reiterating the facts of the matter. In putting its case, the applicant submitted that the Respondent had admitted that indeed there was a contract that had been unilaterally terminated by the Respondent and, as such, any resulting dispute would have to be resolved in accordance with Clause 7.2 of the Contract. In determining the application, the applicant asks the Court to address two questions: a) whether the applicants case raises any dispute as per the contractual agreement and b) whether the Respondent has been notified of the dispute, if any, and what steps have been taken to resolve the matter.

5. In considering the application, it is for the Court to first determine whether indeed a dispute did arise between the parties and if so, what measures were taken by the parties to amicably settle the same. According to the Blacks' Law Dictionary, 9th Edition, a dispute is defined as:

"A conflict or controversy; a conflict of claims or rights; an assertion of a right, claim, or demand on one side, met by contrary claims or allegations on the other."

The International Court of Justice (ICJ) and the Permanent Court of International Justice (PCIJ) have addressed the issue of determining what entails disputes in various cases. In **Mavrommatis Palestine Concessions (Greece v. Great Britain), Judgment of 30 August 1924, 1924 PCIJ (Ser. A) No. 2, at 11,** the PCIJ gave a broad definition of dispute as follows:

"A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."

The ICJ in **Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion of 30 March 1950 (first phase), 1950 ICJ Rep. 65, at 74,** defined the term as:

"A situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations."

The two interpretations in these international cases raise the fundamental question as to when a conflict or disagreement presupposes a dispute. The definition of dispute has been widely adopted, not only in resolving international conflict but also commercial settings. It juxtaposes that for there to be a dispute, there had to have been some form of communication as between the parties, which lead to an impasse or disagreement, hence a dispute arising. A dispute would still be deemed to arise, notwithstanding one party's inactive participation in the communication, as in the present circumstances of this suit. In the **Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania, Advisory Opinion** (supra), the ICJ held inter alia that:

"…the mere denial of the existence of a dispute does not prove its non-existence."

6. From the onset therefore, the courts have to determine whether a dispute arises as between parties, given the circumstances of the matter. Both parties in this matter do not deny that there was a contract that had been entered between them on 14th January, 2008. The point of departure on agreed matters was the payment, or non-payment of alleged outstanding monies, the termination of the contract and the duties, rights and obligations of the parties under the contract. It is the Applicant's contention that the termination of the contract was a breach of the contract and that the Respondent had failed to remit monies for what it alleges, was work done. On the Respondent's part, it alluded to the fact that the Applicant never met or satisfied its obligations as under the contract and hence the Respondent exercised its rights under the contract to terminate it. This divergence of opinion between the parties therefore, shows that there was indeed, conflict between the parties. Hence there is a dispute that needs to be resolved, the purview of which as between the Court and the Arbitrator, which has the jurisdiction to resolve it?

7. As per clause 7.2 of the Contract, any dispute arising out of or relating to this contract shall be settled by arbitration. The clause reads:

"Any dispute, controversy or claim arising out of or relating to this contract, or the breach, termination or invalidity thereof, shall be settled by arbitration in accordance with the Uncitral Arbitration rules as at present in force".

In interpreting the words of the arbitration agreement, the Court has to interpret them in their normal, literal meaning in the first instance. This was as reiterated by J.J Breatorn et al.,*"Rules of Construction."* 4Am Jur (2d) **Alternative Dispute Resolution** reference to and citing the case of **St. Pierre v Chriscan Enterprises Ltd (2011) 80 B.L.R 163**. In this regard therefore, an arbitration clause must be construed according to its language, in the context of the agreement as a whole and in the light of the circumstances in which it was made. In this instance, the interpretation of the words *"any"*, *"arising out of"* and *"relating to"* suffices. According to Russel on Arbitration, 23rd Edition, Sweet and Maxwell at paragraphs 2-077 and 2-078, the author terms these words as being wide enough to refer to all disputes between the parties. The author at paragraph 2-077, in referring to **Ashville Investments Ltd v Elmer Contractors Ltd [1989] Q.B 488**, writes:

"An arbitration agreement referring "any dispute or difference" to arbitration was found wide enough to cover the effects of exceptional dislocation and delay notwithstanding that the disputes clause provided that they were to be assessed by mutual agreement. Once the parties had clearly agreed to differ about those issues they fell within the arbitration clause."

In my view, the appointed arbitrator has the jurisdiction and power to hear, interpret and determine all matters as arising out of the contract between the parties.

8. The Courts jurisdiction is limited with regards to the interpretation of the arbitration clause for by virtue of Section 10 of the Arbitration Act, the Courts intervention is minimal. The section reads:

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

It is for the courts to refer the matter to a duly appointed arbitrator, who then makes a determination of whether the matters that he has been called upon to arbitrate fall within the purview of his mandated obligations and jurisdiction. This was the position taken by the Canadian Court of Appeal in **Gulf Canada Resources Ltd. v. Arochem International Ltd. (1992), 66 B.C.L.R. (2d) 113 (C.A.)** in which the Court referred the matter of interpretation of whether the dispute fell within the scope of the arbitral tribunal to the tribunal itself.

9. A copy of the Contract documents was annexed to the Supporting Affidavit sworn by Beatrice Makanga Sabana on 16th October 2012. The contract not only involved the Plaintiff as a consultant to the project but two other consultants as well. By clause 2.6.1 (d), the Defendant reserved the right to terminate the Contract, in its sole discretion by the giving of not less than 30 days written notice thereof. In this matter, the Defendant opted for such termination by giving a notice of 60 days, which does not appear to be in dispute between the parties herein. Under clause 7 of the Contract – Settlement of Disputes, sub-clause 7.2 Dispute Settlement reads:

"7.2 Any dispute between the parties as to matters arising pursuant to this Contract that cannot be settled amicably within thirty (30) days after receipt by one Party of the other Party's request for such amicable settlement may be submitted by either Party for settlement in accordance with the provisions specified in the SC".

10. It appears that matters were not amicably settled as between the parties and consequently the Plaintiff is requesting of this Court to order settlement as per the provisions specified in the S.C. which I take to mean the Special Conditions of Contract commencing at page 25 of the Exhibit to Supporting Affidavit. Indeed by letter dated 7th August 2012 from the State Law Office, the Hon. Attorney General (see Exhibit "NKK 13" to the Replying Affidavit) advised the advocates for the Plaintiff herein (who had called for arbitration as per their letter dated 3rd April 2012 addressed to the Respondent) that the contract had been lawfully terminated. Further the Hon. Attorney General considered that there was no dispute for settlement by arbitration as per clause 7.2 of the Contract. From Exhibit "BMS 1 (a) (b) and (c)" to the

Supporting Affidavit, it is quite obvious to this Court, that the Applicant herein does have a genuine claim as against the Respondent for general and special damages for breach of contract.

11. Although in my view Clause 7.2. of the General Conditions of Contract is pretty nebulous as to settlement of disputes between the parties, the Special Condition at page 29 of Exhibit to the Supporting Affidavit of Beatrice Makanga Sabana sworn on 16 October 2012 is more explicit. It reads:

"7.2. Any dispute, controversy, or claim arising out of or relating to this contract, or the breach, termination, or invalidity thereof, shall be settled by arbitration in accordance with the uncitral Arbitration Rules as at present in force"

Quite clearly the parties agreed to settle their disputes by arbitration to be conducted under UNICITRAL rules.

12. The Applicant has come before Court citing **Section 12 (2) and (3)** of the *Arbitration Act (1995)* as this Court's authority to refer the parties' disputes to arbitration. The Act has been superceded as a result of the *Arbitration (Amended) Act 2009* and the 2 Acts have now been embodied in the *Arbitration Act, Cap 49, Laws of Kenya*. **Section 12 (2)** of the consolidated statute reads that parties are free to agree on a procedure of appointing the arbitrator or arbitrators. **Sub – Section 12 (2) (c)** provides that in an arbitration with one arbitrator, the parties shall agree on the arbitrator to be appointed. Indeed by letter dated 3rd April 2012, the Advocate for the Applicant put forward the name of Mr. Collins Namachanja to be the sole arbitrator. Taking into account the response of the Hon. Attorney General as per his letter dated 7th August 2012 (supra), the Respondent has not agreed to Mr. Namachanja's appointment for the reason that it feels that that there is no dispute as between the parties. However, what the Applicant has failed to do as per the correspondence detailed before Court is to comply with the provisions of **Section 12 (3)** of the *Arbitration Act* and appoint Mr. Namachanja as the sole arbitrator. As a consequence, this Court under **Section 12 (5)** cannot make any order as to the appointment of an arbitrator as between the parties.

13. Fortunately for the Applicant, it has also brought the Application before Court under the provisions of **Order 46 Rule 5** of the *Civil Procedure Rules 2010*. That Rule reads as follows:

"5. (1) in any of the following cases, namely –

(a) where the parties cannot agree within thirty days with respect to the appointment of an arbitrator, or the person appointed refuses to accept the office of arbitrator; or

(b) where the arbitrator or umpire –

(i) dies; or

(ii) refuses or neglects to act or becomes incapable of acting; or

(iii) leaves Kenya in circumstances showing that he will probably not return at an early date; or

(c) where the arbitrators are empowered by the order of reference to appoint an umpire and fail to do so, any part may serve the other or the arbitrators as the case may be with a written notice to appoint an arbitrator or umpire.

(2) If, within seven clear days after such notice has been served or such further time as the court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the court may, on application by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitrator or umpire, or make an order superseding the arbitration, and in such case shall proceed with the suit".

To my mind, the Applicant's advocate's letter of 3rd April 2012 (referred to above) was a clear (14 day)

notice of the appointment of an arbitrator which the Respondent has declined. The Court has now heard the Respondent as envisaged by **Rule 5 (2)** (supra) and can now proceed to appoint an arbitrator to hear and resolve/determine the dispute between the parties. To this end, I direct that the Chairman for the time being of the Chartered Institute of Arbitrators, Kenya Branch will appoint a suitable arbitrator from amongst the Institute's Members, within 21 days of the date hereof. Costs of this Application will be in the costs of the arbitration.

DATED and delivered at Nairobi this 23rd day of May, 2013.

J. B. HAVELOCK
JUDGE