REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

PETITION NO. 18 OF 2018

IN THE MATTER OF: TRANSMARA SUGAR COMPANY LIMITED [C.I/2015]

AND

IN THE MATTER OF COMPANIES ACT 2015

AND IN THE MATTER OF AN APPLICATION UNDER SECTIONS

780, 782,786 AND 789 OF THE COMPANIES ACT, 2015

JATIN SHANTILAL MALDE...1ST PETITIONER

MUKUNTIKUMAR SHANTILAL MALDE............................2ND PETITIONER

MAYUR SHANTILAL MALDE..3RD PETITIONER

MAHUL J. SHAH..4TH PETITIONER

SHASHIKANT S. SHAH...5TH PETITIONER

BHUPENDRA S. SHAH..6TH PETITIONER

YOGESHCHANDRA K. SHAH..7TH PETITIONER

JAYESH J. SHAH..8TH PETITIONER

PALKESH J. SHAH..9TH PETITIONER

ASHISH B. SHAH..10TH PETITIONER

VERSUS

TRANSMARA INVESTMENT LIMITED.................................RESPONDENT

AND

TRANSMARA SUGAR COMPANY LIMITED.....1ST INTERESTED PARTY

SUCRIERE DES MASCAREIGNES LIMITED....2ND INTERESTED PARTY

RULING

1. This Court is asked to give effect to the following Arbitral clause,

> "Any dispute which cannot be amicably resolved by the parties pursuant to clause 17.1 shall be referred to and finally settled by Arbitration in South Africa in accordance with the Rules of Arbitration of the International Chamber of Commerce, which Rules are deemed to be incorporated in reference to this into this clause.

The number of arbitrators shall be one.

The seat, or legal place, of arbitration shall be South Africa.

> The governing law of the Contract shall be the substantive laws of England.
>
> The language to be used in the arbitral proceedings shall be English.
>
> The award of such arbitration shall be final, binding upon the parties and shall not be subject to appeal.
>
> Save as regards Counsels' fees and unless determined otherwise by the arbitrator, the costs of arbitration shall be shared equally between the Parties concerned by such arbitration".

2. This Clause appears in a Shareholders Agreement (SHA) dated 6th April 2015 entered between the Petitioners, Sucriere Des Mascareignes Limited (SDM)(the 2nd Interested party), and Transmara Sugar Company Limited (TSC) (the 1st Interested Party or the Company).

3. The request is in a Motion brought under the Provisions of Section 6(1) and 6(2) of The Arbitration Act 1995 (The Act), which reads:-

> "(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or otherwise acknowledges the claim against which the stay of proceedings is sought, stay the proceedings and refer the parties to arbitration unless it finds—
>
> (a) that the arbitration agreement is null and void, inoperative 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) Proceedings before the court shall not be continued after an application under subsection (1) has been made and the matter remains undetermined".

4. As correctly submitted by Mr. Nyaribo for the Respondent these provisions enjoin a Court to determine three issues:-

> a. That the application has not been brought not later than the time when a Party enters appearance or otherwise acknowledges the Claim.
>
> b. The Arbitration Agreement is not null and void, inoperative or incapable of being performed.
>
> c. There is in fact a dispute between the parties with regard to the matters agreed to be referred to Arbitration.

5. A brief background to the Dispute can be given.

6. The Petitioners are collectively holders of 181,572 Shares which is equivalent to 41% of the Issued Share capital of the Company. This is after the 2nd Interested Party purchased from them 31% of the Ordinary Shares in the Company. The purchase of Shares was effected through a Share Purchase Agreement (SPA) dated 6th April 2015. The Shares purchased by the 2nd Interested Party were transferred to the Respondent (Transmara Investment Limited), which is a Special Purpose Vehicle (SPV) created by the 2nd Interested Party. By virtue of the current Shareholding structure, the 2nd Interested Party has legal and actual control of the body of Shareholders, the Annual General Meeting (AGM) and/or Special General Meeting (SGM).

7. As part of the Share Purchase transaction the parties executed two other documents namely the SHA and the Strategic and Management Support Agreement dated 6th April, 2015 (the Management Agreement).

8. The Petitioners complain that the Respondent and 2nd Interested party have conducted the affairs of the Company in an oppressive manner and to the unfair prejudice of the Petitioners. Instances of that conduct are set out in the Petition.

9. It is also the Petitioners' case that the Respondent and 2nd Interested Party have refused to implement an existing Business Plan of the Company which has led to losses in the Company. An intention being to dilute the minority shareholding. In addition there is systematic and deliberate mismanagement of the Company which has eroded profits. In this regard the Petitioners point to their Right to Deferred Considerations under the terms of the SPA and assert that the loss and mismanagement strategy adopted by the Respondent and the 2nd Interested Party will prejudice these Rights.

10. It would seem that the Company is in need of additional Capital but there is a disagreement between the Shareholders as to how to raise it. The Petitioners preferring that the Board undertakes an Independent Business Review prior to commencing a Rights issue, to first determine the underlying cause of the poor performance of the Company and second to allow the outcome of the Review to inform Shareholders as to whether or not they should participate in any Rights Issue. The Petitioners proposed an alternative funding structure which, in their view, protects the interests of both the Company and existing Shareholders through issuance of Preference Shares. The Respondent on the other hand appears determined to press on with an intended Rights Share issue.

11. In the Petition the Petitioners set out what they believe are Constitutional infringements in respect to their Right to Property, Access to Information, Equality and Freedom from Discrimination, Fair Administrative Action and Access to Justice.

12. Ultimately the Petitioners seek the following Prayers:-

(a) THAT a declaration be and is hereby issued that:

1) the affairs of Transmara Sugar Company Limited have been conducted in an oppressive manner and/or in a manner prejudicial to the Petitioners; and

2) the acts, actual or proposed, complained of in this Petition would be oppressive and/or prejudicial to the Petitioners.

(b) THAT an order be issued quashing the rights issue process that has been initiated with respect to

the Company known as Transmara Sugar Company Limited.

(c) THAT a declaration be and is hereby issued that any funds injected by the Respondent and/ or the 2nd Interested Party into Transmara Sugar Company Limited without following the due process is not classified as a shareholder loan and is an ordinary unsecured loan.

(d) THAT an order be and is hereby issued quashing the valuation process of the shares of Transmara Sugar Company Limited conducted by PWC.

(e) THAT an order be and is hereby issued directing the Board of Transmara Sugar Company Limited to conduct its Board meetings in accordance with the Companies Act, 2015, the Memorandum and Articles of Association of the Company and the Shareholders Agreement dated the 6th April 2015 and in particular:

1. To take and record all affirmative and dissenting votes for all matters brought for deliberation before the Board.

2. To make available to all directors of the Board all executed Board minutes and certified transcripts of Board meetings.

3. To generally conduct Board meetings in accordance with corporate governance principles and best practice standards.

4. To correctly introduce, classify and deliberate **'Board Reserved Matters'**

(f) THAT a declaration be issued that the actions of the Respondent and the Interested Parties as more particularly set out in this Petition have breached the Petitioners constitutional right to own property, right to fair administrative action, right to access to information and are discriminatory and in breach the constitutional obligation on national values and good governance.

(g) THAT a permanent injunction do issue restraining the Respondent and the Interested Parties either by themselves, their employees, agents or servants or any other person acting through them or in their name from initiating or conducting a rights issue with respect to the company known as Transmara Sugar Company Limited without following the laid down procedure under the Companies Act 2015 and the Memorandum and Articles of Association of the said Company.

(h) THAT a permanent injunction do issue restraining the Respondent and the Interested Parties either by themselves, their employees, agents or servants or any other person acting through them or in their name from conducting the affairs of Transmara Sugar Company Limited in an oppressive manner or in a manner prejudicial to the minority shareholders of Transmara Sugar Company Limited.

(i) THAT an order be and is hereby issued restraining the Respondent and the 2nd Interested Party from making any alterations to the Memorandum and Articles of Association without leave of the Court.

(j) THAT an Order be and is hereby issued that the Respondent and the Interested Parties are jointly and severally liable to indemnify the Petitioners for all consequential liabilities and losses incurred as a direct result of the actions of commission or omission taken by them in conducting the affairs of Transmara Sugar Company Limited in an oppressive manner and/or in a manner prejudicial to the interests of the Petitioners.

(k) General Damages for breach of the Petitioners constitutional and statutory rights.

(l) THAT this Honourable Court do issue such orders or give such directions as it may deem just and appropriate in all the

circumstances of this matter.

(m) THAT the costs of this Petition be borne by the Respondent and Interested Parties

13. As a prefatory issue there is need to discuss who bears the onus of satisfying this Court that the dispute herein must be referred to Arbitration. The view taken by Mr. Gachuhi for the 1st Interested Party is that the onus is on the party resisting the Referral. In this event the Petitioners. Although the Petitioners did not respond to this directly they referred this Court to the decision in East African Cables Ltd vs. Mt. Kenya Cables Ltd [2012]eKLR, where the High Court held as follows:-

"*The onus of proving the matters in dispute fell within a valid and subsisting arbitration clause referred to by the applicant is on the party applying to the court for stay of proceedings, once the burden has been discharged then the burden shifts to the opposing party to show the cause why effect should not be given to the arbitration clause. The defendant who is the applicant in his application has failed to specifically state the nature of the dispute and that it fell within a valid and subsisting arbitration clause*."

14. The words used in Section 6(1) are of assistance in locating the bearer of that Burden. Flowing from the language of the provisions it would seem that the Applicant bears the task of persuading the Court that the matter before it is the subject of an Arbitration Agreement. Once this is done, the burden shifts to the party resisting the Referral to satisfy the Court that circumstances under Section 6(1)(a) and/or 6(1)(b) exist that make the referral untenable. This view finds support in the English Decision of Joint Stock Company "Aeroflot Russian Airlines" v Berezovsky & Ors [2012] EWHC 1610 (Ch) (18 June 2012) in which Justice Floyd, discussing that burden in respect to Section 9 of the English Arbitration Act 1996, which is not too dissimilar with our Section 6, had this to say:-

"In my judgment the correct approach is that the burden of establishing the matters identified in section 9(4) rests on the party asserting them, namely the claimant. Beyond that, I am prepared to accept that the use of the word "satisfied" in subsection (4) is an indication that the court must come to a clear conclusion that the agreement is null and void, inoperative or incapable of performance. However I am unable to go as far as accepting that the existence of a mere arguable case of to the contrary would be sufficient for the court to give effect to the arbitration agreement. "

15. There is no controversy about the timing of the Application. The Application was filed simultaneously with the filing of the Notice of Motion and the Provisions of Section 6(1) of The Act have been complied with.

16. The Petitioners take a view that the dispute is a combination of matters which revolve around the Companies Act 2015, the Memorandum and Articles of Association of the Company and the SHA and the Kenyan Constitution. One argument by the Petitioners is that some matters like the Rights issue, the rules, process and procedure of injecting capital, and borrowing powers of the Company, conduct of Board meetings, and the valuation process preceding the Rights issue are issues not governed by the SHA but by the Memorandum and Articles of Association of the Company. It being pointed out that the Memorandum and Articles of Association do not have an Arbitration Agreement. As a start therefore, the Petitioners argue that in so far as the dispute also touches on the Memorandum and Articles of Association and the Companies Act, it is unsuitable for referral to Arbitration as requested by the Respondent.

17. Mr. Gachuhi asked the Court to give regard to Article 11 of the SHA and to find that the whole dispute is governed by this Article. Article 11 reads as follows,

"The Parties hereby undertake and shall procure to the others that as soon as practicable following Completion, the Memorandum and Articles of Association of the Company shall, as far as permissible by law, be aligned on the terms and conditions of this Agreement.

If there is any conflict between the provisions of this Agreement and any of the said Memorandum and Articles of Association, it is agreed that the provisions of this Agreement shall prevail to the extent of such inconsistency, and accordingly the Parties shall, to the extent permitted by law, exercise all voting rights and powers available to them so as to give effect to the provisions of this Agreement and shall further if necessary procure any required amendment to the said Memorandum and Articles of Association".

18. In respect to these opposed positions, I begin by citing Clause D of the Recital part of the SHA which states an objective of the Agreement,

"*SML and the Kenyan Parties have agreed to enter into this Agreement for the purpose of regulating their relationship as Shareholders of the Company and for this purpose have agreed to enter into the present shareholders Agreement".*

While Clause E reads,

"*The Company has agreed with SML and the Kenyan Parties that it will comply with the terms and conditions of this Agreement in so far as they relate to the Company*".

19. Under Article 11 the Parties to the SHA are enjoined to take steps, as soon as is practical and in so far as is permissible by law, to align the Memorandum and Articles of the Association of the Company to the terms and conditions of the SHA. The need for this alignment should be viewed from the overall objective of the Agreement which is to regulate the relationship of the Parties to the Agreement as Shareholders.

20. The Memorandum and Articles of Association of a Company sets out the objects of the Company and declares that the members have come together to form the Company and importantly, the duties and responsibilities of its Members. As correctly pointed out by Mr. Nyaribo for the Petitioners it is the Constitution of the Company. It is therefore a fundamental principle of Company Law that a Company's

Memorandum and Articles of Association give rise to a Contract not only between every member and the Company but also among the Members of the Company *inter se*. If the objective of the SHA is to regulate the relationship between the Shareholders of the Company in that capacity and the Shareholders have covenanted, through clause 17.2, that any dispute, controversy, or claim arising out of or in connection with the SHA will be referred to Arbitration, then it only seems sensible that any dispute, controversy or claim arising out of or in connection with the document that constitutes the Company should not be placed before a different forum otherwise that would not be in consonance with the terms of the SHA. By dint of the Provisions of clause 11 which requires an alignment of the Memorandum and Articles of Association of the Company with the terms and conditions of the SHA, the Arbitration clause provided by clause 17.2 must be read as being incorporated into the Memorandum and Articles of Association. This would be consistent with the terms of clause 11 which requires any conflict between the provisions of the SHA and the Memorandum and Articles of Association to be resolved in favour of the SHA.

21. Another issue raised is that the Respondent is not a Party to the SHA and cannot seek to rely on the Arbitration Clause therein. It is emphasized that parties to the Agreement are the Petitioners and the 1st and 2nd interested parties. It is however acknowledged even by the Petitioners that the Respondent is a Special Purpose Vehicle created by the 2nd interested Party. The creation of the Respondent being in the Contemplation of clause 18(2) of the Agreement which reads,

> "*Notwithstanding sub-clause (1) above, SML Shareholders have the right to set up a Special purpose vehicle to hold its shareholding in the Company and in such a case shall be entitled to assign all its rights and obligations under the present Agreement to the said Special purpose vehicle. In such event, the parties agree to enter into an assignment agreement to formalize the said assignment*".

There is express recognition under the terms of that clause that the 2nd interested party had a right to set up a Special Purpose vehicle to hold its shareholding in the Company. An important consequence of transfer of shares to the Special Purpose Vehicle, which is stated in the agreement, is that the 2nd interested party would be entitled to assign all its rights and obligations under the SHA to the Special Vehicle Company. In the Petition, the Petitioners have expressed and accepted that all Rights and obligations accruing to the 2nd Interested Party have been transferred to the Respondent. This is what is pleaded in paragraph 15 of the Petition,

> "By virtue of the terms of the MEMATS (as amended) of the Company, SML created an affiliate/subsidiary company, the Respondent, and transferred all its shares in the Company to the Respondent. On transfer of the shares, the Respondent undertook to comply with the terms of the SHA and executed a deed of adherence by which all rights and obligations accruing to SML by virtue of the SHA and the SPA were transferred to the Respondent. Consequently, I am informed by our advocates on record, which information I verily believe to be true, that the Respondent is the right, necessary and proper party to these proceedings." (*emphasis added)*

The Petitioners should not be permitted to now repudiate this position.

22. It has been argued by the Petitioners that in addition to raising Claims under the Companies Act and those falling under the ambit of the Memorandum and Articles of the Company, the Petition raises Constitutional claims which cannot be ceded to an Arbitral Tribunal. The Respondents and the Company take a cynical view of this and submit that this matter is purely a Commercial dispute, a matter for private Law.

23. Similar debate has had to be entertained elsewhere. The question is whether the matter before Court constitutes a Constitutional issue or is a private law issue clothed as a Constitutional matter. This Court was referred to the decision in REVITAL HEALTHCARE (EPZ) LIMITED & ANOTHER VS. MINISTRY OF HEALTH & 5 OTHERS [2015] eKL in which Hon. Emukule J. citing various decisions set out the approach to take in resolving the question. I quote in extensor:-

"What is a constitutional issue" **Nyamu, J** (as he then was) in **Muiruri vs. Credit Bank Ltd & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** was of the view that **"A constitutional issue ... is that which directly arises from court's interpretation of the Constitution."** This court made similar determination in the case of **Maggie Mwauki Mtalaki vs. Housing Finance Company of Kenya [2015] eKLR** stating:

> **"52. The test whether a Petition raises a constitutional issue, and adopted by Tuiyott J in FOUR FARMS LIMTIED vs. AGRICULTURAL FINANCE CORPORATION [2014] e KLR following the decision in DAMIAN BELFONTE vs THE ATTORNEY GENERAL of TRINIDAD AND TOBAGO where it was stated inter….**
>
> **… where there is a parallel remedy, Constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule there must be some feature, which, at least arguably indicates that the means of least redress otherwise available would not be adequate. To seek constitutional relief in the absence of such feature would be a misuse, an abuse of the Court's process."**
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> **53. The above principle was not lost to the Court in JOHN HARUN MWAU VS. PETER GASTROW & 3 OTHERS [2014] E KLR where the court said –"Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights.**
>
> **… It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so."**

54. The Constitution is not to be invoked unless the constitutionality is itself in question, in LEONARD JEFWA KALAMA AND ANOTHER vs. CONSOLIDATED BANK OF KENYA LTD. AND 3 OTHERS [2014] E KLR, the court said-

"unless it can be shown that the law itself is against the constitution, the sale of charged

property in accordance with due process of that law cannot be held to be unconstitutional deprivation of property within Article 40 of the constitution, this is because the constitution has as one of its principles of governance and national values under Article 10, the doctrine of the rule of law."

11. The issue of whether the Petitioners' rights were violated by the PPB overstepping their mandate will only become determinable upon establishing whether the PPB has indeed acted *ultra vires*. The constitutional issue therefore, if any, only arises as a conditional issue and may not in fact arise if the court finds that the PPB acted *intra vires* after all. The Supreme Court in **ICJ (K) v. A.G. & 2 Others S.C. Cri. Appeal No. 1 of 2012 on its part opined that th**e issue of enforcement of Bill of Rights should not be a collateral question when presented before the court. The Court did also adopt the Principle of Constitutional Avoidance in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** in the following terms:

> **"[256]...The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995**
>
> **(3) SA 867 (CC) the Constitutional Court, Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:**
>
> **"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue,that is the course which should be followed."**

This Court takes this well beaten path.

24. There is hardly any Right in Private law in which a Constitutional issue cannot be sighted. As a way of illustration, an unlawful exercise of a Chargee's Statutory Power of Sale allegedly carried out under the Provisions of the Land Act which leads to the loss of a Chargor's property, though an issue under the Land Act, can be said to touch on the Chargor's Constitutional Right to Property guaranteed under Article 40 of the Constitution. However, where Private law either through a legislative provision or common law or contract grants an efficacious remedy to a grievance, then it would be an abuse of Court process to seek a Constitutional relief. As a General Principle where it is possible to decide any case, Civil or Criminal, without granting a Constitutional Relief or Remedy then disposal in that manner should be followed.

25. Let me probe whether the issues raised as Constitutional questions in this matter can be efficaciously dealt with at a Private Law forum. These issues appear in paragraphs 33 to 49 of the Petition and can be broken down.

26. It is asserted that the Petitioners Right to acquire, use and own property as envisioned under Article 40 of the Constitution has been breached. However, in elaborating the breach the Petitioners plead that the 2nd interested party and Respondent have unprocedurally and illegally commenced a process of diluting the shareholding of the Petitioners without following the procedure laid down by the Companies Act and the Memorandum and Articles of Association of the Company. The SHA is also mentioned. Is this not an admission that the provisions of The Companies Act and the Contractual arrangements between the Shareholders provide the answer to the Petitioners' concern?

27. This is repeated in the averment in regard to the Petitioners' right to Fair Administrative Action. The Respondents are accused of flouting the provisions of the Companies Act, the subsidiary legislation made thereunder and the Memorandum and Articles of Association in respect to the Rights' issue.

28. Hear what the Petitioners say in respect to their Right of Access to Information. Paragraph 45 is the bedrock of this complaint in which it is averred,

> "45. Through many letters and request made at Board meetings the Petitioners had made specific request for information which request for information was flatly ignored or rejected with full knowledge that the information sought, was as of rights available to the Petitioners as of right under the provisions of the SHA and the SPA whether in their capacity as shareholders or Board of Directors."

The Petitioners are simply saying that whilst the provisions of the SHA and the SPA adequately protect their right to certain information those provisions have been breached. A suggestion that an order to compel the Respondent and Interested Parties to adhere to those provisions would be a sufficient redress in this regard.

29. It is fairly clear to this Court that the Petitioners are basically disguising issues of Company law as Constitutional Questions and they should not be allowed to avoid the Forum which they had chosen for resolving their disputes by invoking the name of the Constitution.

30. It is common ground that there will be no resort to the Arbitral Clause if there is in fact no dispute between the parties with regard to the matters agreed to be referred to Arbitration. The Respondent argues that the reading of clause 17(2) is wide and the use of the words "any dispute" was intended to mean referral of all and every dispute (without exception) to Arbitration. The Court is also urged to give regard to the definition of dispute under the provisions of clause 17.1.1. which reads:-

> "17.1.1. In the event of any dispute, controversy or claim arising out of or in connection with this agreement, either party (The requesting party) may serve a formal written notice. (The notice of Dispute) on the other party that a dispute has arisen."

31. The Petitioners argue that none of the claims made in these Proceedings can be deemed or considered to arise out of in connection with the SHA. It is argued that the issues are in respect to the Memorandum and Articles of Association and the Companies Act and that the reliefs sought by the Petitioners make no allegation of breach of the SHA.

32. As a way of introduction to the claim, The Petition points to three Agreements as being the basis of the interaction between the Petitioners and the Respondent. These are the SPA, the SHL and the Management Agreement. In addition is the Memorandum and Articles of Association. After giving particulars of what it views as mismanagement of the Company and instances of oppressive and prejudicial conduct, the Petitioners unequivocally state as follows in paragraph 31,

> "All these actions go against the Companies Act, the MEMATS of the Company, the SHA, good corporate governance and best practice and in totality, are oppressive and prejudicial to the minority shareholders/members".

33. In regard to the Prayers in the Petition, Prayer (e) specifically touches on the SHA. And so by the Petitioners' own Pleadings, it is evident that the dispute touches on issues arising or in connection with the Agreement or else it would not make sense to complain of its breach and to therefore seek its compliance. As to matters touching on the Memorandum and Articles of Association, I have already found that the Arbitral Agreement necessarily applies to disputes between Members arising therefrom.

34. Let me now consider the argument that the Arbitration agreement is null, void, and inoperative and is therefore incapable of being performed. The basis of this argument is threefold:-

(i) The Notice of a dispute or difference has not been issued as required under clause 17.1.1 of the SHA.

(ii) The Petitioners will not be in a position to enforce the award as in the Republic of South Africa is not a reciprocating Country for purposes of The Foreign Judgements [Reciprocal Enforcement] Act, Cap 43.

(iii) The Notice of a dispute or difference even if issued was not issued within 90 days of the occurrence or discovery of the matter or issues giving rise to the dispute which is a mandatory requirement under clause 45.3 of JBC Agreement.

35. The Foreign Judgement [Reciprocal Enforcement] Act, cap 43 of the Laws of Kenya is an Act of Parliament which makes provisions in Kenya for enforcement of Judgements made in foreign Countries which accord reciprocal treatment to Judgements of our Courts. The Judgements to which the Act applies are those in section 3 of the Act:-

(1) Subject to subsections (2) and (3), this Act applies with respect to—

(a) a judgment or order of a designated court in civil proceedings whereby a sum of money is made payable, including an order for the payment of a lump sum as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;

(b) a judgment or order of a designated court in civil proceedings under which movable property is ordered to be delivered to any person, including an order for the delivery of movable property as part of a scheme for the provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of another;

(c) a judgment or order of a designated court in criminal proceedings for the payment of a sum of money in respect of compensation or damage to an injured person or for the delivery of movable property by way of restitution to an injured person;

(d) a judgment given in any court on appeal against a judgment or order of a designated court referred to in paragraphs (a) to (c);

(e) a judgment of a designated superior court for the costs of an appeal from a subordinate court, whether or not a designated court, or from an award referred to in paragraph (f); and

(f) an award in arbitration proceedings, if the award has, under the laws in force in the country where it was made, become enforceable in the same manner as a judgment given by a designated court in that country.

(2) This Act applies to a judgment referred to in subsection (1) if it—

(a) requires the judgment debtor to make an interim payment of a sum of money to the judgment creditor; or

(b) is final and conclusive as between the parties thereto,but a judgment is deemed to be final and conclusive notwithstanding that an appeal may be pending against it, or that it may still be subject to appeal, in the courts of the country of the original court.

(3) This Act does not apply to a judgment or order—

(a) whereby a sum of money is payable or an item of movable property is deliverable in respect of taxes or other charges of a

similar nature or in respect of a fine or other penalty;

(b) to the extent to which it provides for the payment of a sum of money by way of exemplary, punitive or multiple damages;

(c) for the periodical payment of money as financial provision for, or maintenance of, a spouse or a former or reputed spouse or a child or other person who is or was a dependant of the person against whom the order was made;

(d) in a matrimonial cause or matter, or determining rights in property arising out of a matrimonial relationship, not being a judgment referred to in paragraph (a) or (b) of subsection (1), whereby a sum of money is payable or item of movable property deliverable;

(e) in proceedings in connection with the custody or guardianship of children;

(f) in proceedings concerning the administration of the property or affairs of a person who is incompetent or incapable of managing and administering his property and affairs;

(g) in a matter of succession to, or administration of, estates of deceased persons whereby a sum of money is payable or movable property is deliverable;

(h) in a matter of social security or public assistance whereby a sum of money is payable by or to a public authority or fund;

(i) in bankruptcy proceedings or in proceedings for the winding-up or re-organization of a corporation or in proceedings for judicial arrangements, compositions or similar matters;

(j) in proceedings relating to damage, death or injury caused by occurrences involving nuclear matter or the emission of ionising radiation;

(k) of a designated court in any proceedings if—

(i) the bringing of those proceedings in that court was contrary to an agreement, or to an instrument in respect of which the proceedings were instituted, whereby the dispute, or the proceedings, were to be settled otherwise than in the courts of the reciprocating country; and

(ii) those proceedings were not brought in that court by, or with the agreement of, the person against whom the judgment was given;

(iii) that person did not counterclaim in the proceedings or otherwise submit to the jurisdiction of the court;

(l) which is regarded for the purposes of its enforcement as a judgment of a designated country but which was given in another country;

(m) given by a designated court in proceedings founded on a judgment of a court in another country and having as their object the enforcement of the latter judgment"

36. The Foreign Judgement (Reciprocal Enforcement (Extension of Act) order 1987 has a schedule of Countries declared to be reciprocating Countries for the purposes of the Act. South Africa is not one such Country and so that even if the South African legislation had provisions for recognition and enforcement of the Award of the Arbitral as a Decree of Court (of similar effect to the provisions of Section 36 (1) of our Arbitration Act) then it could not be enforced by dint of the Foreign Judgement [Reciprocal Enforcement] Act Cap 43.

37. But to look to the Foreign Judgement [Reciprocal Enforcement] Act cap 43 is to miss the point because an International Arbitration Award can be recognized as binding and enforceable under the provisions of Section 36(2) and 36(5) of The Arbitration Act which reads:-

"(2) An international arbitration award shall be recognised as binding and enforced in accordance to the provisions of the New York Convention or any other convention to which Kenya is signatory and relating to arbitral awards".

"(5) In this section. the expression "New York Convention" means the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations General Assembly in New York on the 10th June, 1958, and acceded to by Kenya on the 10th February, 1989, with a reciprocity reservation".

Important to note from subsection (5) is that the Accession by Kenya was with a Reciprocity Reservation.

38. A copy of the Status on the Convention on the Recognition and Enforcement of Foreign Arbitrator Awards (New York, 1958) has been made available to the Court. Note (a) to the Status Report is the Reservation made by Kenya when Acceding to the Convention and reads:-

"This state will apply the Convention only to recognition and enforcement of awards made in the territory of another contracting state".

The same status report shows that South Africa is a contracting party having acceded to the Convention on 3rd May 1976 with an effective date 1st August 1976. It is common cause that by dint of Article 1(b) of The Constitution, any Treaty or Convention ratified by Kenya shall form part of the Laws of Kenya under this Constitution. For that reason the High Court of Kenya can receive for Recognition and Enforcement a Foreign Arbitral Award made in South Africa, a territory of another contracting State.

39. Taken up as well for the Petitioners is that the Notice of a Dispute or difference contemplated by clause 17.1.1 of the SHA has not issued and a Referral Order cannot be made. An argument, I understand to be that the Application is premature. The Court reproduces clause 17.1 again:-

17.1.1. In the event of any dispute, controversy or claim arising out of or in connection with this Agreement, either party (the "Requesting Party") may serve a formal written notice (the "Notice of Dispute") on the other Party that a dispute has arisen.

17.1.2 The Parties shall use their best endeavours to settle such dispute amicably within a period of thirty (30) days from the date on which the Notice of Dispute was served by the Requesting Party on the other Party.

17.1.3 If the Parties are unable to resolve the dispute within the period referred to in Clause 17.1.2, they shall refer the matter to arbitration as provided for in clause 17.2.

40. In arguing this point Mr. Nyaribo referred the Court to two decisions. In Nanchang Foreign Engineers Company (k) Ltd vs. Easy Properties Kenya Limited [2014] eKLR Hon. Kamau J, held,

"It is very clear parties from the aforesaid clause cannot proceed for determination in an Arbitral proceeding before an amicable settlement has been attempted. Attempt of an amicable settlement was a condition precedent before the dispute was referred to Arbitration. Neither the Plaintiff nor the Defendant provides the Court any evidence to show that they had indeed attempted such amicable settlement. On this ground alone, the Defendants application would automatically fail as referral to arbitration would be premature".

Cited as well is my decision in Acme Apartments Ltd vs. Deepak Krisha t/a Team 2 Architects & Another [2017] eKLR which shall be discussed shortly.

41. In replying to this argument, Mr. Kirungo asked the Court to consider that the Petitioners who are the initiators of the Dispute rushed to Court without invoking clause 17.1.1 and nothing should turn on it.

42. First I make a few comments on the decision in Acme (*Supra).* That Decision was in respect to Arbitration provided under subsidiary legislation (the Architects and Quantity Surveyors Bylaws) and was not in respect to an Arbitral Agreement entered by parties in a Contract. The finding of the Court in paragraph 37 which was emphasized by the Petitioners was as follows,

"37. That has a clear implication as to whether A.7 on Arbitration can be triggered. This is because that Arbitration mechanism can be invoked or commenced only where any difference or dispute cannot be determined in accordance with paragraph (a) of clause A6 (See the provisions of clause A.6 reproduced in paragraph 34 of this Decision). As there is no agreement to actuate a reference under clauses A.6, a Referral to Arbitration cannot be reached."

The purport of the Court's decision was that there was in fact no agreement by the parties to invoke the Dispute Resolution Mechanism availed by the Bylaws. This is distinguishable from the matter at hand where there is an Arbitral Agreement.

43. The circumstances here are more akin to those in Nanchang *(supra)* where although Hon. Kamau J. took the view that notwithstanding her finding that the referral to arbitration may have been premature, she could nevertheless refer the dispute to amicable settlement. This is what the Judge held,

"Notwithstanding the above, it does not, however, mean that the Court would be powerless to refer the dispute to amicable settlement. The Supreme law and enacted legislation clearly shows that the Court has power to refer dispute to Alternative Methods of Dispute Resolution".

I identify with this view otherwise Arbitral Agreements which have to be preceded with an attempt at amicable settlement will easily be circumvented by a party rushing to Court without first attempting amicable settlement and then resisting an application for Referral to Arbitration on the grounds that it is premature because amicable settlement was not given a chance. A party who ignores a step in a Dispute Resolution Process which has been freely agreed will not be allowed to take advantage of his/her misfeance to avoid an Arbitral Agreement. Having found that the matters in dispute herein are the subject of the Arbitral Agreement, I further find that by commencing the Petition before attempting the amicable solution, the Petitioners overlooked that step and cannot rely on it to gain an advantage.

44. The findings above made in respect to the Provisions of Clause 17.1.1 apply to the arguments raised in respect to Clause 45.3 of the JBC Agreement.

45. For the reasons stated, I allow the Application dated 6th June, 2018 with costs.

Dated, Signed and Delivered in Court at Nairobi this 20th day of July, 2018.

F. TUIYOTT

JUDGE

PRESENT;

Nyaribo for Petitioners

Kamugo for Respondent/2nd Interested party

Gachuhi for 1st Interest Party

Nixon - Court Assistant