REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 203 OF 2020

BERNERD OUMA BABU.....CLAIMANT

-VERSUS-

WHITESPACE TECHNOLOGIES LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday* 30th July, *2020)

RULING

There are three applications subject of this ruling. The claimant filed the notice of motion dated 20.05.2020 through Maina & Onzare Advocates. The application was under Article 159 (2) of the Constitution of Kenya, Rule 19 of the Employment and Labour Relations Court (Procedure) Rules 2016, Order 51 Rule 1, Order 46 Rule 3(2) of the Civil Procedure Rules, Section 6 of the Arbitration Act and Rules 2, 3 and 11 of the Arbitration Rules 1997 and all other enabling provisions of the law. The pending prayers for consideration are for orders:

1) That the Honourable Court lifts the suspension of the claimant from employment and orders his immediate reinstatement pending hearing and determination of the suit.

2) The Honourable Court grants an injunction restraining the respondent either by themselves, employees, servants or agents from subjecting the applicant to disciplinary proceedings pending the hearing and determination of the suit.

3) That the Honourable Court be pleased to stay the proceedings pending exhaustion of the dispute resolution mechanism under clause 22 of the shareholders' agreement.

4) That the costs of the application be provided for.

The application was based on the attached supporting affidavit by the claimant and upon the following grounds:

a) It was agreed that the claimant shall occupy the position of the Chief Executive Officer of the respondent for a period of 5 years' subject of the shareholders' agreement dated 10.12.2018.

b) Clause 22 of the shareholders' agreement advises that any dispute arising between the shareholders in relation to any matter arising out of agreement, then such a dispute shall be dealt with in the manner hereinafter set forth. The dispute resolution mechanism set out includes but is not limited to mediation and arbitration.

c) The respondent issued the claimant with a notice to show cause dated 31.03.2020. The claimant responded and after correspondence on the issues raised the claimant declared a dispute by his letter dated 12.05.2020.

d) By reason of the dispute resolution clause and with the claimant having declared a dispute on the basis of the correspondence exchanged, the respondent ought to have had its board of directors appoint a mediator to mediate. Any dispute as to the performance of his functions is subject of the dispute resolution clause of the shareholders' agreement of 10.12.2018.

e) The respondent has opted to also prefer charges and conduct disciplinary hearing on the basis of the Mini Group Human Resource Manual of which the respondent is not a party to.

f) Referring the matter to alternative dispute resolution mechanisms as agreed upon by the parties will save time and realise the intention of the oxygen principles and Article 159(2) (c).

g) That failure to abide by the terms of the dispute resolution mechanism in the shareholders' agreement will occasion the claimant

great prejudice.

The respondent opposed the application by filing on 26.05.2020 the replying affidavit of John Kiragu, the head of human resource at Mini Management Services Limited (MMSL) which provides human resource services to the respondent. The respondent appointed KRK Advocates LLP to act in the matter. The respondent's case is as follows. The Mini Group HR Manual was inaugurated on 05.02.2016 at a ceremony attended by, amongst others, the claimant. The Manual became effective on 07.03.2016. The respondent admits that the respondent employed the claimant as the Operations Director and Chief Executive Officer. The claimant was employed as the Operations Director by the letter dated 20.03.2014. His employment as Chief Executive Officer for a term of 5 years was pursuant to clause 6.6 of the shareholders' agreement between the claimant and Pall Mall Holdings Limited dated 10.12.2018. Clause 6.6 of the agreement provides that the claimant is answerable to the respondent's board of directors and subject to the proper performance of his fiduciary duties.

The respondent's further case is as follows. In early 2020 the said head of human resources for MMSL received information from the respondent's management concerning the claimant's loyalty and commitment to the respondent and alleged breach of fiduciary duties. A background check was undertaken by the respondent and allegations found to be credible. In accordance with the Mini Group HR Manual the respondent's Board referred the case to the human resource office for further investigations and recommend if disciplinary process could be commenced. Investigations were concluded and the respondent decided to place the claimant on 30 days' suspension pending conclusion of investigations. The letter to show cause dated 31.03.2020 alleged that claimant had failed to account for Kshs. 8, 867, 743.85 concerning three projects, conflict of interest in awarding subcontracts, failure to foster harmonious working environment with other staff and respondent's directors, and failure to adhere to internal procedures for prequalifying subcontractors and payment procedures. During suspension, the salary would be paid to the claimant. The claimant replied by the letter dated 06.04.2020 stating that the respondent had failed to follow the disciplinary procedure in the policy document No. WST/PR/HRM/07. However the respondent's case is that the said policy did not apply because it expressly excluded the claimant who had a written contract with the respondent, the policy referred to group HR Manual as the main document governing disciplinary process, and under the policy an employee would be send on suspension only after replying to a letter to show cause but which would defeat investigations in the instant case especially that the claimant was the Chief Executive Officer and would frustrate the investigations.

The claimant was informed that his explanations were found unsatisfactory (per letter of 22.04.2020) and invited to a disciplinary hearing fixed for 29.04.2020 per respondent's letter of 22.04.2020. There after the claimant requested for time to prepare for defence at the hearing and more time was allowed per letter of 29.04.2020. By the letter dated 12.05.2020 the claimant contested the disciplinary procedure as invoked. The claimant alleged that the respondent was not part of Mini Group and the Mini group HR Policy Manual did not apply because his employment was governed by the shareholders' agreement and any dispute thereof should be resolved by mediation or arbitration.

The respondent's further case is that the Mini Group HR Manual bears, inter alia, the respondent's logo and the respondent was part of its formulation way back in 2016, policy document WST/PR/HRM/07 approved by the claimant on behalf of the respondent refers to the Mini Group HR Manual, previous redundancy and disciplinary cases by respondent have invoked the Manual, the claimant and other staff enjoy pension benefits of Mini Group, and respondent has enjoyed other human resource functions offered by MMSL. The claimant is therefore aware of the role of MMSL and the Manual. The shareholder's agreement does not apply because there exists a contract of service between the parties. It is proper that the claimant goes through the disciplinary process to clear his name as the respondent's Chief Executive Officer. The delay in determining the disciplinary case has left the respondent without proper leadership. The respondent says it has treated the claimant fairly throughout the process.

The respondent's further case is that mediation and arbitration does not meet the purpose of a disciplinary hearing requiring the claimant to exculpate in view of the levelled allegations. The claimant is answerable to the respondent's board and only the board and not a mediator or arbitrator can handle the disciplinary case. In any event clause 22 of shareholders' agreement to resolve disputes between shareholders by mediation or arbitration does not apply to an employment dispute like the instant dispute. The shareholders' agreement only gives the claimant a tenure of 5 years but all other terms of service are in the contract of service.

The claimant filed the application dated 11.06.2020 under Article 41 of the Constitution, 2010, Order 51 rule 1 of the Civil Procedure Rules and Part IV of the Employment Act and all enabling provisions of law. The claimant prayed that pending the *inter parte* hearing, the respondent continues to pay the claimant's salary during the period of suspension; the respondent to continue paying the claimant salary during the period of suspension and pending the hearing of the suit; and costs of the application be provided for. The application was based on the attached claimant's supporting affidavit and upon the following grounds:

a) By reason of shareholders' agreement of 10,12.2018 it was agreed that the claimant shall be the Chief Executive Officer of the respondent for 5 years.

b) A dispute arose suspending the claimant with pay effective 31.03.2020.

c) The court has granted an interim order staying the disciplinary process against the claimant. Thereafter the respondent has changed the terms of the suspension to one without pay. The change is calculated to harass and intimidate the claimant.

The application was opposed by the replying affidavit by John Kiragu and Amin Manji sworn 24.06.2020. It was urged for the respondent that in view of the interim Court order staying the disciplinary proceedings, it became clear that the disciplinary proceedings would not be expeditiously decided and therefore pay during the suspension became not sustainable. To the two affidavits the claimant filed his supplementary affidavits repeating that he was employed pursuant to the shareholders' agreement and that the respondent had no rules providing for suspension without pay.

The application dated 25,06.2020 and filed on 29.06.2020 for the respondent through learned counsel Mr. James Rimui of KRK Advocates was brought under Rule 33(1) (a) and (b) of the Employment and Labour Relations Court (Procedure) Rules, 2016 and Articles 159 (2) (a) and (d) and all other enabling provisions of the law. The respondent prays for orders that the Court be pleased to stay the ex-parte interim orders issued on 25.06.2020 in this matter pending the *inter parte* hearing of the application and consequential to the *inter parte* hearing, the

orders issued on 25.06.2020 and all consequential proceedings thereof be set aside. The respondent also prays for costs of the application. The application was based on the annexed supporting affidavit of James Rimui and upon the following grounds:

a) If the disciplinary proceedings are allowed to continue and the claimant fails to exculpate himself, then the respondent may never recover the salaries paid during the suspension period. The order that the claimant remains on full pay during the suspension and pending the disposal of the applications should be set aside.

b) The orders were given ex parte in circumstances that it was not mistake by the respondent's counsel not to attend court on 25.06.2020.

c) The ex-parte orders were without taking into account the replying affidavits and in particular the hardships the respondent would go through if the salary is paid during suspension and pending determination of the applications.

Parties have filed their respective submissions on the three applications.

The **1st issue** for determination is whether the Court should interfere with the performance of the human resource functions by the respondent namely, continuing and concluding the initiated disciplinary proceedings against the claimant. The claimant's case as per his letter dated 12.05.2020 is as follows:

a) The HR policies by MMSL do not apply because MMSL is merely a human resource consultant retained by the respondent on case to case basis and its policies do not apply to the claimant's disciplinary case.

b) He appreciated time extended to enable him prepare for his defence.

c) Two Board members senior to him should sit as panel members in his disciplinary hearing and as per the respondent's HR Manual.

d) The shareholders' agreement dated 10.12.2018 provides that the claimant serves as Chief Executive Officer for 5 years. The disciplinary proceedings flow from his execution of duties as Chief Executive Officer so that the dispute resolution procedures of mediation or arbitration in the agreement applied. In view of the show cause letter and correspondence exchanged it was safe to assume that a dispute had been declared within clause 22 of the shareholders' agreement. He invited the board of directors to appoint a mediator as provided in the agreement.

e) The claimant disputed that the respondent was a member of MMSL.

By the letter dated 15.05.2020 the respondent replied as signed by John Kiragu, Head of HR on the respondent's letterhead and stated:

a) Reference to Mini Group does not change the respondent's shareholding. Pall Mall Holdings Limited held 760 ordinary shares and the claimant 240 ordinary shares. The claimant had attended the unveiling of the HR Manual by MMSL that he now disputed. MMSL had always handled the respondent's HR matters as addressed to it by the claimant The HR department was facilitative and the disciplinary panel would make the final decision.

b) The disciplinary panel would constitute a representative from HR department and two persons senior to the claimant but whose identity would not be disclosed.

c) It was true that the claimant's employment was pursuant to the shareholders' agreement with a tenure of 5 years. However, nothing in clause 22 of the agreement provided that disciplinary proceedings against the claimant as Chief Executive Officer would be in accordance with mediation or arbitration. The disciplinary proceedings are not such dispute contemplated in clause 22.

d) As an employer the respondent was entitled to commence disciplinary proceedings against an employee like the claimant.

In deciding whether to interfere in the employer's prerogative to undertake human resource functions, the Court has held that the jurisdiction to do so shall be exercised very sparingly. As submitted for the respondent, in **Rebecca Ann Maina and 2 Others –Versus- Kenyatta University of Agriculture and Technology [2014]eKLR** the Court held that the it will only intervene in compelling and exceptional cases when the process is fundamentally flawed to occasion serious injustice or where the process was marred with irregularities. Further the intervention would not be to stop the disciplinary process but to right things. In **Geoffrey Mworia-Versus- Water Resources Management Authority and 2 others [2015]eKLR** the Court held thus, **"The principles are clear.**

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the instant case, the parties are in agreement that the claimant is the respondent's Chief Executive Officer by reason of clause 6.6 of the shareholders' agreement dated 10.12.2018 and which states thus, "**It is agreed that for the period of five (5) years with effect from the date of execution of this Shareholders' Agreement, BVB being the founder member herein shall be the CEO of the Company subject**

to his proper performance of his fiduciary duties and shall be answerable to the Board. Thereafter, the said position shall be discussed and agreed on by the Board of Directors." It is also not in dispute that the claimant is also a shareholder within the meaning of the shareholders' agreement herein. It is also not in dispute that clause 22 of the agreement provides for dispute resolution. Clause 22.2 of the agreement provides that if any dispute arises between the shareholders in relation to any matter arising out of this agreement, then such dispute shall be dealt with in the manner hereinafter set forth. Clause 22.3 states that for purposes of the clause "**dispute**" shall include, but not be restricted to:

a) any action by any shareholder or director contrary to the provisions of this agreement or the Constitution;

b) any dispute concerning the validity, existence and/ or implementation and/or interpretation and/or application of any of the terms of this agreement;

c) any dispute concerning the respective rights and/or obligations of shareholders and the company in terms of and/or arising out of the conclusion, breach and/or cancellation or termination of the agreement.

The clause proceeds to provide for giving notice of dispute, appointment of mediator appointed by shareholders, timelines for mediation process, and within set time lines the appointment of an arbitrator.

The Court has considered the submission for the respondent that the pending disciplinary proceedings are not a dispute within clause 22. However, it is clear to the Court that by reason of the allegations in the letter to show cause, an issue has arisen for interpretation of the agreement being, in terms of clause 6.6, whether the claimant has failed in the proper performance of his fiduciary duties and so his 5 years' tenure should lapse prematurely as proposed in the show cause letter. That is more so especially that, in the findings of the Court, the claimant's roles as a shareholder and as a Chief Executive Officer are intertwined and the alleged misconduct is in the nature of the question whether his alleged conduct as a Chief Executive Officer and shareholder was contrary to provisions of the agreement and the Constitution as contemplated in clause 22.3.2 of the agreement. In any event, the allegations are about respective rights of the claimant as both Chief Executive Officer and a shareholder as contemplated in clause 22.3.3. A collateral issue is the source of the applicable policies in the disciplinary proceedings and which goes to interpretation of the appointment of the claimant as Chief Executive Officer under clause 6 of the agreement.

In view of the findings the Court returns that the parties are bound by the shareholders' agreement and the dispute whether the claimant being a shareholder and Chief Executive Officer has breached his fiduciary duty as alleged is matter clearly contemplated in the dispute resolution mechanism in clause 22 of the shareholders' agreement. The Court finds that the claimant has established a *prima facie* that the respondent is proceeding in breach of clause 22 of the shareholders' agreement and which justifies the Court's intervention. Further, the Court finds that if the parties' own shareholder agreement is not upheld would constitute an injury incapable of being remedied in damages. In any event it is trite that parties are bound by their own agreements. The Court further upholds the respondent's submission that in the circumstances the role by the Court is to put things right and not to scuttle the pending disciplinary proceedings all together. The Court will therefore issue an order that pending the hearing and determination of the suit and by reason of the allegations in the show cause letter herein, the initiated disciplinary proceedings amount to a dispute subject to clause 22 of the shareholders' agreement to be continued and determined in accordance with the procedures set out in the said clause 22 of the shareholders' agreement.

The Court has considered the respondent's submission that in view of the case having been filed in Court, the respondent was not in control of the expeditious determination of the pending disciplinary proceedings. The Court has remitted the disciplinary proceedings for determination in accordance with clause 22 whose regime places the procedure in the respondent's shareholders and within prescribed time lines. Accordingly, the respondent should be able to expeditiously get the matter determined within the agreed procedure. The Court considers that as per the respondent's submission suspension does not mean an end to the employment contract and in absence of an agreement on terms of suspension, the respondent should continue paying the monthly salary pending conclusion of the dispute resolution process under clause 22 of the shareholders' agreement. While making that finding it is clear to the Court that the respondent was willing to pay during the period of suspension subject to expeditious determination of the disciplinary case and the parties have not agreed upon no payment during the suspension period. Further, clause 22.1 of the shareholder agreement provides that the clause shall not preclude any party from obtaining interim relief on an urgent basis from a court of competent jurisdiction pending the decision of the arbitrator and the Court considers that in the circumstances of the case, the claimant has established that until the issue of alleged breach of his fiduciary duty as alleged in the letter to show cause is established one way or the other, his 5 years' tenure is otherwise still running.

To balance justice for the parties, the costs of the three applications shall be in the cause.

In conclusion, the three applications dated 20.05.2020, 11.06.2020 and 25.06.2020 respectively are hereby determined with orders:

1) That pending the hearing and determination of the suit and by reason of the allegations in the show cause letter herein, the initiated disciplinary proceedings amount to a dispute subject to clause 22 of the shareholders' agreement to be continued and determined in accordance with the procedures set out in the said clause 22 of the shareholders' agreement.

2) That pending the hearing and determination of the suit or pending conclusion of the dispute resolution process under clause 22 of the shareholders' agreement and whichever is earlier, the respondent to continue paying the claimant's monthly salary during the period of suspension in issue.

3) Costs of the three applications in the cause.

Signed, dated and delivered by the court at Nairobi by video link this Thursday, 30th July, 2020.

BYRAM ONGAYA

JUDGE