

IN THE HIGH COURT OF TANZANIA
(DAR ES SALAAM DISTRICT REGISTRY)

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 21 OF 2017

(In the matter of an application for the removal of Mr. Karel Daele, the adjudicator appointed by the Respondent pursuant to an agreement between the Applicant and the Respondents)

BISMARCK HOTELS LTD.....APPLICANT

VERSUS

KAREL DAELE.....1st RESPONDENT

PANGEA MINERALS LIMITED.....2nd RESPONDENT

BARRICK EXPLORATION AFRICA LIMITED.....3rd RESPONDENT

ACACIA MINING PLC.....4th RESPONDENT

HON. JOSEPH S. WARIOBA.....5th RESPONDENT

RULING

Date of last Order: 24/7/2018

Date of Ruling: 20/9/2018



Munisi,J

The applicant Bismark Hotels Ltd instituted the present application under a range of provisions including; Order XLIII (2), section 68 (e), and section 95 of the Civil Procedure Code, Cap 33 RE 2002, section 2(3) of the Judicature and Application of Laws Act, Cap 358 RE 2002; Article 108 (2) of the Constitution of the United Republic of Tanzania 1977 as amended and any other enabling

provisions of the law. Initially the application was preferred against five respondents, however on 24/7/2018, when Mr. Nyange, learned counsel appeared for the fifth respondent, the issue of the latter's locus in the proceedings was put to scrutiny and it transpired that his presence in the application was unnecessary. The court thus granted the prayer to have the name of the fifth respondent expunged from the record, leaving the other four respondents untouched. The applicant is seeking the following orders:

EX- PARTE:

1. That the Adjudication proceedings be stayed pending hearing and determination inter-partes of the Application for removal of Mr. Karel Daele appointed Adjudicator for the 2nd 3rd and 4th Respondents.
2. An order for removal of Mr. Karel Daele the appointed Adjudicator of the Respondents from the conduct of the matter as an Adjudicator.
3. An order that a new and an independent Adjudicator be appointed by the Respondents.
4. Any other reliefs which this Honourable Court may deem fit to grant.
5. Costs of the Application.

INTER-PARTES:

1. An order for removal of Mr. Karel Daele the appointed Adjudicator of the Respondents from the conduct of the matter as an Adjudicator.

2. An order that a new and an independent Adjudicator be appointed by the Respondents.
3. That the Adjudication proceedings be stayed pending determination of the Application.
4. Any other reliefs which this Honourable Court may deem fit to grant.
5. Costs of the Application.

On 24/7/2018, Mr. Onesmo Mpinzile, learned counsel for the applicant, Mr. Mponda, learned counsel for the 1st respondent, Miss Faiza Salah, learned counsel for the 2nd, 3rd and 4th respondents by consent sought court's leave to argue the application by way of written submission which prayer was granted. The court thus fixed a filing schedule which was duly complied with by the parties.

The facts giving rise to the application as gathered from the contents of the supporting affidavit and the counter affidavits filed thereto revolve around an adjudication clause contained in a Prospecting and Mining Option Agreement executed between the applicant and the 2nd respondent way-back in 1995. Parties agreed in the said agreement that in case of a dispute each party will appoint an adjudicator and the Tanzanian laws were agreed to prevail. The said clause is couched as follows:

"Should any dispute arise between the parties as to the implementation or the interpretation of this agreement, such dispute shall be referred to adjudication for decision, and each party shall appoint one adjudicator. Should the two

adjudicators fail to reach a decision, they shall jointly appoint an umpire whose decision shall be final and binding on the parties. The adjudicators and umpire shall act as experts and not as arbitrators and shall not be bound by the provision of any Act in substitution thereof, and their decision shall be final and binding on the parties."

Following a dispute that arose in the course of implementing the agreement, the clause was invoked and each side appointed its adjudicator. On its side, the applicant appointed Hon. Joseph S. Warioba, while the 2nd 3rd and 4th respondents appointed the 1st respondent, Mr. Karel Daele. As no objection was expressed by either side regarding the appointed adjudicators, the adjudication proceedings took off on 13/1/2015. However, in the course of the proceedings, applicant raised a concern regarding the independence and impartiality of the 1st respondent upon discovery that he had previously worked as a partner and consultant at Mkono & Co. Law Firm which was the then legal adviser to the respondents. The applicant's claim is that such fact was not within their knowledge at the appointment stage the reason why they failed to raise it; they also blamed the 1st respondent for the failure to disclose the same to them. Upon this realization, the applicant sought for the 1st respondent's recusal vide a letter dated 25th May 2016 addressed to the Managing Partner, Law Associates Advocates followed by an e-mail to Mr. Daele. The said communications met resistance as the 1st respondent declined the recusal proposal on the ground that his impartiality was not affected by the alleged facts. The said

resistance pushed the applicant's counsel to formally inform the panel for the Adjudication Proceedings that the applicant was still apprehensive of the 1st respondent's impartiality and independence.

The applicant alleged further that in the subsequent investigation carried out on the respondent, new facts were discovered regarding the 1st respondent's background and his involvement with the respondents and their counsel that had not been disclosed. The new facts alleged that the 1st respondent had been working as a co-counsel with one Quinn Emmanuel Urquhart & Sullivan who had been representing the 2nd, 3rd and 4th respondents in a separate case pending before the International Centre for Settlement of Investment Disputes (ICSID). Following the said discovery, on 19/1/2017, the applicant moved the Adjudication Panel for the stay of the interlocutory hearing and issue of directions for filing of the facts. The said application met similar resistance as the earlier one, the 1st respondent maintaining his stance that no good cause had been exhibited to warrant his recusal. The refusal to recuse by the 1st respondent in respect of the second attempt prompted the applicant to file the present application.

In his counter affidavit, Mr. Karel Daele strongly disputed that his impartiality was affected by the facts alleged by the applicant, dismissing them as speculations. He was however candid enough to admit that he once worked at Mkono & Co. Advocates as alleged by the applicant. With regard to the 1st set of alleged facts complained against him, he disputed categorically that he is or

was aware that during his tenure at the said Firm, the 2nd, 3rd, and 4th Respondents received legal services from the Firm or that he ever offered any such legal service to them. In that regard, he said he saw no duty on his part to disclose the alleged conflict of interest which he disputes existed. With regard to the alleged set of facts in the 2nd prayer for recusal, Mr. Daele disputed them strongly on the grounds that they were mere speculations lacking any concrete evidence to substantiate them. He contended further that the applicant failed to show any clear evidence to prove the perceived lack of impartiality or neutrality on his part. He also disputed the allegation that he ever worked with one Honest Lugaila during his tenure at Mkono & Co. Advocates insisting that he never had any relationship with the said Lugaila. With regard to the allegation that he paired as a co-counsel of the respondents' counsel in another matter pending at ICSID which he failed to disclose, he vehemently opposed the allegation on the ground that the respondents were being defended by a different counsel and his involvement was very limited. He thus maintained that no good ground for his recusal had been shown to justify the grant of the application.

As earlier on intimated, the learned counsel complied dutifully with the schedule set for the filing of the respective written submission. I thank them for the very elaborate, resourceful and enlightening submissions. Having studied them, it is apparent that each counsel strenuously presented its side of the case with passion and precision, articulating the reasons and the legal position governing recusal as propounded by case law and the international

guidelines. In addition, each one attached copies of authoritative decisions on the subject supporting their respective positions.

The learned counsel for the Applicant in cementing his position that in the instant matter recusal is necessary for a credible and smooth adjudication in the adjudication proceedings, he referred me to Court of Appeal and High Court decisions in:

- **Issack Mwamasika and 3 others V CRDB Bank Ltd, Civil Revision No 6 of 2016 (unreported)**
- **Zabron Pangamaleza V Joachim Kiwaraka & Another (1987) TLR 140**
- **Infinity Communications Ltd V MIC Tanzania Ltd, Miscellaneous Commercial Cause No 233 of 2015 (unreported) and;**
- **An extract from Karel Daele's book titled "Challenge and Disqualification of Arbitrators in International Arbitration."**

Likewise, the learned counsel for the 1st respondent in countering the applicant's stance and augment his position to the effect that; the reasons for recusal advanced by the applicant do not affect the independence or impartiality of Mr. Karel Daele, filed the following authoritative decisions together with some extracts, namely:

- **Kambembe Enterprises Ltd V N.B.C Ltd and Another, Civil Case No 52 of 2011 (unreported)**

- **Golden Globe International Services Ltd V MIC Tanzania Ltd and 3 Others, Miscellaneous Commercial Case No 118 of 2016** (unreported).
- **Issack Mwamasika and 3 others V CRDB Bank Ltd, Civil Revision No 6 of 2016** (unreported)
- **Mwita Chacha and 4 Others V R, Criminal Revision No 1 of 2007** (unreported)
- **Jayantkumar Chandubai Patel @ Jeetu Patel and 3 Others V the Attorney General and 2 Others, Civil Appeal No 59 of 2012** (unreported)
- Extract from Karel Daele's book - "**Challenge and Disqualification of Arbitrators in International Arbitration.**"

The learned counsel for the 2nd, 3rd, and 4th Respondents opted to support the 1st respondent's position and filed some more decisions, including, the case of **Independence Power Tanzania Ltd and another V Standard Chartered Bank (Hong Kong) Ltd and 2 others Civil Case No 60 of 2014** (unreported).

I truly thank the learned counsel for the very enlightening and resourceful submissions loaded with supporting authoritative decisions. It is apparent from the counsel submissions that while the applicant is alleging; the 1st respondent is countering all the alleged facts, so the word of one against the other. It is also glaring from the rival sworn depositions and respective written submission that some elements have not been strongly disputed. The 1st respondent has for instance admitted that he worked at Mkono & Co. Advocates and that he had limited involvement in

the ICSID as revealed in paragraph 6, 10, 15 and 16 of the 1st respondent's counter affidavit. The same state as follows:

6. That the contents of paragraph 7 of the affidavit are strongly disputed. I state that I am not aware; and was not aware that during my tenure at Mkono & Co Advocates the 2nd, 3rd, and 4th Respondents received legal services from this firm, nor did I offer any legal services to them, consequently there was no duty on my part to disclose the alleged conflict of interest.

10. The contents of paragraph 14(b) of the affidavit are denied and confirm that the Applicant is speculating than stating facts prevailing at the time I was at Mkono & Co. Advocates. I have demonstrated from the beginning my lack of knowledge or relationship between Mkono & Co. Advocates and 4th Respondent.

15. I state further that my involvement in the ICSID case was very limited as I acted for only one of the six claimants (Mr. Francesco Becchetti). As to the alleged failure to disclose this alleged conflict of interest I state that there is no conflict of interest and there was nothing to disclose.

16. The contents of paragraph 15 and 16 of the affidavit are disputed. I state that there is no conflict of interest on my part as adjudicator and the Applicants have not been prejudiced and will not be prejudiced. The application is frivolous.

In view of the above limited admissions on some of the allegations leveled against the 1st Respondent, I have wondered whether even if he maintains that his impartiality and independence are not affected, justice will be seen to be done and the interest of justice realized if he is to preside over as an adjudicator in proceedings where the applicant had expressed such intense apprehension against him. It is trite law as per the case of **Zabron Pangamaleza V Joachim Kiwaraka & Another (1987) TLR 140** that:

"Justice must not merely be done but must be seen to have been done. The safest thing to do for a judicial officer who finds his integrity questioned by litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case unless it is quite clear from the surrounding circumstances and the history of the case that the accused is employing delaying tactics;"

Having closely studied the contents of the Applicant's affidavit together with the annexed documents, there seems to be very strong lack of confidence expressed against the 1st respondent from the moment the applicant learnt of the latter's tenure at Mkono & Co. Advocates. The alleged subsequent investigation which uncovered the additional facts in relation to the 1st respondent's ICSID appearances, just demonstrates the applicant's lack of faith on the 1st respondent's capacity to continue presiding over the adjudication proceedings involving the parties.

I have keenly considered the principles for recusal set in various decisions and extracts pertaining to international standards annexed by the learned counsel in their submission against the rival facts presented in the matter at hand. It is trite law that each case has to be determined on its own merits hence the application of the propounded principles will depend on the facts obtaining in each case. In the instant case, having considered the competing allegations, I have no doubt whether proved or not, the impartiality of the 1st respondent has seriously been challenged. In that regard, I have wondered whether within the spirit of the adjudication clause, the 1st respondent is poised to stand as an adjudicator after this protracted wrangle which has forced parties to knock the court's doors contrary to the spirit of the Agreement. In my considered view, whether the grounds set out by the applicant constitute good ground for recusal of the applicant or not, it is to the best interest of the adjudication process and for justice to be seen to be done for the applicant to step down. I believe for adjudication to succeed, parties have to have trust and confidence to the adjudicators otherwise, the process will be bogged down and it will cause anxiety and frustration to both parties. Further, I am of a firm view that where parties resolve in their agreement to settle their disputes through adjudication or mediation, it means they desire to settle matters pertaining to their relationship outside the court process hence without the strict rules of litigation. In that regard, the application of the principles governing recusal of judicial officers in judicial proceedings have to be construed more strictly to guarantee

independence and impartiality to the consumers of the adjudication. I am of a further view that to instill confidence to parties in such proceedings it is important that the appointed adjudicators be trusted by both sides failure of which no meaningful adjudication will be realized. It is more so considering the fact that the decision of the adjudication panel or the appointed umpire is final and binds the parties.

From the foregoing discussion, I am satisfied that the application has merit and I allow it. Accordingly, I order for the removal of Mr. Karel Daele the appointed Adjudicator of the 2nd, 3rd, and 4th respondents from the conduct of Adjudication Proceedings and direct that a new independent Adjudicator be appointed by the said respondents to pave way for the adjudication to proceed in line with the spirit of the parties' agreement. I make no order as to costs.



A. Munisi
Judge
20/9/2018

Ruling delivered in Chambers in the presence of Mr. Onesmo Mpinzile, learned Counsel for the Applicant Anjelista Nashon, learned counsel for the 1st Respondent and Flora Oberto, learned counsel for the 2nd, 3rd and 4th Respondent, this 20/9/2018.



A. Munisi
Judge
20/9/2018