IN SUPERIOR COURT OF JUDICATURE,
IN THE COURT OF APPEAL SITTING AT
ACCRA ON THE 29TH DAY OF OCTOBER,
2004.

CA.NO.H1/191/2004.

CORAM - TWUMASI, J.A.
AMONOO-MONNEY, J.A.
ANIN-YEBOAH, J.A.

BMC GHANA LIMITED … RESPONDENTS
VRS.
ASHANTI GOLDFIELDS BIBIANI LTD. … APPELLANTS

J U D G M E N T

TWUMASI, J.A. - This appeal from the ruling delivered by the High Court, Accra on the 19th January 2004 sharply brings into focus the fundamental canons for the construction and interpretation of contracts entered into by businessmen, with particular reference to actual or presumed intentions of the parties. Both parties are limited liability companies engaged in the mining industry. By an agreement entered into by them on the 25th July 1997, the appellants herein (defendants in the court below) engaged the respondents (plaintiffs in the court below) to carry out open pit mining operations at the appellants' Bibiani mine. It was an express term of the contract that where the costs to the plaintiffs of executing the work was increased or decreased, as the case might be, by variation in wages, allowance or any other labour connected costs of materials expressed as a component of the contract prices, the payment of the works under the contract would be subjected to adjustment for rise and fall by application of an agreed formula. Germane to this appeal, was a provision or term in the contract on the procedure for dispute resolution, the parties having recognised the human inability to foresee future fortunes ahead of them, however the degree of optimism that they humanly could have mastered for the success of the business. It was provided under clauses 3.25.1, 3.23.2 and 3.25.5 that:-

3.25.1 – " If any difference or dispute arises between the parties

in relation to or in connection with this Agreement, or its construction or in relation to or in connection with the works or the performance thereof, either party may by notice in writing to the other party call for the point or points at issue to be formally resolved by the parties. Both parties shall, as soon as reasonably practicable, submit in writing to the other party details clearly specifying the nature of such question, difference or dispute and call for the point or points at issue to be formally resolved within (28 days) after written submissions are received by each party."

3.25.2 - If the dispute cannot be resolved by the parties to their mutual satisfaction within the twenty-eight day (28 days) as stated in clause 3.25.1, that difference or dispute may be referred to arbitration as hereinafter provided.

3.25.5 - The decision of the arbitrator pursuant to this clause shall be final and binding on the parties and no party or parties shall be entitled to commence or maintain any action or proceedings until the dispute, question or difference has been referred to and considered in accordance with the terms of this clause."

It appears from the facts that, following the execution of this agreement, the parties commenced business in earnest. Then, it happened that disputes began to rear their ugly heads as though providence had intervened to put to the acid test the sincerity of the parties to the agreement.

By a Writ of Summons filed at the High Court, inter alia, a declaration that in terms of the contract upon and executed by the parties on the 25th day of July 1997 "the plaintiff is entitled to rise and fall claims as defined in clause 3.21 thereof."

The plaintiff claimed "a further declaration that by virtue of the Defendant's own past performance in making good the rise and fall claims, it is estopped from denying, refusing and/or neglecting to pay in full all rise and fall due to the Plaintiff from the Defendant.

As was only to be expected, the appellants entered a conditional appearance and followed it immediately by a motion for an order for a stay of proceedings. In the said motion, the appellants contended that the action was not competent and could not be entertained by the High Court and relied upon the provisions in the agreement relating to arbitration where it had been provided that the respondents could not commence the action without first resorting to arbitration as stipulated in the agreement referred to in this judgment. The High Court dismissed the application and this appeal asks this court to set aside the said ruling. The whole ruling turned prominently on the construction of the three clauses of the agreement which I have quoted verbatim previously and in particular the import of the word "may" in clause 3.25.1. The learned trial judge took the view that the said word "may" used in the context of reference of disputes or differences to arbitration should be interpreted as giving an option or discretion to either party to chose between arbitration or a court of law. Three main grounds of appeal were filed on behalf of the appellant and they are:-

(a) The trial judge erred in not granting the application for stay of proceedings.

(b) The trial judge's construction of the word "may" on the agreement between the parties renders nugatory not only the provision for the resolution of disputes and differences by mediation and arbitration but also the provision that neither party shall otherwise commence or maintain an action in court.

(c) The holding that the defendant has not evinced willingness to go to arbitration is unsupportable having regard to respective affidavits filed by the parties and the provision of the Arbitration Act.

Ground one has no substantial impact upon the real issues and it is struck out. The next ground, however is of great moment. Counsel for the appellants hit the nail right on the head when he submitted that the learned trial judge declined the application for stay because he held the wrong view that the word "may" used in the arbitration clause being permissive and empowering, in effect gave the respondents the option to arbitrate or litigate.

Put differently, the learned trial judge held the wrong view that the provisions on arbitration gave the party aggrieved to choose a forum he liked, arbitration or a court. I entirely agree with Counsel on this submission.

It is conceded that the word "may" whenever used in a statute or a private document connotes freedom to exercise a discretion and this is precisely what the agreement under consideration provided.

In the instant appeal, however, the error or misconception that afflicted the mind of the learned trial judge occurred in his determination of the real target at which the parties to the agreement could direct their contractual discretion to effect the disposal of disputes. It is incontrovertible that the agreement gave the parties the right to go to court, but then it made it abundantly clear that that should be exercised as a last resort and upon the fulfillment of specific prerequisites namely the exploration of all the avenues for amicable settlement followed by arbitral proceedings.

The learned trial judge erroneously held the view that arbitration was not the only option open to the parties. This view flagrantly and unabashedly spites the face of the clear and unambiguous terms of clause 3.25.5 of the agreement which says that no action could be commenced by any party until the dispute, question or difference has been referred to and considered in accordance with the terms of the clause on arbitration.

Throughout the proceedings no evidence was ever adduced to establish that the respondents took any steps towards settlement of any dispute by conciliation, mediation or arbitration. It has been stated **ad nauseam** in the superior courts of this country and elsewhere in the common law jurisdictions, that where in a statute or under a private or public agreement a specific power is conferred upon any person or group of persons, then it shall be absolutely necessary, even imperative upon the person purporting to enforce such power, to ensure that the conditions, if any, precedent to such enforcement of the power so conferred are scrupulously observed, or fulfilled; because non-fulfilment of such conditions shall always render null and void any purported exercise or enforcement or the power so conferred. In the instant case, the proceedings instituted before the High Court by the respondents were void ab initio and the learned trial judge should have, ex debito justitiae, set same aside.

For the foregoing reasons the appeal is allowed and the relief sought by it is hereby granted. The ruling of the court is hereby set aside and the proceedings before the High Court are hereby stayed.

P.K. TWUMASI
JUSTICE OF APPEAL

AMONOO-MONNEY,JA - I agree with the opinion that has just been read by my learned brother that the appeal be allowed.

I, however, wish to add some words of my own on a small matter.

2. In the negotiations leading to the suing out of the Writ of Summons in this case, the Plaintiff/Respondent sent a letter dated January 17, 2003 to the Defendant/Appellant {"Attention: Mr. Brent Horochuk"} portions of which are in these terms:-

"Dear Brent,

Re: Ore and Waste Mining at Bibiani – Contract No. C. 1276/GP/B
Clause 3.25.1 Dispute Notice Elements of the Evaluation of
North West Cutback and the Elevated Area Claims.

"As identified in previous meetings and correspondence of both parties it is not the fact that the claims actually exist rather BCM dispute certain elements of the AGBL evaluation.

AGBL tabled calculations received August 15, 2002 have been directly compared to BCM calculations prepared in a similar format to clearly identify the disputed elements. {Refer attachments}.

The disputed elements are as follows:-

x x x x

x x x x

"BCM agree that among other issues the elements above have been under debate since February and which, despite efforts of the two parties, are yet to be resolved.

x x x x

"Other than AGBL agreeing to our offer to settle dated 28th December 2002 the solution to this dispute is to exercise the remedy in terms of the contract. Accordingly BCM puts you on notice that in accordance with the provisions of clause 3.25.1 BCM call for the above points at issue to be formally resolved in 28 days failing which we will be compelled to go for arbitration.

3. The Respondent Company itself was invoking and relying on the provisions of the contract that was binding on the parties and evincing an intention, a desire, and a preparedness " to go for arbitration" if the dispute was not "formally resolved in 28 days." Clause 3.25.2 of the contract states that –

"Arbitration.

If the dispute cannot be resolved by the Parties to their mutual satisfaction within the twenty-eight days {28 days} as stated in clause 3.25.1, that difference or dispute may be referred to arbitration as herein-after provided."

It may be asked, "in the face of this clear declaration by the Respondent "to go for arbitration" in terms of the contract, why the subsequent volte-face and resort to court action to resolve the dispute?"

4. For this and other reasons given by the President of the panel, I agree, as already indicated, that the appeal be allowed.

J.C. AMONOO-MONNEY
JUSTICE OF APPEAL

ANIN YEBOAH, JA - I also agree.

ANIN-YEBOAH
JUSTICE OF APPEAL

COUNSEL - KIZITO BEYUO FOR APPELLANT.
FIRNA ASAFU ADJAYE FOR ATTA AKYEA FOR RESPONDENT.

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