

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**Bay View Group LLC and The Spalena Company LLC**

**v.**

**Republic of Rwanda**

**(ICSID Case No. ARB/18/21)**

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**PROCEDURAL ORDER NO. 5  
ON THE CLAIMANTS' REQUEST TO EXCLUDE EXPERT EVIDENCE**

***Members of the Tribunal***

Rt. Hon. Lord Phillips KG, PC, President of the Tribunal  
Mr. J. Truman Bidwell, Jr., Arbitrator  
Ms. Barbara Dohmann QC, Arbitrator

***Secretary of the Tribunal***

Mr. Alex B. Kaplan

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May 14, 2020

## **I. INTRODUCTION**

1. The Tribunal has carefully considered (i) the Claimants' Application of March 24, 2020 (the "Application") requesting that the Tribunal disqualify the Respondent's expert witness on Rwandan law, Mr. Richard Mugisha, together with (ii) the Respondent's Response and Witness Statement of Mr. Richard Mugisha of April 14, 2020. The Tribunal has also carefully considered (iii) the Claimants' Reply of April 23, 2020, together with the Second Supplemental Witness Statement of Ms. Zuzana Mruskovicova, and (iv) the Respondent's Rejoinder of May 4, 2020 together with the Witness Statement of Mr. Apollo Nkunda, which the Tribunal granted leave to submit.
2. The Claimants' Application alleges that Mr. Mugisha is not independent of the Parties or in compliance with the IBA Guidelines on Conflicts of Interest in International Arbitration advising him to disclose any past or present relationship with the Parties to the Tribunal. For the Claimants, Mr. Mugisha has a past professional relationship with the Parties through his affiliation with National Resources Development (Rwanda) Ltd ("NRD"), whose successor in interest was eventually purchased by The Spalena Company LLC, a Claimant in this proceeding.
3. The Claimants specifically submit that during Mr. Mugisha's tenure as the managing partner of the law firm Trust Law Chambers ("TLC"), he was retained by investors in NRD to represent them on issues that for the Claimants are directly relevant to this proceeding. Further, the Claimants affirm that they also retained TLC to represent them and NRD in connection to issues relevant to this proceeding.
4. As a result of these engagements, the Claimants say that either Mr. Mugisha or TLC received NRD's and Claimants' confidential and privileged information on issues relevant to this proceeding. Thus, Mr. Mugisha has a conflict of interest in acting as an expert on behalf of the Respondent. Further, as neither Mr. Mugisha nor the Respondent disclosed his material connection to these proceedings, the Claimants request that Mr. Mugisha be disqualified as an expert witness and that his report be excluded from evidence.

5. In its Response, the Respondent squarely refutes the Claimants' allegations. According to the Respondent, neither Mr. Mugisha nor TLC have ever represented NRD or either of the Claimants. Instead, the Respondent describes any prior involvement with NRD and the Claimants as "extremely limited", and Mr. Mugisha confirms in his witness statement submitted together with the Response that he has not received any confidential or privileged information regarding the Claimants or NRD that are relevant to these proceedings.
6. Further, the Respondent questions the 10-month delay between the initial submission of Mr. Mugisha's expert report and the Claimants' Application. According to the Respondent, the delay is evidence of the tactical nature of the Application that is instead used to cause disruption and prejudice to the Respondent's preparation of its Rejoinder.<sup>1</sup>
7. In their Reply, the Claimants explain that while they expected that the Respondent would oppose the Application, they did not expect what they describe to be a "false den[ial]" of his and TLC's past representations of NRD and the Claimants. Together with their Reply, the Claimants exhibited documentation they claim was previously immaterial to this proceeding and not responsive to the Respondent's discovery requests. For the Claimants, these documents evidence Mr. Mugisha's prior attorney-client relationships giving rise to the Application.
8. In the Respondent's Rejoinder, the Respondent first argues that the newly produced evidence belies the contention that Mr. Mugisha and TLC represented NRD. The Respondent observes that the new evidence neither refers to Mr. Mugisha nor suggests he received confidential or privileged information about the Claimants. For this reason, the Respondent instead views the newly produced evidence as supportive of the Respondent's position as to the Application. For this reason, the Respondent seeks the dismissal of the Application with costs.
9. Second, the Respondent's Rejoinder questions the Claimants' "very late production" of emails with its Reply, noting that it raises concern for the Respondent regarding the

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<sup>1</sup> The Tribunal notes that the Respondent separately requested, and the Claimants consented to, an extension of time to file the Rejoinder.

Claimants' approach to document production in this arbitration. The Respondent argues that the Claimants' belated production of evidence belies their repeated mantra that all documents in relation to the management of NRD were lost in June 2015. Thus, the Respondent submits that the Tribunal should reach appropriate inferences as to the lack of merit in the Claimants' case overall.

10. The following is the Tribunal's ruling in relation to this Application.

## **II. DECISION**

11. The Tribunal has deliberated and given careful consideration to the parties' respective submissions. The Claimants' Application invited the Tribunal to conclude, essentially as a matter of inference, that Mr. Mugisha was given confidential information at a meeting on October 8, 2015 with the Claimants' prior counsel. Mr. Mugisha, in a witness statement, has described what took place at that meeting and states specifically that he received no confidential information in the course of that meeting. The Tribunal accepts his evidence. The Claimants further submitted that Mr. Mugisha and his firm had earlier provided legal services to the Claimants and NRD, in the course of which he received confidential information. That submission was supported by the 3<sup>rd</sup> Witness Statement of Mr. Marshall. Mr. Mugisha has dealt specifically with these allegations. He accepts that his firm acted for Zarnack Holdings, the previous shareholders in NRD, but denies acting for that Company or the Claimants. In some respects his statement is in stark conflict with that of Mr. Marshall. In particular while Mr. Marshall states that he had meetings with Mr. Mugisha, Mr. Mugisha denies that he ever met Mr. Marshall.
12. The Tribunal is not able to resolve at this stage some of the conflicts between the evidence of Mr. Marshall and Mr. Mugisha. It finds, however, that the Claimants have failed to make out a case of conflict of interest or other ground for taking the extreme step of disqualifying Mr. Mugisha from giving expert evidence in these proceedings. If the Claimants wish to pursue a case of lack of integrity on the part of Mr. Mugisha, it will be open to them to do so by cross-examination when he gives evidence.

13. The Claimants have stated that their application has been based in part on a flash drive that they had not previously reviewed. This has led the Respondent to seek a further Order against the Claimants in respect of disclosure of documents. The Tribunal considers that the Claimants should search the flash drive for any matters that should have been disclosed at the stage of production of documents but that no other order in relation to disclosure is called for.
14. Accordingly, the Tribunal directs that (i) the Claimants' Request that Mr. Mugisha be disqualified from acting as an expert witness for the Respondent is dismissed and (ii) that the Claimants search the flash drive that they have discovered for any matters that should have been disclosed at the stage of production of documents.
15. The Tribunal reserves the costs in relation to this Application.

On behalf of the Tribunal,

[signed]

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Rt. Hon. Lord Phillips KG, PC  
President of the Tribunal  
Date: May 14, 2020