IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 69 OF 2023

BETWEEN

ZAWIYA TANZANIA TRADERS LTD..... APPLICANT

VERSUS

COCA-COLA KWANZA LTD.....RESPONDENT

RULING

Date of Last Order: 06/03/2024
Date of Ruling: 29/04/2024

GONZI, J.

By way of a letter dated 31st October, 2023, from Mr. January R. Kambamwene, learned advocate for the Applicant, addressed to the Honourable Deputy Registrar of this Court, a Final Arbitral Award between the Applicant and the Respondent dated 29th August 2023, was filed in this court seeking its recognition and enforcement as a decree of this Court. The arbitration was prompted by a dispute between the parties in the course of performance of their Master Agreement for Truck Leasing Services dated 14th February 2020 and an agreement for Transportation of Goods dated 11th February 2020. Clause 34 of the Master Agreement for Truck Leasing

Services signed on 14th February 2020, contained an arbitration clause empowering each party to appoint one arbitrator and the two party-appointed arbitrators could appoint an Umpire. It was in pursuance to the said arbitration agreement that the parties appointed a panel of 3 arbitrators to preside over their dispute. The arbitral tribunal that conducted the arbitration proceedings and ultimately issued and published the award was made up of three arbitrators namely Hon. Mr. Justice (Rtd) Robert Vincent Makaramba, Arbitrator and Chairman of the arbitral Panel; Hon. Mr. Rosan Senzia Mbwambo, First Arbitrator and Hon. Justice (Rtd) Dr. Fauz A.Twaib, second Arbitrator .

In its Statement of Claim before the Arbitral Tribunal the Applicant sought the following reliefs:

(a) Declaration that the Respondent Coca-Cola Kwanza Limited, has breached the contract by unilaterally failing to perform his side of the contract.

(b) Compensation to Zawiya for loss of business for the balance of the contract period, average of TZS 64,028,672 per month from

September 2021 to final date of the contract i.e., 31st January 2024 totaling TZS 1,885,000,000/= (TZS 1.885 billion).

(c) General damages for breach of contract as the Arbitral Tribunal will deem fit to grant.

(d) Costs of arbitration.

(e) Any other award as the tribunal will deem fit to grant in the circumstances of this matter.

In addition to disputing the above claim, the Respondent filed a counterclaim for breach by the applicant of the terms and conditions of the of their Vehicle Hire and Transportation of Goods Agreements. The Respondent prayed for the following reliefs in the Counter Claim:

(a) Refund by the Applicant of Shillings 118,394,028.00 which the Respondent was compelled to pay Azam, who is the Claimant's partner, on 25th August 2021 for Azam to release the Respondent's trucks with its products which had been impounded or seized by Azam for Claimant's failure to pay Azam.

(b) Refund of Shillings 50,000,000/= which Coca Cola Kwanza paid to Azam on 12th April 2021 to salvage the Claimant from liability from Azam for transporting Coca-Cola Kwanza's products.

(c) The Claimant be ordered to pay the Respondent Shillings 4.17 billion being the loss suffered by the Respondent in Zanzibar region due to Claimant's incompetent and inconsistent supply of the Respondent's products as agreed, as pleaded under paragraph 30 and calculated in Annexture CCK 12 hereto.

(d) Refund of Shillings Sixty Million Five Hundred Thirty-Three Thousand and Seventy-three (60,533,073), which the Respondent paid being worth of the goods that sank in the ocean since the Claimant did not obtain the requisite insurance cover.

(e) The Claimant be ordered to pay the Respondent compensation for damages caused by the Claimant by breach of contract and remedying the inconveniences caused by the non-performance of contract in the amount that shall be assessed by the Honourable Tribunal.

(f) The Claimant be ordered to pay the Respondent such other sums as shall be deemed fit and just by the Tribunal to grant in favour of the Respondent.

(g) An order directing the Claimant to pay 15% interest on the amounts stated I items 4(a),4(b),4(c),4(d) above.

(h) Costs of the reference and costs of the Award be taxed by the Honouable Tribunal.

After conducting the arbitration, the Arbitral Tribunal signed and issued their Award on 29th August 2023. The Final Award contained the following Orders:

(a) The Respondent shall pay the Claimant TZS 9.5 Million (Say Nine Million Five Hundred Thousand Tanzanian Shillings) being specific damages in favour of the Claimant.

(b) The Respondent shall pay the Claimant TZS 50,000,000/= (Say Fifty Million Tanzania Shillings) being general damages in favour of the Claimant.

(c) The Claimant shall pay TZS 750,000 (Say Seven Hundred Fifty Thousand Tanzanian Shillings) to the Respondent.

(d) The Claimant shall pay TZS 1,500,000/= (Say One Million Five Hundred Thousand) to the Tribunal.

(e) Interest at the rate of 15% per annum on (a) above from the date due that is TZS 4,750,000/= in September 2021 and TZS 4,750,000/= in October 2021 to the date of payment.

(f) Interest at the rate of 7% per annum on (b), (c) and (d)above from the date of the Award on 29th August 2023 to the date of payment.

It is the above Final domestic Arbitral Award that is sought to be recognized and enforced as a decree of this Court. On 6th March 2024 when the matter came for orders in court Mr. January Kambamwene, learned advocate represented the Applicant and Mr. Acley Thawe, learned advocate appeared for the Respondent. Mr. Kambamwene prayed for the registration and enforcement of the arbitral award as a decree of the court. Mr. Thawe stated that the Respondent was not objecting to the prayer.

I should pause at this juncture and say that I found it a bit strange as to why did the learned counsel for the Applicant opt to file this domestic arbitral award in the High Court given the fact that its pecuniary value could perfectly fit withn the jurisdiction of the District Court or a Court of Resident Magistrate

as well. Under section 6 of the Arbitration Act, 2020 "the court" in relation to domestic arbitration, means the District court, Resident Magistrates' Court and the High Court exercising its original jurisdiction or appellate jurisdiction or the Court of Appeal. The section reads:

> **6.-(1) The term "court"-**
>
> **(a) in relation to domestic arbitration, means the district court, resident magistrate's court, the High Court exercising its original or appellate jurisdiction or the Court of Appeal; or**
>
> **(b) in relation to international arbitration, means the High Court in the exercise of its ordinary original civil jurisdiction.**
>
> **(2) The manner of recognition and dealing with foreign arbitration in the United Republic shall be as prescribed in the respective laws governing arbitration.**
>
> **(3) For the purpose of subsection (1)(a), jurisdiction of court shall be in accordance with the Magistrate's Court Act and any other written laws.** (emphasis added)

As section 6 (3) of the Arbitration Act relies on the Magistrates Courts Act and other written laws to determine the jurisdiction of the courts in relation

to domestic arbitral awards in Tanzania, I looked at section 40 (3) of the Magistrates Courts Act, Cap 11 of the Laws of Tanzania which provides:

> ***"Notwithstanding subsection (2), the jurisdiction of the District Court shall, in relation to commercial cases, be limited-***
>
> ***(a) in proceedings for the recovery of possession of immovable property, to proceedings in which the value of the property does not exceed one hundred million shillings; and***
>
> ***(b) in the proceedings where the subject matter is capable of being estimated at money value, to proceedings in which the value of the subject matter does not exceed seventy million shillings."***

In view of the above revealed position of the law, I looked at the reliefs awarded to the Applicant in the Final Arbitral Award in terms of the substantive monetary awards plus the accrued interests thereon as of 31st October 2023 when the award was filed in this court. I found that the total sums awarded to the Applicant under the arbitral award does not surpass

Ths.70,000,000/= which is the upper threshold of the pecuniary jurisdiction of the District Court or a Court of Resident Magistrate in commercial disputes like the ones giving rise to the arbitral award in this case. This domestic final arbitral award could therefore as well fit in the jurisdiction of the District Court or the Court of Resident Magistrate. With that observation made in the course of preparing the Ruling, I suspended the delivery of the Ruling and called upon the learned counsel for both parties to address me on this issue on 2nd May 2024 before delivery of the Ruling in the afternoon of the same date. Mr. Kambamwene was of the view that the claim by the Applicant before the arbitral Tribunal was for TZS 1.885 billion and the counter claim was for over 4billion. Hence, he argued that those amounts fit in the jurisdiction of this Court. He submitted further that under the Arbitration Act, an arbitration award is registrable in the High Court. Therefore, he argued, even if the amount involved fits in the jurisdiction of the lower court, so far as it is an arbitral award, it should be filed in the High Court for recognition and enforcement.

Mr. Jonathan Kessy, learned advocate who was holding brief for Mr. Acley Thawe, responded briefly that he was concurring with what Mr. Kambamwene had submitted. Mr. Kessy stated that for an arbitral award to

be enforceable as a decree of Court, it must be filed in Court and that the competent Court intended under the Arbitration Act, is the High Court.

I raised the issue of jurisdiction of the court suo mottu and accorded both sides an opportunity to be heard on it because a court of law, at the very beginning, must satisfy itself as to whether or not it has the requisite jurisdiction over the matter before it. Otherwise, even if no party complains on lack of jurisdiction, still the court may embark into a futile exercise of judicial proceedings which ultimately become nullity ab initio. As it was remarked by the Court of Appeal of Kenya in **"MV Lilian S"** [1989] 1 eKLR case that: -

> **"Jurisdiction is everything, without it, a Court has no power to make one more step. Where the Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."**

Although parties and their counsel in this matter are not disputing the jurisdiction of this Court, the rule is that parties by consent cannot confer jurisdiction to the court. Jurisdiction cannot be implied either. From their

brief opinions responding to the issue of jurisdiction that I raised suo mottu, I found that both counsel in the case were still holding to the old position of the law under the repealed Arbitration Act when all arbitral awards would be filed for recognition and enforcement or be challenged in the High Court only. The current position of the law under the Arbitration Act 2020 as evidenced under section 6 thereof, is that the High Court has exclusive jurisdiction in respect of foreign arbitral awards only. For the domestic arbitral awards, the District Court, Court of Resident Magistrate and the High Court, all have jurisdiction in respect of applications for their recognition and enforcement or to determine challenges in respect thereof. Therefore, the award in this case being a domestic arbitral award, could have been filed in the lower Courts pursuant to their pecuniary jurisdiction under the Magistrates Courts Act. As regards the value contained in the statement of claim and the counter claim during the arbitral proceedings, I am of the view that it is the value in the Final Arbitral Award that should be considered for the purpose of determining the pecuniary jurisdiction of the subordinate courts when the domestic arbitral award is sought to be recognized and enforced or challenged in the lower courts. This is the value of the arbitral award. Filing an award for recognition and enforcement in court does not

entail re-hearing of the "raw dispute" as what was heard and determined by the Arbitrators. The claims and counter claims raised before the arbitral tribunal were adjudicated upon before the arbitral tribunal and a refined product in the form of Final Award was issued. It is the final award which is taken to court for recognition and enforcement or for challenge thereof. Thus, it is the pecuniary value of the arbitral award and its nationality (whether domestic or foreign) which should determine the jurisdiction of courts for the purpose of recognition, enforcement or challenge of domestic arbitral awards in Tanzania under the Arbitration Act,2020.

After hearing the learned counsel for parties, on my part, I reverted to section 6(1)(c) of the Arbitration Act, 2020 which provides that:

> **"For the purpose of subsection (1)(a), jurisdiction of court shall be in accordance with the Magistrate's Court Act and any other written laws." (underlining supplied)**

The other "written laws" apart from the Magistrate's Courts Act intended by the above provision, in my view, include all relevant laws which have a bearing to the jurisdiction of Courts (except for Primary Courts) in Tanzania. These include the Constitution of the United Republic of Tanzania, the

Judicature and Application of Laws Act and the Civil Procedure Code, Cap 33 of the Laws of Tanzania. I asked myself as to whether the High Court lacks jurisdiction in respect of a case where the value of its subject matter is small enough to fit in the pecuniary jurisdiction of the lower court? My answer is in the negative. The High Court is a court of unlimited pecuniary jurisdiction both upwards and downwards. The Civil Procedure Code under section 13 Clearly provides that:

> **13. Every suit shall be instituted in the court of the lowest grade competent to try it and, for the purposes of this section, a court of a resident magistrate and a district court shall be deemed to be courts of the same grade: Provided that, the provisions of this section shall not be construed to oust the general jurisdiction of the High Court.**
> (underlining supplied for emphasis)

It should be noted that that the above *proviso* safeguarding the general jurisdiction of the High Court came as an amendment of the Civil Procedure Code, vide section 9 of Act No.4 of 2016 and it came to disapply the rule laid down in the famous case of **M/S Tanzania – China Friendship Textile Co. Ltd. Versus Our Lady Of The Usambara Sisters,** Civil Appeal No. 84 of 2002, Court of Appeal of Tanzania at Dar es Salaam, in so far as the

jurisdiction of the High Court is concerned. Hence, this Court is seized with the requisite pecuniary jurisdiction over the subject matter whose monetary value could perfectly fit in the pecuniary jurisdiction of the subordinate court too. In such circumstances, this court could, as a matter of procedure not and not of jurisdiction, transfer the case to the competent subordinate court to proceed with it. However, in this application, I have opted to continue with the matter at hand since this court is clothed with the requisite jurisdiction and bearing in mind that the application at hand is not contested and also that this move will be line with the mission and vision of the judiciary on timely justice for all. There is a sizeable amount of money lying locked in this un-contested case which, if disentangled earlier, can be put into circulation by all the parties concerned and thus contribute to the business prosperity and the national economy at large. Delayed disposal of this matter would unnecessarily and negatively impact all that.

Proceeding with application at hand, section 83(1) of the Arbitration Act, Cap 15 provides that:

> **"Upon application in writing to the court, a domestic arbitral award or foreign arbitral award shall be recognised as binding and enforceable."**

The present arbitral award is domestic arbitral award. The grounds to be used by the court in deciding whether or not to grant an application for recognition and enforcement of a domestic or foreign arbitral Award as an Order or a Decree of the Court in Tanzania, are stipulated under section 83(2) of the Arbitration Act, Cap 15 of the Laws of Tanzania. Section 83(2) provides that:

> (2) **Notwithstanding subsection (1), a domestic arbitral award or foreign arbitral award shall be refused if**
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> **(a) at the request of the party against whom it is invoked, that party furnishes to court proof that-**
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> **(i) parties to the arbitration agreement, pursuant to the law applicable-**
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> **(aa) lacked capacity to enter into the agreement; or**
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> **(bb) were not properly represented;**
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> **(ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made;**
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> **(iii) the party against whom the arbitral award is invoked was not given proper notice of the**

appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case;

(iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration, or it contains decisions on matters beyond the scope of the reference to arbitration, provided that, if the decisions on matters referred to arbitration can be separated from those not so referred, that part of the arbitral award which contains decisions on matters referred to arbitration may be recognised and enforced;

(v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement by the parties, was not in accordance with the law of the state where the arbitration took place; or

(vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made; (a) the making of the arbitral award was

induced or affected by fraud, bribery, corruption or undue influence; or

(b) if the Court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under any written laws; or

(ii) the recognition or enforcement of the arbitral award would be contrary to any written laws or norms.

It is noteworthy that the 6 grounds stipulated under section 83(2)(a) are substantive grounds which can only be considered by the Court if the person against whom the award is sought to be enforced, invokes them as the grounds for his resisting the recognition and enforcement of the domestic or foreign arbitral award. On the other hand, the 2 grounds stipulated under section 83(2)(b) are ex officio grounds which can be raised and considered by the court suo mottu even if the party against whom the award is sought to be recognized and enforced does not raise them. It is therefore the duty of the Court to always satisfy itself on whether or not the arbitral award sought to be recognized and enforced as a decree or order of the Court is in conformity with the 2 ex-officio grounds even if neither party to the

application or petition raises them. The Court should not accept to be used to bless, institutionalize and sanction an illegality that might arise from foreign or domestic arbitral proceedings.

It is trite that the current application is not opposed by the Respondent. The Respondent did not file any petition to challenge the recognition and enforcement of the arbitral award in question. During the hearing, the learned counsel for the Respondent was loud and clear that they are not opposing the recognition and enforcement of the award. Therefore, the grounds under section 83(2)(a) were not raised by the parties and thus are not going to be considered in this Ruling.

It is the duty of the Court in terms of section 83(2)(b) of the Arbitration Act, however, to assess the award and satisfy itself as to its conformity with the 2 ex-officio grounds prescribed under section 83(2)(b) of the Arbitration Act. I therefore proceeded to consider whether *"the subject matter of the dispute is not capable of settlement by arbitration under any written laws in Tanzania or whether the recognition or enforcement of the arbitral award would be contrary to any written laws or norms of Tanzania"?* My answer is in the negative. The dispute that the Applicant referred to for Arbitration concerned a breach of contract. The Award made by the Arbitrators is with respect to

the relative rights and obligations of the parties herein arising out of and in connection to their agreements. I know no law in Tanzania that would make that subject matter not capable of settlement by way of arbitration; and hence the dispute was arbitrable.

The second test under section 83(2)(b) is whether the recognition or enforcement of the arbitral award would be contrary to any written laws or norms of Tanzania. Again, I am satisfied that the recognition and enforcement of the Final arbitral award in this matter, would not offend any laws or norms in Tanzania. The learned Counsel representing the Respondent, either, did not raise any such concern. The Court also finds no violation of the laws or norms of Tanzania if the Final arbitral award is implemented. All the orders in the award are valid legal remedies in the courts and tribunals of Tanzania. There is no law or norm obtaining in the country that would be incompatible with recognition and enforcement of such kind of an award. I therefore find that the unchallenged Final arbitral award in the present application, also passes the dual ex-officio tests under section 83(2)(b) of the Arbitration Act, Cap 15 of the Laws of Tanzania.

Having found that there is no legal obstacle for the recognition and enforcement of the final arbitral award in the present application,

accordingly, I grant the application and I order that the same is hereby recognized for enforcement as a decree or Order of this Court.

In ***Ardhi University v. Kiundo Enterprises (T) Ltd.,*** decided by the High Court of Tanzania (Commercial Division) at Dar es Salaam, Misc. Commercial Cause No. 272/2015 (Unreported), it was held that:

> **"an award alone cannot be enforced if it is not converted into a decree by a court order, and an order alone without the award would not amount to a decree. That is, an arbitral award, having been filed in court, must be tabled before a judge or magistrate, as the case may be, who will make necessary orders to render it a decree of the court."**

More often than not, an award is not written with the same precision and clarity of a High Court judgment; and certainly, an award is more like a judgment than a decree. The practice as can be seen in the decision of this court in **the case of *Attorney General v Hermanus Philippus Steyn,*** Misc. Commercial Cause No. 11 of 2010 (unreported) entails the process involving the Judge taking the award and extracting a decree from it. The decree is then signed by a judge.

After going through the Final Arbitral Award by the panel of 3 arbitrators Hon. Mr. Justice (Rtd) Robert Vincent Makaramba, Arbitrator and Chairman of the arbitral Panel; Hon. Mr. Rosan Senzia Mbwambo, First Arbitrator and Hon. Justice (Rtd) Dr. Fauz A. Twaib, Second Arbitrator, dated 29th August 2023 between the parties herein, and having granted the application at hand, I have extracted from the Final Award dated 29th August 2023 the following Orders which shall now constitute the Decree/ Drawn Order of this Court:

a) **The Respondent shall pay the Applicant TZS 9.5 Million (Say Nine Million Five Hundred Thousand Tanzanian Shillings) being specific damages in favour of the Applicant.**
b) **The Respondent shall pay the Applicant TZS 50,000,000/= (Say Fifty Million Tanzania Shillings) being general damages in favour of the Applicant.**
c) **The Applicant shall pay TZS 750,000 (Say Seven Hundred Fifty Thousand Tanzanian Shillings) to the Respondent.**
d) **The Applicant shall pay TZS 1,500,000/= (Say One Million Five Hundred Thousand) to the Tribunal.**

e) **Interest is imposed at the rate of 15% per annum on (a) above from the date due that is TZS 4,750,000/= for September 2021 and TZS 4,750,000/= for October 2021 to the date of final and full satisfaction thereof.**

f) **Interest is imposed at the rate of 7% per annum on (b), (c) and (d) above from the date of delivery and publication of the Final Arbitral Award on 29th August 2023 to the date of final and full satisfaction thereof.**

g) **Each party shall its own costs in the present application.**

A. H. GONZI
JUDGE
29/04/2024

Ruling is delivered in Court this 29th day of April 2024 in the presence of Mr. January Kambamwene learned advocate for the Applicant and Mr. Jonathan

Kessy, learned Advocate holding brief for Mr. Acley Thawe learned advocate for the Respondent.

A. H. GONZI

JUDGE

29/04/2024