IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: LILA, J.A., NDIKA, J.A., And SEHEL, J.A.)

CIVIL APPEAL NO. 14 OF 2016

VODACOM TANZANIA LIMITED ..... APPELLANT

VERSUS

FTS SERVICES LIMITED ..... RESPONDENT

(Appeal from the Ruling and Order of the High Court of Tanzania, Commercial Division at Dar es Salaam)

(Nyangarika, J.)

Dated 16th day of October, 2014
in
Miscellaneous Commercial Cause No. 186 of 2014

JUDGMENT OF THE COURT

14th June & 31st December, 2019

NDIKA, J.A.:

This is an appeal from the ruling of the High Court of Tanzania, Commercial Division at Dar es Salaam (Nyangarika, J.) in Miscellaneous Commercial Cause No. 186 of 2014 dated 16th October, 2014. In that ruling, the High Court dismissed a petition by Vodacom Tanzania Limited, a limited liability cellular network company incorporated in Tanzania (from now on to be referred to as "the appellant"), to set aside an arbitral award rendered on 9th June, 2014 in favour of FTS Services Limited, also a limited liability company registered in Tanzania, (from now on to be referred to as "the

respondent"), in a dispute over termination of a contract for marketing of converged services and products.

The circumstances giving rise to this appeal are briefly that on 6th June, 2012 the appellant and the respondent entered into a Converged Services Agreement, henceforth to be referred to as "the Agreement", in which the respondent agreed to market and procure orders for a complete range of converged services and products of the appellant, and to provide front line technical assistance and general information regarding the said products and services to subscribers of the appellant's network.

In terms of Clause 15.1 of the Agreement, either party was at liberty to terminate the "agreement for convenience subject to giving the other party a prior notice of three (3) months in writing." Six months and eight days after the commencement of the Agreement, that is on 14th December, 2012 to be exact, the appellant wrote a notice of termination of the Agreement "with effect from 1st January, 2013 to 30th March, 2013 by which date the agreement will come to an end." It was the respondent's case that the said notice was served on it on 7th January, 2013 by email with the letter constituting the notice attached to it, and that no notice was served on it in writing. In essence, the respondent disputed the validity of the termination of the Agreement. Its effort, by way of emails and letters, to

try to engage the appellant to reconsider its decision to terminate the Agreement was barren of fruit. The parties having failed to resolve the dispute, the respondent referred the matter to arbitration pursuant to Clause 16.1 of the Agreement, which stipulates as follows:

> *"If any dispute or difference whatsoever shall arise between the parties hereto, unless the parties concur in the appointment of a single arbitrator, the matter in dispute or difference shall be referred to two arbitrators, one to be appointed by each party, or to an umpire to be appointed by the arbitrators pursuant to and in conformity with the provisions of the Arbitration Act (Cap. 15) of the Laws of Tanzania."*

In compliance with the above arbitration clause, the respondent appointed the Hon. Mr. Justice Thomas Bashite Mihayo, Judge of the High Court (Retired), as one arbitrator while the appellant appointed Mr. Charles R.B. Rwechungura as the other arbitrator. With the consent of the parties, the said arbitrators, in turn, appointed the Hon. Mr. Justice John A. Mroso, Justice of Appeal (Retired), as the third arbitrator to preside over the matter instead of acting as an umpire.

In its amended Statement of Claim, the respondent alleged, in essence, that the appellant's termination of the Agreement was unlawful

because it failed to state in the notice the business reasons justifying the course it had taken. In response, the appellant refuted that claim in its amended Statement of Defence, averring that the termination was one for "convenience" in terms of Clause 15.1 of the Agreement. Based on the pleadings, the arbitral tribunal, with the consent of the parties, recorded seven issues for hearing and determination. We take the liberty to paraphrase the said issues thus:

1. Whether the Agreement between the parties was lawfully terminated;
2. If the answer to the above issue is in the negative, whether the respondent has any claim against the appellant as a result of the unlawful termination of the aforesaid contract;
3. Whether there are unpaid bonuses due to the respondent as per the said contract;
4. Whether there were customers prospected by the respondent who joined the appellant subsequent to the termination of the contract;
5. If the answer to the issue number 4 is the affirmative, whether the respondent is entitled to any payment of commissions in that respect;

6. Whether the respondent is entitled to compensation from the appellant for investments it made in anticipation of the existence of the Agreement to its initial period; and
7. To what reliefs are parties entitled.

In addition, it was recorded that the parties were not at issue as regards five matters, which we paraphrase as follows:

1. That the parties' relationship was governed by the Agreement entered on 6th June, 2012 and that the said agreement had an initial term of two years' renewable for an indefinite period of time but subject to termination in the manner provided therein;
2. That following the commencement of the contract, the respondent obtained customers for the appellant and the latter paid the former commissions as per the Agreement;
3. That the Agreement was terminated by the appellant upon issuing the respondent a three-months' notice dated 14th December, 2012. The termination was to take effect on 30th March, 2013;
4. That the Agreement was a standard form contract prepared by the appellant; and
5. That there had been communications between the parties on the possibility of rescuing the contract by reviewing their relationship

but that effort failed and that the parties no longer have any working relationship.

In establishing its case, the respondent relied upon a witness statement of Mr. Frank Goyayi, one of its directors, supplemented by an additional statement from the same witness. Conversely, the appellant filed a witness statement deposed by Mr. Olaf Mumburi, the appellant's Head of Legal Department. That statement was amplified by an additional statement made by Ms. Rosalynn Mworia, the appellant's Head of Sales: Strategic, Corporate and SME.

As intimated earlier, the arbitral tribunal found in favour of the respondent in its award dated 9th June, 2014. On the first issue, it held that Clause 15.1 of the Agreement governing its termination was not complied with. The other issues, too, were substantially resolved in favour of the respondent. In the end, although the tribunal dismissed the respondent's prayer for specific performance of the Agreement as well as several heads of claims for special damages, it awarded reliefs as follows: first, payment of TZS. 9,109,600.00 to the respondent as loss incurred for an occasion called "Mbudya event" and US$ 530 spent for electrical items. Secondly, TZS. 564,822,772.00 bonus payable to the respondent for the period from June 2012 up to March 2013. In addition, TZS. 36,301,503.00 was granted

to the respondent as commission on undeclared revenue. Thirdly, a total of TZS. 836,634,426.00 was granted to the respondent as general damages of which the sum of TZS. 500,000,000.00 was specifically allotted for wrongful termination of the Agreement. Finally, the appellant was condemned to pay costs in the sums of TZS. 50,957,985.75 as instruction fees incurred by the respondent and US$ 31,386.50 as arbitrators' fees.

Resenting the outcome of the arbitration, the appellant proceeded by way of a petition to the High Court, Commercial Division at Dar es Salaam pursuant to section 16 of the Arbitration Act, Cap. 15 R.E. 2002 (from now on to be referred to as "the Act") seeking the award to be set aside. The main thrust of the challenge of the award was as disclosed in Paragraph 17 of the Petition thus:

> *"That the Petitioner seeks to challenge the validity of the award and prays for it to be set aside on* ***grounds of misconduct as a result of the arbitrators denying the Petitioner the right to be heard, acting outside their jurisdiction and committing errors on the face of the award*** *...."* [Emphasis added]

It is evident from the above that the appellant's attack on the award was three-pronged. In the first limb that the appellant's right to be heard was abrogated, it was averred that the arbitral tribunal misconducted itself

in determining the validity of the notice of termination as to whether it was in writing and whether it was served on the respondent timely without hearing the appellant on the issue. It was further claimed that the tribunal determined the issue on the validity of the notice based on fabricated and or extrajudicial evidence.

Connected to the second general complaint that the tribunal acted outside its jurisdiction, numerous criticisms were raised: that general damages were considered and awarded even though they were neither pleaded nor at issue; that the tribunal gave a novel construction to the limited liability clause set out in Clause 15.7 of the Agreement which was also not at issue; that the tribunal acted on extrajudicial evidence; that the tribunal purportedly determined the validity of the notice of the termination which had been recorded as matter not in dispute; that the tribunal wrongly amended targets for new business set out in the Appendix II to the Agreement, an act that amounted to improving the said Agreement; and finally, that the tribunal awarded damages for wrongful termination of contract when it had declared that the termination of the Agreement as being invalid implying that the said Agreement remained in force.

In the final limb of attack, the appellant raised nine instances of errors allegedly apparent on the face of the award that were committed by the

arbitral tribunal. These included an erroneous award of damages for wrongful termination of contract despite the tribunal finding the notice of termination of the Agreement invalid and ineffectual implying that the Agreement was never terminated; a wrong construction of the term "writing" to exclude emails contrary to the law; determining the issue on manner and time of service of the notice of termination of the Agreement when the matter was not in dispute; misapplication and misconstruction of the decision in **Antaios Cia Naviera SA v. Salen Rederierna AB** [1984] 3 All ER 229 to the facts of the case at hand; an erroneous award of general damages in the place of disallowed and unproved special damages; a flawed additional award of TZS. 500,000,000.00 for the same head of claim without justification having initially awarded general damages for wrongful termination of contract; general damages were mistakenly awarded without the corresponding injury having been proven; and finally that the Agreement was wrongly construed by including old business targets into the targets set out in Appendix II to the Agreement resulting in wrong computation of the respondent's entitlement to bonus.

The High Court, as hinted earlier, was unimpressed by the appellant's petition. The record of appeal at page 730 shows that the learned High Court Judge dismissed the petition with costs upon concluding that the

arbitration process was fair and justified, having found no proof that the arbitrators misconducted themselves; and that there was no error whatsoever on the face of the award to justify the court's intervention.

Dissatisfied by the High Court's ruling, the appellant, through the services of IMMMA Advocates, has appealed to this Court on fifteen grounds as follows:

1. *The learned High Court Judge erred in law and in fact in failing to hold that the arbitrators erred and thus misconducted themselves in dealing with the issue of the validity of the notice of termination at its own instance with respect to whether it was in writing or whether it was served on the respondent within the prerequisite time contractually without according the appellant the right to be heard and therefore breaching one of the fundamental principles of natural justice. In particular, the learned trial (sic) Judge erred in holding that the arbitral tribunal was obliged to read all the documents submitted and make a determination on the validity of the notice.*
2. *The learned High Court Judge erred in law in failing to hold that the arbitral tribunal denied the appellant the right to be heard by considering extrajudicial evidence that was not pleaded nor presented by the respondent during the hearing.*
3. *The learned High Court Judge erred in law and fact in failing to hold that the arbitral tribunal exceeded its jurisdiction by*

determining that the appellant owed the respondent general damages when the issue of general damages was not among those which parties submitted to the arbitral tribunal for determination.

4. *The learned High Court Judge erred in law and in fact in failing to hold that the arbitral tribunal acted outside its jurisdiction in dealing with the issue of service and validity of the notice terminating the Service Agreement when the respondent and the applicant (sic) had already admitted and recorded that the service and receipt of the notice of termination was not an issue.*
5. *The learned High Court Judge erred in law and fact in failing to hold that the arbitral tribunal made an error of law apparent on the face of the award by defining the word 'writing' as used in Clause 18.4 of the Service Agreement to exclude emails contrary to the definition of the said word in the Law of Contract Act, Cap. 345 R.E. 2002 as defined by the Interpretation of Laws Act, Cap. 1 R.E. 2002.*
6. *The learned High Court Judge erred in law and fact in failing to hold that the arbitral tribunal made an error of law apparent on the face of the award by holding that the issue of the validity of the notice with respect to whether it was in writing or whether it was served on the respondent within the requisite time contractually was left to the tribunal's decision when the record is that the parties had already put it on record as an issue not in dispute.*

7. *The learned High Court Judge erred in law and fact in failing to hold that the arbitral tribunal made an error apparent on the face of the award by misapplying and misconstruing the decision in* ***Antaios Cia Versus Salen Rederierna*** *[1984] 3 All ER 229 to the facts of the case.*
8. *The learned High Court Judge erred in law and fact in failing to hold that the arbitral tribunal made an error of law apparent on the face of the award in proceeding to award general damages in place of the item of special damages which was found not to have been proved by the respondent.*
9. *The learned High Court Judge erred in law and fact in failing to hold that the arbitrators exceeded their jurisdiction by giving a novel construction of the limitation of liability clause set out in Clause 15.7 of the Service Agreement, when the construction of the said clause was not a matter in issue between the appellant and the respondent.*
10. *The learned High Court Judge erred in law and fact in failing to hold that upon finding and accepting as a principle at page 30 of the award that the guiding principle in the assessment of damages is to place the injured person in the same situation as if the contract had been performed, the arbitrators made an error apparent on the face of the award in awarding damages for which no injury had been alleged and proved by the respondent.*
11. *The learned High Court Judge erred in law and fact in failing to hold that having erroneously awarded the*

respondent with (sic) general damages for wrongful termination of contract based on various items claimed as special damages the arbitrators made an error apparent on the face of the award in making a further award of general damages of TZS. 500,000,000.00 for wrongful termination of contract.

12. *The learned High Court Judge erred in law and fact in failing to hold that upon accepting as a fact that the agreement distinguished between old and new business the arbitrators made an error apparent on the face of the award in including the old business into the targets set by Appendix 2 of the agreement for new business. In doing so, the arbitrators made an error apparent on the face of the record in failing to exclude the collections from old business in the determination of the respondent's entitlement to bonus.*

13. *The learned High Court Judge erred in law in holding that errors of law or fact on the face of the award no matter how obvious cannot be a ground for setting aslde the award under the arbitration laws on the ground of misconduct.*

14. *The learned High Court Judge erred in law and fact in holding that the power of the High Court in interfering with an arbitral award is limited to only supervision powers where it is absolutely necessary especially where there is no fairness and justice in the arbitration process.*

15. *The learned High Court Judge erred in law and fact in holding that the arbitration process was fair and justified and that there is no error whatsoever on the face of the award*

for setting aside. In doing so, the learned Judge erred in failing to appreciate that in (sic) according to the law the errors of law and fact have to be apparent in the award and not necessarily the proceedings leading to the award. The learned trial (sic) Judge erred in failing to appreciate that the errors in the present case were apparent in the award.

At the hearing of the appeal before us, Mr. Gaspar Nyika, learned counsel for the appellant, adopted the written submissions he had lodged earlier in support of the appeal and, without much ado, beseeched us to allow the appeal with costs. His counterpart, Mr. Michael Ngalo for the respondent, too, made a very brief argument, urging us, upon the written submissions he had lodged in opposition thereof, to dismiss the appeal with costs. He also invited us to take into account the written submissions on record that he lodged in opposition to the appellant's petition before the High Court.

Before dealing with the contested issues in this matter, we wish to state that section 16 of the Act constitutes the court's power to review and set aside an arbitral award for arbitration proceedings conducted under the Act as was the case in the instant appeal. The said provision stipulates thus:

"Where ***an arbitrator or umpire has misconducted himself or an arbitration or***

award has been improperly procured, *the court may set aside the award."*[Emphasis added]

It is clear from a reading of the above section that the court (that is, the High Court as defined by section 3 of the Act) is vested with limited jurisdiction to review and set aside an arbitral award if the petitioner seeking to have it set aside can establish either that the arbitrator or the umpire "misconducted himself" or that the "arbitration or award has been improperly procured."

We hasten to say that any application to the High Court for review of an arbitral award is not an appeal and, therefore, cannot be disposed of in a form of a rehearing. That position has been taken in numerous cases including a decision by the Supreme Court of Canada in **City of Vancouver v. Brandram-Henderson of B.C. Ltd.** [1960] S.C.R. 539 at 555, which we approve, where it was stated, as per Locke, J., that:

> "***This is not an appeal from the award and the proceedings upon a motion such as this are not in the nature of a rehearing,*** *as was the case in Cedar Rapids v. Lacoste .... This fact is noted in that portion of the judgment of the Judicial Committee in the second appeal in that matter, to which we were referred on the argument. We cannot in the present proceedings weigh the*

evidence or interfere with the award on any such ground as that it is against the weight of the evidence." [Emphasis added]

As indicated earlier, the appellant's Petition to the High Court challenged the arbitral award, as per Paragraph 17, on the "grounds of misconduct as a result of the arbitrators denying the Petitioner the right to be heard, acting outside their jurisdiction and committing errors of law apparent on the face of the award." That on the aforesaid grounds of misconduct, the award was effectually without any basis in both facts and law. However, the appellant does not seem to have alleged that the award was "improperly procured."

What then constitutes "misconduct" under section 16 of the Act? That term is not defined anywhere in the Act. In the case of **D.B. Shapriya and Co. Ltd. v. Bish International B.V.** [2003] 2 EA 404 the High Court (Msumi, J.K.), having acknowledged the absence of a statutory definition of that term, had to rely upon various English and Indian court decisions which had over and over again discussed that term. The High Court rightly justified that approach on the reason that the Act and the Arbitration Act, 1899 of India had common generic roots in the Arbitration Act, 1889 of England. At page 409, the High Court stated that:

> *"Under the influence of this common legal heritage, courts in this country have been,* ***as a matter of practice, regarding both English and Indian court decisions in the interpretation of these common statutes to be highly persuasive except where such decisions are not in harmony with the relevant local statutory provisions or court decisions****. There is no reason why this long established court practice should be ignored in the present case."* [Emphasis added]

Msumi, J.K. then went on to consider and endorse the position taken in several English cases including **Moran v. Lloyd's** [1983] 2 All ER 2002 and **Tersons Ltd. v. Stevenage Development Corporation** [1963] 3 All ER 863. In the latter case, the Court of Appeal, speaking through Upjohn, L.J. held that:

> *"The courts will not interfere with the conduct of proceedings by the arbitrator except in circumstances which are now well defined. If the arbitrator is guilty of misconduct, his award may be set aside or remitted. If the award contains an error of law on its face, it may be sent back or remitted. If a special case is stated on a question of law, the court will determine that question of law within the framework of the particular case.* ***But if there is***

no misconduct, if there is no error of law on the face of the award, or if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. *It is not misconduct to make a mistake.* ***It is not misconduct to go wrong in law so long as any mistake of law does not appear on the face of the award."***
[Emphasis added]

In the same vein, Russell on Arbitration, 20th Edition, states at page 422 that:

"It is not misconduct on the part of the arbitrator to come to an erroneous decision whether his error is one of fact or law, and whether or not his findings of fact are supported by the evidence. It may, however, be misconduct if there are gross errors in failing to hear, or improperly receive evidence."

More elaborately, the statement goes further at the same page thus:

"It is no ground for coming to a conclusion on an award that the facts are wrongly found. The facts have got to be treated as found .... Nor is it a ground for setting aside an award that the conclusion is wrong in fact. Nor is it even a ground for setting aside an award that there is no evidence on which the facts could be found, because that

would be a mere error in law, and it is not misconduct to come to a wrong conclusion in law and would be no ground for setting aside the award ***unless the error in law appeared on the face of it....*** "[Emphasis added]

We fully subscribe to the above stance, which is firmiy premised on the reasoning that since the parties choose their own arbitrator to be the judge to resolve the dispute between them, they cannot object to his decision, either upon the law or the facts, if the award is good on the face of it. The courts, as a result, cannot interfere with the award on the ground of misconduct except for errors of law manifest on its face.

It is apt at this point to say a word on the meaning of the phrase "error in law on the face of the award." In **D.B. Shapriya and Co. Ltd** (supra), Msumi, J.K. referred to Lord Dunedin's opinion in **Champsey Bhara & Co. v. Jivraj Balloo Spinning & Weaving Co.** (1923) 92 LJPC 163 at 166 that:

"An error in law on the face of the award means, in their Lordships' view, that ***you can find in the award or a document actually incorporated therein, as, for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and you can then say***

> ***that it is erroneous*** *... Here it is impossible to say, from what is shown on the face of the award, what mistake the arbitrators made."* [Emphasis added]

In the same vein, the House of Lords, speaking through Viscount Cave, stated in **Kelantan Government v. Duff Development** Co. [1923] AC 395 at 589 that:

> *"**If it appears by the award that the arbitrator has proceeded illegally** – for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award."* [Emphasis added]

It is, therefore, inferable from the above decisions that the court is not entitled to intervene where there is an error in law on the part of the arbitrator which can only become apparent after an examination of the evidence. As a general rule, the court is not entitled to examine the record of proceedings before the arbitrators except the award and the document incorporated therein.

Having summarized the principles of law relevant to this matter, we now proceed to deal with the grounds of appeal.

We begin with the first ground of appeal, which, as stated earlier, is a complaint to the effect that the learned High Court Judge erred in law in failing to hold that the arbitrators misconducted themselves for raising *suo motu* the question of the validity of the notice of termination and determining it without according the appellant the right to be heard on that issue.

Mr. Nyika submitted for the appellant that the question of validity of the notice of termination was not one of the matters submitted for the determination by the arbitrators; that the arbitrators raised it on their own motion; and that the appellant was not accorded an opportunity to be heard on it. In support of this contention, the learned counsel referred us to a passage in Russell on Arbitration, 9th Edition defining misconduct by an arbitrator to cover cases where there is breach of natural justice. Further reliance was placed on a number of authorities including **Tanzania Electric Supply Limited v. Dowans Holdings (Costa Rica) and Another**, Civil Application No. 8 of 2011, High Court, Dar es Salaam Registry (unreported); **Interbulk Ltd v. Aiden Shipping Co. (The Vimeira) (No.1)** [1984] 2 Lloyd's Rep 66; **Pacol Ltd v. Joint Stock Company Rossakhar** [2000] CLC 315; **Gbangbola v. Smith and Sherrif** (1999) 1 TCLR 136; **Societe Franco-tunisienne D'armement-**

tunis v. Government of Ceylon [1959] 1 WLR 787; and **Annie Fox & Others v. P.G. Welfair Limited** [1981] WL 186914 for the proposition that a denial of the right to be heard is a misconduct rendering the whole award invalid and liable to be set aside.

Conversely, Mr. Ngalo contended that the issue of the validity of the notice in terms of the manner of issue and legal sufficiency was raised by the pleadings and addressed by the parties in evidence.

As intimated earlier, one of the matters recorded as not being in issue between the parties was the fact that the Agreement **was terminated** by the appellant upon issuing the respondent a three-months' notice dated 14th December, 2012, the envisaged termination being due to take effect on 30th March, 2013. Yet, the first and central issue submitted to the arbitral tribunal was whether the Agreement was **lawfully terminated**. There was, on the face of it, a conflict between the aforesaid recorded non-issue that the Agreement was **actually terminated** upon the notice being issued and the central question whether the said Agreement was **lawfully terminated**. Despite that ostensible inaptness, in our considered view, the tribunal was enjoined to consider and determine the central issue submitted to it by the parties. In dealing with it, the tribunal, initially acknowledged in Paragraph 3.17 that the respondent appeared to have

given the impression that it had accepted the notice as proper notice of termination, and then, in Paragraph 3.18 took the view as follows:

> *"With respect,* ***we cannot with conscience gloss over the glaring defects regarding the notice merely because the Claimant did not clearly and specifically plead the defect. We feel obliged to look critically at the notice which was given to satisfy ourselves that what the Respondent gave as notice to terminate the Agreement was notice as envisaged by the parties in the said Agreement.*** *It must be said that in order for the notice of termination to be valid and effective the provisions of* ***Clauses 15.1, 18.3 and 18.4 must be fully complied with****. We adopt the quotation from Halsbury's Laws of England, 4th Edition, p.983 which counsel for the Claimant helpfully cited in the final submissions:*
>
> > *'In common law, if a contract contains an express or implied provision that one of the parties may determine the contract by notice, notice must be given in accordance with the terms of the contract.'*
>
> *We adopt those words as a correct expression of the law."*

Then, the tribunal went ahead and held in Paragraph 3.19 that:

> *"As shown above, Clause 15.1 was not complied with in several respects.* ***First****, the notice which was served on the Claimant was not 'in writing'. It was an e-mail which, being an electronic means of communication, was excluded as a writing by Clause 18.4 of the Agreement.* ***Second****, since the notice had to be in writing and it was not, there was in fact no notice.* ***Third****, even if it were accepted, and it has not, that there was a notice in writing,* ***the requirement that it should be of three months was not complied with****. So, the notice, if it were a notice, was not given in accordance with the terms of the contract by which the parties were bound. The purported notice was not valid and it could not have the effect of terminating the Agreement between the parties. The Claimant, therefore, was wrongfully terminated. In effect, the Respondent acted in breach of the Agreement and consequences will follow."* [Emphasis added]

With much respect to Mr. Nyika, we do not agree with him that the tribunal raised the question of validity of the notice of termination on its own motion just because it acknowledged that the respondent did not clearly and specifically plead the apparent defects in the notice. We are inclined to agree with Mr. Ngalo that in determining the central question

whether the Agreement was lawfully terminated by the appellant's issuance of the notice, the tribunal was entitled to consider and determine the ancillary issues on whether the notice met the terms of the Agreement based on the evidence adduced by the parties. We are satisfied that in coming to its finding on the issue the tribunal meticulously and judiciously considered the evidence and arguments of the parties before arriving at the conclusion that the notice was invalid and the Agreement was wrongfully terminated. We are fortified in our view particularly by the finding by the tribunal based on uncontroverted evidence that the purported notice of termination was on the face of it invalid for failing to meet the three months' requirement apart from not being in "writing" within the meaning intended by the Agreement as found by the tribunal. We thus do not find any fault in the High Court's endorsement of the tribunal's approach on the issue at hand. Accordingly, we dismiss the first ground of appeal as it is unmerited.

Next, we deal with the second ground of grievance faulting the learned High Court Judge for not holding that the arbitral tribunal abrogated the appellant's right to be heard by considering extrajudicial evidence that was neither pleaded nor presented at the hearing.

On the ground at hand, Mr. Nyika contended that the learned Judge erred in not finding that the arbitral tribunal relied upon an email of 7th January, 2013 that the respondent allegedly received from the appellant attached with the notice of termination to conclude that the said notice was not served on 14th December, 2012. It is further contended that the said email was not tendered in evidence and that the tribunal relied on extrajudicial evidence for which the appellant was not accorded an opportunity to challenge. It is added that the learned Judge ought to have considered whether the evidence which the arbitral tribunal relied upon was part of the record.

Mr. Ngalo, on the other hand, countered that the claim that extrajudicial evidence was acted upon by the tribunal was unsubstantiated. While wondering whether the said extrajudicial evidence meant fabricated or concocted evidence, he argued that the appellant ought to have furnished proof beyond reasonable doubt to support such a serious claim. He then referred to the record of proceedings on the final session before the arbitral tribunal on 24th April, 2014 where the parties were afforded an opportunity to be heard and none of them raised any new issues even after being invited to do so by the tribunal.

We understood the appellant's grievance here to mean that the arbitral tribunal wrongly acted upon extraneous matter that an email of 7th January, 2013 was allegedly received by the respondent from the appellant attached with the notice of termination and that based on that fact it concluded that the said notice was not served on the respondent on 14th December, 2012 but on 7th January, 2013. That the learned Judge ought to have considered whether the evidence which the arbitral tribunal relied upon was part of the record.

With respect, we do not think that Mr. Nyika is right. To respond to his submission, we think it is necessary that we advert to the excerpt we adopted from Russell on Arbitration (supra) at page 422 for the position that it is not a "ground for setting aside an award that there is no evidence on which the facts could be found, because that would be a mere error in law, and it is not misconduct to come to a wrong conclusion in law" unless the error in law appears on the face of it. Instead of stating if the said error is manifest on the award, it has been valiantly argued for the appellant that the learned Judge ought to have looked at the transcript of the evidence before the arbitral tribunal to determine if the alleged email was part of the record. It is our firm view that the learned Judge was not entitled to do so in the circumstances of this matter. To be sure, as held in the decision of

the Supreme Court of Canada in **City of Saint John v. Irving Oil Co. Ltd.**, [1966] SCR 581 that:

> *"**there may be cases where it is permissible to examine the evidence, but the general rule**, and the one which in my opinion applies in the present case is stated in Russell on Arbitration, 17th Ed. at p. 179, where it is said:*
>
> *'In deciding as to the admissibility of evidence tendered, the **arbitrator must act honestly and judicially, and if while so acting he decides erroneously that evidence is or is not admissible, that is not in itself misconduct**, and (as with other mistakes) his award will not be set aside on that ground, **unless the error appears on its face.**'"* [Emphasis added]

In the instant case, it is not manifest on the face of the award that certain "extrajudicial evidence", whatever that means, was acted upon by the tribunal as the basis for its finding that the impugned notice was issued on 7th January, 2013 as well as its ultimate conclusion that it did not meet the three months' requirement. We thus find no merit in the claim that the learned High Court erred in not scrutinizing the record of evidence to see if such extraneous evidence was acted upon. The second ground of appeal stands dismissed.

The third ground of appeal as reproduced earlier is a claim that the learned High Court Judge erred in law and in fact for failing to hold that the arbitral tribunal exceeded its jurisdiction by determining in favour of the respondent the issue of general damages which had not been submitted for determination.

Mr. Nyika submitted on the third ground that the issue of general damages was never framed for the determination by the arbitral tribunal and, as a result, no evidence was adduced on it. Citing the case of **W.J. Tame Ltd. v. Zagoritis Estates Ltd.** [1960] 1 EA 370 for the holding that it was a fundamental error where the arbitrators went outside the terms of the submission by answering wrongly a question, be it of law or mixed fact and law, which was not referred to them at all, he urged us to find that the tribunal exceeded its jurisdiction to consider the question of general damages the parties did not submit to it.

Mr. Ngalo disagreed. He argued that the question of general damages was properly pleaded, considered and determined as a part of the general question as to what reliefs the parties were entitled to. He added that the learned High Court Judge having found no misconduct on the part of the arbitrators could not, and was not, expected to evaluate the evidence and the reasoning of the arbitrators on general damages.

We have no hesitation to go along with Mr. Ngalo on the issue under consideration. It is manifest on the face of the award that one of the heads of reliefs prayed for by the respondent was general damages and that as rightly argued by Mr. Ngalo that question was conveniently considered and determined under the rubric of what reliefs the parties were entitled to. In fact, that head of reliefs seems to have had five sub-heads, each of which was scrupulously considered and determined by the arbitral tribunal. Thus, the contention that the tribunal exceeded its jurisdiction defined by the submission to arbitration by the parties is, on the face of the award, hollow and we dismiss it.

We now turn to the fourth ground of appeal. Its thrust is a contention reflective of the first ground of appeal in that it faults the learned High Court Judge for not holding that the arbitral tribunal exceeded its jurisdiction in dealing with the issue of service and validity of the notice terminating the Agreement while the parties had recorded that the service and receipt of the notice was not an issue. On this ground, the learned counsel for the appellant relied on the cases of **Dowans** (supra) and **W.J. Tame Ltd.** (supra) to carry home his point that the service and the validity of the notice were not issues submitted to the tribunal for arbitration and

thus the tribunal exceeded its mandate in raising and dealing with the said issues.

Mr. Ngalo counteracted that the question on the notice of termination via email of 7th January, 2013 was specifically pleaded and testified upon by the respondent. He asked us to look at pages 000179 to 000211 of the record.

We would say that our reasoning and findings on the first ground of appeal apply with equal measure to the ground under consideration. Even though the tribunal had recorded that it was not in dispute between the parties that the Agreement was terminated by the appellant upon issuing the respondent a three-months' notice dated 14th December, 2012 with the envisaged termination being due to take effect on 30th March, 2013, it was clearly stated that the first and vital issue for the hearing and determination was whether the Agreement was lawfully terminated. We would restate that there was an apparent inaptness between the non-issue, as recorded, that the Agreement was **terminated in fact** upon the notice being issued and the crucial question whether the said Agreement was **terminated in law**. In this milieu, the tribunal was enjoined to consider and determine that central issue along with the related sub-issues on the medium and span of the notice so far as they were relevant to the determination of the

validity of the notice in terms of Clauses 15.1, 18.3 and 18.4 of the Agreement. From the award, we have formed the impression that those sub-issues were addressed by both parties, meaning that the claim that the appellant was not heard on that aspect does not arise. Without further ado, we hold that the fourth ground of appeal is bereft of substance and proceed to dismiss it.

Next, we deal with the fifth ground of appeal alleging that the learned High Court Judge erred in law in failing to hold that the arbitral tribunal erred on the face of the award by defining the word 'writing' as used in Clause 18.4 of the Agreement to exclude emails contrary to the definition of the said word in Cap. 1 (supra) and Cap. 345 (supra). On this ground, it was argued for the appellant that the learned High Court Judge failed to decipher that the arbitral tribunal's finding that the notice of termination sent by email was not in "writing" in terms of Clause 18.4 of the Agreement was contrary to section 4 of Cap. 1 (supra) defining a writing so broadly to include "other modes of representing or reproducing words in visible form" which, then, would conveniently include an email. It was thus submitted that the tribunal's holding that the notice was not in writing was erroneous and an apparent error on the face of the award.

Mr. Ngalo responded that the alleged error was not apparent on the face of the award to have warranted the intervention of the High Court. He added that an error on the face of the award is one which is self-evident or one which does not require reasoning or identifying process. It is an error visible to the eye when one looks at the award alleged to contain such an error.

Without a doubt, the appellant's criticism of the award is clearly directed at the holding in Paragraph 3.15 of the award to the effect that the notice of termination sent by email was not in "writing" contrary to the terms of Clause 18.4 of the Agreement. We feel obliged to let the said paragraph speak for itself thus:

> *"There is another disquieting feature about the notice of termination. It appears undisputed that the notice that the Claimant received was an e-mail. The question here is whether the e-mail is a 'writing' within the meaning intended by the Agreement. Clause 18.4 of the Agreement has excluded telex and facsimile as a means of communicating a notice. Of course, e-mail has not been specifically excluded but the exclusion of telex and facsimile which are electronic means of communicating a message would, to us, mean that*

electronic means of communicating a notice under the Agreement were excluded."[Emphasis added]

Having scanned the above analysis and finding of the arbitral tribunal, we would observe that the tribunal construed the term "writing" by applying the *eusdem generis* rule thereby excluding electronic forms of communication. The matter before the High Court not being an appeal but a petition for reviewing the award, the court was not concerned with the correctness of the definition of "writing" adopted by the tribunal. The crucial issue was whether that aspect of the award disclosed an error on its face. We are unpersuaded that even if the tribunal's analysis and finding were erroneous, the error involved would amount to one on the face of the award. As rightly submitted by Mr. Ngalo, the alleged error is not self-evident. It is one requiring a long drawn-out process of reasoning involving the consideration of the provisions of Cap. 1 (supra) and Cap. 345 (supra). As a result, we dismiss the fifth ground of complaint for want of merit.

As indicated earlier, the sixth ground of appeal criticizes the learned High Court Judge for not holding that the arbitral tribunal erred on the face of the award by raising on its own the issue of the validity of the notice as to whether it was in writing or whether it was served on the respondent within the requisite contractual time when it was on record that the parties were not at issue on that aspect. We need not belabour the issue as it

mostly regurgitates the essence of the first, second, fourth and fifth grounds of appeal. We are decidedly of the view that our reasoning and findings on those grounds equally take care of the thrust of the present ground under consideration. Indeed, having considered the opposing written submissions of the parties on the present ground, we can do no better than briefly restate that although it had been recorded that the parties were not at issue on the fact that the Agreement was terminated upon the notice dated 14th December 2012 being issued, there was outwardly an incongruity between the said recorded non-issue and the central question for the hearing and determination whether the said Agreement was terminated in law. Given these circumstances, the tribunal had to consider and determine that central issue along with the related sub-issues on the medium and the span of the notice so far as they were relevant to the determination of the validity of the notice in terms of Clauses 15.1, 18.3 and 18.4 of the Agreement. We thus do not find any justification in the complaint that the sub-issues were raised by the tribunal *suo motu* and that in doing so the appellant's right to be heard was abrogated. It is our view that the learned High Court Judge cannot be faulted on this aspect. Accordingly, we hold that the sixth ground of appeal, too, is without merit and proceed to dismiss it.

We move on to the complaint in the seventh ground of appeal to the effect that the learned High Court Judge erred in law in failing to hold that the arbitral tribunal made an error apparent on the fact of the award by misapplying and misconstruing the decision in **Antaios Cia** (supra) to the facts of the case.

For the appellant, it was submitted on the seventh ground that in Paragraph 4.10.2 of the award the tribunal misapplied the decision in **Antaios Cia** (supra) to support the proposition that a court or tribunal may interpret words in a contract to give them business sense. Mr. Nyika assailed the said proposition, contending that **Antaios Cia** (supra) was cited and applied out of context. That a court or tribunal could only improve a term of contract if it was ambiguous but otherwise the court or tribunal has no jurisdiction to interfere with what the parties agreed under the contract. Thus, it was argued that the tribunal's finding that Clause 15.7.5 of the Agreement made no business sense by limiting the appellant's liability for damages on termination of the contract was patently erroneous.

Conversely, Mr. Ngalo claimed that the alleged error was not apparent on the face of the award to have warranted the intervention of the High Court.

In determining the issue at hand, we looked at Paragraph 4.10.2 of the award, which is the subject of the appellant's criticism of the arbitral tribunal. It reads thus:

> *"The plain meaning of the relevant provision in the Agreement and the submissions by Mr. Nyika is that it is possible for a person to enter an agreement for a certain duration which obliges him to perform certain duties, go ahead and perform those duties at a certain cost and to the full satisfaction of the other party anticipating returns over the contract period, and nonetheless that person be precluded by the same agreement from claiming compensatory damages upon termination before expiry of the contract regardless of whether the termination was valid or not according to their contract. We do not see the business sense of such a contractual arrangement and on this we wish to quote Lord Diplock L.J. in* ***Antaios Cia Naviera SA v Salen Rederierna AB, The Antaios*** *[1984] 3 All ER 229 which, though made in a slightly different context, aptly summarises the situation thus:*
>
> > *'... if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts business sense, it must be made to yield to business common sense.'"*

Having read the tribunal's reasoning and finding as excerpted above, we are firm in our mind that the alleged misapplication of the passage in **Antaios** (supra) as a springboard for the tribunal's refusal to rely on Clause 15.7.5 of the Agreement to deny the respondent its right to compensation by way of general damages does not meet the threshold of an error on the face of the award. Besides, the tribunal's refusal to rely on Clause 15.7.5 was further justified by its view stated in Paragraph 4.10.3 of the award that since the premature termination of the Agreement was contrary to the terms of the Agreement and that it amounted to a breach of contract by the appellant, the respondent was entitled to compensation for loss or damage under section 73 of Cap. 345. The tribunal accentuated that compensation for breach of contract was a statutory right that could not be contracted away. In the premises, it cannot be said that the aforesaid holding by the tribunal in favour of the respondent was arrived at based on a manifestly erroneous proposition of the law from a distorted construction of **Antaios** (supra). We would, therefore, dismiss the seventh ground of appeal as we find no substance in it.

To be dealt with in unison at this point are the eighth, tenth and eleventh grounds of appeal whose thrust is an attack on the general damages awarded by the arbitral tribunal. In essence, these grounds raise

three interrelated aspects: first, as per Ground No. 8, it is contended that the learned High Court erred in not finding that it was an error on the face of the award that the tribunal awarded general damages in the place of unproven special damages; secondly, it is claimed, as per Ground No. 10, that the learned Judge erred in not holding that it was an error on the face of the award that the tribunal awarded damages for which no injury had been alleged and proven by the respondent; and finally, that the learned Judge erred in failing to find that it was wrong on the face of the award that the tribunal awarded a further sum of TZS. 500,000,000.00 for wrongful termination of contract on top of general damages awarded for the same wrongful termination based on various items claimed as special damages.

In amplifying its criticism of the arbitral tribunal's treatment of general damages, Mr. Nyika submitted, briefly, that the tribunal wrongly granted certain discounted amounts as general damages while it had disallowed them as special damages for want of specific proof. It was submitted further that as no injury or damage was proven by the respondent and also based on the principle that where a party fails to prove special damages the court or tribunal can only award nominal damages, the learned High Court Judge should have found that the tribunal erred in

granting substantial damages to the respondent. Finally, it was argued that the award of general damages for TZS. 500,000,000.00 in addition to other general damages granted in lieu of special damages was erroneous.

Mr. Ngalo's response was both brief and general. He denied that the alleged errors were apparent on the face of the award to have warranted the intervention of the High Court. He thus beseeched us to dismiss the complaints.

We must reiterate that it was not the duty of the High Court in dealing with the complaints under consideration to determine whether the arbitral tribunal was correct in its treatment and determination of the awarded general damages. The court could not go beyond determining whether there was any error on the face of the award as regards the assessment and award of the damages. Of course, we acknowledge that the High Court dealt with these complaints rather generally, if not perfunctorily. It concluded that there was no error justifying the award being set aside.

On our part, we scrutinized the award on how the tribunal dealt with the claims for special and general damages. It is noteworthy that while the tribunal assessed and awarded special damages for loss of the money invested under the contract as well as the claim for commissions and bonuses for the period from June 2012 up to March, 2013, it rejected the

claims for special damages for loss of projected earnings on commissions and bonuses for the remaining contract period of fourteen months following premature termination of the said Agreement. It is enlightening to look at the reason for the disallowance as stated in Paragraph 4.9.3 of the award (at page 28 of the award – page 773 of the record of appeal):

> *"**We noted that these claims were made in specific numbers as if they have been suffered already. The difficulty with these kinds of claims is that they tend to be speculative. There are so many vagaries about the future**. Who knows if the Claimant will be able to earn the stated amount of commission and bonuses each month or on most of the months or on only some of the months. These are claims for specific damages and they have to be proved specifically. **We are not satisfied that the Claimant has proved them.**"* [Emphasis added]

The tribunal, then, deliberated on the claim for general damages. Its reasoning and finding on that aspect is shown by Paragraph 4.11.6 of the award, which we extract at length:

> *"In the assessment of general damages, we found ourselves caught between two situations. On the one hand, having found that the Respondent wrongfully and prematurely terminated the*

Agreement, we are also bound to award damages to the Claimant. On the other, much as the law and the court decisions referred to earlier on give us a wide latitude of discretion in determining general damages, we are hesitant to just pluck figures from the air. ***We guided ourselves with the circumstances of this dispute and the fact that the Agreement was terminated prematurely and wrongfully.***

We want to start from the premise that much as it is not possible to predict with mathematical accuracy the earnings which the Claimant would have realized if the Agreement had run its full term, and that it the reason we disallowed the claim for specific damages for loss of expected commissions and bonuses, ***it is not at all unreasonable to assume that earnings of some magnitude would have been made.*** *Indeed, there would be an element of absurdity to assume that no commissions and bonuses would have been earned at ail. Similarly, much as the Claimant has failed to prove a good portion of its claim for specific damages for lost investment, it would be unreasonable to assume that the Claimant did not invest in its business to equip itself to adequately meet its obligations to the Respondent for the duration of the Agreement."* [Emphasis added]

Finally, the tribunal found, in the same paragraph, that it was just and fair to determine general damages on the bases of the respondent's figures as a guide only. That statement reads:

> *"While we must reiterate here that although we have dismissed certain claims specifically claimed by the Claimant, and that we are not bound by the figures given by the Claimant,* ***the said figures were good guidance to us in exercising our discretion. We thus have to rely on the indicative figures in the Statement of Claim and discount them to the extent we found just and fair to determine general damages*** ...." [Emphasis added]

The above extracts from the award, in our considered opinion, dispel the appellant's complaint that the award of general damages is riddled with errors apparent on its face. At first, it is not true that the disallowed claims for special damages were rehashed and repackaged as general damages. The indicative figures given by the respondent in its Statement of Claim were only used as a guide for assessing and determining general damages to compensate for loss of expected earnings from commissions and bonuses for the remainder of the Agreement. Secondly, Mr. Nyika's submission to us that no injury or damage was proven by the respondent and so the respondent was entitled to no more that nominal damages is

neither here nor there. It is apparent that the tribunal found that the respondent was in law entitled to general damages for loss of expected earnings from commissions and bonuses for the remainder of the Agreement. Certainly, that claim was not a class of damages for which the respondent had to provide any specific proof. Thirdly, we do not find anything objectionable as regards the tribunal's assessment and eventual award of TZS. 500,000,000.00 "for wrongful termination of the Agreement" generally separate from the award of other general damages for loss of expected earnings from commissions and bonuses for the remainder of the duration of the Agreement. Thus, Grounds No. 8, 10 and 11 are lacking in substance. We dismiss them all.

Another ground of grievance is the ninth ground of appeal. As hinted earlier, it is a contention that the learned High Court Judge erred in law and fact in failing to hold that the arbitrators exceeded their jurisdiction by giving a novel construction of the limitation of liability clause set out in Clause 15.7 of the Agreement, when the construction of the said clause was not a matter in issue between the appellant and the respondent. On this complaint, Mr. Nyika argued that the arbitral tribunal exceeded its jurisdiction by construing the limitation of liability clause (Clause 15.7.5) which was not a part of the submission to arbitration. That in its

construction, the tribunal wrongly refused to enforce that clause on the reason that it lacked business sense. That there was no proof that the said clause was ambiguous or that it lacked any business sense. Again, Mr. Nyika contended that the case of **Antaios** (supra) was not only cited out of context but it was also misapplied.

On the part of the respondent, Mr. Ngalo, once again, countered that the appellant went out of its way to analyse the award and reasoning thereof instead of pointing out errors appearing on the face of the award. He said that the alleged error on the construction of Clause 15.7.5 of the Agreement was not apparent on the face of the award.

To us, the complaint at hand is essentially an extension of the grievance in Ground No. 7 that we have dealt with and dismissed. Having considered the competing submissions of the learned counsel for the parties and scrutinized the award, we maintain our finding that the tribunal's refusal to rely on Clause 15.7.5 of the Agreement to deny the respondent its right to compensation by way of general damages does not meet the threshold of an error on the face of the award. We would reiterate that the tribunal's refusal to rely on the limitation of liability clause was mainly justified in Paragraph 4.10.3 of the award. First, the tribunal was of the view that the premature termination of the Agreement by the appellant

was contrary to the terms thereof and thus it amounted to a breach of contract by the appellant. Secondly, due to the said breach, the respondent was entitled under the law (section 73 of Cap. 345) to compensation for loss or damage suffered. Thirdly, the tribunal stressed that compensation for breach of contract was a statutory right that could not be contracted away.

With respect, we do not agree with Mr. Nyika that the tribunal exceeded its mandate in dealing with the effect of Clause 15.7.5 of the Agreement. It may not have been a specific question in the submission but the tribunal had to deal with it as an ancillary matter in order to determine the appellant's liability to the respondent for payment of compensation that had been claimed under several heads. The ninth ground of appeal, too, fails.

Next, we turn to the twelfth ground of appeal, which, for all intents and purposes, is a contention criticizing the learned High Court Judge for not holding that upon accepting as a fact that the Agreement distinguished between old and new business, the arbitral tribunal made an error apparent on the face of the award by including the old business into the targets set by Appendix 2 of the Agreement for new business. It is further claimed that the tribunal misconstrued the Agreement (at pages 25 and 26 of the award)

and in doing so, it made an error apparent on the face of the award in failing to exclude the collections from old business in the determination of the respondent's entitlement to bonus.

Having dissected the part of the award referred to by the appellant, we observe that the impugned conclusion that the respondent was eligible for commissions and bonuses for old business in the same way as it was for new business, was premised upon two matters: first, the tribunal's construction of certain terms of the Agreement to the effect that mere recognition of distinction of "old business" (prior to the Agreement coming into force) and "new business" (under the Agreement) did not subject the old business to a remuneration regime less favourable to that of new business. Secondly, the tribunal took into account uncontroverted evidence that certain invoices raised by the respondent for the months of June 2012 to March 2012 in respect of old business (prior to the Agreement being entered into) were settled by the appellant in accordance with the Agreement.

As we see it, there is no apparent error on the face of the award on how the above assailed conclusion was reached, based on the construction of the Agreement and the uncontroverted evidence that payment for old business was made in accordance with the Agreement. It was not for the

learned High Court Judge to consider whether the tribunal was correct in its construction of the Agreement and the inference it drew from the evidence that old business and new business were being treated similarly under the Agreement. As a result, we have no hesitation to dismiss Ground 12 of appeal.

Finally, we turn to the last three grounds of appeal (that is the thirteenth, fourteenth and fifteen grounds), which we propose to consider and resolve conjointly. The common thread in all these grounds is an attack on the learned High Court Judge's exposition of the applicable law for reviewing and setting aside arbitral awards: that he wrongly stated that errors of law or fact on the face of the award no matter how obvious cannot be a ground for setting aside an award on the ground of misconduct; that he erred in saying that the power of the High Court in interfering with an arbitral award is only supervisory and can only be applied where there is no fairness and justice in the arbitration process; and finally, that he failed to appreciate that errors of law and fact had to be apparent on the face of the award and not necessarily in the proceedings before the arbitral tribunal. On account of these errors, it was submitted that the learned Judge slipped up in concluding that the arbitration process was fair and

justified. We considered the contending submissions of the parties on these complaints.

Beginning with Ground No. 13, we agree with Mr. Nyika that the learned High Court Judge's exposition of the applicable law was to a certain extent flawed. For, at page 14 of his ruling he stated that

> *"... in Tanzania, setting aside an award on the ground of* ***misconduct is very limited as it is only restricted to the personal misconduct of the arbitrator and not procedural misconduct.****"*[Emphasis added]

In **Rashid Moledina & Co. (Mombasa) Ltd. and Others v. Hoima Ginners Ltd.,** [1967] EA 645, the now defunct East African Court of Appeal on an appeal from Kenya, held, as per Sir Charles Newbold, P., that:

> *"A good reason for setting aside the award would obviously be, as is set out in s. 12, misconduct of the arbitrator or the improper procuring of the award. It has also been held (see Tame v. Zagoritis ...)* ***that another good reason is where an error of law is apparent on the face of the record ....****"*[Emphasis added]

We are highly persuaded by the above position being a construction of the provisions of the Kenyan law which are in *pari materia* with section

16 of the Act. Thus the power to set aside an award, as we explained earlier, is not limited to an arbitrator's personal misconduct but it extends to cases involving errors manifest on the face of the award. We are, however, constrained to hold that even though there is merit in the ground of appeal under consideration as we have demonstrated, the said ground is not decisive on the outcome of the instant appeal.

By dint of the above reasoning, we also agree with Mr. Nyika, as regards the complaint in Ground No. 14, that the learned High Court Judge's view that the power of the High Court in interfering with an arbitral award is only supervisory and can only be applied where there is no fairness and justice in the arbitration process is somewhat faulty. While we agree that the court's power under the Act is mainly supervisory, it is not correct that such power to review and set aside an award can only be applied in cases of unfairness and injustice in the arbitration process. We need not reiterate that the said power is exercisable in cases of misconduct of the arbitrator or improper procuring of the award or where there is an error on the face of the award. Again, here, we hold that despite the merit in Ground No. 14 as we have demonstrated, our finding on it does not affect the validity of the impugned award or the outcome of the appeal.

Apart from assailing the learned High Court Judge's exposition of the applicable law, the fifteenth ground presents a general grievance that the

learned Judge failed to appreciate that the errors in the instant case were on the face of the award. In view of our findings on the preceding grounds of appeal to the effect that none of the alleged errors was proven to be exhibited on the face of the award, the appellant's allegation in Ground 15 is plainly without substance. It stands dismissed.

In sum, we uphold the High Court's conclusion that, on the whole, there was no justification for interfering with the arbitral award and setting it aside. As a result, we dismiss this appeal with costs.

DATED at **DAR ES SALAAM** this 27th day of December, 2019.

S. A. LILA
JUSTICE OF APPEAL

G. A. M. NDIKA
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The Judgment delivered this 31st day of December 2019 in the presence of Mr. Silas Shija, Counsel for the Appellant and Mr. James Bwana, Counsel for the Respondent is hereby certified as a true copy of the original.

S. J. KAINDA
DEPUTY REGISTRAR
COURT OF APPEAL