IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MMILLA, J.A., MWANGESI, J.A., And SEHEL, J.A.)

CIVIL APPLICATION NO. 103/01 OF 2018

PATTY INTERPLAN LTD.....APPLICANT

VERSUS

TPB BANK PLC..... RESPONDENT

(Application for Review from the Judgment of the Court of Appeal of Tanzania in Civil Appeal No. 68 of 2014)

(Mjasiri, Mmilla, Lila, JJ.A.)

dated the 5th day of February, 2018
in
Civil Appeal No. 68 of 2014

RULING OF THE COURT

18th February & 20th April, 2020

MMILLA, J.A.:

This is an application for review. It has been brought by Patty Interplan Ltd. (the applicant/contractor), and relates to the Court's decision in Civil Appeal No. 68 of 2014 dated 5.2.2018. It is by way of Notice of Motion, and is anchored under the provisions of section 4 (4) of the Appellate Jurisdiction Act Cap. 141 of the Revised Edition, 2002 as amended by the Written Laws (Misc. Amendments Act) No. 3 of 2016 (the AJA) and Rule 66 (1) (a) of the Tanzania Court of Appeal Rules, 2009 (the Rules). The said application is

supported by an affidavit sworn by Patrick Mbedule, the principal officer of the applicant company. The Notice of Motion has raised a single ground that there is a manifest error on the face of the record in that judgment, resulting in the miscarriage of justice because there wasn't any decision taken by the Project Manager which the contractor (the applicant) believed was either outside the authority by the contract or that the decision was wrongly taken, as such there was no decision to be referred to adjudication prior to arbitration.

The application is contested by TPB Bank Plc. (the respondent/employer). It is contended on its behalf that there is no any manifest error on the face of the record in the judgment of the Court of 5.2.2018 capable of occasioning a miscarriage of justice.

At the commencement of the proceedings, Mr. Julius Kalolo Bundala, the learned advocate who represented the respondent bank raised a concern about the composition of the panel. He said in law, in an application of this nature, save for Hon. Mjasiri who has retired, the other panelists ought to have been Mmilla and Lila, JJ.A. He wondered why Hon. Lila was not amongst the panelists.

On their part, Mr. Alex Mgongolwa and Mr. Sosten Mbedule, learned advocates, represented the applicant. Mr. Mgongolwa submitted that they had no problem with the present composition in so far as Mmilla, JA who was one of the panelists during the hearing of the appeal subject of the review, is present. He urged the Court to proceed with the hearing of the application as was scheduled.

After hearing them, we resolved to proceed and promised to give our reasons in the course of composing the ruling in respect of the substantive application, which is why we have it covered.

We have given an anxious consideration to the concern raised by Mr. Bundala. Although he did not specifically say so, we think he had in mind the provisions of Rule 66 (5) of the Rules which stipulate that:-

> *"(5) An application for review shall* ***as far as practicable be heard by the same Justice or Bench of Justices*** *that delivered the judgment or order sought to be reviewed."* [The emphasis is ours].

In our firm view, the words ". . . ***as far as practicable be heard by the same Justice or Bench of Justices*** . . .," give room for consideration of other essential factors when composing a panel, including the question of

convenience. We are firm that the presence of Mmilla, JA is a reasonable compliance attempt with the requirement under that Rule. It is on this basis that we felt it was in order for us to proceed with the hearing of this application.

The background facts of this matter are that, on 5.7.2006 the parties signed a contract whereby the applicant/the contractor was to execute work for the respondent/the employer at the original contract price of Tzs. 373,093,928.00. It was also agreed that in case of a dispute between them, it had to be referred to an adjudicator before sending it to the arbitrator. Through a separate agreement, the respondent appointed a Project Manager (the Consultant), whose duty was to superintend the works.

At the completion of the work, the original contract price of Tzs. 373,093,928.00 rose to Tzs. 722,689,017.20 allegedly due to change of specifications and other incidentals. The respondent paid the applicant Tzs. 531,989,979.81 and declined to honor Interim Certificate No. 7 dated 8.11.2007 of Tzs. 190,699,038.39. The respondent averred that the claimant was wrongly paid the sum of Tzs. 571,989,979.81. Over-payment stood at Tzs. 190,699,038.39, and the respondent demanded a refund of that amount. For that refusal, the applicant instituted a claim for breach of

contract and payment of Tzs. 357,713,256.00 being the principal sum of Tzs. 190,699,038.80 plus 21% per annum interest under Clause 43.2 of the Conditions of Contract counting from 28 days after 8.11.2007 to the date of filing the statement of claim, among others. The respondent disputed the claim and raised a counter claim.

At that point, the present applicant submitted the dispute for arbitration. The present respondent resisted the submission of the dispute to the arbitrator for the reason that it was yet to be submitted to the adjudicator in accordance with the agreement. However, the objection was overruled. Arbitration proceedings were concluded and the respondents were awarded Tzs. 371,712,256/=.

That decision aggrieved the respondent who petitioned to the High Court. In the judgment handed down on 28.8.2013, the High Court found and held that the arbitrator had no jurisdiction to arbitrate that dispute, in consequence of which it found the proceedings before the arbitrator incompetent, nullified them and set aside the award it had given and all the resultant orders. In turn, that decision aggrieved the applicant who lodged in the Court Civil Appeal No. 68 of 2014. In its decision of 5.2.2018, the Court upheld the findings of the High Court and dismissed the appeal. Feeling

uncomfortable with that decision, the applicant lodged the present application for review.

The applicant's strong point in the written submissions is that there is a manifest error on the face of the record that has resulted in miscarriage of justice because it was not correct for the Court to hold that the matter ought to have been submitted to the adjudicator before it could be referred to the arbitrator. It is stated that because the crux of the matter between the parties was the respondent's refusal to honour Interim Certificate No. 7, the payment of which was sanctioned by the Project Manager, there was no need to refer it to the adjudicator prior to the same being referred to the arbitrator because that was not the decision which aggrieved the applicant. As such, it is submitted, the dispute of the parties was not covered by Clause 24.1 of the Contract.

In his oral submission, the applicant's learned counsel exemplified that for Clause 24.1 of the Contract to apply, there ought to be a decision of the Project Manager which was wrongly taken or was *ultra vires* the powers conferred on him/her. That is when it could be necessary to refer the matter to the adjudicator before it could be referred to the arbitrator. This, they argued, was not the case in the present matter; therefore that the decision

misapprehended the facts and law in the circumstances of this case, and it worked injustice on the part of the applicant.

Probed by the Court on whether or not misapprehension of fact and law is a ground for review, Mr. Mgongolwa was positive that it is, and referred us to this Court's case of **OTTU on Behalf of P. L. Assenga & 106 Others & 3 Others v. AMI (Tanzania) Limited**, Civil Application No. 20 of 2014 (unreported) in which, he said, the Court quoted with approval a portion in the Australian case of **Autodesk Inc. v. Dyson (No. 2)** – 1993 HCA 6; 1993 176 LR 300.

Mr. Mgongolwa concluded his submission that the facts in the case of **Mvita Construction Company Limited v. Tanzania Harbours Authority** [2006] T.L.R. 22 which was relied upon by the Court in arriving at the decision which is the subject of this review, were distinguishable to those in the present case; therefore that **Mvita's** case was not applicable. He requested the Court to allow the application with costs.

On the other hand, the learned advocate for the respondent supported the judgment of the Court subject of this review. It has been contended in the written submissions in reply that the Court correctly decided that the

arbitrator lacked jurisdiction to adjudicate the matter between the parties, and that referring the matter to the arbitrator skipped one of the procedures under the contract of submitting the dispute to the adjudicator before the arbitration stage. It is insisted that the relationship of the parties was created by an agreement whose terms are binding upon them, and ought not to have been circumvented.

According to Mr. Bundala, Clause 24.1 of the Contract requires all the parties to submit their dispute arising out of their agreement to the adjudicator within a period of 14 days. He maintained that the dispute of the parties was not confined to payment of the amount of Tzs. 190,699,038.39 in Interim Certificate No. 7, but it included other claims, to wit, over payment of the sum of Tzs. 531,989,979.81 and issues of delayed works. In the circumstances, he argued, the parties were required to submit their dispute to the adjudicator before embarking to the arbitration stage. Since this was not done, the parties failed to honour the terms of their contract.

Mr. Bundala submitted similarly that in case of dissatisfaction with the decision of the adjudicator, Clause 25.2 of the Contract contemplated either party to refer that decision to arbitration within a period of 28 days of the adjudicator's decision. As it was, Mr. Bundala insisted, it was improper for the

applicant to skip one of the procedures of referring the dispute to the arbitrator because the parties to the contract are bound by their terms of the contract. He relied on the case of **Fina Bank Limited v. Spares and Industries Limited** [2000] E.A. 52.

In his oral submission, Mr. Bundala argued likewise that the assertion that the Project Manager did not make any decision that would necessitate the matter to be referred to the adjudicator is misleading because rejection to approve payment in respect of Interim Certificate No. 7 was not the only dispute between the applicant and the respondent, but there were others. He repeated his earlier assertion that other claims included overpayment to the applicant contrary to the provisions of the contract and issues of delayed works as reflected in the cross petition at pages 91 and 92, all of which were supposed to have been referred to the adjudicator. Mr. Bundala emphasized therefore, that the parties in the present case could not escape from the requirements of the terms of contract to submit the dispute to the adjudicator before the arbitration stage.

In the circumstances explained above, Mr. Bundala stressed that there is no misapprehension of fact or law because it was necessary for the parties to adhere to the terms of their contract and refer their dispute to the

adjudicator before it could have found its way to the arbitrator. He said the case of **Mvita** (supra) was correctly cited and relied upon to show that where prerequisite procedures are not followed, then the decision resulting therefrom is invalid. He urged the Court to dismiss this application with costs because there is no any manifest error on the face of the record to attract a review.

We have carefully considered the competing arguments of counsel for the parties. We gather that the crux of the matter is whether or not having the Court held that the arbitrator had no jurisdiction because the matter ought to have been submitted to the adjudicator before it could be referred to him (the arbitrator); that decision constituted a manifest error on the face of the record which occasioned a miscarriage of justice to the applicant.

As earlier on pointed out, the applicant maintains that since the dispute between the parties was refusal to pay the amount quipped in Interim Certificate No. 7, and because the Project Manager had sanctioned the payment of the amount involved in that certificate, it did not require to go through the adjudication process as was held by the High Court and confirmed by the Court. We consider that this argument is based on the

belief that Interim Certificate No. 7 was the only claim between the parties. We pose here to think; was that really the position?

Before delving into the problem facing us here, we wish to deplorably observe that the contract of the parties was in some parts imprecise. According to the terms of that Contract, resolution of disputes is covered under Clause 24.1 thereof. Unfortunately, while that clause is specific and clear on disputes between the contractor and the Project Manager, it is unclear in respect of disputes between the contractor and the employer. In our view, that was an oversight, and was very unsatisfactory. In the absence of any other clause to cater for disputes between the contractor and the employer, particularly when we take into account the provisions of Clause 25 (1), (2) and (3) of that Contract which is inclusive (employer and contractor), we have good cause to believe that by necessary implications, the procedure under Clause 24.1 of the said Contract also applies in disputes between the contractor and the employer.

An in-depth traverse of the dispute between the parties right from when it started has induced us to agree with Mr. Bundala's bold assertion that it was not confined to the claim in respect of Interim Certificate No. 7 only. To the contrary, there were other claims too, including overpayment to

the applicant contrary to the stipulation in the contract, also issues of delayed works which forced the respondent to raise a counter claim as it were. No doubt, those other claims fell within the range of the duties and concern of the Project Manager, which means the disagreement was required to be referred to the adjudicator prior to the arbitration stage. Thus, contrary to Mr. Mgongolwa's submission, the case of **Mvita** (supra) was correctly relied upon in the circumstances of this case. It was held in that case that:-

> *"iv): The arbitrator was competent to adjudicate and give awards in* ***all claims which were properly before him either because the procedural pre-requisites were followed*** *or because THA had not raised any objection."* [The emphasis is ours].

That implied, as correctly submitted by Mr. Bundala, that where procedures are not followed, then the decision resulting therefrom cannot stand.

We need to point out however, that looking at the decision of the Court subject of this review, we disparagingly note that it impliedly and/or mistakenly confined itself to the claim of payment specified in Interim Certificate No. 7, instead of encompassing all the other claims which were involved as afore-pointed out. This being the case, it is obvious that that

judgment was to that extent ambiguous, a fact which we believe constituted an error, bringing it closer to the ambit of the Court's decision in **OTTU** (supra). In that case, the Court relied on the Australian case of **Autodesk Inc. v. Dyson (No.2)** -1993 HCA 6; 1993 176 LR 300 where it was expounded that:-

> *"(i) The public interest in the finality of litigation will not preclude the exceptional step of reviewing or rehearing an issue when a court has good reason to consider that, in its earlier judgment it has proceeded on a misapprehension as to the facts or the law.*
>
> *(ii) As this court is a final Court of Appeal there is no reason for it to confine the exercise of jurisdiction in a way that would inhibit its capacity to rectify what it perceives to be an apparent error arising from same miscarriage in its judgment.*
>
> *(iii) It must be emphasized, however that the jurisdiction is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be exercised simply because the party seeking a rehearing has failed to present the argument in*

all its aspect or as well as it might have been put. The purpose of the jurisdiction is not to provide a back door method by which unsuccessful litigants can seek to re-argue their cases."

In the circumstances of the present case however, having said that the dispute between the parties was not confined to the refusal to pay the amount which was expressed in Interim Certificate No.7, but there were other claims too as repeatedly stated herein; it is palpable, and we emphasize, that the Court correctly confirmed the decision of the High Court to the effect that the arbitrator lacked jurisdiction because the parties skipped one of the procedures under the contract of submitting the dispute to the adjudicator before the arbitration stage. That means, Mr. Bundala is correct in saying that the dispute fell under the purview of Clause 24.1 of the Contract, also that the Court's judgment of 5.2.2017 did not misapprehend the facts and law in the circumstances of this case as claimed by the applicant. As such, we stress that the case of **Mvita** (supra) was applicable here in as much as it said where procedures are not followed, then the decision resulting therefrom is worthless and must be set aside. Consequently, save for the correction we have made that the judgment of

the Court wrongly confined itself to the question of Interim Certificate No. 7, we have found no justification to interfere with the Court's decision of 5.2.2017 by way of review. Thus, the application is devoid of merit and is hereby dismissed. Each party to bear own costs.

Order accordingly.

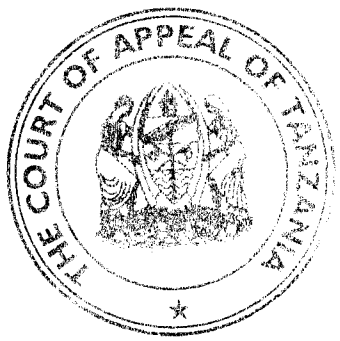
DATED at **DAR ES SALAAM** this 16th day of March, 2020

B. M. MMILLA
JUSTICE OF APPEAL

S. S. MWANGESI
JUSTICE OF APPEAL

B. M. A. SEHEL
JUSTICE OF APPEAL

The ruling delivered this 20th day of April, 2020 in the presence of Mr. Sosten Mbedule, learned counsel for the Applicant and Ms. Raya Nassir, learned counsel for the Respondent is hereby certified as a true copy of the original.



B. A. MPEPO
DEPUTY REGISTRAR
COURT OF APPEAL