IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: MWARIJA, J.A., KWARIKO, J.A. And FIKIRINI, J.A.)

CIVIL APPEAL NO. 162 OF 2020

CATIC INTERNATIONAL ENGINEERING (T) LTD ..... APPELLANT

VERSUS

UNIVERSITY OF DAR ES SALAAM ..... RESPONDENT

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

(Nangela, J.)

dated the 3rd day of March, 2020

in

Miscellaneous Commercial Case No. 1 of 2020

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JUDGMENT OF THE COURT

22nd March & 13th June, 2023

KWARIKO, J.A.:

This appeal is against the decision of the High Court of Tanzania, Commercial Division at Dar es Salaam (the trial court) in Miscellaneous Commercial Case No. 1 of 2020 which upheld the objection raised by the respondent and set aside an arbitral award (the award), dated 27th August, 2019 given in favour of the appellant.

A brief background of the matter goes as follows: The appellant is a limited liability company carrying out construction works while the respondent is a Government owned institution. These two parties had entered into a construction agreement (the agreement) for a proposed

construction of the University of Dar es Salaam Business School, Phase Three which was executed in November, 2009 to its completion in 2015. The original contract price was Tsh. 7,238,794,872/00 but it rose due to some variations made in compliance with the instructions issued by the project manager, the Ardhi University.

On her part, the appellant claimed that it had performed its part of the agreement by executing the construction project where in various stages, the project manager issued several certificates for payment in favour of the appellant. That, after a practical completion of the project and its certification, the project manager issued a Penultimate Certificate No. 21 (henceforth the certificate) amounting to Tshs. 924,790,091/31 which was however disputed by the respondent and required it to be revised. The certificate was revised to the tune of Tshs. 544,694,143/86 as the amount payable under the contract. Again, the respondent disputed that amount on the ground that the variations had not been approved by the Tender Board (the board), thus contravening the requirements set out under the Public Procurement Act No. 7 of 2011 (the Act).

As the parties failed to reach a settlement, the appellant invoked clause 28.3 of the agreement which provides that in a case of a dispute

the same should be referred to a Sole Arbitrator for decision. The appellant filed its claim for arbitration and by the consent of the parties, Engineer Emmanuel N. Kimambo was appointed as the Sole Arbitrator to preside over the matter. Before the Arbitrator, the appellant prayed for the following reliefs: the Arbitrator to consider that the respondent breached the contract which brought financial consequences to the claimant; the respondent be ordered to pay full amount certified under the Revised Penultimate Certificate No. 21 amounting to Tshs. 544,694,143/86; the respondent be ordered to pay interest due to the delay in making payment of the Revised Penultimate Certificate No. 21 from the date the payment became due; the respondent to provide the final accounts as per the work done subject to the compensation accrued therein; costs of the case and any other relief the Arbitrator would deem just to grant.

On her part, the respondent denied the claim. She contended that, following the appellant's presentation of the certificate amounting to Tshs. 924,790,091/30, a scrutiny was conducted where upon arithmetic errors were discovered showing that the unapproved amount was Tshs. 624,762,974/96. Further, after making correction the appellant re-submitted the certificate amounting to Tshs. 418,352,123/=.

It was the respondent's further contention that the re-submitted certificate had a variation of Tshs. 1,889,986,706/ while the approved one was Tshs. 1,253,624,600/24, thus the variation amounting to Tshs. 636,362,105/96 was not approved by the board. As such, the respondent sought guidance from the Public Procurement Regulatory Authority (the PPRA) in respect of the certificate which contained unapproved variations. The PPRA instructed the respondent to ensure that all applications for variations are reviewed and approved by the appropriate board. As such, since the variations were not approved, they could not be paid and the respective board could not issue a retrospective approval. It followed therefore that, since the revised certificate amounting to Tshs. 544,694,143/86 was not approved as per the PPRA guidance, the respondent refused to pay.

The following issues were agreed upon by the parties before the Arbitrator: whether the claimant was contractually obliged to execute the variations claimed; whether the claimant executed the claimed variation works; whether the respondent was obliged to pay the claimant for the variations as per the Revised Interim Penultimate Certificate No. 21; whether the non-payment of the Revised Interim Penultimate Certificate No. 21 was a breach of contract by the

respondent; whether the disputed Revised Interim Penultimate Certificate No. 21 is correct and proper; and to what reliefs are the parties entitled.

At the end, the Arbitrator allowed the appellant's claims. He found that the appellant had executed the variation work, the certificate was correct and proper and thus the respondent was in breach of the contract for its non-payment. It was thus directed, among other things, to pay full amount under the certificate amounting to Tshs. 544,694,143/86.

Subsequent to the publication of the award, the appellant filed a petition before the trial court under section 17 of the Arbitration Act [CAP 15 R.E. 2002] (the Arbitration Act) and rules 3, 5, 6 and 7 of the Arbitration Rules, G.N. No. 427 of 1957 for registration of the award. When the petition was called on for hearing, the respondent raised an objection on the ground of illegality. It was claimed that the award is contrary to an express written guidance from the PPRA. The respondent contended that the amount which was certified under the certificate contravened the requirements under the PPRA which are to the effect that the variations which exceeds 15% of the contracted sum should be

placed before the board of the procuring entity for approval before payment is made.

As indicated earlier, the trial court upheld the objection. The reasons for the decision were that the award was tainted with an illegality for being contrary to section 33 (1) (b) of the Act and regulations 110 (3) (4) (5) of Public Procurement Regulations, G.N. No. 443 of 2013 (the Regulations), requiring all procurement entities to ensure all applications for variations, addenda or amendments to the ongoing contracts to be reviewed and approved by the appropriate tender boards. Subsequently, the certificate was declared illegal and thus the award was set aside.

Aggrieved by that decision, the appellant filed this appeal upon the following six grounds:

1. *That, the trial Judge erred in law and fact by holding that; the contract price was increased only based on several variations made under the instructions of the project manager.*
2. *That, the trial Judge erred in law and fact by holding that the total variations amounted TZS 1,889,986,706.60 equal to 22.49% of TZS 8.4 billion were unapproved by the Tender Board of the respondent, hence the source of the acrimony between the respondent and the claimant (the appellant).*

3. *That, the trial Judge erred in law and fact by holding that the total unapproved variations TZS 1,889,986,706.60 is equal to 22.49% of 8.4 billion; hence the variations are way above the 15% of the contract sum, as such they were not incidental but substantial and accordingly ought to have been approved by the Tender Board of the respondent as per the requirement of the Public Procurement Act, Cap 410.*

4. *That, the trial Judge erred in law and fact by holding that the Arbitral Award is tainted by illegality and the award is faulted on such ground because it goes contrary to the public policy (i.e., it requires the respondent to condone or bless acts that infringe the Public Procurement Act and its Regulations).*

5. *That, the trial Judge erred in law and fact by holding that section 33 (1) of the Public Procurement Act, 2011 and Regulation 110 (3), (4) and (5), Government Notice No. 446 of 2013 requires all procurement entities to ensure that all applications for variations addenda or amendments to the ongoing contracts to be reviewed and approved by appropriate Tender Board without appreciating the difference between the variation of the contract and variation of the works and wrongly concluded, that the Tender Board, being an organ that provides crucial oversight function on behalf of the respective procurement entities cannot be easily side lined especially where there is requirement that variations such as those involved in this petition ought to have been approved.*

6. *That, the trial Judge error in law and fact by determining merit of the case instead of considering matter of registration of the Award which is against the spirit of arbitration proceedings.*

At the hearing of the appeal, Mr. Bryson Shayo, learned advocate who was assisted by Mr. George Palangyo, represented the appellant, whereas Mr. Daniel Nyakiha assisted by Ms. Egidy Mkolwe, both learned State Attorneys, appeared for the respondent.

Mr. Shayo started by adopting the written submissions in support of the appeal and made oral clarifications on the grounds of appeal. In relation to the first ground, he submitted that, the trial Judge erred to hold that the contract price between the appellant and respondent increased only based on variations issued by the project manager which led to the wrong conclusion that all variations were not approved by the board. He argued that, on the contrary, the facts of the matter show that the addition works valued at Tsh. 1,253,624,600/64 were instructed by the respondent and approved by the board. Whereas, the incidental works valued at Tsh. 636,362,105/96 which the project manager instructed the appellant to execute did not require the approval by the respondent's board.

As regards the second and third grounds, it was contended by Mr. Shayo that the arithmetic calculations done by the trial Judge shows total variations valued at Tsh. 1,889,986,706/60 including Tsh. 1,253,624,600/64 approved by the board and Tsh. 636,362,105/96 which was not approved by the board and concluded that the total amount of unapproved variations was 22.9%. The learned counsel contended that the issue for consideration was not the variation which was approved by the board but Tsh. 636,362,105/96 equal to 7% which did not require approval by the board. Upon being probed by the Court on whether all variations ought to be approved by the Board, Mr. Shayo responded that not all variations require such approval.

In relation to the fourth and fifth grounds of appeal, the appellant faults the trial Judge to hold that the award is tainted by an illegality as it goes contrary to the public policy. Mr. Shayo submitted that in reaching that holding, the trial Judge was guided by the issue whether the variations issued by the project manager to be executed by the appellant without the approval by the board were legally correct. He cited the provisions of regulation 110 (3) of the Regulations which provides for categories of variations. He argued that the variations such as additions or deductions to the contract price which are not incidental

to or arising out of the contract and those which alter the scope, extent, or intention of the contract are the ones which require the approval of the board before instructions are issued to the tenderer. On that note, he contended that variations in dispute are incidental to and arising out of the contract thus do not require the approval of the board.

It was Mr. Shayo's further contention that whereas section 33 (1) (b) of the Act mandates the board to review all applications for variations made by the procuring entities, rule 110 (3) of the Regulations provides for categories of variations which require the approval of the board. He faulted the trial Judge for following the erroneous interpretation of the law made by the PPRA without making his own analysis thus reaching to a wrong conclusion. Mr. Shayo invited the Court to find that the disputed variations are incidental to and arising out of the contract between the appellant and the respondent which in law or contract did not require the approval of the board before the project manager issued instructions to the appellant to execute them.

As regards the sixth ground, the learned counsel argued that, according to section 16 of the Arbitration Act, the Judge has powers to set aside the arbitral award where it is established that the arbitrator

has committed misconduct or the award has been improperly procured. In support of this contention, he cited the case of **Rashid Moledina & Co (Mombasa) Ltd and Others v. Hoima Ginners Ltd** [1957] EA 654, where it was held that the court may set aside the award if it is discovered that there is an error of law apparent on the face of it. He argued that contrary to this principle of law, the trial Judge acted as an appellate court by re-hearing the dispute which was already decided by the Arbitrator. To fortify this contention, the learned counsel referred the Court to a law book titled **"Law Relating to Arbitration and Conciliation"** 8th Edition 2013 by *Dr P C Markanda, Naresh Markanda and Rajesh Markanda,* at page 831 where it is stated that an illegality for the purpose of setting aside an award must be going to the root of the matter. Such that, in the instant case the Judge did not demonstrate that the alleged illegality went to the root of the matter.

In response, Mr. Nyakiha made his stance that they were opposing the appeal. Thereafter, he argued the first, second and third grounds together. He submitted that the total amount of variations is Tsh. 1,889,986,706/60 obtained from Tsh. 1,253,624,600/64 and Tsh. 636,362,105/96 which is equal to 22% of the contract price, thus

requires the approval of the board as it is beyond 15% variation allowed in law to be executed without the approval of the board.

Mr. Nyakiha also argued the fourth, fifth and sixth grounds together. Relying on the decision in the case of **Rashid Moledina** (supra), he supported the finding by the trial Judge that there was an illegality in the award. He thus contended that, where there is illegality, the award cannot be registered. He went on to argue that, the project manager ought to have obtained the approval of the board before he authorised execution of the impugned variations as required under section 33 (1) (b) of the Act and regulation 110 (3) (4) (5) of the Regulations. He also submitted that although the certificate valued at Tsh. 924,790,091/31 was rectified upon objection, the reduced amount of Tsh. 636,362,105/66 was not approved by the board. In the light of his submission, Mr. Nyakiha urged us to dismiss the appeal for lack of merit.

In rejoinder, Mr. Shayo insisted that the project manager had mandate to authorise variations valued at Tsh. 636,362,105/66 which was below 15% that is allowable in law. He argued that, the trial Judge misinterpreted section 33 of the Act and regulation 110 of the Regulations.

Having considered the submissions by the learned counsel for the parties, the issue which calls for our determination is whether the grounds of appeal have merit. In the first ground, the appellant has faulted the trial Judge's finding that the increase on the contract price was solely caused by the variations made under the instruction of the project manager. Upon perusal of the evidence adduced before the Arbitrator, it was a cogmmon ground that whenever there was need for variations, the appellant as the contractor would consult the project manager who in turn would forward them to the respondent for approval before he could issue instructions to the appellant for execution. It was not also disputed that the contract price increased due to the said variations. However, the parties were not at issue as to who was the cause for increase of the contract price and the trial Judge did not make a finding on the said complaint but he was only narrating the facts of the case. This ground has no merit and it fails.

The appellant's complaint in the second and third grounds of appeal relates to the trial Judge's holding that the unapproved variations were valued at Tsh. 1,889,986,706/60. Upon consideration of the record, we are in agreement with the appellant that the value of unapproved variations is Tsh. 636,362,105/96. This is because by its

own hand in the letter to the PPRA dated 9th February, 2017 seeking for guidance, the respondent stated that out of the variations valued at Tsh. 1,889,986,706/60, the variations valued at Tsh. 1,253,624,600/64 were approved by the board. Therefore, the trial Judge erred to hold that the unapproved variations were valued at Tsh. 1,889,986,706/60. These grounds of appeal succeed.

We now propose to determine the sixth ground which raises the issue whether the trial Judge determined the merit of the case instead of the consideration of the registration of the award against the arbitration proceedings. As indicated earlier, the trial court sustained an objection raised by the respondent against the appellant's petition on the ground of illegality to the effect that the award was procured contrary to the law.

Notably, the powers of the High Court to set aside an award is provided under section 16 of the Arbitration Act which provides that:

> *"Where an arbitrator or umpire has misconducted himself or an arbitration or award has been improperly procured, the court may set aside the award."*

From this provision, an award can be set aside on two grounds, namely; misconduct of the arbitrator or where an award is improperly procured.

However, apart from these grounds, the court can interfere with an award where it is established that there are errors of law manifest on its face. In the case of **Vodacom Tanzania Limited v. FTS Services Limited,** Civil Appeal No. 14 of 2016 (unreported), the Court referred to several authorities and observed thus:

> *"We fully subscribe to the above stance, which is firmly 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."*** [Emphasis supplied].

[See also **Rashid Moledina** (supra)].

As to what the court is entitled to examine when the award is presented before it for registration, in the case of **Vodacom Tanzania Limited** (supra), the Court consulted several decisions in that respect and observed that:

> *"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."*** [Emphasis ours].

What has been enunciated in the cited decision as a general rule is that the court is only entitled to investigate the award and the incorporated document to find out errors in law and not to examine the record of proceedings before the arbitrators.

Now, coming to the instant case, the issue which was before the trial court was the illegality or otherwise of the award. Upon perusal of the court record, we have found that the trial court discussed the scope of the court's powers and principles governing setting aside an arbitral award. It examined the award and concluded that the certificate required approval of the board and failure to do so contravened the Act and its Regulations. In that regard, the trial court did not act as an appellate court but complied with the general rule of investigating the award as opposed to examining the record of proceedings. Accordingly, the sixth ground lacks merit.

In the fourth and fifth grounds, the appellant faults the trial court in holding that the award is tainted by an illegality as it goes contrary to the public policy. As indicated earlier, the trial court observed that the certificate consists of variations which were not approved by the board as required under section 33 (1) (b) of the Act and regulation 110 (3) (4) and (5) of the Regulations. For easy of reference, these provisions are reproduced hereunder:

"Section 33 (1) The functions of the tender board shall be to-

(a) N/A

(b) review all applications for variations, addenda or amendments to ongoing contracts."

Regulation 110 (3) (4) and (5) provides which variations require approval of the board and those which do not as follows:

"Regulation 110

(1) N/A

(2) N/A

(3) The proposed variations such as additions or deductions which are not incidental to or arising out of the contract shall, in every case, be referred to the appropriate tender board for approval before instructions are issued to the tendered.

(4) The procuring entity shall have no powers to authorise additions beyond the scope of the contract without having obtained prior written approval from the Paymaster General or appropriate budgetary approving authority for additional financial authority to meet the cost of such work.

(5) Where the execution of contracts has commenced, the cost increases involving all changes which alter the scope, extent or intention of such contracts shall have the prior written approval of the tended board."

According to these provisions, in every case where the proposed variations are not incidental to or arising out of the contract and which alter the scope, extent or intention of the contract should be referred to the appropriate tender board prior to issuance of instructions to the tenderer for execution. In this aspect, Mr. Shayo maintained that the unapproved variations were valued at Tsh. 636,362,105/96 equal to 7% thus below 15% of the contract price which did not require the approval by the board. And in any case, he argued that the variations in question were incidental to and arising out of the contract.

In considering the arguments by the parties, we have gone through the court record and the law applicable at the material time. Since the original certificate was issued on 4th June, 2015 the law

applicable is the Act and the Regulations. As cited above, the provisions have not categorised the variations in terms of percentage of the contract price as argued by the counsel of the parties and adopted by the trial Judge. The issue of percentage has been brought by the Public Procurement (Amendment) Regulations, 2016 G.N. No. 333 which was published on 30th December, 2016. Regulation 110 of the Regulations was amended to the effect that:

> *"A contract amendment shall not increase the total contract price by more than fifteen percent of the original contract price without the approval of budget approving authority".*

It is clear that, this amendment came long after the date of the impugned certificate.

Now, as regards the applicable law, while section 33 (1) (b) of the Act requires the board to approve all variations, regulation 110 (4) (5) and (5) of the Regulations qualifies that requirement. It is clearly provided that the variations which are not incidental to or arising out of the contract, and which alter the scope, extent or intention of the contract require approval of the board. The question which follows is whether the impugned variations required the approval of the board.

It is common ground that the original contract sum was Tsh. 7,238,794,872/=. Whereas the impugned variations were revised from Tsh. 924,790,091/31 to Tsh. 636,362,105/96. Therefore, by simple calculation, if the impugned variations are added to the original contract price the total price is Tsh. 7,875,156,977/96. It goes without doubt that the new value of the contract is not incidental to and it altered the scope, extent and intention of the contract and therefore, the approval of the board was needed. If we may add, it is not disputed that subsequent to the original contract price, there were variations valued at Tsh. 1,253,624,600/64 which got the approval of the board before execution by the tenderer. However, the appellant did not provide reasons why those variations were approved before the execution but maintained that the impugned variations did not require approval while both variations were not incidental to or arising out of the contract and altered the scope and extent and intention of the contract.

From the foregoing, we have no hesitation to hold that the impugned variations required approval of the board before execution by the tenderer and no approval was given. Therefore, there is a manifest error of law on the face of the award as Penultimate Certificate No. 21 contained unapproved variations. Therefore, the trial court did not err to

set aside the award on account of illegality. The fourth and fifth grounds also flop.

Finally, we find the appeal without merit save for the second and third grounds which we have allowed. In the circumstance, each party shall bear its costs.

DATED at **DAR ES SALAAM** this 9th day of June, 2023.

A. G. MWARIJA
JUSTICE OF APPEAL

M. A. KWARIKO
JUSTICE OF APPEAL

P. S. FIKIRINI
JUSTICE OF APPEAL

The Judgment delivered this 13th day of June, 2023 in the presence of Mr. George Palangyo, learned Counsel for the Appellant and Mr. Daniel Nyakiha, learned State Attorney for the Respondent is hereby certified as a true copy of the original.

J. E. FOVO
DEPUTY REGISTRAR
COURT OF APPEAL