IN THE HIGH COURT OF TANZANIA

AT DAR ES SALAAM

CONSOLIDATED MISC. CIVIL CAUSE NO. 254 OF 2003

AND

MISC. CIVIL CAUSE NO. 49 OF 2002

VIP ENGENEERING AND MARKETING LTD . . . APPLICANT

VERSUS

1. **INDEPENDENT POWER TANZANIA LTD**
2. **MECHMAR CORPORATION (MALAYSIA) BERHAD**
3. **THE ADMINISTRATOR GENERAL/ OFFICIAL RECEIVER . . . . . RESPONDENTS**

Date of last order – 25/01/2008
Date of Ruling – 5/2/2008

RULING

Oriyo, J.

On 28February 2007, the following order was made by the Court of Appeal of Tanzaniain Civil Application No. 163 of 2004:-

> *"In the circumstances, we hereby quash and set aside all proceedings and orders made by*

Ihema, J. in Misc. Civil Cause No. 254 of 2003 and order that the record be remitted to Oriyo, J. for her to proceed with the application which was filed in the High Court on 24th September, 2003 for consolidation of Misc. Civil Cause No. 254 of 2003 and Misc. Civil Cause No. 49 of 2002, among other prayers."

The parties in Civil Application No. 163 of 2004 were the Applicant herein who was also the Applicant in the Court of Appeal. The Respondent was the 2nd Respondent herein.

The application referred to by the Court of Appeal was the one filed in this court by the Applicant on 24/9/2003 in MCC 254/2003. In the application, the applicant seeks a total of 7 reliefs from this court; ranging from company matters, ordinary civil matters and arbitral reliefs. The first relief is for the consolidation of MCC 49/2002 and MCC 254/2003. In its endeavour to comply with the Court of Appeal order, this Court

ordered on 31/7/2007 that the two applications be consolidated.

Having disposed the first relief; parties were given time to consult on the order of disposal of the remaining 6 reliefs. It was the parties consensus which was adopted by this court that they be allowed to make submissions on the 2nd relief sought by the applicant. In addition, they agreed to make simultaneous submissions on the 1st and 2nd respondents points of preliminary objection raised in relation to the 2nd relief of the applicant. The relevant objections are Nos. 3, 4 and 5 as filed on 30/4/2007. With leave of the court the submissions were to be made in writing according to an agreed schedule.

The applicants 2nd relief seeks the following orders:-

> *"To set aside the Award by the London Court for International Arbitration Tribunal (hereinafter to be referred to as (LCIA) in Arbitration No. 2353".*

The Respondents Notice of Preliminary Objection has the following points:-

> *"3. That this Hon. Court lacks jurisdiction to hear or determine relief No. 2 prayed for in the Applicant's Chamber Summons.*
>
> *4. That the proceedings have been erroneously commenced by way of a Chamber Summons instead of a Petition contrary to the mandatory requirement of Rule 5 of the Arbitration Rules, 1957.*
>
> *5. That the Application is fatally defective as it does not contain the submission or a certified copy of the award to which the application relates."*

The decision in this ruling is therefore limited to the applicant's single relief and 3 points of objections reproduced above which was the consensus of the parties.

I will begin with the points of objection. Objection 3 challenges the jurisdiction of the High Court of Tanzania to hear and determine an application to set aside the Award issued by the London Court of International Arbitration Tribunal. Let me first satisfy myself that this court has jurisdiction over the matter. And in the event I find that the court lacks jurisdiction; that will be the end of it.

Mr. Kesaria, learned counsel, made submissions on behalf of the 1st and 2nd respondents. The learned counsel has the following arguments in support of the objection. He states that the Award relates to Arbitration proceedings conducted at the London Court for International Arbitration. The said proceedings were between the 2nd respondent, (a Malaysian Company) and the applicant, (a Tanzanian Company). Further stated is that the seat of Arbitration was London, England. Therefore, the learned counsel contends that was an International Arbitration which is governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; (The New York Convention). In addition to

that, counsel states that Tanzania ratified the Convention by way of accession on 13 October 1964. And on 12 January 1965, the Convention came into force in Tanzania. He states further that the United Kingdom where the award was made is also a party to the New York Convention; (a Contracting Party) since 1975. He submits that according to the Declarations and Reservations part of the Convention; Tanzania expressly declared to apply the New York Convention for Recognition and Enforcement of Awards made in another Contracting State. Therefore, Tanzania is bound to recognize the Award in this matter because it is made in the United Kingdom, which is another contracting state. The learned counsel further submits that Article III of the New York Convention makes it mandatory for contracting states to recognize and enforce such awards. He argues that under Article V of the Convention the High Court of acontracting party may, on very limited grounds refuse recognition and enforcement of a foreign arbitral award. However, he contends that in terms of Article V (e) of the New York Convention, the award at hand can only be set

aside or suspended by a competent authority of the country where the award was made; that is the High Court of England.

Further counsel states that apart from the jurisdictional issue; there is a second reason why the New York Convention is applicable to the Award at hand. He contends that according to the Shareholders Agreement of the parties which contains the Arbitral Clause; it expressly provides that the same shall be governed and construed according to the laws of the United Kingdom. According to the learned counsel's opinion; this means that the exclusion clause under Section 28 (2) of the Arbitration Act, does not apply here. Therefore, in conclusion the learned counsel submits that under such circumstances Tanzanian Courts have no jurisdiction over the Final Award Part I; and it is only the courts in the United Kingdom which have jurisdiction to set aside the award.

On the part of the Applicant, the submissions were made by the learned counsel Mr. Julius Ndyanabo of Julius Chambers Advocates together with Mr. Michael Ngalo, learned counsel of Ngalo and Co. Advocates.

In their reply to the submissions on the jurisdictional issue, counsel contend that the reasons advanced by the 1st and 2nd respondents are erroneous and contrary to the provisions of Article V (1) (c) and 2 (b) of the New York Convention. They contend that these provisions empower this court to refuse to recognize an award which contains decisions on matters beyond the scope of the submission to Arbitration or which is contrary to public policy of this country. Their further argument is that the New York Convention does not vest exclusive jurisdiction to set aside the Award only on the courts of the United Kingdom. They state that after all, the provisions of Article V (i) (e) of the New York Convention relied upon by the 1st and 2nd respondents is in **pari materia** with Section 30 (2) (a) of the Arbitration Act. They contend that the law presupposes that in appropriate circumstances a competent foreign authority may set aside an award granted in a foreign country and when that happens, this court shall not recognize such annulled Award. However they do not agree with the 1st and 2nd respondents submission that this court cannot set aside any Foreign Arbitral Award. They state that this court has jurisdiction

vested upon it by the Constitution and the Arbitration Act to set aside Foreign Arbitral Award as in this case where the Arbitration was improper, the Award was improperly procured and where the Single Arbitrator misconducted himself.

For clarity purposes, I will preface the decision with a brief history of the matter.

According to the record, on 28/9/1994, the applicant, VIP Engineering and Marketing Ltd of Tanzania and the 2nd respondent, Mechmar Corporation (Malaysia) Berhad of Malasysia entered into an agreement titled PROMOTERS/SHAREHOLDERS AGREEMENT. One of the points of their agreement was to form a private limited liability company in Tanzania. Later on the agreement materialized and the company came to be known as the Independent Power Tanzania Ltd (IPTL); the 1st respondent herein whereby the applicant holds 30% shares and the 2nd respondent holds the remaining 70% of the shares. Clause 17 of the Agreement states:-

"This Agreement shall be governed by and construed in accordance with the laws of the United Kingdom"

Further Clause 18 provides for dispute settlement mechanism as follows:-

"18. (a) Any dispute arising out of or in connection with this agreement, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration in London in accordance with the Arbitration rules of the London International Centre for the time being in force which rules are deemed to be incorporated by reference into this clause."

Therefore, in view of the clear provisions of the Share holders Agreement; Final Award Part I issued by a Single Arbitrator in London on 26/8/2003 and filed in this court on 8/9/2003 is a Foreign Award and the New York Convention is relevant. The learned counsel for the 1st and the 2nd

respondent respondents is under the circumstances quite correct in his submissions on both the law applicable and the nature of the Award. However, I hasten to add here that for the avoidance of doubt; it is the law that where the award is made abroad in another country but the arbitration agreement is governed by the laws of Tanzania; the New York Convention would not apply; interms of Section 28 (2) of the Arbitration Act, Cap. 15 [R.E. 2002].

The issue here is whether the jurisdiction of this court is ousted by the provisions of the New York Convention as submitted by the 1st and 2nd respondents.

In terms of sections 17 and 29 of the Arbitration Act all Awards, whether foreign or domestic; are enforceable as decrees of the court; once filed. The High Court of Tanzania is vested with exclusive jurisdiction to enforce arbitral awards. Section 17 (1) provides:-

> *"An award on a submission on being filed in the court in accordance with this Act* ***shall, unless the court remits it to the reconsideration***

of the arbitrators or umpire or sets it aside, *be enforceable as if it were a decree of the court." (Underlining supplied)*

In addition S. 29 (1) provides as follows with regard to foreign awards:-

"A foreign award shall, subject to the provisions of this Part, ***be enforceable in the High Court either by action or under the provisions of section 17 of this Act.*** *" (emphasis supplied)*

And for the avoidance of doubt, the interpretation of the word *"the Court"* in the Act is defined as *"means the High Court"*.

It is a general rule therefore that all arbitral awards are automatically enforceable in the High Court, when filed. However, there are some exceptions.

The exceptions include instances stated in Section 17 (1) where the court, for reasons to be stated, remits the award for

the reconsideration of the arbitrators or umpire or sets the award aside.

Further exceptions are found in Section 30 of the Arbitration Act. These exceptions are limited to foreign awards only and are in 2 categories.

The first category is where the mandatory conditions for the enforcement of foreign awards set out in Section 30 (1) (a) to (e) have not been satisfied. An example under subsection (1) is under paragraph (e) where the award is in respect of a matter which may NOT lawfully be referred to arbitration under the laws of Tanzania; and its enforcement must not be contrary to the public policy or the laws of Tanzania.

The second category of exceptions are found in Section 30 (2) (a) to (c). For ease of reference, the exceptions include:-

> *"(2) Subject to the provisions of this subsection, a foreign award shall not be enforceable under this Part if the court is satisfied that –*

(a) the award has been annulled in the country in which it was made; or

(b) the party against whom it is sought to enforce the award was not given notice of the arbitration proceedings in sufficient time to enable him to present his case or was under some legal incapacity and was snot properly represented; or

(c) the award does not deal with all the questions referred or contains decisions on matters beyond the scope of the agreement for arbitration."

In other words, the law vests the High Court with jurisdiction to refuse recognition and enforcement of awards; be it a foreign award or local/domestic award.

The Convention on the Recognition and Enforcement of Foreign Arbitral Awards vests similar jurisdiction on the High

Court of Tanzania (where the recognition and enforcement are being sought). By Art V (1); the New York Convention sets out 5 grounds upon which the High Court may refuse recognition and enforcement of a foreign award. The Convention states that the High Court may refuse recognition and enforcement where " . . . . *a party furnishes to the competent authority where the recognition and enforcement is sought, proof that* . . . . "

For ease of reference, Article V (1) is reproduced hereunder. It provides as follows:-

> "*1. Recognition and Enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:*
>
> *(a) The parties to the agreement referred to in article II were, under the law applicable to them, under some*

incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or

(b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which

contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.

Further Article V (2) provides for another category of instances where the High Court has jurisdiction to refuse recognition and enforcement of a foreign award. It states as follows:-

"(2) Recognition and enforcement of an arbitral award may also be refused if the competent authority in the country where recognition and enforcement is sought finds that:

(a) The subject matter of the difference is not capable of settlement by arbitration under the law of that country; or

(b) The recognition or enforcement of the award would be contrary to the public policy of that country.

Having stated the obvious in Article V above and with due respect; I am of the considered opinion that neither the provisions of the New York Convention nor the Arbitration Act Cap. 15, ousts the jurisdiction of this court to appropriately deal with the Final Award Part I filed in this court.

There are several reasons for the holding that the court has the necessary jurisdiction. Paramount is the Constitution of

the United Republic of Tanzania in particular Articles 107 A and 108. The constitution vests this court with jurisdiction to hear and determine all matters in accordance with the relevant laws and without fear or favour. The court would be abdicating its duties under the constitution if the submissions of the 1st and 2nd respondents were to be upheld. Further, the provisions of Sections 17, 29 and 30 of the Arbitration Act as reproduced above do not support the contention that this court lacks jurisdiction; but to the contrary. In addition, Article V of the New York Convention explicitly recognizes the jurisdiction of state courts where recognition and enforcement of a foreign award is being sought.

In my view, it would be absurd if this court were to be passive, sit back and be turned into a mere rubber stamp of the foreign arbitral tribunal. The court has a principal duty of satisfying itself that the foreign award filed meets all the relevant legal provisions. Therefore I have no doubt in my mind that under appropriate circumstances and time this court has jurisdiction.

On the foregoing, I find that the 3rd point of objection by the 1st and 2nd respondents fail and is dismissed.

Having determined the jurisdictional issue; the next point of objection is that the application has been commenced by way of **"Chamber Application"** instead of a **"Petition".** It is contended that the procedure violates the provisions of Rule 5 of the Arbitration Rules. Rule 5 provides:-

> *"Save as is otherwise provided all applications made under the Act shall be made by way of petition."*

On the part of the applicant it is argued that it is the Companies Act and the Winding Up Rules, which are applicable and not the Arbitration Act. The applicant contends that the court is moved by a Chamber Summons in compliance with Rules 11 (2) and 8 (2) of the Companies (Winding Up) Rules, 1929.

The law is simple and unambiguous.

However, to me, the application appears to be a cocktail in itself. It seeks 7 reliefs from this court. The reliefs are diverse; some fall under the provisions of the Civil Procedure Act, some are under the Arbitration Act while the majority of the reliefs (Nos 3, 4 and 5) fall under the Companies Act. The original Cause No. 49/2002 is also controlled by the Companies Act.

Rule 11 (2) of the Winding up Rules states:-

> *"The first proceedings in every winding up matter shall have a distinctive number assigned to it in the office of the Registrar, and all proceedings in any matter subsequent to the first proceeding shall bear the same number as the first proceeding."*

Further Rule 8 (2) states:-

> *"Every application in chamber shall be made by summons . . . ."*

Under these circumstances the applicant cannot be faulted. The court was properly moved by the relevant

provisions of the Civil Procedure Act, the Arbitration Act and the Companies Act as cited. Similarly the title "*Chamber Summons*" instead of a "*Petition*" does have an explanation and the respondents are not prejudiced in any event It is my view that it would have been quite difficult if not impossible for the applicant to justify the use of the title "*Petition*".

In the result; I find that the applicant correctly titled the matter Chamber Summons. The point of objection 4 is dismissed.

The last objection is the failure by the applicant to attach a copy of the submission and the award to the matter filed in court. It is alleged that the omission violate the provisions of Rule 8 of the Arbitration Rules.

Rule 8 provides:-

> *"Every petition shall have annexed to it submission, the award or the special case, to which the petition relates, or a copy of it*

certified by the petitioner or his advocate to be a true copy."

In view of the decision made in objection 4 above, then objection 5 does not arise. The legal requirement to annex the submission and award is only relevant when the matter filed in Court is a Petition under the Arbitration Act. In the absence of a Petition then the requirements of Rule 8 of the Arbitration Rules do not arise.

All in all, the 1st and 2nd respondents objections have failed and are dismissed with costs.

Now I turn to consider the applicant's substantive relief sought:-

"To set aside the Final Award, Part I"

However, I note that there is also pending determination a petition filed on 18/11/2004 by the 2nd respondent seeking the enforcement of the Award as a Decree of this court. The two causes in Misc. Civil Cause 49/2002 and Misc. Civil Cause 254/2003 have been consolidated into one. We cannot at this

point in time turn a blind eye on other matters pending for determination; but are outside the applicants application filed on 24/9/2003. The application to set aside the award is closely related to the Petition for the enforcement of the award. In order to avoid duplicity and contradictions which may prejudice the pending petition; it would be orderly and in the interest of justice if the application to set aside the award and the petition to enforce the same are determined simultaneously and together.

Therefore, determination of the application to set aside the award is adjourned pending the hearing of the petition for the enforcement of the award.

Accordingly ordered.

K. K. Oriyo

JUDGE

5/2/08