IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

IN THE SUB- REGISTRY OF DAR ES SALAAM

AT DAR ES SALAAM

MISCELLANEOUS CIVIL CAUSE NO. 138 OF 2022

IN THE MATTER OF THE ARBITRATION AND IN THE MATTER OF THE ACT

AND

IN THE MATTER OF SECTION 27 (4) (B) OF THE ARBITRATION ACT, CAP. 15 OF 2020

BETWEEN

ORYX OIL COMPANY LIMITED ..... 1ST PETITIONER

ORYX ERNEGIES SA ..... 2ND PETITIONER

VERSUS

OILCOM TANZANIA LIMITED ..... RESPONDENT

RULING

28th September, & 18th October, 2022

ISMAIL, J.

In this petition, I am called upon to accede to the petitioners' prayer from removal of Prof. Mussa Juma Assad from serving as an Arbitrator in the arbitral proceedings that are pending between the parties herein. The reason for the removal is that the Arbitrator previously worked for the respondent, an act which is feared that it may compromise his impartiality.

Resort to court action stems from the allegation that the Petitioners' motion for Arbitrator's recusal was given a wide berth. The embattled Arbitrator found nothing that would be said to constitute a justifiable reason to call for his recusal. In his own words, extracted from his ruling, the Arbitrator is quoted as saying as follows:

> *"I have therefore failed to find any realistic reasons of fear of bias upon which a seriously minded person would point a finger at. I am aware that as an Arbitrator, I should not recuse myself in conduct of any proceedings for flimsy reasons. This is because there is nothing to evidence that I have any interest in the outcome of the arbitration process, which at any rate, will involve three arbitrators. I wish to state that if I accept the above application for recusal, on such a ground, I will be abdicating my arbitral responsibilities."*

It is significant to point out that the parties hereto are embroiled in a disagreement that arises from the interpretation of some clauses in the Agreements that they entered into, on 18th November, 2016 and 5th December, 2016. Both of these Agreements provide for submission of their disagreements or differences to an arbitral forum made up of three arbitrators. Each of the parties enjoyed the right of picking an arbitrator of their own choice. The chosen duo would then settle on their chair to complete a bench of three arbitrators. The respondent settled on Prof. Mussa Assad as its nominee. This was after a series of recusals of each other's choices, done at the instance of the adverse parties.

The request for Prof. Assad's recusal was fuelled by what appeared in his Curriculum Vitae (C.V.), which indicates that, at some point in the past (March, 2006), he worked for the respondent as a sole consultant who prepared what came to be known as the Kawawa Road Fuel Filling Business Plan. The petitioners felt that the information, which was not disclosed to them, had a link to the subject matters of the pending arbitral proceedings. In the petitioners' view, Prof. Assad's past dealings with the respondent raised concerns and justifiable doubts as to his impartiality when he sits to determine the dispute.

As stated earlier on, the petitioners' request for Prof. Assad's recusal, communicated vide a letter dated 11th March, 2022, was swiftly rejoined by Prof. Assad on 16th March, 2022. His contention is that he never, at any point in time, served for the respondent, and that the project in respect of which his services were enlisted was a JV (Joint Venture) undertaking whose client was Ilala Municipal Council, the latter of whom engaged him. He stated that during his stint, he never had any contact or meet anybody in the respondent's management, and that the choice of the title in his CV was intended to gain some mileage, knowing that the respondent was a major oil company at the time. He held the position that he is "fiercely independent" and saw no conflict of interest in his role as an arbitrator. It is this ruling that has escalated the matter to this Court.

The position taken by the respondent, as reflected in the answer to the petition, is that what appears to be a consternation by the petitioners is a calculated malicious intention to delay the arbitration process. The respondent takes the view that Prof. Assad will just be one of the three-man bench, adding that his position cannot influence the position of the bench. She took the view that fears of lack of impartiality and presence of bias are unjustified.

The petition was argued by way of written representations whose filing conformed to the filing schedule set out by the Court. Credit to both sets of counsel, their submissions were nothing short of sublime.

The petitioners submitted in support of the petition by highlighting the provisions that vest jurisdiction in the Court to remove an arbitrator. Such removal must, in terms of sections 27 (4) (b) and 28 (1) (a) of Cap. 15, be based on the existence of circumstances that give rise to justifiable doubts relating to impartiality, as that negates the principle which is to the effect that justice must be seen to be done. Learned counsel for the petitioners took the view that an arbitrator must be alive to the possibility of apparent bias and of actual but unconscious bias. He must disclose matters which could be said to give rise to real possibility of bias. To buttress this argument, the petitioners cited the decision in an English case of ***Halliburton Company v. Chubb Bermuda Insurance Ltd (formerly known as Ace Bermuda Insurance Ltd*** [2020] UKSC 48. Learned counsel argued that the decision made a finding on the provisions of section 24 (1) (d) (i) of the UK Arbitration Act, 1996, which is in *pari materia* to section 28 (1) (a) of Cap. 15.

The petitioners' motion for recusal is premised on three grounds. These grounds are pleaded in paragraph 10 of the petition, and they include:

One, that the arbitrator has been working with the respondent and one instance of such dealings is the preparation of the respondent's business plan. ***Two***, that the arbitrator withheld the nexus of his professional undertakings and/or financial gains with the respondent; and ***three***, that there exists an apparent fact on the arbitrator's involvement in the preparation of the respondent's business plan for the latter's fuel filling and service station, retail and recreational centres which would, in this or that way, have a link to the subject matters of the pending arbitration. A trio of decisions have been cited to back up the petitioners' contention on the impact of bias. These are: ***Porter v. Magill*** [2002] AC 375; ***Yiacoub v. The Queen*** [2014] UKPC 22; and ***Helow v. Secretary of State for the Home Department & Another*** [2008] UKHL 62.

In the petitioners' contention, refusal by the arbitrator to accede to a request for recusal is a notable deviation from the facts in the CV, and that the irrefutable conclusion is that the arbitrator will not be impartial to preside over the matter to which his client is a party. Turning on to the duty of disclosure, the petitioners contended that the provisions of section 28 (1) (a) of Cap. 15 were flouted as the arbitrator failed to disclose to the parties a nexus of his professional undertakings and/or financial gains with the respondent. In the petitioners' view, the arbitrator's conduct militates against

the reasoning in ***Halliburton Company v. Chubb Bermuda Insurance Ltd*** (supra).

The petitioners further contend that the business plan that the arbitrator allegedly drew for the respondent is at the centre of the parties' legal tussle in the pending arbitral proceedings. Inevitably, the petitioners contended, issues relating to scrutiny and interpretation of performance will definitely come to the fore. This may bring a conclusion, in the eyes of a reasonable third party, that the arbitrator's decision was influenced by factors other than the merits of the case. It is why a call for recusal is loud, and that the respondent will not suffer any adverse consequence since she will be handed an opportunity to pick another arbitrator.

With respect to the respondent's answer to the petition, the petitioners held the view that the arbitrator's decision to refuse to recuse himself parted ways with what is expressly stated in his CV, which pointed that the respondent was his client. It was further contended that the respondent has not expressly denied being the client of the arbitrator.

The petitioners have taken the view that issues raised touch on non-compliance with the law and are detrimental to fair hearing. They reveal the

respondent's non-compliance with the provisions of Cap. 15. As such, the same cannot be ignored, as they are likely to lead to a miscarriage of justice.

Besides praying for removal of the arbitrator, the petitioners have implored the Court to appoint an arbitrator for the respondent. Costs should also be granted.

The respondent's rebuttal submission was equally potent. The respondent's advocate began by laying a foundation on the grounds upon which an application for recusal may be considered. This is consistent with the accentuation by the Court of Appeal of Tanzania in ***Issack Mwamasika & 2 Others v. CRDB Bank Limited***, CAT-Civil Revision No. 6 of 2016 (unreported). The respondent posited that the grounds for recusal advanced by the petitioners cannot lead to a conclusion that there is a real possibility that the arbitrator will be biased. The respondent's reason for her position is three-fold. ***Firstly***, that there is no documentary evidence such as employment contract, salary slip and the like, to establish existence of any contractual ties between the respondent and the arbitrator. The respondent further contended that no evidence has been submitted, either, to prove that the said business plan was indeed prepared at the instance of the respondent and for the respondent. The respondent blamed the petitioners for not

furnishing further and betters particulars that would blur the arbitrator's denial of any contractual link with the respondent.

Secondly, the respondent contended that the arbitrator was not under any obligation to disclose any information on his association with the respondent. In any case, the respondent argued, such information would not be different from what was contained in the arbitrator's ruling on the matter. The respondent maintained that any thought of bias is far-fetched, where the arbitrator is neither the owner nor the employee of the respondent company. The respondent termed the allegation ill-founded and sheer apprehension of bias that is not substantiated.

Thirdly, that the mistaken act of naming the respondent in the arbitrator's CV as his client does not change the truth which is amply explained by the arbitrator himself, through the response he fielded in his March 16 letter. The respondent took the view that evidence would be required subsequent to the arbitrator's denial of any wrong doing, knowing that the allegations were serious, and that the onus of proving the existence of that fact rested on them. This, the petitioners did not do. The respondent fortified her contention by citing the decisions in ***R v. Australian Stevedoring Industry Board, Ex-parte Melbourne Stevedoring Co. Pty Ltd*** [1953] 88 CLR. 100, quoted with approval in ***Dhirajlal Walji***

Ladwa & 2 Others v. Jitesh Jayantilal Ladwa & Another, HC-Comm. Cause No. 2 of 2020 (unreported); and ***Ex-parte Blume; Re Osborn*** (1958) S.R. (NSW) 334, in both of which it was emphasized that suspicion of bias should be strong be enough and courts should not act on unsubstantiated grounds of flimsy pretexts of bias.

Leaping to the arbitrator's defence, the respondent poured glowing compliments on the arbitrator, terming him as most trusted, principled, uncompromised, and one of the finest minds this country has ever produced, and that the decision to call for recusal ought to have been based on some solid grounds.

The respondent took a swipe at the petitioners' decision to skip the arbitrator as a party in the instant matter. The respondent contended that non-inclusion of the arbitrator means the decision regarding his removal will be given without according him an opportunity to be heard on the allegation. When that happens, the respondent argued, the decision becomes a mere sham which cannot hold. It is a decision that will have defied the principle of natural justice of the right to be heard. To buttress her argument, the respondent cited a trio of court decisions. These are: ***Jambo Petroleum Products Limited v. The Managing Director of Oryx Energies Tanzania Limited***, HC-Misc. Civil Application No. 2 of 2022; ***Mbeya-***

Rukwa Autoparts and Transport Ltd v. Jestina George Nyakyoma [2002] TLR 251; ***David Nzaligo v. National Microfinance Bank Plc***, HC-Civil Appeal No. 61 of 2016 (two unreported).

The respondent took the view that the petition is lacking in merit on account of failure to disclose a cause of action, and on account of misjoinder of the arbitrator. She prayed that the same be dismissed with costs.

In replying to the petitioners' written submission, the respondent discounted the relevance of the cited decisions, arguing that the said decisions were only useful in illustrating bias in other contexts and not in the context of this matter. The respondent reiterated her argument that evidence of bias was missing to justify the petitioners' contention of bias.

Regarding the prayer for appointment of a new arbitrator, the respondent's view is that this is a prayer which was not factored in petition. The respondent contended that the Court has no business meddling in the affairs of the parties, since the agreements signed between them provided for a manner in which arbitrators would be appointed. She argued that the prayers by the petitioners are misplaced and untenable, urging the Court to decline the invitation to interfere with the process.

The respondent prayed that the petition be dismissed with costs.

Having dispassionately reviewed the parties' splendid submissions, one key issue arises. This is as to whether grounds exist for removal of the arbitrator from his office.

As unanimously submitted by the parties, in law, bias constitutes the basis for a party's call for recusal of a judicial officer, and this includes an arbitrator. The decisions cited and quoted by counsel for the contending parties underscore this position. Of the said decisions, the Court of Appeal of Tanzania's reasoning in ***Issack Mwamasika & 2 Others v. CRDB Bank Limited*** (supra) stands as an iconic decision in which grounds for recusal of a judicial officer were exemplified. The upper Bench quoted the decision in ***Laurean G. Rugaimukamu v. Inspector General of Police & Another***, CAT-Civil Appeal No. 13 of 1999 (unreported), in which it was held as follows:

> *"An objection against a judge or magistrate can legitimately be raised in the following circumstances: **One**, if there is evidence of bad blood between the litigant and the judge concerned. **Two**, if the judge has close relationship with the adversary party or one of them. **Three**, if the judge or a member of his close family has an interest in the outcome of the litigation other than the administration of justice. **A judge or a magistrate should not be asked to disqualify himself for flimsy or imaginary fears.**"*

A critical review of these grounds reveals, in all of them, instances of bias which may arise out of bad blood, close relationship, or interest in the outcome of the litigation in question. The important take away is that such interest must be that which deviates from the normal administration of justice.

In order to appreciate the legitimacy or otherwise of what is alleged to be bias, need arises for having the term **"bias"** defined. West's Encyclopedia of American Law, 2nd Edn., 2008, defines bias in the following words:

> *"Predisposition of a judge, arbitrator, prospective juror, or anyone making a judicial decision, against or in favour of one of the parties or a class of persons. This can be shown by remarks, decisions contrary to fact, reason or law, or other unfair conduct."*

The definition goes further to lay a description of bias by stating as follows:

> *"A particular influential power which sways the judgment; the inclination or propensity of mind towards a particular object…. Justice requires that the judge should have no bias for or against any individual; and that his mind should be perfectly free to act as the law requires."*

As widely stated in the submissions, the arbitrator's liner in his CV is what has cast aspersions on his fitness to take part in the arbitral proceedings. It is about what is contended to be his past association with the respondent. A glance at the CV reveals what the petitioners contend, and what the arbitrator has given a clarification on. That there was an involvement in the project in which the respondent was also a player. The defence given by the arbitrator is that the respondent was not involved in hiring, supervising or paying for the services the arbitrator was engaged for. The inclusion of the respondent as a client was intended to boost his profile and associate himself with a successful establishment. No evidence has been adduced to refute this contention.

While the act of inflating the arbitrator's credentials is in bad taste and borders on misrepresentation, the effects arising out of this inaccuracy cannot be said to bring about any sense of feeling that the arbitrator may be biased in his operation. I am hardly convinced that the same can amount to or result in the disqualification, or truncation of his participation in the arbitral proceedings. As I appreciate that this anomaly is stronger than a mere keyboard error, I take the conviction that the same cannot be a justifiable reason for "baying for the arbitrator's blood". It brings nothing to suggest, albeit remotely, that bias would be bred out of this misstatement

and form the basis for recusal. Instead, I consider it as a trifling misstatement which should not be hyped beyond what it is.

Thus, in the absence of any other interpretation than that the twisting of facts was intended to have the arbitrator ride on the wave of the respondent's fame, an explanation which I find some plausibility in, the imputation of bias is, to say the least, imaginary, illusory and a hot air. It fails to meet the threshold of bias as illustrated in the definition given above.

I also contend that sense would be made if the arbitrator was a sole adjudicator in the pending arbitral proceedings, which is not the case. He is one of the three-bench team, with an umpire. The decision in the arbitration is by majority of the arbitrators. A single arbitrator will not, however influential he may be, sway the decision of the panel. It should be emphasized that, an arbitrator, once appointed, serves as a parties' judge and never the parties' proxy. This is why the fees for meeting the cost of arbitration is deposited by both parties and payable to all arbitrators from single pool or basket.

I take the conviction that there is nothing to suggest, in the slightest degree, that the arbitrator's "tainted" past or association with the

respondent, if any, would hand any advantage to the respondent or prejudice the interests of the parties, more specifically, the petitioners.

My view is fortified further by the import of regulation 14 of the Arbitration (Rules of Procedure) Regulations, 2021, GN. 146 of 2021, which describes the qualifications of an arbitrator. Item (e) provides that arbitrators should *"be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment."*

Further to that, regulation 15 states as follows:

> *"An arbitration who is appointed determine the dispute shall sign a statement of Independence in Form No. 1 in the prescribed Fourth Schedule to these Regulations."*

It should not be lost on any of us, that the aim and purpose is to affirm to one's independence and impartiality when he serves as an arbitrator. Considering that this is an imperative requirement of the law, my expectation is that each nominee to the position must go through this 'ritual' and when he does so, he undertakes that he will not waver in his commitment to the rules of independence or impartiality. This, therefore, serves as a 'purifier' to whatever perceptions that one would have against the arbitrator.

This brings me to the conclusion that the feeling of bias by the petitioners is more of a perception than a reality. The feelings have not graduated to a higher level of reasonable apprehension or suspicion that would make a fair minded and informed member of the public to hold that the arbitrator has any traces of bias. They are flimsy pretexts of bias which do not pass an objective test; and are not anywhere enough to justify drawing of the inference of bias.

In sum, I hold that the petition is utterly misconceived and devoid of merit. Accordingly, the same is dismissed with costs. With this holding, the question of non-joinder of the arbitrator becomes a subject whose determination is less important.

Order accordingly.

DATED at **DAR ES SALAAM** this 18th day of October, 2022.

M.K. ISMAIL

JUDGE

13.10.2022