

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA

MOSHI DISTRICT REGISTRY

AT MOSHI

CIVIL CASE NO. 6 OF 2020

HON. ATTORNEY GENERAL.....1ST PLAINTIFF

NATIONAL CONSTRUCTION COUNCIL.....2ND PLAINTIFF

VERSUS

AMANI CENTRE FOR STREET CHILDREN..... DEFENDANT

JUDGMENT

10/11/2022 & 12/12/2022

SIMFUKWE, J.

The plaintiffs herein instituted the instant suit against the defendant claiming a total sum of Two hundred and twenty million, nine hundred thirty-nine thousand and seven hundred thirty Tanzanian shillings (TZS 220,939,730/=) arising from the defendant's breach of duty to pay the arbitration fees and associated costs in the dispute between Viso Construction Co. Ltd (hereinafter referred as **Viso**) and the defendant Amani Centre for Street Children (hereinafter referred as **Amani Centre**) which was presided by Eng. Sudhir Chavda as a Sole Arbitrator. A copy of the computation of the claimed Arbitration fees and the 2nd Plaintiff's costs in the conduct of the Arbitration was attached to the plaint to form part of the plaint. (**Annexure NCC-1**).

The plaintiff prayed for judgment and decree against the defendant as follows:

- a. Declaration that the Defendant has breached her duty to pay the arbitration fees and associated costs in the arbitration between Viso Construction Co. Ltd and the Defendant.*
- b. That the Defendant be ordered to pay the 2nd Plaintiff's costs of Arbitration to the tune of Tshs, 220,939,730/=, a sum of Tshs 51,560,100/= being the outstanding principal amount plus interest charges at a commercial rate of 18% per annum to the tune of Tshs 169,379,630.00 from the date of default August 2011 to the date of institution of this suit.*
- c. That the Defendant be ordered to pay interest charges at a commercial rate of 18 % per annum of (a) above from the date of judgment to the date of full payment.*
- d. Costs of this suit be provided for.*
- e. Any other relief (s) this Honourable Court may deem just and equitable to grant.*

Contesting the claim, the defendant filed a Written Statement of Defense.

The plaintiffs were represented by Mr. Yohana Marco, learned State Attorney while Ms Patricia Eric learned counsel appeared for the defendant. Prior to the hearing, the following issues were framed:

- 1. Whether there was duty on party of the Defendant to pay Arbitration fees and associated costs in the dispute between Viso Construction Company Ltd and the Defendant.*
- 2. If the first issue is in the affirmative, whether the duty has been breached.*

- 3. Whether the Defendant made efforts to perform its duty to pay Arbitration fees on a dispute between Viso and the Defendant.*
- 4. Whether the Plaintiff's Arbitration Costs and fees were in agreement with a Tripartite agreement and NCC Rules.*
- 5. What reliefs are the parties entitled to.*

The plaintiffs called two witnesses to prove their case while the defendant had one witness only.

PW1 Sudhir Chavda his evidence among other things was that, he is a trained Civil Engineer and he practices as a Registered Consulting Engineer in Tanzania in which capacity he has to deal with disputes emanating from his work. That, he is also a registered Arbitrator in Tanzania and he has been involved in arbitration for over 50 years. He said that he came to know the National Construction Council (NCC) when it was created around 1992 when he was invited to be one of its Council members to represent the Consulting Engineering Sector of Tanzania in which capacity, he served the first Council for the period of three years. Thereafter, he was tasked by the Regional Commissioner of Dar es Salaam to head the Commission of Inquiry to establish the cause of collapsed multi storey building for which there were fatalities. That, the National Construction Council's Secretariat also joined the said Commission of Inquiry.

PW1 went on to testify that he does recall the day in February 2008 when he received a phone call from a lady in Moshi who identified herself as Valerie Todd who said that she was a Director of an entity called Amani Centre for Street Children. That, the said lady requested PW1 to assist her in a dispute that she had with a contractor called Viso Construction in

respect of a project in Moshi which had been completed and the Centre had commenced using but for which there was a dispute as to the entitlement of quantum payment yet to be made to the contractor. PW1 quoted some of the words of the said lady that:

"It is not as though we do not want to pay the contractor, but we cannot agree on the amount that should be paid."

PW1 stated further that he advised Miss Valerie Todd of Amani Centre that in the type of a situation that she was in, she would not require his services, instead, she would enlist the services of Construction Professionals from within Moshi because, actually it was not a dispute but a matter of measurement of work done and nothing more. That, Miss Todd explained that they had already tried that approach to resolve the issue but the dispute remained. Amani Centre and the Contractor Viso concluded that they needed third party intervention, and that such intervention was provided for in their contract. Thus, she wanted to know how to proceed and at which point. PW1 told Miss Valerie that arbitration as a process would require consultation from the other party as to the name of the arbitrator. That, his name would have to be consulted to by the other party Viso. Meaning that, Miss Todd should have informed PW1 that the other party had given the mandate of the suggested name and that Viso could accept it. PW1 told her that it would require a written agreement on a standard format whereas the two parties consented to the appointment of arbitrator and that such a process would have to be foreseen by the National Construction Council who administer Construction Arbitration in Tanzania. Thus, PW1's last advice to the defendant was to get in touch with the National Construction Council.

Thereafter, on 21st July, 2008, PW1 was appointed to be an Arbitrator between Viso Construction Company Limited and Amani Centre for Street Children. The document was signed by both parties and they appointed him as sole Arbitrator. Then, the document was served to the National Construction Council. On 14th August, 2008, PW1 received a formal letter from the National Construction Council. On 28th August, 2008, the said arbitration began with a preliminary meeting which was held in Dar es Salaam and it was attended by both parties, NCC representative and representatives of the parties.

PW1 produced the minutes of the said preliminary meeting. The minutes were admitted as exhibit P1.

Being examined in chief by using exhibit P1, PW1 went on to state that remuneration of the Arbitrator was agreed to be Tzs 100,000/ per hour plus VAT. That, at no time did either **Amani Center** or the other party **Viso** bring any document and submit it to PW1 to show that they were exempted from imposition of VAT.

PW1 elaborated that, expressed in terms of duration it would be duration counted from 28th August, 2008 when the preliminary meeting was held to the date of making and publication of the Award which was done on 17th June 2011. That was the time spent, but in terms of actual time spent by PW1 as the Arbitrator amounted to 740 hours. That, the make-up of those 740 hours are items in page 20 tabulation forming part of the Award.

It was testified further that, for four and a half months after the commencement of arbitral proceedings on 28th August, 2008, by middle of January 2009, Amani Centre petitioned at the High Court of Tanzania

seeking PW1's removal and in that petition, the respondent was Viso. To put his defence to the other party Viso, PW1 could not have involvement directly. Thus, he was required to hire an advocate who would be acting on his behalf on watching brief basis.

It was averred by PW1 that arbitration took long because of the behaviours of the two parties and the stance taken by the respondent whereas originally PW1 was informed by Valerie Todd the Director of Amani Centre in the first phone call. That stance which PW1 thought would prevail during arbitral proceeding did not prevail. That, PW1 was surprised to find that Amani Centre had submitted a substantial counter claim which was to be adjudicated.

Another reason for the arbitration taking too long, was stated to be High Court intervention by Amani Centre seeking PW1's removal which took extra time. Also, to PW1's surprise Amani Centre had taken combative stance which had feuded a formidable team who in effect prolonged matters which in the final analysis turned out to have no merit. That, PW1 had no control in such bureaucracy relation and such prolongation because he found that any attempt which he made to speed up or shorten the time spent was rejected mainly by Amani' team who reminded PW1 not to suppress evidence. Also, PW1 added another factor to be frequent instances of illness not only on part of Amani's counsel, Advocate Marando, but also on part of Amani's Director of Finance who attended all sessions and multiple applications to prolong proceedings on medical grounds.

Another factor explaining prolonged proceedings was said to be the manner in which both parties decided to produce oral testimony through

their respective witnesses numbering eight in all. That, oral testimony alone took up to 39 days of hearing; which hearing was voice recorded and the two parties insisted that the transcript be produced of the said 39 days of oral hearing.

PW1 stated further that he made and published the Award on 17th June 2011. He prayed to tender as exhibit, a copy of the covering letter of the Award which he sent to the National Construction Council. His prayer was objected by Ms Patricia learned counsel for the Defendant on the reason that Mr. Chavda was the author of the said document. Mr. Yohana learned state attorney for the Plaintiff prayed inter alia that the court should employ the Objective Principle to cure that technicality.

The objection of Ms Patricia was overruled under **section 65 (a) of the Evidence Act**. Thus, a certified copy of a letter dated 17th June 2011 was admitted as exhibit P2.

PW1 concluded his testimony by stating that he taxed the secretarial services because the same form part of the services of the arbitration.

PW2 Elias Fredrick Kisamo testified inter alia that he is an employee of National Construction Council of Tanzania since November 2005. That, the National Construction Council is a Government Institution established to coordinate issues of construction and construction disputes.

He asserted that, in this case the National Construction Council owes Amani Centre for Street Children a sum of Tshs 220,939,730/= which were costs of arbitration between Viso Construction Company and Amani Centre for Street Children. The source of the said claim was the dispute which was referred to the Council by Viso Construction Company Ltd

through a letter. PW2 said that they could not locate the said letter due to transfer of their office from Dar es Salaam to Dodoma.

PW2 went on to state that the claims of Viso concerned institution of the construction dispute against Amani Centre for Street Children. That, after they had received the said letter, they wrote a letter to Amani Centre for Street Children to avail them with their construction contract with Viso. That, they requested for the said contract because they wanted to satisfy themselves whether there was Arbitration Clause in the said contract. Viso replied to their letter which was attached with a copy of their contract which contained Arbitration Clause as mechanism to resolve their dispute. Thereafter, NCC wrote a letter to Amani Centre notifying them about the application to institute arbitration proceedings before the National Construction Council. PW2 alleged that they could not locate the case file which had the said letter due to transfer.

It was testified further by PW2 that, thereafter, they received a joint letter informing them that the parties had appointed an Arbitrator. He produced a copy of the said letter to form part of his testimony. The learned counsel for the Defendant had no objection. Hence, a copy of the letter dated 22nd April 2008 was admitted as exhibit P3.

PW2 continued to state that the said letter was addressed to the Director of National Construction Council informing the Council that Amani Centre for Street Children and Viso Construction Company Limited had selected Mr. Sudhir J. Chavda to be their Arbitrator. After they had received the said letter, the National Construction Council wrote a letter to Mr. Chavda informing him of his appointment as an Arbitrator of the dispute between the parties.

PW2 prayed to tender copy of the letter addressed to Mr. Chavda as exhibit to form part of his evidence. The learned counsel for the Defendant had no objection. Thus, copy of a letter dated 14th August 2008 with a heading "CONSTRUCTION OF AMANI CENTRE FOR STREET CHILDREN" was admitted as exhibit P4.

PW2 contended further that after they had written a letter to the Arbitrator, the Arbitrator convened the first preliminary meeting not later than a month. The said meeting was held at NCC offices at the Board room. In the said meeting many issues were discussed including agreement of arbitration fees and expenses. It was agreed that the Arbitrator would charge on hourly basis including other costs which could be incurred by the Arbitrator and the charges of NCC as coordinators of the Arbitration. That, the NCC charges are called NCC direct costs which covers costs of the venue, lunch and refreshments, any cost of secretarial nature and costs of handling pleadings between the parties. That, costs of handling pleadings are to the effect that NCC play a role of circulating pleadings to the parties and the Arbitrator. The said coordination commenced in 2008 and ended in June 2011 when the Award was published. That, on 17th June 2011 the Arbitrator issued notice of publication of final Award. The notice was addressed to NCC.

PW2 prayed the said Notice of Publication of Final Award (exhibit P2) to form part of his evidence.

PW2 went on to state that after being notified of publication of the award, the said notice was attached with a letter of arbitration costs. He prayed to tender copy of a letter of arbitration costs. The learned counsel for the

Defendant had no objection, in the event, copy of a letter dated 17th June 2011 with reference number 1519/SJC/gim was admitted as exhibit P5.

It was testified further that, according to the letter from the Arbitrator addressed to NCC, the total arbitration costs were Tshs 118,120,200/= which were to be paid by both Viso Construction Company and Amani Centre for Street Children. After calculation, NCC wrote a letter to Amani Centre and Viso Construction Company informing each of them the amount which they had to pay as arbitration costs which were to be half the costs for each party.

PW2 prayed to tender the said letter which had not been signed as exhibit. It was objected by Ms Patricia the learned counsel for the Defendant. The objection was upheld.

PW2 continued that, after he had received costs of arbitration from the Arbitrator, on 22/6/2011 the National Construction Council wrote a letter to both parties informing them about the amount they had to pay as arbitration costs. Amani Centre for Street Children had the pending amount to settle of Tshs 51,560,100/=. That, the said amount was to be paid within 30 days from 22/6/2011. Amani Centre for Street Children refused to pay, thus the interest accrued. Amani Centre through their representative replied their letter dated 22/6/2011.

PW2 prayed to tender copy of the letter from Amani Centre. The learned counsel for the Defendant had no objection, thus a letter dated 01/7/2011 with reference number CYGS/AM/ARB/3098 was admitted as exhibit P6.

Explaining about exhibit P6, PW2 averred that in the said letter, Amani Centre through their representative, first acknowledged receipt of their letter dated 22/6/2011 which required them to pay Tshs 51,560,100/=.

Second, they alleged that for them to approach sponsors they required detailed breakdown of the costs. NCC replied them through a letter that the detailed breakdown which they required was that which was issued by the Arbitrator as costs for arbitration and that NCC had no further details. That, NCC also informed Amani Centre that they could be issued with the final award after payment. PW2 alleged that they could not locate the said letter of their reply but it was dated 6/7/2011.

PW2 continued to testify that according to his experience and procedures of arbitration they are led by the **Arbitration Act** and **NCC Arbitration Rules**. In this case they were led by the **NCC Arbitration Rules of 2001 Edition**. Thus, in this case the detailed costs of arbitration were part of final award. For the party to be issued with the final award, the said party had to pay first. That, the **NCC Arbitration Rules** prescribes that a party should pay first. If parties are not satisfied with the award after being supplied with copy of the award, they must challenge it before the High Court. That, on August, 2011 Viso paid the amount owed to them and NCC supplied them with copy of the Award. They filed it to the High Court in order to register it as a Decree of the Court. Amani Centre filed a Petition challenging the Arbitration Award. Their petition was dismissed. Still aggrieved, Amani Centre appealed before the Court of Appeal where they settled the matter out of court. That, the noted decisions are before the High Court at Dar es Salaam and Court of Appeal.

PW2 elaborated further that when the matter is referred to court, NCC is not party to it, thus they did not pursue copies of the above noted decisions.

Thereafter, on 25/7/2011 Amani Centre through their representative, replied NCC's letter dated 6/7/2011. PW2 prayed to tender copy of the said letter as exhibit. It was admitted as exhibit P7.

That, in the said letter, Amani Centre acknowledged to have received their letter dated 6/7/2011 and insisted to be supplied with breakdown of arbitration costs. NCC replied Amani Centre's letter on 3/8/2011. Copy of the said letter was admitted as exhibit P8. PW2 went on to insist that in their letter dated 3/8/2011 they insisted that Amani Centre could be supplied with detailed arbitration costs after effecting payment.

From that time, NCC had series of correspondences till on July 2015 when the Director of Viso Construction Company Limited, one Madam Sophia went to NCC's office and informed them that the matter which was before the Court of Appeal between them and Amani Centre for Street Children was settled amicably. After NCC had received the said information on 2/7/2015 they wrote a letter to Amani Centre requiring them to pay arbitration fees and costs. Copy of the said letter was admitted as exhibit P9.

Explaining about exhibit P9, PW2 stated that the subject of the said letter dated 2/7/2015 was recovery of arbitration fees and costs. That, they notified Amani Centre that if they could not pay the said costs, NCC could take legal actions against them. That, according to PW2's testimony, NCC had exhausted all available means to recover arbitration costs in vain.

PW2 prayed this court to grant their prayers as indicated in the plaint.

That marked the end of the Plaintiffs' case. The Defendant called one witness Mr. Meindert Schaap (DW1).

Mr. Meindert's testimony among other things was that he was the Executive Director of Amani Centre for Street Children. His responsibility was to oversee all Amani's operations, manage their funds well, do the fundraising for Amani so that they can help the children that they serve. That, Amani rescue children who are living in the streets. In the past 21 years they were able to rescue more than 1800 street children from the streets of Moshi, Arusha and Singida. That, they closely collaborate with the government especially Social Welfare and Community Development. That, the Government sees Amani as one of the best organizations for street children in Tanzania.

DW1 said that he knew Viso Construction Company Limited as the company which constructed Amani Children's Home in Moshi. That, at the end of the construction there was a dispute between Amani and Viso. The said dispute went for arbitration under the guidance of National Construction Council, the second plaintiff in this case. That, Mr. Sudhir Chavda was appointed by the two parties (Amani and Viso) as the sole arbitrator in this case. That, on the first meeting of arbitration they set the terms of reference of working and payment of the Arbitrator. The terms of reference were captured in the minutes of preliminary meeting. They agreed that the Arbitrator was to be paid on hourly basis based on invoicing his hours at the rate of Tshs 100,000/= per hour. The arbitration was completed though it took a very long time. They were requested to pay Tzs 7,500,000/= as advance. That, according to the agreement and NCC Rules the parties were jointly and severally liable; meaning that any of the two parties would be liable to the full amount. So, if one party was not able to pay, the other party would cover the costs and could claim that later while executing the award.

DW1 stated further that after arbitration, the Arbitrator sent three copies of the Award to the National Construction Council. The National Construction Council notified the parties about the Award being received by NCC and costs which could be paid, a lumpsum amount which Amani had to pay for arbitration costs.

DW1 identified exhibit P5 which was a letter which they received from the National Construction Council. DW1 alleged that when they received the said letter, they had a lot of challenges, one of the big challenges was that it was agreed that the Arbitrator would be paid on the basis of hourly fees. There was no itemization at all, it was a full lumpsum amount without breakdown of hours and the amount was found to be very high by both parties. That, they had below 50 meetings.

DW1 mentioned the second challenge to be who was Professor Fimbo and why pay him Tshs 10,000,000/= as legal fees for engaging Prof Fimbo who was unknown by the parties. Later, they understood that he was hired by the Arbitrator Mr. Chavda for watching brief for him and Viso to counter the petition by Amani to remove the Arbitrator because of the alleged bias. In the whole course of arbitration, it was never communicated to Amani. Thus, they were surprised to see that amount included in the costs.

DW1 stated another challenge to be the Value Added Tax (VAT). That, VAT was charged on items which were not VAT chargeable, such as secretarial services by the Arbitrator, VAT of legal costs to hire Prof. Fimbo, VAT of site visit to Moshi. They wrote a letter to the National Construction Council and the Arbitrator requesting clarification.

Referring to exhibit P6 and P7, DW1 testified that the letter from their legal team requesting detailed breakdown of the services provided by the Arbitrator and particularization of the expenses. Nothing was attached to the expenses in respect of air ticket and secretarial services. That, the invoices from NCC had no attachments. DW1 alleged further that they were a professional organization which means they cannot approve one big lumpsum amount without breakdown. That, no international sponsors are keen to pay something like that. They pay money for children. So, to convince them, you must have a breakdown of the costs.

DW1 testified further that NCC replied that they will not give a breakdown of anything and that Amani should just pay. That, if they did not like that payment, they could contest later in court. DW1 prayed to tender a letter from NCC dated 6/7/2011 as exhibit. It was admitted as exhibit D1. It was averred further that NCC said that they were not giving a detailed breakdown and that they could see it in the final Award. Also, NCC said that parties were severally liable to pay the arbitration costs. In exhibit P7 Amani Centre explained that without the breakdown and explanation on the 10,000,000/= of Prof. Fimbo, Amani will not be able to negotiate with International Sponsors. They elaborated that they had a total of 49 meetings and each meeting took four hours. Thus, the Arbitrator's charge would be below Tshs 20,000,000/= (Twenty million). If the amount is doubled, it would be below 40,000,000/= less than the amount which was presented to them. That was the reason for asking for clarification and breakdown. DW1 complained that to date he cannot understand why they failed to make a breakdown which would have taken three minutes. He prayed to tender a letter dated 3rd January 2012 which was written by NCC to Amani. It was admitted as exhibit D2.

DW1 explained that exhibit D2 was a reply to their request that NCC cannot do anything and cannot explain the ten million of Prof Fimbo. Thus, it was impossible to find the funds for paying the Arbitrator. He prayed to tender a letter dated 15th November 2011 which he wrote to NCC. It was admitted as exhibit D3.

Elaborating on exhibit D3, DW1 said that in the said letter they said that they were trying to find international sponsors and that they were requesting for breakdown of costs of arbitration. He stated further that at some point Viso decided to take up the Award by paying all the outstanding fees according to NCC Rules. They paid about 1/3 of the outstanding amount. They paid to the National Construction Council and NCC accepted the 1/3 payment which is against the **NCC Regulations, 2011, Clause 15.1**. That, Clause 14.1 requires parties to pay the costs of the Award severally. Thus, Viso should have paid the whole amount and claim it back from Amani Centre. That, Viso collected the Award while Amani Centre never received a copy of the Award from NCC.

DW1 mentioned the second misconduct to be that NCC allowed the Arbitrator to file the Award in the High Court for execution, knowing that Amani did not have its copy. Thus, one party had all the information of the case while the other party (Amani) had no information of the case. That, if they had the original Award, they would be able to challenge it. So, they filed petition in the High Court requesting to be furnished with the award. The Court kicked them out on technical omission that they did not attach the Award. They referred the matter to the Court of Appeal unsuccessfully. That, it took a lot of time and costs. In the end they were forced to settle. They settled for USD 330,000/= about Tzs 700,000,000/=.

It was stated further that the fixed original contract with Viso was 337,000,000/=Tzs. That was for construction of the entire Amani Children Home in Moshi, Viso wanted payment of several more millions which was the cause of their dispute as there was no substantiation to the payment. That, from 337 million, they had to pay 1.4 billion. It made their work almost impossible. They failed to help 350 street children. That, it also damaged their reputation to their donors.

Moreover, DW1 alleged that the current claim is Tzs 51,000,000/ and a total claim is Tzs 220,939,730/=. That, they are struggling like crazy plus the two years of Covid 19. That, if they had to pay the amount, they will have to close some of the programs. That, Viso had never claimed it before. It was not discussed in the preliminary meeting. In the first years they were requesting clarification. Then, they spent several years in court. From 2015 to 2020 NCC was silent. He contended that if they had received the breakdown and Fimbo was taken out, they could have been able to raise the funds for paying. Meanwhile, it was alleged that it is difficult to pay as he cannot explain to donors.

DW1 concluded by praying this case to be dismissed. That, if Amani is ordered to pay the principal amount plus Fimbo out, they will be able to pay.

That was the end of evidence of both parties. The learned counsels of both parties filed their final written submissions.

Mr. Yohana Marco learned State Attorney on the outset started his final submissions by reproducing the issues which were agreed and framed in this matter. Submitting on the first issue, Mr. Yohana argued that the Defendant has a duty to pay arbitration fees and associated costs arising

from the agreement to refer the dispute between the Defendant and VISO Construction Company Ltd to the sole arbitrator who was Sudhir Chavda. That, the said duty is owed to the 2nd Plaintiff by the Defendant as a matter of law. He referred to the evidence of PW1 Mr. Sudhir Chavda the said Arbitrator and PW2 one Elias Kisamo a quantity surveyor of the 2nd Plaintiff. In addition, Mr. Yohana referred to the evidence of DW1 one Meindert Schaap the Director of the Defendant who confirmed the existence of the duty but complained that the costs and fees were unjustifiable and that they were refused to collect copy of the award. Mr. Yohana concluded the first issue by stating that it had been affirmatively answered.

On the second issue, Mr. Yohana answered it in the affirmative that the Defendant had breached the duty to pay the arbitration fees and associated costs. He averred that the Defendant based his defence on the reasons which made them not to honour their duty to pay the costs. He said the dispute before this court is centered on the question of how much is the Defendant supposed to pay and that the rest is a pursuit of sympathy from the court which is uncalled for because this is the court of justice not of sympathy.

On the question whether the Arbitrator is right to withhold the award until his fees and costs are paid, Mr. Yohana alleged that the said question had already been answered in **Misc. Commercial Cause No. 23 of 2011 between Amani Centre for Street Children vs Viso Construction Company Ltd**, High Court, Commercial Division at Dar es Salaam. Thus, this court is functus officio to determine the said issue.

Mr. Yohana commented that from the above noted decision of this court, it is obvious that the award which the Defendant calls this court to make adjustments such as removing the fees of Prof. Mgongo Fimbo and VAT on stationeries has already been made a decree of this court. He cemented his argument by subscribing to the case of **Mohamed Enterprises (T) Ltd vs Masoud Mohamed Nasser, Civil Appeal No. 33 of 2012**, at page 15, Court of Appeal at Dar es Salaam, where it was held that:

"Once judgment and decree are issued by a given court, judges (or magistrates) of that court become "functus officio" in so far as that matter is concerned...."

Mr. Yohana was of the opinion that the duty on part of the Defendant to pay fees and associated costs remains intact and failure to pay marks the breach of it. He submitted that the same is construed so because at the time this suit was filed all the fees and costs had already been made part of the award which was filed by the Arbitrator in court to make it a decree and the same has not been set aside. That, the 2nd Plaintiff could not enforce it as did VISO because NCC was not party to the tripartite agreement and the duty towards the 2nd Plaintiff from the Defendant is created by virtue of relationship other than a contract which was already by the 2nd Plaintiff as fees and costs collector among others. The learned State Attorney also made reference to **Clause 15.2 of the National Construction Council Rules 2001** which stipulates that:

"If the award has not been taken up within one month of the notification, the National Construction Council may by action recover all outstanding costs of arbitration from any or all of the parties."

Mr. Yohana concluded that the act of the Defendant not taking up the award by giving unfounded reasons amounts to breach of the duty towards the 2nd Plaintiff and that the 2nd Plaintiff was justified to file the instant suit.

On the third issue, it was submitted that it is clear that the Defendant had not made any effort to pay the dues. That, what the Defendant did was to protest the payment by labelling the award as unjustified, the fees and costs being irrational without following proper procedure to challenge it. That, when DW1 was cross examined, he was of the view that when one wants to challenge the judgment of the court, he must take the judgment first and challenge it. The learned State Attorney asserted that the Defendant never did that. That, the plea by the Defendant that they had no money to pay is aimed at disguising the court into believing illusions as by then the amount due was Tshs 51 million. In support of his assertion, Mr. Yohana stated that as DW1 testified, the Defendant managed to settle Tshs 700,000,000/= with VISO and at the same time they alleged that they had no money to pay the arbitration fees and costs to the 2nd Plaintiff while the owed amount was much small. He concluded that there were no efforts made by the Defendant to pay arbitration costs and fees.

On the fourth issue, Mr. Yohana submitted that fees and associated costs in the arbitration were made part of the arbitral award which has already been made a decree of this court, hence this court is functus officio to determine whether the same was in accordance with the tripartite agreement and National Construction Council Rules. He was of the view that the Defendant was left without option other than settling with VISO. He suggested the proper way was to take the award and challenge it

according to **section 16 of the Arbitration Act, Cap 15 R.E 2019** before it had been filed in court for enforcement.

On the issue that the Defendant withdrew the appeal before the Court of Appeal in order to settle with VISO, Mr. Yohana invited this court to take a judicial notice of the judgment in **Amani Centre for Street Children vs VISO Construction Company Ltd [2013] TLR 38** in which the Court of Appeal upheld the decision of the High Court Commercial Division in Misc. Commercial Cause No. 23 of 2011.

Regarding the issue of remedies, it was submitted that since all evidence show that the Defendant has a duty to pay arbitration costs and fees but protests the figures therein, the said protests cannot do away with the mentioned duty. The learned State Attorney prayed for judgment and decree as presented in the plaint plus interest from the date of delivery of judgment to the date of satisfaction of the same as well as costs associated with this suit.

On her part, Ms Patricia Eric learned counsel for the Defendant started his final submissions by stating the background of the case which I do not see any reason to reproduce as the same has been covered by evidence of both parties. In addition, Ms Patricia listed authorities which she intended to rely upon.

The learned counsel prayed to commence with the 4th framed issue on the reason that it would allow determination and good sequence of the rest of the issues. She submitted that during the preliminary hearing meeting, parties agreed that:

- (i) *The Arbitration procedure would conform with the Arbitration Act, Cap 15 R.E 2002 (The Arbitration Act) and the Arbitration NCC Rules (2001 Edition)*
- (ii) *The Arbitrator fees would be chargeable at an hourly rate of Tshs 100,000/=*

Ms Patricia alleged that the arbitration proceedings were not in conformity with either **the Arbitration Act** or **the NCC Arbitration Rules** as agreed. She made reference to the table of costs in exhibit P5 in which the total arbitration costs is Tshs 118,120,200/=. That, parties had the right to know exactly how much time was spent on the arbitration and be able to calculate the time spent on the matter and know what was to be paid as fees of the arbitration. That, parties did not agree anywhere in their Tripartite Agreement that such costs details would be included in the Award and not in the invoice. The learned counsel was of the view that failure to give the breakdown of costs was a total breach of the agreed terms of the contract on charging by hours spent.

Challenging the item of secretarial services, Ms Patricia submitted inter alia that the said item was supposed to be accompanied with an invoice, receipts or any kind of document to prove the same. She was of the view that charging secretarial services without availing any invoice and recharging VAT on it was illegal.

On the issue of Value Added Tax (VAT), Ms Patricia elaborated the meaning of the term and the law governing it. She submitted that, when cross examined PW1 admitted that he incorrectly charged VAT on secretarial services. She was of the view that, the same was double taxation on part of the Defendant and VISO.

Concerning the legal cost for engaging Advocate Prof. G.M. Fimbo PhD on watching brief in Commercial Cause No. 1 of 2009; it was submitted among other things that during cross examination, PW1 stated that he employed Prof. Fimbo to watch his brief after the Defendant had petitioned in court to remove him as an Arbitrator due to bias. The learned counsel contended that the engagement of Prof. Fimbo to watch PW1's brief was never communicated to the parties and the costs in respect of the same came as a surprise and that they were not warranted. That, such services were not part of arbitration. In support of her submission, Ms Patricia cited **Rule 7.3 (d) of the NCC Rules**.

The learned counsel faulted all the costs in a sense that the costs were not accompanied by receipts, invoices or any document to prove that the services were rendered.

On the 1st and 2nd issues, Ms Patricia answered the first issue in the affirmative that both parties had obligation to pay arbitration fees and associated costs jointly and severally. She made reference to **Black's Law Dictionary, 8th Edition** which defines joint and several liability as:

"Liability that may be apportioned either among two or more parties or to only one or a few members of the group, at the adversary discretion. Thus, each liable party is individually responsible for the entire obligation but, a paying party may have right of contribution and indemnity from non-paying parties."

Basing on the above quoted definition, Ms Patricia was of the opinion that once notification of the Award was given, the party intending to take up the Award ought to have paid the entire amount to the 2nd Plaintiff as per **NCC Rule 15.1** and then recover the same from the Defendant later, as

per Rule 15.3 cited above. That, allowing Viso to only partly pay the arbitration costs and avail them a copy while withholding the same from the Defendant was totally in contradiction to the NCC rules and the rules of natural justice because the said action prevented the Defendant from challenging the same in any court and thus its right to be heard was infringed.

On the third issue whether the Defendant made efforts to perform its duty to pay arbitration fees in a dispute between Viso and the Defendant; the learned counsel for the Defendant submitted that the Defendant had always been willing to pay what it was legally obliged to pay. That, the 2nd Plaintiff had failed to state to the Defendant exactly how much time was spent by the Arbitrator on the arbitration between the Defendant and Viso. That, the same made it impossible for the Defendant to get full account which will justify its payment to the 2nd Plaintiff.

On the last issue which is in respect of reliefs, the learned counsel for the Defendant contested the reliefs and compound interest sought by the Plaintiffs on the reason that the same were not proved.

In conclusion, Ms Patricia submitted that it was not the Defendant who breached any part of the agreement, but it was the 2nd Plaintiff who breached the agreement in multiple ways and who misconducted itself in its role to neutrally, legitimately and fairly coordinate the arbitration. She was of the view that the 2nd Plaintiff came to court to seek equity with dirty hands. She prayed that all the claims be dismissed and costs be awarded to the Defendant.

After going through evidence of both parties, starting with the first issue whether there was a duty on part of the Defendant to pay arbitration fees

and associated costs in the dispute between Viso Construction Company Ltd and the Defendant; it is clear from the above summarized evidence that the defendant does not dispute the fact that they were obliged to pay the said costs. Their dispute is in respect of the breakdown of the alleged costs. I therefore find the first issue in the affirmative.

On the second issue whether the defendant has breached its duty specified in the first issue herein above; the learned counsel for the plaintiff was of the view that the defendant had breached its duty to pay costs. DW1 and the learned counsel for the defendant were of the view that they had not breached their duty save that they disputed the fees paid to Prof. Fimbo, VAT charged on secretarial services and the accrued interests. Also, the defendant disputed other costs to the effect that the costs were not accompanied by any receipt or invoice.

It may appear that the defendant assumes to be innocent and casts the blame on part of the 2nd plaintiff for failure to supply breakdown of the costs owed to them. In the course of perusing the exhibits tendered before this court, I had time to consider exhibit P7 which is a letter from the legal representative of the defendant which echoed the breakdown of the costs as presented by the arbitrator to NCC.

With due respect to both parties, this court is of considered opinion that this suit has been preferred before this court prematurely. Powers to determine issues pertaining to arbitration costs are conferred on the Arbitrator who prior to publication of the award should have determined all issues concerning arbitration costs. **Rule 16.2 of the Arbitration Rules 2001 Edition** provides that:

*"16.2 If the arbitration is abandoned, suspended or concluded, by agreement or otherwise, **before the final award is made, the parties shall pay** to the National Construction Council the costs of the arbitration incurred up to that time, **in such proportions as between them as they shall agree on**, failing agreement, **as the arbitrator shall determine.**"*Emphasis added

Rule 14.5 of the Arbitration Rules (supra) provides that:

*"14.5 The arbitrator will specify the total amount of the costs of the arbitration in his award. **Unless all the parties shall agree otherwise, he will determine – in the exercise of his absolute and unfettered discretion – which party shall pay them and whether any party shall pay all or part of any other costs incurred by any other party.**"*Emphasis mine

The above quoted rule specifically states that it is an absolute and unfettered discretion of the arbitrator to determine issues of arbitration costs.

What is the way forward in the circumstances? **Section 15 (1) and (2) of the Arbitration Act, Cap R.E 2019** provides that:

"15. -(1) The court may, from time to time, remit the award to the reconsideration of the arbitrators or umpire.

(2) Where an award is remitted, the arbitrators or umpire shall, unless the court otherwise directs, make a fresh award within three months after the date of the order remitting the award."

In the upshot, on the basis of the above quoted provisions of the law, I find this matter prematurely before the court. I therefore remit back to

the arbitrator the disputed issues in respect of arbitration costs for his determination and make a fresh award within three months from the date of this order. Meanwhile, the suit is hereby stayed pending the outcome of determination of disputed issues of arbitration costs by the arbitrator. No order as to costs.

It is so ordered.

Dated at Moshi this 12th day of December 2022.



X

A handwritten signature in blue ink, appearing to read "S. H. Simfukwe", is placed over a light blue rectangular background.

S. H. SIMFUKWE
JUDGE
Signed by: S. H. SIMFUKWE