IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 13 OF 2007

IN THE MATTER OF THE ARBITRATION ACT CAP. 15 (RE 2002)
AND IN THE MATTER OF AN ARBITRATION
BETWEEN

THE PERMANENT SECRETARY, MINISTRY OF PLANNING ECONOMY AND EMPOWERMENT .....APPLICANT/RESPONDENT
AND
M/S E & A CONSTRUCTION CO. LTD....RESPONDENT/CLAIMANT

RULING

1. Date of Last Submission – 21/12/2007
2. Date of Ruling – 27/12/2007

MASSATI, J

After publishing an award in an arbitration between the parties herein, the Sole Arbitrator filed an award in this Court on 30th August 2007 at the request of the Claimant. On 31st August 2007, the Court issued a notice to the parties to show cause why the award should not be issued as a decree of the Court.

On 27/9/2007, the Claimant filed a petition for a declaration that the award be confirmed as a decree of the Court under ss. 17 18 and 19 of the Arbitration Act (cap 15). The petition was opposed by

the counter affidavit of one P. S. Humbeye filed on 5/10/2007. On the same date the Respondent also filed a chamber summons to apply for extension of time in which to set aside the award. The petition was again supported by the affidavit of P.S. Humbeye. Attached thereto was the draft petition to set aside the award.

In response to the counter affidavit against the petition to issue the award as a decree, the Claimant/Applicant filed a reply and a notice of preliminary objections. The first set of preliminary objections was filed on 12/10/2007. It had two. First, that the counter affidavit of Humbeye was incompetent because no court fees were paid. Second, the chamber summons and the application for extension of time was also incompetent for failure to pay Court fees. The second set of preliminary objections was filed on 29th November, 2007. It has 3 objections. First, the application for extension of time was incompetent for failure to comply with the provisions of Rule 5 of the Arbitration Rules, since a chamber summons was not a proper way to move the Court under the Arbitration Act. Second, since the application for extension of time was drawn by a private advocate, it contravened s. 10 of the Government Proceedings Act and therefore incompetent in law. Third, the application was incompetent because no filing fee has been paid by the person who drew it. On account of those defects, the Court was urged to strike out the application with costs.

Dr. Mapunda, learned Counsel appeared for the Claimant, whereas, Mr. Lukwaro, learned Counsel, appeared for the Respondents.

On 5/10/2007, I ordered that the petition be argued by way of written submissions. This was before any preliminary objections were raised. In order to address on the preliminary objections on 30/11/2007, I ordered that the preliminary objections also be argued by written submissions. So, although Counsel have filed their submissions to cover the substance of the petition, in this ruling, I will confine myself to the preliminary objections filed on 29/11/2007 first, and if need be resort to the merits of the petition later.

In support of the first preliminary objection, Dr. Mapunda, learned Counsel, submitted that since Rule 5 of the Arbitration Rules, (1957) requires all proceedings under the Arbitration Act, to be instituted by way of a petition, the chamber summons filed for extension of time was not properly before the Court. Referring to **C.U. PATEL VS. SM & N.M. PATEL** [1960] E.A. 154, where it was held that there was no room for adopting other procedures in arbitration proceedings, he also submitted that since the arbitration emanated from the Arbitration Act and not the Civil Procedure Code, the law applicable was the Arbitration Rules only. He further referred to the Court of Appeal decision of **TANZANIA BREWERIES LTD VS. MS. GREEN WAYS COMPANY LTD** (CAT Civil Appeal No. 79 of

1999) (unreported) on the same principle. Lastly the learned Counsel referred to me, a number of cases, on the effects of citing wrong provisions of the law in support of applications; which is to render the application incompetent. Such cases, include; **HARISH AMBARAM JINA VS ABDULRAZAK JUSSA SULEMAN** (Civil Application No. 2 of 2003) (unreported) **ABDALLAH NDEGE & OTHERS VS. NATIONAL HOUSING CORPORATION** (Civil Application No. 21 of 2006) (unreported) both of the Court of Appeal of Tanzania. He therefore prayed for dismissal of the application for extension of time with costs.

Mr. Lukwaro, learned Counsel for the Respondents, submitted that the objection was misconceived, because, not only that Rule 5 of the Arbitration Rules, only applies to applications for setting aside the award or enforcement thereof, and not for extension of time, but also that the application was not made under the Arbitration Act but under the Law of Limitation Act, which is the applicable law. He thus distinguished **PATEL'S** Case.

In rebuttal, Ms. Ringo, learned Counsel, submitted that although the Law of Limitation Act, was the law of general application in extension of time, not every application for extension of time is initiated by a chamber summons. She insisted that on a proper reading, Rule 5 of the Arbitration Rules was the applicable law, and it is wide enough to cover all kinds of applications under the Arbitration

Act Apart from the previously cited case of **TANZANIA BREWERIES LTD,** the learned Counsel, also referred to **ALOYS MSELLE VS CONSOLIDATED HOLDING CORPORATION** (Civil Appeal No. 18 of 1997 (unreported) in support of her argument.

I think, the crucial issue in this objection is whether Rule 5 of the Arbitration Rules is applicable to extension of time for the doing of anything under the Arbitration Act?

Rule 5 of the Arbitration Rules, provides: -

> *"5. Save as is otherwise provided, all applications made under the Act shall be made by way of petition."*

Two cases were cited to me by the Claimant to support that Rule 5 of the Arbitration Rules, applies to all proceedings. These are: **C.U. PATEL** (op cit) by the then Eastern Court of Appeal; and **TANZANIA BREWERIES LTD** (op cit) by the Tanzania Court of Appeal. I have carefully read the two cases.

In **PATEL'S** case, the Applicant sought to set aside an award under s. 15 of the Tanganyika Arbitration Ordinance by way of a plaint. The Court held that, reading rr. 3 and 5 of the Arbitration **Rules**, together, the action should have been instituted by a petition and that r. 5 applied to applications to set aside an award. On the

other hand, in **TANZANIA BREWERIES LTD** case, the Court of Appeal held that the application/petition to set aside the award was incompetent for failure to comply with the provisions of Rule 6; in that no enabling provision of the Arbitration Act was cited.

In my view, the two cases, relied upon by the learned Counsel for the Claimant are distinguishable, in that; what was before the Courts in the above two cases were petitions to set aside awards, which were specifically provided for under the Arbitration statute. In the present case, there is no petition to set aside the award, but an application for extension of time to set aside the award, which to me is not synomious to the two applications in the two cases cited by Counsel.

But of even more significance to me, is the Court of Appeal of Tanzania's observation in the **TANZANIA BREWERIES LTD** case, on p. 2 of the typed judgment: -

> *"In order for the High Court to invoke its powers under s. 15 of the Arbitration Ordinance; rule 6 of the Arbitration Rules, 1957, requires explicit reference to be made to section 15 of the Arbitration Ordinance, failure to make reference to the section in the petition is fatal.*

> ....From this it is apparent that ***it is a mandatory requirement under the rule to make reference in the petition to the relevant section of the Ordinance...that vests on the Court with jurisdiction to set aside the award..."*** (underlining mine)

This leads me to conclude that for a proper appreciation of rule 5, it should not be read in isolation from the rest of the rules. A quick reading of rr. 3, 5, and 6 together shows that for any application to be made under r. 5, it must have the support of the enabling Act, that is the Arbitration Act. If there is no provision to support the application in the Act, it cannot, in my view, be ***"an application under the Act"*** for the purposes of r. 5 of the Rules. Rule 5 in my considered view, applies only where the proposed action is enabled under the Arbitration Act.

In the present case, the High Court has certain powers under the Arbitration Act. As supported in the marginal notes, the Court has power to extend time for making an award (s. 14) power to remit award for reconsideration (s. 15) power to set aside an award (s. 16) and power to remove an umpire or arbitration (s. 18). If a party intends to move the High Court to exercise any of those powers he must, in my view invoke rr. 5 and 6 of the Arbitration Rules. The Arbitration Act does not confer on the High Court any powers to

extend time to file a petition to set aside an award. So rule 5 is not applicable.

The above does not however, mean that the High Court has no power to extend time for filing a petition to set aside an award. As rightly submitted by Mr. Lukwaro, learned Counsel, the Court has such power under the general law of limitation. Section 40 (1) of the Act clearly stipulates the position: -

> *"S. 40 (1) This Act shall apply to arbitration in the same manner as it applies to other proceedings."*

Since the Arbitration Act, does not contain any provision on limitation, and since the Law of Limitation Act is specifically applied to arbitration proceedings, I think the application for extension of time to set aside the award is properly before the Court. The first objection therefore fails and is dismissed. That said, I do not see the need to consider the effects of not citing or citing wrong provisions in applications.

The second objection is that the application was incompetent because it was drawn and filed by an unauthorized person, or a public officer on behalf of the Government. Therefore it was incompetent in law.

Arguing the point Dr. Mapunda, learned Counsel submitted that under O. III rule 1 of the Government Proceedings Act 1968, it is only the Attorney General, his representative or a public officer gazetted by a Minister who can appear in proceedings against the Government. So, in terms of s. 10 of the Government Proceedings Act and O.III r. 1 of the Government Proceedings (Procedure Rules) 1968, Mr. Lukwaro has no locus standi in the present matter, which by definition, is a proceeding against the government and in the absence of any evidence of authority. Therefore the application should be dismissed with costs.

On the other hand, Mr. Lukwaro, learned Counsel submitted that although under s. 10 of the Government Proceedings Act provides that civil proceedings by or against the government should be instituted by or against the Attorney General, the proceedings in the present case are not "civil proceedings" as defined under s. 2 of the Government Proceedings Act, which are confined to proceedings for recovery of fines and penalties. In the alternative, it was, the learned Counsel's view that proceedings in the present matter could only refer to those prior to the publication of the award and not after. In any case, the Attorney General was not a party in the arbitral proceedings. If it was necessary to join him as party in the arbitral proceedings, then the whole of those proceedings should be declared a nullity, argued the learned Counsel. Otherwise, Mr. Lukwaro,

forcefully argued that this objection too was without merit and should be dismissed.

In rebuttal, Ms. Ringo, learned Counsel, submitted that since, in law the government could only appear through the Attorney General, a public officer, or a duly authorized person and the Respondent so appreciates, the burden was now on the Respondent's Counsel to prove that he was expressly authorized by the Attorney General to appear and represent the government. It was her view that the Respondent has failed to discharge that burden.

I think there is no dispute that with respect to the present preliminary objection, the law applicable is to be found in the Government Proceedings Act (Cap 5) and the Government Proceedings (Procedure) Rules. Section 10 of the Act provides:-

> *"10. Subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney General.*
>
> *Provided that the Minister may by order published in the Gazette direct that any particular civil proceedings or class of civil proceedings be instituted by any other officer designated in the order instead of by the Attorney General."*

The section prescribes the parties in a government suit. With regard to representation, the governing law is O. 111 rule 1 of the Government Proceedings (Procedure) Rules which reads: -

> "*(1) Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court, may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by an advocate duly appointed to act on his behalf* ***or where the Attorney General is a party, by a public officer duly authorized by him in that behalf."***

From the underlined words, it appears to me that in a very simple language, if the Attorney General is a party, **it can only** be represented by a public officer authorized by the Attorney General or himself.

In the present proceedings the Attorney General has been joined as a party in the petition. So, s. 10 of the Act has been complied with. What remains to be decided is whether Mr. Lukwaro, is a public officer duly authorized by the Attorney General to appear on behalf of the government?

Under normal circumstances, this would not have qualified as a preliminary objection, because it is prima facie, it is a matter of evidence. However in **MUKISA BISCUIT MANUFACTURES LTD VS WEST END DISTRIBUTORS LTD** [1969] E.A. 696, undoubtedly a leading authority on the law on preliminary objections, it was observed by Sir Charles Newbold P. at p. 701:

> *"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct.* ***It cannot be raised if any fact has to be ascertained or what is*** *sought is the exercise of judicial discretion."* (underlining mine).

In the present case, what the Claimant has pleaded is that Mr. Lukwaro is a private advocate and not a public officer. I too, take judicial notice of that fact under s. 59 (1) (j) of the Law of Evidence Act. Mr. Lukwaro himself has not disputed this. It is not therefore a fact which has to be **ascertained** any further.

Being not a **public officer** is in itself sufficient to disqualify Mr. Lukwaro from representing the Government, because even if the Attorney General had duly authorized him, the law does not permit him to appoint any person other than a public officer. A public officer

is defined under s. 4 of the Interpretation of Laws and General Clauses Act (cap 1) to mean: -

> *"every officer...with or performing duties of a public nature whether under the immediate control of the President or not and includes an officer or department under the control of a local authority, the community or a public corporation."*

The next question is, what is the consequence of Mr. Lukwaro's appearances in Court. Before I come to that, let me quickly dispose of Mr. Lukwaro's second argument.

Mr. Lukwaro has submitted that if the Court upholds that the Government was not duly represented, then it should also quash the arbitral proceedings for the same reason. I do not think this is correct. Although the provisions of the Second Schedule to the Civil Procedure Code in so far as they relate to arbitration in suits, have been expressly applied to proceedings under the Government Proceedings Act, by exclusion, the provisions of the Arbitration Act with regard to arbitral proceedings have not. It follows therefore, in my view, that the arbitral proceedings are not "civil proceedings before High Court or subordinate Courts." And in particular, O. III r. 1 of the Government Proceedings (Procedure) Rules under which Mr. Lukwaro's locus standi has been challenged, only refers to

appearances, applications or acts in **Court** and not in arbitral proceedings. So, I will reject that line of argument too.

Rule 1 of Order III of the Government Proceedings (Procedure) Rules, opens with the word ***"may"***. My understanding of that word as used in the rule, is to provide an alternative to the party himself/herself, and with regard to the Attorney General, it specifically directs whom to appoint as a representative. As **BEG J, held in OFFICIAL LIQUIDATOR VS. DHARTI DHAN AIR 1977 SC. 740.**

> *"If the conditions in which the power is to be exercised in particular cases are also specified by a statute, then, on the fulfillment of those conditions, the power conferred becomes annexed with a duty to exercise it in that manner."*

Therefore, although the word "may" can never mean "must" in the ordinary meaning of that word, when the manner of exercising that power is provided, it becomes a compulsion for the authority to exercise that power in the manner provided.

Since the Attorney General did not in law, exercise his powers under O. III r. 1 of the Rules to appoint Mr. Lukwaro to represent the Government in the present proceedings it follows, in my view, that Mr. Lukwaro has no locus standi to draw any pleadings or appear in

Court on behalf of the Respondents. In the event I will expunge from the record all the documents filed by him in the present matter.

Having said so, however, I do not agree with the Claimant that, therefore the petition to declare the award as a decree must succeed. My view is that since the Respondents were not properly represented they must now be given a chance to be heard. I will therefore direct that the Respondents be served with the petition, for them to make appropriate responses.

Having held that Mr. Lukwaro has no locus standi in the matter, I think it is sufficient to dispose of the matter. I do not therefore have to deal with the third preliminary objection.

In the result, I will allow the second objection with costs. All documents filed by Mr. Lukwaro are to be expunged from the record and the Respondents have to be served to appear.

Order accordingly.

S.A. MASSATI

JUDGE

27/12/2007

3,196words