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

MISCELLANEOUS COMMERCIAL APPLICATION NO.14 OF 2009

BETWEEN

N.W. BUILDERS LIMITED .....PETITIONER

AND

MUNICIPAL DIRECTOR
KINONDONI MUNICIPAL COUNCIL ..... RESPONDENT

Date of last order – 24/09/2010
Date of oral submissions – 15/10/2010
Date of ruling – 10/06/2011

RULING ON APPLICATION

MAKARAMBA, J.:

This is a ruling on the application by way of Amended Petition the Petitioner filed in this Court on the 20th day of April 2010, seeking to quash and set aside parts of the Final Award dated 15/09/2008 filed in this Court by the Arbitrator on the 12th December 2008, and the Additional or Fresh Award by the same the Arbitrator made on 04/09/2009 and filed in this Court on 18/02/2010, following an order of remittance by this Court issued on 22/07/2009.

Initially, on the 8th day of May 2009, N.W. Builders, the Petitioner herein, filed in this Court application by way of petition under sections 15 and 16 of the *Arbitration Act* [Cap.15 R.E. 2002], Rules 5 & 6 of the Arbitration Rules and "*any other enabling provisions of the law.*" However, on the 20th day of April 2010, pursuant to an order of this Court dated 9th day of April 2010, the Petitioner filed an Amended Petition, which by consent of the learned Counsel for the parties, was disposed of by way of written submissions. Mr. MAHENGE, learned Counsel advocated for the Petitioner and LAW ASSOCIATES, ADVOCATES appeared for the Respondent.

In the present petition, the main controversy revolves around the interpretation by the Arbitrator of the letter ***"L"*** appearing under ***item 6.20*** of the ***Bill of Quantities (BOQ)*** in the ***Construction Contract*** (hereinafter the Contract), which the Petitioner and the Respondent concluded on the 05th day of August 2006. The Contract's scope of works included among other things the installation of streetlights along roads which were constructed under the Contract, the measurement of which was provided for in the BOQ – Bill No.6 (streetlights) where there were two items, namely, **No.6/04** and **6.20** respectively, and whose unit of measure was given as "L."

The Petitioner contends that it dutifully commenced the installation works and requested from the Project-Manager for an interim certificate for payment, which when the Petitioner had presented to the Respondent for payment. It is the further contention of the Petitioner that the Respondent declined to make payments in respect of the installation of the streetlights

on the ground that the unit of measure for items 6.04 and 6.20 in the BOQ-Bill No.6 should be in "***numbers***" instead of "***Linear Meter***." A dispute ensued regarding the unit of measure applicable to the two items in the BOQ – Bill No.6. The dispute was unsuccessfully referred to an Adjudicator who ruled that the unit of measure for ***items 6.04*** in the BOQ-Bill No.6 should be ***Linear Metres*** while that of ***item 6.20*** should be "***number.***" The Petitioner was dissatisfied with the Adjudicator's decision and referred the matter to Arbitration. The Petitioner further contends that while in the mid of the arbitral process, on the 10th March 2008 the Respondent terminated the Contract. This also aggrieved the Petitioner. The two matters, that is, disagreement over the unit of measure in the BOQ-Bill No.6 and the termination of the contract by the Respondent were referred to the same Arbitrator for resolution.

On the first limb of the dispute, that is, on the unit of measure in the BOQ – Bill No.6, the Arbitrator ruled partly in favour of the Petitioner in respect of one item, that the unit of measure for item 6.04 should be Linear Metre but as regard item 6.20 it should be numbers. Unlike the Adjudicator, the Arbitrator awarded twice the number of poles. On the second limb of the controversy, the Arbitrator upheld the Petitioner's claim that the termination of the Contract by the Respondent was unlawful. The Arbitrator however, declined to award liquidated damages for the extended contract period of 59 days granted by the Project Manager. The Arbitrator also declined to award the full amount claimed as liquidated damages in respect of 8 months period extension granted by the Adjudicator. Furthermore, the Arbitrator did not award the full amount claimed by the

Petitioner as payment on termination of the Contract. As regards costs of arbitration, the Petitioner contends that the Arbitrator did not apply the principle of costs follow the event instead he apportioned the costs to all the parties as if neither of them won. The Petitioner was aggrieved by the part of the Award and required it to be filed in Court so that he could contest it, which was done sometimes in December 2008. On 8th May 2009 the Petitioner lodged the present petition putting up eight grounds as follows:

i) That the Arbitral Award is bad for misconduct on the part of Arbitrator in holding that the unit of measure for item 6.20 is number instead of linear meter contrary to the Measurement Sheet as certified by the Project Manager; the Standard Method of Measurement for Electrical Works applicable in the industry, custom, practice and usage; and the Contract, BOQ Number 6.

ii) That the Arbitrator misconducted himself further in this aspect in that while the two items, item 6.04 and item 6.20 both apply unit "L" in the BOQ, he contradictorily applied different unit of measure on similar items.

iii) That the Arbitrator also misconducted himself by relying on an unknown source of reference in the industry in establishing the unit of measure in respect of item 6.20.

iv) That the Arbitrator misconducted by declining to award liquidated damages for 59 days extended contract period granted by the Project Manager on the ground that the same was not referred first to the Adjudicator. On this he apparently overlooked the fact that these are claims that can only be raised in the final accounts. Interestingly, he contradictorily awarded claims on review rates which were also not referred first to the Adjudicator.

v) *There is also misconduct on the part of the Arbitrator in that he declined to award the entire amount claimed as liquidated damages in respect of 8 months period extension granted by the Adjudicator. He instead awarded a very trivial amount and in total disregard of the evidence presented.*

vi) *The Award is also bad for misconduct on the part of Arbitrator as he manifestly failed to award the entire amount claimed as payment on termination and instead awarded a very insignificant amount contrary to the evidence available.*

vii) *The Arbitrator misconducted himself for not applying the principle that costs follow the event.*

viii) *The Arbitrator misconducted himself on the issue of costs for apportioning the costs between the parties as if neither of the parties won and/o as if there was a successful counter claim.*

On the 22/07/2009 when the matter came for hearing, this Court granted the prayers by the Counsel for the parties that the grounds of the Petition regarding the applicable unit of measure in the BOQ – Bill No.6 could properly be addressed by remitting that part of the award for reconsideration by the same Arbitrator, who being assisted by expert witnesses can make an order accordingly. Following the order of this Court remitting part of the Final Award to the same Arbitrator for reconsideration, the Arbitrator made an Additional Award by determining that the unit measure applicable in item 6.20 in the BOQ – Bill No.6 is "*linear metre*" and proceeded to determine the amount to be paid to the Petitioner per metre. The Petitioner is also aggrieved by this part of the award on the following three grounds:

i) *That the Arbitrator misconducted himself by proceeding **suo motu** to determine the issue of amount payable per metre while the same was not one of the matters remitted to him for reconsideration. Neither had this issue been one of the issues raised in the whole arbitration process. Further that the amount payable per metre had already been agreed in the BOQ.*

ii) *By so holding the arbitrator acted not only against the court order remitting the award but also against the rules of natural justice.*

iii) *The Arbitrator misconducted himself for once again not applying the principle that costs follow the event thereby apportioning costs to the parties.*

The Petitioner prayed that the impugned parts of both the Final Award and Additional Award be quashed and set aside on the grounds of misconduct on the part of the Arbitrator. The Petitioner prayed further as follows, that:

(a) *The Petitioner is entitled to the amount as per agreed price in the BOQ in respect of item 6.20;*

(b) *The Petitioner is entitled to liquidated damages for 59 days in respect of the extended contract period granted by the Project Manager;*

(c) *The Petitioner is entitled to the entire amount claimed as liquidated damages in respect of 8 months period extension granted by the Adjudicator;*

(d) *The Petitioner is entitled to entire amount claimed as payment on termination;*

(e) That the Petitioner is entitled to all the costs it incurred in the Arbitration in the spirit of costs follow the event principle;

(f) Costs of this Petition; and

(g) Any other relief as this Court shall deem appropriate.

The present matter indeed has had some interesting turn of events, which I find pertinent to narrate hereunder albeit very briefly. On the 08/05/2009, the Petitioner filed a petition in this Court. On the 22/07/2009, when the Petition came for hearing, Mr. Mbwambo, learned Counsel advocating for the Petitioner and Mr. Lusago, learned Counsel appearing for the Respondent by consensus agreed and prayed before this Court that since the only and main issue of controversy in the application is *whether the unit of measure for Items 6.04 and 6.20 in the BOQ-Bill No.6 should be in "**number**" instead of "**Linear Measure**"*, it would be wise to remit that part of the award to the same arbitrator, who with technical assistance from expert witnesses should determine and send back to this Court a fresh award in that respect, which prayer this Court granted and accordingly made the following remittal orders:

(1) The impugned part of the Award namely, the disagreement by the parties over the unit of measurement is hereby remitted to the same arbitrator for reconsideration.

(2) The arbitrator shall bring witnesses to assist him with the technical aspects.

(3) The Arbitrator is to make a fresh award on the impugned part of the arbitration and file it with this Court within three (3) months of this Order.

The Arbitrator, having reconsidered the impugned part of the award as per this Court's remittal order accordingly reconsidered the matter and filed a fresh award with this Court. On the 09/04/2010 when the matter was called again, both Mr. Mahenge, learned Counsel for the Respondent and Mr. Mwambo, learned Counsel for the Applicant, expressed their dissatisfaction over the additional fresh award of the Arbitrator over some areas, and prayed that they be given time to file an Amended Petition and reply thereto. Accordingly this Court made an order for the filing of an Amended Petition as prayed, the Petitioner by or on 20/04/2010; Reply of the Respondent by or on 04/05/2010 and Rejoinder (if any) by or on 11/05/2010. The Amended Petition was accordingly timely filed by the Petitioner in this Court on the 20th April 2010 as ordered. On the 4th of May 2010, the Respondent filed a Reply thereto.

This Court, on the 12/05/2010, before Mr. Brashi learned Counsel holding brief for Mr. Mwambo learned Counsel and Mr. Lusago learned Counsel for Respondent set the 09/06/2010 for the oral hearing of the petition. The oral hearing did not take off as scheduled on that date whereupon this Court on a prayer by Mr. Mahenge, learned Counsel for the Respondent and holding brief for Mr. Mbwambo, learned Counsel for the Petitioner, ordered the petition to be disposed of by way of written submissions, and accordingly proceeded to make a scheduling order in that regard. Apparently, the Petitioner failed to abide by the scheduled date for

filing his submissions and filed an application for orders, namely, that the submissions in support of the Amended Petition filed out of time to be received by this Court, or alternatively time be extended for the Applicant/Petitioner to file the written submissions. As it turned out however, the Respondent did not file counter affidavit to the application by the Petitioner, neither did the Respondent appear in Court on the date set for the hearing of the application. On the 24/04/209, this Court granted the prayer by the Applicant's/Petitioner's Counsel to proceed by way of exparte. In the course of Mr. Mbwambo, the Applicant's/Petitioner's Counsel, making his oral submissions in support of the application for leave to file written submissions ex parte, Mr. Mahenge learned Counsel for the Respondent entered appearance. This Court however proceeded to hear the submissions by the Applicant's/Petitioner's Counsel ex parte on the application for leave to file written submissions and accordingly made an order that the written submissions filed by the Petitioner in this Court on the 1st day of July 2010 out of time be received by this Court, and the Respondent to file his reply thereto on or before 15/10/2010, and rejoinder (if any) on 22/10/2010 and set the 18/11/2010 for the ruling. On the 18/11/2010, Mr. Mahenge, learned Counsel for the Respondent and holding brief for Mr. Mbwambo, learned Counsel for the Petitioner, admitted to have failed to serve the Petitioner with a reply on 03/11/2010 instead of 15/10/2010 as ordered by this Court, as a result of which the Petitioner could not file a rejoinder on 22/10/2010 as earlier scheduled. Mr. Mahenge prayed that the Petitioner be granted extension of time to file a

rejoinder which prayer this Court accordingly granted for it to be filed on or before 25/11/2010.

Let me now, having sketched the turn of events in this petition, give a brief background to the matters in controversy in the petition itself. The Petitioner was awarded a road construction contract (***hereinafter the Contract***) by the Respondent, which the Petitioner claims that it dutifully undertook by commencing installation work for ***street lights*** as part of the scope of works under the Contract. Upon request from the Project Manager, the Petitioner further contends, the Petitioner presented an Interim Certificate for payment to the Respondent, but the Respondent declined to make payments in respect of street lights installation on the ground that ***the unit "L" of measure used for Items 6.04 and 6.20 in the Bill of Quantities (BOQ) No.6 should be in number instead of Linear Meter***. Consequently a dispute arose regarding the unit of measure with respect to the two items namely, ***6.04 and 6.20*** in the BOQ-Bill No.6, which was unsuccessfully referred to an **Adjudicator** who ruled that ***the unit of measure for Item 6.04 should be Linear Meter while that of Item 6.20 should be number,*** which decision the Petitioner was dissatisfied with and referred the matter to Arbitration. The Petitioner contends further that while in the midst of the arbitral process, on the 10th of March 2008, ***the Respondent terminated the Contract***, which also aggrieved the Petitioner. The parties agreed to refer this matter to the same Arbitrator who tried the two differences together as agreed to by the parties.

On the dispute regarding the unit of measure, the Arbitrator ruled that ***as for Item 6.04 it should be Linear Meter and as for Item 6.20, numbers, and unlike the Adjudicator, the Arbitrator awarded twice the number of poles.*** As for the second limb of the differences, the Arbitrator upheld the Petitioner's claim that ***the termination of the Contract was unlawful, but declined to award liquidated damages for the extended contract period of fifty-nine (59) days*** granted by the Project Manager; ***as well as the full amount for liquidated damages claimed in respect of eight (8) months period of extension granted by the Adjudicator***. The Arbitrator also ***declined to award the full amount claimed as payment on termination***. As regards the costs of arbitration, the Petitioner claims that the Arbitrator did not apply the principle of costs follow the event instead he unjustifiably apportioned the costs to all the parties as if neither of them won. The Petitioner was aggrieved by part of the Award and requested the Arbitrator to file it in Court so that he could challenge it, which the Arbitrator did and notified the Petitioner.

The Petitioner filed the original petition in this Court on the 8th day of May 2009 putting up a number of grounds for challenging the Award. On the 22/07/2009, when the matter came for hearing, Counsel for the parties proposed that the grounds for the Petition regarding ***the applicable unit of measure could properly be addressed by remitting that part of the award for reconsideration by the same Arbitrator with the assistance of expert witnesses.*** This Court accordingly granted the prayer and made an order for remittance as prayed. The Arbitrator

accordingly took up the matter as per the Court remittance order and at the conclusion of the hearing, ***the Arbitrator made an Additional Award with respect to unit of measure, that, as for Item 6.20 is Linear Meter and proceeded to determine the amount to be paid to the Petitioner per meter***. The Petitioner was also aggrieved by this Additional Award upon the grounds stated in the Amended Petition filed in this Court on the 20th day of April 2010.

Let me now turn to consider the submissions of Counsel on the various grounds in the petition. The submissions of Counsel for the parties are with respect to the Petitioner's complaint against the Additional Award as well as those in the Final Award. Much as no issues were framed for determination of this Petition, I take the grounds in the petition as constituting issues for determination of the petition.

The ground relating to misconduct on the part of the Arbitrator is that the Arbitrator misconducted himself by proceeding ***suo motu*** to determine the issue of amount payable per metre while the same was not one of the matters remitted to him for reconsideration and neither had this issue been one of the issues raised in the whole arbitration process. Further that the amount payable per metre had already been agreed by the parties in the BOQ and therefore by so holding the Arbitrator acted not only against the court order remitting the award but also against the rules of natural justice, the Petitioner contended. It was the further contention of the Petitioner that by proceeding ***suo motu*** to determine the issue of amount payable per metre which was not one of the matters remitted to him for reconsideration the Arbitrator misconducted himself, and in so

doing the Arbitrator acted not only against the Court order remitting the award but also against rules of natural justice. The Petitioner contends further that the Arbitrator misconducted himself for once again not applying the principle that costs follow the event thereby apportioning costs to the parties. Further, that the Arbitrator misconducted himself for once again not applying the principle that costs follow the event thereby apportioning costs to the parties. The Petitioner is praying for among other reliefs that the impugned parts of the Final Award and Additional Award be quashed and set aside on the grounds of misconduct on the part of the Arbitrator.

The main complaint of the Petitioner is that the Arbitrator having decided the unit of measure applicable in Item 6.20 is Linear Measure proceeded suo motu to determine the amount to be paid per metre without granting a hearing to the parties. The argument by the Petitioner's Counsel is that by proceeding ***suo motu*** to determine the amount of price payable by Linear Metre, which was not among matters in the Court's order remitting the award for reconsideration by the Arbitrator, the Arbitrator therefore misconducted himself. It is the further argument by the Petitioner's Counsel that the order of this Court dated 22/07/2009 remitting the matter to the Arbitrator for reconsideration specifically directed the Arbitrator, with the assistance of expert witnesses, ***to reconsider the issue of unit of measure applicable in respect of Item 6.20 in the BOQ and not on the amount of price payable per metre, since this had already been fixed in the BOQ as at Tshs.15,000/- only***, and further that the issue of amount payable per metre has never been raised

in the whole arbitration process. It is the further submission of the Petitioner's Counsel that the act of the Arbitrator of proceeding on his own motion to fix the price per linear measure is an outright misconduct not only because it was against the remittance order of this Court, but also against principles of natural justice, because the Petitioner was not afforded an opportunity to put up its case on the matter of price and therefore the Petitioner was denied the right to be heard. The Petitioner's Counsel submitted further that the Arbitrator's decision on this aspect was ***ultra vires*** the Court order of remittance as it did not direct the Arbitrator to reconsider matters of price per metre. It is the Petitioner's prayer that the part of this Award be quashed and set aside and that the Additional Award that the Petitioner is entitled to be paid **TZS 20,308.30** per metre of cable conductor is beyond what was remitted to him for reconsideration and should be set aside.

The Petitioner's Counsel submitted further that the Arbitrator having made the Final Award was ***functus officio*** to reconsider on remittance matters of analysis of contract documents, variations, unrealistic and/or impossibility of implementation of the Contract.

The Petitioner's Counsel further submitted that the Petitioner's complaint against the Arbitral Award both in the Final and the Additional Award is on the issue of costs; which did not follow the principle that costs follow the event, instead the Arbitrator apportioned costs as if none of the parties won the matter. The Petitioner's Counsel argued further that the Arbitrator ought to have awarded the Arbitration costs to the Petitioner both in the original proceedings and in the remittance proceedings; and

therefore by not awarding costs to the Petitioner, the Arbitrator misconducted himself. The Petitioner's Counsel prayed that this part of the award as to costs also be set aside and this Court be pleased to order that the Petitioner is entitled to the costs of the arbitration.

The other complaints of the Petitioner against the Arbitral Award concern ***liquidated damages***, that these are losses and expenses the Contractor incurred when the Contract validity period was extended by the Project Manager and/or the Adjudicator. It was the submission of the Petitioner's Counsel that the Arbitrator declined to compensate the Petitioner for losses and expenses incurred due to the extended contract validity period on the ground that the said claims were not first referred to the Adjudicator. In the present matter, the Petitioner's Counsel submitted that losses and expenses incurred due to the extended contract validity period could not have been raised with the Adjudicator given that the same had not been refused by the Respondent at the time of referring the matter to the Adjudicator and therefore the Arbitrator erred in refusing to award the Petitioner liquidated damages arising out of losses and expenses incurred due to the extended contract validity. The Petitioner's Counsel prayed that this Court so find and direct that the costs and expenses incurred as a result of extended contract validity period be paid as claimed.

The Petitioner's Counsel hinted that there is no dispute that the Petitioner was granted extension of time twice, one from 5th June 2007 up to 4th August 2007 due to additional works; and another from 4th August 2007 to 10th March 2008.

It was the further submission of the Petitioner's Counsel that interestingly the Arbitrator allowed claims incurred due to extended time including those on review which were not referred to the Arbitrator on the reason that the claims on extended period should have been referred first to the Adjudicator, which the Petitioner's Counsel claims that it is not only wrong but also contradictory. The Petitioner's Counsel prayed that the Award on this particular aspect also be set aside and this Court be pleased to find that the Petitioner is entitled to recover the losses and expenses for the fifty-six (56) days extension.

It was the further submission by the Petitioner's Counsel that the Arbitrator also erred in refusing to award the entire claims as regard losses and expenses incurred as a result of eight (8) months extension granted by the Adjudicator instead awarded trivial amount in total disregard of the evidence before him. The Petitioner claims further that the Arbitrator also erred in awarding very insignificant amount on the claims for payment of termination.

In his reply to the submissions of the Petitioner's Counsel on the act of the Arbitrator in the Additional Award awarding a different rate on the payment relating to Item 6.20 of the BOQ, the Respondent's Counsel contended that much as the expert witnesses gave their opinion, this was not final since in the final analysis it was for the Arbitrator to decide which is the correct interpretation after also having revisited other items of the contract. It was the further submission of the Respondent's Counsel that going through the whole context of the fresh award, it is clear that the Arbitrator did not accept the expert's opinion and therefore the Petitioner's

Counsel argument that the Arbitrator accepted the experts opinion is misconceived.

The Respondent's Counsel submitted further that they firmly believe that the interpretation of the letter "L" in Item 6.20 in the BOQ was in "numbers" not in Linear Metres. The Respondent's Counsel submitted further that since the letter "L" in the BOQ was an item forming part of the Contract, it cannot be read in separation/isolation of the whole contract, and therefore the Arbitrator did not act *ultra vires* in considering other factors than what the Petitioner alleged. It was the further submission of the Respondent's Counsel that if the Arbitrator had read the letter "L" in BOQ in isolation of the whole Contract, definitely could not arrive at the conclusion and could make the provision of clause 38.1 of the Contract redundant and/or impotent.

On the Petitioner's complaint that the Arbitrator erred in apportioning costs for arbitration, the Respondent's Counsel submitted that the Arbitrator was correct in so doing because in the arbitral award both the Petitioner and the Respondent had an obligation to perform and therefore some remedies befell to each party.

As regards to the award of liquidated damages, it was the Respondent's Counsel submission that the Petitioner's Counsel's alleged dissatisfaction is unfounded because all the extension of time were upon the Petitioner's request and none were initiated by the Respondent, and therefore if there any losses incurred, it was the result of the poor performance by the Petitioner of the Contract and further that there were no additional work(s) issued by the Respondent to the Petitioner.

As to the Arbitrator's award of fresh/additional award, the Respondent's Counsel is of the firm view that they were unreasonably awarded. The Respondent's Counsel submitted further that the Arbitrator ought to compute the entitlements basing on rates stipulated in the BOQ wherein in Item 6.04 the rate it was TZS 1000/= per metre, and since only 4000 metres were supplied, then the right payment could be TZS 4,100,000/=. It was therefore not correct for the Arbitrator to award TZS 20,308.30 per cable which brought the sum to TZS 83,255,830/=, surmised the Respondent's Counsel.

The Respondent's Counsel submitted further that it was an error on the part of the Arbitrator to award simple and compound interest at the rate of 23% for the awarded sum using the Arbitrator's discretional power.

The Respondent's Counsel partly agrees with the Arbitrator's fresh award and partly does not agree for the reasons averred in his submissions.

The root to the dispute before this Court is the Contract for the construction of road, public toilets and streetlights in Midizini sub-ward, Manzese ward, Dar es Salaam. The Contract was concluded between the Petitioner, a limited liability company and registered Building and Civil Works Contractor with the Contractor's Registration Board of Tanzania; and the Respondent, a Local Government Authority under the Kinondoni Municipal Council on the 05th day of August 2006 at a contract price of TZS 741,979,535/= for whole work with a completion date slatted for 08th June 2007. The scope of the works included construction of 2.05 km of two way gravel road; 2.20 km of one way gravel road; 4.25 km of road side drains;

fabrication of 4 solid waste containers; 4 public toilets; and provision of street lights. The scope of Works included installation of Streetlights along the roads to be constructed. Measurement for Streetlights installation were provided for in the BOQ No.6 wherein there were two items, No.6.04 and 6.20 whose unit of measure is "L."

The main controversy which has set the parties apart and for which it was referred first to an Adjudicator and then to an Arbitrator and finally to this Court, is over ***the interpretation of letter "L" in Item 6.20 of the BOQ No.6.*** The Petitioner on his part contends that the letter "L" should be interpreted in terms of Linear Metres instead of numbers. The Respondent argues that the letter "L" is in Numbers not Linear Metres. In the course of interpreting the right unit measure between number and length, the Arbitrator by order of remittance of this Court was required to seek expert opinion, whose ***majority opinion found the letter "L" to be interpreted in Linear Metres***. Contrary to the submission by the Counsel for Petitioner, the Arbitrator did not accept the expert opinion on the unit measure. It is the argument of the Respondent's Counsel that the expert opinion was not final, since in the final analysis it was the Arbitrator who was to decide which is the correct interpretation having revisited other terms of the contract, a move the Petitioner's Counsel claims that it was *ultra vires* the order of this Court, and further that the Arbitrator having made the Final Award was **functus officio** to reconsider on remittance matters of analysis of contract documents, variations, unrealistic and/or impossibility of implementation of the Contract.

The Arbitrator gave his reasons for differing with the opinion of the expert witnesses on the unit measure as clearly stated in Clause 6.26 and 6.27 of the Fresh Award. Essentially, the Arbitrator states in his report that ***if the letter "L" is to be interpreted to be Linear Metres, the quantity in Item 6.20 will change from 99 to 7997 units basically making the quantity for "fix" in Item 6.20 the same as the quantity for "supply" in Item 6.04 of the BOQ No.6.*** The Arbitrator gave the effect of this approach on the contract, as rightly captured by the Respondent's Counsel in his submissions, that if the Arbitrator had sided with the expert opinion, the quantity for "fix" in Item 6.20 could be 7997 x TZS **1,500,000/=** per unit which is equal to TZS **1,999,550/=,** which amount was to pay only one Item of 6.20, which was for fixing the discharge conductor of 50 mm^3 in the 99 poles, a sum almost double the whole contract price of **TZS 741,979,535/=.** The Respondent's Counsel hinted that Item 6.20 in the BOQ was about careful fixing of the discharge conductor of 50 mm^3 along the erected 99 poles at the rate of TZS **150,000/=** per pole which by computation made a sum of **TZS 14,850,000/=,** which amount the Respondent's Counsel claims that the Petitioner himself pledged in the course of filing in of the BOQ. In the course of his submissions, the Respondent's Counsel submitted that in the course of executing the Contract, the Petitioner for reasons known to himself decided to vacate from mutually agreed Contract and came up with different claims which were strongly denied by the Respondent which lead to the dispute finding its way to an Adjudicator and later to an Arbitrator and eventually landed in this Court.

It is trite before I address myself to the merits of the petition perhaps to comment briefly on the concept of ***adjudication.*** Adjudication is but one of a number of recognized ADR methods used in resolving disputes in the construction industry. In Tanzania, although adjudication has gained popularity in the construction industry, it is not a creature of legislation and it is still a voluntary requirement for the settlement of disputes prior to the completion of the contract. Adjudication is normally adopted by agreement between the parties as was the case in the present matter. The adjudicator therefore is a third-party intermediary appointed to resolve a dispute between the disputants and his decision is binding and final, unless it is later reviewed by either arbitration or court proceedings, whichever the parties selected at the time of formalizing the contract. Adjudication therefore is intended to be a condition precedent to either arbitration or litigation. I should point out here that adjudication is not arbitration or litigation nor is it a decision by the engineer/project manager. The adjudicator is completely independent and is paid by both parties. Opinion however, varies as to whether adjudication should be limited to a claim for payment only and should exclude any dispute arising under the contract. In the present case adjudication was limited to a claim for payment.

In the present Petition, the Petitioner has alleged several heads of misconduct against the Arbitrator as outlined in the various grounds in the petition, with which the Petitioner is seeking the interference of this Court with the arbitrator's Final and Additional awards. Misconduct however is not defined in the Arbitration Act [Cap.15 R.E. 2002], which provides under section 16 that:

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

Apparently, misconduct of the arbitrator and impropriety in procuring so far are the only two grounds for challenging an arbitral award in court as clearly stated under section 16 of the Arbitration Act, under which the present petition has been preferred among others. The term misconduct appearing in section 16 of the Arbitration Act is not defined. However, the scope of the term "misconduct" has been developed by judicial authorities as could be gathered from the decision of this Court in **Miscellaneous Commercial Cause No.20 of 2009 between KOBIL TANZANIA LIMITED and SYCON BUILDERS LIMITED**, (unreported) (dated 05/07/2010) where the case of **D.B SHAPRIYA AND CO. LTD V BISH INTERNATIONAL BV (2) [2003] 2 E.A 404 (HCT),** was cited with approval where Msumi, J. (as he then was) noted that the term misconduct does not find definition anywhere in the Arbitration Act. In **KOBIL TANZANIA LIMITED and SYCON BUILDERS LIMITED** (supra) I had occasion to note that the ground of misconduct which empowers a court to set aside an arbitral award comprises of a number of categories, which are still being developed by courts of law and as such they are not closed. It is trite that I revisit the categories of misconduct which I consider to be critical for the determination of the present petition.

The first category of misconduct is comprised in the general rule that ***a mistake of law or fact by an arbitrator is not a ground for***

challenging the validity of the award unless the mistake appears on the face of the award. This principle was succinctly restated in **MORAN vs. LLOYD'S [1983] 2 All ER 200,** where the Court of Appeal of England observed that an arbitrator does not misconduct himself or the proceedings merely because he makes an error of fact or law unless where it appeared on the face of the award or where the question of law was raised by special case stated for the opinion of the court, which is the only occasion an error of law could be used to justify the intervention of the court with the proceedings of an arbitrator. The circumstances in which a court may interfere with the conduct of proceedings by the arbitrator and set it aside or remit it were succinctly stated by Upjohn L.J in **TERSONS LIMITED V STEVENAGE DEVELOPMENT CORPORATION [1963] 3 All E.R. 863**. They include the following: (a) If the arbitrator is guilty of misconduct; (b) If the award contains an error of law on its face; and (c) If a special case is stated on a question of law, the court of law will determine that question of law within the framework of the particular special case. His Lordship Upjohn LJ capped it up in the following terms:

> *"...But if there is no misconduct, if there is no error of law on the face of the award, of if no special case is stated, it is quite immaterial that the arbitrator may have erred in point of fact, or indeed in point of law. It is not misconduct to make a mistake of fact. It is not misconduct to go wrong in law so long as any mistake of law does not appear on the face of the award."*

As what amounts to "*error of law on the face of the award*" it was defined in **CHAMPSEY BHARA AND COMPANY V. KUVRAJI BALLOW**

SPG AND WVG COMPANY LIMITED [1968] AIR Bem. 217, to mean "***an erroneous legal proposition stated in the award and which forms its basis***." The late Mwakasendo, J.A (as he then was) in **CEQB LIMITED v. SDC [1983] TLR 13** accepted as the correct law the statement of Lord Wright in **HEYMAN v. DARWINS LIMITED [1942] AC 356**, that, indeed it is the court's jurisdiction to set aside an arbitrator's award if it is bad in law on its face. Emphasizing the fact that the court will not interfere with the finding of the arbitrators on a question of law even if the court is of the opinion that the same is wrong, Msumi J. observed in **D.B SHAPRIYA AND CO. LTD V BISH INTERNATIONAL BV** (supra) that, ***instead of submitting a question of law to the arbitrator, which cannot be challenged in court, that question ought to have been referred to Court for its opinion by way of case stated***. His Lordship shared fully the view of the learned author in SD ***Singh's Law of Arbitration*** (10th Ed.) at page 612 with regard to a question of law specifically referred to an arbitrator rather than to the court, thus:

> *".....the court will not interfere with the award of the arbitrator on that question on the grounds that there is an error of law apparent on the face of the record even if the view taken by the arbitrator does not accord with the view of the court."*

In the present petition the parties have differed markedly on the manner in which the Arbitrator dealt with the Court's order of remittance. The order of this Court specifically directed the Arbitrator to make a fresh award on the impugned part of the arbitration resulting from the disagreement by the parties over the ***unit of measure in Item 6.20*** in

the BOQ. This Court further mandated the Arbitrator to bring expert witnesses to assist him with the technical aspects. For the avoidance of doubt let me recite the Court's remittance order which was couched in the following terms:

> *(1) The impugned part of the Award namely, the disagreement by the parties over the unit of measurement is hereby remitted to the same arbitrator for reconsideration.*
>
> *(2) The arbitrator shall bring witnesses to assist him with the technical aspects.*
>
> *(3) The Arbitrator is to make a fresh award on the impugned part of the arbitration and file it with this Court within three (3) months of this Order.*

In carrying out the court's direction, the Arbitrator indeed did summon expert witnesses as directed by this Court in its remittance order. The experts submitted their written opinion. Apparently the Arbitrator did not agree with the expert opinion given by the expert witnesses for the reasons he advanced in his fresh award. The issue now is whether this amounted to misconduct on the part of the Arbitrator as the Petitioner seems to claim.

In my view, the reasons advanced by the Arbitrator in differing with the expert opinion on the interpretation of the unit of measure with respect to the unit of measure in Item 6.20 in the BOQ are quite cogent. As correctly submitted by the Respondent's Counsel and contrary to the submissions by the Petitioner's Counsel, the Arbitrator did consider the expert opinion but at the end decided to differ with it and gave his reasons.

As correctly submitted by the Respondent's Counsel, in the final analysis it is the Arbitrator, having considered the expert opinion and having analyzed the relevant aspects in the Contract, to render his decision on the issue presented before him by the parties who by their own consent in the Agreement decided to refer their differences to arbitration.

I am at one also with the Respondent's Counsel that since the letter "L" in the BOQ was an item forming part of the Contract and which was a subject for reconsideration, it could not be read in isolation of the whole contract. As correctly submitted by the Respondent's Counsel, in my view, the Arbitrator in considering the whole contract did not, and with due respect to the Petitioner's Counsel, act *ultra vires* as contended. The matters the Arbitrator considered in my considered view enabled him to arrive at a right decision.

I am also at one with the submissions by the Respondent's Counsel that if the Arbitrator had decided to take on board the opinion of the expert witnesses, this would have meant that the quantity for "***fix***" in Item 6.20 would be **7997 x TZS 1,500,000/=** per unit, which is equal to **TZS 1,199,550,000/=,** an amount which was to pay only one item of Item 6.20 in the BOQ, which was for fixing the discharge conductor of 50 mm^3 in the 99 poles, a sum almost twice the whole contract price, which stood at **TZS 741,979,535/=.**

I do not find any fault in the reasoning of the Arbitrator that the letter "L" in the BOQ-Bill No.6 for Items 6.04 and 6.20 should be interpreted as linera metters not "***numbers***" contrary to the experts' opinion, which opinion in my view, the Arbitrator for reasons he advanced

in his award, quite rightly differed with, particularly considering its effect on the Contract as I have pointed out above. In any event, as correctly submitted by the Respondent's Counsel, and as rightly pointed out by the Arbitrator in his decision, in terms of Clause 38.1 of the Contract, there had not been any variation made by the Project Manager to accommodate the claims of the Petitioner. The Petitioner claims further that in considering matters not remitted to the Arbitrator by the order of this Court the arbitrator exceed his authority and therefore the Petitioner is seeking the part of the award be set aside. However, as I indicated above the Petitioner has failed to establish how the award deals with a dispute not falling within the terms of order of remittance by this Court to the arbitrator.

In light of the foregoing reasons, I find no merits in the argument by the Petitioner's Counsel that the Arbitrator in considering matters which the Petitioner claims were not remitted to him by the Court acted *ultra vires.* The Arbitrator, in my view, acted with the mandate as per the remittance order of this Court. This Court therefore does not, in the light of the reasons shown above, find any justifiable ground for impugning the fresh award by the arbitrator which the Petitioner contends that it contains matters not remitted to the arbitrator, which view in my considered opinion is misconceived.

Let me now, albeit very briefly, deal with the other areas of difference between the Petitioner and the Respondent in the present petition.

The other area of disagreement between the Petitioner and the Respondent is in respect of the findings by the Arbitrator regarding the apportionment of the costs for arbitration. The Petitioner contends that it was not proper since this was contrary to the principle that costs follow the event and in any event the Arbitrator acted as if there was no one who won. The Respondent on its part contends that this was right since in the arbitral award both the petitioner and the respondent had an obligation to perform, some remedies therefore befell each party.

It should be noted here that the agreement to arbitrate is a contract, and being so it is so sacrosanct that this Court, in the absence of any proven misconduct on the part of the arbitrator or impropriety in procuring the award, will endeavour to give effect to it, and to the decision emanating there from. I should further point out here that the award of costs by an arbitrator is a matter of exercise of discretion. An arbitrator for reasons expressed in writing in his decision could dispense with costs altogether. Understandably, the main objective of parties resorting to arbitration is to get speedy justice and to avoid unnecessary charges and costs. In the present case, it is the parties who by their mutual consent appointed the arbitrator to decide their dispute without in the first instance resorting to court. The agreement to contract between the parties stipulated very clearly the powers and the duties of the arbitrator, which included among others making an interim award after considering "***any or all evidence***" offered by parties, where the Arbitrator believed it was necessary for the settlement of the dispute. The Arbitrator having made the initial award which was filed in this Court, the parties could not agree

on the unit of measurement, a matter which by mutual consent of the parties again was remitted for reconsideration by the same Arbitrator who had rendered the Final Award.

In the circumstances and with due respect to the Petitioner's Counsel, I do not find reason why the Arbitrator should be faulted by his decision to apportion the costs in the Fresh Award. In the circumstances of this arbitration, there was no loser who should have bore the brunt of paying the costs for the fresh arbitration as the Respondent seems to suggest. In my considered view, it is common sense that since the parties disagreed on some items in the initial award, which was remitted for reconsideration, then each should bear own costs as rightly determined by the Arbitrator in his decision in the Fresh Award.

The other area of controversy between the parties is with regard to the award of liquidated damages. The Respondent argues that liquidated damages are unfounded, for two reasons. First, that, all the extensions of time were upon the Petitioner's request as none were initiated by the Respondent. Further, if there were any losses incurred it was a result of the Petitioner's poor performance of the contract. Secondly, that, in any event there were no additional work(s) issued to the petitioner by the respondent. The extension of the contract period as rightly submitted by the Respondent's Counsel, was at the instance of the Petitioner. The Petitioner sought for extension apparently since he had failed to perform the contract within the agreed contract validity period.

This Court therefore does not find any cogent basis for faulting the Arbitrator's finding with respect to the payment of liquidated damages.

The other area of disagreement between the parties is in relation to the arbitrator's award in clause 6.38 and 6.40 of the Fresh/Additional Award. The Respondent contends that they are unreasonably arrived at as it was not correct because the Arbitrator ought to compute the entitlements basing on the rates stipulated in BOQ where in item 6.04 the rate was TZS 1000/= per metre and since only 4,100 metres were supplied, then the right payment could be TZS 4,100,000/= and therefore it was not correct to award **TZS 20,308.30** per cable which brought the sum of **TZS 83,255,830/=**

In my view, the Arbitrator properly considered the effect of the unit of measure on the contract price as agreed to by the parties as per the BOQ where in item 6.04 the rate was TZS 1000/= per metre. In considering the unit of measure, the Arbitrator however, for reasons which are explained in his decision decided to differ with the opinion of the expert witnesses, which reasons as I indicated above, I fully agree with him. In their opinion the expert witnesses had concluded that the letter **"L"** means "linear metres" for Item 6.20 but the Arbitrator determined otherwise and concluded that the unit of measure "L" as applicable to the BOQ items 6.04 and 6.20 should be interpreted as linera metres (m) and proceeded to declare that the BOQ rate for item 6.20 of TZS 150,000/- is rendered inneftive and inapplicable to the changed speifications to define unit measure due to non compliance with Clause 38 of the Contract and lack of the confirmed analysis of the rate as tendered under the respective Bill item. As rightly argued by the Respondent's Counsel, going by the opinion of the expert witnesses this would have made the quantity of "***fix***" in item

6.20 the same as the quantity for "***supply***" in item **6.04**, thus resulting into change in units with a huge impact on the contract price. The Arbitrator however, in his decision in clause **6.38** and **6.40** of the Fresh/Additional Award elected to go against what the parties had agreed to in the Contract which was the rates stipulated in BOQ where in item **6.04** the rate was **TZS 1000/=** per metre, and since only **4,100** metres were supplied, then the right payment would have been **TZS 4,100,000/=** instead of awarding the Claimant/Petitioner the sum of **TZS 20,308.30** per metre of cable conductor. This decision of the Arbitrator, as correctly submitted by the Respondent's Counsel, thus entitled the Claimant/Petitioner to the payment of **TZS 4,100 x 20,308.30** thus bringing the amount to a total **TZS 83,255,830.00** for the total length of conductors so fixed under item **6.20** thus resulting into an additional payment of **TZS 68,255,830.00** which was over and above the sum awarded in the Final Award dated 15th September 2008. As correctly submitted by the Respondent's Counsel, the decision by the Arbitrator in the Fresh/Additional Award to award the Claimant/Petitioner the sum of **TZS 20,308.30** per metre of cable conductor was unreasonably arrived at. As the Respondent's Counsel submitted and rightly so in my view, the Arbitrator ought to have computed the entitlements basing on the rates stipulated in BOQ where in item 6.04 the rate was **TZS 1000/=** per metre, and since only **4,100** metres were supplied, then the right payment should have been **TZS 4,100,000/=** and not **TZS 20,308.30** per cable as determined by the Arbitrator in the Additional/Fresh Award, which brought the sum of **TZS 83,255,830/=** for the total length of conductors

so fixed under item **6.20**. This resulted into an additional payment of **TZS 68,255,830.00** which was over and above the sum awarded in the Final Award dated 15th September 2008.

This Court finds and hold that the Arbitrator was correct in his finding that the unit of measure "L" as applicable to the BOQ-Bill No.6 items 6.04 and 6.20 should be interpreted as "linear metres" or (m).

This Court finds and hold further that the Arbitrator properly considered the effect of the unit of measure on the contract price as agreed to by the parties as per the BOQ where in item 6.04 the rate was TZS 1000/= per metre.

This Court finds and hold further that the Arbitrator having made a finding that the unit of measure "L" as applicable to the BOQ-Bill No.6 was 6 items 6.04 and 6.20 should be interpreted as linear metres ought to have computed the entitlements basing on the rates agreed to by the parties and stipulated in the BOQ where in item 6.04 the rate was **TZS 1000/=** per metre, and since only **4,100** metres of cable were supplied, the right payment should have been **TZS 4,100,000/=** and not **TZS 20,308.30** per cable which would bring the payment to the sum of **TZS 83,255,830/=** for the total length of conductors so fixed under item **6.20** thus resulting into an additional payment of **TZS 68,255,830.00,** which was over and above the sum the Arbitrator had awarded in the Final Award dated 15th September 2008.

This Court finds and hold further that in considering matters which the Petitioner claims were not remitted to him by the Court the Arbitrator did not act *ultra vires.*

This Court finds and hold that it does not find reason to fault the Arbitrator in his decision to apportion the costs in the Fresh Award.

This Court also does not find any cogent basis for faulting the Arbitrator's finding with respect to the payment of liquidated damages.

In fine this Court does not find any ground for impugning the award on ground of misconduct on the part of the arbitrator. All the matters in the Final Award of the Arbitrator of 15th September 2008 which were not remitted shall continue to hold unchallenged as directed.

In the upshot and for the foregoing reasons, the petition partly succeeds and fails to the extent indicated above. In the circumstances, I shall make no award for costs. Each party shall bear own costs in this petition. Order accordingly.

.....

R.V. MAKARAMBA
JUDGE
10/06/2011

Judgment delivered this 10th day of June 2011 in the presence of Miss Kabisa, Advocate for the Petitioner and in the presence of Miss Grace Julius, Advocate for the Respondent.

.....

R.V. MAKARAMBA

JUDGE

10/06/2011.

Words count: 8,975