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

MISC.CIVIL CAUSE NO.30 OF 2012

IN THE MATTER OF ARBITRATION ACT, CAP.15 R.E 2002

AND

In the matter of an intended Petition to Challenge the Award granted by Mr. Charles R.B. Rwechungura (the Arbitrator) in favour of the Claimants in the Arbitration.

BETWEEN

GJIS P.DE RAADT.....1ST PETITIONER

MOIVARO INVESTMENT &

TRADING COMPANY LTD .....2ND PETITIONER

AND

JAN W. HALFWERK, GERT BORST AND

PATRICK R. DEVINE .....RESPONDENTS

Date of last order: 20/11/2012

Date of Ruling: 01/03/2013

RULING ON PETITION

MAKARAMBA, J.:

On the 3rd December, 2012 the Petitioner lodged his petition in this Court under the provisions of section 16 of the Arbitration Act, Cap.15 R.E 2002 read together with Rules 5, 6, 7 and 8 of the Arbitration Rules, GN.

No. 427 of 1957 challenging the registration of the Final Arbitral Award dated 21st September, 2012 as Decree of this Court.

Mr. Charles Mrosso, Advocate represented the Petitioner and Mr. **Gasper Nyika**, advocate represented the Respondent. By order of this Court made on the 20th November, 2012, the matter disposed of by way of written submissions.

Basically the Petitioners herein strongly challenge the registration of the Arbitral Award to be enforced as if it were a decree of this Court on the following grounds:

1. *That, the Arbitrator failed to determine the Preliminary Objections as raised by the Counsel for the Petitioners herein, first, before going ahead with the full hearing of the Arbitration.*

2. *That, the Arbitrator forced and or induced the Counsel for the Petitioner herein to go ahead with the Arbitration proceedings without determine, first the Preliminary objections raised by the Counsel for the Petitioners.*

3. *That, the Arbitrator maliciously ignored the proposed issues raised by the Petitioners herein and entertain the issue proposed by the Respondents herein, despite the fact the same being not agreed by the Petitioners.*

4. *That, the Arbitrator made an Award only based on the void ab initio agreements and left behind the most important terms and conditions set out in the Memorandum of understanding dated 28th May, 2008.*

5. *That, the Arbitrator deliberately disregarded the evidence on records that the 1st and 2nd Petitioner made efforts on making the intended 90% share purchase of the Speke Bay Lodge Limited to be productive.*

6. *That, the Arbitrator failed to consider the legal obligation by the Respondents herein of providing the requisite and or necessary documents are requested by the Tanzania Investment bank Limited and the Petitioner herein in order to process the loan facility as described in the Memorandum of Understanding, dated 28th May, 2008.*

7. *The Arbitrator demonstrated gross bias in favour of the Respondents herein, by making one side communications with the Counsel for the Respondents without involving the Counsel for the Petitioners herein.*

8. *The Arbitrator demonstrated gross bias for forcing to frame issues in favour of the Respondents.*

9. *The Arbitrator demonstrated gross bias in favour of the Respondents herein by determines the Preliminary Objections within the award.*

The above grounds for challenging the registration of the Arbitral Award are considered to be issues for determination of this Petition. I shall however, treat the 1s, 2nd and 9th grounds of the Petition jointly.

The first ground of the petition is that *the Arbitrator failed to determine the Preliminary Objections as raised by Counsel for the Petitioners first, before going ahead with the full hearing of the Arbitration.*

It is a general practice and procedure requirements under the Civil Procedure Code, Mr. Mrosso argued, that preliminary objections raised by any party in civil proceedings have to be determined first before hearing the main case. In the Arbitration proceedings between the parties herein the Petitioner raised two points of preliminary objection, first, that as per the Memorandum of Understanding dated 28th may 2008, the Claimants have no cause of action against the Respondent, and secondly, that the Claimants claim before the Arbitrator are improperly and void ab initio for having arisen from invalid contract. Mr. Mrosso submitted further that the Arbitrator refused and/or failed to determine those points of preliminary objection first, and informed the Counsel for the Petitioners that the same will be determined at the time of making an award. Surprisingly, Mr. Mrosso further submitted, at page 3 of the award proceedings the Arbitrator it is recorded to make it look as if the points of preliminary objections were determined in the course of the hearing by consent of both

parties, while the Counsel for the Petitioners did not consent. This, according to Mr. Mrosso, is purely misconduct on the part of the Arbitrator.

Mr. Nyika responded by arguing that, the parties agreed that the points of preliminary objection be determined by the Arbitrator during the issuance of the Award and therefore it was by consensus by both parties that the points of preliminary objection be determined by the Arbitrator at the end of the proceedings. The Arbitrator determined the points of preliminary objection fully in pages 6 to 9 of the Award giving his reasons therein for overruling them, Mr. Nyika pointed out. The Arbitrator never coerced the Petitioners into agreeing that the objections be determined at the end of the proceedings, Mr. Nyika further submitted. One of the advantages of arbitration is that, the proceedings are run and controlled by the parties through their consent, Mr. Nyika insisted. On that basis, the parties in this case agreed for purpose of expediency, that the objections are dealt with in the final submissions, and for the Arbitrator to deal with them in the final award, Mr. Nyika pointed out. It is therefore surprising that, the Petitioners' Counsel is trying to disown his own consent, Mr. Nyika surmised.

In rejoinder, Mr. Mrosso maintained that, the Counsel for the Petitioners never agreed that the points of preliminary objection be determined by the Arbitrator during the issuance of the Award. There is nowhere worldwide the legal system allows preliminary objections to be determined during the issuance of Judgment, Mr. Mrosso added.

It is trite principle as Mr. Nyika rightly submitted that arbitral proceedings are run and controlled by the parties to the arbitration. In the

event of any misconduct by an arbitrator during the arbitration, parties may remove the arbitrator and may wish to appoint another arbitrator. The only problem may arise in the course of making an award since parties to the arbitration proceedings no longer have powers to intervene in the action of the Arbitrator. Only the Court may intervene and set aside the arbitral Award for having been improperly procured.

I have gone through the record of the arbitral proceedings, and specifically at page 3 wherein it shows that both learned Counsel consented to the points of preliminary objection the Respondents raised to be determined at the end of the arbitral proceedings. For avoidance of doubt and to set the record straight, the Orders by Consent which were made at the meeting held on the 15th March, 2012, which appears at page 3 of the arbitral proceedings state as follows:

> *"The Preliminary Objections raised by the Respondent should be addressed in the course of hearing and in framing issues the parties should include issues relating to the preliminary objections as appropriate. Counsel will address them when making submissions and the Arbitrator will make a ruling on them in his award."*

The quorum at the meeting shows that, Gasper Nyika, appeared for the Claimants, and Charles Mrosso for the Respondents, and that the Order by the Arbitrator was made following consent by both learned Counsel. The allegation by Mr. Mrosso that there was no consent by the Petitioners for the points of preliminary objection to be determined in the award is mere words from the bar, not supported by any evidence to prove it.

Consequently, the Petitioners' allegation as to lack of consent must therefore fail and are dismissed.

The statement by Mr. Mrosso as to the general practice and procedure as per the Civil Procedure Code, that preliminary objections in civil proceedings be determined first before hearing the main case and that there is no legal system worldwide which allows preliminary objections to be determined during the issuance of Judgment, are his own innovations.

In the first place arbitral proceedings are not civil proceedings per se. The provisions of the Civil Procedure Code apply only to the extent of arbitral proceedings falling under the Second Schedule to the Civil Procedure Code. Save for that, the Civil Procedure Code does not regulate arbitral proceedings regulated by the Arbitration Act and the Arbitration Rules. The issue whether a preliminary objection has to be determined first or at the end of the proceedings, is a matter of practice, and parties may agree to that. In the present petition, evidently the parties consented to the points of preliminary objection being determined at the end of the proceedings. It is for the above reasons that the 1st, 2nd and 9th grounds of the petition must be answered in the negative and accordingly are hereby dismissed.

Let me now turn to determine the 3rd and 8th grounds of the petition jointly, namely, whether *the Arbitrator maliciously ignored the proposed issues raised by the Petitioners herein and entertained the issue proposed by the Respondents herein, despite the fact the same being not agreed by the Petitioners.*

Mr. Mrosso argued that, the Petitioner herein proposed issues as per material facts of the dispute, but the Arbitrator ignored the same and entertained the issues as raised by the Respondents despite the same not being agreed to by the Petitioners. The issues raised by the Respondents were irrelevant to the material facts of the dispute and therefore they were not supposed to be entertained by the Arbitrator. According to Mr. Mrosso, this is misconduct by the Arbitrator.

In rebuttal, Mr. Nyika argued that, both parties filed their own issues. It was therefore up to the Arbitrator to frame issues based on the issues filed by the parties. The issues were framed by the Arbitrator following an impasse between the parties reaching a consensus as to the agreed issues. None of the parties including the Counsel for the Petitioners objected to the issues as framed by the Arbitrator. All the issues framed by the Arbitrator went hand in hand with the issues that had been proposed by both parties. The issues were framed on the basis of the matters in dispute. The Petitioners have not stated any facts which ought to have formed an issue for determination which was never covered in the issues framed.

The controversy over the agreed set of issues comes out clearly from the Arbitration proceedings dated 7th May, 2012, specifically at page 10, wherein the Arbitrator, in the presence of Gasper Nyika for the Claimants and Linda Waache Bosco for the Respondents, stated as follows:

"...However, before you proceed, I have noted that each party has filed their own issues. I propose parties to frame the agreed issues

now so that we can have a common stand on where to base your cross examination."

Undoubtedly, each party had proposed and filed its own set of issues. What the Arbitrator did was simply to invite the parties to frame the agreed issues so that they could have a common stand as a basis for cross-examination. I have compared the issues proposed of the Respondents and those of the Claimant duly filed on the same date, that is, on the 29th March, 2012 with the issues the Arbitrator recorded for determination of the proceedings. As rightly submitted by Mr. Nyika, the issues which the Arbitrator recorded were extracted from those that the parties to the Arbitration had proposed. There is nothing in the record to suggest that the issues proposed by the Respondents/Claimants were directly adopted by the Arbitrator. As per the record, the Arbitrator recorded following issues, namely:

a) *Whether there was a valid agreement between the Claimants and the Respondent.*

b) *If the answer to paragraph 1 above is in the affirmative, whether in that agreement the Respondent undertook to compensate the Claimants in the event of non purchase of the 90% shares under Moivaro Lodge.*

c) *If the answer to paragraph 2 above is in the affirmative, under what circumstances was the obligation to compensate enforceable.*

d) *What remedies are parties are entitled to?*

On the other hand the issues which the Respondents/Claimants proposed run as follows:

1. *Whether there was an agreement between the Claimants and the Respondent in which the Respondent undertook to compensate the Claimants to the tune of USD 300,000 in the event that Moivaro Group failed to purchase the 90% shares of the Shareholders of Speke Bay Lodge.*

2. *Whether the Moivaro Group did indeed fail to purchase the 90% shares of the shareholders of Speke Bay Lodge as agreed in the agreement dated February 19, 2009 as varied by the Agreement dated December 24, 2009.*

3. *If the answer above is in the affirmative, whether the Claimants are entitled to the said compensation of USD 300,000 from the Respondent.*

4. *To what remedies are the parties entitled to?*

A comparison of the two set of issues as I have set them out above, do not support the allegation that the Arbitrator adopted the Respondent's issues and thus constituting bias on his part. Aside from this, I have also carefully examined the Final Award the Sole Arbitrator issued and I have found that, all the issues the Arbitrator recorded were covered and well

determined in the proceedings. It is for the foregoing reasons that the 3rd and 8th grounds are to be answered in the negative and are hereby also dismissed.

The fourth ground is that, *the Arbitrator made an Award only based on the void ab initio agreements and left behind the most important terms and conditions set out in the Memorandum of Understanding dated 28th May, 2008.*

Mr. Mrosso argued that, the alleged agreements by the Respondent were not signed in the required manner and was never witnessed by a Commissioner for Oaths as required and guided by the laws, and as such they lacked the essential elements of a valid contract, which is to say that there was no intention to create legal relations. Mr. Mrosso further submitted that the Arbitrator made the Award based on the said agreements and left behind the most important obligations to the Respondents and the Petitioners set out in the Memorandum of Understanding dated 28th May, 2008. According to Mr. Mrosso, this is also misconduct by the Arbitrator.

In his response Mr. Nyika argued that, the agreement dated 28th May, 2008 was between the Respondents and the 2nd Petitioner. The terms and conditions set out in that agreement were irrelevant to the Arbitrator in rendering his award as they were never in issue but what was in issue was the undertaking by the 1st Petitioner to compensate the Respondents. Mr. Nyika submitted further that, the issue whether the agreements between the Respondents and the 1st Petitioner were signed had been raised by the Petitioners as a preliminary objection and was dealt with by

the Arbitrator at pages 7-9 of the Award in which the Arbitrator stated as follows:

> *"...It may be as well that, yes, the 1st and 2nd Agreements were not signed by or on behalf of Moivaro and cannot therefore be enforceable against Moivaro, but that cannot render the agreements unenforceable against the Respondent if it is established that the Respondent was a signatory to them in his personal capacity."*

Mr. Nyika submitted further that, page 24 to 25 of the arbitration proceedings on record shows that, the 1st Petitioner admitted in evidence that he signed the agreements in good faith to assure Mr. Jan Halfwerk, one of the Respondents, and whom he entered the agreement with, that the 2nd Petitioner would purchase 90% of the Respondents shares. The Petitioners cannot therefore say that the Agreements were not signed when in fact the party that signed the agreements has admitted to signing them.

Mr. Nyika submitted further that, the issue of non-witnessing of the agreements by the Commissioner for Oaths has been misplaced because there is no requirement under the law for agreements between two people wishing to be bound legally to be witnessed by a Commissioner for Oaths. After all, issues on the validity of contract are to be dealt with by the Arbitrator/Tribunal and not the Court, Mr. Nyika further submitted. In support of his arguments Mr. Nyika referred this Court to the case of **FIONA TRUST & HOLDING CORPORATION & 20 OTHERS VERSUS YURI PRIVALOV & 17 OTHERS** and the case of **NOM PREMIUM**

NAFTA PRODUCTS LIMITED (20TH DEFENDANT) & OTHERS VERSUS FILI SHIPPING CO. LIMITED (14TH CLAIMANT & OTHERS [2007] UKHL 40 which is to the effect that:

> *"It is arbitral tribunal, not the courts that have jurisdiction to resolve disputes as to the validity of an agreement that includes an agreement to arbitrate.*

Mr. Mrosso has argued that, the alleged agreements by the Respondent were not signed in the required manner and were never witnessed by the Commissioner for Oaths as required and guided by the laws. I am alive to the decision of the Supreme Court of India in the case of **ASSOCIATED ENGINEERING COMPANY VERSUS. GOVERNMENT OF A.P., A.I.R. 1992 SC 232,** in which the Court held that:

> *"The Arbitrator cannot act arbitrarily, irrationally, capriciously or independently of the contract. His sole function is to arbitrate in terms of the contract. He has no power apart from what the parties have given him under the contract. If he has traveled outside the bounds of the contract, he has acted without jurisdiction. Conscious disregard of the law or provision of the contract from which he has derived his authority vitiates the award."*

Unfortunately, Mr. Mrosso did not cite any law which the Arbitrator has violated. As Mr. Nyika rightly submitted, the issue of signature and attestation of the Agreements has already been determined by the

Arbitrator. In the arbitration proceedings specifically at page 26, Mr. Gijs de Raadt (the 1st Petitioner) stated as follows:

> *"Yes, I signed the documents but it (sic!) was forced to and it was in good faith in the hope that the Claimants would produce the required documents. I now know it was a mistake not to commit the Claimants to the same obligation if he did not give the documents."*

In the Final Arbitral Award at page 7 to 9, the Arbitrator addressed the preliminary objection and held as follows:

> *"...It may be as well that, yes, the 1st and 2nd Agreements were not signed by or on behalf of Moivaro and cannot therefore be enforceable against Moivaro, but that cannot render the agreements unenforceable against the Respondent if it is established that the Respondent was a signatory to them in his personal capacity.....As regards signing, I have no doubt in my mind that the Agreements were duly signed and there was neither contractual nor statutory requirements for attestation."*

In relation to the above finding, the Arbitrator, while addressing the first issue stated at page 10 of the Award as follows:

> *"The Respondent admitted to have signed the two Agreements voluntarily and he even added that he had done so just to please the claimants."*

On the above reasons and as can be gathered from the record of the proceedings, the allegations by the Petitioner that, *the Arbitrator made an Award only based on the void ab nitio agreements and left behind the most important terms and conditions set out in the Memorandum of Understanding dated 28th May, 2008*, lack any merit and must fail and accordingly are dismissed.

I shall now turn to determine the 5th and 6th grounds jointly, thus; that, *the Arbitrator deliberately disregarded the evidence on record that the 1st and 2nd Petitioners made efforts on making the intended 90% share purchase of the Speke Bay Lodge Limited to be productive.*

Mr. Mrosso argued that, the Respondent herein frustrated the undertaking of the 90% of the share in Speke Bay Limited. The 1st Respondent on behalf of other Respondents admitted to not to have transferred nor prepared the documents for the transfer of the said shares to the Petitioners. The 1st Respondent had also admitted to not to have complied with instructions by the Tanzania Investment Bank Limited of supplying the requisite documents for processing of the loan facility for the purchase of the said 90% shares.

Mr. Mrosso submitted further that, Clause 2.3 of the Memorandum of Understanding dated 28th May, 2008 between the parties stipulates that; the payment for the purchase of the shares by the 2nd Petitioner was to be done after the Respondents had transferred the said shares to the 2nd Petitioner. However, the Respondents upon Petitioners requests failed to provide the said documents and hence hinders the progress for the acquisition of loan facility and the shares.

In his response Mr. Nyika argued that, it was never an issue to be decided by the Arbitrator as to whether the 1st and 2nd Petitioner made any effort to purchase the 90% shares of the Respondents. The title deeds were not a pre-requisite for the 2nd Petitioner to obtain any funding from the bank or at all. It was not a requirement that the Respondents as shareholders of Speke Bay Lodge Limited would provide title deeds or any other documents from Speke Bay Lodge Limited to support the obtaining of the funds by the 2nd Petitioner. The said title deeds belong to another person (Speke Bay Lodge Limited) who is not a party to these proceedings and was not a party to the Memorandum of Understanding or subsequent agreements thereto. What was relevant before the Arbitrator is that the 2nd Petitioner has failed to pay the purchase price to the Respondents on the covenanted date.

In his rejoinder Mr. Mrosso maintained that, the Respondents never prepared nor transferred the said shares to the 2nd Petitioner. Therefore the Arbitrator has failed to determine the obligations to the parties, and hence open bias in favour of the Respondents.

The Arbitrator stated at page 10 and 11 of the Final Award as follows:

> *"I have considered very seriously all the arguments by counsel for the Respondent as regards the failure by the Complainants to furnish to Tanzania Investment Bank Limited the documents requested in order to consider an application by Moivaro for a loan to finance the share purchase transaction. I also considered the counter arguments by counsel for the Complainants in this regard."*

I am of the considered view that, the issue of documents for the transfer of shares was well considered by the Arbitrator. An Arbitrator in his discretion may disregard any document if it appears to him to be irrelevant to the matter in question. Since the matter at issue which was the failure by the Complainants to furnish to Tanzania Investment Bank Limited the documents requested in order to consider an application by Moivaro for a loan to finance the share purchase transaction had already been determined by an Arbitrator, this Court cannot reopen it and determine it. Doing so would amount to this Court converting itself into a court of first instance to determine matters for which it does not have evidence to deal with. It is for the above reasons that the 5th and 6th grounds of the petition are to be answered in the negative and accordingly dismissed.

The seventh ground of the petition is that, *the Arbitrator demonstrated gross bias in favour of the Respondent herein, by making one side communications with the Counsel for the Respondents without involving the Counsel for the Petitioners herein.*

Mr. Mrosso argued that, most of the time, the Arbitrator preferred to make one side communication with Mr. Gasper Nyika, the Counsel for the Respondents and most of the time Mr. Nyika was seen at the office premises of the Arbitrator.

In his response Mr. Nyika argued that, the allegations that the Arbitrator made one sided communication with Counsel Gasper Nyika are dangerously unfounded and frivolous. The Petitioners have not provided

any evidence of one sided communication to substantiate the allegations and thus vitiate the Award. The allegations by the Petitioners are very serious and attack the character of the Counsel Gasper Nyika and the Arbitrator and for which the Petitioners have failed to bring any evidence to establish.

The allegations raised by Mr. Mrosso as Mr. Nyika rightly submitted attack the character of both Counsel Gasper Nyika and the Arbitrator. In my considered opinion, such allegations impute corruption and procuring an award fraudulently, for which concrete evidence is required to establish. I should only point out here that the standard of proof required to establish such allegations is slightly higher than that which is required in ordinary civil litigation. The record does not show any cogent evidence tendered by the Petitioners to justify the allegations. It is for the foregoing reasons that the seventh ground of the Petition must fail and it is hereby dismissed.

The Petitioners have also complained further that, *the Award contains an error of fact on the face of record by reason of the arbitrator's total failure to address overwhelming evidence attested to the existence of damage to the 1st Petitioner and 2nd Petitioner as result of the Respondent breach of their obligations to the term and conditions of the Memorandum of Understanding, dated 28th May, 2008.*

I carefully went through the Final Award on record and specifically at page 11 wherein the Arbitrator addressed the issues in the counterclaim including that of damage to the 1st and 2nd Petitioners and held as follows:

"As regards the alleged damage to the Respondent's reputation I have seen nothing in the testimony of the Respondent to prove what

the nature of the alleged report to the Netherlands Embassy was and what damages were and what damages were in fact suffered. In the absence of such testimony I am hesitant to allow the Respondent's counterclaim in this regard."

The Petitioners now seek this Court to decide on matters decided by the Arbitrator on merits by examining and scrutinizing evidence. This in my view is contrary to the spirit of arbitration, which is for the courts to limit its interference with the outcome of the arbitration proceedings and to respect the sacrosanct nature of the agreement of the parties to submit their differences to arbitration and to be bound by the outcome. As a matter of principle a Court of law will embark upon looking for something that will justify it to review the decision of the arbitrator on matters submitted to him for his decision, save where it appears on the face of the award, or, on in a document forming part of the award, that the arbitrator grossly misconducted himself. Furthermore, "*mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct" as it* was ably stated in **SHELL TANZANIA LTD AND SUPER STAR FORWARDERS COMPANY LTD, Miscellaneous Civil Cause No.4 of 2011 (unreported).** I am also alive to the cogent statement of principle in the persuasive authority in ***AGRAWAL KRISHI SEWA KENDRA VERSUS HINDUSTAN FERTILIZERS, Madhya Pradesh High Court, 2002*** , which I cannot help but quote in extensio that:

"In recent times, error in law and fact in basing an award has not been given the wide immunity as enjoyed earlier, by expanding the import and implication of "legal misconduct" of an arbitrator so that award by the arbitrator does not perpetrate gross miscarriage of justice and the same is not reduced to mockery of a fair decision of the lis between the parties to arbitration. However, in the anxiety to render justice to the party to arbitration, the Court should not reappraise the evidence intrinsically with a close scrutiny for finding out that the conclusion drawn from some facts, by the arbitrator is, according to the understanding of the Court, erroneous. Such exercise of power which can be exercised by an Appellate Court with power to reverse the finding of fact is alien to the scope and ambit of challenge of an award under the Arbitration Act. If a question of law is referred to arbitrator and the arbitrator comes to a conclusion, it is not open to challenge the award on the ground that an alternative view of law is possible. Even if it is assumed that on the materials on record, a different view could have been taken and the arbitrators have failed to consider the documents and material on record in their proper perspective, the award is not liable to be struck down in view of judicial decisions referred to hereinbefore. Error apparent on the face of the record does not mean that on closer scrutiny of the import of documents and materials on record, the finding made by the arbitrator may be held to be erroneous. An error of law or fact committed by an arbitrator by itself does not constitute misconduct warranting interference with the award."

It is not for a Court to reappraise the evidence tendered and examined by the Arbitrator by making a close scrutiny for finding out that the conclusion drawn by the Arbitrator from some facts was erroneous according to the understanding of the Court. A court when dealing with enforcement of an arbitral award does not step into the shoes of an Appellate Court with powers to reverse the finding of fact, which is what the Petitioners seem to want this Court to do, to reopen and consider matters of fact leading to the award by the Arbitrator. This, in my considered view, is not what the Arbitration Act envisages. It is for the foregoing reasons that this ground must also fail and is accordingly dismissed.

The Petitioners have also alleged that, *the enforcement of Award is against the natural justice and contrary to human rights*.

I must point out here that the power of the Court to set aside an arbitral award is circumscribed to those grounds expressly set out in the Arbitration Act, which must be specifically pleaded in the petition. The Arbitration Act does not, in my view, confer unfettered discretion on parties to challenge an arbitral award for any alleged breach of principles of natural justice and/or human rights. The grounds for setting aside an arbitral award are specifically stipulated under section 16 of the Arbitration Act, Cap.15 R.E 2002 thus:

> *"Where an arbitrator or umpire has* ***misconducted himself*** *or arbitration or award has been* ***improperly procured****, the court may set aside the award." (the emphasis is of this Court).*

What constitutes misconduct, Mr. Nyika has tried to amplify explain by referring to **Halsburry's Laws of England, 3rd Edition, Vol. 2 at page 57** thus:

> *"....the expression is of wide import, including on the one hand bribery and corruption and on the other, a mere mistake as to the scope of the authority conferred by the agreement of reference or a mere error of law appearing on the face of the award...thus misconduct occurs if the arbitrator or umpire, as the case may be, fails to decide matters which were referred to him, if by his award he purports to decide matters which have not, in fact, been included in the agreement of the reference; if the award is inconsistent or uncertain or ambiguous, or is on its face erroneous in matter of law, or even if there is some mistake of fact but in such case the mistake must be either admitted or at least clear beyond any reasonable doubt, if there has been irregularity in the proceedings, as for example where the arbitrator failed to give notice to the parties of the time and place of meeting..."*

I have also sought refuge and assistance in Article 34 and 36 of the UNICITRAL Model Law on International Commercial Arbitration (1985), but did not find breach of natural justice or human rights as grounds for challenging an arbitral award. I am alive however, to the decision in the persuasive Indian case of **DEWAN SINGH VERSUS CHAMPAT SINGH & ORS, SUPREME COURT OF INDIA, (1969)** wherein it is stated that:

"The proceedings before the arbitrators are quasi-judicial proceedings. They must be conducted in accordance with the principles of natural justice. The parties to the submission may be in the dark as regards the personal knowledge of the arbitrators. There may be misconceptions or wrong assumptions in the mind of the arbitrators. ***If the parties are not given opportunity to correct those misconceptions or wrong assumptions, grave injustice may result.****" (the emphasis is of this Court).*

The record of the arbitration proceedings don not reveal the fact of any of the parties raising before the Arbitrator allegations of breach of principles of natural justice or human rights. That being the case then the allegations lacks any legal basis. They must therefore fail and accordingly they are hereby dismissed.

In the whole and for the foregoing reasons the Petition fails. It is hereby dismissed with costs. The Arbitral Award dated 21st September, 2012 which was filed in this Court on the 7th November, 2012 is hereby registered and shall be enforced as if it were a decree of this Court.

R.V. MAKARAMBA

JUDGE

01/03/2013

Ruling delivered this 1st day of March, 2013 in the presence of Mr. Robert Mgoa, Advocate for the Petitioner and Mr. G. Nyika, Advocate for the Respondents

R.V. MAKARAMBA

JUDGE

01/03/2013