

IN THE HIGH COURT OF TANZANIA

(COMMERCIAL DIVISION)

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL CAUSE NO. 09 OF 2018

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

AND

IN THE MATTER OF ARBITRATION

BETWEEN

MAHAWI ENTERPRISES LIMITED.....PETITIONER

Versus

SERENGETI BREWERIES LIMITED.....RESPONDENT

Last Order: 20th June, 2019

Date of Ruling: 26th Sept, 2019

RULING

FIKIRINI, J.

The petitioner's petition seeks to challenge the arbitral award dated 17th July, 2018. The petitioner raised three (3) grounds challenging the arbitration namely:

1. That the award was improperly procured,

2. That the sole arbitrator did not conduct the arbitration fairly for failing to consider all issues before him; and
3. That the arbitrator acted with misconduct by wrongly assessing costs contrary to the provision of the law.

On 20th June, 2019 when the matter came up for hearing Ms. Janet Bisanda learned counsel appeared on behalf of the petitioner while Ms. Elizabeth John Mlemeta learned counsel appeared on behalf of the respondent. Ms. Mlemeta prayed for the petition to be argued by way of written submissions, the prayer which was not objected to by Ms. Bisanda. The submissions were timely filed and hence this ruling.

I have carefully read through the petition, reply to the petition and submissions, would not reproduce them verbatim, but certainly will consider them in course of the decision.

Pursuant to section 16 of the Arbitration Act, Cap 15 R. E. 2002 (the arbitration Act), an award by an arbitrator may be, set aside only in two situations which are, when there is misconduct or that the award had been improperly procured. For ease of reference the provision is reproduced below:

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

Although the two terminologies have not exactly been defined to classify situations where section 16 of the Arbitration Act, Cap 15 R. E. 2002 may be applicable, but in the course of decisions some situations had been established where an award granted is not open for challenge, unless there is error on the face of the record. Amongst them is that a mistake of law or fact by an arbitrator is never a ground to challenge the award unless the claimed mistake appear on the face of the award. There is a long list of cases both from the English and Indian courts. A number of decisions were referred in the respondent's submission namely: **Moran v Llyod's [1983] 2 All ER 200**, where the Court of Appeal restated the above position:

".....that an arbitrator or umpire do not misconduct himself or the proceedings merely because he makes an error of fact or of law....."

And once the arbitrator is considered guilty of misconduct and/or the award has apparent error on the face of the record, such award may be set

aside or remitted. In the case of **Tersons Limited v Stevenege Development Corporation [1963] 3 All ER 863**, the Court clearly stated the principles. Back home the enunciated principles were restated in the cases of **Konnect Telecom Company v MIC Tanzania Limited, Miscellaneous Commercial Cause No. 7 of 2012** after the **DB Shapriya & Co. Ltd v Bish International BV (2) [2003]2 E. A. 404 [HCT]**, where the Court propounded that:

"Court cannot interfere with findings of fact by the arbitrator and a mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the ground of misconduct"

In the case of **Kong Kee Brothers Construction Co. Limited v Attorney General [1986] LRC (Comm) 345**, whereby the definition on the term misconduct was extended to include technical misconduct such as mishandling or procedural irregularity, ambiguity, excess of jurisdiction, incompleteness and breach of rules of natural justice. As for improper procurement of the award, it is now settled position that this will include elements such as bribe, treating bias, misleading or deceiving arbitrator, employing arbitrator for reward, failure to be impartial. This by any

standard does not include erroneous decision, mistake of the law, misunderstanding of submissions or the like and so forth.

From the laid down principles which mainly is coming from the respondent's submissions, the position which I subscribe to, I shall now embark on examining the merits of the petition before me.

The genesis of the petitioner's complaint is premised from the following brief facts: that the petitioner and the respondent on 1st February, 2014 executed an agreement appointing the petitioner as distribution and sales personnel of the respondent's products within Pugu territory (the contractual area). The agreement was to last up to 31st January, 2016. Prior to the expiry day and to be specific on 14th January, 2016 the agreement was renewed for another 2 (two) years under the same terms.

While the petitioner's agreement was still on going, the respondent without notifying the petitioner divided and re-allocated contractual area to a third party, contrary to the schedule 2 of the agreement and hence in breach of the distribution agreement. Following the breach and in compliance with the requirement of the agreement under clause 17, it required that all disputes arising from the agreement to be resolved by way of arbitration.

The dispute was referred for arbitration by the petitioner claiming for the following: a declaration that the respondent was in breach of agreement; specific damages of Tzs. 805, 000,000.00; general damages, reinstatement order of the re-allocated territory (divided) and any other reliefs. The dispute was finalized by the arbitrator dismissing the petitioner's claims on the contractual breach and proceeded to allow counter claim by awarding the respondent claim of Tzs. 55,686.388.00 plus other reliefs as prayed in the counter claim. Finally the arbitrator arbitrarily awarded costs to the tune of Tzs. 38,983,900.00 to the respondent.

The petitioner was now challenging the award issued by the sole arbitrator on 17th July, 2018 to the respondent. From the petitioner's submission there was no single issue which evidently exhibit misconduct or that the award was improperly procured. As pointed out earlier in this decision that though section 16 of the Arbitration Act has established under which circumstances an award can be set aside or remitted, but without explicitly defining what amounts to "misconduct" or "award improperly procured", but through case laws the Courts have succeeded to establish principles which can guide one along in determining if there was misconduct or not or if the award has been improperly procured.

This could have been revealed by the petitioner exposing the misconduct or misconducts on the part of the arbitrator and not challenge the merits of the decision by way of a petition. Similarly, the petitioner has failed to point out what made him allege that the award was improperly procured. Just mentioning the award was improperly procured was not enough. The petitioner was required to point out with clarity as elucidated in the case **DB Shapriya** (supra), where the petitioner failed to mention if there was fraud or anything that was morally wrong or error or mistake on the face of the award. All that what has been disclosed in the submission in my view did not fit the description or interpretation as to what amounts to improperly procured award as elaborated by various decisions cited above as well as section 16 of the Arbitration Act.

This is in my view has answered the 1st ground that the award was not improperly procured.

The 2nd ground that the arbitrator failed to answer all the issues framed. There is essentially nothing related to misconduct or improper procurement of the award. Failure to address all the issues framed in my view did not amount to misconduct or improper procurement of the award. Nevertheless, I agree that it is a settled legal position that a judge/

magistrate is obliged to decide on each and every issue framed; failure of which constitutes a serious breach of procedure. **See: NIC & Another v Sekulu Construction Co. Ltd [1986] T. L. R. 157.** The petitioner despite putting forward the claim but could not state exactly how many issues were framed and which one in particular was not dealt with fairly which as a result the petitioner has suffered substantial injustice. Vague assertion would leave any Court in an awkward position and possibly make it fail to successfully grant the relief sought. In the present instance I find that to be the case.

As for the rest of the petitioner's submission in this ground, I find the submission leaning towards an appeal and not petition as envisioned. This ground fails as well.

Coming to the third ground on costs awarded to the respondent. It was the petitioner's complaint that the arbitrator was not a taxing master and thence erroneously ordered parties to file their Bill of Costs. And that this was an error on the face of the record. Controverting the submission the respondent contended that the arbitrator had the powers to decide on costs as well.

Arbitrators have wide discretion which they can exercise in the arbitration proceedings before it. This includes awarding of costs. Therefore the arbitrator in exercising their discretion can direct costs be paid, how and by whom those costs or any part thereof will be paid. Not only that the arbitrator may tax but also may settle the amount of costs to be paid. The award of costs is at the sole discretion of the arbitrator and hence when that has been done, it cannot be termed that the arbitrator has misconducted himself. If the amount awarded is extreme, that can then be picked as a ground of appeal but not misconduct or that the award was improperly secured.

Having examined the submissions by the parties, I am of no doubt that the petitioner has failed to establish or prove misconduct or improper procurement of the award. All the points raised and the submissions made by the petitioner were basically addressing an appeal, which this Court is not vested with jurisdiction to entertain.

This Court finds no reason to interfere with the award after the petitioner has failed to establish misconduct and/or improper procurement of the award. The petition is thus dismissed with costs.

It is so ordered.



A handwritten signature in black ink, appearing to read "P.S. FIKIRINI", with a long horizontal line extending to the right.

P.S.FIKIRINI

JUDGE

26th SEPTEMBER, 2019