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

MISC.COMMERCIAL CASE NO.1 OF 2020

IN THE MATTER OF ARBITRATION

AND

IN THE MATTER OF SECTION 17 OF ARBITRATION ACT, CAP 15 [R.E.2002]

AND

IN THE MATTER OF ARBITRATION

BETWEEN

CATIC INTERNATIONAL ENGINEERING (T) LTD..... PETITIONER

VERSUS

UNIVERSITY OF DAR-ES-SALAAM .....RESPONDENT

RULING

10/2/2020 & 3/3/2020.

NANGELA, J.:

This ruling is in respect of a petition filed in this Court by the Petitioner/Claimant, CATIC International Engineering (T) LTD, a limited liability company established and incorporated under the laws of the United Republic of Tanzania. The Petitioner is a **Class I** registered

construction company. The Respondent, the University of Dar-es-Salaam, is a Public University.

The circumstances giving rise to this Petition are briefly, that sometime in November 2009, the Petitioner and the Respondent signed a building construction contract. The contract, which was concluded on 30th November 2009, required the Petitioner to execute works related to a proposed extension of the University of Dar-es-Salaam Business School- (UDBS Facilities (Phase III) Building, at the UDSM Main Campus. The Respondent engaged Ardhi University as the Consultant, and, a Project Manager was appointed on behalf of the Respondent for Ardhi University.

The total initial Contract Price was **TZS 7,238,794,872.00/=** (*Tanzanian Shillings Seven Billion Two Hundred Thirty Eight Million Seven Hundred Thirty Nine Thousand Eight Million Seven Hundred Thirty Nine Thousand Eight Hundred Seventy Two Only*). However, due to several variations made under the instructions of the Project Manager, this contract price increased.

The contract provided for a mode of settlement of disputes. In particular, **Clauses 28.3** of the Contract provided that, should there be

any dispute between the parties, the same will be referred to a Sole Arbitrator. It also had variations clauses and the procedure for such.

In the course of executing the work, there arose a need for variations in the form of an addition works altering the original scope of works. The Respondent was consulted and through its Tender Board approved a total of **TZS 1,253,624,600.64** (*Tanzanian Shillings One Billion Two Fifty Three Million Six Hundred Twenty Four Thousand Six Hundred and Sixty Four Cents*).

The Petitioner executed the works contracted for and, at various stages, the Project Manager issued several certificates for payments in favour of the Contractor. After accomplishment of the project and its certification, the Project Manager issued a **Penultimate Certificate No. 21**. Normally, once the Project Manager issues a Penultimate Certificate, the Contractor is entitled to be paid the agreed retention percentage certified as due. This is an amount which is normally retained by the client to ensure that the contractor properly completes the works.

It is alleged that, after the Project Manager had issued the Penultimate Certificate, No.21, the Respondent disputed it, calling for its rectification/revision. The Certificate was revised, as requested by the

Respondent, certified and, on 18th May 2017, the Project Manager re-issued it to the Respondent as "**Revised Penultimate Certificate No.21.**" The Revised certificate certified a total of **TZS 544,694,143.86/=** as the amount payable under the contract.

It is averred that, the Respondent still refused to effect payment to the Petitioner on the basis of the Revised Penultimate Certificate, arguing that some variations were yet to be approved by the Employer (the Respondent)'s Tender Board, and thus were in breach of the Public Procurement Act, Cap. 410. It is the non-payments of the sums certified under the Revised Penultimate Certificate No. 21, that made the Claimant/Petitioner to trigger the **arbitration clause No. 28.3** of the contract, and, hence, the Arbitration Proceedings were set in motion.

Apart from claiming to be paid the full amount as per the Certificate, the Claimant/Petitioner asked for payment of interest owing to the delayed payments; also that, the Respondent should be asked to provide the Final Accounts as per work done, subject to compensation accrued thereon; payments of costs of the arbitration; and any other reliefs which the Arbitrator might have deemed fit and proper to grant.

The Respondent responded to the Claim, noting and stating, among others, that, the Fixed Contract Price was **TZS**

7,238,794,872/= and not **TZS 7,238,739,872/=** as stated by the Claimant. The Respondent averred that, the Revised Penultimate Certificate No. 21 which was for payment of a total of **TZS 544,694,143.86/=** to the Claimant, had unapproved variations which, as per the Public Procurement Authority's guidance obtained by the Respondent, could not be paid.

On 19th September 2018 and 20th December, 2018, the Claimant/Petitioner and the Respondent submitted their matter to arbitration, appointing one, Eng. I. N. Kimambo, as a Sole Arbitrator.

The Sole Arbitrator presided over the proceedings and, the Parties to the Arbitration Proceedings, agreed to the six (6) issues, which the Sole Arbitrator was called upon to resolve.

The issues were as follows:

(a) Whether the Claimant was contractually obliged to execute variations claimed.

(b) Whether the Respondent was obliged to pay for variations to the Claimant as per the Revised Interim Penultimate Certificate No.21.

(c) Whether the Claimant executed the claimed variation works.

(d) Whether the non-payment of the Revised Interim Penultimate Certificate No.21 was a breach of contract by the Respondent.

(e) Whether the disputed Revised Interim Penultimate Certificate No. 21 is correct and proper.

(f) To what reliefs are the Parties entitled?

The Sole Arbitrator heard the matter and received evidence from the Parties. At the end, on 27th August 2019, he published an Award and Directed as follows:

1. That, the Respondent, pays the full amount certified under the Revised Penultimate Certificate No. 12 amounting to Tzs. 544,694,143.86/=.
2. That, the Respondent, pays interest on the Revised Penultimate Certificate No. 21, since the date the payment became due, at the rate provided in the contract.
3. That, the Respondent, pays the Claimant in his costs for the same.
4. That, the Respondent, pays the Cost of the Arbitration, comprising of the Arbitrator's fees for 232.5 hours @150, 000/- per hour, cost of audio recording, and Secretarial Services; amounting to a total of TZS 35,925,000/-.
5. That, the Respondent, pays NCC charges for servicing the meetings.

Following the publication of the Award, the Petitioner, by way of filing this Petition, has approached this Court, seeking, under section 17 of the Arbitration Act, Cap.15, [R.E. 2002], and Rule 3, 5, 6 and 7 of the Arbitration Rules, G.N. No.427 of 1957, for the registration of the Award.

On 10th February 2020, when this Petition was called on for hearing, the Petitioner was represented by Mr. George Pallangyo, learned Advocate, while Dr. Saudin Mwakaje, learned counsel, represented the Respondent. Since Mr. Pallangyo, the learned counsel, entered the courtroom belatedly, he found that Dr. Saudin Mwakaje, the learned counsel for the Respondent, had already taken the floor. He apologized for being late and allowed Dr. Saudin Mwakaje to proceed with his submissions.

In his submissions, Dr. Saudin Mwakaje informed this Court that, the Respondent is objecting the registration of the award on the ground of illegality. He submitted that, the award is inviting the Respondent to make payments which are contrary to an express written guidance from the Public Procurement Regulatory Authority (in short **PPRA**).

Dr. Mwakaje submitted that, being a public institution, the Respondent is obliged to follow all procedures stipulated in the Public Procurement Act, Cap.410 (in short the **PP Act**). He submitted that, the amount certified under the Revised Penultimate Certificate No. 21, contravened the requirements under the Public Procurement Act, as the Act requires any variation exceeding 15% of the contracted sum to be

channelled through the Tender Board of the Procuring Entity for approval.

Besides, Dr. Mwakaje argued that, in this instant petition, the amount of variations approved by the Consultant exceeded 15% of the contracted sum, and, since that amount was not approved by the Tender Board, it was in breach of the Public Procurement Act. He further stated that, the Respondent, acting in good faith, sought clarifications from the PPRA regarding whether such varied payments could be made having been approved by the Consultant.

According to Dr. Mwakaje, the PPRA's response, which was also submitted to the Arbitrator, was that, the payments cannot be effected without first obtaining Tender Board's approval of the variations made to the Contract. In view of that, Dr. Mwakaje was of a firm view, that, compliance with the award's requirements to pay will amount to a breach of the law, the PPA, Cap.410, and, the Respondent being a public entity, that breach of the law will invite an audit query on its part.

On his second point of objection to the registration of the award, Dr. Mwakaje submitted that, the award is not maintainable because the Arbitrator did not address all issues submitted and agreed upon by the parties during the proceedings. He submitted that, in the Revised

Penultimate Certificate No. 21, which was the subject of dispute between the parties, there were several items (works) listed by the Petitioner, and which the Petitioner claimed to have carried out, but which, in actual fact, were not carried out.

In view of the above, he submitted that, enforcement of the award will, occasion an injustice to the Respondent, who will end up paying for services which were not actually rendered, a fact which, though contained in the Respondent's submission, was ignored by the Arbitrator. He stated, that, crucially important, the award invited the Respondent to breach the provisions of the Public Procurement Act, Cap. 410.

To buttress his submissions, Dr. Mwakaje referred to this Court two authorities which he argued supported a view that, an award can be challenged, though in limited circumstances, especially where it is against public policy and the law or where the Arbitrator failed to consider all issues presented before him.

The cases he referred this Court to are the case of **Mahawi Enterprises Ltd v Serengeti Breweries Ltd, Misc. Commercial Cause No.9 of 2018 (HC Comm. Division) (unreported),** and

Vodacom Tanzania Ltd v FTS Services Ltd, Civil Appeal No.14 of 2016, CAT (unreported).

In respect of the first case, Dr. Mwakaje submitted that, although based on the facts presented the High Court did not establish an illegality in the award, the Court, (**Fikirini, J.),** accepted that, misconduct, improper procurement of the award or failure to address all the issues framed, are considerations of assessing the appropriateness of an award.

As regards the second case, **Vodacom Tanzania Ltd v FTS Services Ltd, (supra),** Dr. Mwakaje submitted that, the Court of Appeal reiterated that illegality is one of the important consideration as it goes to the root of justice dispensation. Dr. Mwakaje also submitted that, the way the award was structured, is also an issue to take note of.

In his views, the award consolidated claims which are not disputed and those which are disputed, in particular those which arose from the variations, and, which, if are to be subjected to the requirements of the Public Procurement Act, they fail to satisfy the legal requirements, and, hence, the reason why the Respondent dispute them.

For his part, Mr. Pallangyo conceded that, it is true that the PPA, Cap.410, allows for only variations of not more than 15% of the Contract sum to be executed without Tender Board's approval. He stated that, although the initial contract sum was for **TZS 7.2 billion,** later **TZS 1.2 billion** were increased variations, making the contract sum to be **TZS 8.4 billion.** He was of the view that, since the amount in dispute is **TZS. 544,694,143.86/=,** this is less than 7% of the contract sum, and less than the said threshold percentage (i.e., 15%).

He submitted further, that, looking at the final valuation of the approved works, they did not exceed the value of the approved contract sum. Consequently, Mr. Pallangyo was of the view that, there was no violation of the PPA, Cap.410, as the Consultant approved all payments within the limits of the law.

As regards the Respondent's submission, that, the Arbitrator failed to consider all issues brought before him, Mr. Pallangyo was of the view that, all issues were fully canvassed by the Arbitrator. He referred to this Court Vol.1 of the Arbitration Proceedings, which is the AWARD itself, and pointed out the six issues which we have listed herein above.

As regards the third ground raised in objection by Mr. Mwakaje, i.e., concerning the lumping of both dispute and non-disputed matters

together, Mr. Pallangyo was of the view that, that alone cannot be said to be in contravention of the law. In my view Mr. Pallangyo is correct and I do share his views that this third ground is baseless and I will not discuss it any further.

In reference to section 16 of the Arbitration Act, Cap.15 [R.E.2002], Mr. Pallangyo submitted that, although the section provides reasons or grounds upon which an award may be set aside, such grounds do not apply to this petition. In view of that, he prayed that the petition be granted and the award be filed and registered as a decree of this Court.

In an attempt to provide clarity to the issues raised in his main submission in objection to the Petition, Dr. Mwakaje, rejoined, submitting, that, it is incumbent upon an Arbitrator to consider all issues placed before him judicially. He argued that, this did not happen, and pointing this Court to **page 19 of the Award**, in respect of **issue number 3**, Dr. Mwakaje contended that, in his view, the arbitrator "*just listed (reproduced) the provision of the contract in verbatim and concluded, with one sentence, that the Respondent was supposed to pay*". In view of that, he argued, that, the Arbitrator did not judicially consider the parties' submissions on this issue.

Secondly, as regards section 16 of the Arbitration Act, Cap. 15, [R.E.2002], which had been cited by Mr. Pallangyo, Dr. Mwakaje submitted that, the grounds stated in that section, accommodate his submissions, because, broadly defined, the word "misconduct", which is contained in that provision, includes failure on the part of an Arbitrator to address issues before him.

Dr. Mwakaje submitted further that, section 16 of the Act needs to be read in the context of the existing jurisprudence in Tanzania, and the several other cases that have cited with approval the grounds upon which the Respondent's submissions are anchored. He once again referred to this Court the case of **Vodacom Tanzania Ltd v FTS Services Ltd, (supra)**, insisting that, failure to consider all issues before an arbitrator or where an arbitrator acted with misconduct thereby occasioning an injustice, constitute some of the grounds to set aside an arbitration award.

Dr. Mwakaje was of the view that, the mathematical issue regarding whether the variations were in excess of the allowed 15% threshold, was a point which this Court will have the benefit to look at, but averred that, what was a critical issue is that, the Arbitrator did not consider the letter which the PPRA sent to the Respondent as a Public Institution. Along those lines of his submissions and, in the context of

the letter from the PPRA, he further stated that, one should understand the public policy rationale which is centered on the need to discourage or prohibit service providers to secretly increase the contract value outside the eyes of the Tender Board.

In particular, Dr. Mwakaje was of the view that, since the Respondent is a public institution, if there was any substantial variation to the contract value, then, such variations should have been channelled to the Tender Board as part of the safeguards for public funds. The Respondent being attuned to the requirements of the PPRA had its hands tied, Dr. Mwakage argued. He stated that, the PPRA directive was issued after the Respondent had requested for guidance from the PPRA.

The letter requesting for such guidance was part of documents submitted to the Arbitrator in Vol.3 of the proceedings leading to the Award. He, therefore, reiterated his submission in chief, that, there was an apparent issue of illegality and the Arbitrator wants the Respondent to be drawn into it. As such, the Court should, because of that fact, decline to register the award and dismiss the petition.

Mr. Pallangyo was uncomfortable with that submission. He stated that, as regards Agreed Issue No. 3 (i.e., whether the Claimant executed

the claimed variation works), the Arbitrator had captured the Witness Statement for the Petitioner, the witness who was the Consultant, and who, at page 3 of Vol.3 referred to the clause in the contract which clearly stated the manner in which the Payments Certificates were to be dealt with. Mr Pallangyo submitted that, for his part, the issue No.3 was well addressed by the contract.

Overall, Mr. Pallangyo was of the view that, the Respondent has failed to show how his objections are empowered by section 16 of the Act, and the cases he has called upon this court to consider. He submitted that, according to the laws governing arbitration proceedings before the NCC Board, the Arbitrator is not obliged to fulfil all requirements of handling proceedings as in normal courts, though justice should be made.

He submitted further that, the letter to the **PPRA** (contained in Vol.3) did not reflect the true facts and the disputed amount as per the Award, was not addressed there. He stated that, the variations leading to the amount were as a result of works which were considered to be necessary to be carried out by the contractor as they were additional or incidental to, and not covered under the initial contract. This being the case, he was of the view that, the **PP Act, 2011** as well as its

Regulations, G.N. 446/2013, (as amended in 2016), provide for incidental variations which did not require for the approval of the Tender Board, considerations having been made to the limitations of the percentages.

Finally, Mr. Pallangyo submitted that, the contract variations were incidental variations whose execution was within the limit of the Consultant, even before the approval of the Tender Board. He prayed that the Petition be granted and the Respondent should not be allowed to hide behind the veil of not paying the petitioner.

I have listened to the rival submissions of the learned counsel for the Petitioner and the Respondent. In this Petition, the questions which I am called upon to consider are as follows:

(a) Whether there is an illegality on the face of the award which, if it is to be registered as prayed, will lead to an infringement of the Public Procurement Act.

(b) Whether the Arbitrator failed to consider all issues before him and if so, whether such amounts to a misconduct warranting this Court to set the award aside.

Before I address the above two issues, I find it appropriate to state, essentially, that, although this Court has the authority, in appropriate situations, to remit, set aside or declare the whole of or part

of an award made by an arbitrator to be of no effect, in principle, Courts are always cautious when they are called upon to interfere with the findings of the arbitrators.

As correctly stated by **Fikirini, J.,** in the case of **Mahawi Enterprises Ltd v Serengeti Breweries Ltd, Misc. Commercial Cause No.9 of 2018 (HC Comm. Division) (unreported),** an award, once granted, is not easily open to challenge. In other words, arbitral proceedings are ordinarily not to be subjected to scrutiny with the finesse of a toothcomb.

As it was stated in the Nigerian case of **Celtel Nigeria BV v Econet Wireless Limited & Others (CA/L/895/2012) [2014] NGCA, 28,**

> "What a court called upon to set aside an arbitral award ... has to decide is, whether the arbitral award was *prima facie* good or right on face of it, not whether the reasons (whether of law or facts or both) given by the arbitral tribunal for the award were right or sound, unless the reason(s) form part of the award."

In the case of **Fidelity Management SA and others v Myriad International Holdings BV and another [2005] EWHC 1193; [2005] 2 ALL (Comm),** in 312, at [2] -[5], Morison J., observed, that:

> "When considering arbitral awards ... as a matter of general approach, the courts strive to uphold arbitration awards. They do not approach them with a meticulous legal eye endeavouring to pick holes,

inconsistencies and faults in awards and with the objective of upsetting or frustrating the process of arbitration. Far from it. The approach is to read an arbitration award in a reasonable and commercial way expecting, as is usually the case, that there will be no substantial fault that can be found with it."

In that same judgement, the Court further expounded the reason as to why there is such a need for caution, (a cautionary stance I find to be quite instructive). In particular, the Court held that:

"The need for caution when a commercial court judge is dealing with an arbitral award, is that much greater, because, the parties have chosen an autonomous process under which they agree to be bound by the facts as found by the arbitrators and from whose findings of fact there is no appeal."

It is also important to note, as it was held by the Court of Appeal of Tanzania (Ndika, JA) in the case of **Vodacom Tanzania Ltd v FTS Services Ltd, Civil Appeal No.14 of 2016, CAT (unreported),** that,

"[A]ny application to the High Court for review of an arbitral award is not an appeal and, therefore, cannot be disposed of in a form of rehearing. The position has been taken in numerous cases, including a decision by the Supreme Court of Canada in **City of Vancouver v Brabdram-Henderson of BC. Ltd [1960] S.C.R. 539 at 555**, which we approve, where it was stated, as per Locke, J., that:

This is not an appeal from the award and the proceedings upon a motion such as this, are not in the nature of rehearing.... We cannot in the present proceedings weigh the evidence or interfere with the

award on any such ground as that is against the weight of the evidence."

As I endeavour to address the arguments raised by the learned counsel for the parties to the Petition at hand, I am, therefore, fully guided by such important principles, that apply to the review of arbitral awards.

In particular, this Court takes note of the fact that, arbitral justice calls for the support of the freestanding nature of the arbitral process rather than interfering with it, save only for extreme cases where, for instance, an arbitrator has gone so wrong in his conduct of the arbitration in such a way that substantive justice will demand that the award be set aside or remitted.

This kind of approach, in my view, is essential, not only for the sake of upholding the principle of party autonomy, but also for the purposes of promoting certainty and predictability of the arbitral process itself. That is healthy for the business environment and the general policy of promoting positive spillovers that lead to economic development.

Having summarized the applicable guiding principles relevant to this case, I now consider the two issues raised herein to guide the Court in the course of determining this petition, the first issue being:

Whether there is an illegality on the face of the award which, if it is to be registered as prayed, will lead to an infringement of the Public Procurement Act.

It is clear, in the present Petition, that, Dr. Mwakaje, the learned counsel for the Respondent, objected to the award being registered and adopted as a decree of this Court for the basic reason that, the award is based on an illegality. In his submissions, in support, of that objection, the learned counsel for the Respondent, argued that, the illegality referred to arises from the fact that, the Arbitrator is calling upon the Respondent to carry out an act which will infringe the Public Procurement Act, Cap. 410.

To provide further clarity to his submissions on this first point, Dr. Mwakaje submitted that, the Public Procurement Act, Cap. 410, among other things, set restrictions on payments for unapproved variations, if they exceed a threshold of 15% of the contract amount, and that, such payments must, in the first place be approved by the Tender Board of the Procuring Entity (PE).

Referring to this Court a letter from the PPRA, in response to the guidance sought by the Respondent, Dr. Mwakaje submitted that, the amount claimed by the Petitioner under the Revised Penultimate

Certificate No. 21 ought not be paid because, doing so, would be in contravention of the Public Procurement Act, Cap. 410. I have looked at the Guidance Letter from the PPRA. Indeed, according to the letter, the PPRA made it clear that:

> "... section 33 (1) (b) of the PPA, 2011 and Regulations 110 (3), (4) & (5) of GN. 446 of 2013 require all PEs to ensure that all applications for variations, addenda or amendments to the ongoing contracts are reviewed and approved by the appropriate Tender Boards to see if there is any advantage that will be obtained before issuance of instruction to the contractor. In this perspective, the requirements of the Act and the Regulations were not complied with... [and] the Tender Board may not retrospectively approve the variation cost for additional works which were already done."

Further, referring to this Court the case of **Vodacom Tanzania Ltd v FTS Services Ltd, (supra),** Dr. Mwakaje submitted that, in that case, the Court of Appeal reiterated, that, an illegality is one of the important considerations for setting aside an award as it goes to the root of justice dispensation. The question I am left with, therefore, is: **Does the issue of illegality constitute a ground for setting aside an arbitral award?**

In our jurisdiction, section 16 of the Arbitration Act, Cap. 15 [R.E.2002], provides for situations which may cause an award to be set

aside. These are: (i) a situation where the arbitrator or umpire, has "**misconducted himself**" or (ii) a situation where the "**award has been improperly procured**". However, in the case of **Vodacom Tanzania Ltd v FTS Services Ltd (supra),** the Court of Appeal of Tanzania, citing the case of **Rashid Moledina & Co. (Mombasa) Ltd and Others v. Hoima Ginners Ltd.,** [1967] EA 645, noted also, that, apart from the grounds set out in Section 16 of Cap.15 [R.E.2002], the award may as well be set aside where **'an error of law is apparent on the face of the record.'**

As noted above, the learned Counsel for the Respondent has argued that the issue of illegality of an award was a point reiterated by the Court of Appeal in the case of **Vodacom Tanzania Ltd v FTS Services Ltd** (supra). While it is true that an error in law will lead to the setting aside of an award, what I find in this case, apart from the grounds set out in section 16 of the Arbitration Act, Cap.15 [R.E.2002], is that, such illegality or error in law **must be apparent on the face of the award.** Unless an illegality clearly appears on the face of the record of the award, the Court will not interfere.

In the cited case of **Vodacom Tanzania Ltd v FTS Services Ltd** (supra), the Court of Appeal clarified as to what amounts to an "error in law on the face of record" and, referring to the decision of the

High Court in **D.B Shapriya and Co. v Bish International BV (2) [2003] 2 E.A. 404,** the Court stated that:

> "An error in law on the face of the award means, in their Lordships view, that you can find in the award or a document actually incorporated thereto, as for instance a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous."

Looking at the award, and, taking into account the submissions of Dr. Mwakaje, it is clear to me that Dr. Mwakaje's argument regarding the illegality apparent on the face of the award is in respect to the non-adherence to the PPRA letter, which, as he contended, guided the Respondent on matters regarding adherence to the requirements of the Public Procurement Act.

Where an award infringes public procurement laws or public policy, that illegality may be sufficiently relied upon to set aside an arbitral award. In Kenya, for instance, Ringera, J., as he then was, held, in **CHRIST FOR ALL NATIONS VS APOLIO INSURANCE CO. LTD. 2002 EA 366,** thus:

> " I am persuaded by the Logic of the supreme court of India and I take the view that although public policy is a most broad contest incapable of praise definition, or that as the common law judges of Younder years used to say, it is an unruly horse and when once you set astride of it you never know where it will carry you, an award

could be set aside under section 35(2) (b) (ii) of the arbitration act as being inconsistent with the public policy of Kenya if it was shown that it was either: (a) Inconsistent with the constitution or other Laws of Kenya, whether written or unwritten or (b) Inimical to the National Interest of Kenya; or (c) contrary to justice or morality....".

The above excerpt from the decision by Ringera, J., (as he then was) was also referred with approval by Muya, J., in another Kenyan case, **Tanzania National Roads Agency v Kundan Singh Construction Limited, Misc. Civil Application No. 171 of 2012, (Unreported).**

A similar approach was also taken by the Supreme Court of Mauritius, in the case of **State Trading Corporation v Betamax Ltd, 2019 SCJ 154,** where it was held, among others, that:

"(1) ...the parties to a contract are legally bound to act in conformity with the requirements laid down in the Public Procurement Act in respect of a procurement contract....;

(4) Public policy as a ground for setting aside an arbitration award has been generally limited to cases of **clear violations of mandatory legal rules** which are fundamental to the legal order of the State;

(5) There is a high threshold to satisfy if the award is challenged on the grounds of public policy, namely that the breach of the fundamental legal provisions such as the PPA, must be flagrant, actual and concrete;

(6) Having regard to the magnitude of the CoA, its enforcement in flagrant and concrete breach of public procurement legislation enacted to secure the protection of good governance of public funds,

would violate the fundamental legal order of Mauritius. Such a violation breaks through the ceiling of the high threshold which may be imposed by any restrictive notion of public policy.

(7) The arbitral award, which sought to enforce a contract which has violated the procurement laws of Mauritius, is plainly in conflict with the public policy of Mauritius and cannot be legally enforced in Mauritius."

The general principle which we can derived from the above cited cases is that, an award can be set aside if it is in breach or would result into the an express violation of a law or be contrary to public policy. Since an award that infringes a public policy can be set aside, and if such ground could be derived from an illegality point of view as argued by Dr. Mwakaje, the question which needs to be looked at is whether the present award was in breach of the public policy enshrined under the Public Procurement Act, Cap.410.

As noted earlier herein, the counsel for the Respondent has strongly supported a view that, the award was perpetrating an illegality, a breach of the procurement laws. He was of such a view, arguing that, if the Respondent will honour the Interim Penultimate Certificate, the Respondent will be forced to breach section 33 (1) (b) of the PPA, 2011 and Regulations 110 (3), (4) & (5) of GN.446 of 2013 require all Procurement Entities to ensure that all applications for variations,

addenda or amendments to the ongoing contracts are reviewed and approved by the appropriate Tender Boards.

In fact he has argued that, the variations giving rise to the Certificate were unapproved and exceeded the threshold amount of 15% of the contract price which ought to be approved first. It is for such reasons that Dr. Mwakaje assailed the award as it calls the Respondent into the performance of an act which will involve some form of illegality.

On the other hand, and as pointed out earlier, the learned counsel for the Petitioner has strongly opposed the position held by Dr. Mwakaje. For his part, the amount certified by the Project Manager under the Revised Penultimate Certificate No. 21, is below the stated 15% threshold for which no approval of the Tender Board is required and further that the variations which are the subject of the Revised Penultimate Certificate No. 21 were incidental variations whose execution was within the Consultant's approval limits. In fact, Mr. Pallangyo regarded the variations as being merely incidental and well within the limits of the Consultant to approve, even without the Respondent's Tender Board's approval.

I have looked at the award and it is indicated that the variations are to a tune of **TZS 1, 889,986,706.60.** These are the ones referred to as offending the Public Procurement Act. I tend to differ with Mr.

Pallangyo's views that such variations are less than 15% of the contracted sum. It is clear that, although the initial contract sum was about **TZS 7.2 billion (plus)**, later, due to variations amounting to the tune of about **TZS 1.2 billion (plus),** and which were properly approved by the Respondent's Tender Board, the total contract sum amounted to about **TZS 8.4 billion (plus)**.

If one is to take up an arithmetic exercise, **TZS 1, 889,986,706.60** is equal to **22.49 %** of **TZS 8.4 billion**, hence, the variations are way above the 15% of the contract sum. As such, they were not incidental, but substantial and accordingly ought to have been approved by the Tender Board of the Respondent as per the requirements of the Public Procurement Act, Cap.410.

I note, however, that, Mr. Pallangyo's view is pegged to the fact that, since the disputed Revised Penultimate Certificate is for **TZS. 544,694,143.86/=**, this is clearly less than **7%** of the contract sum, and less than the threshold variation percentages referred to by Dr. Mwakaje, and thus well within the Consultant's approval the limits of the law. However, as I have shown herein above, it is clear, even within the award itself, that the variations were of **TZS 1, 889,986,706.60.** This amount, is equal to **22.49 %** of **TZS 8.4 billion**, (the contract

sum), and, these variations were unapproved by the Tender Board of the Respondent, hence the source of the acrimony between the Respondent and the Claimant.

In view of the above, and, since there was no such approval, the question begging the answer of this Court is: was such a non-compliance a sufficient violation or breach of the **PPA, Cap.410,** and the underlying public procurement policy, as argued by the learned counsel for the Respondent? In my view, non-compliance with the requirements of a statute constitute an illegality, and, as the Supreme Court of Uganda, held in the case of **Active Automobile Spares Ltd vs. Crane Bank Ltd and Rajesh Pakesh SCCA 21/2001,** *"it is trite law that courts will not condone or enforce an illegality."*

In **Patel v Mirza, [2016] UKSC 42, (at para 120),** a case that has given a surgical analysis regarding the doctrine of illegality, the Supreme Court of the United Kingdom had the following to say, (which I find useful and persuasive to this case), that:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system .... In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of

the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

On the basis of the above, and looking at the petition at hand, one will note, that, one of the underlying purposes of the Public Procurement Act, Cap. 410, is to prohibit or discourage those involved in contracts financed through public funds from secretly, by way of variations or otherwise, vary the agreed contractual values or change the economic balance of the parties outside the oversights organs of procuring entities, i.e., the Tender Boards.

It is for such a reason, therefore, that, section 33 (1) (b) of the PPA, 2011 and Regulations 110 (3), (4) & (5) of GN. 446 of 2013, require all Procurement Entities to ensure that **all applications for variations**, addenda or amendments, to the ongoing contracts to be reviewed and approved by the appropriate Tender Boards. The Tender Board, being an organ that provides a crucial oversight function on

behalf of the respective Procurement Entities, cannot be easily sidelined, especially where there is a requirement that variations such as those involved in this petition ought to have been approved by it.

Indeed, since the monies involved are public monies and the Respondent's stewardship of such monies being subject to public auditing by the Controller and Auditor General (CAG), demanding that the Contractor should fully comply with respective legal requirements under the **PPA, Cap. 410**, is a justified act, and cannot be brushed aside. Doing so, in my view, is to condone an illegality while it is trite that, the Courts are not supposed to do so because doing so spoils the integrity of the entire legal system.

A contracting party, therefore, should not be allowed to circumvent the purposes of the procurement regime and, if one may add, all Contractors are bound to follow, not only by their contracts, but also all other applicable laws of this Country, including the Public Procurement Act and its Regulations.

In fact, in the absence of an express provisions to the contrary, there is, as a general rule, an implied term in any construction contract, that, the contractor will not carry out or complete the work in a manner

which contravenes relevant regulations or other relevant statutes that may be applicable to the construction industry.

In my view, there is no doubt that the Public Procurement Act and its Regulations apply to the Construction industry, especially when a contractor is engaged to carry out works financed from public funds. As such, all contractors are expected to take cognizance of the requirements of this Act, even if it is not expressly referred to in their contracts.

From the foregoing, the first issue regarding illegality, therefore, stands. The award is faulted on such a ground because it goes contrary to the public policy, (i.e., it requires the Respondent to condone or bless acts that infringe the Public Procurement Act and its Regulations). I see no other policy which is impacted by this denial to register the award and, in my view, the denial is a proportionate response to the illegality, because, the parties are still at liberty to iron out their differences in a manner that is in conformity with the law.

The second issue which arose from the parties' submissions is:

> ***'Whether the Arbitrator failed to consider ali issues before him and if so, whether such amounts to a misconduct warranting this Court to set the award aside.'***

As noted in his objection to the Petition, Dr. Mwakaje, submitted that, it is incumbent upon an Arbitrator to consider all issues placed before him judicially. He argued that, this did not happen, and pointed this Court to **page 19 of the Award**, in respect of **issue number 3**, of which, in his view, the arbitrator "*just listed (reproduced) the provision of the contract in verbatim and concluded, with one sentence, that the Respondent was supposed to pay*". He argued, further, that, by doing so, the Arbitrator did not judicially consider the parties' submissions on this issue, a fact considered amount to a "misconduct" on the part of the Arbitrator sufficient to set aside the award.

It is true, as pointed out by Dr. Mwakaje, that, **Fikirini, J.,** in the case of **Mahawi Enterprises Ltd v Serengeti Breweries Ltd, (supra),** observed that, failure to decide on each and every issue framed constitute a serious breach of procedure. In that case, the Court further observed that, the term "misconduct" is not defined under section 16 of the Arbitration Act. However, referring to the case of **Kong Kee Brothers Construction Co. Ltd v Attorney General** [1986] LRC (Comm) 345), this Court found that, the term has been extended to include misconduct such as mishandling or procedural

irregularity, excess of jurisdiction, incompleteness and breach of natural justice.

In the case of **ORASCOM TMT INVESTMENTS S.À R.L., (formerly Weather Investments II S.à r.l.) v VEON LTD (formerly VimpelCom Ltd) [2018] EWHC 985 (Comm),** Baker, J., referring to a provision in the UK Arbitration Act of 1996, was of the view that:

> "[W]here a tribunal has failed "to deal with all the issues that were put to it", if that amount, in the particular case, to a serious irregularity, the court may intervene. However, "there must be a serious irregularity, that is to say one that has caused or will cause substantial injustice."

Looking at the current petition, I am in disagreement with Dr. Mwakaje, the counsel for the Respondent, that the Arbitrator failed to address all issues. His concern has been directed to issue No. 3 of the award, and, that, the arbitrator only reproduced the provision of the contract in verbatim and concluded, with one sentence, that the Respondent was supposed to pay, without considering the Parties' submissions.

In my view, the arbitrator's decision to reproduce the provision of the contract relevant to the 3rd issue raised in the award, does not amount to a failure to consider the particular issue put before the

arbitrator. To me, the arbitrator was justified to refer to the provisions of the contract to see whether they address the issue raised and agreed upon by the parties. Even if he responded to the issue by one sentence, that was still be sufficient since he was the master of the proceedings and the materials and evidence placed before him.

All in all, while an arbitrator must address all issues put before him, in my view, that does not mean he will have to address every single argument raised by the parties. His concern is only on those issues that are relevant for the decision. Moreover, the fact that the findings of the arbitrator are not in accordance with the wishes of the party, that should not lead to a conclusion that the arbitrator fell short of acting judicially or that the award is not properly a reasoned one. In the upshot, I find that the second objection raised by Dr. Mwakaje is of no merit and is hereby overruled, as the award cannot be challenged on such a ground.

In conclusion, therefore, this Court upholds the first objection by the Respondent, that, the award was tainted with an illegality. It is faulted on such a ground because it goes contrary to the public policy, (i.e., it requires the Respondent to condone or bless acts that infringe the Public Procurement Act and its Regulations). Put differently, it was

rendered without taking into account that the variations, which were a subject of controversy under the Revised Penultimate Certificate, were in breach of the Public Procurement Act and its Regulations, hence made contrary to public policy.

As such, having so decided, this Court proceeds to order as follows:

ORDER:

1. The Award, which was sought to be filed in this Court, in terms of section 17 (1) of the Arbitration Act, Cap.15 [R.E.2002] is hereby, **set aside**.

2. Since the Respondent did not file any document underlying his opposition to the filing and enforcement of the award, but rather appeared right away upon being summoned to show cause why the reliefs sought should not be granted, and orally did so challenging the Award, this Court makes **no order as to Costs,** meaning that each party bears its own costs.

It is so ordered.

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DEO JOHN NANGELA
JUDGE,

HIGH COURT OF TANZANIA
(Commercial Division)
03 / 03 /2020

Ruling delivered on this 03rd day of March 2020, in the presence of the Mr. George Pallangyo, Advocate for the Petitioner, and Mrs. Otilia Rutashobya, Advocate for the Respondent.

THE HIGH COURT OF TANZANIA
COMMERCIAL DIVISION

.....

DEO JOHN NANGELA
JUDGE,

HIGH COURT OF TANZANIA
(Commercial Division)
03/03/2020