IN THE HIGH COURT OF TANZANIA

COMMERCIAL DIVISION

AT DAR ES SALAAM

MISCELLANEOUS COMMERCIAL APPLICATION NO. 106 OF 2018

(Original Miscellaneous Commercial Application No. 67 of 2018)

MOTOSACH INTERNATIONAL CO. LTD.....PETITIONER

Versus

DAR ES SALAM CITY COUNCIL.....RESPONDENT

Last Order: 12th Dec, 2019

Date of Ruling: 25th Feb, 2020

RULING

FIKIRINI, J.

The applicant has petitioned to this Court for the arbitrator's misconduct asserting three things:

(i) That the sole arbitrator was a judge in his own cause which was in breach of the principles of natural justice; and

(ii) That the arbitrator failed to write a reasoned decision culminating into an award.

(iii) That the arbitrator did not write down all the proceedings as agreed, making it difficult to supply the petitioner with such records of proceedings.

The petition was argued by way of written submissions. Mr. Masumbuko Lamwai counsel for the petitioner and Mr. Jumanne Mtinangi City Solicitor each filed written submission for their respective clients.

Briefly, the submissions were to the effect that the arbitrator was a judge in his own cause, which was against the principles of natural justice. Mr. Lamwai submitted that his client got this feeling prior to filing of the submissions in the arbitration, after discovering the arbitrator was an employee as Municipal Solicitor with Kinondoni Municipal Council, which is within the jurisdiction of the respondent. And this fact was conceded to by the respondent but clarified the situation by stating that the City Council and Kinondoni Municipal Council were autonomous.

In this application Mr. Lamwai is contesting the the account, that the two may be separate entities in law but were created under the same law, the Local Government (Urban Authorities) Act, Cap. 288 and were under the same Ministry for Local Government. From the explanation, he concluded that, it was therefore clear that the arbitrator and the respondent were under the same authorities from which they get general directions. In the circumstances, justice must not only be done but must be seen to be done, contended Mr. Lamwai.

Extending his argument on the above principle, the Counsel submitted that the petitioner in paragraph 7 of the amended petition as reflected in annexture "P4" to the amended petition which also featured at the hearing, shows that the petitioner was not confident that the arbitrator will be able to be neutral, being an employee of a local Government authority. The arbitrator claims to have dealt with the issue on 02nd November, 2017 and concluded that the concern was resolved as indicated at page 1 paragraph 2 of the award. Mr. Lamwai queried the assertion and argued that there was nothing in records of proceedings of the day indicating so or that showed if the Claimant's director accepted the explanation. Mr. Lamwai interpreted the anomaly as the arbitrator's aim at favouring one side and this expressed fear of bias on the part of the petitioner. The arbitrator as a judicial officer and before whom the complaint was lodged had a duty of recusing himself from the conduct of the case, which he did not do. In support of his position the cases of **Zabron Pangamaleza v Joachim Kiwaraka & Another [1987] T.L.R. 140 (CA)** and **Kishore Vallabhdas Liladas & Another v SMZ [2000] T.L.R 167** were cited.

The Counsel also asserted that even though the respondent in paragraph 9 (a) of the reply to the petition contended that the issue was resolved on the meeting held on 3rd November, 2017. The records are however, distorted and did not reflect what is claimed to have occurred at the preliminary meeting. Mr. Lamwai concluded the

arbitrator proceeded with the arbitration based on mere verbal assurances of impartiality which was not enough considering the source of bias arose out of the employment relations.

The arbitrator's bias was eventually seen at the end of the hearing. As indicated in paragraph 10 of the amended petition, the arbitrator is said to have given directions that parties should file written submissions. Whereas the petitioner complied the respondent did not as their written submission was filed out of time and without leave of the Court, as such parties were not given a level playing ground. Though petitioner brought this to the attention of the arbitrator as reflected in annexture "P5" still the respondent filed their written submission out of time. Adding to this was the fact that it was agreed that the arbitrator would write down all the proceedings but none was supplied to the petitioner, which made it difficult for the petitioner to properly prepare her case as well as pointing out the misconduct that was vivid from the proceedings. Another example the arbitrator constituted himself as an advocate of the respondent by cross-examining the petitioner's witnesses.

Finally, Mr. Lamwai submitted on the arbitrator's failure to write a reasoned award. Instead he gave the narrative of the evidence as provided by the parties. This as a result made the arbitrator come to a wrong conclusion, on the reliefs which the petitioner was entitled, and his refusal to award any damages for breach of the contract despite finding the respondent as to have breached the contract.

While admitting that the arbitrator was employed by Kinondoni Municipal Council, a local Government authority established under the Local Government (Urban Authorities) Act, Cap. 288, but objecting to the submission, that the sole arbitrator was a judge in his own case and therefore biased in the conduct of the arbitration proceedings, it was his submission that the sole arbitrator was not solving the dispute as an employee of Kinondoni Municipal Council but as an arbitrator listed under the National Construction Council (NCC) guided by laws including NCC rules.

Specifically addressing the issue of bias insinuated, he submitted that the concern raised was dealt with as indicated in the meeting of 02nd November, 2017, whereby Salutare Joseph Kiria (Petitioner's Director with Power of Attorney) was present. Upon explanation by the arbitrator the petitioner withdrew his objection and arbitration proceeded resulting into award given on 31st January, 2018. The award which has already been honoured by making payment to the petitioner through their bank account on 01st March, 2018 as evidenced by a payment voucher attached in reply to the petition. In addition, it was his submission that the petitioner has not assigned or showed facts to support the claim, as nowhere in the proceedings it was shown that the respondent was favoured. Instead the award was in favour of the petitioner and has been implemented already.

Reviewing the cited case, it was his contention that the cases were not relevant and distinguishable. In the Court of Appeal decision the facts of allegation were supported by several events, the bed rock being friendship, which was different to the facts at hand. It was his further assessment and submission that even the respondent's final submission which was complained against was not considered and this has been indicated at page 39 of the of the award, the reason assigned being the written submission was filed out of time. Also the assertion that the arbitrator was biased by cross-examining witnesses was countered by Mr. Mtinangi when he submitted that witnesses from both parties were cross-examined for clarification, including DW1 and DW3 who featured for the respondent. And that the award and amount given were reasoned based on the work performed.

Maintaining his position, it was his submission that there was no misconduct by the arbitrator in conducting the arbitration between the petitioner and the respondent. He thus prayed for the ruling and order against the petitioner and the petitioner be condemned to costs incurred by the respondent.

"Justice must not merely be done, but must be seen to have been done" In observing this principle, judges and magistrates should however, not disqualify themselves from flimsy and imaginary fears. Arbitrators, who are judicial officers, are equally bound by the principles; although as stated in the **Pangamaleza's** case

(supra), like judges or magistrates when they find their integrity questioned they should act accordingly. Quoting straight from the case the Court had this to say:

> *"……The safest thing to do for a judicial officer who finds his integrity questioned by the litigants or accused persons before him, is to give the benefit of doubt to his irrational accusers and retire from the case unless it is quite clear from the surrounding circumstances and the history of the case that the accused is employing delaying tactics."*

Applying the decision to the present matter, it is not disputed at all that the Arbitrator is employed by Kinondoni Municipal Council the fact which he initially never disclosed to the claimant. The respondent Dar Es Salaam City Council and Kinondoni Municipal Council which employed the arbitrator are both established under the Local Government (Urban Authorities) Act, Cap. 288. The matter to be arbitrated was therefore that of a sister body. The arbitrator was in my view obligated to naturally recuse himself from the conduct of the arbitration unless there was compelling reason to continue as arbitrator.

Furthermore, after the concern raised vide the letter from NCC with Ref. No. NCC/63/252/17 attaching claimant's letter, suggesting arbitrator's withdrawal from the conduct of arbitration was raised, that he was employed by Kinondoni

Municipal Council within Dar Es Salaam City, though it was submitted that the complaint has been dealt with leading to the petitioner's director abandoning his prayer and arbitration proceeded, the assertion was controverted by Mr. Lamwai, I equally find the concern was not properly handled and the records do not support that.

Careful examination of the records of proceedings and in particularly those of 02nd November, 2017, did not reveal what was stated. Restating exactly what transpired on the stated date, this is what I came across:

2/11/2017 at 14.05 hrs

Minutes

1. *Introduction-the arbitrator explained on the concern of the claimant to withdrew the arbitrator for being employed by one of the local government (Kinondoni).*

After thorough explanation from the arbitrator, the claimant abandoned his letter hence paved way to proceed with the arbitration with the same arbitrator.

Signed

From this piece of record of proceedings it is without doubt that they do not reflect clearly what is claimed transpired. Nothing from the record shows what was explained to the petitioner's director and what was accepted by the petitioner's director. Based on explanation alleged given by the arbitrator raises skepticism as

to the veracity of the account given and conclusion made therefrom. What is so far on record is the arbitrator's own account and nothing from the claimant or even the respondent who going by the records of proceedings was represented by the City solicitor. Failure to come across such evidence on the records of proceedings, suggested to this Court that there was no such explanation or acceptance which had occurred ironing out the concern raised or reservations the petitioner's director had on the arbitrator, despite the fact that the arbitrator proceeded with the arbitration. And even if there was such explanation still there was no proof that the petitioner's director's was fully satisfied with the explanation clearing his reservations on the arbitrator's possibility of being biased.

In the case of **Kishore Vallabhdas** (supra) the Court of Appeal when faced with the similar issue had this to say:

> *"An allegation of bias against a judge or magistrate is a serious matter, and the judge or magistrate concerned cannot take it lightly. The allegation may be completely unfounded to the knowledge and belief of the judge. But that does not lessen the need to act with great care in reaching to the allegation. .....The existence of bias or the apprehension of its existence in the court seriously undermines that confidence.....we think that where bias has been*

alleged, unless there be very good reasons it is prudent for the judge or magistrate to step down, not to insist on hearing the matter. To insist on hearing the case gives the impression that the judge has or might have personal interest in the matter even though in fact he does not……"

The arbitrator who is a judicial officer akin to a judge or magistrate should have acted prudently. Rather than proceeding with conduct of the arbitration he should have recuse himself, notwithstanding the fact that the decision came out in favour of the petitioner. The whole idea is not only that justice be done but it should be seen to be done, which in the present case that is not what was exhibited.

This is moreso, when even the records of proceedings do not reflect what actually transpired on the fateful day. For one to conclude the records were distorted or to construe that all these were biases geared towards assisting the respondent, would not be far from truth. The arbitrator was not supposed to insist on arbitrating on the matter which he had interest by virtue of being employed by a sister body while there were other arbitrators who could have dealt with the matter. By staying on, he was indeed being a judge in his own cause which was in breach of the principles of natural justice.

This is in my considered view a misconduct which vitiated the proceedings.

As to the reliefs sought in the amended petition, that this Honourable Court award the Petitioners damages as prayed for in this submission on arbitration, I find the prayer misplaced. This Court can only grant reliefs sought after hearing the parties on the claimed reliefs which in the present case that have not taken place. Moreover, This Court is seized with powers to remit the award under section 15 of the Arbitration Act, Cap. 15 R. E 2002 and section 16 to set aside the award. These powers vested in Court can only be exercised under certain conditions. Under section 15 the Court is seized with power to remit the award for reconsideration while under section 16 of the Act, the Court while vested with powers to set aside the award but can do so when: **one,** the arbitrator or umpire has misconducted himself; and **two,** that an arbitration or award has been improperly procured.

There are numerous decisions illustrating on the point. For example in the case of **Moran v Llyod's [1983] 2 All ER 200,** the Court in trying to define what amounts to misconduct held:

> *".....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.

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:

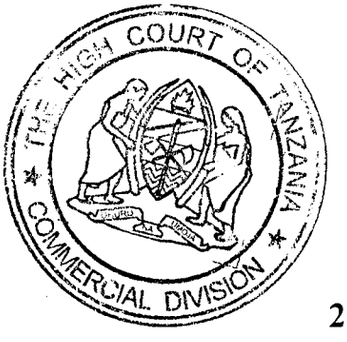
> *"Court cannot interfere with findings of fact by the arbitrator and a mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the ground of misconduct"*

The best definition of what amounts to misconduct has, I would say been elucidated 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.

In the present petition as intimated earlier there is clear evidence that the arbitrator breached the rules of natural justice and hence the conclusion that there was misconduct. This Court can therefore make a decision on the issue of misconduct and no other reliefs as put forward by the petitioner in particularly on awarding damages as prayed in the submission to the petition. The respondent in their

submission objecting to the petition pointed out that the award has already been executed. The petitioner has not countered this fact. That being the case rationally one would say the exercise of setting aside the award is futile since the award was in favour of the petitioner and has already been executed, the position which I, somehow subscribe too, but it is equally important to set the record straight on one hand, by reminding judicial officers of their noble duty of not only doing justice but seeing it being done. The best way to exhibit that is as stated in the case of **Kishore Vallabhads** (supra). Once this is observed, it will minimize complaints and enhance citizen confidence whenever they have to have their matter adjudicated by judges, magistrates or other judicial officers such as arbitrators.

For the fore going, I find this petition is with merit as far as misconduct by the arbitrator is concerned and consequently proceed to set aside the award dated 31st January, 2018, with costs. It is so ordered.



P.S.FIKIRINI

JUDGE

25th FEBRUARY, 2020