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

MISC.COMMERCIAL CAUSE NO.39 OF 2019

(Arising from the Award of Hon. Sole Arbitrator Dr.W.H.F.M Cortenraad LL.M, residing in Eijsden, Municipality of Eijsden Margaten, the Netherlands, dated 29th October, 2019 registered as NAI Case No.4680 in the Netherland Arbitration Institute).

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

IN THE MATTER OF SECTIONS 16, 29 AND 30 OF THE ARBITRATION ACT CAP.15 [R.E.2002]

AND

IN THE MATTER OF A PETITION TO SET ASIDE THE AWARD

BETWEEN

JOVET TANZANIA LTD.....PETITIONER

VERSUS

BAVARIA N.V .....RESPONDENT

RULING

1/4/2020 & 14/5/2020

NANGELA, J.:

This is a petition to set aside an Arbitration Award. The Petition is brought under sections 16, 29 and 30 of the Arbitration Act, Cap.15

[R.E.2002] and Rules 5,6,7 and 8 of the Arbitration Rules, GN.No.427 of 1957.

The petitioner, a limited liability company incorporated under the Laws of the United Republic of Tanzania, and having its principal office in Dar-es-Salaam, is petitioning against an Arbitration Award granted to the Respondent, a public limited company, incorporated under the Laws of the Netherlands, and having its principal offices at Lieshout (the Netherlands).

The Petitioner stands aggrieved by the whole proceedings, the Arbitrator's Final Award, and the whole circumstances under which it was rendered. In particular, the Petition alleged, as the basis for challenging the Award, that:

1. That, the Arbitrator misconducted himself, for failure to communicate to the parties' fair and appropriate Arbitration procedure which was to be used in the Arbitration proceedings. The Arbitrator's failure to respond to the Petitioner's requests as matters of the procedure which was to be used in the Arbitration.
2. That, the Arbitrator misconducted himself for failure to follow cardinal procedural rules prescribed in the NAI Arbitration Rules.

Arbitrator misconducted himself for failure to rule on his jurisdiction first before proceeding to hear the matter in merit.

3. That, the Arbitrator, misconducted himself for failure to frame issues in dispute to enable parties to deal with real issues of the case to enable them to give evidence on those issues, thus contentious issues were not known to the parties; that, the parties were not aware of legal and factual issues that the arbitrator will use to determine the case. Failure to guide parties' evidential matters such as examination of witnesses and experts, despite the Petitioner's efforts to request the same.
4. That, the Arbitrator misconducted himself for failure to afford the Petitioner opportunity to be heard. The Petitioner Advocate Loe Van Erp, a Dutch-based Lawyer, resigned only four days before the hearing of the Arbitration. The Petitioner was supposed to be given an opportunity to find another lawyer conversant with the Dutch Law, to represent her. The Arbitrator forced to continue with the hearing on 16th August 2019; the date which was fixed for the hearing of his challenge of impartiality and independence to frustrate the Petitioner's Appeal pending in the Court of Appeal of Tanzania.
5. That, the Arbitrator's Award has not been made in conformity with the law governing the Arbitration procedure. The Claimant was

not called upon to prove his claims by producing evidence, both oral and documentary.

6. That, the Award has been improperly procured following misleading information /cheating perpetrated by the Petitioner's Advocate, Loe Van Erp, given to Advocate Bryson Shayo, that, he may send the Petitioner's requests by himself directly to the Arbitrator while knowingly not true and Arbitrator tendered a fake email before the NAI Committee which he purports to have sent (sic) it to the Petitioner Advocate Bryson Shayo.
7. That, the Award has been improperly procured because the Claimant was not required to prove his claims by calling witnesses or produce evidence. No proof of the substantive claims of EURO 97,000,000 or receipts of the cost of the Advocates of the Respondent.

In view of the above grounds, the Petitioner is seeking for the following orders/reliefs namely:

1. To set aside the Arbitrator's Award.
2. Costs of this Petition.
3. Any other Order as the Court may deem fit to grant.

On 27th January 2020, when the parties appeared before me, Mr. Francis Stolla, learned counsel informed this Court that he was

holding brief for Mr. Brayson Shayo, (Advocate) for the petitioner, and that, he was instructed to proceed with the matter. On the other hand, Mr. Gerald Nangi, learned counsel, appeared for the Respondent.

Mr. Nangi prayed for time to file a reply to the petition, a prayer which was not opposed by Mr. Stolla. In view of that this Court granted the prayer and ordered the parties to file their respective documents as prayed. When Mr. Nangi filed his answer to the petition, he also raised a preliminary objection. The preliminary objection was to the effect that:

> **"This honourable Court lacks jurisdiction to determine the Petition having been filed prematurely as well as improperly moving the Court under inapplicable legal provisions."**

On 25th February 2020, it was agreed that the preliminary objection should be argued first. This Court, therefore, set the 1st of April 2020, as the date when the preliminary objection should be argued.

On the material date, Mr. Nangi, learned counsel appeared for the Respondent while the Petitioner was represented by Mr.

Stolla, learned advocate. On 27th March 2020, Mr. Nangi filed skeleton arguments in support of the preliminary objection and, on 1st April 2020, when addressing the Court, he prayed to adopt it as forming part of his submission.

Essentially, in his submission, Mr. Nangi submitted that the preliminary point raised has two limbs: one is on the jurisdiction of this Court and, the second, concerns the appropriate or proper provisions under the applicable the law, which ought to have been relied upon to move this court. In other words, as regards the second limb, he is submitting that the Court has not been properly moved.

When addressing the first limb, Mr. Nangi submitted that, the petition has been filed prematurely as it seeks to set aside an Award which is not before the Court. He argued that, for section 16 of the Arbitration Act, Cap.15 [R.E. 2002] to come into play, an Award must be before the Court in terms of section 17 of the same Act. He argued further, that, currently, the Award is not before the Court in terms of section 17 of the Arbitration Act, Cap.15 [R.E. 2002].

To buttress his submission, Mr. Nangi called to his aid and placed reliance on the Court of Appeal decision in the case **Tanzania Cotton Marketing Board v Cogegot Cotton Company SA [1997] T.L.R. 165.** He also cited the decision of this Court, in the case **Ardhi University v M/s Kiundo Enterprises (T) Limited, Misc. Commercial Cause No.272 of 2015, HC, Commercial Division, (unreported).**

Similar reliance was placed on the decision of this Court in the case of **ISOB BPO Tanzania Ltd v Equity Bank (Tanzania) Ltd, Misc. Civil Cause No.659 of 2016, (HC) Dar-es-Salaam District Registry (unreported).**

In view of the above authorities, Mr. Nangi submitted that, the Petition is devoid of merits for being prematurely brought before this Court and ought to be struck out with costs.

As regards the second limb of the preliminary objection, Mr. Nangi submitted that, the Respondent's concerns are centred on the provisions relied upon by the Petitioner to move the Court. He argued that, section 29 and 30 of the Arbitration Act, Cap.15

[R.E.2002] are not enabling provisions and are inapplicable in the current circumstances of setting aside the Arbitral Award.

Mr. Nangi further added, that, section 29 of the Act is on the effects of a foreign award while section 30 is on the conditions for enforcement of a foreign award. He argued that, the sections cited as enabling provisions in this petition are not enabling but prescribing provisions. To that end, he referred this Court to the decision of the Court of Appeal in the case of **Hassan Sunzu v Ahmad Uled, Civil Ref. No. 08 of 2013, CAT, Tabora, (unreported).** He asserted, therefore, that the provisions cited are irrelevant considering the orders being sought in the Petition.

Mr. Nangi submitted further, that, if the Court is to be said to have been moved, that will entail citing all enabling provisions under which the Court is asked to grant the orders sought. Indeed, that is a correct position and, there are numerous decisions, both of this Court and the Court of Appeal, which have held that non citation or wrong citation of enabling provisions of the law renders an application to be incompetent. The case of **Julius Rutabanja v JSI Research & Training Institute Inc. Revision No.49 of**

2011, HC Labour Division (unreported), is only one of such decisions.

Even so, it a well established principle that each case must be heard on its own merits. So, it all depends with the circumstances of each case seeing that some errors or omissions may not be fatal while others are fatal. See, for instance, the cases of **Qing International Investment Ltd v TOL Gas Limited, Civil Application No.292 of 2016, CAT at DSM (unreported); OTTU on behalf of P.L.Assenga & 106 Others v Ami Tanzania Ltd, Civil Aplication No.35 of 2011, CAT, at DSM (Unreported)**.

To conclude, Mr. Nangi's submitted that, citing an improper provision will not trigger the Court's powers because judicial functions are a reserve for special occasions and can only be exercised when the Court is properly moved. The effect, he argued, is to struck out the Petition with costs.

For his party, Mr. Stolla, learned counsel for the Petitioner, submitted that, this Court has jurisdiction to hear and determine

the Petition. He stressed that, the jurisdiction of this Court is independent of whether or not the Petition before it is maintainable. He noted that, the counsel for the Respondent does not object that section 16 of the Arbitration Act, Cap.15 [R.E.2002] gives this Court powers to set aside an Arbitral Award.

Addressing the sub-issue regarding whether the Petition was prematurely before this Court, he argued that, such issue has nothing to do with the jurisdiction of this Court. He submitted that, the Petitioner is not challenging the registration of the award but the award itself as the grounds in the Petition indicate.

He concluded, therefore, that, since that is the position and the Respondent is not denying about the existence of the award, then the Petition has been filed timely and not prematurely.

Mr. Stolla appreciated the authorities cited by the learned counsel for the Respondent and conceded that they indeed put forward the correct position of the law. However, he distinguished them on the ground that they would have been relevant if the

substance of the petition was aiming at the registration of the award.

As regards the second limb of the preliminary objection, Mr. Stolla, learned counsel for the Petitioner, argued that, the enabling provisions cited are three. These are section 16, 29 and 30 of the Arbitration Act, Cap.15 [R.E.2002]. He maintained that, all these sections are applicable in the Petition at hand.

Besides, in the alternative, Mr. Stolla argued, that, should it be found that section 29 and 30 are inapplicable in this Petition, there the Court should find that there is a mixture of both applicable and inapplicable provisions of the law.

He referred this Court to the Court of Appeal Decision in the case of **Duda Dungali v The Republic, Criminal Application No.5 of 2014,** CAT, at Mbeya (unreported), where it was held that, the citing of a mixture of irrelevant or superfluous provisions with the right ones does not oust the Court's jurisdiction to hear and determine an application set before it.

In view of the above case, he argued that, since the Respondent attacked section 29 and 30, but not section 16, then, the Court shall only ignore the superfluous provision, (if at all they are superfluous). In conclusion, Mr. Stolla submitted, that, the Petition is competent before the Court and, prayed that the objections raised should be dismissed with costs as being devoid of merit.

In his rejoinder submission, Mr. Nangi and submitted that, the submissions made by the learned counsel for the Petitioner, takes us back to the definition of what does the term 'jurisdiction of the Court' mean. In his views, and correctly so, the term jurisdiction refers to the power of the Court to exercise its majesty to deal with particular matter which is before it.

He argued, however, that, while the jurisdiction of the Court cannot be regarded as the *rules of Medes* and *Persians*, the same can be restricted by the law. In regard to the Petition at hand, he submitted that, the powers of the Court cannot be invoked as the matter before it has been brought prematurely.

As such, Mr Nangi maintained that, the Court cannot exercise its majesty and powers on petition which is prematurely brought before it as there a legal restriction to it. He added, however, that, in general this Court has jurisdiction, but it is restricted or limited. In his further rejoinder, Mr. Nangi submitted that, the Respondent's prematurity argument is based on the fact that, currently, there are no proceedings before the Court for registration of the Arbitral Award in accordance with the laid down procedures.

As regards the submissions that there has been a cock-tail of enabling provisions, Mr. Nangi submitted that, since he was not in a position to read the case relied upon by the learned counsel for the Petitioner, the case should not be relied upon as doing so will prejudice the Respondent. As regards the last argument, however, Mr. Nangi was not elaborate enough regarding how the Respondent will be prejudiced if the decision is availed to the Court since the decision referred to by the learned counsel for the Respondent is a valid decision of the Court of Appeal. In the end, he asked this court to uphold the preliminary objection and dismiss the Petition with costs.

I have listened to the rival submissions of the learned counsel for the parties and I am grateful for their well thought arguments and their supporting authorities. In my view, the basic issue that I am called upon to address is: **whether the preliminary objection raised by the Respondent is meritorious.**

According to the learned counsel for the Respondent, the objection is meritorious and the Petition should be struck out. However, according to the learned counsel for the Petitioner, the objection is devoid of merits and should be dismissed. That is the dichotomous situation which I am called upon to resolve.

In his submissions, the learned counsel for the Respondent raised a jurisdictional issue to the effect that, this Court lacks jurisdiction to entertain the petition because it is prematurely brought before it. The prematurity alleged is in relation to the fact that, when the Petition was filed in this Court, the Award was yet to be filed. That fact, therefore, is the basis of the Respondent's argument that the Court has no jurisdiction and, if it does, its jurisdiction is limited or restricted by the law.

In my view, I think the question whether the Court has or does not have jurisdiction is a simple one. The law has provided that the court has power to set aside an Award. Section 16 is very clear about that. So to give a quick answer, I am in agreement with the learned counsel for the Petitioner that, this Court is vested with authority to set aside an Award.

In essence, what Mr. Nangi should have considered in his submission is whether in the circumstances of this Petition, the powers of the Court could be triggered. That question is what should be raised in relation to the jurisdiction of this Court. I will therefore determine the matter along that line of thinking.

In that regard, although on the one hand I will side with Mr. Stolla, the learned counsel for the Petitioner, that, this Court has jurisdiction to entertain a Petition filed under Section 16 of the Arbitration Act Cap. 15 [R.E.2002], on the other hand, I will, as well, differ with him regarding whether such jurisdiction can be exercised or triggered in the instant Petition, and whether it is correct to disregard the submissions made to the effect that the Petition has come rather prematurely.

As correctly submitted by Mr. Nangi, the jurisdiction of this Court is triggered once an Arbitral Award is filed in this Court and not before. Authorities abound regarding that position. In the case of **Tanzania Cotton Marketing Board v Cogegot Cotton Company SA [1997] T.L.R. 165,** the Court of Appeal of Tanzania held, on page 172 of its decision, that:

> "On the basis of the Indian Decisions, we are persuaded to take the view that, **as a matter of law, it is not necessary to conduct proceedings before an order for filing is made**. In our view, **the receipt of the award by the Court Registry constitutes filing of the award. Thereafter, the court is required to notify the parties who may wish to challenge or enforce the award in terms of the law.**" (*Emphasis added*).

The above position was followed by this Court in the case of **Kigoma/Ujiji Municipal Council v Nyakirang'ani Construction Limited, Misc. Commercial Cause No.239 of 2015 (unreported).** In that decision, Mwambegele, J., (as he then was) stated, at page 6, as follows:

> "For purposes of regularizing ... understanding, I hasten to observe that **a party aggrieved by an arbitral award has no avenue to challenge the same through a Court of law until and unless the award if filed in court for purposes of**

registration as a decree of the court- See Tanzania Cotton Marketing Board v Cogegot Cotton Company SA [1997] T.L.R. 165." (**Emphasis added**).

Other decisions that have laid emphasis on that position include the recent decision in the case of **Afriq Engineering & Construction Co. Ltd v The Registered Trustees of the Diocese of Central Tanganyika, Review No.3 of 2020, (HC) Commercial Division** (Unreported); **Ardhi University v M/s Kiundo Enterprises (T) Limited, Misc. Commercial Cause No.272 of 2015, HC, Commercial Division,** (unreported) and **ISOB BPO Tanzania Ltd v Equity Bank (Tanzania) Ltd, Misc. Civil Cause No.659 of 2016, (HC) DSM District Registry** (unreported).

As regards the process of registration of an Arbitral Award, this Court, in the case of **Ardhi University v M/s Kiundo Enterprises (T) Limited** (supra), on page 15 of its decision, stated as follows:

"At this juncture, I find it apposite to summarize the answer to the question posed earlier: the process of presenting an arbitral award at the court registry, the relevant file opened and a number given to it constitutes filing of the arbitral award. What follows after that is the file to be placed before

a judge for necessary orders during which, whoever wished to challenge it (the arbitral award filed), normally the respondent, will be allowed to do so. Short of which the arbitral award, by an order of the Court, will assume another status- an enforceable decree of the Court. **The right to challenge an arbitral award by the respondent, accrues after filing.** An arbitral award cannot be challenged in court before it is filed. An arbitral award becomes a decree of the court after an order by a judge to confer it such status." (Emphasis added).

In the case of **Afriq Engineering & Construction Co. Ltd v The Registered Trustees of the Diocese of Central Tanganyika, Misc. Commercial Cause No.4 of 2020,** HC Comm. Division (Unreported), this Court, quoted with approval the decision of Indian case of **O. Mohamed Yusuf Levai Saheb vs S. Hajee Mohammed Hussain Rowther, AIR 1964 Mad 1,** which made it clear that:

"It is also now settled that **an application to set aside an award will be maintainable only after the award comes into Court and not earlier and the time for filing such an application would be reckoned only thereafter.** .... **If, therefore, an award has been sent to the Court by the arbitrators,** it would be competent for it after following the prescribed procedure, to have it filed. **The plaintiffs/respondents** ... **will, however, have an opportunity to file an appropriate application within the time**

limited by law to have it set aside if they so desire and if according to them the award is invalid...." (Emphasis added).

From the above authorities, I am in full agreement with the learned counsel for the Respondent, that, the Petition has been pre-maturely filed in this Court. This means that, although the Court is vested with jurisdiction to hear and determine petitions seeking to set aside Arbitral Awards, its majesty and powers cannot be triggered prematurely. The same can only be triggered **after** an Award has been filed in this Court and **not before**. Doing otherwise is to wrongly trigger the jurisdiction of the Court and such a move will fail.

In view of the above, although the learned counsel for the Petitioner has argued that the Petitioner is not challenging the registration of the Arbitral Award, but the Award itself as the grounds in the Petition indicates, his challenge amounts to gun-jumping. He should have waited until such a time when the Arbitral Award is referred to this Court for its registration in accordance with the law.

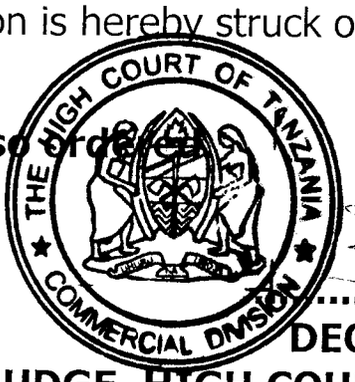
The filing process, as elaborated in the case of **Ardhi University v M/s Kiundo Enterprises (T) Limited** (supra), and as stated in the case of **Afriq Engineering & Construction Co. Ltd v The Registered Trustees of the Diocese of Central Tanganyika, Misc. Commercial Cause No.4 of 2020 (supra)** is a *Post-arbitration Award rendering Process* which culminates into a binding and enforceable decree, if no successful challenge is mounted against the Award (see section 17 of the Arbitration Act).

In view of the above reasoning, I find that, the first limb of the objection raised by the learned counsel for the Respondent is meritorious. The Petition has rather come before this Court prematurely and should be struck out. That being said, I find no reasons why I should labour to address the second limb of the preliminary objection. It is sufficient to hold, as I do, that, the Petitioner has knocked at the doors of this Court too early. He ought to have waited until when the Arbitral Award is filed.

In the upshot, I hereby uphold, as stated herein, the first line of the preliminary objection to the effect that, the Petition has been brought prematurely and, as such, the jurisdiction of this

cannot be triggered under such circumstances. In view of that, this Petition is hereby struck out with costs.

It is so ordered.



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DEO JOHN NANGELA
JUDGE, HIGH COURT OF TANZANIA (COMMERCIAL DIVISION)
14/05/2020

Ruling delivered on this 14th day of May 2020, in the presence of the Advocates for the Applicant and the Advocate for the Respondent.

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DEPUTY REGISTRAR
HIGH COURT OF TANZANIA (COMMERCIAL DIVISION)
14/05/2020