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

CONSOLIDATED MISC. COMMERCIAL CAUSE NOs. 25 & 11 OF 2021

IN THE MATTER OF ARBITRATION AND IN THE MATTER OF ARBIRTATION ACT, [CAP.15 R.E 2020]

AND

IN THE MATTER OF ARBITRATION UNDER THE NATIONAL CONSTRUCTION COUNCIL ARBITRATION RULES 2001 EDITION

BETWEEN

M/S MARINE SERVICES CO.LTD .....PETITIONER

VERSUS

M/S GAS ENTEC COMPANY LTD.....RESPONDENT

Last order: 3rd August, 2021
Ruling: 17th September, 2021

RULING

NANGELA, J:,

This ruling arises from a petition filed by the Petitioner, following an award which the Respondent presented to the Court to be enforced in the same manner as a judgment or order of the court. The award was filed by the Respondent as **Misc. Commercial Cause No. 11 of 2021** on the 12th day of March 2021.

Before I look at the nitty-gritty of this Petition, let me set out its facts, albeit in brief. It all started on the 3rd day of September 2018. On the material date, the Respondent signed a Contract, No. PA/ 115/2016/2017/MSCL/G/01, for Designing,

Building, Supplying and Commissioning of One New Vessel in Lake Victoria with the Petitioner. The contract arose out a procurement process and was worth **US$ 39,000,000** and, as such, its applicable Conditions of Contract for the Works were Conditions of Contract for Designing and Building of Construction Works 2018, issued by the Public Procurement Regulatory Authority (PPRA). Its effective date was the 17th January 2019 and its duration was for 24 months.

In the course of execution of the works, a dispute centred on the Petitioner's refusal to accept a revised contract sum submitted by the Respondent arose necessitating the parties to kick-start the remedial process stipulated in the Contract. In particular, the Respondent claimed for a revised contract price worth **US$ 40,513,750.00** for the contracted works, instead of the originally agreed contract sum of **US$ 39,000,000**. The differential amount which pushed up the contract price, hence prompting the Respondent to call for a revision of the initial contract price, it is averred, was a sum of **US$ 1,513,750** incurred by the Respondent for hiring cranes in the course of assembling and fabrication of the new vessel in the Lake Victoria.

While the Respondent claimed that it was the Petitioner who, as per the Contract, should have shouldered such an increased financial burden (alleging that the Petitioner ought to have provided the Respondent with cranes to lift heavy blocks) the Petitioner shifted the burden to the Respondent, arguing that, the Contract so dictated.

Following such a disagreement, and which, it is alleged, could not be settled amicably, a necessity unfolded that saw the kick-starting of the arbitral process stipulated in the Contract. The Respondent, therefore, approached the National Construction Council (NCC), as agreed Arbitration Institute, calling upon it to initiate the process of appointing an arbitrator who would handle and resolve the dispute.

By way of a Letter, Ref. No. DA/21/111/19 dated 7th September, 2020; the NCC appointed one, **Eng. Julius Mamiro** as a sole arbitrator. Before the hearing, the Petitioner, (by then the Respondent) raised a jurisdictional challenge which, nevertheless, was dismissed. Finally, having heard the parties, the Sole Arbitrator published his Final Award on 28th January 2021 in favour of the Respondent. In his Final Award, the Sole Arbitrator:

1. rejected the Respondent's Jurisdictional Challenges and decided that he was vested with requisite jurisdiction.
2. Partly allowed the Respondent's Claim for Revision of the Contract sum from **US$ 39,000,000/=** to **US$ 40,513,750** by adjusting it adding a total of **US$ 1,333,750** to the original contract sum.
3. Shouldered the parties to a liability of jointly and severally paying the costs of the arbitration (Each being required to pay **TZS 6,435,800**).
4. Ordered each party to bear its own costs.

5. Denied all other relief not specifically addressed in the award.

Armed with the award, the Respondent approached this Court with a view to have it, with the leave of the Court, enforced in the same manner as a judgement or order of the court. Section 73 (1) of the Arbitration Act, [Cap.15 R.E 2020] does provide for that avenue.

However, as provided for under section 73 (3) of the Act, before leave is granted, the person against whom the award is sought to be enforced shall have as of right, an opportunity if so desires, to challenge the award. Consequently, on the 19th day of May 2021, pursuant to Rule 63(1) of the Arbitration (Rules of Procedure) Regulations, G.N 146 of 2021, the Petitioner herein moved in to challenge, by way of a Petition, the filing and enforcement of the Sole Arbitrator's Award.

In its Petition, the Petitioner prays for the following orders:

(i) That, the whole Award be set aside on the basis of there being misconduct and irregularity.
(ii) The Award be declared of no effect.
(iii) Costs of the petition be granted.
(iv) Any other order(s) /relief this honourable Court may deem just and proper to grant in the interest of justice.

The Petitioner premised its prayers on seven grounds, characterised as serious irregularities on the part of the

arbitrator, and called for the annulment of his award. The particular grounds raised by the Petitioner, were as follows:

(i) That the arbitrator misdirected himself and committed serious irregularity when he proceeded with the making of the award without having any pre-requisite jurisdiction.

(ii) The Arbitrator misdirected himself when he directed that he had jurisdiction to determine the matter, ignoring the submission by the Petitioner as regards his jurisdiction.

(iii) The Arbitrator misdirected himself and committed a serious irregularity by acting with bias when he issued Order of Direction No.2 on the 12th day of November 2020 which overruled the Petitioner's preliminary objection before receiving confirmation of the Claimant's letter Ref. No. GET/TZ/2019/118 from Advocate Julieth Kisanga as directed by himself to be furnished with it on the 17th November 2020.

(iv) That, the arbitrator misconducted himself and committed serious irregularity as the award is marred with uncertainty or ambiguity for failure to interpret contractual provisions between the parties as regards who had a duty to provide cranes.

(v) That, the Arbitrator misconducted himself and committed serious irregularities due to his failure to properly interpret the limit of powers of the Project Manager as per Clause 3.1 of the GCC.

(vi) That the Arbitrator has committed serious irregularity for failure to consider and determine the issue on distinction between the contract for Lot one and Lot 2.

(vii) That, the Arbitrator misconducted himself and has committed serious irregularities in awarding the Respondent's claim of USD 1,333,750 without any proof or justification warranting for such an award.

On the 16th day of June 2021, the Respondent filed an **"Answer to the Petition"** disputing all averments in the Petition and putting the Petitioner to strict proof. On the 25th of June 2021, the parties appeared before me. The Petitioner enjoyed the legal services of Mr David Kakwaya and Andrew Rugarabamu, learned State Attorneys, while Ms Agnes Dominick, learned advocate held brief of Mr Kitta Mlinga, Advocate for the Respondent.

On the material date, the parties agreed to have **Misc. Commercial Cause No.25 and No.11** consolidated and be heard and determined together. I granted the prayer and ordered the parties to dispose of the Petition by way written

submissions. A schedule of filing of the respective submissions was issued and the parties duly complied with it.

I will proceed, therefore, to summarise their submissions on each of the grounds raised by the Petitioner, before I analyse them in light of the existing law and finally deliver my verdicts. I will start, however, with **GROUNDS No.1** and **No.2** of the Petition, summing up how each of the parties herein submitted on these grounds.

Submitting on the **GROUND 1**, Mr George Mandepo, the Learned Principal State Attorney representing the Petitioner, contended that, one of the roles played by this Court is to ensure that arbitral proceedings are conducted fairly and thoroughly by arbitral tribunals.

That is fair enough a submission and, indeed, the very spirit of the law as enshrined in section 37(1) (a) of the Arbitration Act. However, one should not lose sight to the fact that, fairness and thoroughness of the arbitral tribunal as enshrined in that provision, presupposes that the arbitral tribunal is seized with jurisdiction to act. Premising his argument on that thesis, Mr Mandepo argued, in support of the first ground of this Petition, that, the Sole Arbitrator misdirected himself and committed serious irregularity when he proceeded with the making of the award without having any pre-requisite jurisdiction.

In a bid to justify and advance his case from that premise, and referring this Court to Clause 20.2 of the General Conditions of Contract **(GCC)**, Mr Mandepo submitted that, the Contract signed by the parties had a multi-tier form of dispute

resolution. According to Mr Mandepo, the initial stage was the issuance of a Notice of Dispute inviting parties to engage in **mutual consultations** and **negotiations**, and to the best use of their efforts, amicably resolve their dispute within 28 days.

Mr Mandepo's submitted that, according to Clause 20.2 of the GCC, if the dispute was to remain unresolved, the second agreed stage was to have it referred to a **Dispute Adjudication Panel (DAP)**. He contended, however, that, under Clause 20.2 of the Special Conditions of Contract **(SCC)**, and this is his bone of contention; the **DAP** was not established, meaning that, that agreed second stage was not observed but, instead, the Respondent rushed to **Arbitration**, which is the third final stage. Mr Mandepo argued, therefore, that, by virtue of Clause 20.5 of the **GCC** and Clause 20.5 of the **SCC**, arbitration could only be resorted to as the agreed **third step** in resolving any of the parties' dispute after failure of amicable settlement and Adjudication (if any).

From that understanding of him, Mr Mandepo contended that, even if the dispute was referred to arbitration, the Respondent had "*failed to exhaust all the pre-arbitration remedy under the dispute settlement clause*". Consequently, it was his contention that, there was no dispute before the arbitrator capable of being arbitrated or determined through an award enforceable as a judgment of the Court and, there being no such a dispute, then, an appointed arbitrator had no jurisdiction.

Relying on the case of **Azov Shipping Co. vs. Baltic Shipping Co.** [1999] 2Lloyd's Report, Mr Mandepo contended that, arbitration being a consensual process, the binding nature of its outcomes will necessarily depend on how each participant in the process complied with the agreed dispute settlement clause in the agreement and subsequent agreements in the course of the proceedings.

In that case of **Azov** (supra) the Petitioner had from the day go challenged the jurisdiction of the arbitrator and, the Court set aside the award on the ground that, the Plaintiff had not agreed to be bound by the underlying contract. Reliance was also placed on the Court of Appeal of Tanzania's decision in the case of **M/s Tanzania China Friendship Textile Co. Ltd vs. Our Lady of Mount Usambara Sisters** [2006] T.L.R. 70 and **Mvita Construction Company vs. Tanzania Harbours Authority**, Civil Appeal No.94 of 2001 (unreported).

In the **M/s Tanzania China Friendship Textile Co. Ltd (supra)** the Court restated the settled legal position that, an objection to jurisdiction can be raised at any stage. Indeed in **Mvita Construction's case** (supra), the Court was of the view that, an arbitrator's jurisdiction is derived from or founded on the agreement of the parties to submit present or future differences to arbitration, and, that, want of jurisdiction will render the award a nullity. That is still the law even today.

At that juncture, Mr Mandepo, the learned Principal State Attorney urged this Court to take note of the fact that, the admissibility, tenability and jurisdiction of the Sole Arbitrator

were thorny issues the Petitioner had raised and argued earlier enough but the Sole Arbitrator did not take time to investigate that particular argument. He contended that, the Arbitrator, instead, and through an **Order of Direction No.2** issued on the 12th day of November 2020, dismissed the preliminary points intended to object to the propriety of the proceedings.

It was, as well, contended, and reliance was placed on the Arbitrator's Revised Programme for the Proceedings issued on the 12th day of November 2020, that, by the time the Sole Arbitrator issued his **Order of Direction No.2**, such ruling was issued before receiving the Respondent's reply to the points of Defence /Counter-claim or rejoinder. According to Mr Mandepo, the Reply to the Statement of Defence was to be filed on 18th November 2020 and Rejoinder was to be filed on 3rd of December 2020.

In view of the above state of affairs, Mr Mandepo submitted that, since the Petitioner's objection to admissibility of the Claim was part of her defence, the dismissal of the Petitioner's objection by way of a mere **"Order of Direction"** instead of an **"Interim Award"** as the law would require, meant that, the dismissal was done without affording the Petitioner a full opportunity to be heard, hence, contrary to the principles of natural justice.

Submitting on **GROUND No.2**, Mr Mandepo submitted that, the Sole Arbitrator misdirected himself when he held that he had jurisdiction to entertain the Claim and ignored the Petitioner's submission. It was contended that, immediately after the Sole Arbitrator issued his **Order of Direction No.2**,

he directed the parties to finalise their Pleadings on the basis of the *Revised Programme of Proceedings*. As such, it was argued by Mr Mandepo, a "*Reply*" by the Respondent was filed on 18th November 2020 and the Petitioner's Rejoinder on 3rd of December, 2020.

He contended further that, even with the **Sole Arbitrator's Order of Direction No.2**, still the Petitioner maintained her jurisdictional challenge (*as it may be seen from pages 5 and 6 of the Petitioner's Rejoinder filed on 3rd of December 2020*), but the Sole Arbitrator did not consider any of such argument in his Final Award. It was contended, therefore, that, the Sole Arbitrator chose to ignore the Petitioner's submission on such a crucial issue.

Mr Mandepo maintained that, since the arbitration process was preferred on the 07th January 2020 at the time when there was no any record that the parties had attempted to negotiate and resolve their differences, it would mean that, the Respondent herein referred the matter to arbitration prematurely and in contravention of the Dispute Settlement Clause contained in the Contract signed by the parties and, for that matter, the arbitrator lacked jurisdiction and the award was entered illegally.

To buttress his submission, Mr Mandepo placed reliance on the case of **Patty Interplan Ltd vs. TPB Bank Plc**, Civil Application No.103/01 of 2018 (unreported), arguing that, where there are stipulated procedures to settle a dispute and such procedures are not followed, then any decision resulting there from cannot stand but should be set aside.

Responding to the Petitioner's submission on **GROUNDs No.1** and **2** of the Petition, Mr Mlinga, the learned counsel of the Respondent, adopted the contents of the "Answer to the Petition" filed in this Court, as forming part of its submission. He contended that, the Sole Arbitrator was seized with the requisite jurisdiction. He submitted that, it was an erroneous, misconceived and, hence, misleading view to contend, as the Petitioner seems to do, that the arbitration was preferred prematurely before exhausting available avenues as per Clause 20.5 of the **GCC** and Clause 2.20 of the **SCC**.

Mr Mlinga contended that, according to Clause 20 of the **SCC** that Clause, the **DAP** was rendered inapplicable in relation to the Contract forming the core of the parties' dispute which triggered the arbitral process. He was of a strong view, therefore that, by virtue of Clause 20 of the **SCC**, there was no need to establish the **DAP** as contended by Mr Mandepo. He also disputed, as a fallacious view; the contention held by Mr Mandepo that, the dispute resolution envisaged in the contract was a multi-tier three stage arguing instead, that, what was an envisaged mode of dispute resolution was a two-tier step whereby, the first was through amicable settlement, failure of which a last resort would be a reference to arbitration.

According to Mr Mlinga, it was clear from the record that, the Respondent did indeed issue a Notice of Settlement on 18th November 2019 (attached to the Petition as **Annexure OSG-2**). He contended, however, that, no settlement was reached by the parties and, that, when the arbitration process was invoked, there was already a dispute and the Petitioner

was well aware of it. He argued, therefore, that, since the Respondent's Letter of Intention to submit Claim No.1 under Clause 20.1 of the **GCC** was not heeded to; next step was to invoke Clause 20.2 and trigger the arbitral process, a step which the Respondent took on 18th November 2019.

Admitting that arbitration is a consensual process and parties are bound by their agreement and subsequent agreement, Mr Mlinga contended, however, that, the contract contained arbitration agreement within its dispute resolution clause, and, the same was adhered to. He argued, as well, that, the initial meetings of the parties held on 23rd September 2020 did also constitute an agreement subsequent to the arbitration agreement which was binding upon the parties as they were asked to confirm the arbitrator's jurisdiction. Consequently, and relying on section 123 of the Evidence Act, Cap.6 R.E 2019, Mr Mlinga contended that, the Petitioner is estopped from objecting to the jurisdiction of the arbitrator.

Commenting on the cases of **Azov Shipping** (supra), **M/s Tanzania China Friendship Textile Co. Ltd** (supra) and **Mvita Construction's case** (supra), Mr Mlinga submitted that, the first case states the obvious. However, as regards the rest of the cases, he contended that, much as he agrees with the principles stated there in, he could not see their applicability after an award has been published. He contended that, at best, they are applicable in a situation where no objection was raised at all unlike in the present Petition where the Petitioner raised that objection and it got dismissed.

As regards the contention that the Petitioner's right to be heard was infringed, Mr Mlinga was quite vociferous, stating that, no injustice was ever committed since the Sole Arbitrator's decision to dismiss the objection was made after the hearing of the Respondent also. For that matter, he maintained that, the arbitrator had all he needed to be able to determine the Petitioner's objection. On the contrary, he argued, if it was a matter of pre-mature determination of the Objection, and hence a denial of right, then it was the Respondent who should have raised that discontent since it was the Respondent who was entitled to file a Reply.

As regard the Petitioner's submission that her consistent objection was not dealt with in the final award, Mr Mlinga was of the view that, since the Sole Arbitrator was already *'functus officio'* having determined the objection as per his **Order of Direction No.2** dated 12th November 2020.

On 30th July 2021, the Petitioner filed rejoinder submissions which I will take on board in the course of my deliberations. As I stated earlier, I will deal with these two grounds first because an issue regarding lack or excess of jurisdiction is a paramount one and needs to be given priority. While I take note of its paramountcy, I am also guided by the fact that, this petition is not an appeal.

As once stated in **Vodacom Tanzania Ltd vs. FTS Services Ltd, Civil Appeal No.14 of 2016, (CAT) (unreported)**, in dealing with arbitral petition like the current one at hand, the Court does not act as an appellate Court and will not have the luxury of re-appreciating the evidence. In

CATIC International Engineering (T) Ltd vs. University of Dar-es-Salaam, Misc. Commercial Case No.1 of 2020 (unreported) this Court also noted that:

> "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."

The above cited legal principles are of global application as they apply even in other jurisdictions. See, for instance, the Indian Supreme Court decision in the case of **SsangYong Engg. & Construction Co. Ltd vs. NHAI**, (2019) 15 SCC 131. My considerations or scope of interference on the award in this Petition, therefore, are to be confined within the legally allowable parameters which, in our jurisdiction, are now well settled and set out in sections 74 and 75 the Arbitration Act, [Cap.15 R.E 2020], one of them being a challenge relating to the substantive jurisdiction of the tribunal.

Essentially, when an arbitrator acts on a matter before him/her, but with no jurisdiction, or where he has jurisdiction but acts in excess of it, his conduct will amount to a violation of the arbitration agreement. It is such kind of a violation; therefore, a party may wish to halt through a petition filed against enforcement of an arbitral award.

It is also worth noting that, although in most cases jurisdictional challenges are commonly raised by the Respondents, Claimants may as well raise such legal points. In the case of **Primetrade AG vs. Ythan Ltd (The Ythan) [2006] 1 All ER (Comm), 157**, for instance, it was the Claimant who applied to challenge the jurisdiction of the arbitral tribunal.

In this Petition, however, it was the Petitioner who raised it before the Sole Arbitrator and, as submitted, raised it at the earliest stage of the arbitral proceedings. That, indeed, was consistent with what section 35 (1) of the Arbitration Act, [Cap.15 R.E 2020] provides, since, as per section 80 (1) of the Arbitration Act, [Cap.15 R.E 2020], failure to raise such an objection at the earliest opportune time, makes one to lose his or her right to object, unless otherwise his or her delay is justified. Unjustified failure will amount to acquiescence. That position is not unique.

In England, the case of **Trading Ltd v. Gill & Duffus SA [2000] 1 Lloyd's Rep. 14**, illustrates that point. In that case, His Lordship Mr Justice Moore-Bick drew attention to the function of section 73 (1) of the English Arbitration Act 1996 (which is in *pari materia* to section 80 (1) of the Arbitration Act, [Cap.15 R.E 2020] noting that, the section requires a party with grounds for objection to the jurisdiction or constitution of the arbitral tribunal or to the conduct of the proceedings, to raise his or her objection as soon as he is, or ought reasonably to be aware of it.

I am also aware, of course, that, our law gives the Arbitral tribunal wide margin of appreciation or discretionary latitude within which an arbitral tribunal may alter the time as to when an objection can be raised. That power, is under section 35 (3) of the Arbitration Act, [Cap.15 R.E 2020]. By virtue of it, an arbitral tribunal is at liberty, depending on the circumstances of each case, to allow a jurisdictional challenge to be raised even outside the prescribed period of time.

In this Petition, the Petitioner has contended that, although the issue regarding the arbitrator's jurisdiction was raised afresh in the course of the proceedings, the same was not considered by the Sole Arbitrator in his final award. The Respondent has contested that submission arguing, in the first place, that, the Petitioner is precluded from raising it at this stage. He even distinguished the authorities relied upon by the Petitioner, arguing, that, he could not see their applicability after an award has been published.

In my view, that is not a correct position of the law. The settled and correct position of the law is that, an objection to jurisdiction can still be raised at this stage, provided, and as I stated earlier here above, that, there are justifiable reasons why it was not raised before. Moreover, even if it might have been raised earlier, that fact by itself does not bar a party from bringing that point to the fore again, after the award has been published.

I hold such a view because, questions regarding jurisdiction go to the root of the matter. That is one of the reasons why the Court of Appeal in the **M/s Tanzania China**

Friendship Textile Co. Ltd (supra) emphasized that, an issue touching on jurisdiction of an adjudicating body, a court or a tribunal, can be raised at any stage, even at the appellate stage.

In the case of **The Registered Trustee of the Diocese of Central Tanganyika vs. Afriq Engineering & Construction Co. Ltd, Consolidated Comm. Cause No.4 &9 of 2020**, this Court did hold, inter alia, that, of itself, a want of jurisdiction is a glaring error on face of record which has the potential of vitiating proceedings and, thereby, rendering everything done by a court or a tribunal a nullity.

In **Mvita Construction's case** (supra), the Court of Appeal reasoned that, an arbitrator's jurisdiction is derived from the agreement of the parties. In my view, that case cannot be said to have no relevance to the Petition at hand as argued by Mr Mlinga, for a simple reason that, it reminds this Court, as well as the parties, that, as a starting point, one has to revert to the Contract itself and find out what the parties agreed under their particular provision constituting the arbitration agreement.

However, I tend to agree with Mr Mlinga's submission on two points. Firstly, is that, the arbitrator's decision to dismiss the Petitioner's objection was based on what was available before him and which he considered to be sufficient for him to make a determination. As it may be seen on page 2 of the **Order of Direction** dated 12th November 2020, both the Petitioner (Respondent) and the Respondent (Claimant) were heard by the arbitrator and he made a ruling thereon.

Likewise, the submission that the Sole Arbitrator ignored the Petitioner's submission cannot stand simply because his ruling was based on the submission made by the Petitioner and the Respondent as it may be observed on page 2 of the **Order of Direction** dated 12th November 2020. As such, the issue of being denied right to be heard, as contended by Mr Mandepo, cannot arise if one is to strictly stand by what is apparent on page 2 of the Arbitrator's **Order of Direction**, unless the argument twists to a different angle of consideration which would altogether warrant a different set of argument. For such reasons, **GROUND NUMBER 2** of the Petition should fail.

Secondly, I also agree with Mr Mlinga that, since the Arbitrator had made a decision in his Order of Direction dated 12th November 2020, which in effect dismissed the objection premised on the issue of jurisdiction, reopening the matter and deciding on it in the final award, as the Petitioner seems to argue, would have been improper simply because, by that time the Sole Arbitrator was already *functus officio*. It suffices to note, however, that, the Arbitrator included such eventuality in the award as part of giving details regarding the process which culminated into the issuance of the final award. In view of that, even Mr Mandepo's contention that the Arbitrator did not include that matter in his Final award is erroneous.

On the other hand, let me emphasize here, that, the fact that the Arbitrator made a ruling on the jurisdictional issue, does not, as I stated herein above, bar or estop the Petitioner from raising the same issue in its Petition at this stage. It is

also worth noting, that, nowhere has it been indicated that, the Petitioner acquiesced in not raising his objection to jurisdiction of the arbitral tribunal.

Besides, it is clear to me that, challenges to the substantive jurisdiction of an arbitral tribunal with a view to set aside an award under section 74 (1) (c) or section 75 (3) (b) or declaring any award to be of no effect under section 75 (3) (c) of the Arbitration Act, [Cap.15 R.E 2020] may, pursuant to sections 74 (1) or section 75 (1) of the Act, be made or raised as matter of right. It suffices to say, therefore, that section 74 (1) (a) of the Arbitration Act, Cap.15 R.E 2020 does permit a party to raise the issue regarding jurisdiction of the tribunal even after the award has been published.

Having said all that, the question that remains, and which is at the epicentre of **GROUNDS No.1** of this Petition, is whether the arbitrator proceeded with the hearing of the matter without jurisdiction.

In his submission, Mr Mandepo has contended that, the arbitral proceedings were held prematurely since, according to the Clause 20.2 of the General Conditions of Contract **(GCC)** signed by the parties, a multi-tier form of dispute resolution process was established. He argued that, by virtue of Clause 20.5 of the **GCC** and Clause 20.5 of the **SCC**, arbitration was an agreed third and final step in resolving disputes among the parties after failure of the amicable settlement and Adjudication, the latter being conducted through a Dispute Adjudication Panel (**DAP**), which he argued, was not formed.

It was from that point Mr Mandepo took offence with the arbitrator contending that, the Arbitrator could not have been properly vested with jurisdiction while there was a deliberate skipping of a dispute resolution stage agreed by the parties.

As noted above, the Respondent has utterly denounced that assertion maintaining that, the Sole Arbitrator had jurisdiction and, that, the dispute resolution stages were only two and not three, and, that, the first was exhausted paving room for arbitration. It is clear from the award that, the Sole Arbitrator's ruling did make a finding that the Petitioner herein, was challenging the admissibility of the claim on ground that it has been prematurely submitted to arbitration. He also ruled that, attempts to settle the claim amicably were made, and further that, Clause 20.2 of the SCC had eliminated the ADR option, thus making the claim amenable to arbitration. On that account, he dismissed the objection.

As a matter of legal principle, it is the Contract of the parties that should be looked at even when one is to decide how the parties had agreed to resolve their disputes and, an arbitrator or an adjudicator, cannot go against the wishes of the parties. In **Mvita Construction's case** (supra), the Court made it clear that an arbitrator's jurisdiction is solely derived from and founded on the agreement of the parties.

Secondly, as is commonly known in arbitration context, jurisdiction of an arbitral tribunal refers to that authority or powers vested on it by the parties to make binding decisions affecting the merits of the case which they submitted before it. If the parties had prescribed how such powers should be

vested on the arbitrator, their prescription is mandatory and should be strictly adhered to.

In essence, as the Court of Appeal stated in **Patty Interplan Ltd** (supra), if the parties' contract has stipulated that parties are to exhaust a prescribed dispute resolution or remedial measures before they can exit to arbitration, then, failure to exhaust such dispute remedial measures, which stand as a conditional precedent to arbitration, will make any arbitral tribunal to lack its requisite substantive jurisdiction. The difference will only stand where it is shown that, the parties themselves agreed in writing to waive or skip such measures in favour of the arbitral redress process.

The above position is widely accepted as a concrete argument when Courts are called upon to determine the issue of arbitral tribunals' jurisdiction. For instance, in the English cases of **Wah (Aka Alan Tang) & Anor vs. Grant Thorton International Ltd & Ors [2012] EWHC 3198** and **Emirates Trading Agency LLC vs. Prime Mineral Exports Private Ltd [2014] EWHC 2104**, it was held, as a matter of principle, that, a failure to comply with an ADR Clause, as a precondition to commencing the arbitration process, gives rise to a jurisdictional challenge to the arbitral tribunal.

In the **Wah's case** (supra), the Court was of the view that:

> "The test is not whether a clause is a valid provision for a recognised process of ADR: it is whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be

> given legal effect. In the context of a positive obligation to attempt to resolve a dispute or difference amicably before referring a matter to arbitration or bringing proceedings the test is whether the provision prescribes, without the need for further agreement, (a) a sufficiently certain and unequivocal commitment to commence a process (b) from which may be discerned what steps each party is required to take to put the process in place and which is (c) sufficiently clearly defined to enable the Court to determine objectively (i) what under that process is the minimum required of the parties to the dispute in terms of their participation in it and (ii) when or how the process will be exhausted or properly terminable without breach. In the context of a negative stipulation or injunction preventing a reference or proceedings until a given event, the question is whether the event is sufficiently defined and its happening objectively ascertainable to enable the court to determine whether and when the event has occurred."

From the above premise, let me examine, therefore, the provision of the Contract in question and find out what was expressly stated by the parties, *viz-a-vis* the what the learned counsel for parties have submitted herein and what was the arbitrator's decision.

In the first place, it is a correct and valid argument that, Clause 20 of the **GCC** governs dispute resolution among the parties. According to Clause 20.1 of the **GCC**, where a Notice of a Claim for additional payments is raised, a determination by the project manager must be made within 28 days after its receipt. That particular Clause provides further that, where there is a rejection (actual or perceived) an aggrieved party was entitled by that provision to refer the same issue to the other party for **"amicable settlement"** in accordance with Clause **GCC** 20.2. The **GCC**'s Clause 20.2 provides as follows:

> "In the event of any dispute arising out of this contract, either party shall issue a notice of dispute to settle the dispute amicably. The Parties hereto shall, within twenty eight (28) days from the notice date, use their best efforts to settle the dispute amicably through mutual consultations and negotiations. Any unsolved dispute **may** be referred to a Dispute Adjudication Panel (DAP) nominated by the appointing Authority in the SCC." (Emphasis added).

As it may be observed herein above, the applicability of Clause 20.2 of the **GCC** is subjected to Clause 20 of the **SCC.**

The preamble to the **SCC** is to the effect that, the **SCC** provisions are supplementary to the **GCC**, but where there is a conflict between the two, the **SCC** provisions shall prevail over those of the **GCC.** In the **SCC**, the relevant part of Clause 20 thereto, which corresponds with Clause 20.2 of the **GCC**, reads as follows:

Appointing Authority of Dispute Adjudicatio n Panel (DAP).	*The Dispute Adjudication Panel is not applicable to the Contract. Any Dispute not settled amicably **shall be** directly **referred to the arbitration** institution stated in the SCC and finally settled by the arbitration.*

Clause 20.5 of the **GCC** provides, inter alia, that disputes not settled amicably and in respect of which the DAP's decision (if any) has not became final and binding, shall be finally settled by arbitration.

From the above observations, I am, generally, in agreement with Mr Mandepo that, where, at the first instance, parties fail to settle their dispute amicably through **mutual consultations and negotiations**, Clause 20.2 provides for establishment of a **Dispute Adjudication Panel (DAP)**, and, that, Clause 20 of the **SCC** envisages a resort to **arbitration**. Those are indeed "three-tier stages" of dispute resolution as rightly submitted by Mr Mandepo.

However, from the look of things, it is clear to me that, what Mr Mandepo submit in defence of the **GROUND NO.1** of the Petition, does not align itself correctly with what the Clauses 20.2 and 20.5 of the **GCC** provide, if read together with Clause 20 of the **SCC**. The correct fact is that, while the Contract envisaged three stages of dispute settlement, it is clear from the contract itself, that, the parties **did not agree to the operationalisation of the second stage (i.e., the DAP stage)** as a precondition towards the third stage, which is arbitration.

That fact is pretty clear from Clause 20 of the **SCC** which provided that "**the DAP SHALL not apply**" to their

Contract but, that, once amicable settlement proves futile, recourse was to be had in arbitration. Consequently, since the parties failed to settle their dispute through mutual consultations and negotiations, and because the **SCC** directed them to arbitration, and not to the **DAP** stage, it follows, therefore, that, **GROUND 1** of the Petition lacks merit.

Had Clause 20 of the **SCC** operationalised the DAP process, as prescribed in Clause 20.2 of the **GCC**, then, by-passing such a requirement would have warranted the setting aside of the arbitrator's decision simply because the arbitration tribunal would have acted without jurisdiction. Apart from the cases I cited earlier, such a finding would have as well found a support in the **Partial Award in Case 16262, (ICC Dispute Resolution Bulletin 2015, No.1, page 75)**, in which the arbitral tribunal made a finding that:

> "a reference to the DAB (Dispute Adjudication Board) was a condition precedent to arbitration and that, since that conditional precedent [was] not satisfied, the Arbitral Tribunal [lacked] jurisdiction."

From the above persuasive decision, it goes without saying that, where it is an agreed condition precedent by the parties that arbitration should be preceded by another form of ADR, any reference to Arbitration instead of the agreed ADR, makes the arbitral tribunal to lack jurisdiction to determine the dispute. In this Petition, however, the ADR procedure envisioned in the Contract had been exhausted and, hence, the

Arbitrator was rightly seized with jurisdiction. The reference made to him, therefore, was not prematurely made.

Let me examine the **3rd Ground**. The Petitioner's **GROUND No.3** is centred on the issue of serious irregularity resulting from acting with biasness. It was argued that, the Sole Arbitrator overruled the preliminary objection before receiving confirmation of the Claimant's letter *Ref. No. GET/TZ/2019/118/01* dated 18th November 2019, from one, Advocate Julieth Kisanga, a letter which he had directed to be availed to him on the 17th November 2020.

It was argued that, the purpose of the letter was to prove whether the parties had indeed failed to settle the matter amicably. Mr Mandepo contended that, even before receiving the letter, the Sole Arbitrator made a ruling dismissing the objection regarding admissibility of the Claim. As such, Mr Mandepo maintained that, the Sole Arbitrator was biased in dismissing the Petitioner's objection without giving the Petitioner opportunity to revert to him concerning the letter and whether it was actually received. He maintained that, the Sole Arbitrator's hurried ruling without completion of the parties' pleadings demonstrated bias and, thus, occasioned an irregularity under section 70 (2)(a) and (b) of the Act (now section 75 (2)(a) and (b) of the Act, [Cap.15 R.E 2020]).

Mr Mandepo argued further that, this was an illegality or error of law apparent on the face of record and warrants the setting aside of the whole award. To support his submission, he placed reliance on the decision of this Court in the case of **The Registered Trustees of the Diocese of Central**

Tanganyika vs. Afriq Engineering & Construction Company Ltd, Consolidated Commercial Cause No.4 & No.9 of 2020 (unreported).

Responding to **GROUND No. 3**, Mr Mlinga, the learned counsel for the Respondent, was very brief. He denounced the alleged bias on the part of the Sole Arbitrator as an unfounded allegation and, maintained that, the Sole Arbitrator was all along acting fairly, having afforded equal opportunity to both parties. He admitted that, much as the Respondent was well aware of the letter *Ref.No.GET/TZ/2019/118/01* dated 18th November 2019 and item No.13 of the **Arbitrator's Order of Direction No.2**, no injustice was ever occasioned to the Petitioner.

From the above rival submissions, the question which I am faced with is whether the Arbitrator's decision to dismiss the objection before receiving the said letter *Ref. No. GET/TZ/2019/118/01* which he had ordered to be availed to him was an act constituting biasness. As this Court stated in the **Registered Trustees of the Diocese of Central Tanganyika** (supra), one of the cardinal principles in any arbitral process is that, the Arbitrator must be seen to act impartially. According to section 37 (1) (a) of the current Arbitration Act, [Cap.15, R.E 2020] the law has also placed a mandatory responsibility on the tribunal to "act fairly and impartially as between the parties."

Likewise, section 5 (a) (i) of the Act, set out the issue of *"fair resolution of disputes by an impartial arbitral tribunal"* as one of the basic principles upon which arbitral disputes are to

be adjudged and, that, the provisions of the Act need to be constructed in light of that principle.

Impartiality is, however, a fluid principle. Its fluidity rests on the fact that it relates to a person's attitude of mind and behaviour. Its assessment, therefore, calls for the application of an objective test. As once observed in the English case of **Porter vs. Magill [2001] UKHL67**, the test that needs to be adopted by a Court is to see whether any reasonable man placed in a similar situation could have concluded that the actions of the arbitrator are biased. Such a test was also emphasized as the correct test in the case of ***Metropolitan Properties -vs- Lannon (1968)3 ALL ER 304,*** where the famous English Judge, Lord Denning held that:

> "In considering whether there was a real likelihood of bias.... the court looks at the impression which would be given to other people ....what right minded persons would think."

It follows, as a general rule, therefore, that, for an arbitral tribunal to be seen to act with impartiality, it must exercise fairness in its attitude towards all parties, failure of which it makes itself vulnerable to open challenges by an aggrieved party.

In the current Petition, the facts are that, the arbitrator had ordered to be submitted to him, a letter *Ref. No. GET/TZ/2019/118/01* dated 18th November 2019, titled: **"NOTICE OF AMICABLE SETTLEMENT OF DISPUTE WITH REGARD TO YOUR REFUSAL TO CONSIDER OUR SUBMITTED CLAIM NUMBER 01"**, but the Arbitrator went

ahead to make a decision before receiving the said letter. Could such an act constitute an act of bias?

In my view, the answer to the above question will depend on whether such a document was indeed a decisive factor in the determination of the matter in controversy which the Sole Arbitrator was called upon to determine. Observably, and, in the circumstance of this case, it is clear from paragraph 8 of the **Order of Direction Number 2, (referred hereafter as the Order**) that, the Respondent had drawn the attention of the Arbitrator to the Letter under reference and, it is averred, in paragraph 9 of the **Order**, that, the decision to go to arbitration followed after the Petitioner failed to respond to that letter.

However, as it may be noted from paragraph 5 of the **Order**, the Petitioner (as Respondent) did submit that negotiations were conducted on 17th April 2020 and, in his ruling, (contained in paragraph 10 of the **Order**), the Arbitrator was satisfied that such negotiations failed. As it will be seen in that **Order**, the decisive part of the ruling ended at paragraph 10 of the **Order** with a dismissal of the objection.

Certainly, while it is clear that paragraph 13 of **the Order** has a direction that a report regarding the letter under reference was to be availed to the arbitrator on the 17th November 2019, as submitted by Mr Mandepo, what I gathered from his submission is that, the purpose of asking for such a letter was to establish whether indeed the parties had failed to settle their dispute amicably. However, a careful look at the **Order** indicates that, the amicable settlement which the

Petitioner was craving for, was that of forming a Dispute Adjudication Panel (**DAP**), which, as I stated when dealing with **GROUND No.1**, was not envisaged by the parties in their contract.

From that understanding, it is clear, therefore, that, any reasonable person looking at the facts and circumstances of the matter in the same way as it was presented before the arbitrator, would not have held a view that, the absence of the letter under reference and the subsequent ruling of the Sole Arbitrator, amounts to an act of partiality. Clearly, even without such a letter under reference, the arbitrator's decision having been based on what was given to him by both parties who appeared before him and were given audience, cannot be faulted as being biased. In view of all what I have laboured to state herein above, **GROUND No.3** of the Petition should as well fail.

Next to my consideration are the merits of **GROUNDS No.4 and 5** of the Petition. These two grounds are to the effect that, the Sole Arbitrator failed to correctly interpret the provision of the Contract regarding who had a duty to provide cranes at the site and what was the limit of the Project Manager. It has been argued by Mr Mandepo that, such a failure on the part of the Sole Arbitrator, occasioned serious irregularities to the award as it is uncertain or ambiguous. In other words, it may summed up that, what the Petitioner is arguing under the two grounds of her petition is that, the Arbitrator failed to appropriately determine the issues placed before him due to his failure to correctly interpret the contract.

In his submission, Mr Mandepo referred to this Court the case of **K v P [2019] EWHC 589 (Comm)**, noting that, an award could be successfully challenged on the ground that, the tribunal had failed to deal with an issue put to it and the Claimant had been denied opportunity to properly present its case. Using that English authority to support his position, Mr Mandepo submitted that, the issue put to the Arbitrator in the Petition at hand, was in respect of the increased final price of the contract following the Respondent's submission of a Revised contract price pegged at **USD 40,513,750/-** instead of the earlier agreed price of **USD 39,000,000/-**.

Mr Mandepo submitted that, in his award, the Sole Arbitrator adjusted the price by adding a total of **USD 1,333,750** to the original sum contrary to the agreement signed by the parties and contrary to the existing procurement laws. He contended that, such a decision of the arbitrator resulted from his failure to construe the contractual provisions and ended up re-writing the contract or the parties.

To buttress his position, he invited this Court to consider the persuasive Kenyan decision in the case of **National Bank of Kenya Ltd vs. Pipeplastic Samkolit (K) Ltd and Another,** Civil Appeal No.95 [2001]eKLR; where the Kenyan Court of Appeal held that, *inter alia*, that:

> "Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved."

It was a further submission by Mr Mandepo that, awarding the Respondent extra **USD 1,333,750** was against the agreed contract sum as this amount was neither in the tender nor in the application for variation order to the Project Manager as required under **Clause 13.3** and **13.8** of the **GCC,** and, that, by so doing the Sole Arbitrator was amending the contract, thereby unprocedurally exceeding his mandate. To support that submission, this Court was invited to consider its own decision in the in the **Registered Trustees of the Diocese of Central Tanganyika** (supra)), at pages 39 and 40. Mr Mandepo contended that, on such a fact alone, the award was tainted with serious irregularity and needs to be set aside.

For his part, Mr Mlinga has argued the fourth ground of the Petition together with **Grounds 5, 6** and **7.** In short, and without much ado, he regarded these grounds as mere speculations. He argued that, to go to the details as submitted by the Petitioner, would be faulting the already laid down legal principles regarding the powers of the Court in determining arbitral awards. Likewise, the Respondent placed reliance on decision of this Court in the **Registered Trustees of the Diocese of Central Tanganyika** (supra)), pages 27 and 28 of that decision.

From the above rival position, the issue is whether the Sole Arbitrator re-wrote the contract for the parties when he awarded an extra **USD 1, 333, 750/-** to the Respondent. It must be remembered that, the demand for payment of the additional amount over and above the initial agreed amount of

USD 39,000,000 was the central point which rocked the parties' harmonious relations and drove them to the arbitral process.

To begin with, it is trite to state that, the handling of the arbitral process in a manner that conforms to the parties' agreement and the contract they had entered into is as important as the outcome of the arbitral process itself. It does require the arbitrator to act within the powers conferred to him by the parties and he has no power, apart from what the parties have given him under the contract.

Such a trite legal position was emphasized by the Supreme Court of India in the case of **PSA SICAL Terminals Pvt. Ltd. v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin,** CIVIL APPEAL NOS. 3699–3700 OF 2018, [***2021 SCC OnLine SC 508***]. In that case, the Indian Supreme Court held that:

> "…. a party to the Agreement cannot be made liable to perform something for which it has not entered into a contract. In our view, re–writing a contract for the parties would be breach of fundamental principles of justice entitling a Court to interfere since such case would be one which shocks the conscience of the Court and as such, would fall in the exceptional category. .., the role of the arbitrator is to arbitrate within the terms of the contract. He has no power apart from what the parties have given him under the contract. If he has travelled beyond

> the contract, he would be acting without jurisdiction, whereas if he has remained inside the parameters of the contract, his award cannot be questioned...."

In the current Petition at hand, it was contended that the Arbitrator's act of awarding **USD 1, 333, 750/-** to the Respondent was tantamount to **'re-writing the contract'** as he failed to interpret it, taking into account Clause 13.3 of the GCC. Is that submission warranted? The Petitioner has argued that it is warranted given that the arbitrator's act was done in excess of jurisdiction. I have had a look at the findings of this Court which I made at pages 39 and 40, in the **Registered Trustees of the Diocese of Central Tanganyika** (supra), the finding which the Petitioner invites me to be inspired with.

In the first place, let me make it clear that, the factual circumstances leading to the making of such finding on page 39 and 40 in **Registered Trustees of the Diocese of Central Tanganyika** (supra), is quite different from the situation in respect of the Petition at hand. There, the Arbitrator had on his own, and with no consent of the parties, made **corrections or amendment in the pleadings filed before him, and hence the contract itself,** and substituted therein the name of the employer, an entity that was not contemplated in the Contract or the Pleadings, instead of advising the parties to go and amend their pleadings. That is not the case in this Petition.

At this juncture, it is perhaps worth to restate what I stated in the case of **Afriscan Construction Co. Ltd &**

Another vs. Afriscan Group (T) Ltd and 3 Ors, Misc. Comm. Case No.182 of 2020 (unreported), that, a precedent is not to be followed blindly. Courts can only place a decisive reliance on its previous decisions or a precedent having been satisfied or taken cognizance of how the factual situation or the particular issue at hand fits in with situation of the decision it is being invited to rely on. Otherwise, a little difference in facts or additional facts in a particular case or in relation to a particular issue contemplated in that particular decision or precedent may make a lot of difference as regards the precedential value of such a decision to be relied upon.

In the present Petition, the issue is on the Arbitrator's correct interpretation of provisions of the contract before him and, that has nothing to do with corrections or amendment in the pleadings filed before the Sole Arbitrator. As such, I cannot follow the thinking I had invested on page 39 and 40 of the **Consolidated Cause No. 4 and No.9 of 2020**, as Mr Mandepo would wish that I should.

That point aside, as it may be noted from Mr Mandepo's submission, the Petitioner's argument in Ground is that: *the arbitrator's "failure to correctly interpret the contract" ended up with the **"re-writing"** of the contract by him for the parties.*

Legally speaking, re-writing of a contract for the parties will definitely amount to an irregularity. Such a position was discussed in the case of **Arnold vs. Britton and Others [2015] UKSC 35.** In that case, the Supreme Court of the UK

emphasized, *inter alia*, when dealing with a contract of insurance, that:

> "... while commercial common sense is a very important factor to take into account when interpreting a contract, a court should be very slow to reject natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed, even ignoring the benefit of wisdom of hindsight. The purpose of interpretation is to identify what the parties have agreed, not what the court thinks that they should have agreed. Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of a court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice. Accordingly, when interpreting a contract **a judge should avoid re-writing it in an attempt to assist an unwise party or to penalise an astute party**." (Emphasis added).

The above holding resonates well with what was stated by the Kenyan Court of Appeal decision in **National Bank of Kenya Ltd (supra)** which I have been asked to adopt. However, as I put my mind to the discussion flowing from the context of what Mr Mandepo submitted before me, the

question which I have asked myself is: *what kind of an irregularity is he referring to, which will amount to re-writing of the contract, hence warranting such to be an act done in excess of jurisdiction?*

The answer I get from his submission regarding the **GROUND No.4** of the Petition is that, the alleged irregularity is based on the Arbitrator's decision to adjust the initial contract sum by awarding the Respondent **USD 1,333,750** in excess of the initial contract sum of **USD 39,000,000/,** as reimbursement for costs incurred to provide cranes services, hence the he "***exceeded its powers***" as that conduct amounted to re-writing the contract. Let me tarry here a little bit.

"**Excess of an Arbitrator's power**" as a ground to challenge an award is provided for under section 75 (2) (b) of the Arbitration Act, [Cap.15 R.E 2020]. Section 75 of the Arbitration Act, [Cap.15 R.E 2020], is in *pari materia* to section 68 of the English Arbitration Act, 1996, [Cap.23 of 1996]. For that matter, English case laws that have had the opportunity to consider it will be of great persuasive effect to Courts in this Country. One of such cases is **Lesotho Highlands Development Authority vs. Impregilo SpA and Others** [2006] 1 AC 221.

In that case, the UK Supreme Court (**UKSC**) held, *inter alia* that:

> "A major purpose of the new Act was to reduce drastically the extent of intervention of courts in the arbitral process .... It is now necessary to

> examine section 68 in its textual setting. ...This is a mandatory provision. The policy in favour of party autonomy does not permit derogation from the provisions of section 68. A number of preliminary observations about section 68 are pertinent. First, unlike the position under the old law, intervention under section 68 is only permissible *after* an award has been made. Secondly, the requirement is a serious irregularity. It is a new concept in English arbitration law. Plainly a high threshold must be satisfied. Thirdly, it must be established that the irregularity caused or will cause substantial injustice to the applicant. This is designed to eliminate technical and unmeritorious challenges. It is also a new requirement in English arbitration law. Fourthly, the irregularity must fall within the closed list of categories set out in paragraphs (a) to (i)."

In the **Registered Trustees of the Diocese of Central Tanganyika** (supra), I had erroneously stated *(and I am only, and specifically so, referring to that observation I made pertaining to the nature of the listed issues)*, that, the categories listed in section 75 (2) (a) to (i) of the Arbitration Act, R.E 2020 **"cannot be closed or exhaustive"**. Now, however, having looked at it closely, I tend to agree with what was stated in the **Lesotho Highlands Development**

Authority's case (supra) that, such a list is indeed a **"closed list."**

In that English case, the **UKSC** stated further, that:

> "It will be observed that the list of irregularities under section 68 may be divided into those which affect the arbitral procedure, and those which affect the award. But, **nowhere in section is 68 there any hint that, a failure by the tribunal to arrive at the "correct decision" could afford a ground for challenge under section 68.** On the other hand, section 68 has a meaningful role to play. An example of an excess of power under section 68 (2)(b) may be where, in conflict with an agreement in writing of the parties under section 37, the tribunal appointed an expert to report to it. At the hearing of the appeal my noble and learned friend, Lord Phillips of Worth Matravers MR, also gave the example where an arbitration agreement expressly permitted only the award of simple interest and the arbitrators in disregard of the agreement awarded compound interest. There is a close affinity between section 68 (2) (b) and section 68 (2) (e). The latter provision deals with the position when an arbitral institution vested by the parties with powers in relation to the proceedings or an award exceeds its

> powers. The institution would exceed its power of appointment by appointing a tribunal of three persons where the arbitration agreement specified a sole arbitrator." (*Emphasis added*).

In this Petition, **GROUND No.4** would be falling under section 75 (2) (b) of the Arbitration Act, [Cap.15 R.E.2020].As I said, this provision is similar to section 68 (2) (b) of the UK's Arbitration Act, 1996. As stated by the UK's Supreme Court in in the **Lesotho Highlands Development Authority's case** (supra), at paragraph 31:

> "By its very terms section 68 (2) (b) assumes that **the tribunal acted within its substantive jurisdiction.** It is aimed at the tribunal exceeding its powers **under the arbitration agreement,** terms of reference or the 1996 Act. Section 68 (2) (b) **does not permit a challenge on the ground that the tribunal arrived at a wrong conclusion as a matter of law or fact. It is not apt to cover a mere error of law.** This view is reinforced if one takes into account that **a mistake in interpreting the contract is the paradigm of a "question of law"** which may in the circumstances specified in section 69 be appealed unless the parties have excluded that right by agreement."
>
> ***[Emphasis added. Note also that*** *section 69 of the UK Act is somehow*

similar to reference under ***section 76*** *of out Act, Cap.15 RE 2020].*

From the above case, it dawns clear to my mind, therefore, that, since Mr Mandepo is contending that, the Sole Arbitrator arrived at "**an erroneous decision due to mistake in interpreting the contract**", that will be a mistake falling under the paradigm of a question of law for which a recourse by way of a case stated under section 76(1) of the Arbitration Act, [Cap.15 R.E 2020] could have been preferred.

In consequence, therefore, and as stated by the UKSC, in **Lesotho Development Authority's case** (supra):

> "In making this general observation it must always be borne in mind that the erroneous exercise of an available power cannot by itself amount to an excess of power. A **mere error of law** will not amount to an excess of power under [the Arbitration Act]."

That being the case, **GROUND No.4** of the Petition lacks merit and will likewise fall.

But, let me pause to ask: *what of* ***GROUND No.5*** *of the Petition?* Is it merited? This ground could have been considered together with **GROUND No.4**, as it was done by the Respondent, but I think it invites a separate consideration.

Mr Mandepo's line of thinking in relation to it is that, the Sole Arbitrator occasioned a serious irregularity due to his inability to interpret the limited powers of the Project Manager and failure to adhere to the mandatory requirement procurement laws. He argued that, the amount awarded was

not in line with the procedure provided for in **Clauses 3.1 of the GCC.**

Basically, Clause 3.1 of the **GCC** is a Clause which deals with the powers and limits of the Project Manager. It requires the Project Manager to **"seek the specific approvals of the Employer"**. One of such approvals, include taking action in relation to the conditions set out in the Clause 3.1 of the **GCC** in respect of variations where that could only happen, as stated in **(b) "GCC 13.1 [Right to vary]:** (ii) **"if such variations would not increase the total Contract amount".**

Since the variations increased the Contract price, Mr Mandepo has argued that, the allegations that the Respondent hired Cranes following an email of Project Manager dated 28th March 2019, is baseless given that, the Project Manager had no such authority, and, hence, the adjusted contract sum by the Arbitrator is contrary to GCC Clause 3.1 (b) (ii) of the Contract.

As I stated earlier, the respective alleged variations in the initial contract, which was the spark that lit the all consuming fires, came out of the requirement for provision of cranes; an obligation which the Petitioner argues was not of the employer but of the Respondent. I have, therefore, given a careful reflection on the above submission.

Although Mr Mandepo has not indicated where under section 75 (2) (a) to (i) of the Arbitration Act, [Cap.15, R.E 2020] he had premised his submission on **GROUND NO.5** of the Petition, if he premised it under section 75 (2) (b) of the

Act, solely in relation to '*a failure to interpret the Contract*', the ground will fall, taking into account what I stated here above regarding **GROUND No.4**. However, looking at his submission and **GROUND NO.5**, there is a point to note and, I think of departure, when one considers the argument he raised in relation to Clause 3.1 and Clause 13.1 of the **GCC** and his line of thinking in his rejoinder submission.

In his rejoinder submission, Mr Mandepo has argued that, ordinarily in a construction contract, the contract will define the scope of works to be executed by the contractor and, unless provided otherwise, neither party can act unilaterally thereafter to risk the other party. Fair enough and, that fact applies to all types of contracts since, as stated by McEWAN J., (as he then was), in **SMITH vs. MOUTON**, 1977 (3) SA 9 @ 120 - 15C:

> "..there is no special law different from the law relating generally to contracts and their interpretation that applies to building contracts..."

Mr Mandepo contended, however, that, since changes in construction contracts do occur oftentimes, a contract will contain a mechanism to deal with such variations. In relation to the matter at hand, however, he contended that, the Respondent could only take steps amounting to variation of the contract **upon written instructions from the Project Manager and the Employer**. Besides, he argued, since the contract was also governed by the Procurement Act, the Sole Arbitrator erred because Regulation 110 (5) to (8) of the Public Procurement Regulations, G.N. No.446 of 2013, restricts

increase of contract price without approvals from the relevant authorities involved in the tender process. He also cited Regulation 61 (1) to (4) of the Public Procurement Regulations, G.N. No.446 of 2013, in relation to approvals required if a contract based on procurement process is to be amended.

To cap it all, reliance was placed on the decision of this Court in **CATIC International Engineering (T) Ltd** (supra). In that case, this Court held, *inter lia,* that:

> "Where an award infringes public procurement laws or public policy, that [kind of an] illegality may be sufficiently relied upon to set aside an arbitral award."

The Court stated further that, the respective award was:

> "... 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 do also understand that the above quoted decision of this Court was delivered under the old law (*the Arbitration Act, [Cap.15 R.E 2002], now repealed*). That fact, notwithstanding, does not change the legal position since, under section 75 (2) (g) of the Arbitration Act, [Cap.15 R.E 2020], **"public policy considerations"** are recognised as one of the criteria for challenging an arbitration award for serious irregularity. As it was the case in **CATIC International Engineering (T) Ltd** (supra), the concerns raised by Mr Mandepo are such that, the revised amounts blessed by the Sole Arbitrator were, as well, in contravention of the procurement laws as the parties'

contract arose from a public procurement process for which the respective laws applied.

In **CATIC International Engineering (T) Ltd** (supra), this Court stated, as a matter of general principle, that:

> "an award can be set aside if it is in breach or would result into an express violation of a law or be contrary to public policy."

In that case, this Court relied on a decision of the Supreme Court of Mauritius in the case of **State Trading Corporation vs. Betamax Ltd**, 2019 SCJ 154, as well as the Kenyan High Court decision, in the case of **Tanzania National Roads Agency vs. Kundan Singh Construction Limited**, Misc. Civil Application No. 171 of 2012, (unreported).

I do understand that the Mauritius decision was later appealed against before the Privy Council and that recently a decision of the Board issued in the case of **Betamax Ltd (Appellant) vs. State Trading Corporation (Respondent) (Mauritius) [2021] UKPC 14**, overturned the Mauritius Supreme Court decision on the ground the award was an award in international and not domestic arbitration .

Even so, in that recent decision of the Privy Council a point was observed as a common ground that:

> "where an arbitral tribunal determined that the contract was illegal, but that the contract could nonetheless be enforced, **a court was entitled to review the question whether an illegal contract should be enforced on an application to set aside or**

> **enforce the award <u>as that would ordinarily raise issues of public policy</u>.**" (Emphasis added).

In **CATIC International Engineering (T) Ltd** (supra), this Court stated, in a bid to further lend clarity to its holding, that:

> "...non-compliance with the requirements of a statute constitutes 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."

However, even by considering the above position and taking into account the submissions made in relation to the provisions of the procurement regulations, can the decision of the Sole Arbitrator be challenged on the ground envisaged under section 75 (2) (g) of the Arbitration Act, Cap.15 R.E 2020?

The simple answer to the above question, in my view, would be a resounding **"YES"** and, I do not think that, doing so would be going behind any of the findings of the arbitrator, especially due to the fact that, he made no such a finding on such a point.

In essence, I am inclined to hold so because, while it is true that steps which ought to have been followed in order to ensure that any proposed variation to the contract was appropriately taken on board are laid out in **Clause 3.1** and **Clause 13 of the GCC**, it is also clear that, under **Clause 13**,

variations could be initiated either by the Project Manager or the Contractor. However, before effecting or sanctioning any such variations, one had to ensure that the dictates of Clause 3.1 are, or were taken on board. It is clear, under that Clause, that, **the Project Manager had no authority to amend the Contract without written approval of the Employer, especially where such amendment (which does include variation of the contract), touches on the contract price.**

As it was argued in this Petition, it is the Respondent who initiated a variation and effected it unilaterally before there being approvals of the Employer while it was very clear, under **Clause 3.1 (b) (ii) of the GCC** that, **if any variation was to increase the agreed contract price, such variation ought to have been backed by an approval of the Employer.** In my view, such a requirement was an obvious one, and, was a matter of necessity taking into account the nature or the context of the contract itself (it being one arising from a procurement process where variations must follow a legally approved process).

Besides, it is worth noting that, **Clause 1.12 of the GCC** and **Clause 1 of the SCC**, the Contractor (Respondent) agreed to comply with or adhere to **"the applicable laws"** in the course of performing the Contract. This is an obvious fact known to the Respondent and presumed to be well known to any decision maker seized with an issue touching on the variation of the respective contract. Implicitly, therefore, that particular clause stands as a reminder to the fact that, non-

compliance with a particular statute, and in this case, the Procurement Act and its Regulations, could have disastrous effects, one being occasioning an illegality, which may lead to the setting aside the award or any decision made in non-compliance with the law.

In essence, as this Court pointed out in **CATIC International Engineering (T) Ltd** (supra) (citing the English case of **Patel vs. Mirza, [2016] UKSC 42,** (at paragraph 120), 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 ...."

Let me reiterate the once stated position by this Court, that, one of the underlying purposes of ensuring that contractors adhere to the dictates of the Public Procurement Act, Cap. 410, and its Regulations, for contracts arising from public procurement processes, 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 from such premises I hold, as I hereby do, that, failure on the part of the Sole Arbitrator to take into account the requirements of **Clause 3.1, Clause 3.1(b) (ii), Clause**

13.1 of the **GCC** (as well as **Clause 1.12** of the **GCC** regarding the need to adhere to other applicable laws such as the Procurement Act, Cap.410 and its regulations), amounted to blessing an illegality in the award. It follows, therefore, that, the above noted particular illegality, goes contrary to the public policy considerations governing procurement contracts and, in itself, when viewed in light of what section 75 (2) (g) of the Arbitration Act, [Cap.15 R.E 2020] provides, constitutes a serious irregularity affecting the award itself.

In view of that reasoning, I will **uphold GROUND 5** of the Petition, though from a different approach and reasoning.

The last two grounds of the Petition, **i.e., Grounds No.6 and 7**, invite a very brief my attention of this Court. As regards **GROUND No.6** of the Petition, which Mr Mlinga counteracted, it was contended that, the Arbitrator committed serious irregularities for failure to determine the issue on distinction between the contract for **LOT 1** and that for **LOT 2.**

In support of it was Mr Mandepo's submission that, the Arbitrator had decided, at paragraph 142 of the Award that, there was interdependence between tender for Lot No.1 and Lot No.2. He argued that such a decision was erroneous as the two lots were two different contracts and, it was unfair to import the facts of Lot No.2 to justify the Respondent's claim under Lot No.2.

However, Mr Mandepo did not tell under what heads of an irregularity, if viewed in light of what section 75 (2) (a) to (i) of the Arbitration Act, [Cap.15 R.E 2020], would such a legal issue fall. As it should be noted, challenging an award on

the basis of serious irregularity as provided for under section 75 (2) (a) to (i) of the Act, would require the Petitioner to ensure that, the irregularity complained of falls under one of the heads provided for in that provision, unless it is one falling under the common law illegality related to failure to observe natural justice.

In my view, looking at **GROUND NO.6** of the Petition, it cannot even be argued under section 75 (2) (d) of the Act, since it was an issue fully canvassed by the Sole Arbitrator. Whether rightly or wrongly, it cannot be raised as an irregularity worth pursued as a ground to challenge the award. At best, it could be considered or raised as a point of law under section 76 of the Act, for which a separate process of case stated would apply. For such a reason, **GROUND NO.6** of the Petition lacks merit.

As regards **GROUND 7** of the Petition, the contention raised by Mr Mandepo, and which was countered by Mr Mlinga, is that, the Arbitrator misconducted himself and committed serious irregularities in awarding the Respondent's claim for **USD 1,333,750/=** without proof or justification warranting such an award. Mr Mandepo has referred this Court to paragraphs 154 and 158 of the Final Award arguing that, since there was no justification, the Arbitrator committed a serious irregularity because section 59 of the Arbitration Act, [Cap.15 RE 2020] requires that, an award must contain reasons. He maintained that, such a fact will also amount to an irregularity relating to the form of the award under section 75 (2) (h) of the Arbitration Act.

Ordinarily, the rendering of a reasoned decision is a feature of any meaningful judicial process. In essence, reasons for deciding either way help to show that the outcome was based on a sober and objective analysis rather than on personal whim. In other words, reasons given by a decision maker in his or her decision, assure the losing party that its case was effectively considered. Besides, giving reasons provide a basis for scrutiny by an appellate Court. For the same arguments, arbitrating parties naturally expect to be given reasons regarding why the arbitrator decided either way in their Final award.

That being said, it must be noted, however, that, the duty to give reasons in a particular decision does not require the decision maker to provide an account that follows exhaustively and one-by-one, on each or all of the arguments articulated by the parties to the case. Instead, and from a general point of view, the reasoning of a decision maker may be implicit, provided, of course, that, the decision is clear enough to enable the persons concerned to know the grounds upon which the decision, or if it is an award, is based and, where a superior court is to be seized with the matter, such a decision provides the Court, on an appeal or otherwise, with sufficient material if it is to exercise its supervisory or appellate powers.

Perhaps one should be persuaded, as I do, by the New Zealand High Court's decision in the case of **Ngāti Hurungaterangi & Ors v Ngāti Wahiao** [2016] NZHC 1486, at paragraph 108, where the Court held, inter alia, and referring

to a passage in *Menna v HD Building Pty Ltd* (01/12/1986), a New South Wales decision, that:

> "Elaborate reasons finely expressed are not to be expected of an arbitrator. Further, the Court should not construe his reasons in an overly critical way. However, it is necessary that the arbitrator deal with the issues rose...and make all necessary findings of fact....The reasons must not be so economical that a party is deprived of having an issue of law dealt with by the Court."

In the present case, and taking into account the above stated legal position, it is my view, as I look at the Arbitral award, in its entirety, that, paragraph 154 and 158 of the Award referred to by Mr Mandepo, are a summary of the findings of the arbitrator, arrived at from what he had discussed earlier in other preceding paragraphs.

Consequently, since the Arbitrator dealt with each of the issues raised by the parties and made all necessary findings of fact, those paragraphs which provide a summation of the aftermath of what transpired, clearly enable a person concerned to know the grounds why the award was granted in favour of the Respondent, and, that by itself, provides sufficient material to, not only the parties to the award, but also the Court, to do that which may be necessary. It cannot be contended, therefore, that, the final award is vitiated by failure to state reasons, contrary to section 59 of the Arbitration Act or is in tainted with serious irregularity by virtue

of section 75 (2) (h) of the Arbitration Act, [Cap.15 R.E 2020]. For the reasons stated here above, **GROUND No.7** of the Petition lacks merits.

In the upshot, this Court makes a finding that, save for **GROUND No.5** which is upheld on the reason that the Awards perpetuated an illegality contrary to public policy, and thus infringes section 75 (2)(g) of the Arbitration Act, [Cap.15 R.E 2020], the rest of the grounds in the Petition cannot stand as they lack merit.

With such a finding, the Final Award becomes subject of the prescribed fate of an award tainted with serious irregularity, as stipulated under section 75 (3) of the Arbitration Act, [Cap.15 R.E 2020]. In exercising my discretion under section 75 (3) of the Arbitration Act, [Cap.15 R.E 2020], however, I am guided by its proviso which is to the effect that:

> "the court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it will be inappropriate to remit the matters in question to the arbitral tribunal for reconsideration."

In this Petition, the finding that the award is tainted with an illegality for being procured in a manner that is contrary to public policy (hence fraught with serious irregularity) is, in my view, grave enough to warrants setting aside the award in whole under section 75(3)(b) of the Act.

I hold so because, in my view, remitting the award to the sole arbitrator will not serve the compliance purpose

envisaged under the Public Procurement Act and its regulation as that Act and its regulations do not sanction retrospective approvals. It is for such a reason, therefore, I find that, the only option I can take is to set aside the award as a whole.

In view of the above, this Court settles for the following orders, that:

1. Grounds 1, 2, 3, 4, 6 and 7 of the Petition are found to be devoid of merit and are hereby dismissed;
2. the Petitioner's ground No. 5 of the Petition is, in terms of section 75 (2) (g) the Arbitration Act, up held;
3. the Sole Arbitrators Award is, by virtue of section 75 (3)(b) of the Arbitration Act, [Cap.15 R.E 2020] set aside on the ground that it infringes section 75 (2)(g) of the Act;, in particular its procurement infringes the public policy considerations.
4. in the circumstance of this Petition, this Court makes no orders as to costs.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 17TH SEPTEMBER 2021

THE HIGH COURT OF TANZANIA COMMERCIAL DIVISION

.....

DEO JOHN NANGELA

JUDGE

Right of Appeal Explained.