

**IN THE HIGH COURT OF TANZANIA
(COMMERCIAL DIVISION)
AT MWANZA**

**MISCELLANEOUS COMMERCIAL CAUSE NO. 02 OF 2021
IN THE MATTER OF ARBITRATION ACT
BETWEEN**

BUNDA DISTRICT COUNCIL.....PETITIONER

AND

MISPA CONSTRUCTION CO. LTD.....RESPONDENT

Date of Last Order: 08/12/2021

Date Ruling: 08/12/2021

RULING

MKEHA, J

The petitioner is challenging an Award dated the 28th February, 2020, issued by one Samwel M. I. M. Msita, Sole Arbitrator. The grounds for

challenging the award are twofold: That, the award was improperly procured in the sense that, the arbitration proceedings were not conducted in a fair manner but without adhering to the agreed arbitration rules and guidelines and that, the arbitrator misconducted himself by awarding specific claims without the same being proved and without according right to be heard to the petitioner. The petitioner is thus moving the court for the following reliefs:

- (a) That, the final award dated 28th February 2020 be set aside;
- (b) Costs of the Petition be awarded and
- (c) Any other reliefs this honourable court may deem fit and just to grant.

The petition is made under section 70 (1) and (2) (a), (c) and (f) of the Arbitration Act, 2020 read together with Regulation 63 (1) of the Arbitration (Rules of Procedures) Regulations, 2021. Whereas Mr. Kitia Turoke and Michael Haule learned State Attorneys represented the petitioner, Mr. Gervas Geneya learned advocate represented the respondent.

The dispute between the parties traces its genesis from a contract signed on 24/04/2015. Through the said contract, the respondent had to construct a Mortuary Building at Manyamanyama Hospital within Bunda District for a consideration of TZS. 97,000,000.00. The contract, had to be executed for a period of 90 days, commencing from seven days after signing the contract. In the course of implementation of the said contract, a dispute emerged between the parties.

According to Mr. Turoke learned State Attorney, the parties to the arbitration agreement had agreed that, in case of a dispute, the same could be referred to the Arbitrator and that, the arbitration proceedings would be governed by the National Construction Council Arbitration Rules. As such, when the dispute arose between the parties, regarding retention money and recovery of advance payments, the same was indeed referred to the Arbitrator and the arbitration proceedings were conducted under the NCC Arbitration Rules. The proceedings were concluded in favour of the respondent. The petitioner was dissatisfied. When the respondent attempted to file the Final Award before this court for execution convenience, the petitioner filed the present petition to

challenge the award. That is how this petition found its way before this court.

Submitting in respect of the grounds for the petition, Mr. Turoke learned State Attorney referred to paragraph 5 of the petition. He then submitted that, the arbitration rules and guidelines were not adhered to at all. The learned State Attorney submitted in the style of complaining that, contrary to the dictates of section 70 (2) (a) of the Arbitration Act, 2020, the parties to the arbitration proceedings were not accorded a right to be heard. According to the learned State Attorney, the Arbitrator relied on the claimant's statement of claim and the respondent's written statement of defence, to hand down the final award without there being a formal session to hear the parties. The learned State Attorney submitted further that, whereas the arbitrator referred to the parties' submissions in the final award, there were no such submissions made by the parties. The final award indicates at page 5 that, issues were framed basing on the submission of the parties. It was also submitted that the arbitrator failed to adhere to instructions of the Court of Appeal in **VODACOM TANZANIA LIMITED VS. FTS SERVICES LIMITED, CIVIL APPEAL NO. 14 OF 2016, CAT (DSM),**

TANG GAS DISTRIBUTORS LIMITED VS. MOHAMED SALIM SAID & TWO OTHERS, CIVIL APPLICATION NO. 68 OF 2011, CAT (DSM) as well as Rule 10 (1) of the National Construction Council Arbitration Rules, which had been chosen by the parties, to govern their dispute. The learned State Attorney condemned the Arbitrator for breaching the principles of natural justice, right to be heard in particular.

The learned State Attorney submitted in respect of the second ground of the petition that, it was wrong for the Arbitrator to award specific damages without actual proof of the same. Doing so, according to the learned State Attorney, is contrary to what has become trite law that, special damages must be specifically pleaded and proved. Reference was made to the decisions in **ZUBERI AGUSTINO VS. ANICETH MUGABE (1992) TLR 137** and **ANTONY & ANOTHER VS. KITINDA KIMARO, CIVIL APPEAL NO. 25 OF 2014, CAT, AT ARUSHA**. A prayer was finally made, that, the award be set aside.

Mr. Geneya learned advocate for the respondent conceded that, there was no actual hearing as required by Rule 10 (1) of the National Construction Council Arbitration Rules. He however maintained that, the

petitioner had not proved the prejudice suffered as a result of denial of right to be heard. He further submitted that, the learned State Attorney failed to particularize how an order for payment of special damages was made in the disputed award.

The issue is whether the Arbitrator committed any serious irregularity attracting the setting aside of the Final Award. Under section 70 (1) of the Arbitration Act, 2020 an award may be challenged on a ground of serious irregularity affecting the arbitral tribunal, the proceedings or the award. In terms of sub section (2) of section 70, the irregularity should be one which is likely to cause injustice to the applicant. Amongst others, the following are considered to be serious irregularities: Failure to comply with section 35 and failure by the arbitral tribunal to conduct the proceedings in accordance with the procedure agreed by the parties.

Section 35 (1) (a) of the Arbitration Act, 2020 provides in mandatory terms that, the tribunal should act fairly and impartially as between the parties, **giving each party a reasonable opportunity of putting his case and dealing with that of his opponent.** The right to be heard is also insisted under the Rules earlier chosen by the parties to govern their dispute. Rule 10 (1) of the National Construction Council

Arbitration Rules insists upon the arbitrator, to fix the date, time and place of meetings and **hearings in the arbitration** and the arbitrator is required to give all the parties, adequate notice on these matters. Under the said rule, hearings are to be continued on successive working days until the matter is concluded.

In paragraph 11 of the final award the arbitrator appears to have given undue weight, to the rule requiring adoption of procedures avoiding unnecessary delay or expenses, thereby completely ignoring rules of natural justice insisted under section 35 (1) (a) of the Arbitration Act, 2020 and Rule 10 (1) of the National Construction Council Arbitration Rules. The learned advocate for the respondent conceded that, the parties were not accorded opportunity of being heard. However, in his view, since the petitioner failed to prove the kind of prejudice suffered as a result of denial of right to be heard, the award ought to be allowed to stand.

It is unfortunate on part of the respondent that, the learned advocate's stance hereinabove, is not in accord with the settled position on the effects of failure to observe principles of natural justice. In the case of **I. P. T. L V. STANDARD CHATERED BANK (HONG KONG) LTD,**

CIVIL REVISION NO. 1 OF 2009 (Unreported) the Court of Appeal held that, "*no decision must be made by any court of justice, body or authority entrusted with the power to determine rights and duties so as to adversely affect the interests of any person without first giving him a hearing according to the principles of natural justice.*"

The consequences of breaching the principles of natural justice are spelled out strictly, in a number of decisions of the Court of Appeal. The settled law is to the effect that, breach or violation of the principles, unless expressly or impliedly authorized by law, renders the proceedings and decisions and/or orders made therein a nullity even if the same decision would have been reached had there been observance of the principles. See: **TANG GAS DISTRIBUTORS LIMITED VS. MOHAMED SALIM SAID & TWO OTHERS** (supra), **VODACOM TANZANIA LIMITED VS. FTS SERVICES LIMITED** (supra) and **ABBAS SHERALLY & ANOTHER VS. RABDUL SULTAN H.M. FAZALBOY, CIVIL APPLICATION NO. 33 OF 2002 (Unreported)**.

Therefore, as demonstrated hereinabove, it is not disputed that the Arbitrator embarked on a fight against delay in total disregard of the principles of natural justice. And, in terms of the statutory provisions

and case laws cited hereinabove, the Arbitrator had no option, but to adhere to the principles. I need not cite any other authority so as to hold as I do that, for failure of the Arbitrator to comply with section 35 (1) (a) of the Arbitration Act, 2020, and his failure to conduct the proceedings in accordance with the procedure agreed by the parties, a serious irregularity likely to cause injustice to the petitioner was committed, which in terms of the authorities cited, attracts the setting aside of the award in whole. Before issuing the final order, I advise those entrusted with a duty of determining rights and duties, to always remember the principle, justice is better than speed. Read: **MOUNT MERU FLOWERS TANZANIA LIMITED VS. BOX BOARD TANZANIA LIMITED, CIVIL APPEAL NO. 260 OF 2018, (CAT) AT ARUSHA.**

For the foregoing reasons, and pursuant to section 70 (3) (b) of the Arbitration Act, 2020, the Final Award by the Sole Arbitrator is set aside in whole. No order is made as to costs.

Dated at MWANZA this 8th day of December, 2021




C. P. MKEHA

JUDGE

08/12/2021

Court: Ruling is delivered in the presence of the parties' learned counsel, this 8th day of December, 2021.




C. P. MKEHA

JUDGE

08/12/2021