

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM
MISC. COMMERCIAL CAUSE NO.8 OF 2022**

IN THE MATTER OF ARBITRATION UNDER THE NATIONAL
CONSTRUCTION COUNCIL (NCC)

STC LIMITEDCLAIMANT

VERSUS

WATER AID TANZANIARESPONDENT

Last order: 25th August, 2022
Judgment: 01st September, 2022

CONSENT DECISION

NANGELA, J.

This is a consent decision arising from a 'Memorandum of Adjustment and Satisfaction of the Award' which was filed in this Court jointly by the parties having being preferred under Order XXI Rule 2(1), (2) and (3) of the Civil Procedure Code, Cap. 33 R.E 2019.

For a brief account setting the background of this matter, the Claimant successfully instituted arbitration proceedings against the Respondent before the National Construction Council (NCC) following a dispute which arose between the

parties in relation to a Contract for Construction Emurtoto Transmission Main, Olkokola and Langijave Distribution in Arusha District Council Area, Arusha Region.

The proceedings were ruled in favour of the Claimant and the Sole Arbitrator made the following orders:

1. That, both parties were in breach of the contract several times. The said breaches were remedied as none of them was fundamental.
2. The communicated decision by the Respondent for the Claimant to leave the project sites amounted to a termination. The said termination was wrongful, un-contractual, thus, unlawful.
3. The subcontract between the Claimant and the Advanced Company Limited was not entered into voluntarily.
4. That, the terms of the subcontract between Claimant and Advanced Company Limited did not amount to authorization for deduction of any sum due to the Claimant over and

above what is itemized in the BoQ for that item. The Claimant is entitled to the sum of TZS 257,703,535/= being the difference thereof.

5. That, no separate approval was required for the additional works and steel pipes purchased. The Claimant is entitled to the sum of TZS 707,890,000 for the additional works instructed by the Respondent and the sum of TZS 132,000,000/- used to purchase additional 420 meters steel pipes.
6. That, the delays in completing the works were contributed by both parties and not by poor performance of the work by the Claimant.
7. The Respondent was not responsible for the maintenance of the contract nor execution of the works, instead the Project Manager was.
8. That, the project inspection team had no mandate in deducting any sums due to the Claimant.

9. The Respondent's claims for the sums of TZS 629,982,012 in liquidated damages and TZS 397,789,306 as costs incurred by its staff in supervising the works as well as interest are disallowed.
10. That, the Claimant's claims for interest from a loan and interest on hire purchase of trucks are disallowed.
11. That, the Claimant is entitled to interest at 7% on all sums allowed from date of presentation of the Final Certificate till settlement of the same in full and,
12. The Respondent is condemned to pay costs of TZS 32,927,806.05 as instruction fees, TZS 15,000,000 as NCC Professional fees refund, TZS 5,400,000/- as NCC Institutional costs and TZS 5,300,000/- as site visitation costs.

Having so decided, the Award was issued on the 13th January 2022 and presented before this Court by the Sole Arbitrator vide a letter dated 6th March 2022 for the Court's

necessary steps as per the law. On the 21st day of March 2022, this Court issued a summons to the parties to appear for orders. On the material date, Ms Dosca Mutabuzi and Mr Reginald Shirima, learned Advocates, appeared for the Respondent and also held brief for Mr Emmanuel Safari, learned advocate for the Claimant.

Ms Mutabuzi informed this Court that, the parties are in the processes of settling the matter out of court in a more amicable way and, thus, she asked for an adjournment which was granted by the Court. After several adjournments, on the 25th day of August 2022, Mr Emmanuel Safari, learned advocate for the Claimant appeared together with Ms Rahma Kombo, learned advocate for the Respondent.

In his submission to the Court, Mr Safari informed this Court that, the parties have succeeded to file a '*Memorandum of Adjustment and Satisfaction of the Award*' which I alluded to earlier at the commencement of this consent decision. He requested this Court to proceed registering the parties' memorandum of adjustment filed in this Court.

As I pointed out earlier, the said "**Memorandum**" filed by all parties in joint agreement, was filed under Order XXI Rule 2(1), (2) and (3) of the Civil Procedure Code, Cap. 33 R.E 2019. The respective Order provides as follows:

"2.-(1) Where any money payable under a decree of any kind is paid out of court or **the decree is otherwise adjusted in whole or in part** to the satisfaction of the decree-holder, **the decree-holder shall certify such payment or adjustment to the court whose duty it is to execute the decree and the court shall record the same accordingly.**

(2) The judgment debtor also may inform the court of such payment or adjustment and apply to the court to issue a notice to the decree-holder to show cause, on a day to be fixed by the court, why such payment or adjustment

should not be recorded as certified; and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the court shall record the same accordingly.

(3) A payment or adjustment, which has not been certified or recorded as aforesaid, shall not be recognized by any court executing the decree." (Emphasis added).

In their '*Memorandum of Adjustment and Satisfaction of the Award*' filed in this Court, the parties have agreed on various matters which constitutes the terms of settlement and adjustment of the Final Award.

Since the Claimant filed the Final Award in this Court with a view to have it recorded as the final decree of this Court, and given that, by virtue of their *Memorandum of Adjustment and Satisfaction of the Award*' the parties have recorded an

adjustment of the said Final Award filed in this Court, the issue which this Court is faced with is whether the Parties' Deed of Settlement satisfies the requirements of an enforceable Deed.

Discharging that vital role is a requirement of the law since, as the Court of Appeal stated in the case of **Karatta Ernest D.O and 6 Others vs. The Attorney General, Civil Appeal No.73 of 2014 (Unreported)**, it must be made clear that the basis of a Deed of Settlement is privity to the parties.

It means, therefore, that the Court must examine the deed of settlement as well to be satisfied that it is in conformity with the law. In particular, and, as once stated in the case of **Jaffery Ind.Saini Ltd vs. M/s Beinjing Construction Engineering Group Ltd**, Commercial Case No.38 of 2021 (unreported) (citing the case of **Farisai Nando vs. Godwills Masimirembwa** , High Court of Zimbabwe Mwayera J, Harare, 10 November, 2016, 23 February 2017), the Court should be satisfied:

"**Firstly**,....that both parties to the agreement have freely and voluntarily concluded the agreement. **Secondly**, that there is meeting of minds of the

contracting parties; in other words, that, the parties are *ad idem* with regards the terms of the Deed of Settlement.

Thirdly ... whether or not the terms of the Deed of Settlement are capable of enforcement without recourse to further litigation. ... These factors in my view fall for consideration cumulatively.”

Having examined the Deed of Settlement filed in this Court by the parties, I am satisfied that the same meets the lawfulness requirements of an enforceable Deed. In view of that, this Court does hereby, proceed to order as follows:

1. That, *Memorandum of Adjustment and Satisfaction of the Award'* signed and filed by the Parties herein is hereby Recorded as the adjustments of the Final Award as per the requirements of Order XXI Rule 2(1) of the Civil Procedure Act, Cap. 33 R.E 2019.
2. That, this Court further proceeds and makes the following further orders:

(i) That, the Respondent shall pay the Applicant (Claimant) a total sum of Tanzanian Shillings, Five Hundred Twenty- Four Million (TZS 524,000,000/=) as the final and full satisfaction of the Final Award of the National Construction Council made on the 13th January 2022.

(ii) That, the above stated sum of money shall also include costs which were also awarded to the Applicant (claimant) in the Final Award and the varied Award shall be settled in favour of the Applicant (Claimant) within five days from the date this Deed of Settlement is registered as a decree of the Court.

(iii) That, the Settlement Deed marks the dispute between the Parties in respect of the Contract for Construction Emurtoto

Transmission Main, Olkokola and Langijave Distribution in Arusha District Council Area, Arusha Region in Tanzania, finally and conclusively settled and they shall cooperate to end all pending litigation arising from this matter and neither the Applicant nor the Respondent shall have any further claim in relation to the subject matter of the dispute.

(iv) That, as agreed by both parties that once the Settlement Deed (*Memorandum of Adjustment and Satisfaction of the Award*)' the parties have herein registered the Deed in the Misc. Commercial Cause No.8 of 2022 and this Court hereby pass it as its decree thereof at each parties' own costs.

(v) That, since parties have agreed that after the signing and registration of their Deed of

Settlement, they, jointly or each of them, shall withdraw the Misc. Commercial Application No.49 of 2022 with no orders as to costs, this Court does record their agreement to that effect.

(vi) That, save as to compliance with the term of the Deed, this Court does hereby certify that the Claimant (Applicant) and the Respondent have duly acknowledged that, by signing and recording their Deed of Settlement (*Memorandum of Adjustment and Satisfaction of the Award*), the Final Arbitral Award dated 13th January 2022, and which was issued by the Sole Arbitrator is hereby declared to have been **FULLY SATISFIED** and no party has any claim thereafter in respect of the same cause of action.

(vii) That, this Court has been duly and jointly moved by both parties to have their *Memorandum of Adjustment and Satisfaction of the Award* recorded by the Court as an agreed adjustment of the Final Award as per the terms contained therein.

It is so ordered.

DATED AT DAR-ES-SALAAM ON THIS 01st DAY OF SEPTEMBER,
2022



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DEO JOHN NANGELA
JUDGE