IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE TANZANIA

(COMMERCIAL DIVISION)

AT DAR-ES-SALAAM

MISC. COMMERCIAL CAUSE NO. 9 OF 2022

(Arising from Misc. Comm. Cause No.52 of 2021)

IN THE MATTER OF ARBITRATION

AND

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

BETWEEN

CEREALS AND OTHER PRODUCE
BOARD OF TANZANIA .....PETITIONER

AND

MONABAN TRADING & FARMING
COMPANY LIMITED .....RESPONDENT

Last Order: 22/07/2022.
Date of Ruling: 02/09/2022.

RULING

NANGELA, J.:

This Petition was filed in this Court under section 74 (1) (a) and (b) and section 75 (1) and (2) (b), (d), (f) and (i) of the Arbitration Act, Cap.15 [R.E 2020], and Regulation 63 (1) of the Arbitration (Rules of Procedure) Regulations (G.N. No.146 of 2021 and other enabling provisions. The brief facts of this Petition, as gathered from the pleadings filed in this Court, may be briefly stated as here below.

On the 23rd day of August 2007, Monoban Trading & Farming Co. Ltd, (the Respondent), inked a Maize and Wheat Milling Agreement with the then National Milling Corporation (**"NMC"**) for milling and storage services at the Arusha maize and wheat plant located at Unga Limited, Industrial Area, in Arusha Region. The Agreement was for 5years which could be renewed by either party giving a six month's written notice before the expiry of the term.

In 2008, however, the Agreement inked in 2007 was followed by an Addendum dated 10th April 2008. It is alleged that, unlike the original agreement, whose intent was to lease the premises, the Addendum, allegedly illegally, allowed the Respondent to expand the milling plant capacity by carrying out major investment amounting to **USD 2.684 Million**. These were to cover costs of rehabilitation, refurbishing, repair and maintaining the plant to NMC an entity which by that time was in the divestiture process.

The lease, thereby, came to an end in 2013 when the parties opted not to renew the agreement. Subsequently, through an Instrument of Transfer dated 2nd August 2013, the Treasury Registrar transferred some assets of the then NMC to Cereals and Other Produce Board ("CPB"). Among those assets is Plot No.1, 3, 5, 7, 11 and 11A which, under the Certificate of Title No.055028/34 situated at Unga Limited Area, Arusha Municipality, the property in dispute.

However, on the 27th June 2014 Monoban and CHC signed a deed of variation. On 6th June 2019 the Respondent handed over the property to the government and a Deed of handing over was executed. The Respondent is alleged to have agreed to the removal of her properties in the premises which included a bakery and sunflower mills by 31st March 2020. However, in 2019, a Court battle ensued between the Respondent and the Petitioner after the Respondent case filed a petition, Misc. Civil Cause No.8/2019 at the High Court, Arusha Registry.

On March 31st 2020, the Court appointed Ms. Christina Ilumba as a Sole Arbitrator. Upon acceptance on the 19th May 2020, the Respondent filed with the Arbitrator, a Statement of Claim alleging that, the dispute in the arbitration arose out of the Petitioner's act of unilaterally terminating the Maize and Wheat Milling Agreement, and hence, amounting to an alleged breach of contract, thus claiming for TZS 116,457,592,766.63 and USD 151,000,000.

Although the Petitioner disputed the claims, nevertheless, the Sole Arbitrator, having considered the matters laid before her and heard submissions from the respective parties, she did, on 2nd April 2021, publish the award and order, declare and direct as follows, and I quote:

"

1. That, the Arbitrator has jurisdiction to determine the dispute between the Claimant and the Respondent.

2. That, the Claimant's claims for breach of contract is dismissed.
3. That the Claimant succeeds in its claim for specific damages in respect of confiscated cereals and, thus, the Respondent shall, within 14 days of receipt of this award, pay the Claimant the sum of Tanzanian Shillings Six Hundred Forty Million, Eight Hundred Fifty Seven Thousand Eight Hundred only (TZS 640,857,800).
4. That, the Claimant's claim on specific damages of USD 151,000/= is dismissed.
5. That, the Claimant's claim for specific damages of TZS 27,900,000,000/= is dismissed;
6. That, the Claimant's claims for TZS 87, 874, 488,566.63 as compensation for total investment cost and expected profit for the entire agreement period from 2007 to 2024, is dismissed.
7. That, the Claimant's claims for general damages lacks merits and is dismissed.
8. That, the Respondent is responsible to pay the arbitrator's fee in the sum of TZS 37,000,000 plus VAT and Expenses assessed at TZS 2,000,000/=. Therefore, the Respondent shall, within 14 days of

receipt of [the] award, refund the Claimant the portion of the Arbitrator's fees and expenses which have been funded by the Claimant.

9. That, post-award interest on the awarded sum is due and owing to the Claimant and shall carry a simple interest of 10% per annum from 14 days of receipt of this award by the Respondent (CPB) until payment.
10. That, the Respondent (CPB)'s counter-claim of TZS 17,671,221, 646.58 as economic loss is dismissed.
11. That, the Respondent's claim for pre-and post-award interest is dismissed;
12. That, the Respondent's prayer for payment of costs is dismissed.
13. That, all other claims or prayers for relief made in the course of this arbitration by either party is dismissed.**"**

With such findings, orders and directive having been made, the Petitioner herein lodged this Petition seeking for the following Orders or reliefs:

1. The setting aside of the Arbitral Award published by Ms Christina Ilumba, a Sole Arbitrator on 2nd April 2021, on grounds of irregularities and misconducts.

2. Awarding the Petitioner whole of costs involved in the arbitration proceedings
3. Award the Petitioner costs of this Petition.
4. Any other orders or relief this Honourable Court may deem just and proper to grant.

The grounds advanced by the Petitioner in her Petition as the basis for the granting of the prayers sought are pegged on the allegations of lack of substantive jurisdiction and serious irregularities on the face of the award. In particular, the Petitioner enlisted the following eight grounds:

1. That, the Sole Arbitrator entertained the matters laid before her while aware that there was no arbitration agreement vesting the arbitrator with substantive jurisdiction to entertain the dispute and, therefore, the Award was entered and published without any substantive jurisdiction.
2. That, the Sole Arbitrator misdirected herself by proceedings to determine the matter while knowing that she had no pre-requisite jurisdiction to determine the matter.
3. That, the Sole Arbitrator committed serious irregularities in considering that, the Petitioner had inherited the Milling Agreement, its Addendum and Deed of Variation of the NMC

making the same liable under the contract between defunct NMC and the Respondent (Monaban) while there was no any agreement to such effect.

4. That, the Sole Arbitrator committed serious irregularities by misapplying the case of **Trade Union Congress of Tanzania vs.** Engineering **Systems Consults Limited and Others**, Civil Appeal No.51 of 2016 (unreported) in the dispute between the Petitioner and the Respondent to form the basis of her decision.
5. The Sole Arbitrator committed serious irregularities by failing to deal with the issues before her, including forming another issue which was not agreed by the parties and warding special damages to the Respondent to the tune of TZS 640,857,800 as specific damages for the alleged confiscation of cereals, with no proof of the same.
6. The Sole Arbitrator committed serious irregularities after rejecting the Respondent's case that, the Petitioner stepped into the shoes of the defunct NMC through Deed of Variation and proceeded to determine Petitioner's liabilities outside the Respondent's pleadings.

7. The award is uncertain as the arbitrator, while awarding special damages to claims that were not specifically proved by the Respondent.
8. The Sole arbitrator committed serious misconduct for failing to award specific damages to the claims that were specifically proved by the Petitioner.

On the 16th of June 2022, when the learned counsels for the parties appeared before this Court, an order was made to the effect that, the matter at hand shall be disposed of by way of written submissions. Such submissions were filed and I will briefly summarise the parties' submissions here below, before I proceed to deliberate on the matter and make a decision.

Addressing the grounds for challenging the award, the Petitioner submitted, in her preliminaries, that, the advent of the Arbitration Act, Cap.15 [R.E 2020] and its Regulations, GN.No.146 of 2021, has not changed the general rule that, as far as petitions for challenging an arbitral award are concerned, a petition of that nature is not an appeal and should not be an appeal in disguise. That is, indeed a correct view. The Court of Appeal decision in **Vodacom Tanzania Ltd vs. FST Services Ltd**, Civil Appeal No.14 of 2016 (unreported), conspicuously made that point.

Submitting on the applicable provisions, the Petitioner's counsel, Mr George Mandepo submitted, and correctly so, that, according to sections 74 and 75 of the Arbitration Act, Cap.15 R.E

2020 this Court has powers to set aside an arbitral award on grounds of either substantive jurisdiction or serious irregularity affecting the arbitration. Mr Mandepo made reference to a number of cases.

The cases cited include: **the Registered Trustees of the Diocese of the Central Tanganyika vs. Afrique Engineering & Construction Company Ltd,** Consolidated Commercial Cause No.4 and 9 of 2020 (unreported), **Tanzania Electricity Supply Company Ltd (TANESCO) vs. Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)**, Misc. Civil Appl. No.8 of 2011, as well as **Champseybhaka & Co. vs. Kuvkajballowspg and WVG Co. Ltd** (1923) AC , 480 and **Mvita Construction Company vs. Tanzania Harbours Authority**, Civil Appeal No.94 of 2001.

The cases cited here above, have dealt with various issues and grounds upon which an award of an arbitrator may be set aside by this Court, which grounds include there being a misconduct or lack of jurisdiction on the part of the arbitrator. Citing the case of **Mvita Construction Company vs. Tanzania Harbours Authority** (supra), Mr Mandepo submitted that, under the law of Tanzania, an Arbitrator's authority, power and jurisdiction are founded on the agreement of parties to contract to submit present or future differences to arbitration.

The question which Mr Madepo has posed, however, is whether, as between the parties, there was an arbitration agreement, taking into account the grounds stated in paragraph

15 (i), (ii) and (iii) of the Petition. Mr Mandepo, however, has endeavoured to respond to it. He submitted that, although the Arbitrator made a finding that the Petitioner stepped into the shoes of the Defunct NMC, the Petitioner is not a successor of the defunct NMC in terms of the NMC functions.

Mr Mandepo contended that, legally there has never been an express vesting of assets and liabilities of the defunct NMC on the Petitioner, and, that, since there was such a finding on the part of the Sole Arbitrator, that should have been sufficient to hold that the arbitration agreement contained in the Wheat and Maize Agreement and its Addendum, does not bind the Petitioner as the latter was not the Successor of the defunct NMC.

He submitted that, although the Sole Arbitrator made a finding that, as per the law there was no express vesting of assets and liabilities by an Act of Parliament establishing the Petitioner, yet, she proceeded to state that, through the instrument of Transfer date 2nd August 2013, the Petitioner became the successor in title of the property in dispute and has inherited the liabilities of the defunct NCM pertaining to the property in issue and thus, the arbitration agreement.

Mr Mandepo submitted further that, two issues which need to be addressed on that regard, and these are: (i*) whether this honourable Court has jurisdiction to determine the jurisdiction of the arbitrator, while the arbitrator was appointed by the Court in Misc. Civil Cause No. 8/2019 between Monaban Trading and Farming Company Ltd and Cereal and Other Produce Board of*

Tanzania and (ii) *whether the Arbitrator has substantive jurisdiction to arbitrate over the matter emanating from an invalid contract and arbitration agreement*.

Mr Mandepo has laboured strenuously to address the two sub-issues which he enlisted in his submission. As regards the first, he contended that, even though arbitration is a procedure to determine the legal rights and obligations of parties in private proceedings and with binding effects, still Courts of law have great roles in arbitral proceedings as reflected in the Arbitration Act, Cap.15 R.E. 2020.

He noted, however, that, the appointment of an arbitrator in this matter was made under the now repealed Arbitration Act, Cap.15 R.E 2019; while the current law came into operation on the 18th January 2021 vide the Arbitration (Date of Commencement) Notice, No.101 of 2021. He submitted that, under section 8 (2) of repealed law, the Court had power to appoint arbitrator where parties failed to do so within 7 days after notice and, that, this power was exercised *in Misc. Civil Cause No. 8/2019,* by appointing Ms Christina Ilumba.

He submitted, nevertheless, that, the role of the Court as an appointing authority in no way acted as the vesting of jurisdiction or the determination of jurisdiction of the arbitrator by the Court, since that is a matter left to the arbitrator. He contended, therefore, that, this Court is not barred from entertaining the current challenge of the substantive jurisdiction of the arbitrator as what the Petitioner has done.

In response to that, submission, Mr Francis Stolla, the learned counsel for the Respondent, made a brief reply to the effect that, as rightly conceded by the Petitioner, the Sole Arbitrator was appointed by the Order of the High Court. He contended that, upon that appointment she was vested with the power to arbitrate, that is to say, to conduct amicable settlement of the matter.

An endeavour was made to cite the relevant part of the Court's order in verbatim as hereunder:

> "One Christina Ilumba (MC/Arb) is appointed in this matter. The matter is now left on the hands of the arbitrator for an amicable settlement. This file is marked closed."

The Respondent submitted that, the above order of the Court has two aspects, i.e., (i) it appointed the arbitrator and (ii) it vested jurisdiction on the arbitrator to act. With such an observation, it has been contended that, the Court appointed the arbitrator to arbitrate and the order has never been vacated or reviewed by the same Court or revised by the Court of Appeal, hence, still valid.

Perhaps I should first dwell on the issues considered in these rival submissions. In my considered opinion, the issue of jurisdiction of an arbitrator, as the contention herein stands, need not be tied to the fact that the arbitrator was appointment by the Court as per the order made in *Misc. Civil Cause No. 8/2019*.

In the first place, as Stephenson, D. A. (1993) "*Arbitration Practice in Construction Contracts*", Third Edition, p.1 notes:

> "An arbitrator is a private extraordinary Judge between party and party, **chosen by their mutual consent** to determine controversies between them, and arbitrators are so called because they have an arbitrary power; for if they observe the submission and keep within due bounds, their sentences are definite from which there lies no appeal." (**Emphasis added**).

A broad understanding of the above excerpt is that, arbitration is a consensual process – it depends on **an agreement** between the parties to refer their dispute to arbitration. In our case, parties were to appoint an arbitrator but they did not. Because the parties failed to appoint her, the Arbitrator was thereby appointed by the Court by virtue of the operation of the law, i.e., section 8 (2) of the then Arbitration Act, Cap.15 R.E 2019. The law allowed the Court to step in for that purpose only.

However, and, as rightly submitted by Mr Mandepo, the Court's appointment was not a ticket vesting jurisdiction on the arbitrator or determining her jurisdictional mandate. Rather, what the Court did was to appoint a person who should preside over the matter upon failure by the parties to agree and, it is upon

that person to see to it that, he or she had jurisdiction to entertain the matter or not. The Court did not at that juncture rule on the issue of jurisdiction because; doing so, would have been against the rule that favours the facilitation of arbitration and restrict pre-emptive court challenges to the jurisdiction of an arbitrator. It only appointed the arbitrator who should determine her competence on her own.

Taking into account what section 96 (4) of the Arbitration Act provides, the above understanding is, in my view, in consonance with what section 34 (1)(a) to (c) of the current Arbitration Act, Cap.15 R.E 2020 provides in relation to the competence of the arbitrator to rule on jurisdiction. In section 34(1) (a) of the Act, the arbitrator is empowered to rule as to whether there is a valid arbitration agreement. The need to do that is imperative because, the basis of jurisdiction to arbitrate is the parties' valid agreement. If one is to put it differently, as a matter of law, it is the parties' arbitration agreement which constitutes the foundation of the arbitrator's jurisdiction and not otherwise.

The above position was authoritatively affirmed by the Court of Appeal in the case of **Mvita Construction Company vs. Tanzania Harbours Authority** (supra). In that case, the Court of Appeal made it clear that:

> "...under the law of Tanzania, an arbitrator's authority, power, and jurisdiction are founded on the agreement of the parties to a

contract to submit present or future differences to arbitration."

The implication of the above statement is, in my view, that, it is the parties who vest jurisdiction on the arbitrator by their agreement. That being the case, I do agree with Mr Mandepo that, even if the Sole Arbitrator was appoint by the Court, since she ought to have ruled on her competence based on the arbitration agreement, this Court cannot be precluded from entertaining any challenge regarding the Arbitrator's substantive jurisdiction. In view of the above, I cannot as well be in a position to concur with Mr Stolla that the jurisdiction of the arbitrator in this matter was vested upon her by the Court.

Having determined the first sub-issue, let me turn to the second sub-issue raised by Mr Mandepo, i.e., *whether the Arbitrator has substantive jurisdiction to arbitrate over the matter emanating from an invalid contract and arbitration agreement*. I think I may rephrase it to mean: whether the agreement to arbitrate, which forms the basis for determining the arbitrator's substantive mandate or jurisdiction, was itself valid.

The gist of Mr Mandepo's submission in respect of the second sub-issue is that there was no valid agreement between the parties and, for that matter, no arbitration agreement ever existed between the Petitioner and the Respondent vesting the arbitrator with jurisdiction to determine the matter. He contended that such an argument featured in the arbitral proceedings and in the Final Award arguing that, the Petitioner was simply taken to

the arbitration tribunal because the properties in dispute were transferred to her through an Instrument of Transfer but which did not under any clause entrust the Petitioner with the liabilities of the defunct NMC.

He has contended, however, that, even if there was a clause in the Instrument of Transfer vesting the liabilities of the defunct NMC upon the Petitioner, a fact which he denied to be the case, still, there was no any arbitration clause in relation to any dispute between NMC and the Petitioner. He concluded, therefore, that, it was grossly wrong for the Petitioner to be sued in the arbitration proceedings by the Respondent on the basis of a void agreement or Addendum thereof between the defunct NMC and the Respondent. And, that, as a matter of law, where there is no arbitration agreement or submission to arbitrate, the arbitrator will be lacking the requisite jurisdiction, added Mr Mandepo.

As it may be gleaned from Mr Mandepo's submission, the crux of the matter here is the validity of the agreement and its Addendum as he considers that, the agreement was void. He has contended that, the Petitioner never made the agreement with the Respondent and, thus, there was a lack of free consent and, that, the subsequent actions taken by the Petitioner after the property was transferred to them cannot in any way be termed to have agreed to be bound by the Maize and Wheat Milling Agreement and its Addendum because she was not the successor of the defunct NMC, and the Instrument of Transfer did no

transfer assets and liabilities of the defunct NMC to the Petitioner but rather merely transferred such properties to her.

He further submitted as another reason, that, the Maize and Wheat Milling Agreement and its Addendum did not exist at the time of transferring the properties to the Petitioner. As such, he contended, that, there was no valid contract between the defunct NMC and the Respondent since, the former had no capacity to contract any longer. In his submission, however, Mr Mandepo has also pointed out and referred to the doctrine of separability/severability of an arbitration agreement.

Under the doctrine of severability, the validity of the arbitration clause does not depend on the validity of the remaining parts of the contract in which it is contained; insofar there is a valid agreement to arbitrate. In our law, this doctrine is enshrined under section 12 of the Arbitration Act which provides that:

> "Unless otherwise agreed by the parties, an arbitration agreement which forms or was intended to form part of another agreement, whether or not in writing, shall not be regarded as invalid, non-existent or ineffective because that other agreement is invalid, did not come into existence or has become ineffective, and the arbitration agreement shall for that purpose, be treated as a distinct agreement."

The above doctrine is well entrenched even in other jurisdictions to the extent that, an arbitration clause cannot be terminated even if the man contract in which it is contained is breached. That is an understandable rule. In the case of **Heyman vs. Darwins Ltd** [1942] A.C 356, for instance, the Court was of the view that:

> "neither repudiation nor accepted repudiation entails termination of the obligation to refer dispute to arbitration. On the contrary, injured party can insist on having consequences of the repudiation assessed by arbitration."

In his submissions, however, Mr Mandepo has contended that, there are exceptional circumstances to the above doctrine, in particular where the arbitration agreement is itself impeached or its existence is being disputed. He contended that, if there be an argument that there is lack of jurisdiction because the arbitration agreement itself is invalid or non-existent, the tribunal may decide that question but its decision will not be conclusive and will be subject of review by the Court.

He has supported the above particular argument by citing **Sutton, D., et al, Russel on Arbitration, 24th Edn, Sweet & Maxwell**, 2018, p.29-30. Reliance was also placed by the Petitioner on the case of **Hyundai Merchant Marine Company Ltd vs. American Bulk Transport Ltd** [2013] EWHC 470 (Comm) and the decision of the Court of Appeal in the case **of**

Louis Dreyful Commodities Tanzania Ltd vs. Roko Investment Tanzania Ltd, Civil Appeal No.4of 2013 (unreported) where the Court made a finding that there was no agreement between the parties to submit to the jurisdiction of an arbitrator.

Relying on all such submissions, it was the conclusion of Mr Mandepo that, there was clearly no agreement between the Petitioner and the Respondent due to there being no consensus ad idem between the parties as the Petitioner had no engagement with the Respondent as stated earlier. In that regard, he surmised and maintained that, there be no such valid arbitral agreement leaves the arbitrator without substantive jurisdiction to determine the matter before her and, makes the award invalid.

For his part, Mr Stolla offered no critical challenged to the above stated submissions, other than urging this Court to make a finding that the Sole Arbitrator had jurisdiction owing to her being appointed by this same Court. If I may also infer from his submission, he seems to bank on Clause 11 of the Maize and Wheat Milling Agreement. However, as I stated herein earlier, being appointed by the Court did not vest jurisdiction automatically on the Sole Arbitrator since jurisdiction of an arbitrator is dependent upon the agreement of the parties. (See the **Mvita Construction Company's case (supra)**).

Notwithstanding Mr Stolla's brief submission, I find it necessary to consider the merits of Mr Mandepo's submissions. In

my view, Mr Mandepo has a point. As I stated, apart from banking on the order of the Court appointing the arbitrator, which I have ruled was not a ticket conferring jurisdiction to her, Mr Stolla's stance, is also premised on Clause 11 of the Milling Agreement. That clause, however, has been disputed by the Petitioner's learned counsel as being invalid.

Perhaps I should borrow a leaf from the South African case of **Canton Trading 17 (Pty) Ltd t/a Cube Architects vs. Fanti Bekker Hattingh** NO (479/2020) [2021] ZASCA 163 (1 December 2021) in the course of discussing Mr Mandepo's submissions and their merit or otherwise. In that, "**Canton's case**", the Court quoted with approval the following dictum in **Heyman vs. Darwins Ltd** (supra), that:

> "[i]f the dispute is as to whether the contract which contains the clause has ever been entered into at all, **that issue cannot go to arbitration under the clause**,for the party that denies he has ever entered into the contract is thereby denying that he has ever joined in the submission." (**Emphasis added**).

The Court went on to state that:

> "Since the submission of a dispute to arbitration requires the consent of the parties, **if the very agreement that requires the submission is challenged on the basis that**

such agreement never came into existence, a dispute exists as to whether there was submission of the dispute to arbitration at all. The problem that then arises is this: who decides the 'existence dispute', the courts or the arbitrators? The question as to who decides whether a dispute goes to arbitration or remains in the courts is one of ever greater significance, given the enhanced role that arbitration enjoys in the resolution of disputes, both domestically and in transnational law. This question may arise at different stages. As the present matter illustrates, there may be litigation at the commencement of a dispute as to whether the courts should decide the dispute or whether it should be sent to arbitration. **Sometimes, however, the issue crystalizes for the first time before the arbitrators**. **They are asked to decide whether they enjoy jurisdiction to hear the dispute**. **The arbitrators may determine the issue. Finally, a court may be called upon to decide whether the arbitrators correctly assumed jurisdiction over the**

dispute, if the arbitrators' award is taken on review or enforcement proceedings are brought. " (Emphasis added).

In the present Petition's scenario, the arbitrator's jurisdiction was challenged during the arbitral proceedings and she ruled out that, she had the requisite jurisdiction to determine the dispute between Monaban and CPB pursuant to Clause 11 of the Milling Agreement. She ruled that, there being a valid arbitration agreement contained in the Milling Agreement and, the same agreement binds the Petitioner, then, she accordingly, had jurisdiction. However, the Petitioner has now challenged that position held by the Sole Arbitrator.

That fact would mean, therefore, that, the issue now is whether the Sole Arbitrator had such requisite substantive jurisdiction to hear the dispute, a fact which the Petitioner refutes on the ground that there was invalid agreement upon which such could be founded. But was the agreement invalid?

As observed earlier, the agreement (the Milling Agreement) which contained the arbitration agreement (clause 11) was concluded on 23rd August 2007 between the NMC and the Respondent. It was followed by an addendum on 10th April 2008. The NMC had, however, been specified by a Declaration Notice dated 30th November 1994. In the year 2014, however, there was a Deed of Variation signed by the Respondent and the Consolidated Holding Corporation (CHC) given that, the 23rd

August 2007 Milling Agreement was found to have been entered when the NMC was under divestiture.

In the Petitioner's submission, it has been contended that, as per section 40 A (1) (m) of the Public Corporation Act, Cap.257 [R.E 2002], the persons who signed the Agreement and its Addendum had no capacity for lacking the requisite approvals. The relevant section referred to, here above, provides as follows:

> 40A.—(1) A specified public corporation shall:
>
> (m) **not enter into any lease,** loan, credit **agreement,** settlement or compromise arrangement **without the approval of the Corporation**." (*Emphasis added*).

The above cited provision was considered by the Sole Arbitrator but she was not convinced that the validity of the Milling Agreement was ever affected. As pointed out earlier here above, determining the validity of the Milling Agreement in general and the validity of the arbitration agreement in particular, was a necessity. Much as the doctrine of severability applies to an arbitral agreement, if the underlying agreement is itself a nullity for want of capacity to create it, in the circumstance of the case at hand, the same effect will definitely permeate to the arbitral agreement because, the same argument would be marshalled in that, it was agreed by parties with no capacity to contract.

In finding about the validity, the Sole arbitrator made her finding that since the agreements were prepared by Government agents (NMC and CHC) and signed by government officials the

doctrine of indoor management would apply, the Petitioner would be *estopped* from pleading incapacity and illegality of the agreements, hence, be bound by the Milling Agreement and, hence, the arbitration agreement contained in it bound the parties.

While I am mindful that the role of this Court, in these proceedings, is not to give the award a meticulous eye endeavouring to pick holes, inconsistencies or faults in the award (see **the Registered Trustees of the Diocese of the Central Tanganyika' case (supra) a**t p.27-28), I am also alert to the fact that, when this Court is called upon to set aside an award it has to decide whether the arbitral award was *prima facie good* or *right on the face of it*. (See **CACIT International Engineering (T) Ltd vs. University of Dar-es-Salaam**, Misc. Comm. Case No.1 of 2020 (unreported). Where the award is tainted with an error of law on the face of it, on the basis of the Court of Appeal's authority in the case of **Vodacom Tanzania Ltd vs. FST Services Ltd**, (supra), the same will be a basis for setting it aside.

Looking at the award from the context of the discussion flowing from the Sole Arbitrator's reliance on the doctrine of estoppel, I find, in my view, that, there is a fundamental legal issue here which will warrant the intervention of the Court. I hold it so because, in the first place, it is trite that estoppel cannot be used to circumvent the law. In other words, a statutory duty cannot be avoided on the face of a plea of estoppel.

Perhaps I should recite the words of Lord Maugham in the English case of **Maritime Electric Co. vs. General Dairies Ltd [1937] A.C. 610**, to bolster what I have stated herein above. In that English case, his Lordship Maugham had the following to say, and which I consider to be quite persuasive, that:

> " Where, as here, **the statute imposes a duty of a positive kind**, **not avoidable by the performance of any formality**, for the doing of the very act which the plaintiff seeks to do, **it is not open to the defendant to set up an estoppel to prevent it**. This conclusion must follow from the circumstances that an estoppel is only a rule of evidence which under certain special circumstances can be invoked by a party to an action; it cannot, therefore, avail in such a case to release the plaintiff from an obligation **to obey such a statute, nor can it enable the defendant to escape from a statutory obligation of such a kind on his part**." (Emphasis added).

To further contextualise the above understanding in light of the presence matter at hand, the trouble I note is, in the first place, centred on what section 40 A (1) (m) of the Public Corporation Act, Cap.257 [R.E 2002], which I earlier cited here above, provides. Essentially, that provision places a clear positive duty of mandatory nature on any specified public corporation intending to enter into a lease transaction (as the one which led

to the conclusion of the Milling Agreement and its Addendum) to ensure that it has obtained approvals.

In my humble view, the above requirement was a matter of statutory compliance, the absence of which will vitiate the transaction in view of the fact that there would be lack of capacity to transact or contract, an aspect which is essential in any contracting process. But that point aside, though I will revert to it, my first concern is more deep rooted on the applicability of the doctrine of estoppel in the manner it was invoked in the award. In my view, to state that the doctrine of estoppel would apply to override any statutory requirement which demanded positive compliance, that would, amount to an erroneous legal proposition.

In essence, an erroneous legal proposition stated in an award and forming its basis, as was held in the case of **Tanzania Electricity Supply Company Ltd (TANESCO) vs. Dowans Holdings SA (Costa Rica) & Dowans Tanzania Limited (Tanzania)**, Misc. Civil Appl. No.8 of 2011, at page 41, constitutes an error of law apparent on the face of the award. That, being said, as stated by the Court of Appeal in the case of **Vodacom Tanzania Ltd vs. FST Services Ltd**, (supra), where an award is tainted with an error of law on the face of it, that by itself constitute a ground of setting it aside.

As I stated here above, there was, as well, the issue capacity to transact or contract, an aspect which I stated in my

earlier discussion here above as being essential in any valid contracting process.

That aspect, in the context of this Petition, has to do with whether in the course of the Parties' engagements which led to the conclusion of the lease Agreement there was compliance with section 40 A (1) (m) of the Public Corporation Act, Cap.257 [R.E 2002]. The Petitioner has all along maintained that, there was no such proof. However, as I noted earlier, the Petitioner's contention in the course of the arbitral proceedings was assailed and silence by way of application of the doctrine of estoppel, which, nevertheless, and, as I stated here above, was, in my view, erroneously applied.

From that understanding, and, there being no proof of compliance with section 40 A (1) (m) of the Public Corporation Act, Cap.257 [R.E 2002], it is my view that, the MNC lacked the capacity to ink the Mills agreement, in the first place. As I pointed out earlier here above, essentially, it is a well understood and established fact, from the separability point of view, that, a party may lack capacity to enter into the main agreement but still retain capacity to inter into agreement to arbitrate.

However, the functionality of the above may as well depend on the nature contractual transaction as a whole, since, if the validity of the arbitration agreement is itself an issue, the same may be tainted with lack of capacity. The rationale for that is the fact that, from a contractual point of view, capacity is one of essentials of any legal agreement and, arbitration agreements are

not exceptional to the rule that an agreement tainted with lack of capacity is void. Contracting parties, must, therefore, have the requisite legal capacity to execute contracts, absent which their agreement will be void.

Invariably, lack of capacity to submit to arbitration constitutes invalidity of the arbitration agreement, hence, sufficient grounds for denying enforcement. In the context of this Petition, much as the main agreement may be held to be void for want of some capacity on the part of the defunct NMC, yet, Clause 11 of the Mills Agreement was a valid agreement to arbitrate and, in my view, that was the rationale for why this Court appointed an arbitrator.

It has to be noted, however, that, the validity of the agreement to arbitrate, which has been the contentious issue, was left for the arbitrator to rule, and she ruled that the agreement was valid and, that, she had jurisdiction. As I stated earlier herein, that is an issue which this Court is entitled to examine in a Petition like this one.

In my view, since I have held a view that the NMC lacked capacity to ink the Mills agreement, in the first place, the Mills Agreement in which the arbitration agreement was included was void for want of capacity to contract.

Given the incapacity status of one of the parties, i.e., the NMC, that lack of capacity did permeate as well to the conclusion of the arbitral agreement (i.e., the Clause 11) and, in that regard, the Sole Arbitrator could not have jurisdiction to entertain the

matters which were laid before her since, capacity is one of essentials of any legal agreement and arbitration agreements, as I stated, are not exceptional. Once there is lack of capacity, then the arbitral agreement was also invalid, and the jurisdiction of an arbitrator cannot be mounted on an invalid agreement of the parties.

With that in mind, the Petitioner's Petition under section 74 (1) (a) and (b) of the Arbitration Act, Cap.15 R.E 2020, becomes sound and warranting the intervention of this Court under section 74 (3) (b) or (c) of the Arbitration Act, Cap.15 R.E 2020.

In her Petition, the Petitioner has also raised the issue of serious irregularity. The basis for the alleged irregularity is stated under paragraph 15 (iv), (v), (vi) and (viii) of the Petition. Perhaps it will be proper to recite the paragraphs here under:

> "15 (iv) The Sole Arbitrator committed serious irregularity by misapplying the case of **Trade Union Congress of Tanzania vs. Engineering Systems Consults Ltd and Others**, No.15 of 2016 (unreported) in the dispute between the Petitioner and the Respondent to form the basis of her decision;
>
> (v) The Sole Arbitrator committed serious irregularities by failing to deal with the issues before her, including [raising] another issue which was not agreed by the parties and warding special damages to the Respondent to

> the tune of TZS 640,857,800 as specific damages emanating from the alleged confiscation of cereals, with no proof of the same;
>
> (vi) The Sole Arbitrator committed serious irregularities after rejecting the Respondent's case that, the Petitioner stepped into the shoes of the defunct NMC through Deed of Variation and proceeded to determine Petitioner's liabilities outside the Respondent's pleadings.
>
> (vii) The award is uncertain as the arbitrator, while awarding special damages to the claims that were specifically proved by the Petitioner."

In expounding the above grounds, the Petitioner has elected to deal with them in unison. It was Mr Mandepo's submission that, the Respondent's case was premised under the Deed of Variation, thus, culminating into a conclusion that, by such a Deed, the Petitioner had stepped into the shoes of the defunct NMC and was bound by the Maize and Wheat Milling Agreement.

He submitted, however, that, since the Arbitrator rejected that proposition, she ought to have ended there. Instead, it was so argued, she proceeded to determine who should bear liabilities of the defunct NMC, aside from the case brought by the Respondent. From Mr Mandepo's view, that approach taken by the Sole Arbitrator constitutes an irregularity of serious nature

because she acted in excess of her mandate as she ended up amending the case for the Claimant.

To buttress his submission, he placed reliance on the case of **the Registered Trustees of the Diocese of the Central Tanganyika' case** (supra), regarding the duty on the part of the arbitrator to act impartially. Alongside the foregone submission, it was also contended that, there was an irregularity in applying the **TUCTA case** (supra) to form the basis of the Award given the facts of and the scenario giving rise to that case.

The Petitioner has also submitted that, the Sole Arbitrator committed a serious irregularity by awarding special damages to claims that were not specifically proved by the Respondent and, on the other hand, failed to award specific damages on claims that were specifically proved by the Petitioner. Overall, it was therefore contended that, by virtue of section 75 (2) (i) of the Arbitration Act, the Sole Arbitrator committed a serious irregularity by placing a higher burden of proof to the Petitioner while awarding to the Respondent special damages that were not specifically proved as required by the law.

In the answer to the Petition and the response submissions made regarding the issue of serious irregularities committed by the Sole Arbitrator, however, Mr Stolla, the learned advocate for the Respondent herein, has conceded to issues raised by the Petitioner and the submissions made in respect of them, adding even more other concerns which, according to him, amounted to serious irregularities on the part of the arbitrator.

According to Mr Stolla, the Sole Arbitrator delivered an award which contravened section 75 (1) and (2) (a) of the Arbitration Act, in that, she failed to act fairly in the course of conducting the arbitral proceedings and making decision on matters of procedure and evidence. He relied on a factual matter that on 6th June 2019, the Respondent was coerced to execute a Deed of handing over of premises in dispute and give vacant possession and, contended that, the Sole Arbitrator seriously overlooked such a factual matter, hence, constituting an irregularity.

He also contended that, the Sole Arbitrator failed to conduct the proceedings in accordance with the agreed procedure, and, hence, a serious irregularity under section 75 (2) (c) of the Act. He contended further that, although paragraph 12 and 13 of the Award indicate that the parties chose the Tanzania Institute of Arbitrators' Arbitration Rules of 2018 Edition, as the applicable procedural Rules, such rules were never used in the course of Arbitration.

He has as well contended that, the Sole Arbitrator did not deal with issues No. (iv), (v), (vi), (vii), (viii), (ix) and (x) as provided for by the law. He contended that, issue No. (iv) was fundamental issue in the whole proceedings but the arbitrator simply dwelt strictly on the documentary evidence of the Handing Over Deed, but seriously disregarded the oral evidence given by the Respondent.

Moreover, the Respondent's counsel contended that, the Sole Arbitrator failed to comply with the form of the award (Form No.7) as provided for in section 70 (2)(h) of the Arbitration Act, Cap.15 [R.E 2020] read together with Regulation 47 (3) of the Arbitration (Rules of Procedure) Regulations, 2021 (GN. No.146 of 2021). Let me point out, however, there is no section 70(2)(h) in the Act and section 70 of the Act deals with matters related to recoverable costs of arbitration and not serious irregularities.

All in all, the Respondent's counsel submitted that, since the Petitioner and the Respondent are in agreement that the award is tainted with serious irregularities, then, this Court should pronounce judgement in terms of what the Court did in the case of **Joseph Warioba Butiku vs. Perucy Muganda Butiku** [1980] TLR in which the Court held inter alia, that:

> "Where at first hearing of the suit it is apparent that the parties are not at issue on sufficient questions of law or fact, the Court may at once pronounce judgement. In this matrimonial suit both parties have by their counsel agreed on more than sufficient issues of fact and law raised in the pleadings. The Petitioner in his petition and the Respondent in her answer establish that the marriage has irreparably broken down, as both assert it has, and each spouse is praying for a divorce..."

Mr Stolla has submitted, from an analogous premise to the above holding of the Court, that, this Court should hold that:

(i) That, the Arbitrator had requisite jurisdiction to arbitrate on the matter in terms of the clause 11 of the Milling Agreement and, in pursuance of the order of the High Court of Tanzania at Arusha, dated 31st March 2020.

(ii) That judgement be pronounced at once as both the Respondent and the Petitioner are in agreement that the award is tainted with serious irregularities.

(iii) That, the award be set aside.

(iv) That, arbitration be conducted *de novo* before another arbitrator to be agreed upon by the parties or to be appointed by the Court.

(v) That, each party should bear its costs in this petition.

What I have asked myself in the course of dealing with the submissions made in respect of the alleged serious irregularities on the part of the Sole Arbitrator is whether this Court should blindly agree to the parties' submissions only because they are in agreement that the award is beset with serious irregularities.

In my humble view, I do not think that, a Court properly constituted, should blindly act in the manner suggested by the learned counsel for the Respondent without being satisfied itself of the truths about what has been agreed upon by the counsels for the parties as matters constituting serious irregularities.

I hold it to be so because, grounds constituting serious irregularities are categorically stated in section 75(2) (a) to (i) of the Arbitration Act, Cap.15 [R.E 2020]. As such, what is alleged must fall in one or in all of the paragraphs (a) to (i) of that section. The said provision contains high thresholds and not every alleged matter, even if labelled "**serious irregularity**", may fall under those thresholds.

For instance, in the in the English case of **The Secretary of State for the Home Department and Raytheon Systems Limited** [2015] EWHC 311 (TCC) and [2014] EWHC 4375 (TCC), while setting aside an arbitral award for serious irregularity under section 68 (2) (d) of the UK's Arbitration Act 1996 (same as section 75 (2) (d) of our law), his Lordship Akenhead J was of the view that, there is no failure to deal with an issue where arbitrators have misdirected themselves on the facts.

Besides, in that case, the Court was of the view, that, in order to meet the requirement for substantial injustice, the applicant needed to show that, his position on that issue was "reasonably arguable" and, had the tribunal found in his favour, the tribunal might well have reached a different outcome in the award.

In his submissions, however, Mr Stolla has not been able to go to that extent and this Court cannot be taken aboard by a sweeping statement that both parties have agreed that there are serious irregularities in the award. Moreover, I have also looked at the award and I find that, the Sole Arbitrator addressed all ten

issues enlisted on paragraph 36 of the Award. As such, the submission that she did not address issues No. (iv), (v), (vi), (vii), (viii), (ix) and (x) as provided for by the law is erroneous. If the Respondent is unpleased by the conclusions arrived at, that cannot be said an irregularity.

In the case of **M/s Marine Services Co. Ltd vs. M/s Gas Entec Company Ltd,** Consolidated Comm. Cause Nos. 25 & 11 of 2021, this Court, citing the English case of **Lesotho Highlands Development Authority vs. Impregilo SpA and Others** [2006] 1 AC 221, and observed that the law:

> "**does not permit a challenge on the ground that the tribunal arrived at a <u>wrong conclusion as a matter of law or fact</u>**.."

As I assess the Petitioner's submissions in regard to the issue of serious irregularities, first, I do not agree, had the Sole Arbitrator been vested with jurisdiction the award would have been open to challenge on the ground that she exceeded her mandate or unbiased. Neither would it have been easier to assail her reliance on the TUCTA Case nor the way she analyzed the evidence before her a subject which this Court would venture into to establish an irregularity.

In my humble view, that kind of an approach would, at best, be applicable to an appeal by an appellate court when dealing with an appeal and cannot be the case in an arbitration petition since such a petition is not an appeal.

However, as regards the issue of award of specific damages, the law is settled that, special damages should, not only be pleaded, but the claimant should also strictly prove them. The case of **Zuberi Augustino vs. Anicet Mugabe** [1992] TLR 137 is a case in point. In his submissions, Mr Mandepo has relied on section75 (2) (i) to pitch his argument and finding that, the award of specific damages without there being proof was an irregularity of serious nature.

A plea regarding serious irregularity under section 75(2)(i) will stand, if the same is admitted by the arbitral tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.

As I stated here above, Mr Stolla, the learned advocate for the Respondent, has conceded that the kind of irregularities pointed out by the Petitioner should stand. Save for what I stated herein above in respect of the rest of the submissions by Mr Mandepo in respect of the serious irregularity issues he raised, it will mean that, Mr Stolla, being a person to whom the Respondent has vested powers to act for her in this Court, does support the view that, the award of specific damages without there being proof was a serious irregularity falling under section 75 (2) (i) of the Arbitration Act, Cap.15 R.E 2020.

In his submissions, Mr Mandepo (for the Petitioner) has prayed for the following:

1. That, the award be set aside based on the ground of lack of substantive jurisdiction.
2. In the alternative, the award be set aside on the grounds of serious irregularities or be declared to be of no effect in whole as provided for under section 75(3) of the Arbitration Act, Cap.15 R.E 2020.
3. That, the whole costs involved in the arbitral proceedings and costs for this Petition be provided for, and any other order(s) or relief this Honourale Court may deem just and proper to grant in the interest of justice.

As it may be well noted, the payers made by the Petitioner and those made by the Respondent are of diverse nature and their angles of inclination are different, even though both have a common thread that the award should be set aside.

As it may be noted from the beginning, the finding which this Court made in the first place was that, the Sole Arbitrator lacked substantive jurisdiction owing to the fact that, the arbitral agreement and the entire Milling Agreement was invalid. When a tribunal lacks jurisdiction whatever it does is a nullity. In view of that fact, this Court settles for the following orders:

(a) That, since this Court has made a finding that the arbitrator lacked substantive jurisdiction to entertain the matters laid before her, owing to

the fact that the agreement upon which her jurisdiction should have been anchored was invalid, it follows that the award dated 2nd April 2021 is invalid and this Court, acting under section 74(3)(c) of the Arbitration Act, Cap.15 [R.E 2020], hereby set it aside in whole.

(b) That, in the circumstances of this petition, each party shall bear its own costs.

It is so ordered.

DATED AT DAR ES SALAAM ON THIS 02ND DAY OF SEPTEMBER, 2022

IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
COMMERCIAL DIVISION

.....

DEO JOHN NANGELA
JUDGE