

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF THE
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL CAUSE NO. 32 OF 2022**

IN THE MATTER OF ARBITRATION

AND

IN THE MATTER OF ARBITRATION ACT OF 2020

BETWEEN

VODACOM TANZANIA PLC..... PETITIONER

VERSUS

SHIVACOM TANZANIA LTD.....RESPONDENT

Last Order: 29/08/2022.
Date of Ruling: 14/09/2022.

RULING

NANGELA, J.:

This Petitioner was initially filed under section 78 (1) of the Arbitration Act, 2020 (**which as of now should read as section 83 (1) of the Arbitration Act, Cap.15 R.E 2020**) and Regulation 63 (1) (a), (b), (c), (d) and (e) of the Arbitration (Rules of Procedure) Regulations, 2021 (*"the Regulations"*).

The Petitioner is seeking for recognition of a Third Partial Award dated and signed by the members of the Tribunal on the

29th April 2021 and the 04th day of May 2021. The respective Tribunal was formed under the Rules of the United Nations Commission on International Trade Law ("*UNCITRAL*").

Perhaps it will be prudent to set out, albeit in brief some factual background so as to get a big picture regarding this petition. On the 1st day of September 2004, the Respondent and the Petitioner concluded a Super Dealer Agreement ("**SDA**"). Similarly, on 1st July 2007, the two parties concluded as well an 'Electronic Voucher Agreement' ("**EVA**").

On the 27th November 2013, both, the "SDA" and the "EVA" were amended in their dispute resolution clauses. In those amendments the parties agreed that, any dispute or claims arising in connection to the "**SDA**" and the "**EVA**" would be resolved by arbitration under the arbitration rules then in force of the UNCITRAL (as amended in 2010).

As the parties' relations progressed, there ensued a dispute as the Respondent alleged breach of both agreements. In view of such allegations, notices of arbitration were issued on 06th day of July 2018 and 26th day of July 2018 in respect of the "EVA" and the "SDA" respectively. The claims were later

consolidated into one arbitral proceeding which was referred to a panel of three arbitrators ("the Tribunal") appointed in accordance with the UNCITRAL Rules.

The Tribunal determined the matter and issued its 1st Partial Award on the 18th day of November 2019. That partial award only determined the parties' liability wherein the Respondent as found to be liable for the breach of the "SDA" and the Petitioner was found on the wrong side for having wrongly terminated the "**EVD.**"

On the 09th March 2021, a 2nd Partial Award was issued in regard to the parties' entitlements to damages. In that award, the Petitioner was entitled to **TZS 22, 548,600,000/=** and the Respondent was awarded only nominal damages.

Further, the Respondent was also found liable to pay the Petitioner a simple interest on the amount awarded, at the contractual rate of **18%** per annum, from March 2013 until the date when the 2nd Partial Award was issued, and continuing thereafter at the same rate until payment. The Respondent was also condemned to pay costs and interest thereon.

However, the amount constituting costs was not computed but deferred to a later stage when the Tribunal would issue its **3rd Partial Award**. At the time of issuing its 2nd Partial Award, the Tribunal directed experts instructed by the parties to calculate and come up with an agreed interest and costs payable by the Respondent, in respect of damages awarded on the Petitioner's counterclaim from 31st March 2013 to the date of the Award.

On the **29th April 2021** and **04th May2021**, the Members of the Tribunal signed and issued their **3rd Partial Award**. In this Third Partial Award, the Tribunal determined and held, *inter alia*, that, the Petitioner is entitled to **TZS 32,228,000,000/=** on account of interest following breach of the "**SDA**".

In view of the above, by email dated 16th April 2021 the Respondent's counsels confirmed to the Tribunal that, the agreed amount due as interest payable to the Petitioner from 31st March 2013 until the date of the 2nd Partial Award was **TZS 32, 228, 000,000**. The Tribunal, thereby certified the amount

and issued the Third Partial Award which the Petitioner herein seeks to register in Court and, hence, the present Petition.

On the 21st day of June 2021, and, pursuant to the orders of this Court dated 1st June 2021, the Respondent filed an answer to the Petition. In her answer to the Petition, the Respondent indicated that, on the day set for the hearing of this Petition, the Respondent would move this Court to stay the proceedings of this Petition pending the hearing and determination/disposal of two earlier matters, namely: **Miscellaneous Civil Application No.210 of 2021** filed by the Respondent against the Petitioner (**Shivacom -1**) and **Miscellaneous Civil Cause No.216 of 2021** filed by Tanil Somaiya as Guarantor against the Petitioner (**Shivacom-2**).

In addition, the Respondent did indicate that, on the date fixed for the hearing of this Petition, she would apply for its consolidation with the Petitioner's other Petition comprised in **Miscellaneous Commercial Cause No.22 of 2021** which, essentially, emanated from the same arbitral proceedings and sought similar relief, i.e., recognition and/or enforcement of Partial Awards rendered in those proceedings.

Unfortunately, the **Miscellaneous Commercial Cause No.22 of 2021** (hereafter referred to as "**MCC 22/21**") was not consolidated as the Respondent had intended but it was argued and determined earlier by this Court (Maruma, J.,) in a ruling issued on the 6th April 2022. In those proceedings before this Court, the Respondent raised a number of issues to challenge the prayers sought by the Petitioner therein which are similar to the prayers sought in this Petition.

This Court (Maruma, J), made a finding on the issues raised and dismissed the "**MCC 22/21.**" Aggrieved by the decision of this Court in the "**MCC 22/21**", the Petitioner herein filed a Notice of Appeal in the Court of Appeal seeking to appeal against the said decision.

Since the present matter was presided over by the same judge who heard and determined the "**MCC 22/21**", the parties requested her to recuse from this matter to avoid being prejudice by her earlier ruling in the "**MCC 22/21**". The prayer was granted and the case file was reassigned to me.

Unfortunately, when the parties appeared before me on 06th of July 2022, neither party told this Court whether

Miscellaneous Civil Application No.210 of 2021 and **Misc. Civil Cause No.216 of 2021** were already disposed of since there was an earlier ruling of this Court (**Mteule J.,**) dated 28th day of January 2022 which stayed the proceedings of this Petition pending hearing and determination of the two mentioned Miscellaneous Applications/Cause (No.210/21 and 216/21).

On the material date, however, the parties' learned counsels led by Mr Gasper Nyika and Mr Michael J.T. Ngalo respectively, prayed to proceed with the hearing of this matter by way of written submission, a prayer which I readily granted. The respective learned counsels were given a schedule of filing their respective submissions and they duly filed their written submissions on time. I will briefly sum-up those submissions hereunder.

In his written submission, the learned counsel for the Respondent, raised an initial concern regarding whether it is legally healthy to pursue this Petition to its finality when there is in place, an on-going appeal process, involving these same parties, against the decision of this Court (Maruma J.,) in the

"MCC 22/21". What seems to be proposed here is a stay order in respect of this Petition.

However, in his rejoinder submission, Mr Nyika, the learned counsel for the Petition contended that, the counsel for the Respondent did not rely on any authority to backup his submission, and, that; in any case, seeking for a stay of proceedings must be made by way of an application to the Court which will give the Petitioner an opportunity to respond appropriately.

In view of the above, he urged this Court to disregard the Respondent's statement because it was a statement made in the reply to the Petitioner's submission in chief and not an application as such.

Perhaps I should pose here to reflect. First, the current Petition is premised on a Third Partial Award issued by a Tribunal which also issued two earlier Partial Awards. This means that, the proceedings from which the Partial Awards emanate are essentially the same.

Secondly, there is now a pending appeal before the Court of Appeal challenging the decision of this Court (Maruma,J.) in

MCC 22/21, the ruling made in respect of the earlier Partial Awards made by the same Arbitral Tribunal whose proceedings were challenged by the Respondent successfully in the MCC 22/21.

From the two factual issues above, should I proceed with a final determination of this matter? The Petitioner argues that this Court should proceed while the Respondent has raised a red flag.

In my view, although the Respondent did not certainly rely on any authority regarding why this Court should stay the current Petition and, even if there has not been a formal application for stay of these proceedings as rightly contended by Mr Nyika, still, this Court is entitled to take judicial notice of the ruling in the "**MCC 22/21**", and the fact that, this Court's ruling in that case, is now a subject of an appeal before the Court of Appeal.

In doing so, the Court will have to decide as to whether it should proceed with the hearing and determination of the merits of this matter or stay it to give room to the **MCC**

22/21's appellate process of having it heard and determined by the Court of Appeal come to an end.

I have considered the factual matrix herein and the fact that, this Petition (**MCC- 32/21**) and the already determined MCC-22/21, which is now a subject of an appeal, emanate from the same root and, hence, share a similar nexus.

In the case of **Bavaria N.V vs. Jovet Tanzania Ltd**, Consolidated Commercial Cause No.11 and 31 of 2020 (read with Misc. Commercial Application No.10 of 2020 -same parties), this Court made a finding that, where a matter has an ample nexus to an appeal pending before the Court of Appeal in such a way that the decision rendered by the Court of Appeal will necessarily have ramifications in the determination of that matter, that matter before the lower Court should be subjected to stay orders to await the decision of the higher Court.

For the sake of being precise, this Court stated as follows, and I quote:

"In my view, to just consider the current
Misc. Comm. Cause No. 11 of 2020 as a
'mere application to register an award',

without considering the ramifications it might occasion given the pending Appeal in the Court of Appeal, will be, in my view, tantamount to casting a short-sighted glance at, and belittling the intensity of the whole matter, thus complicating it further. For that reason, wisdom dictates, therefore, that I consider the bigger picture of the case in light of the ... position of the law regarding what this Court is supposed to do once a matter is found to have nexus with an Appeal filed and pending in the Court of Appeal.”

The Court went on to state further that:

“In my view there is a nexus to it since if the Court of Appeal will happen to make a finding that the trial judge in Misc. Comm. Cause No.183 of 2018 erred, that will mean that there will be a change of trajectory in regard to the reference to Arbitration and the outcome of the entire process. ”

In that Bavaria's case (supra) reference was also made to the case of **Lake Ltd vs. Dorcus Martin Nyanda**, Civil Revision No.1 of 2019, (unreported) whereby, the Court, at page 3, (citing the case of **TANESCO vs. Dowans Holdings S.A (Costa Rica) and Dowans Tanzania Ltd (Tanzania)**, Civil Application No.142 of 2012 (unreported) held that:

"It is settled law in our jurisprudence, which is not disputed by the counsel for the applicant, that the lodging of appeal in this Court against an appealable decree or order of the High Court commences proceedings in the Court. We are equally convinced that it has long been established law that once a notice of appeal has been duly lodged, the High Court ceases to have jurisdiction over the matter"

In the case of **Serenity on the Lake Ltd vs. Dorcus Martin Nyanda, Civil Revision No.1 of 2019, (CAT) (unreported)**, it was observed by the Court of Appeal that:

"after realizing that there [is] a pending appeal before [the Court of Appeal the

High Court should] **halt the proceedings** and pave way for the appeal process to proceed.” (Emphasis Added).

As I stated herein earlier, whether the Respondent filed an application seeking for a stay or not, upon giving a prudent look at the matters before this Court and the fact that the Arbitral proceedings challenged in the “**MCC-22/21**” are emanating from the same proceedings from which the Third Partial Award, which forms the subject of this “**MCC-32/21**”, there seem to be an ample nexus to the pending Appeal arising from the “**MCC-22/21**”.

As such, if the Court of Appeal will happen to make a finding that the trial judge in “**MCC-22/21**” did not err or otherwise that she erred in her findings; in whichever way such a finding may be, certainty this Court will be properly guided lest it ends up making conflicting decisions and complicate the whole trajectory of determining this Petition.

In view of the above, even if this Court had made an order declaring a date for the issuance of its ruling, the same

cannot stand, and this Court cannot as well proceed with the final determination of the current Petition while there is still unresolved Appeal pending in the Court of Appeal of Tanzania which has a direct bearing to the arbitral proceedings from which the Third Partial Award, which is being enforced in this Court, arose.

The orders of this Court dated the 29th August 2022 and the entirety of this Miscellaneous Commercial Cause No.32 of 2021 will be, therefore, put on hold until the Petitioner's Appeal arising from the ruling of this **MCC-22/21** is heard and determined by the Court of Appeal.

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

1. The Orders of this Court dated 28/8/2022 are hereby set aside.
2. That, the final determination by this Court of this Miscellaneous Commercial Cause No.32 of 2021 is **put on hold** till hearing and final determination by the Court of Appeal, of an Appeal arising from

the decision of this Court in the Miscellaneous Commercial Cause No.22 of 2021, seeing that the outcomes from the pending Court of Appeal's decision will have a direct nexus to and bearing on the way the current Miscellaneous Commercial Cause No.32 of 2021 will finally be determined.

3. Parties are to promptly and duly notify this Court of the outcomes of the pending Appeal at the Court of Appeal in respect of the MCC-22/21 once the Court of Appeal renders its decision.

It is so ordered.

DATED AT DAR ES SALAAM ON THIS 14TH DAY OF
SEPTEMBER, 2022



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HON. DEO JOHN NANGELA
JUDGE