

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)**

AT DAR ES SALAAM

MISC. COMMERCIAL CAUSE NO. 29 OF 2022

IN THE MATTER OF ARBITRATION

AND

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

AND

IN THE MATTER OF ARBITRATION UNDER THE NATIONAL CONSTRUCTION

COUNCIL ARBITRATION RULES 2001 EDITION

BETWEEN

IRINGA MUNICIPAL COUNCIL PETITIONER

VERSUS

JV TANGERM CONSTRUCTION CO. LTD

& INTERCITY BUILDERS CO. LTD RESPONDENT

RULING

Date of last order: 14/04/2023

Date of ruling: 28/04/2023

AGATHO, J.:

The Petitioner petitioned to this Court challenging the arbitral award issued by the Arbitral Tribunal as well as the proceedings. The Respondents contested the petition by filing a reply thereto. Both parties employed the services of learned counsel. Whereas the petitioner was represented by Rehema Mtulya, learned State Attorney, the respondents

enjoyed the services of the learned counsel Willson Ogunde. The hearing of the petition was done by way of written submissions.

This case centres on among other issues whether there is illegality in the award issued by the arbitrator, that whether the award was issued contrary to the law and public policy. The arbitrator also failed to properly interpret the contract between the parties on the variation clauses found in the General Conditions of the Contract.

But before delving into the grounds of the petition, it is worthwhile to sketch the background of the petition albeit briefly. The petition stems from the arbitration proceedings on the contractual agreement between the parties executed on the 05/11/2015 a contract No. LGA/025/2014/2015/HQ/W/32 for construction of one bridge along Tagamenda – Kilolo Road for a contract price of TZ 5,343, 133, 556.30. The contract also included the construction of two span bridge of total length 30 metres and the construction of the approach roads of 262 metres length into the gravel standards. The contract was for a period of 300 days from 19/11/2015 to 13/09/2016 which was later extended by the petitioner for further period of 705 days. The UNITEC Civil Consultants was a Project Manager (PM) to supervise the bridge construction project. The dispute

arose, the petitioner's alleged that the respondent performed various contract works that contained variations without obtaining the final approval from on the quotations from the Petitioner (the employer), without giving early warnings to the employer and in some instances without seeking the project manager's approval contrary to clauses 35.1, 35.2 and 43 of General Contract Conditions (GCC). The petitioner went on terminating the contract which culminated into the dispute that was referred to the project manager (PM), to the adjudicator and finally to the arbitration tribunal.

At the PM the respondent raised the following claims for variations. It is noted that initially the respondent during execution of the contract raised 10 claims which were rejected by the PM (see A copy of a letter with Ref. No. TG-KL/PMRALG/215/aju/227 dated 29/10/2018 "IMC-02". That irked the respondent who on 26/02/2019 referred the matter to the adjudicator, Engineer Immanuel Kimambo who in turn delivered his decision on 26/09/2019 granting six out of 10 claims. These were:

- (i) Costs for fabrication and installation of expansion joint to the tune of TZS 93,831,700.00

- (ii) Costs for excavation of river diversion and backfilling to the tune of TZS 120,650, 500.00
- (iii) Costs for carrying out pile integrity test to the tune of TZS 20,998, 800.00
- (iv) Costs for fabrication and installation of sacrificial casing in piling works TZS 64,989, 042.22
- (v) Variation costs for supply and fixing services pipes inside pedestrian walkway TZS 8,510, 000.00
- (vi) Costs for additional Geotechnical Investigations to the tune of TZS 14,509,706.25.

According to the petitioner though the adjudicator granted the claims, the items (i) was done without approval of quotation), (ii) was done without issuance of early warnings and being instructed by the PM, (iii) and (vi) were done without issuance of early warning and approval of quotation, (iv) and (v) too were done without approval of quotations. A copy of the adjudicator's decision dated 26/02/2019 is annexure "IMC-03."

The petitioner was dissatisfied with the adjudicator's decision, and she invoked clause 28.2 of the GCC and on 22/03/2019 by writing to National Construction Council (NCC) informing them her intention to

challenge the adjudicator's decision and requested the institution of the arbitration proceedings. The NCC on 30/04/202 appointed Advocate Deogratias Ringia as a sole arbitrator in accordance with NCC rules.

At the arbitration tribunal the petitioner unsuccessfully claimed that the adjudicator's decision was improperly procured, null and void. Thus in her view it should be set aside for want of jurisdiction as the adjudicator committed serious misconduct in awarding the respondent's claims. The petitioner prayers were for:

- i. A declaration that the termination of contract was lawful and valid.
- ii. A declaration that the Adjudicator committed serious misconduct in his award for allowing the respondent's claims and refund without considering contractual provisions and factual issues on the project.
- iii. A declaration that the award by the adjudicator dated 26/02/2019 was improperly procured, null and void, hence should be set aside for want of jurisdiction and awarding compensation to the respondent when she did not abide to the compensation procedures as laid in the contract.

- iv. A declaration that the respondent is in breach of her obligations under construction contract in this dispute for failure to complete the works within agreed intended completion date or such other extended date.
- v. An order that the respondent pay the claimant all the losses resulted from the breach of contract as will be pleaded in the claimant's statement of claim.
- vi. An order that the respondent is entitled to be deducted of liquidated damages applied by the claimant during the execution of the contract.
- vii. A declaration that the decision taken by the claimant not to extend further time was valid and in accordance with the provisions of the parties' construction contract.
- viii. An order that the respondent compensate the claimant for the costs of arbitration, including legal fees, in a an amount to be specified later together interest thereon and, as between the he parties, alone bear the responsibility for the compensation to the Arbitral tribunal.
- ix. Any other relief as it deems just and appropriate.

The respondent on her side in the written statement of defence challenged the jurisdiction of the Arbitrator to determine matters that were not raised before the Adjudicator. Along that the respondent raised 11 counter claims. These were:

- i. An order for wrong application of liquidated damages.
- ii. An order for a sum of TZS 93,831, 170 for fabrication and installation of expansion joint.
- iii. An order for sum of 120,650,500 for excavation for river diversion.
- iv. An order for a sum of TZS 20,998,800 for carrying out pile integrity test.
- v. An order for a sum of TZS 64,989,043.22 for fabrication and installation of sacrificial casing in piling works.
- vi. An order for the sum of TZS 8,500,800 for supply and fixing of service pipes in pedestrian walkway.
- vii. An order for a sum of TZS 14,509, 705.25 for additional geotechnical investigation.

- viii. a) An order for a sum of TZS 1, 121, 018,863 for prolongation costs in respect of extension of time no.2.
- b) An order for a sum of TZS 742,900,987 for prolongation costs in respect of extension of time no.3
- c) An order for as sum of TZS 1, 395,773, 486 for prolongation costs in respect of extension of time no.4
- ix. An order for a sum of TZS 41, 692,911.30 for variation order for reno mattresses.
- X. A claim in respect of final account after termination of the contract.
- Xi. A claim for pilferage, vandalism and theft of the respondent's property under the petitioner's custody.

The Sole Arbitrator delivered his decision on 20/11/2021 which he communicated to the parties. See a copy of the said final award dated 20/11/2021 and the proceedings, annexure "IMC-04." The said award was in favour of the respondent containing the declarations, orders, and remedies as follows:

- i. That the claims under chapters IV, V, VI, VII, VIII, IX, X and XI of the statement of claim are refused for want of jurisdiction.

- ii. That the Adjudicator had jurisdiction to determine the 10 disputed claims referred to it by the petitioner thereat.
- iii. That the claim of liquidated damages is not granted.
- iv. That the respondents are granted the sum of TZS 93,831, 700/= for fabrication and installation of expansion joint.
- v. That the respondents are granted sum of TZS 120,650, 500/= for excavation of river diversion and backfilling.
- vi. That the respondents are granted the sum of TZS 20,998, 800/= for carrying out pile integrity tests on piles.
- vii. That the respondents are granted the sum of TZS 64,989,042.22 for installation of sacrificial casing in piling works.
- viii. That the respondents are granted sum of TZS 8,480,953/= being costs for supplying and fixing service pipes on pedestrian walkway.
- ix. That the respondents are granted the sum of TZS 14,509,706.65 for additional geotechnical investigations.
- x. The compensation in respect of the extension of time No. 2, 3 and 4 is rejected.

- xi. That the prayer for variation on Reno Mattresses is rejected.
- xii. That the claim in respect of final accounting is referred back to the Adjudicator where it remains pending and undetermined.
- xiii. That the termination of the contract was inevitable, contractual, and rightful.

Dissatisfied with the arbitral award and proceedings, the petitioner outlined grounds for challenging the award with intent to set it aside as follows:

- (i) Misconduct; and
- (ii) serious irregularity affecting the arbitral tribunal's proceedings or the award.
 - (a) Whether the arbitrator committed serious irregularities by procuring an award contrary to public policy by awarding the respondent costs associated with variations whose quotations were not finally approved by the petitioner hence contrary to the procedure for issuing early warning, and payment of variations as per clause 35.1, 35.2 and 43 of the GCC. And whether the Arbitrator misconducted himself and committed

serious irregularities by stating that the requirements to issue early warning was not a mandatory prerequisite in the contract.

(b) Whether the arbitrator misdirected himself for directing that the adjudicator had jurisdiction to determine the matter ignoring the submission by the petitioner as regards to submission of the adjudication out of time.

(c) That the arbitrator misdirected himself and committed serious irregularities on the award by directing that the claims raised by the petitioner in chapters IV, VI, VII, VIII, IX, X and XI had not been determined before the adjudicator and the same cannot be raised before the arbitrator.

But at this juncture, and since jurisdiction is a fundamental principle, it is ideal to start with the same because that will resolve the ground (c) of the petition, that of the arbitrator lacking jurisdiction to determine the petitioner's claims in chapters IV, VI, VII, VIII, IX, X and XI. Depending on the agreement of the parties to the contract, disputes may be approached

from different ways and levels. It is worth noting that the case at hand was of a *three-level approach* to dispute resolution. According to the contract between the petitioner and the respondent the dispute arising thereof ought to take a three-level approach. That, first, it starts with the Project Manager, thereafter it goes to the Adjudicator, if one is still dissatisfied, he can refer it to the arbitrator. The principle underlying the three-level approach to dispute resolution is that the arbitrator lacks jurisdiction to deal with matters that were not before the adjudicator. I thus concur with the arbitrator's view that he lacked jurisdiction to deal with the petitioner claims in chapters IV, VI, VII, VIII, IX, X and XI as they had not been determined before the adjudicator.

On irregularity, the court in **CATIC International Engineering (T) Limited** (supra) citing the English **ORASCOM TMT Investments S.A' R.L., (formerly Weather Investments II S.a'r.l) v Veon Ltd (formely Vimpelcom Ltd) [2018] EWHC 985 (Comm)**, Baker, J., referring to a provision in the UK Arbitration Act of 1996 was of view that:

"[W]here a tribunal has failed to deal with all the issues that were put to it, if that amount, in the particular case, to serious irregularity, the court may intervene. However, there

must be a serious irregularity, that is to say one that has caused or will cause substantial injustice."

In my view the Arbitrator applied logic instead of what is provided for in the contract (GCC) between the parties. This quote from page 27 paragraph 2 of the Award verifies this:

"It could have been against the interest of the employer had the contractors proceeded to execute the works despite discovering shortfalls for the sake of blindly adhering to specific contractual clauses instead of attaining the overall interest of the client as well as beneficiaries."

The above quote illustrates how the arbitrator meddled with the terms of the contract. Which in my view is against the law, as expressed in the case of **Simon Kichele Chacha v Aveline M. Kilawe, Civil Appeal No. 160 of 2018 CAT**, that sanctity of contract should be respected. The court is not allowed to interfere with what the parties have agreed upon in their contract. Therefore, the arbitrator ought to have observed the terms of the contract. That is the contractors ought to have informed the employer after discovering shortfalls that is early warning and also

seek approval for variations as per clause 35.1, 35.2 and 43 of the GCC. If early warning is not given and variation is done without approval of the employer (government entity) that will not only contravene the laws (Public Procurement Act and its Regulations) but also could become audit query. The project funded by the government are approved by a particular Board or council. That extends to variations because they have cost implications. This becomes serious considering that there is public policy and laws regulating procurement of government contracts such as that of bridge construction. Regulation 110 (5) of the Public Procurement Regulations, G.N. 446 of 2013, restricts the increase of contract price without the approval of relevant authorities involved in the tender process. Regulation 61(1) of the same Regulations emphasizes on a need for approvals if a contract based on procurement process is to be amended or altered. The public policy behind these provisions of the law is to ensure that the public funds are not embezzled through secret or unauthorized variations of the contract. In other words, they intend to restrict by-passing of the oversight bodies such as tender boards.

Therefore, the good intention of the respondent to ensure the bridge construction work is completed is not an excuse because that is not a mere matter of quality of the bridge. Rather, it is about adhering to the procedures set in the contract and the law. The arbitrator ought to have noted that. Failure to abide to the law constitutes a serious irregularity. It is clear under Section 75(2) (g) of the Arbitration Act, Cap 15 of 2020 that:

"A party to arbitral proceedings may, upon notice to the other parties and to the arbitral tribunal, apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the arbitral tribunal, the proceedings or the award.

(2) For the purposes of this section, "serious irregularity" means an irregularity of one or more of the following kinds which the court considers has caused or is likely to cause substantial injustice to the applicant.

(g)...the award was procured in a manner that is contrary to public policy."

I am thus in accord with the above provision of the Arbitration Act, and the **CATIC International Engineering (T) Limited v University of Dar es salaam (UDSM), Misc. Commercial Case No.1 of 2020, HCCD** at page 23 which held that:

"Where an award infringes public procurement laws and public policy, that illegality may be sufficiently relied upon to set aside an arbitral award."

The court clarified further on page 31 that:

"The award is faulted on such a ground because it goes contrary to public policy (i.e., it requires the respondent to condone or bless acts that infringes the Public Procurement Act and its Regulations)."

The respondent's counsel has divergent view that the **CATIC v UDSM case** (supra) is distinguished from the case at hand because while in **CATIC v UDSM case** (supra) when brought before the arbitrator the amount exceeded 15% of the contract price as such was supposed to be approved by the tender board as per the law. He submitted that in the case at hand the variation does not reach even 10% of the contract price. He was of the view that all the contractual provisions were adhered to. I

agree with the respondent's counsel that in **CATIC v UDSM case** (supra) and other authorities cited by the petitioner the court did not hold that all variations should be approved by the tender board before execution. However, the issue of percentage of amount for variation, which the respondent's counsel claimed to be less than 10% is not properly articulated. It was up to the respondent to show the total sum of money for the variations, subtract the same from the contractual amount then compute its percentage. But even if the amount was less than 15% the respondent has not told the court which provision of Public Procurement Act (PPA) prescribes that percentage.

Mr Ogunde, the respondent's counsel further contended that the issue of the PPA is an afterthought as it was not raised before the Adjudicator or the Arbitrator. I disagree and hold the view that the issue of PPA being a point of law, can be raised anytime and at any stage. See the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696**.

Regarding, the counsel for respondents' submission that they complied with all contractual provisions, that is false. It is conspicuous from the arbitral award itself on page 27 paragraph 2 that the respondent failed

to comply with the GCC clauses 35.1 and 35.2. The arbitrator condoned such breach. In my view, in doing so he committed serious irregularity. The award therefore cannot be allowed to stand for failure to enforce the contract between the parties as well as contravening the PPA and public policy. I thus proceed to set it aside.

Since the irregularities observed were partly contributed by the arbitral tribunal, each party shall bear its costs.

It is so ordered.

DATED at **DAR ES SALAAM** this 28th day of April, 2023.



U. J. AGATHO
JUDGE
28/04/2023

Date: 28/04/2023

Coram: Hon. U.J. Agatho J.

For Petitioner: Rehema Mtulya, State Attorney

For Respondent: Willson Ogunde, Advocate.

C/Clerk: Beatrice

Court: Ruling delivered today, this 28th April 2023 in the presence of Rehema Mtulya, learned State Attorney for the Petitioner. But in the absence of the Respondent.



U. J. AGATHO

JUDGE

28/04/2023