

**IN THE HIGH COURT OF THE UNITED REPUBLIC OF
TANZANIA
(COMMERCIAL DIVISION)
AT DAR-ES-SALAAM
MISC. COMMERCIAL CAUSE NO.6 OF 2023**

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

AND

IN THE MATTER OF THE ARBITRATION UNDER THE
INTERNATIONAL CENTRE FOR SETTLEMENT OF
INVESTMENTS DISPUTES (ICSID)

AND

IN THE MATTER OF APPLICATION FOR RECOGNITION AND
ENFORCEMENT OF FOREIGN ARBITRATION AWARD

BETWEEN

THE ATTORNEY GENERAL OF THE UNITED
REPUBLIC OF TANZANIAPETITIONER

VERSUS

AYOUB-FARID MICHAEL SAABRESPONDENT

Date of the Last order: 13/06/2022
Delivery of the Ruling: 03/08/2022

RULING

NANGELA, J.,:

This ruling is in respect of a preliminary objection filed in
court on the 29th of May 2023 by the Respondent's Legal
Counsel. The objection was to the effect that:

The application before this
Honourable Court is

incompetent as it contravenes
Regulation 63 (1) of the
Arbitration (Rules of Procedure)
Regulations, G.N. No.146 of
2021.

By way of background, the Petitioner herein filed in this court for recognition and enforcement purposes, a Foreign Award emanating from (ICSID) Case No. ARB/19/8, dated 24th June 2021.

In that award, the ICSID Tribunal issued an order in favour of the Respondent (**the Petitioner herein**) to the effect that, the Claimant (**the Respondent herein**) should reimburse the Respondent (**Petitioner herein**) the fees paid to the Tribunal to the tune of **US\$ 100,000.00**.

When the matter was called on for orders on the 08th day of May 2023, Mr. Seni Malimi, Learned Counsel appearing for the Respondent herein, prayed for time to make appropriate responses and finally came up with a Notice of Preliminary Objection as set out herein above.

On the 13th day of June 2023, the Learned Counsel for the parties herein appeared before this court. On the part of

the Petitioner, it was Ms. Neisha Shao, Learned State Attorney who entered appearance while Mr. Seni Malimi appeared for the Respondent. On that material date, I ordered the parties to dispose of the preliminary objection by way of written submissions. I will summarise their submissions shortly.

In his submission, Mr. Malimi contended that, according to Regulation 63 (1) (a) of the *Arbitration (Rules of Procedure) Regulations*, GN. No.146 of 2021, it is trite that, the law requires applications under the provisions of the Act or the Regulations to be made by way of Petition unless the law provides otherwise.

He contended that, the Petitioner has filed the application by way of a letter seeking recognition and Enforcement of the Foreign Award and that, that filing contradicts Regulation 63 (1) (a) of the Arbitration (Rules of Procedure) Regulations, 2021. He urged this court to have it dismissed with costs.

To support his averments, he relied of the case of **EMESI (T) Ltd and Mtembwe Technical and Supplies vs. YAPI Merkezi Insaat Ve Sanayi Anonim Sirket &**

Another, Misc. Commercial Application No.74 of 2022 (unreported); the case of **Amin Nathaniel Mcharo vs. TANESCO**, Civil Application No.196 of 2019 and the **Mondorosi Village Council & 20others vs. Tanzania Breweries Limited & 40others**, Civil Appeal No.66 of 2017 (unreported).

For her part, Ms. Niesha Shao submitted that, the Arbitration Act and its Regulations provide for two procedures in filing awards. According to her, the first procedure is provided for under Regulation 51 (4) and 51 (5) of Arbitration (Rules of Procedure) Regulations, 2021 (GN.No.146 of 2021) vesting powers on the Arbitrator or any of the parties to the arbitration proceedings (with the permission of the Arbitrator) to file the award. She submitted that, under Regulation 51(5) the Arbitral Tribunal may, by way of a letter transmit the award and allow that a party to the proceedings file a certified copy thereof together with the proceedings for purposes of registering the same in court.

The second procedure, as per Ms. Neisha, is provided for under Regulation 63 (1) (a) which requires that applicants file their applications by way of "petition" in the manner so

provided under the regulation. Ms. Neisha submitted that, in filing the award before this court, the Petitioner has adopted the mode provided for under Regulation 51 (5) unlike the general approach under Regulation 63 (1)(a).

She contended further that; Regulation 63 (1) (a) sets out an exception to the general rule as it reads: "*save as is otherwise provided*". She contended, therefore, that, there are other applications which fall within the exceptional cases, one being, for example, the application meant to file an award in court under Regulation 51(4) and (5) of the Arbitration (Rules of Procedure) Regulations, 2021.

Ms. Neisha distinguished the case of **Emesi (T) Ltd** (supra) noting that, that case was not one primarily dealing with the filing of an award but sought to seek for an order restraining the Respondent from satisfying a performance bond pending reference to arbitration.

She contended that, the application at hand, however, is an application for filing of an award for purposes of registration and enforcement. She contended that, the procedure of registration comes prior to that of enforcement. She surmised that, the rest of cases relied upon by the Respondent are

irrelevant to the matter and, hence, inapplicable. She urged this court to dismiss the preliminary objection with costs.

I have considered the rival submissions. The matters raised herein are similar to what was raised in an earlier petition decided just a day before this one, involving **The Higher Education Students' Loans Board (Claimant) and Tanzania Building Works Limited (Respondent)**, Misc. Commercial Cause.39 of 2022, (to be referred to as "**The HESLB's petition**")

In "**The HESLB's petition**" (supra), this court made an extensive consideration regarding the applicability of both Rule 51 (4) and Rule 51 (5) of the Arbitration (Rules of Procedure) Regulations, 2021 and Rule 63 (1) of the same Regulations. For brevity, this court would wish to reiterate the position it took regarding the application of the above cited provisions and, one should as bear in mind that, the Arbitration Act Cap.15 R.E 2020 does provide for "recognition of awards" (section 83(1)) and "enforcement of awards" (section 73).

As regards the two, while disposing of an objection raised in "**The HESLB's petition**" (supra), this court agreed

to the view maintained by **Blackaby, N., et al**, in their treatise *Redfern and Hunter on International Arbitration*, 6thed., Oxford University Press, 2015, page 611, that:

'recognition of award' entails a process where a party to an award asks the court to "recognize an award as valid and binding upon the parties in respect of the issues with which it dealt."

The court surmised that:

"Recognition of awards, therefore, is the **first pre-requisite of the three** final **post-arbitration stages** in case an award is not voluntarily executed. The other two subsequent stages after recognition are *enforcement of the award* and *execution of the decree emanating from that enforcement process*."

As regards the process of “enforcement of an award” this court stated, and I quote:

“The Act does not define what
“enforcement of award” means.
However, enforcement of award
entails the process during which
the court, ensures that the
award which it had recognised
*“is carried out, by using legal
sanctions as are available”.*”

Enforcement of award, thus, involves the conversion of the award into concrete relief for the claimant, which can ably lead her to commence execution proceedings. This process, therefore, is regarded as a step further than recognition. Even so, this court noted that, as **Blackaby N, et al** (supra) stated, that:

“A court that is prepared to
grant enforcement of an award
will do so because it recognises
the award as validly made and
binding upon the parties to it,
and therefore suitable for
enforcement. In this context,

the terms 'recognition' and
'enforcement' do run together:
one is a necessary part of the
other."

In that same decisions of this court, this court made it clear that, an enforcement stage under section 73 (1) of the Act will attract an application which may be made orally or in writing (see Regulation 51 (7) of the GN.No.146 of 2021), and if there be any challenge the same to be filed as "petition" under Regulation 63 (1) read with Section 74 of the Act, (and any other provision ((especially section 75) depending on the grounds upon which Petitioner wants to challenge the award).

However, considering the context underlying the two related processes of "recognition" and "enforcement", it is clear that, at the stage of "recognition of an award under section 83(1) of the Act", what a party or the tribunal does is to merely bring the award to the attention of the court for its registration.

The manner of bringing such an award to the attention of the court is therefore provided for under Rule 51 (4) and/or 51 (5) of the Regulations and, a mere transmittal letter suffices

as an application to the court. In that circumstance, there will be no need for a petition under Regulation 63 (1) and even that regulation does recognise there being possibilities of bringing applications to the court by other means other than by way of a “petition.”

If, however, a party wishes to block such ‘*recognition*’ she/he is at liberty to do so under section 83 (2) of the Act (for a domestic award) or section 83 (4) and (5) of the Act (for a foreign award). The law is also clear as to when such a party may do so. She or he may do so at the time when she/he appears to show cause following a summons issued under Regulation 51 (6) of the Regulations.

In my view, she/he may make an oral or written application to the court as nothing restricts any of such approached from being taken bearing in mind that, even an enforcement application may be made orally or in writing.

Essentially, it is worth noting that, “**enforcement of the award**” may only be **challenged** based on either section 74 or section 75 of the Act. “**Recognition of the award**” is only “**blocked for refusal**” under section 83 (1) of the Act.

In **"The HESLB's petition"** (supra), this court stated in orbiter that:

"If, however, nothing was raised to block the award from being "recognized" as final, valid, and binding on the parties, hence, enforceable, then "the enforcement" of the award will proceed under section 73 (1) of the Act."

As I stated here, and as was the case in **"The HESLB's petition"** (supra), the process to enforce the award may proceed by there being made through an oral application or a written application (whichever the case) as per Regulation 51(7) of the Arbitration (Rules of Procedure) Regulations, 2021.

In this petition at hand, the award was brought to the attention of the court by way of a covering letter dated 13th March 2023 and the Court was requested to act on it in accordance with section 73 (1) and Regulation 66 of the

Arbitration (Rules of Procedure) Regulations, 2021 (the award being a foreign award).

In her submission, Ms. Neisha has argued that the same was brought under Regulation 51 (5) of the Arbitration Regulations 2021. She contended therefore, that, the award was properly brought to the attention of the court, considering that there are two approaches of doing so, one being under Regulation 51 and by way of a petition under regulation 63.

As regarding the two approaches, I do not have issues with them since it is the context that will determine how and why the award is being brought to the attention of the court as I have explained hereabove and as this court extensively dealt with the matter in **"The HESLB's petition"** (supra). It means, therefore, that, bringing the matter under Regulation 51 (4) or (5) is, but one of the accepted means.

However, there are requirements which need to be adhered to. For clarity, Regulation 51 (5) which Ms. Neisha has relied upon reads as follows:

51 (5) Notwithstanding the provisions of sub-regulation (4), the arbitral tribunal may,

in the letter transmitting the
award to the parties, allow any
party to the proceedings to file
a certified copy of the award
together with the
proceedings thereof with the
court for purposes of
registration of the same.”
(**Emphasis added**).

As it may be noted in the above Regulation, the award does not get transmitted vide the transmittal letter as a standalone. It is accompanied by proceedings of the tribunal. A transmission of the award that goes to the court without its accompanying proceedings will be declared incompetent. A letter of transmittal or a covering letter thereto cannot constitute “proceedings”.

In **“The HESLB’s petition”** (supra) (although the matter involved a domestic award) this court stated, citing the **Black’s Law Dictionary**, 10th ed., page 1398, that the term “proceeding” is defined as:

“The regular and orderly
progression of a lawsuit,

including all acts and events
between the time of
commencement and entry of
judgement ... 'Proceeding' is a
word much used to express the
business done in courts...but it
may include in its general sense
all steps taken or measures
adopted in prosecution or
defence of an action, including
the pleadings and
judgement...."

In this instant application, although this court agrees with what Ms. Neisha ably submitted regarding the available means through which an award may find its way to the court, and even if I will proceed to overrule the objection raised by Mr. Malimi, still I will not proceed with the matter, but have it struck out with leave to re-file.

The reason for such a decision is that the award must be accompanied with proceedings of the tribunal as per the requirements of Rule 51 (5) of the Arbitration (Rules of Procedure) Regulations, 2021, G.N. No.146 of 2021. Where an

application for registration of an award under Regulation 51(5) of the Arbitration (Rules of Procedure) Regulation 2021 is unaccompanied by proceedings in relation to the award sought to be registered, that application will be incompetent and a remedy for an incompetent application is to have it struck out.

In the upshot of what I have laboured to state herein above, this court settles for the following orders:

1. That, the preliminary objection raised by Mr. Malimi is devoid of merits and is hereby overruled.
2. That, the award sought to be registered having been filed under Regulation 51 (5) of the Arbitration (Rules of Procedure) Regulations, 2021 without there being the accompanying proceedings from which the award emanated, is found to be incompetent and, hence, struck out.
3. That, the Petitioner is granted leave to re-file a competent application to the court.

4. In the circumstances of this
petition, I make no orders as to
costs.

It is so ordered.

**DATED at DAR-ES-SALAAM, THIS 04^{Tth} DAY OF
AUGUST 2023**



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DEO JOHN NANGELA
JUDGE

Ruling delivered on this 3rd Day of August 2023 in the presence
of Mr. Francis Rogers, Principal State Attorney appearing for
the Claimant and Mr. Seni Malimi, Learned Counsel appearing
for the Defendant.

**DATED at DAR-ES-SALAAM, THIS 03rd DAY OF
AUGUST 2023**



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DEO JOHN NANGELA
JUDGE